2008 CanLII 27479 (ON SC)

COURT FILE NO.: 03-CV-1275CP
DATE: 20080606

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

KENNETH SMITH, as Estate Trustee of the Last Will and Testament of Margaret Smith, deceased, and ROBERT ADRIEN ORIET

Plaintiffs

- and -

NATIONAL MONEY MART COMPANY and DOLLAR FINANCIAL GROUP, INC.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

COUNSEL:

Harvey T. Strosberg, Q.C., David Stratas, and Trevor Guy for the Plaintiffs
F. Paul Morrison, John P. Brown, Mahmud Jamal, Christopher M. Hubbard, and Debra Lovinsky for the Defendants

HEARING DATES: May 12, 13, 14, 15, 16, 20 and 21, 2008

REASONS FOR DECISION

PERELL, J.

Introduction

[1] On January 5, 2007, Justice Hoy certified this action as a class proceeding pursuant to s. 5 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6; see *Smith v. National Money Mart Co*., [2007] O.J. No. 46 (S.C.J.), leave to appeal refused [2007] O.J. No. 2160 (Div. Ct.). The Plaintiffs now move for summary judgment pursuant to Rule 20 of the *Rules of Civil Procedure*, and the Defendants move for a stay of the action pursuant to s. 7 (1) of the *Arbitration Act, 1991*, S.O. 1991, c. 17. For the reasons that follow, I dismiss both motions.

[2] The two motions before the court raise at least six questions of considerable importance and difficulty.

[3] The first question is: What is the relationship between s. 5(1) of the *Class Proceedings Act*, which compels a court to certify an action as a class proceeding when the criteria for certification have been satisfied, and s. 7(1) of the *Arbitration Act, 1991,*

which compels a court to stay proceedings when the parties have agreed to submit their dispute to arbitration? This question has been asked in other jurisdictions across the country, where legislatures and courts have confronted the tension between the public policies supporting class proceedings and the public policies supporting arbitration.

[4] The second question is: Do sections 7 and 8 of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, which preclude contracting out of class proceedings apply retroactively?

[5] The third question is: When should a lower court exercise its jurisdiction to allow a party to re-litigate an already decided issue because a higher court subsequently changed the law that had been applied to decide the issue?

[6] The fourth question is: What is the significance to the law of Ontario and other common law provinces of the Supreme Court of Canada's decisions in *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801 and *Rogers Wireless Inc. v. Muroff*, [2007] 2 S.C.R. 921?

[7] The fifth question is: In a class proceeding, what is the extent of the jurisdiction of a court to grant a summary judgment pursuant to Rule 20 of the *Rules of Civil Procedure*?

[8] The sixth question is: In a payday loan transaction between a lender and a borrower, what counts for interest for the purposes of determining whether a criminal rate of interest has been charged contrary to s. 347 of the *Criminal Code*?

Overview

[9] The Defendants are National Money Mart Company ("Money Mart") and Dollar Financial Group Inc. ("Dollar Financial"). Money Mart offers a payday loan known as a "Fast Cash Advance." (I will use the terms interchangeability.) Payday loans are small loans with a due date for repayment connected to the borrower's payday. Dollar Financial is an American corporation, and it is the sole shareholder of 23 subsidiaries, including DFG International, Inc., which is the sole shareholder of Money Mart. The Plaintiffs allege that Dollar Financial controls Money Mart and carries on business in Ontario through the Money Mart stores.

[10] In the certification order, the Representative Plaintiffs are Margaret Smith, now deceased, and Ronald Adrein Oriet. By Order to Continue dated April 29, 2008, Kenneth Smith, as Estate Trustee of Margaret Smith, became a representative plaintiff in this action. Mr. Smith is the late Mrs. Smith's son. She was a retiree living in Windsor, Ontario. The other Representative Plaintiff, Mr. Oriet, is a resident of Windsor, Ontario. He is a project manager at an engineering consulting firm. Both the late Mrs. Smith and Mr. Oriet were payday loan borrowers.

[11] The class members are certain payday loan borrowers in Ontario. There are approximately 210,000 class members The class defined by Justice Hoy's order is:

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> All persons who, in the period August 19, 1997 to the date of the publication of the certification order, [September 9, 2007] received a Fast Cash Advance in Ontario that was payable either in cash on or before the borrower's next scheduled payday, being the day on which the borrower is scheduled to receive his or her salary, pension benefit, or any other regularly scheduled payment or by cheque on the borrower's next scheduled payday, and was repaid by cheque on the borrower's next scheduled payday, to Money Mart or a Franchisee.

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[12] In this action, before the certification motion, relying on an arbitration provision contained in a payday loan agreement with the late Mrs. Smith, Money Mart moved for a stay of the action pursuant to s. 7 (1) of the *Arbitration Act, 1991*. Justice Ellen Macdonald dismissed the motion for a stay. An appeal from her order refusing to stay the action was quashed by the Court of Appeal; see: *Smith* v. *National Money Mart Co.*, [2005] O.J. No. 2660 (S.C.J.), appeal quashed [2005] O.J. No. 4269 (C.A.), leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 528.

[13] In dismissing the motion for a stay, Justice Macdonald, and in quashing the appeal, Justice Weiler for the Court of Appeal indicated that the law in Ontario was that the enforcement of an arbitration provision should be considered as a part of the preferable procedure criterion of a motion for certification of a class proceeding. This articulation of the law in Ontario was consistent with a case out of British Columbia; namely, *MacKinnon v. National Money Mart Company* (2004), 50 B.L.R. (3d) 291 (B.C.C.A.), which also involved Money Mart.

[14] The question of whether the dispute between Mrs. Smith and Money Mart should be arbitrated was next considered as a part of the motion seeking certification, but arbitration was rejected as the preferable procedure, and the action was certified.

[15] After the action was certified, in July 2007, the Supreme Court of Canada released its decisions in *Dell Computer Corp. v. Union des consommateurs* and *Rogers Wireless Inc. v. Muroff,* and shortly thereafter, Money Mart and Dollar Financial again sought arbitration. When the Plaintiffs refused to comply, the Defendants brought one of the motions now before the court, and they submit that the Supreme Court "effectively overturned" the law employed by Macdonald, J. and Weiler, J.A., which in turn, it is submitted, means that Hoy, J. erred in certifying this action. Relying on the Supreme Court's decisions, Money Mart and Dollar Financial argue that class proceedings in Ontario must give way to arbitration if the representative plaintiff or a class member is bound by an agreement to arbitrate.

[16] Money Mart and Dollar Financial submit that *Dell Computer* and *Rogers Wireless* are authority that: (1) an arbitration agreement removes the court's subject matter jurisdiction or, in common law provinces, requires the court to stay its jurisdiction; (2) the fact that a matter is in the form of a class action does not vest a court with subject-matter jurisdiction that it otherwise lacks; and (3) any challenge to the arbitrator's jurisdiction or to the validity or applicability or the arbitration agreement must be resolved by the arbitrator first. They submit that Hoy, J. was required to stay the action

and refer it to arbitration. Accordingly, Money Mart and Dollar Financial move to have the action stayed, the dispute referred to arbitration, and, if necessary, the action decertified.

[17] Mrs. Smith and Mr. Oriet, however, dispute that their certified action should be stayed or decertified. They dispute the Defendants' interpretation of the Supreme Court's judgments in *Dell Computer* and *Rogers Wireless* and they rely on several exemptions found in s. 7(2) of the *Arbitration Act, 1991* as grounds to refuse a stay. In particular, the Plaintiffs submit that their motion for summary judgment provides a reason for not staying the action and referring the dispute to arbitration. Mrs. Smith and Mr. Oriet also rely on s. 7 and s. 8 of the *Consumer Protection Act, 2002* as negating any agreement to arbitrate, but the Defendants, of course, deny that any of these provisions apply to help the Plaintiffs avoid arbitration.

[18] Mrs. Smith and Mr. Oriet argue that their class proceedings should not be stayed but rather pursuant to Rule 20 of the *Rules of Civil Procedure,* a summary judgment should be granted. They contend that there is no genuine issue for trial that Money Mart and its franchisees received interest in breach of s. 347 of the *Criminal Code*, R.S.C. 1985, c. C-46. (The franchisees have agreed to be bound by the outcome of the litigation.)

[19] The Plaintiffs allege that Money Mart's payday loans, the nature of which I will describe below, and which are called "Fast Cash Advances," contravene s. 347 of the *Criminal Code* and that Money Mart charges a criminal rate of interest. The alleged result is an illegal contract, and the Plaintiffs, as representative plaintiffs, assert claims for a declaration, unjust enrichment, a constructive trust, an equitable tracing order, and a permanent injunction against Money Mart and Dollar Financial. The Plaintiffs believe that the amount in issue in this action will exceed $500,000,000, including pre-judgment interest.

[20] The parties advance numerous arguments and counterarguments. As a matter of overview, it is helpful to summarize their main arguments. To speak in broad brush terms, I understand their main competing arguments to be as follows.

- The Defendants argue that the late Mrs. Smith and Mr. Oriet entered into payday loan under Fast Cash Advance Agreements that provide Money Mart with the right to elect arbitration as the means to resolve any disputes with its customers. Money Mart has exercised its right to require an arbitration and based on the principles of law declared by the Supreme Court of Canada in *Dell Computer* and *Rogers Wireless Inc.*, the court has no choice but to stay the action and refer it to arbitration.

- The Defendants argue that that fact that this court and the Court of Appeal have already ruled that Money Mart's contractual right to an arbitration should be determined in the context of the certification motion and the fact that this court has already certified this action for a class proceeding do not stand in the way of the court staying the action. The Defendants submit that the previous rulings of

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this court and of the Court of Appeal were wrong, and since this action is still in the system, this court can now correct the error and the court must allow the arbitration to proceed.

- The Defendants argue further that Dollar Financial also has a right to require an arbitration because it has been sued as the *alter ego* of Money Mart. Dollar Financial asserts that it could not exercise its right to require an arbitration because to do so would have been inconsistent with its formerly extant challenge to the extraterritorial jurisdiction of this court. The court's jurisdiction over Dollar Financial having been resolved, Dollar Financial asserts that it is now entitled to exercise its right to require an arbitration, and it submits that the court has no choice but to decertify the class proceeding and to allow the arbitration to proceed.

- The Plaintiffs counter that *Dell Computer* and *Rogers Wireless* do not stand in the way of a class proceeding.

- Further, the Plaintiffs submit that the Defendants cannot rely on the arbitration provisions in the payday loan contracts because of the *Consumer Protection Act, 2002* or the Defendants have waived or otherwise disentitled themselves to arbitration. The Plaintiffs argue that there is an issue estoppel or *res judicata*. In particular, the Plaintiffs submit that a stay should not be granted because: (a) Money Mart expressly and by its conduct has waived the arbitration agreement; (b) the common issues include claims against Dollar Financial that are not subject to any arbitration provision; and (c) the issue of a stay has already been finally decided against Money Mart; and (d) Dollar Financial does not have the right to rely on the arbitration agreement or to seek a stay.

- Moreover, the Plaintiffs argue that the case at bar is within the exceptions found in s. 7 (2) of the *Arbitration Act, 1991* pursuant to which the court should not stay its proceedings. The Plaintiffs submit that the following exceptions apply: (a) the exception for an invalid arbitration agreement; (b) the exception for a subject-matter not capable of being the subject of arbitration; (c) the exception for undue delay; and (d) the exception for a matter that is a proper one for summary judgment.

- If the matter of a stay is out of the way, the Plaintiffs assert that the court is in the position to grant a summary judgment. The Plaintiffs argue that there is no genuine issues for trial that: (a) the charges associated with Money Mart's payday loans are "interest;" and (b) the rate of interest is a criminal rate of interest.

- In defence of the motion for a summary judgment, the Defendants submit that the criminal interest rate provisions of the *Criminal Code* are unconstitutional as contrary to s. 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B. to the *Canada Act 1982* (U.K.), 1982, c.11.

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- Further, in defence of the motion for a summary judgment, the Defendants deny that some of the charges associated with Money Mart's payday loans are interest. Money Mart asserts that its customers are offered two separate financial products, a payday loan and a cheque cashing service; the charges for the cheque cashing service are charges for that service and are not interest attributable to the payday loan, which thus does not contravene the criminal interest rate provisions of the *Criminal Code*. The Defendants also assert that they have a defence based on the freedom of the borrower to pay the payday loan in cash – the voluntary payment defence. The Defendants submit that all their defences raise genuine issues for trial.

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[21] As a matter of an overview of my responses to these arguments, as already noted above, it is my opinion that both motions should be dismissed.

[22] With respect to the Defendants' motion for a stay, it is my opinion that this court and the Court of Appeal did not err in its general approach to arbitration agreements in the context of class proceedings and that the action now before the court should not be stayed nor decertified. I arrive at this opinion about the motion for a stay for several reasons, including my views that: (a) s. 7 and s. 8 of the *Consumer Protection Act, 2002*, do apply, and, therefore, the Defendants do not have a right to arbitrate; (b) the Defendants' interpretation of the meaning and effect of the Supreme Court's decisions in *Dell Computer* and *Rogers Wireless Inc.* is incorrect and, therefore, the Defendants are not entitled to a stay pursuant to s. 7(1) of the *Arbitration Act, 1991*; and (c) Money Mart's right to a stay pursuant to s. 7 (1) of the *Arbitration Act, 1991* has already been litigated and the matter is now subject to an issue estoppel.

[23] My decision to dismiss the motion for a stay, however, is not based on the exceptions to ordering a stay found in paragraphs 1, 3, and 4 of s. 7(2) of the *Arbitration Act, 1991* or on waiver. As an alternative to the other grounds for denying a stay, I do, however, rely on paragraphs 2 and 5 of s. 7(2) of the Act.

[24] With respect to the Plaintiffs' motion for a summary judgment, it is my opinion that there is a genuine issue for trial about whether the charges for the payday loan are "paid for the advancing of credit." The presence of this contested central issue is sufficient to defeat the Plaintiffs' motion for summary judgment. In my opinion, however, there is no genuine issue for trial about the constitutionality of s. 347 of the *Criminal Code* and no genuine issue for trial arising from the freedom of the borrower to repay the payday loan in cash.

Organization of Reasons for Decision

[25] There is a great deal of territory to discuss. As a matter of organizing the discussion, first, I will detail the background to both motions. The background involves both facts and legal developments. I will develop the background in two parts. The first part will provide the general background, and the second part will set out the background essential to the stay motion, much of which is a product of the procedural history of the

action now before the court, and some of which involves a discussion the law as it was developing in other court proceedings.

[26] After I have set out the background, which will also mention some of various positions taken by the parties, I will discuss the motion for the stay. The first part of the discussion of the motion for a stay anticipates my analysis that the Supreme Court of Canada's decisions in *Dell Computer* and *Rogers Wireless* do not require that this court must stay the class action. The second part of this discussion examines the significance of those two cases and legal developments in other cases, and both parts of the analysis will involve addressing the myriad arguments of the parties.

[27] After I have explained why I am dismissing the stay motion, I will turn to the motion for summary judgment and explain why I am dismissing the Plaintiffs' motion for a partial summary judgment.

[28] The Reasons for Judgment will be organized under the following headings:

- Introduction
- Overview
- Organization of Reasons for Decision
- Evidence on the Motions
- Dollar Financial and Money Mart's Business: Cheque Cashing and Fast Cash Advances
- Background to the Stay Motion – The Arbitration Agreements
- Chronology of the Action and Legal Developments
- Section 7 of the *Arbitration Act, 1991* – Introduction
- Dollar Financial's Motion for a Stay to Permit Arbitration
- Money Mart's Motion for a Stay and the *Consumer Protection Act, 2002*
- Money Mart's Motion for a Stay and the s. 7(2) Exceptions of the *Arbitration Act, 1991* – Introduction
- The Paragraph 3 of s. 7 (2) Exception
- The Paragraph 5 of s. 7 (2) Exception
- Money Mart's Motion for a Stay and the Waiver Arguments
- Issue Estoppel and the Motion for a Stay under s. 7(1) of the *Arbitration Act, 1991*
- The Law about the Relationship between Arbitration Agreements and Class Proceedings before *Dell Computer* and *Rogers Wireless*
- The Theory that *Dell Computer* and *Rogers Wireless* Effectively Overrules the Law in Ontario and British Columbia about Arbitration Agreements and Class Actions
- The Supreme Court of Canada's Judgments in *Dell Computer* and *Rogers Wireless*
- The Motion for Summary Judgment – Introduction
- Summary Judgment and Partial Summary Judgment in the Context of Class Proceedings
- Section 347 of the *Criminal Code* in Criminal and Civil Cases

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- *Garland v. Consumers' Gas* and the Characterization of the Impugned Charges
- Does s. 347 of the *Criminal Code* contravene s. 7 of the *Charter*?
- Is There a Genuine Issue for Trial about the Voluntary Payment Defence?
- Conclusion

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Evidence on the Motions

[29] The parties supported their respective motions for a stay and for a summary judgment with affidavit evidence. There were also transcripts of examinations, which I need not detail.

[30] For the Plaintiffs, there were affidavits from: the late Mrs. Margaret Smith; Mr. Oriet; Jasminka Kalajdzic, who is a lawyer at Sutts, Strosberg, LLP, one of the counsel for the Plaintiffs; Margaret Woltz, practice manager at Sutts, Strosberg, LLP; and Leslie Swartman, a principal of a communications consulting firm retained to give notice of the class action.

[31] The Plaintiffs also provided several affidavits from Ms. Margaret Waddell, both for their motion for summary judgment and to respond to the Defendants' motion for decertification and a stay. Ms. Waddell is a lawyer from Paliare Roland, LLP, one of the law firms acting on behalf of the class.

[32] On the issue of whether a criminal interest rate was charged, the Plaintiffs provided the affidavit evidence of James E. Jeffrey, an expert actuary. He is a Fellow of the Society of Actuaries and of the Canadian Institute of Actuaries. The Defendants did not file any responding actuarial evidence and did not cross-examine Mr. Jeffrey.

[33] The Defendants delivered affidavits from Ms. Patti Smith. Ms. Smith is now the President of Money Mart. She has been with Money Mart since 1992, where she began her employment as the Regional Manager for the Edmonton market. They also delivered an affidavit from Donald F. Gayhardt, who is the President of Dollar Financial since 1998.

[34] The Defendants relied on the affidavit evidence of Dr. Paul Wertheim and his expert report. Dr. Wertheim holds a doctorate in Accounting and Finance as well as professional designations as a Certified Management Accountant, a Certified Public Accountant and as a Certified Financial Manager. He is a member in good standing of the American Accounting Association and of the Institute of Management Accountants.

Dollar Financial and Money Mart's Business: Cheque Cashing and Fast Cash Advances

[35] Money Mart began it business in 1982 in Edmonton, Alberta, and it provides a variety of financial services. It now carries on business across Canada, and there are more than 397 stores owned and operated by Money Mart. There are also over 59 franchise

Money Mart stores that are independently owned and operated. Together, these stores employ over 3,000 Canadians.

[36] Amongst Money Mart's lines of business is making "payday loans" to consumers. I will describe the nature of its payday loans below. It also has a cheque cashing business. The cheque cashing business is Money Mart's original and predominant line of business. It has been a core part of Money Mart's business since 1982. For a fee that involves both a fixed and a variable component, Money Mart will immediately cash cheques. Money Mart cashes both first party and second party cheques. A first party cheque is a cheque written by the customer on his or her own bank account. A second party cheque is a cheque written payable to the customer by another party. In either case, when a customer uses Money Mart's cheque cashing service, he or she receives cash and the cheque is endorsed over to Money Mart by the customer.

[37] Beginning in 1996, Money Mart began to offer "Fast Cash Advances" which are payday loans. A payday loan is a loan of a relatively small amount of money (up to approximately $1,500 and typically up to $500) for a relatively short period (up to approximately a month). The borrower will repay the loan, interest, and sometimes certain other sums. Whether all or part of those sums are "interest" as that term is defined in s. 347 (2) of the *Criminal Code*, R.S.C. 1985 is ultimately what the dispute at bar is all about.

[38] In order to qualify for a Fast Cash Advance, a customer must have a regular, verifiable source of employment income. To obtain this payday loan, a Money Mart customer must have a valid chequing account and the customer is required to provide a bank statement, a recent pay stub, and identification. The customer completes an application form that provides him or her with a summary of the terms and conditions of the loan.

[39] Money Mart's payday loan transaction is structured in the following way:

- The borrower is lent a sum of money, "the advance amount," which he or she is obliged to repay the day before the borrower's next payday, which is the "due date" of the loan.

- If the borrower repays the loan in cash before the due date, then he or she is charged a "finance charge" that has ranged from 46.44% to 59% *per annum*. The finance charge is calculated from the date of the loan to the date of repayment.

- At the time of the advance of the loan, the borrower provides Money Mart with a postdated endorsed cheque to be used only in the event that the loan is not repaid in cash before the due date. The cheque is dated as of the borrower's payday. The amount of the cheque is equal to the sum required for repayment in the event that the loan is not repaid in cash.

- If the borrower repays the loan in cash before the due date, the customer's postdated cheque is returned to the customer.

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- If the borrower does not repay the loan in cash before the due date, then Money Mart uses the postdated cheque and the borrower is charged: (a) the finance charge; (b) a "cheque cashing fee," which is a percentage (which has ranged from 2.9% to 13.99%) of the sum of the advance amount and the finance charge calculated from the date of the loan to the borrower's pay date (i.e., calculated to the day after the due date); and (c) an "item fee," which is a fixed fee that has ranged from $2.49 to $14.99.

[40] A Fast Cash Advance transaction between Money Mart and the late Margaret Smith on February 13, 2003 provides an example of the standard form contract used by Money Mart. The contract is set out below. I have, however, left out the arbitration provision, which I will set out and discuss later in these Reasons for Decision.

FAST CASH ADVANCE
DISCLOSURE OF ALL COSTS OF BORROWING

Date of Advance: February 13, 03
Term of Advance: 12 (days)
To receive $190.00 in cash for a period of 12 days:

A. You will repay Money Mart	$192.89
B. You will receive in cash today	$190.00
C. The total costs of borrowing	$2.89

Actual Borrowing cost = 89 cents per $100.00 per week
Annual effective rate of interest is 59% per annum which will accrue from date of advance to the date of payment in full.

I acknowledge that the above costs of borrowing have been disclosed to me and I understand the same.
Dated this 13th day of February, 2003
"Margaret Smith"
Borrower

FAST CASH ADVANCE™ LOAN AGREEMENT

A Loan agreement between National Money Mart Company ("Money Mart") and Margaret Smith (Borrower), dated 13 day of February 2003. In consideration of the mutual covenants and agreement set forth below, the parties agree as follows:

1. Money Mart hereby lends to the Borrower the sum of $190 ("Loan"). Borrower promises to repay Money Mart in accordance with the terms hereof at 200 Wyandotte St. E. Windsor, ON on or before the due date of 02/25/03 ("Due Date") the amount of the Loan together with interest at the rate of 59% per annum from the date hereof to the date of payment both before and after maturity or default.

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2. Upon execution of the Agreement that the Borrower shall provide Money Mart with a post dated cheque ("Cheque") in the amount of $213.90, representing the amount of the Loan, interest and Money Mart's standard first party cheque cashing fee.

3. The Borrower shall have the right to repay the Loan at any time on or before the Due Date. In the event of early repayment, the interest will be determined at a per diem rate and shall be prorated to the date of actual payment.

4. In the event the Borrower does not repaid the Loan and interest in cash on the Due Date, he/she will have opted for repayment by way of the Cheque and the Borrower hereby authorizes Money Mart to deposit the Cheque on the day following the Due Date in payment of both the Loan and interest due under this Agreement. In such case, Money Mart's standard first party check cashing fee of 2.99% of the amount of the loan plus interest and $14.99 per item fee will apply.

5. In the event that the Borrower's Cheque is dishonored the Borrower will pay Money Mart a $25.00 dishonored cheque service charge.

6. [Arbitration provision – see discussion below]

7. All amounts set out herein are in Canadian Dollars.

8. All payments will be applied first towards interest and secondly towards the principal amount of the Loan.

9. The benefit of this agreement shall transfer to the successors and assigns of the parties.

10. This agreement shall be governed in accordance with the laws of the Province of ON.

11. In witness whereof, the parties have executed this agreement in the City of Windsor, in the Province of ON.

"signature"
National Money Mart Company (operating as Money Mart)

"Margaret Smith"
Borrower

[41] Pausing here to highlight the dispute between the parties that is critical to the motion for summary judgment, the parties have competing characterizations of the just described charges that are triggered when a borrower does not repay the loan under the Fast Cash Advance Agreement in cash before its due date. It is the Plaintiffs' position

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that the charges are interest as that term is defined under the *Criminal Code*. The Defendants' position about the nature of the charges is described by Ms. Patti Smith in paragraphs 18 and 19 of her affidavit sworn on January 25, 2008, where she states:

> 18. A Borrower may also elect to repay the loan by using the store's cheque cashing service. If a customer does not repay a Fast Cash Advance in cash on or before the due date, the customer has elected to use the store's cheque cashing service, and authorized the store to deposit the customer's cheque. The customer's first party cheque, which includes an amount in respect of the fees for cashing a first party cheque, is then cashed by the store.
>
> 19. The cheque cashing fee which is charged in those circumstances is not a fee that is part of the cost of the Fast Cash Advance. It is charged for the separate cheque cashing service which is provided for the convenience of the customer. It is a fee the customer chooses to incur for the benefit and convenience of not having to return to the Money Mart outlet to repay the Fast Cash Advance.

[42] A Fast Cash Advance transaction between Money Mart and the representative plaintiff Ron Oriet on January 14, 2004 provides an illustration of Money Mart's payday loan transaction and the dispute between the parties. Mr. Oriet received "the advance amount" of $100. He provided Money Mart with a postdated cheque in the amount of $119.18, dated as of January 23, 2004, which was his payday. The $119.18 was calculated as the sum of the advance amount of $100 plus $1.14 (the finance charge of 59% *per annum* calculated from January 14, 2004 to January 23, 2004) plus $5.05 (the cheque cashing fee; namely 4.99% of ($100 + $1.14)) plus the item fee of $12.99. Mr. Oriet did not repay the loan in cash, and, accordingly, Money Mart negotiated his postdated cheque. The result is Mr. Oriet spent $19.18 for a 9-day loan of $100.00.

[43] Assuming that all of the $19.18 paid by Mr. Oriet is interest – which, of course, is the major issues to be decided – the uncontradicted actuarial evidence of Mr. Jeffrey establishes that the effective annual rate of interest charged by Money Mart was an astronomical 123,060.2%.

[44] Money Mart disputes that all of the $19.18 paid by Mr. Oriet is "interest." It concedes that only the finance charge of $1.14 is interest. As already noted, it would characterize the other charges as fees for its separate cheque cashing service. Money Mart emphasizes that the services are separate. For instance, it offered evidence that between August 19, 1997 and April 30, 2006 approximately 60% of Fast Cash Advance customers (including the Plaintiffs) used Money Mart's cheque-cashing service to cash cheques other than cheques to repay Fast Cash Advances.

[45] In this specific example of a payday loan involving Mr. Oriet, it is important to note that he did not exercise his right to repay the loan in cash. This fact is shared by all class members. The class in this class proceeding is defined to comprise only persons who paid their payday loans by cheque, and thus the class members paid all of the

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charges with respect to the payday loan including the charges associated with the cheque cashing service.

[46] Assuming that: (a) the cash repayment option is not exercised for a Fast Cash Advance Agreement; and (b) all the amounts charged by Money Mart are interest, then the uncontradicted actuarial evidence is that the effective annual interest rate on all of the payday loans to the members of the class give rise to an effective annual interest rate of 60% or more.

[47] The late Margaret Smith had seven Fast Cash Advance Agreement transactions with Money Mart, and she had four free-standing cheque cashing transactions. On her seventh Fast Cash Advance transaction, Mrs. Smith's postdated payment cheque in the amount of $364.81 was returned NSF from her bank. Repayment of this payday loan remains outstanding, and its amount exceeds the total of all interest and cheque cashing fees that Mrs. Smith had paid to Money Mart.

[48] The Plaintiff Ron Oriet has used Money Mart's cheque cashing service on 60 occasions between November 2000 and January 2004. He has had at least ten Fast Cash Advance transactions.

Background to the Stay Motion-The Arbitration Agreements

[49] I turn now to describe the background to the stay motion. It is far from simple. The relevant circumstances go well beyond the central fact that some borrowers from Money Mart, including the representative plaintiffs, signed loan agreements that contained an arbitration agreement or that after April 2003, borrowers signed agreements that contained a mediation/arbitration agreement.

[50] The background to the motion to stay also involves the history of the action, including Dollar Financial's unsuccessful attempt to dispute its joinder as a party and also what happened on the certification hearing. It also involves legislative and jurisprudential developments across the country both before and after the Supreme Court of Canada's judgments in *Dell Computer* and *Rogers Wireless*.

[51] The presence of arbitration agreements, however, is at the very heart of the stay motion, and so the discussion of the background to the stay motion may begin with the arbitration agreements.

[52] An arbitration agreement was first introduced into the Fast Cash Advance Agreements in February 2001. Thus, some payday loan transactions with some class members do not have arbitration agreements.

[53] Since 1999, Mrs. Smith had entered into eleven agreements and some of the agreements contained arbitration or arbitration/mediation agreements. Mr. Oriet has also signed loan agreements containing arbitration agreements.

[54] I set out sample arbitration agreements below, but to summarize, most of the loan agreements contain broadly-worded arbitration agreements allowing a party to elect to

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have any question arising out of the payday loan resolved by binding arbitration under Ontario's *Arbitration Act, 1991*, and the loan agreements include promises from the late Mrs. Smith and Mr. Oriet "not to commence or participate in any class action either as a representative plaintiff or as a member of a plaintiff class, and to opt out of any class action, if the class action, involves, directly or indirectly, any Claim."

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[55] Before April 2003, some loan agreements with Money Mart contained the following arbitration agreement:

> Any claim, dispute or issue whether in contract, tort or otherwise, arising out of or in connection with the Loan or this Loan Agreement or any prior or future loan agreements between the parties, including any issue regarding related fees, advertising, promotion or any oral or written statements or the absence thereof, default of payment, and/or the relationship between the parties shall, upon the election of either party be resolved by binding arbitration in accordance with the *Arbitration Act* of Ontario as amended ("the Act"). No joinder or consolidation of claims with other persons are permitted without the consent of the parties thereto. In the event of a conflict between this arbitration provision and the Act, the terms of this arbitration provision shall govern.

[56] In April 2003, Money Mart amended its arbitration agreement to provide for mediation followed by arbitration. The new provision stated:

> Alternative Dispute Resolution - The parties agree that "Claim" includes any claim, dispute, or controversy arising out of or relating to this agreement or the construction thereof either directly or indirectly, whether in contract or tort, or for restitution of whatever kind, and whether arising pursuant to a statute or regulation, or otherwise.
>
> Mediation - The parties agree that, if any party requests mediation to resolve any Claim, then such mediation shall be a precondition to any party commencing or continuing any court proceedings of whatever kind. The Claim will be referred to private and confidential mediation before a single mediator or jointly appointed by the parties and the cost of the mediator will be paid by Money Mart. The parties may elect to proceed with mediation in person, in writing only, or electronically using an Internet or online mediation service jointly appointed by the parties.
>
> Arbitration – In the event that parties are unable to resolve any such Claim by mediation, the parties agree to have the Claim determined by private and confidential arbitration before a single arbitrator joint appointed by the parties and the costs of the arbitrator will be paid by Money Mart. The parties may elect to proceed with the arbitration in person, in writing only, or electronically using an Internet or online arbitration service jointly appointed by the parties.

> Jurisdiction – In the event that the parties mutually agree to forego mediation and arbitration provisions is invalid or unenforceable, the parties agree that the courts of the Province in which this Agreement was executed will have exclusive jurisdiction over any action involving any Claim.
>
> When and How Any Action May be Commenced – The parties agree that any action involving any Claim shall be commenced within one (1) year after the date on which this agreement was executed, failing which no such action can or shall be commenced. Each party agrees that the joinder or consolidation or any such action with the action or actions or any other persons is not permitted and further agrees that it will not request and will oppose such joinder or consolidation. Each party also agrees not to commence or participate in any class action either as a representative plaintiff or as a member of a plaintiff class, and to opt out of any class action, if the class action involves, directly or indirectly, any Claim.

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Chronology of the Action and Legal Developments

[57] Turning to the chronology of this action and to legal developments, it is necessary to begin with a digression into legal history and to describe the state of the law about the interrelationship between arbitration agreements and class proceedings as it had developed leading up to early 2005, when various motions, including a motion for a stay to allow an arbitration to proceed, were heard by Justice Macdonald.

[58] On November 25, 1991, the *Arbitration Act, 1991,* received royal assent, and the Act came into force on January, 1, 1992. Section 7 of the *Arbitration Act, 1991* states:

> *Stay*
>
> 7. (1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.
>
> *Exceptions*
>
> (2) However, the court may refuse to stay the proceeding in any of the following cases:
>
> > 1. A party entered into the arbitration agreement while under a legal incapacity.
> >
> > 2. The arbitration agreement is invalid.
> >
> > 3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.

4. The motion was brought with undue delay.

5. The matter is a proper one for default or summary judgment.

Arbitration may continue

(3) An arbitration of the dispute may be commenced and continued while the motion is before the court.

Effect of refusal to stay

(4) If the court refuses to stay the proceeding,

(a) no arbitration of the dispute shall be commenced; and

(b) an arbitration that has been commenced shall not be continued, and anything done in connection with the arbitration before the court made its decision is without effect.

Agreement covering part of dispute

(5) The court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that,

(a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and

(b) it is reasonable to separate the matters dealt with in the agreement from the other matters.

No appeal

(6) There is no appeal from the court's decision.

[59] On June 25, 1992, the *Class Proceedings Act, 1992* received royal assent, and the Act came into force on January 1, 1993. The text of s. 5(1) of the *Class Proceedings Act, 1992,* states:

5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

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

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

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

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

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

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

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

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

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[60] In February 2002, Justice Nordheimer decided *Kanitz v. Rogers Inc.* (2002), 58 O.R. (3d) 299 (S.C.J.). In this case, the representative plaintiffs in a proposed class action were dissatisfied customers of the defendant Rogers Inc., which had provided them with Internet services. Rogers' response to the litigation was to invoke an arbitration provision in the consumer contract. When the plaintiffs refused to arbitrate, Rogers moved for a stay of the proposed class action. It relied on s. 7 (1) of the *Arbitration Act, 1991*, set out above. In response, the proposed plaintiffs relied on s. 7 (2) of the *Arbitration Act, 1991*, which, as may be noted above, provides five exceptions to the stay compelled by s. 7 (1). The proposed plaintiffs argued that: (a) the arbitration agreement was invalid because it was unconscionable; (b) the subject-matter of the dispute was not capable of being the subject of arbitration; and (c) the matter was a proper one for summary judgment.

[61] In the result, Justice Nordheimer stayed the action, and in doing so, he rejected the plaintiffs' main argument that the arbitration provision was unconscionable because it was contrary to the public policy advanced by the *Class Proceeding, 1992*. Justice Nordheimer stated in paragraphs 50-53 of his judgment:

> 50. The plaintiffs, however, continue their attack on the arbitration clause by asserting that the prohibition against class actions, is by itself, sufficient to constitute the entire clause as unconscionable because it has the effect of defeating the public policy inherent in the *Class Proceedings Act, 1992*. The problem with that assertion is two-fold. First, it has been held on many occasions by our courts that the *Class Proceedings Act, 1992* is procedural and not substantive. …
>
> 51. Secondly, it is apparent that there are two public policies at issue here which may, to some degree, conflict. While the *Class Proceedings Act, 1992* represents one public policy, the *Arbitration Act, 1991* represents

> another. There is no reason to prefer one over the other if there should be a conflict between the two. However, these public policies do not have to be interpreted in a manner such that they do not conflict. They can be interpreted in a manner where they co-exist if the plaintiffs' interpretation, which would have the *Class Proceedings Act, 1992*, first conflict with, and then take precedence over the *Arbitration Act, 1991,* is not accepted.
>
> 52. There is no reason to believe that the legislature intended the interpretation urged by the plaintiffs. The *Class Proceedings Act, 1992* was passed after the *Arbitration Act, 1991*. If the legislature had intended that the former was to be given precedence over the latter, it could have so provided. The legislature could have expressly exempted class proceedings from the effects of the *Arbitration Act, 1991,* as it did with situations of default or summary judgment. It could have enacted any number of other provisions which would have had the same effect. The legislature chose not to do so.
>
> 53. Further, the *Class Proceedings Act, 1992* itself requires the court to consider whether a class action is the preferable procedure for the resolution of the common issues before granting a certification order. In considering whether a class action is the preferable procedure, the court must take into account alternative methods of redressing the putative class members complaints. . . . It would seem arguable that the arbitration of claims is one such procedure.

[62] In paragraph 56 of his judgment, Justice Nordheimer concluded that the plaintiffs' concerns about the effect of the arbitration agreement on class proceedings did not rise to the level of unconscionability. And in paragraph 55, he suggested that their concerns might be addressed by an arbitrator consolidating a number of arbitrations.

[63] Five points should be noted from Justice Nordheimer's judgment in *Kanitz v. Rogers Inc.* First, he recognized that as a matter of public policy, there was tension between the statute supporting private arbitration and the statute authorizing class proceedings. Second, he did not see a clear directive from the legislature insulating class proceedings from arbitration agreements. Third, although he held that an arbitration provision could be enforced notwithstanding the commencement of a proposed class proceeding, he was looking for an interpretation of the statutes that promoted co-existence between arbitration and class proceedings, and in this regard, he mentioned that arbitration was a matter to be considered as a part of the analysis of whether a class action is the preferable procedure and that arbitrators might have the power to aggregate proceedings. Fourth, while an arbitration agreement was not *per se* unconscionable and hence "invalid," Justice Nordheimer did not have the benefit of the arguments that came to be made in later cases in British Columbia and Ontario about the interpretation of s. 7(2) of the *Arbitration Act, 1991*. Fifth, his judgment invites a clear message from the Ontario legislature to resolve the tension between the statutes and their competing public policies.

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[64] The Ontario Legislature apparently responded. On December 13, 2002, the *Consumer Protection Statute Law Act, 2002*, S.O. 2002, c. 30 received royal assent. The Act included as Schedule A, the *Consumer Protection Act, 2002* which was to come into force by proclamation of the Lieutenant Governor (which did not occur until July 30, 2005). The *Consumer Protection Act, 2002* included s. 7 and s. 8, which have the effect of making arbitration agreements in consumer contracts, which include payday loans, unenforceable. The text of the relevant provisions is set out below:

> *No waiver of substantive and procedural rights*
>
> 7. (1) The substantive and procedural rights given under this Act apply despite any agreement or waiver to the contrary.
>
> *Limitation on effect of term requiring arbitration*
>
> (2) Without limiting the generality of subsection (1), any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under the Act.
>
> *Non-application of Arbitration Act, 1991*
>
> (5) Subsection 7(1) of the *Arbitration Act, 1991*, does not apply in respect of any proceeding to which subsection (2) applies unless, after the dispute arises, the consumer agrees to submit the dispute to arbitration.
>
> *Class Proceedings*
>
> 8. (1) A consumer may commence a proceeding on behalf of members of a class under the *Class Proceedings Act, 1992* or may become a member of a class in such a proceeding in respect of a dispute arising out of a consumer agreement despite any term or acknowledgment in the consumer agreement or a related agreement that purports to prevent or has the effect of preventing the consumer from commencing or becoming a member of a class proceeding.
>
> *Non-application of Arbitration Act, 1991*
>
> (4) Subsection 7 (1) of the *Arbitration Act, 1991* does not apply in respect of any proceeding to which subsection (1) applies unless, after the dispute arises, the consumer agrees to submit the dispute to arbitration.

[65] The *Kanitz v. Rogers Inc.* judgment was also noticed by the British Columbia Court of Appeal. In September 2004, that court decided *MacKinnon v. National Money Mart Company* (2004), 50 B.L.R. (3d) 291 (B.C.C.A.), which is that province's version of the case at bar.

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[66] In *MacKinnon*, as in the immediate case, Money Mart sought to enforce an arbitration agreement in a payday loan agreement. Similar to the situation in Ontario, the British Columbia arbitration legislation requires a court to stay an action when a party relies on an arbitration agreement, but again there are exceptions. Under the British Columbia statute, "the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed." Also similar to the situation in Ontario, in British Columbia there is the pull of class proceedings legislation that competes with the arbitration legislation. In *MacKinnon,* the judge at first instance, Madame Justice Brown, dismissed the motion for a stay sought because she ruled that the existence of a proposed class action made the arbitration provision inoperative. Justice Brown's order was appealed.

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[67] In the British Columbia Court of Appeal, Justice Levine wrote the judgment for a five-member panel of the court. In her judgment, Justice Levine interpreted the British Columbia legislation, and agreeing with Justice Brown, she reasoned that if a proceeding is certified as a class proceeding, the arbitration provision is "inoperative." However, Justice Levine concluded that Justice Brown's order dismissing the motion for a stay was premature because it had not yet been determined whether the action should be certified. Thus, whether an arbitration provision would be enforced would fall to be determined as part of the analysis of a certification motion.

[68] For reasons that will become apparent later, it is important to note that Justice Levine's approach was a matter of interpreting the British Columbia statutes about arbitration and about class proceedings. Under the heading "Arbitration vs. Class Proceeding," Justice Levine stated in paragraphs 47 to 49, and 53 of her judgment:

> 47 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.
>
> 48 The case management judge also correctly interpreted the word "inoperative" in the context of a class proceeding, when she said (at para. 32): "... where a proceeding meets the requirements of s. 4 of the *Class Proceedings Act*, the court must certify it as a class proceeding; the arbitration clause is, therefore, inoperative".
>
> 49 There is a gap in her reasoning, however, between the *prima facie* conclusion that a class proceeding would be the preferable procedure and

> the order refusing the stay on the ground that the arbitration agreement is "inoperative". As the case management judge acknowledged, it is because certification is mandatory that the arbitration agreement is "inoperative". Her decision to refuse the stay before deciding whether the proceeding would be certified was therefore premature.
>
> 53 Thus, the applications for a stay and for certification of the class proceeding must be dealt with together. The outcomes of the two applications are interdependent: the mandatory terms of the *Class Proceedings Act* mean that arbitration and class proceedings cannot operate at the same time with respect to the same dispute. On the other hand, if the proceeding is not certified as a class proceeding, there may be no basis for saying that the arbitration agreement is "inoperative".

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[69] This being the development of the law about arbitration agreements and class proceedings up to early 2005, I backtrack slightly to return to the chronology of the case at bar.

[70] The late Margaret Smith commenced this action in January 2003, and on December 22, 2003, an amended statement of claim was served on Money Mart and Dollar Financial.

[71] On February 16, 2004, Money Mart purported to invoke its right to have Mrs. Smith's claim arbitrated pursuant to the arbitration agreement in the Fast Cash Advance Agreement. On that day, Money Mart's lawyers wrote her a letter that advised her that Money Mart had elected to resolve the dispute by arbitration, but Mrs. Smith unequivocally refused to arbitrate her claim.

[72] On February 18, 2004, relying on s. 7(1) of the *Arbitration Act, 1991*, Money Mart moved to have Mrs. Smith's action stayed. On February 27, 2004, relying on s. 5 of the *Class Proceedings Act, 1992*, the Plaintiffs served a motion seeking certification of this action as a class proceeding.

[73] Meanwhile, at the same time as Money Mart was moving to have the action stayed and Mrs. Smith was seeking certification, Dollar Financial was challenging its joinder as a party defendant, having been served *ex juris*. It contended that an Ontario court did not have jurisdiction *simpliciter* over it and alternatively it submitted that Ontario was *forum non conveniens.* On May 3, 2004, Dollar Financial moved for an order setting aside service out of the jurisdiction and for an order dismissing or staying the action against it for lack of jurisdiction in Ontario.

[74] On February 1 and 2, 2005, Justice Ellen Macdonald heard Money Mart's motion to stay and Dollar Financial's motion challenging the court's jurisdiction. At the hearing of the stay motion, Mr. Oriet sought to be added as a proposed representative plaintiff for the action.

[75] On June 22, 2005, Justice Ellen Macdonald granted leave to add Mr. Oriet as a plaintiff (the joinder was not effected until December 20, 2005), but she dismissed

Money Mart's motion for a stay, and she dismissed Dollar Financial's motion challenging the court's *ex juris* jurisdiction. See *Smith v. National Money Mart Co.* [2005] O.J. No. 2660 (S.C.J.).

[76] Justice Macdonald viewed the arbitration provision as an effort by "Money Mart to immunize itself from the *Class Proceedings Act, 1992* and more generally from the jurisdiction of the Superior Court" (para. 24). Relying on s. 7(2) of the *Arbitration Act, 1991,* which provides that a court may refuse to stay where the arbitration agreement is invalid," she refused to stay the Plaintiff's action. She observed that the action challenged the legality of the Fast Cash Advance Agreements, and she held that an arbitration agreement is void against public policy if it interfered with a person's rights with respect to an illegal contract (paras. 28-29). Here, it may be noted that much like the approach of Justice Levine in *MacKinnon*, Justice Macdonald was engaged in the exercise of interpreting the meaning of statutes with competing public policies.

[77] Money Mart and Dollar Financial respectively appealed Justice Macdonald's orders. Shortly after Justice Macdonald's order, on July 30, 2005, s. 7 and s. 8 of the *Consumer Protection Act, 2002,* were proclaimed in force, and the former *Consumer Protection Act* was repealed.

[78] On October 7, 2005, the Court of Appeal quashed Money Mart's appeal of the order refusing a stay. See *Smith v. National Money Mart Co.*, [2005] O.J. No. 4269 (C.A.). Money Mart's appeal was quashed because s. 7(6) of the *Arbitration Act, 1991* provides that there is no appeal from the order made on a motion to stay. However, in quashing Money Mart's appeal, Justice Weiler stated at paras. 14 and 15 of her Reasons for Decision:

> 14. My conclusion that the motions judge correctly held that the legality of the arbitration provision should be determined at the certification hearing and that it is premature to attempt to stay the action beforehand is consonant with the decision of the five judge panel of the British Columbia Court of Appeal in *MacKinnon v. National Money Mart Co*. That panel dismissed the appeal from the dismissal of an application to stay a proposed class action against the same company. The court rejected the "sequential approach" to the interpretation of two statutes. This would have resulted in the validity of the arbitration clause being determined first and only if the clause was "inoperative" under the *Commercial Arbitration Act* would a class action be considered. Instead, the court opted for an examination of the words of both the *Class Proceedings Act* and the *Commercial Arbitration Act* in the context of their schemes and underlying policies and held that such examination should take place at the certification hearing.
>
> 15 Here, at the certification hearing, the Superior Court judge will want to consider the wording of Ontario's *Class Proceedings Act*, the slightly different wording of s. 7(2) of the *Arbitration Act* that permits a judge to refuse a stay if the court finds that the arbitration agreement was "invalid,"

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> and s. 7 of the *Consumer Protection Act, 2002*, proclaimed in force July 30, 2005, which states . . . .

[79] Although Money Mart’s appeal had been quashed, Dollar Financial’s appeal remained outstanding, and it was heard on December 5, 2005 by the Ontario Court of Appeal, which reserved its judgment.

[80] Meanwhile, Money Mart sought leave to appeal the outcome of its motion to stay to the Supreme Court of Canada, and while its motion for leave was pending, it learned that the Supreme Court had granted leave to appeal in *Dell Computer Corp. v. Union des consommateurs*. Money Mart wrote the Supreme Court and urged that its leave motion be granted and that its case be heard with *Dell Computers* because both cases involved the interaction of class proceedings legislation and arbitration agreements for consumer transactions. The Supreme Court, however, declined the entreaties and refused Money Mart’s request for leave to appeal on March 2, 2006. See *Smith* v. *National Money Mart Co.*, [2005] S.C.C.A. No. 528.

[81] On May 8, 2006, the Court of Appeal dismissed Dollar Financial’s appeal on its jurisdiction motion. See *Smith v. National Money Mart* (2006), 80 O.R. (3d) 81 (C.A.), and Dollar Financial immediately sought leave to appeal to the Supreme Court of Canada. But, on October 12, 2006, the Supreme Court of Canada dismissed Dollar Financial’s application for leave to appeal. See *Smith v. National Money Mart* [2006] S.C.C.A. No. 267.

[82] The underbrush of interlocutory motions and appeals now having been cleared, the action moved to a certification hearing.

[83] In the context of that certification motion, Justice Hoy considered the significance of the arbitration agreements in the Money Mart loan agreements. In paras. 128 to 132 of her judgment, she stated:

> 128 Third, Money Mart says that it is willing to mediate or arbitrate claims by individuals, at no cost to claimants; that is, Money Mart would pay for the mediator or arbitrator. Money Mart submits that individual mediation or arbitration, and not a class proceeding, is the preferable procedure for resolving proposed class members' claims. Money Mart submits that because it is willing to mediate or arbitrate claims on an individual basis, proposed class members would have access to justice, and judicial resources would not be taxed by multiple claims.
>
> 129 With respect to this argument, I note that Money Mart unsuccessfully sought to have this action stayed because the Fast Cash Advance Agreements signed by the plaintiffs contained clauses requiring any claims relating to the agreement to be referred to mediation, and if unsuccessful, determined by private arbitration. .... The Court of Appeal upheld E. Macdonald J.'s decision that the appropriate time for the court to determine whether the matter should be arbitrated or litigated was at the

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certification motion, when determining whether a class proceeding is the preferable procedure. In its decision, the Court of Appeal indicated, at para. 15, that, "... at the certification hearing, the Superior Court judge will want to consider the wording of Ontario's *Class Proceedings Act*, the slightly different wording of s. 7(2) of the *Arbitration Act* that permits a judge to refuse a stay if the court finds that the arbitration agreement was invalid', and s. 7 of the *Consumer Protection Act, 2002,* proclaimed in force July 30, 2005 ...".

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

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

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

[84] Pausing again, several aspects of what happened on the certification motion need to be noted.

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- First, there was no motion for a stay based on the arbitration provision in the payday loan agreements; rather, arbitration was dealt with as an ingredient in the preferable procedure analysis.

- Second, Justice Hoy ruled that Dollar Financial did not have a contractual right to arbitrate.

- Third, Justice Hoy ruled that the arbitration agreements in Fast Cash Advance Agreements executed after July 30, 2005, are invalid because of the *Consumer Protection Act, 2002*.

- Fourth, because of the position being taken by Money Mart, she expressly did not rule on whether the arbitration agreements in loan agreements executed between February 2001 and July 30, 2005, were enforceable. In other words, Justice Hoy did not rule one way or the other on whether s. 7 and s. 8 of the *Consumer Protection Act, 2002,* applied retroactively – which is my holding, explained below.

- Fifth, Money Mart made some sort of concession, the significance of which was hotly debated on the motion before me. In support of their waiver argument, Ms. Waddell for the Plaintiffs submits that on the motion for certification, which she attended, Money Mart abandoned reliance on the arbitration agreement. Money Mart denies any waiver and argues that its concession about the arbitration agreements was just obedience to the directives of Justices Macdonald and Weiler and the concession was made without prescient knowledge of the significance of the outcome of *Dell Computer* and *Rogers Wireless*, which was pending before the Supreme Court of Canada.

- Sixth, practically speaking, Justice Hoy dealt with arbitration as an aspect of the preferable procedure criterion, and carefully weighing this factor, she certified the action as a class proceeding.

[85] Thus, on January 5, 2007, Justice Hoy certified this action as a class proceeding, and shortly thereafter, the motion for certification of the parallel action in British Columbia, *MacKinnon v. National Money Mart Company*, was heard by Justice Brown. Money Mart did not pursue the issue of a stay at the certification hearing, and on March 14, 2007, the *MacKinnon* action was certified as a class proceeding in British Columbia.

[86] On July 13, 2007, the Supreme Court released its decisions in *Dell Computer* and *Rogers Wireless*, and within days both Money Mart and also Dollar Financial advised Mr. Oriet that they had elected to resolve his claim by binding arbitration pursuant to the arbitration agreements in the payday loans, and Dollar Financial made a similar election with respect to Mrs. Smith. Dollar Financial submits that having regard to the way events in the proceedings had unfolded, this was the earliest opportunity to exercise its rights with respect to both representative plaintiffs, and Money Mart makes a similar submission with respect to Mr. Oriet. (These submissions are relevant to the matter of waiver discussed later).

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[87] Around November 26, 2007, Money Mart and Dollar Financial (which had not participated in the initial go-around for a stay, because it was pursuing its challenge to the court's *ex juris* jurisdiction), formally brought the motion to stay that is now before the court. Again the motion is brought pursuant to s. 7 (1) of the *Arbitration Act, 1991*.

[88] Meanwhile, in British Columbia, Money Mart also moved for a stay of the certified class proceeding again relying on the arguments it makes in the motion before me. Money Mart sought this stay from the British Columbia Court of Appeal because it was in the process of appealing the certification order. The appellate court, however, referred the stay motion for a first instance ruling from Justice Brown.

[89] In a decision that was released while argument was ongoing before me, Justice Brown dismissed the motion for a stay. I will discuss Justice Brown's reasons several times later in this judgment, but to remove the suspense, I note here that she dismissed Money Mart's motion for a stay. She held that *Dell Computer* and *Rogers Wireless* did not address the issues of statutory interpretation that confronted the court in *MacKinnon v. National Money Mart Company*. She held that the Supreme Court's decisions did not overrule the decision of the British Columbia Court of Appeal on the original appeal of the stay motion order in the *MacKinnon* case. She also held that even if *Dell Computer* and *Rogers Wireless* changed the law, she would not relieve Money Mart from the issue estoppel and permit it to re-litigate its request for a stay.

[90] Finally, there are several miscellaneous facts that may be relevant to the motion to stay and in particular to the submission of the Plaintiffs that the Defendants have waived or abandoned reliance on the arbitration provision; namely: (a) Money Mart's President, Ms. Patti Smith was examined for discovery as was Dollar Financial's President, Donald Gayhardt; (b) the Plaintiffs are not at risk of paying costs because they have been granted funding by the Class Proceedings Fund, which becomes responsible for any costs awarded against the Plaintiffs; (c) Class Counsel in the class proceedings have paid more than $390,000 in disbursements in the prosecution of the action, and the Class Proceedings Fund has incurred disbursements of $69,987.85; (d) as of November 30, 2007, at usual hourly rates, Class Council and forensic accounts retained by it have work in progress valued at approximately $4.7 million.

Section 7 of the Arbitration Act, 1991 and the Motion to Stay - Introduction

[91] With this background, I can now explain why I am dismissing the Defendants' motion to stay the action, which has been certified as a class proceeding.

[92] The Plaintiffs advanced a series of largely mutually independent arguments for dismissing the Defendants' motion for a stay. As the discussion below will reveal, I agree with some, but not all, of the Plaintiffs' arguments for dismissing the Defendants' motion for a stay.

[93] To explain my own reasons for dismissing the motion to stay the action, I will break down the issues, and I will discuss them under the following ten headings: (i)

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Dollar Financial's Motion for a Stay to Permit Arbitration; (ii) Money Mart's Motion for a Stay and the *Consumer Protection Act, 2002*; (iii) Money Mart's Motion for a Stay and the s. 7(2) Exceptions of the *Arbitration Act, 2001-Introduction*; (iv) The Paragraph 3 of s. 7(2) Exception; (v) The Paragraph 5 of s. 7(2) Exception; (vi) Money Mart's Motion for a Stay and the Waiver Arguments; (vii) Issue Estoppel and the Motion for a Stay under s. 7(1) of the *Arbitration Act, 1991* (viii) The Law about the Relationship Between Arbitration Agreements and Class Proceedings Before *Dell Computer* and *Rogers Wireless*; (ix) The Theory that *Dell Computer* and *Rogers Wireless* Effectively Overrules the Law in British Columbia and Ontario about Arbitration Agreements and Class Actions; and (x) The Supreme Court of Canada's Judgments in *Dell Computer* and *Rogers Wireless*.

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Dollar Financial's Motion for a Stay to Permit Arbitration

[94] With respect to the motion for a stay of the action, I will begin with Dollar Financial's situation, which I can deal with relatively quickly. Here, I agree with Plaintiffs' argument that Dollar Financial has no right to request or compel arbitration because it is not a party to any agreement with the Plaintiffs or any member of the class.

[95] The arbitration agreements are found in loan agreements between Money Mart and its customers. Dollar Financial does not concede that it has the same legal identity as Money Mart, and thus it is not a privy to the contract with the customer nor is Dollar Financial even mentioned as a third party beneficiary of the Money Mart contract. It follows that Dollar Financial has no right to invoke an arbitration agreement.

[96] Dollar Financial would have it that because the Plaintiffs allege that it is the *alter ego* of Money Mart, therefore, it has an independent right to call for arbitration, which it could not exercise until its challenge to being served *ex juris* had been finally adjudicated. I do not see how Dollar Financial can make this argument without conceding that it is indeed the *alter ego* of Money Mart, which it has not done.

[97] Further, I do not understand how it follows from being sued as an *alter ego* of Money Mart, that Dollar Financial would have an independent right to call for arbitration. If, contrary to the position actually being taken by Dollar Financial, it is assumed that Dollar Financial is indeed the *alter ego* of Money Mart, then, it cannot have any rights higher than Money Mart. Given that Money Mart and Dollar Financial have been and presumably would be represented by the same law firm throughout, there was a surreal aspect to Dollar Financial's argument seeking to obtain a right to arbitrate independent of Money Mart's rights.

[98] Further still, as noted above, this particular point has been determined against Dollar Financial by Justice Hoy; the alleged change of law precipitated by the judgments in *Dell Computer* and *Rogers Wireless* has nothing to do with this particular issue estoppel.

[99] Accordingly, Dollar Financial's motion for a stay pursuant to s. 7(1) of the *Arbitration Act* should be dismissed.

Money Mart's Motion for a Stay and the Consumer Protection Act, 2002

[100] As noted above, in quashing the appeal from the order refusing to stay the then proposed class action, Justice Weiler said that the Superior Court judge at the certification hearing would want to consider the *Consumer Protection Act, 2002,* and, as also already noted above, at the certification hearing, Justice Hoy ruled that the arbitration agreements in Fast Cash Advance Agreements executed after July 30, 2005, were invalid because of the *Consumer Protection Act, 2002*. Justice Hoy did not rule on whether the arbitration agreements in loan agreements executed between February 2001 and July 30, 2005, were enforceable. She felt that she did not need to.

[101] For the reasons that follow, it is my conclusion that s.7 and s. 8 of the *Consumer Protection Act, 2002*, which came into force on July 30, 2005, apply retroactively, in the sense of having an affect on things done prior to enactment. I also conclude that the arbitration agreements in Fast Cash Advance Agreements executed between February 2001 and July 30, 2005 are not enforceable. It is my opinion that as a matter of statutory interpretation, the Ontario legislature made it clear that the s. 7 and s. 8 should apply retroactively, even if this would take away the substantive contract right to have the right to arbitrate and even if an arbitration was actually underway.

[102] If my conclusions are correct and s. 7 and s. 8 of the *Consumer Protection Act, 2002* apply, then the Defendants' motion for a stay must be dismissed and it is not necessary to consider whether Justices Brown, Levine, Macdonald, Weiler, and Hoy are correct about the relationship between arbitration agreements and class proceedings. (The relationship between class proceedings and arbitration agreements would remain a question only outside the realm of consumer contracts).

[103] I can begin to explain my conclusions by describing the practical consequences of my being wrong and of Money Mart being correct that s. 7 and s. 8 of the *Consumer Protection Act, 2002* do not apply retroactively. One practical consequence of my being incorrect about the application of the Act is that the Money Mart customers between February 2001 and July 30, 2005 would be removed from the class that has been certified in this action.

[104] Money Mart argues that there should be further removals from the class. It submits that class members with payday loans signed before February 2001 or signed after July 30, 2005 should be removed if they also signed a payday loan between February 2001 and July 30, 2005, on the theory that these customers signed some enforceable arbitration agreements. In an argument, which if successful would decimate the whole class, Money Mart submits that class members who signed payday loans only before February 2001 or only after July 30, 2005 must be taken to have agreed to be in the same plight as the other members of the class by not opting out of the class proceeding.

[105] Thus, the practical consequence in the case at bar of not treating the *Consumer Protection Act, 2002* as retroactive is to require the court to separate similarly-situated claimants as if they were eggs moving along a conveyer belt being graded for size. This

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phenomenon, however, would not be limited to the case at bar because similar arguments could be made in other cases, of which *Kanitz v. Rogers Inc.*, (2002), 58 O.R. (3d) 299 (S.C.J.), the case that prompted the enactment of s. 7 and s. 8 of the Act, might be an example.

[106] I do not believe that the legislature could have intended such an untidy and unfair solution to the problem of the tension between the public policies supporting arbitration and class proceedings. Indeed, to get to the heart of the matter, it is my conclusion that as a matter of statutory interpretation, the legislature made it clear that the s. 7 and s. 8 should apply retroactively, even if this would take away the substantive contract right to have the right to arbitrate and even if the arbitration was actually underway. I mention the last point because it was submitted by the Defendants that the Legislature could not have meant to go so far as to interfere with an existing right to arbitration by retroactive legislation. My response is that the Legislature may have had good reason to do precisely that.

[107] If the Ontario legislature was expropriating the right to arbitrate by s. 7 and s. 8 of the *Consumer Protection Act, 2002*, it was giving the good value of a class action procedure that would adjudicate a dispute not only for the persons who lost the right to arbitrate but for many others, and there is also the factor that persons who wish to arbitrate can bilaterally agree to opt out of s. 7 and s. 8 of the Act.

[108] Moreover, it is sometimes lost sight of that class actions are not necessarily a bad thing for defendants. Defendants can use a class action certification and a settlement approval to resolve genuine claims at substantial discounts. In the case at bar, if Money Mart succeeds in its defence and establishes that its Fast Cash Advance Agreement is a legitimate commercial transaction, it will have defeated over 200,000 claimants and likely have its legal costs paid for by the Law Foundation. An arbitration award against Mrs. Smith and Mr. Oriet would not bind other Money Mart customers, while the binding effect and the precedent of a judgment in a class action might be a thing of beauty for a successful Money Mart.

[109] In any event, retroactive consequences are only one factor in the interpretation of a statute, and the problem remains one of determining whether the legislator used language that was intended to yield retroactive consequences or whether a retroactive application of the legislation arises by necessary implication.

[110] It is a fundamental rule of statutory interpretation that substantive legislation, that is, legislation that is not merely about procedural rights, is not to be construed to operate retroactively to affect substantive rights and obligations, unless the statute clearly provides or such retroactive operation is required by clear implication having regard to the language of the Act and the achievement of its purposes: *Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256; *Acme (Village) School District No. 2296 v. Steele Smith*, [1933] S.C.R. 47.

[111] In *Upper Canada College v. Smith* (1920), 61 S.C.R. 413, Duff, J. stated at p.419:

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> That intention [for a retroactive operation] may be manifested by express language or may be ascertained from the necessary implications of the provisions of the statute, or the subject matter of the legislation or the circumstances in which it was passed may be of such a character as in themselves to rebut the presumption that it is intended to be prospective in its operations.

See also: *Bank of Nova Scotia v. Desjarlais*, [1983] 2 W.W.R. 645 (Man. C.A.); *Campbell v. Campbell*, [1996] 1 W.W.R. 457 (Man. C.A.)

[112] It is a fundamental rule of statutory interpretation that procedural legislation, that is, legislation that affects only the procedure and practice of the courts, is presumed to operate retroactively: *Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256; *Howard Smith Paper Mills Ltd. v. The Queen*, [1957] S.C.R. 403; *S.(D.D.) v. H.(R.)* (1993), 104 D.L.R. (4th) 73 at p. 79 (Alta. C.A.); *Legislation Act*, 2006, S.O. 2006, c. 21, Sch. F, s. 54(2).

[113] The Plaintiffs characterize s. 7 and s. 8 of the *Consumer Protection Act, 2002* as procedural in nature because these provisions relieve the tension between two statutes that would govern the manner in which a dispute is adjudicated; visualize: a dispute may be resolved by arbitration procedure pursuant to the *Arbitration* Act, *1991* or a dispute may resolved by the procedure of a class proceeding.

[114] In arguing that the subject matter of s. 7 and s. 8 of the *Consumer Protection Act, 2002* is procedural, the Plaintiffs point to the authority that the *Class Procedures Act, 1992*, which is the subject matter of s. 7 and s. 8, is itself a procedural statute, and that it does create new substantive rights: *Hollick v. Toronto (City),* [2001] 3 S.C.R. 158; *Kanitz v. Rogers Inc.*, (2002), 58 O.R. (3d) 299 (S.C.J.); *Ontario New Home Warranty Program v. Chevron Chemical Company* (1999), 46 O.R. (3d) 130, (S.C.J.) at para. 50; *Serhan Estate v. Johnson and Johnson*, [2006] O.J. No. 2421 (Div. Ct.) at para. 41; *Reid v. Ford Motor Co.*, [2006] B.C.J. No. 993 (B.C.S.C.) at para. 26.

[115] However, the Defendants characterize s. 7 and s. 8 of the *Consumer Protection Act, 2002* as being a matter of substantive law because these provisions nullify a right of private contracting. I agree with the Defendants, notwithstanding the arguments of the Plaintiffs to the contrary, and I do not regard s. 7 and s. 8 of the *Consumer Protection Act, 2002* as procedural. They rather take away the substantive right to enter into a particular type of contract, an arbitration agreement.

[116] For the case that s. 7 and s. 8 are substantive provisions, the Plaintiffs cite a phalanx of cases for the proposition that legislatures have the power to enact statutes that may affect or disturb existing substantive rights. See *Acme (Village) School District No. 2296 v. Steele Smith*, [1933] S.C.R. 47 at p. 53; *Edmonton (City) v. Allarco Dev. Ltd.* (1982), 141 D.L.R. (3d) 174 (Alta. C.A.) at p. 177; *Bank of Nova Scotia v. Desjarlais*, [1983] 2 W.W.R. 645 (Man. C.A.) at pp. 649-650, 653; *Barry v. Alberta Securities Commission* (1986), 25 D.L.R. (4th) 730 (Alta. C.A.) at para. 739, aff'd on appeal, [1989] 1 S.C.R. 301 at paras. 48-51; *Canadian Assn. of Industrial, Mechanical and Allied*

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Workers (CAIMAW) v. British Columbia (Director, Employment Standards Branch) (1992), 91 D.L.R. (4th) 219 (B.C.S.C.) at pp. 227-228; *S. (D.D.) v. H. (R.)* (1993), 104 D.L.R. (4th) 73 (Alta. C.A.) at pp. 77, 79; *Campbell v. Campbell*, [1996] 1 W.W.R. 457 (Man. C.A.) at paras. 16-17 and 19, leave denied, [1996] S.C.C.A. No. 32.

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[117] There is no doubt that the Ontario legislature was competent to take away Money Mart's right to have an arbitration agreement. The question, however, remains whether that competency has manifested itself in s. 7 and s. 8 of the *Consumer Protection Act, 2002*.

[118] In my opinion, these sections were passed to address the mischief that some – it is not necessary to point a finger at all – suppliers of goods and services were using the device of an arbitration agreement not because they genuinely wished to have an alternative to court proceedings to resolve disputes but rather to immunize themselves from the seat of justice altogether. Their eagerness to arbitrate was disingenuous because they knew that just as individual actions by consumers would not be viable, so would individual resort to arbitration not be viable. A disingenuous willingness to arbitrate was being used to thwart at least two of the purposes to be achieved by a class proceeding; namely, access to justice and behaviour modification. The obvious purpose of s. 7 and s. 8 of the *Consumer Protection Act, 2002* was to stop this mischief, but this mischief is not stopped if the legislation is not applied retroactively. Indeed, the mischief is exacerbated by the phenomenon described above of a truncated class in a class action. A retroactive interpretation efficiently and effectively deals with the mischief that the enactment was meant to stop.

[119] Moreover, in my opinion, the expression of an intent that s. 7 and s. 8 are meant to apply retroactively is found in both sections of the Act, but it is most forcefully expressed in ss. 8 (1) and (4), which for convenience, I will set out again:

> *Class Proceedings*
>
> 8. (1) A consumer may commence a proceeding on behalf of members of a class under the *Class Proceedings Act, 1992* or may become a member of a class in such a proceeding in respect of a dispute arising out of a consumer agreement despite any term or acknowledgment in the consumer agreement or a related agreement that purports to prevent or has the effect of preventing the consumer from commencing or becoming a member of a class proceeding.
>
> *Non-application of Arbitration Act, 1991*
>
> (4) Subsection 7 (1) of the *Arbitration act, 1991* does not apply in respect of any proceeding to which subsection (1) applies unless, after the dispute arises, the consumer agrees to submit the dispute to arbitration.

[120] The intention of a retroactive influence may be found in the expression in s. 8(1) that a class member – and it is worth remembering that the representative plaintiff is also a member of the class – "may become a member of a class despite any term that has the

effect of preventing the consumer from becoming a member of a class proceeding." The words of the statute speak universally and without any temporal qualification and although dealing with a past situation, the statute is immediately progressive in its orientation. The legislation applies with respect to any contract term, which will already exist in the past, that prevents the consumer from becoming a member of a class proceeding, which is something that will occur in the future. The provision provides no exemptions, for instance for existing arbitrations, and rather speaks only to the terms that would trigger its application; namely, agreements that would prevent the consumer from becoming a member of a class proceeding in the future.

[121] A similar argument about retroactivity may be made about s. 7, but in my opinion s. 8 is the more powerful expression because it better demonstrates that the legislature intended to allow persons to be become members of a class proceeding notwithstanding circumstances that may have arisen in the past, which is to say that the legislature meant to remove pre-existing obstacles, which is to say that it intended that its statute should operate retroactively, if and when necessary.

[122] In my opinion, the language of s. 7 and s. 8 of the *Consumer Protection Act, 2002* expresses a clear intent that these provisions should apply retroactively and as a matter of practical necessity not applying the provisions retroactively would lead to unfair and anomalous partitioning of claimants, which confirms that the legislature intended to make the statutory provisions operate retroactively.

[123] The Defendants, however, argue that I am bound to come to the conclusion that s. 7 and s. 8 do not apply retroactively because of the Supreme Court of Canada's decisions in *Dell Computer* and *Rogers Wireless*, where the matter of retroactive affect was contested about the operation of s. 11.1 of Québec's *Consumer Protection Act*. As already mentioned several times, I will be discussing *Dell Computer* and *Rogers Wireless* at some length later, but for present purposes, the necessary background is just that each case involved a class action by the plaintiff and a request for arbitration by the defendant and after the litigation in those cases was underway, s.11.1 of Québec's *Consumer Protection Act* came into force.

[124] Section 11.1 of the Québec *Consumer Protection Act*, which came in force as of December 14, 2006, states:

> 11.1 Any stipulation that obliges the consumer to refer a dispute to arbitration, that restricts the consumer's right to go before a court, in particular by prohibiting the consumer from bringing a class action, or that deprives the consumer of the right to be a member of a group bringing a class action is prohibited.
>
> If a dispute arises after a contract has been entered into, the consumer may then agree to refer the dispute to arbitration.

[125] It may be noted that section 11.1 of Québec *Consumer Protection Act* prohibits a contract and prevents a court action including a class action. The Ontario statute goes

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further. Subsection 7(1) invalidates a term in an agreement insofar as it prevents a consumer from exercising a right to commence an action in court and s. 8(1) empowers a consumer to become a member of a class despite any term in a consumer agreement that has the effect of preventing the consumer from becoming a member of a class proceeding. These are indicia in the Ontario statute of an intention of a retroactive operation that the Supreme Court found wanting in the Québec statute. In my opinion, the *Dell Computer* and *Rogers Wireless* judgments are distinguishable on the issue of the interpretation of the Ontario legislation.

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[126] I, therefore, conclude that for this class proceeding all of the members of the class may rely on s. 7 and s. 8 of the *Consumer Protection Act, 2002*, and for this reason, the Defendants' motion for a stay should be dismissed.

[127] Assuming, this last conclusion is incorrect, I will go on to consider the other arguments of the parties about whether a stay should be granted or refused.

Money Mart's Motion for a Stay and the s. 7(2) Exceptions of the Arbitration Act, 2001-Introduction

[128] When pursuant to s. 7 of the *Arbitration Act, 1991*, a motion is brought for a stay of an action or application, the court is required to determine whether the parties' dispute is subject to an arbitration agreement, and if so, the court is required to stay the proceedings unless one of the exceptions found in s. 7(2) is engaged or unless s. 7(5) of the Act applies, under which the court issues a partial stay with respect to matters dealt with in the arbitration agreement.

[129] In *Mantini v. Smith Lyons LLP* (2003), 64 O.R. (3d) 505 (C.A.) at para. 17, Justice Feldman stated for the Court of Appeal:

> 17. In order to determine whether a claim should be stayed under s. 7 (1) of the *Arbitration Act*, the court first interprets the arbitration provision, then analyzes the claims to determine whether they must be decided by an arbitrator under the terms of the agreement, as interpreted by the court. If so, then under s. 7 (1), the court is required to stay the action and refer the claims to arbitration subject to the limited exceptions in s. 7 (2): *T1T2 Limited Partnership v. Canada* (1994), 23 O.R. (3d) 66 (Gen. Div.) at pp. 73-74.

[130] Assuming I am wrong about the operation of s. 7 and s. 8 of the *Consumer Protection Act, 2002* and assuming that I am also wrong about the significance of *Dell Computer* and *Rogers Wireless*, which I will discuss later, there is an arbitration agreement between Money Mart and Mrs. Smith and there is an arbitration agreement between Money Mart and Mr. Oriet that would appear to cover the claims to be decided, and thus the court must stay the class proceedings pursuant to s. 7(1) of the *Arbitration Act, 2001* - unless one of the exceptions set out in s. 7(2) of the *Arbitration Act, 2001* applies or unless Money Mart has waived its right to arbitration or unless some principle

of *res judicata* applies to preclude Money Mart from asserting its right to a stay and a referral to arbitration.

[131] The Plaintiffs do not rely on paragraph 1 of the exceptions found in s. 7(2) of the *Arbitration Act, 1991.* The do rely on the other paragraphs found in s. 7(2) to argue that the Defendants' motion for a stay should be dismissed. Therefore, I turn now to consider whether the Plaintiffs' arguments provide alternative grounds for my conclusion that the motion for a stay should be dismissed, and in this section of my Reasons, I will discuss the Plaintiffs' arguments about the application of s. 7(2) of the *Arbitration Act*, *2001.*

[132] The Plaintiffs rely on paragraphs, 2, 3, 4, and 5 of s. 7(2) of the *Arbitration Act*, *2001*, which for convenience, I set out again below:

> *Exceptions*
>
> 7. (2) However, the court may refuse to stay the proceeding in any of the following cases: . . .
>
> > 2. The arbitration agreement is invalid.
> >
> > 3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.
> >
> > 4. The motion was brought with undue delay.
> >
> > 5. The matter is a proper one for default or summary judgment.

[133] About all the exceptions, I foreshadow to say that, in my opinion, the paragraphs 2 and 5 exceptions do apply but the paragraph 3 and 4 exceptions do not. I also foreshadow to say that, in my opinion, this is not a case where the doctrine of waiver would apply to preclude resort to the arbitration provision, if it was otherwise available.

[134] At the outset of the discussion about the operation of the exceptions found in s. 7(2) to the stay of proceedings commanded by s. 7(1) of the *Arbitration Act, 1991*, I note that I will defer discussion of the paragraph 2 (the arbitration agreement is invalid) exception until my discussion of *Dell Computer* and *Rogers Wireless*. Of the three remaining exceptions, I will defer discussion of paragraph 4 (undue delay) until my discussion of waiver in the next section of these Reasons for Decision.

The Paragraph 3 of s. 7(2) Exception

[135] Beginning the discussion with paragraph 3 of s. 7(2) of the *Arbitration Act, 1991,* under this paragraph, the court has a discretion to refuse to grant a stay when "the subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law." I conclude that this exception is not available for the Plaintiffs.

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[136] The subject matter of the dispute between Money Mart and the late Mrs. Smith and Mr. Oriet is the legality of the Fast Cash Advance Agreement and that subject-matter is capable of being the subject of arbitration.

[137] The Plaintiffs submit that the concurrent issues of the conspiracy claim involving Dollar Financial are subject matters that are not capable of being the subject of the arbitration agreement. Assuming that submission is correct, the legal consequence is that the stay of the class proceeding would be temporary and not a permanent stay, but there would still be a stay to permit the arbitration to proceed. See *Arbitration Act, 1991*, s. 7(5)(b); *Boart Sweden AB v. NYA Stromnes AB* (1988), 41. B.L.R. 295 (Ont. H. C.); *Dalimplex Ltd. v. Janicki* (2003), 64 O.R. (3d) 737 (C.A.).

[138] Justice Nordheimer noted in *Kanitz v. Rogers Inc.* (2002), 58 O.R. (3d) 299 (S.C.J.), discussed earlier, that the joinder of claims that arguably are not capable of being the subject of arbitration will not necessarily make the paragraph 3 exception available. He stated at paragraph 62 of his judgment:

> 62. I do not accept that a party can avoid the consequences of an arbitration agreement by simply tacking onto their basic complaint a claim for punitive damages. To hold otherwise would effectively make optional every arbitration agreement, since all a party would have to do to avoid arbitration is advance a punitive damages claim. Given the frequency with which such claims are seen in statements of claim in this court, there would be little left to which the arbitration process could apply. As Mr. Justice Blair said, albeit in a different context, in *Deluce Holding Inc. v. Air Canada* (1992), 12 O.R. (3rd) 131 (Gen. Div.) at pp. 151-52:
>
>> It is important to guard against the resort to such a position simply as a tactic to avoid the agreed upon arbitration procedure, thereby eroding the clear policy of the legislature that the parties are to arbitrate what they have agreed to arbitrate.

[139] In the case at bar, I do not see the nature of the claims advanced by the Plaintiffs or their joinder of parties as making the dispute incapable of being the subject of arbitration. In my opinion, the paragraph 3 exemption is not available for the Plaintiffs as ground for the court to refuse to stay the class action.

The Paragraph 5 of s. 7(2) Exception

[140] Turning to paragraph 5 of s. 7(2) of the *Arbitration Act, 1991,* under this paragraph, the court has a discretion to refuse to grant a stay "when the matter is a proper one for summary judgment." It is not necessary for this exception to be available that a motion for summary judgment actually be made (although that is the situation at bar) and typically the motion for a stay will be brought at the outset of an action before any motion for summary judgment: *Ottawa Rough Riders Inc. v. Ottawa (City)*, [1995] O.J. No. 3797 (Gen. Div.); *407 ETR Concession Co. v. Ontario (Minister of Transportation*)

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[2004] O.J. No. 4516 (S.C.J.) at paras. 42-43. It is in this context that the court must assess whether the action is a "proper one" for summary judgment.

[141] The circumstances of the case at bar are atypical circumstances because in the case at bar, there actually is a motion for a summary judgment before the court, and thus it is not a matter of conjecture whether the matter is a proper one for a summary judgment.

[142] Although, for reasons that I will explain later, I will be dismissing the motion for a summary judgment, nevertheless, with the untypical benefit of hindsight, I conclude that the matter is a proper one for a summary judgment and therefore the paragraph 5 exception to a stay is available to the Plaintiffs.

[143] As I repeat, the availability of the exception in paragraph 5 of s. 7(2) is determined far more typically near the outset of the action sought to be stayed under s. 7(1) of the *Arbitration Act, 1991*. For that context, although the court has the discretion to refuse a stay without actually deciding whether the motion for summary judgment will be successful, before refusing the stay, the court should be satisfied that the motion for a summary judgment appears to have a high prospect of success and that it is not being used as a device to avoid the agreement to arbitrate.

[144] The authorities establish that the discretion granted to the court to refuse to grant a stay of an action in respect of the summary judgment exception should be exercised sparingly and only in the simplest and clearest cases: *Apotex Inc. v. Virco Pharmaceuticals (Canada) Co.*, 2007 CanLII 53234, (Ont. S.C.J.) at para. 19. See also *Kanitz v. Rogers Inc.* (2002), 58 O.R. (3d) 299 (S.C.J.). The discretion to refuse a stay under paragraph 5 is limited; see: *Ottawa Rough Riders Inc. v. Ottawa (City)*, [1995] O.J. No. 3797 (Gen. Div.) at para. 31; *Kallur v. Baranick* (1996), 4 C.P.C. (4th) 151 (Ont. Gen. Div.) at p. 157; *Sigfussion Northern Ltd. v. Cantera Mining Ltd.*, [2003] O.J. No. 1040 (C.A.) at para. 2; *Dewshaf Investments Inc. v. Buckingham Hospitality* (2005), 18 B.L.R. (4th) 272 (Ont. S.C.J.) at para. 7, var'd (2006), 18 B.L.R. (4th) 183 (Ont. C.A.).

[145] The discretionary jurisdiction under paragraph 5, however, is not so narrow as Money Mart would have it, and, in my opinion, paragraph 5 is available for the immediate case, where, as will be seen, the Plaintiffs, although technically unsuccessful, did achieve some benefit from their motion for a summary judgment.

[146] In the case at bar, when Justice Macdonald dismissed Money Mart's first motion for a stay under s. 7(1) of the *Arbitration Act, 1991*, no mention is made of the paragraph 5 exception, but given that this is the second occasion that Money Mart brings a motion and given that it relies on an alleged change in the law brought about by the Supreme Court of Canada's decisions in *Dell Computer* and *Rogers Wireless,* it seems only fair to have regard to the changed circumstances that the Plaintiff have a formidable, albeit ultimately unsuccessful, motion for summary judgment.

[147] The Defendants' argue, however, that the exception under paragraph 5 of s. 7(2) of the *Arbitration Act, 1991,* is not available when the party relying on the exception will

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be seeking a partial summary judgment, as is the situation in the case at bar. I disagree. There is no call to add this categorical qualification to the court's discretion under paragraph 5 of s. 7(2). Partial summary judgment is just a type of summary judgment, and as I will explain later, granting a partial summary judgment is jurisdictionally sound and may have utility in the context of a class proceeding.

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[148] Undoubtedly, a judge exercising his or her discretion under paragraph 5 should have regard to whether only a partial summary judgment seems feasible, but I do not see the need for a categorical rule, and a judge should be able to exercise his or her discretion under paragraph 5 based on the exigencies of the particular case.

[149] *407 ETR Concession Co. v. Ontario (Minister of Transportation*) [2004] O.J. No. 4516 (S.C.J.) demonstrates the potential breadth of the paragraph 5 exemption notwithstanding that the arbitrator may have jurisdiction to resolve a dispute and notwithstanding that the court's judgment may resolve only partially the dispute between the parties.

[150] In this case, 407 ETR Concession Co. brought a court proceeding by application for, amongst other things, a declaration that a binding settlement agreement had been reached in its dispute with the Province of Ontario. The province moved to stay the application pursuant to s. 7(1) of the *Arbitration Act, 1991* on the grounds that whether a binding settlement had been reached was a matter to be resolved by an arbitrator pursuant to the arbitration agreement between the parties. Justice Cullity relied on paragraph 5 of s. 7(2) of the *Arbitration Act* to make an order in the application that might be described as a partial summary judgment if the proceeding had been by way of action rather than by application. Justice Cullity heard ETR's application to the extent of deciding that the settlement agreement did not affect a binding settlement. Then, after deciding just one of the issues raised by ETR's application, Justice Cullity stayed the application and remitted the rest of the dispute to the arbitrator in accordance with s. 7(1) of the *Arbitration Act, 1991*. Cleverly, Justice Cullity managed to apply subsections (1) and (2) of s. 7 of the *Arbitration Act, 1991* simultaneously.

[151] Thus, in the particular and perhaps peculiar circumstances of the case at bar, although I will not be granting a summary judgment, I conclude that the matter is a proper one for summary judgment, and I exercise my discretion under paragraph 5 of s. 7(2) of the *Arbitration Act* to refuse a stay.

Money Mart's Motion for a Stay and the Waiver Arguments

[152] I turn now to the hotly contested issue of whether Money Mart and Dollar Financial waived their right to arbitration, and therefore they are not entitled to a stay of the action.

[153] The Plaintiffs cite a very lengthy list of authorities to support the proposition a party must promptly invoke his or her right to arbitration before steps are taken in the litigation or forgo his or her rights to a stay of the action. See: *Engels v. Merit*, [2008] O.J. No. 672 (S.C.J.) at para. 11-12; *Lansens v. Onbelay Automotive Coatings Corp.*,

[2006] O.J. No. 5470 (S.C.J.) at paras. 32-34; *Chewins v. El-Equip Inc.*, [1996] O.J. No. 1865 (Gen. Div.) at para. 11; *Armstong v. Camroux*, [1995] B.C.J. No. 121 (S.C.) at paras. 7-21; *Saskatchewan Rivers Bungalow Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490 at pp. 499-500; *Marchischuk v. Dominion Industrial Supplies Ltd.*, [1991] 2 S.C.R. 61 at p. 68; *Zodiac International Productions Inc. v. Poland (Republic)*, [1983] 1 S.C.R. 529 at p. 547; *Federal Business Development Bank v. Steinbock Development Corp.* (1983), 42 A.R. 231 (C.A.); *Boucher v. Soo Homes Inc.*, [1980] O.J. No. 2819 (Dist. Ct.) at paras. 24-26; *Caribou Construction Inc. v. Robert McAlpine Ltd.*, [1976] C.A. 393 at pp. 393-94; *Rosenberg v. Goldberg*, [1960] O.R. 162 (H.C.J.) at p. 163-64; *Bond v. Sixty-Four West St. Clair Ltd.*, [1940] O.J. No. 175 (S.C.) at para. 8; *J. Coughan & Son Ltd. v. Canada*, [1937] Ex. C.R. 29 at p. 35; *The Dufferin Paving Co. Ltd. v. The George A. Fuller Co. of Canada Ltd.* [1935] O.R. 21 (C.A.) at pp. 24-26; *Heisten & Sons v. Polson Iron Works* (1919), 46 O.L.R. 285 (Master) at p. 286; *Hudson's Bay Insurance Co. v. Walker* (1914), 6 W.W.R. 147 (B.C.C.A.) at pp. 148-150; *Doleman & Sons v. Osett Corporation*, [1912] 3 K.B. 257 at pp. 269, 271; *Cole v. Canadian Fire Insurance Co.* (1907), 15 O.L.R. 336 (Div. Ct.) at p. 338.

[154] Money Mart and Dollar Financial deny that there was any waiver or abandonment of their right to arbitration of the disputes with Mrs. Smith and Mr. Oriet.

[155] In its denial of any waiver with respect to Mrs. Smith, Money Mart submits that it initially attempted to enforce its right to arbitrate by a motion for a stay, which Money Mart pursued up to and including an unsuccessful application for leave to appeal to the Supreme Court of Canada. During this pursuit, Money Mart says that the lower courts declared that the matter of arbitration was to be dealt with as an aspect of the preferable procedure analysis of a certification motion. So, Money Mart pressed for arbitration as part of the certification motion. Its willingness to arbitrate was made manifest, but arbitration was rejected by Justice Hoy, and that seemed to end the matter without Money Mart ever abandoning its desire for arbitration. Then, the judgment in *Dell Computer* was released by the Supreme Court, and Money Mart concluded that it had been misled by what it had been told by the lower courts about the treatment of arbitration agreements, and it immediately renewed its request for arbitration, and it asserted its right to arbitrate by the motion for a stay now before the court. Thus, Money Mart submits that it never waived its right to arbitrate disputes with Mrs. Smith.

[156] In its denial of any waiver with respect to Mr. Oriet, Money Mart submits that he was not made a party until after Money Mart's rights to ask for arbitration had been erroneously delineated by the lower courts, and, again after *Dell Computer* was released by the Supreme Court and Money Mart knew the true legal picture, it asserted its right to arbitrate by the motion for a stay now before the court. Thus, Money Mart submits that it never waived its right to arbitrate disputes with Mr. Oriet.

[157] In its denial of any waiver with respect to both Mrs. Smith and Mr. Oriet, Dollar Financial submits that by the time its challenges to the court's *ex juris* jurisdiction had been resolved, its right to ask for arbitration had been erroneously delineated by the lower courts, but, again after *Dell Computer* was released by the Supreme Court, Dollar Financial realized the true legal picture, and it asserted its right to arbitrate by the motion

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for a stay now before the court. Thus, Dollar Financial submits that it never waived its right to arbitrate disputes with Mrs. Smith or Mr. Oriet.

[158] My own analysis is that, as already discussed above, Dollar Financial has no right to arbitrate disputes with Mrs. Smith and Mr. Oriet, and so any discussion of waiver becomes nonsensical.

[159] Therefore, I turn to discuss the situation of Money Mart, where, for different reasons, I find the notion of waiver nonsensical in the peculiar circumstances of this case. In my opinion, a discussion of waiver misclassifies the legal problem, which rather falls to be solved as a matter of an issue estoppel.

[160] Waiver of a legal right or delay in asserting a legal right presupposes that a person has a legal right to be waived. I think it is fair for Money Mart to submit that it had been told by Justices Macdonald, Weiler, and Hoy that its right to arbitrate was a matter of the preferable procedure analysis of a motion for certification and that Money Mart then simply obeyed the court's direction to argue arbitration as an aspect of the motion for certification of the class proceeding.

[161] In other words, Money Mart – and for that matter Mrs. Smith and Mr. Oriet – were behaving as if Money Mart had no right to insist on arbitration independent of the determination of the court on a certification motion. I do not see how acceptance of or submission to a court order can be said to be a waiver of contractual rights that would preclude a party from asserting them.

[162] It seems to me that the case at bar is not a matter of the waiver of a contractual right, but it is a matter of the re-litigation of an assertion of a statutory right. Thus, the problem is a matter of re-litigation of statutory rights and not the waiver of private contractual rights. The problem is that there has already been two legal pronouncements about Money Mart's rights to a stay in the case at bar, one time when Justice Macdonald dismissed the motion under s. 7(1) of the *Arbitration Act* and a second time when Justice Hoy decided that a class proceeding was the preferable procedure.

[163] Thus, I simply do not see the case at bar as apt for a discussion of waiver. Whatever happened in this case to the right to arbitrate pursuant to an arbitration agreement, it was a result of the judicial process. Therefore, I would not dismiss the motion to stay this action on the ground of a waiver of the right to arbitrate. However, I do dismiss the motion to stay the action on the ground of issue estoppel, which is the matter discussed in the next section of these Reasons.

[164] For similar reasons, I do not see the case at bar as one where it would be proper to exercise the court's jurisdiction associated with the exception found in paragraph 4 of s. 7(2) of the *Arbitration Act, 1991*, pursuant to which a court may refuse to stay the proceeding where the motion was brought with undue delay.

[165] Money Mart brought its initial motion for a stay without undue delay. Its motion for a stay was dismissed, and it obeyed the court's directive as to how the matter of arbitration was to be adjudicated. Its plea for arbitration was rejected as part of the

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certification process, but it promptly renewed its demand for arbitration after *Dell Computer* and *Rogers Wireless* was decided. In my opinion, the resulting legal question about Money Mart's right to bring a second motion pursuant to s. 7(1) of the *Arbitration Act,* 1991 is not a question of waiver but rather the question is one of issue estoppel, which is the next topic for discussion.

Issue Estoppel and the Motion for a Stay under s. 7 (1) of the Arbitration Act, 1991

[166] *Res judicata*, issue estoppel, the doctrine against collateral attacks against court orders, and abuse of process are all doctrines that preclude a party or its privies from re-litigating a matter that has already been adjudicated. In the case at bar, the Plaintiffs argue that the Defendants have had their day in court with respect to a motion for a stay and they are precluded from re-litigating the matter.

[167] I begin the discussion of the question of whether the Defendants are precluded from re-litigating an application made under s. 7(1) of the *Arbitration Act, 1991* by discussing the situation of Dollar Financial. As repeatedly noted above, in my opinion, on its merits and as a matter of issue estoppel, since Dollar Financial is not a party to an arbitration agreement, it has no right to seek a stay pursuant to s. 7(1) of the *Arbitration Act, 1991*.

[168] Therefore, Dollar Financial can be ignored in the discussion that follows, which begins with the fact that in June 2005, Justice Macdonald dismissed Money Mart's motion for a stay pursuant to s. 7(1) of the *Arbitration Act, 1991*. Money Mart's appeal was quashed by the Court of Appeal in October 2005, and its request for leave to appeal to the Supreme Court of Canada was refused in March 2006.

[169] Money Mart now again brings a motion for a stay pursuant to s. 7(1) of the *Arbitration Act, 1991*, and it says that it can do so because in July 2007, the Supreme Court of Canada changed the law and "effectively overruled" the law as it had been held to be and as applied by Justices Macdonald, Weiler, and Hoy to deny Money Mart its absolute right to have its disputes with Mrs. Smith and Mr. Oriet submitted to an arbitrator.

[170] The idea of *res judicata* ("a matter adjudicated") is a matter of public policy, and it presents the legal rule that a final judgment on the merits by a court of competent jurisdiction is binding and determinative of the rights of the parties or their privies in all later suits with respect to fundamental issues decided in the former suit (issue estoppel) and with respect to causes of actions and defences that were decided (cause of action estoppel) or could and ought to have been decided in the former suit (the rule from *Henderson v. Henderson* (1843), 67 E.R. 313, 3 Hare 100).

[171] The leading cases about issue estoppel are: *Angle v. Minister of National Revenue* (1975), 47 D.L.R. (3d) 544 (S.C.C.); *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460; *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853 (H.L.); *Thoday v. Thoday*, [1964] P. 181 (C.A.).

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[172] As Money Mart has exercised several opportunities to request that this class action be stayed and since several judges have dismissed its request, the renewed request for a stay pursuant to s. 7(1) of the *Arbitration Act, 1991* is an occasion for issue estoppel.

[173] Money Mart`s response is that because of the change in the law brought about by the Supreme Court`s decisions in *Dell Computer* and *Rogers Wireless*, as a matter of fairness, the court should not apply an issue estoppel. In particular, Money Mart relies on the case of *Hockin v. Bank of British Columbia* (1995), 123 D.L.R. (4th) 438 (B.C.C.A.), which applied the special circumstances exception to issue estoppel from *Arnold v. National Westminster Bank Plc*, [1991] 2 A.C. 93 (H.L.).

[174] The short answer to Money Mart is that for the reasons that will follow in other sections of these Reasons for Decision, there has been no change in the law in Ontario brought about by *Dell Computer* and *Rogers Wireless*, and thus there is no reason to permit Money Mart to re-litigate its motion for a stay.

[175] The longer answer involves assuming Money Mart is correct and that *Dell Computer* and *Rogers Wireless* changed the law. In *Canada (A.G.) v. Hislop*, [2007] 1 S.C.R. 429, the Supreme Court of Canada stated that its decisions operate retroactively and not just prospectively. On this assumption, by application of the changed law declared by the Supreme Court, Money Mart would be entitled to a stay and a referral of this action to arbitration. It is in these circumstances that the exception to issue estoppel recognized in *Hockin v. Bank of British Columbia* would apply.

[176] In *Hockin v. Bank of British Columbia,* in an action brought by employees against their employer, the Bank of British Columbia, it was alleged that the Bank had no claim to funds it had removed from its employees` pension plan. Justice Spencer held that the Bank had the right to remove the funds. Justice Spencer`s judgment was affirmed by the British Columbia Court of Appeal. The matter proceeded to trial before Justice Paris and relying on the Court of Appeal`s decision as raising an issue estoppel, he dismissed the employees` action. The employees appealed, and during the hearing of their appeal, the Supreme Court of Canada released its judgment in *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611, which overturned Justice Spencer's judgment as a precedent. In these circumstances, the British Columbia Court of Appeal ruled that as a matter of fairness, there should be no issue estoppel based on the now overruled precedent. The court stated in paragraph 35 of its judgment:

> 35. The injustice to the appellants [the employees] is obvious. If they were denied a hearing on the merits, they would be told by the courts that, even though their case is before the Court of Appeal, and even though the Supreme Court of Canada has said the very issue in this case was wrongly decided by the court in 1990, and the law now is that on the wording of this plan the employees are entitled to any surplus in the fund, they will nevertheless be denied this result because of a principle of law that has as one of its cornerstones the interests of justice.

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[177] For present purposes, the court's last comment is the most important. The doctrine of issue estoppel is meant to do justice and is not meant to be an instrument for injustice. The court has the discretion to employ or not employ the doctrine of issue estoppel in the interests of justice. The application of an issue estoppel and the application of the exceptions to an issue estoppel are matters of the court's discretion.

[178] The discretionary nature of issue estoppel and other types of *res judicata* is demonstrated by *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460. In *Danyluk*, an employee with a claim for $300,000 of unpaid commissions filed a complaint under the *Employment Standards Act*, R.S.O. 1990, c. E.14 seeking unpaid wages including commissions. Before a decision was reached in the proceedings under the Act, she brought an action for wrongful dismissal. The proceedings under the Act continued, and the employee was awarded $2,354.55; namely, two weeks' pay in lieu of notice. The employer then moved to have the portion of the wrongful dismissal claim about commissions struck out on the grounds of an issue estoppel.

[179] In *Danyluk*, the Supreme Court agreed with the Ontario Court of Appeal that the technical requirements for an issue estoppel had been established, but reversing the Court of Appeal's judgment, the Supreme Court held that where a party successfully establishes the preconditions for an issue estoppel, a court must still determine whether, as a matter of discretion, issue estoppel ought to be applied. The Supreme Court decided that in the circumstances of the Danyluk case, it would have been unjust to apply an issue estoppel because the claim for $300,000 of commission had simply never been properly considered and adjudicated. See also: *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, [2003] 3 S.C.R. 77 at paras. 52 and 53; *British Columbia Ministry of Forests v. Bugbusters Pest Management Inc.* (1998), 50 BCLR (3d) 1 (C.A.).

[180] Returning to the case at bar and assuming that *Dell Computer* and *Rogers Wireless* have changed the law, I would not exercise the court`s discretion to relieve against the issue estoppel because, in all the circumstances of this very particular case, it does not seem unfair to deny Money Mart a referral to arbitration.

[181] Any unfairness to Money Mart must be put into prospective and it must be balanced against the unfairness to other parties to the litigation. The circumstances include the factors that: (a) if *Dell Computer* and *Rogers Wireless* changed the law, there nevertheless are class members (no one could tell me the number of them) who are not bound by any arbitration agreements, and their class action could go forward against Money Mart; (b) Money Mart continues to carry on business as before, and a brand new class proceeding could be commenced by consumers protected by the *Consumer Protection Act, 2002,* to challenge the legality of the Fast Cash Advance Agreements, leaving the current class members to arbitration, which the court has already found not to be the preferable procedure and practically speaking unavailable to them *en masse*; (c) the Plaintiffs and other class members were bound to follow the law until it was changed, and with a considerable investment of time and expense, they did so, before the law they relied on was overruled; and (d) assuming that the *Consumer Protection Act, 2002,* does

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not apply retroactively it does not seem unfair to treat the common law the same way and not apply it retroactively.

[182] Finally, I note that Justice Brown came to a similar conclusion not to apply the principle from *Hockin v. Bank of British Columbia* in the renewed stay application in *MacKinnon v. National Money Mart Company*, (May, 13, 2008, not yet reported) and I would adopt her judgment as a precedent for the case at bar.

The Law about the Relationship between Arbitration Agreements and Class Proceedings Before Dell Computer and Rogers Wireless

[183] If I am wrong about refusing a stay on the grounds of s. 7 and s. 8 of the *Consumer Protection Act, 2002,* or on the alternative grounds discussed above, it is necessary to address the Defendants' arguments that they are entitled to a stay because of the change of law brought about by the Supreme Court of Canada's decisions in *Dell Computer* and *Rogers Wireless*.

[184] In this section of my Reasons for Decision, I will analyze the law in Ontario about the relationship between the *Arbitration Act, 1991* and the *Class Proceedings Act, 1992* as the law presented itself before the Supreme Court decided *Dell Computer* and *Rogers Wireless*. I will also analyze the law as it had developed in British Columbia.

[185] The purpose of the analysis is to have a baseline to measure the merits of the Defendants' argument that *Dell Computer* and *Rogers Wireless* "effectively overruled" the law employed in Ontario when there is an arbitration agreement and a proposed class action. This discussion is necessary to address the Defendants' ultimate submission that Justices Macdonald, Weiler, and Hoy in Ontario and Justices Brown and Levine in the parallel proceedings in British Columbia erred in denying Money Mart a stay and a referral to arbitration.

[186] In effect, the Defendants submit that the law expressed in *Smith* v. *National Money Mart Co.*, [2005] O.J. No. 2660 (S.C.J.), appeal quashed [2005] O.J. No. 4269 (C.A.), leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 528 and in *MacKinnon v. National Money Mart Company* (2004), 50 B.L.R. (3d) 291 (B.C.C.A.) is not good law because of *Dell Computer* and *Rogers Wireless*. In order to evaluate this argument, it is necessary to understand precisely the nature of the legal problem addressed by the courts in Ontario and British Columbia and their solutions to the problem.

[187] Class proceedings under the *Class Proceedings Act, 1992* are a special type of court proceeding, and at the time when Money Mart made its application for a stay of the proposed class action in Ontario and a referral to arbitration, the relationship between the court's jurisdiction to stay any type of action and an arbitrator's jurisdiction to decide a dispute under an arbitration agreement was governed by the *Arbitration Act, 1991*.

[188] Pursuant to s. 7 of that Act, Money Mart brought a motion for a stay, and pursuant to the comparable but not identically worded section of the British Columbia legislation, Money Mart had sought a stay of the proposed class action in British Columbia.

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[189] I have set out the text of s. 7 of Ontario's *Arbitration Act, 1991,* earlier in this judgment under the heading "Chronology of the Action and Legal Developments," and various aspects of it have already been discussed. As may have been observed, the design of s. 7 is that under subsection (1), if there is an arbitration agreement and a court action or application (a proceeding) is brought by a party to the agreement, then the other party to the arbitration agreement may bring a motion and the court shall stay the action or application. Subjection (2) provides a list of exceptions, where the court may refuse to stay the proceeding. The design of the comparable British Columbia legislation is the same.

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[190] The design of s. 7 of Ontario's *Arbitration Act, 1991,* is part of the overall design of the Act, which, generally speaking, is to give arbitration priority or paramountcy over court proceedings. Subsection 2(1) makes the Act apply to arbitrations and arbitration agreements, and s. 6 specifies only limited court intervention over arbitrations. Subsections 2(1) and section 6 of the Act state:

> s.2 (1) This Act applies to an arbitration conducted under an arbitration agreement unless,
>
> > (a) the application of this Act is excluded by law; or
> >
> > (b) the *International Commercial Arbitration Act* applies to the arbitration.
>
> s. 6 No court shall intervene in matters governed by this Act, except for the following purposes, in accordance with this Act:
>
> > 1. To assist the conducting of arbitrations.
> >
> > 2. To ensure that arbitrations are conducted in accordance with arbitration agreements.
> >
> > 3. To prevent unequal or unfair treatment of parties to arbitration agreements.
> >
> > 4 To enforce awards.

[191] The paramountcy of arbitration above court proceedings is described in an article by L. Yves Fortier, entitled "Delimiting the Spheres of Judicial and Arbitral Power: Beware, My Lord of Jealousy" (2001), 80 *Can. Bar Rev.* 143, where he states at pp. 114-45:

> Needless to say, the creation and preservation of a sphere within which arbitrators rather than judges are paramount, involves a delicate balancing of the right of parties to determine freely the means by which their private disputes are resolved, and the interests of the national legal systems that are expected to recognize and enforce the product of such private dispute resolution. Such balancing involves, above all, a demarcation of the scope

> of possible intervention by the courts. If the task is delicate, the language by which this is accomplished by the Model Law is direct. Article 5 of the Model Law – entitled "Extent of Court Intervention – states simply: *"no court shall intervene except where so provided"* in this Law. By this language, article 5 is intended to exclude any so-called general, supervisory or residual power of intervention or national courts. There are now several Canadian cases confirming that the federal and provincial equivalents or art. 5 have precisely that effect: *Quintette Coal Ltd. v. Nippon Steel Corp.* (1999), B.C.J. No. 2241 (C.A.); *Compagnie Nationale Air France c. Mbaye*, [2000] R.J.Q. 717.
>
> When seized with a dispute in a matter which one party claims is the subject of an arbitration agreement, the role of the court, as provided in the Model Law and the New York Convention, is confined to determining whether the arbitration agreement is null and void, inoperative, or incapable of being performed. Faced with a valid arbitration agreement, the court is required to send the parties to arbitration: *Rio Algom v. Sammi Steel* (1991), 47 C.P.C. (2d) 251 (Ont. Gen. Div.).
>
> The Model Law also provides that questions pertaining to the arbitrator's jurisdiction and scope of authority are for the *arbitrator* to determine in the first instance. This fundamental principle – that the arbitral tribunal is empowered to determine the existence and scope of its own jurisdiction – is well established in the theory and practice of international commercial arbitration where it is known as *"kompetenz-kompetenz"*.
>
> The Model Law also sets out the related (and equally well accepted) principle of "severability" or "autonomy" of the arbitration agreement, whereby an arbitration agreement is deemed to have a life of its own, separate and apart from the broader contract in which it may be contained. As a result, the principle operates so as to shield an arbitration agreement from any finding of invalidity concerning the principal contract.

[192] Mr. Fortier's comments are very helpful in defining the problematic of the case at bar and of the parallel case in British Columbia, which both involved the assertion by Money Mart of the paramountcy of arbitration over a special type of court proceeding; namely, a class action.

[193] Mr. Fortier notes that under the Model Law and the New York Convention, the court is confined to determining whether the arbitration agreement is null and void, inoperative, or incapable of being performed and if there is a valid arbitration agreement, the court is required to send the parties to arbitration. In this regard, an arbitration agreement is not tainted by the invalidity of the agreement in which it may be found. Mr. Fortier also notes that it is for the arbitrator in the first instance and not the courts to decide the scope of his or her jurisdiction under the arbitration agreement.

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[194] The legislation in Ontario is similar to the Model Law and the New York Convention, but it is important to note that under Ontario's *Arbitration Act, 1991*, the court's power includes but is not confined to determining whether the arbitration agreement is null and void, inoperative, or incapable of being performed. The invalidity of the arbitration agreement is just one item from a list of exceptions found in s. 7(2) of the *Arbitration Act, 1991*, where a court may refuse to stay proceedings, notwithstanding an arbitration agreement. It is convenient here, to set out s. 7(2) again. It states:

> *Exceptions*
>
> (2) However, the court may refuse to stay the proceeding in any of the following cases:
>
> 1. A party entered into the arbitration agreement while under a legal incapacity.
>
> 2. The arbitration agreement is invalid.
>
> 3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.
>
> 4. The motion was brought with undue delay.
>
> 5. The matter is a proper one for default or summary judgment.

[195] In addition to the exceptions set out in subsection 7(2), a court may also refuse to stay a proceeding notwithstanding the existence of an arbitration agreement where Ontario legislation expressly excludes arbitration. Although there is a debate about whether they are available in the circumstances of the case at bar, s. 7 and s. 8 of the *Consumer Protection, Act, 2002* is an example of an express exclusion of arbitration, which would justify a court refusing to stay court proceedings, most particular a class proceeding. In its factum, Money Mart lists 19 Ontario statutes where the legislature has expressly excluded arbitration, which statutes for present purposes I need not list.

[196] With the addition of one more legislative fact, Mr. Fortier's comments may be used to state more precisely the problem that presented itself in the case at bar and also the problem that presented itself in British Columbia in the case known as *MacKinnon v. National Money Mart Company*, which concerned British Columbia's *Commercial Arbitration Act,* R.S.B.C. 1996, c. 55.

[197] The additional legislative fact is that s. 5(1) *Class Proceedings Act, 1992* provides that on motion, the Superior Court of Justice shall certify a class proceeding if the criteria for certification, which include a finding that class proceedings are the preferable procedure, are satisfied. Thus, where there is an arbitration agreement, there is an apparent conflict between the *Class Proceedings Act, 1991*, where the court shall certify a class proceeding if the criteria set out in s. 5(1) are satisfied, and the *Arbitration Act, 1991*, where the court shall stay the action because there is an arbitration agreement. The

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problem raised by the case at bar and that existed in the similar case in British Columbia was whether this apparent conflict could be resolved as a matter of statutory interpretation of the arbitration legislation.

[198] Money Mart relied on the paramountcy of arbitration over court proceedings, and it denied that there was any conflict. Its position was simply that class actions must give way when there was an arbitration agreement. It relied on a principle endorsed by the Supreme Court of Canada that legislation cannot be assumed to exclude arbitral jurisdiction, unless it expressly so states: *Desputeaux v. Éditions Chouette (1987) inc.*, [2003] 1 S.C.R. 178 at para. 42; *Dell Computer Corp. v. Union des consommateurs,* [2007] 2 S.C.R. 801 at paras. 109 and 143. And, Money Mart makes the point that there is no express exclusion of the *Arbitration Act, 1991* found within the *Class Proceedings Act, 1992*.

[199] In *Kanitz v. Rogers Inc.* (2002), 58 O.R. (3d) 299 (S.C.J.), discussed earlier, Justice Nordheimer saw that there was a conflict between the statutes, but he saw no solution to the problem in the existing legislation.

[200] In *MacKinnon v. National Money Mart Company*, in British Columbia, disagreeing with Money Mart that there was no conflict between the statutes, Justices Brown and Levine saw a problem, and as a matter of statutory interpretation, they found a solution. They found an exemption for class proceedings within the existing exemption set out in s. 15(2) of the *Commercial Arbitration Act*, which provides that the court must stay the legal proceedings "unless it determines that the arbitration agreement is void, inoperative or incapable of being performed." More particularly, they concluded that the certification of a class proceeding meant that the operation agreement was "inoperative."

[201] Justice Levine concluded that Justice Brown had been correct in focusing attention on whether the arbitration agreement was "inoperative" because of a class proceeding but had been premature in dismissing the stay motion because the certification motion in *MacKinnon* had not yet been heard. Justice Levine's judgment is the source of the rule that came to govern in British Columbia and Ontario that a motion for a stay for a submission to arbitration should be considered as a part of the preferable procedure analysis of a motion for certification.

[202] In Ontario, in the case at bar, Justices Macdonald and Weiler also saw the conflict between the statutes and adopted the solution developed in British Columbia. As a matter of statutory interpretation there were exemptions available under the *Arbitration Act, 1991* so that the court was not required to stay a certified class action when there was an arbitration agreement.

[203] With respect to exemptions, the word "inoperative" is not found in the Ontario legislation, which simply uses the word "invalid," but, although it is not entirely clear, it appears that Justice Macdonald relied on the arbitration agreement being "invalid" within the meaning of paragraph 2 of s. 7(2), because it was part of an illegal contract (i.e. contrary to s. 347 of the *Criminal Code*) or because the submission to arbitration was an

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unlawful attempt to immunize a dispute from the *Class Proceedings Act, 1992* or more generally the jurisdiction of the Superior Court.

[204] It also seems that Justice Macdonald may perhaps have been relying on the exemption in paragraph 3 of s. 7(2) that the subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law. In any event, she was clearly refusing a stay of the class action pursuant to s. 7(2) of the *Arbitration Act.*

[205] On the motion to quash, in the Court of Appeal, Justice Weiler's conclusion was that the validity of the arbitration provision should be determined at the certification hearing and that it is premature to attempt to stay the action beforehand. Justice Weiler endorsed the approach developed by Justice Levine in British Columbia for the *MacKinnon case*.

[206] This motion is not an appeal, but, in my opinion, with one exception there are no errors to be found in the development of the law as expressed in *MacKinnon v. National Money Mart Company* or in the previous judgments in the case at bar. The one exception where there may have been an error in law is the conclusion that the arbitration agreement in the case at bar is invalid because it was in an agreement that might be illegal because of a contravention of s. 347 of the *Criminal Code*. That conclusion offends the principle that an arbitration agreement is not tainted by the invalidity of the agreement in which it may be found, which principle is codified in s. 17(2) of the *Arbitration Act, 1991*, mentioned in the next section of these Reasons. However, in the case at bar, nothing turns on this error because it may properly be concluded that the arbitration agreement as such is "invalid" within the meaning of the exemption found in s. 7(2), paragraph 2 of the *Arbitration Act, 1991*.

[207] Historically, at common law, a contract that interferes with the administration of justice was regarded as illegal on the grounds of public policy. An illegal contract is an invalid contract, and, in my opinion, as a matter of statutory interpretation, an arbitration agreement that interferes with the administration of justice, which is the very purpose of a class proceeding, properly falls within the meaning of "invalid" under Ontario's arbitration statute or within the meaning of "inoperative" under British Columbia's comparable statute. In any event, whether my opinion is right or wrong, the judgments in Ontario and British Columbia established the proposition that if an action was certified as a class action, then an arbitration agreement that precluded the class action was illegal or inoperative within the meaning of the exceptions to a stay in the arbitration statute.

[208] For what it is worth, it is also my opinion that this development of the law is consistent with the principles set out in the helpful analysis of Mr. Fortier. Ultimately, what the courts in British Columbia and Ontario decided is that as a matter of statutory interpretation, an arbitration agreement that had the effect of absolutely blocking an action that satisfied the criteria for a class proceedings and thus the social purposes of access to justice, judicial economy, and behaviour modification was "inoperative" in British Columbia or "invalid" in Ontario and thus within an exemption to the stay mandated by the arbitration statute.

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[209] In order to understand what follows in these Reasons for Decision, it is important to emphasize that this outcome is a matter of statutory interpretation. It is also worth emphasizing that the rule developed in *MacKinnon v. National Money Mart Company* and used in the case at bar does not automatically strike down arbitration agreements. A court may conclude that arbitration is preferable to a class proceeding and dismiss the certification motion. Or a court may for other reasons refuse to certify the class proceeding, in which case the arbitration agreement would not be "invalid" and the exemption found in paragraph 2 of s. 7(2) of the *Arbitration Act, 1991,* would not be available and a stay of the uncertified action would be granted.

[210] It remains, however, to determine whether this law has been "effectively overruled" by the Supreme Court of Canada's judgments in *Dell Computer* and *Rogers Wireless.*

The Theory that Dell Computer and Rogers Wireless Effectively Overrules the Law in Ontario and British Columbia about Arbitration Agreements and Class Actions

[211] I turn now to the Defendants' argument that the Supreme Court of Canada's judgments in *Dell Computer* and *Rogers Wireless* changed the law in Ontario about the relationship between arbitration agreements and class proceedings and "effectively overruled" the law employed by Justices Macdonald, Weiler, and Hoy in the case at bar and developed by Justices Brown and Levine. As promised, I will momentarily give *Dell Computer* and *Rogers Wireless* a close reading. However, before doing so, I can refute the Defendants' argument that these cases changed the law previously applied to deny Money Mart a stay of the class action. I can do this by demonstrating the falsity of the theory underlying the Defendants' argument.

[212] As noted at the outset of these Reasons for Decision, the Defendants' three-branched argument is that: (1) an arbitration agreement removes the court's subject matter jurisdiction or, in common law provinces, requires the court to stay its jurisdiction; (2) the fact that a matter is in the form of a class action does not vest a court with subject-matter jurisdiction that it otherwise lacks; and (3) any challenge to the arbitrator's jurisdiction or to the validity or applicability or the arbitration agreement must be resolved by the arbitrator first.

[213] The first branch is false because, at least in Ontario, it is not the case that an arbitration agreement can oust the court's subject matter jurisdiction. Private citizens can neither confer or take away the court's jurisdiction, and under the Canadian Constitution, there is a "core jurisdiction" that cannot even be removed by Parliament or the legislatures without amending the Constitution: *Reference re: Amendments to the Residential Tenancies Act (N.S.)*, [1966] 1 S.C.R. 186; *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725; *Reference re: Young Offenders Act, s. 2 (P.E.I.)*, [1991] S.C.R. 252; *BCGEU v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214; *McEvoy v. New Brunswick (Attorney General),* [1983] 1 S.C.R. 704; *Canada (Attorney General) v. Law Society of British Columbia*, [1982] 2 S.C.R. 307; *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220.

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[214] However, what a legislature or Parliament can do is use an arbitration agreement as grounds for a statutory provision directing a court not to exercise its subject matter jurisdiction to decide a cause of action or statutory claim.

[215] As a matter of etymology, the word "jurisdiction" means to speak the law. The Defendants do not cite any common law principle or precedent that would empower contracting parties, in effect, to silence the court's ability to speak the law to resolve contractual disputes. When a court stays an action to permit arbitration, it is not because it has no power to speak the law, but rather, the action is stayed because a statute or the court's own power directs it to defer to another means of dispute resolution selected by the parties.

[216] The British Columbia Court of Appeal recently discussed the nature of a court's jurisdiction when there is an arbitration agreement in *Boutsakis v. Kakevelakis* 2008 BCCA 13, where Justice Newbury discussed the English case of *Doleman & Sons v. Ossett Corporation*, [1912] 3 K.B. 257 (C.A.), which concerned an English arbitration statute similar to the statutes now found in British Columbia and Ontario. Justice Newbury stated at paras. 12 and 13 of her judgment:

> 12. In *Doleman*, the litigants were parties to a contract that contained an arbitration clause. The plaintiffs commenced a court action and the defendants did not seek a stay. Meanwhile, the arbitrator, an engineer, proceeded to make an award without the knowledge or consent of the plaintiffs and without giving notice to the parties. These defendants pleaded the award as a bar to the plaintiffs' claims proceeding in a court of law. In response, the plaintiffs argued that since no order for a stay had ever been sought, the court's jurisdiction could not be and had not been ousted, and the arbitrator's award was invalid.
>
> 13. In the course of ruling that the court action could proceed, the majority of the Court of Appeal (Vaughan Williams L.J. dissenting) explained that parties to a contract cannot oust the jurisdiction of a court of law, but that a clause in which they agree to refer their disputes to arbitration is valid and entitles the defendant to apply to the court to stay the action before taking any step in the proceeding. If the defendant fails to do so, however, the court retains jurisdiction. Thus, Fletcher Moulton L.J. observed:
>
>> … the Legislature by the *Common Law Procedure Acts* introduced the machinery which is now provided by s. 4 of the *Arbitration Act, 1889*. It enables the defendant to an action brought in breach of an agreement to proceed by arbitration to apply to the court to stay the action, and the court is given the power to do so. Prior to the statutable provisions the court could not refuse to settle such dispute which was brought before it, because it not only had the jurisdiction but also the duty to decide that dispute if called

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> upon so to do. It has under these provisions power to refuse its aid to a person who appeals to it in breach of an agreement to decide the matter by arbitration. [emphasis in the original]

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[217] This passage confirms that unaided by legislation, an arbitration agreement does not oust a court's jurisdiction. As will be noted later, as a part of the discussion of *Dell Computer*, in Québec, an arbitration agreement is defined under article 2638 of the *Civil Code of Québec* as an agreement by which parties may submit a dispute to the decision of an arbitrator "to the exclusion of the courts." In Ontario, under the *Arbitration Act, 1991*, an arbitration agreement is defined as "an agreement by which two or more persons agree to submit a dispute that has arisen or may arise between them." There is thus a very significant difference between Québec and Ontario, but for present purposes, the more important point is that it requires legislation for an arbitration agreement to have any influence on a court's jurisdiction to adjudicate a matter. This happens to be true in both Ontario and also Québec.

[218] Therefore, in my opinion, the first branch of the Defendants' argument is false, and I turn to the second branch of the Defendants' argument, which is that a class action or more particularly, class action legislation does not vest a court with subject matter jurisdiction that it otherwise lacks. This premise is true; it is accepted in Québec and in Ontario that class action legislation is procedural and it does not create new substantive rights: *Bisaillon v. Concordia*, [2006] 1 S.C.R. 666 at para. 22; *Hollick v. Toronto (City),* [2001] 3 S.C.R. 158; *Kanitz v. Rogers Inc.*, (2002), 58 O.R. (3d) 299 (S.C.J.); *Ontario New Home Warranty Program v. Chevron Chemical Company* (1999), 46 O.R. (3d) 130, (S.C.J.) at para. 50; *Serhan Estate v. Johnson and Johnson*, [2006] O.J. No. 2421 (Div. Ct.) at para. 41. But the procedural nature of the class action legislation is irrelevant to the question to be decided in the case at bar, which is how should Ontario's arbitration legislation be interpreted and, more particularly, how should the exceptions to a stay in s. 7(2) of the *Arbitration Act, 1991* be interpreted.

[219] The circumstances of the case at bar demonstrates that the Defendants' arguments' second premise is irrelevant to the legal problem to be solved. The subject matter of the dispute between Money Mart and its consumers is a matter of the alleged illegality of a contract. The court undoubtedly has the subject matter jurisdiction to decide that dispute. It is true, but irrelevant, that a class action does not vest a court with jurisdiction that it otherwise lacks, but the court in Ontario does not need the *Class Proceedings Act, 1992* to decide the matter of the illegality of the Fast Cash Advance Agreements. Thus, for instance, a class member could opt out of the class proceeding and have this dispute resolved by the court in an individual action. And there apparently is a subgroup of class members not bound by the arbitration agreement, and the court has the subject matter jurisdiction to decide their dispute without the aid of anything but procedure from the *Class Proceedings Act, 1992*.

[220] If by the second branch of their argument the Defendants mean, however, that the court cannot gain subject matter jurisdiction to ignore or nullify arbitration agreements from the *Class Proceedings Act, 1992*, that is also true, but also irrelevant. It is not a

matter of interpreting the *Class Proceedings Act, 1992* to find the court's jurisdiction to ignore or nullify arbitration agreements. The court has subject matter jurisdiction over contract enforcement independent of the *Class Proceedings Act, 1992,* but more to the point, as explained several times already, the question to be decided in the case at bar is one of interpreting *s. 7* of the *Arbitration Act, 1991*, which is the legislation being relied on by the Defendants as entitling them to a stay of the court proceedings that are a class action.

[221] As I explained at some length in the previous part of these Reasons for Decision, as a matter of statutory interpretation, the existence of both the *Arbitration Act, 1991* and the *Class Proceedings Act, 1992* creates difficulties of interpretation and application, but it is the resolution of those interpretative difficulties not any supposed untenable conferral of subject matter jurisdiction by the *Class Proceedings Act, 1992* that resolves those difficulties. Thus, the Defendants' second premise said to arise from *Dell Computer* and *Rogers Wireless* is irrelevant.

[222] The third branch of the Defendants' argument is that any challenge to the arbitrator's jurisdiction or to the validity or applicability or the arbitration agreement must be resolved by the arbitrator first. This approach is supported by subsections 17(1) and (2) of the *Arbitration Act, 1991*, which state:

> *Rulings and objections re jurisdiction*
>
> *Arbitral tribunal may rule on own jurisdiction*
>
> 17 (1) An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration and may in that connection rule on objections with respect to the existence or validity of the arbitration agreement.
>
> *Independent agreement*
>
> (2) If the arbitration agreement forms part of another agreement, it shall for the purposes of a ruling on jurisdiction, be treated as an independent agreement that may survive even if the main agreement is found to be invalid.

[223] As will be seen, this approach, which is called the "competence-competence" principle was endorsed or approved by the Supreme Court of Canada in the context of its interpretation of Québec legislation about when a stay should be granted, and it is true that this ruling from *Dell Computer* and *Rogers Wireless* has been applied in courts across Canada, including courts in Ontario; see: *Plan Group v. Bell Canada*, [2008] O.J. No. 1683 (S.C.J.); *St Joseph Corp. v. Canada (Attorney General)*, [2008] O.J. No. 1630 (S.C.J.); *EDF (Services) Ltd. v. Appeton & Associates*, [2007] O.J. No. 3281 (S.C.J.); *Bearlap Inc. v. Joffe*, [2007] O.J. No. 4465 (S.C.J.).

[224] Under the competence-competence principle, most contests about the arbitrator's jurisdiction should first be resolved by the arbitrator. The competence-competence principle, however, is not an absolute rule of referral, it is only a general rule of referral and admits of exceptions. Under the competence-competence principle, a contest about

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the arbitrator's jurisdiction should first be resolved by the arbitrator - unless the challenge is based solely on a question of law, or, if a question of mixed fact and law, the question of fact requires only a superficial consideration of the documentary evidence on the record.

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[225] As revealed by the discussion in the previous part of these Reasons for Decision, one way of describing the question to be decided in the case at bar is that it concerns whether as a matter of interpretation, there are exceptions to the direction from the legislature found in s. 7(1) of the *Arbitration Act, 1991* that a stay should be granted when the parties have an arbitration agreement. The competence-competence principle does not create or negate the existence of an exception in the *Arbitration Act, 1991*, which remains a matter of statutory interpretation.

[226] The precise point is that the principle drawn from *Dell Computer* and *Rogers Wireless* that a challenge to the arbitrator's jurisdiction or to the validity or applicability or the arbitration agreement should be resolved by the arbitrator is not relevant because the genuine dispute before the court is not about the arbitrator's jurisdiction, which will be subject to the competence-competence principle, but rather the genuine dispute is about the court's jurisdiction to grant a stay, which is a matter of interpreting s. 7 of the *Arbitration Act, 1991*. The conclusion that the invalidity (or not) of the arbitration agreement should be determined at the certification hearing does not offend the "competence-competence" principle because that conclusion is about the court's jurisdiction to stay under the *Arbitration Act, 1991* and the "competence-competence" principle is about the arbitrator's jurisdiction to arbitrate under an arbitration agreement, which is not the same thing.

[227] In an article, about the state of the law in common law jurisdictions after *Dell Computer*, Andrew D. Little discusses the phenomena that even with the competence-competence principle, there remains a role for the court. Part of that role, is that the court determines whether there are exceptions to the imperative of a stay of court proceedings that arises if there is an arbitration agreement. In "Canadian Arbitration Law after *Dell Computer Corp. v. Union des consommateurs"* (2007), 45 *Can. Bus. L.J.* 356, Mr. Little states at p.371:

> In *Dalimplex Ltd. v. Janicki* (2003), 64 O.R. (3d) 737 (C.A.), the Court of Appeal for Ontario adopted the *Gulf Canada* test and underlined the principle that the arbitral tribunal should decide first where the legislation and the parties, together with the nature of the dispute, support that approach. Charron J.A. held that where it is "clear" that the arbitration agreement is null and void, inoperative or incapable of being performed, the courts should make a determinative finding and dismiss the referral application. However, where it is "not clear" it may be preferable to leave any issue related to the "existence or validity of the arbitration agreement" for the arbitral tribunal to decide "in the first instance" under article 16 of the Model Law. Given the tests applied in these cases, it is submitted that the majority's "general rule" in Dell will not conflict with the rule emerging from Gulf Canada and *Dalimplex* [emphasis added]

[228] In his article, Mr. Little, also makes the point, which I have tried to make, that it is a matter of legislation and the judicial interpretation of that legislation that ultimately governs the relationship between a court and an arbitration tribunal. Mr. Little states at pp. 371-72:

> Whether a province has reformed domestic legislation based on the Model Law, or [has] an older-style discretion to grant a stay of the court proceedings, the statutory test for doing so is subject to judicial interpretation, particularly concerning the evidence necessary to grant the (mandatory) stay and the relationship between the court and the tribunal. In that context, *Dell's* "general rule" and the negative aspect of the competence-competence principle can be implemented in common law Canada.

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[229] The Court of Appeal's judgment in *Dalimplex Ltd. v. Janicki* (2003), 64 O.R. (3d) 737 (C.A.), referred to in Mr. Little's article, is informative. In that case, Justice Charron for the Court of Appeal discussed the role of the court on a motion for a stay and referral to arbitration. After accepting the competence-competence principle where there was a contest about the arbitrator's jurisdiction, she discussed the court's approach to determining whether the exceptions to a stay should be applied. She stated at paragraph 22 of her judgment:

> 22. An issue may also arise on an article 8 motion [a motion for a stay] as to whether the agreement is (a) null and void; (b) inoperative; or (c) incapable of being performed. In the same way, where it is clear that one of these situations exist, the court will make a determinative finding to that effect and dismiss the motion for a referral. However, in cases where it is not clear, it may be preferable to leave any issue related to the "existence or validity of the arbitration agreement" for the arbitral tribunal to determine in the first instance under article 16.

[230] In considering the role of the court, it may be noted that several paragraphs of s. 7(2) of the *Arbitration Act, 1991* are outside the operation of the competence-competence principle. These exceptions are exclusively for the court to decide. For example, it is for the court and not the arbitrator to determine whether the motion for a stay was brought with undue delay and it is exclusively for the court to determine whether the matter is a proper one for default or summary judgment.

[231] At this juncture, in considering the role of the court, it is also worth digressing to note another significant difference between the situation in Québec and Ontario or British Columbia. The legislation in Québec that is comparable to Ontario's *Arbitration Act, 1991* is Québec's *Code of Civil Procedure*. I will set out the relevant provisions in the next section of these Reasons for Decision, but the point to note now is that the Ontario legislation provides more exceptions to where a stay must be granted by the court than does the Québec's *Code of Civil Procedure*.

[232] In Ontario, whether an arbitration agreement is "invalid" under one of the exceptions to granting a stay because it interferes with a class proceeding is a legal issue

for the court and not the arbitrator to determine. Whether or not a proposed class action satisfies the certification criteria of s. 5(1) of the *Class Proceedings Act*, which would make the arbitration agreement invalid or inoperative, is an issue of law or of mixed fact and law that can only be decided by the court and not the arbitrator. It is an exception to the general referral to the arbitrator and clearly a matter outside of his or her jurisdiction under any arbitration agreement. Whether an action may be certified as a class proceeding is clearly outside the scope of any arbitration agreement. Even when parties agree or consent to certification, the court must still rule on whether the criteria for certification have been satisfied: *Markle v. Toronto (City)*, [2004] O.J. No. 3024 (S.C.J.) at para. 2; *Vezina v. Loblaw Companies Ltd.*, [2005] O.J. No. 1974 (S.C.J.) at para. 13.

[233] In my opinion, for the circumstances where there is both an arbitration agreement and a pending motion for certification of a class proceeding, Justices Brown, Levine, Macdonald, and Weiler correctly interpreted the statutory provisions for granting or refusing a stay, and they did so in a way that both as a matter of statutory interpretation and also as a matter of implementation was correct, fair, and not inconsistent with the competence-competence principle. Thus, the Defendants' third premise said to arise from *Dell Computer* and *Rogers Wireless* does not apply.

[234] Before moving on, one additional point that refutes the Defendants' theory about the *Dell Computer* and *Rogers Wireless* cases may be made. As will be seen, *Dell Computer* and *Rogers Wireless* are cases about the interpretation of a statute that affects a court's subject matter jurisdiction, and in particular, they are about the extent to which Québec legislation uses the existence of an arbitration agreement as grounds to oust the Québec court's jurisdiction to decide disputes. (As noted above, *Dell Computer* and *Rogers Wireless* are also about whether legislation comparable to s. 7 and s. 8 of Ontario's *Consumer Protection Act, 2002* negated arbitration agreements as grounds to oust the Québec court's jurisdiction to decide disputes that may be certified as class proceedings. That issue too is a matter of statutory interpretation.)

[235] I will return to these points several more times below, but for immediate purposes, the point to emphasize is that *Dell Computer* and *Rogers Wireless* are ultimately just cases about statutory interpretation. The Supreme Court interpreted Québec legislation, but how legislation in other provinces should be interpreted remains an open issue, and there is certainly no common law non-statutory principle that contracting parties can oust the court's subject matter jurisdiction simply by entering into an agreement to arbitrate. It is a matter of statute law what influence an arbitration agreement may have on a court's jurisdiction.

[236] As noted in Mr. Fortier's article mentioned in the previous part of these Reasons, speaking historically and from the perspective of many Anglo-Canadian and American jurisdictions, it was precisely because courts were unsympathetic, if not hostile, to arbitration agreements denying access to the courts, that legislatures responded to direct courts to support arbitration, but as evidenced by the exemptions found in the statutory provisions I have already examined above, it is legislation not arbitration agreements *per se* that ousts the court's jurisdiction. It is for a legislature to decide when and to what extent arbitration agreements will be grounds for the courts to stay proceedings. It is

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entirely possible for legislatures across the country to come to their own and different approaches. The law in Québec and Ontario does not have to be the same and as I have already pointed out there are indeed significant differences.

[237] In *Dell Computer*, Justice Deschamps, who writes the majority judgment, focuses her remarks exclusively to the *Civil Code of Québec*. There is no mention anywhere in her judgment of *MacKinnon v. National Money Mart Company* (2004), 50 B.L.R. (3d) 291 (B.C.C.A.); *Smith* v. *National Money Mart Co.*, [2005] O.J. No. 2660 (S.C.J.), appeal quashed [2005] O.J. No. 4269 (C.A.), leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 528. In their factum and in their material for the motions now before the court, the Defendants make much of the fact that because of the presence of several intervenors from across Canada, the law from across Canada was before the Supreme Court. However, in *Dell Computer*, although the intervenors inundated the Supreme Court with the law from other provinces, the court did not comment and cannot be taken to have ruled on the Ontario legislature's design for the relationship between arbitration agreements and class proceedings, which is, of course, a moving target because the Ontario legislature and the legislatures of the other provinces are free to do something different from Québec.

[238] The Supreme Court did not purport to address the legislative choices of other provinces. Justice Deschamps does not refer to the law in other provinces or to the submissions of the intervenors. The statutory and common law underpinning of the law in other parts of the country is not mentioned, and I do not understand how it can be that Justice Deschamps' judgment can overturn settled case law in those provinces without actually mentioning it. The Defendants, therefore, develop a thesis at a doctrinal level to "effectively overrule" the case law that the Supreme Court does not mention. As I have demonstrated in this section, the doctrine does not prove their thesis.

[239] I therefore conclude that the theory of the Defendants' argument based on *Dell Computer* and *Rogers Wireless* is false and that these cases do not "effectively overrule" the law in Ontario that has been applied to the case at bar. I will nevertheless go on to closely read these judgments and examine again whether they do change the law in Ontario.

The Supreme Court of Canada's Judgments in Dell Computer and Rogers Wireless

[240] Courts in Ontario are bound to follow *Dell Computer* and *Rogers Wireless* to the extent that *Dell Computer* and *Rogers Wireless* are determinative of the law in Ontario. The Defendants submit that these cases "effectively overruled" the law in Ontario and given the retroactive and declaratory effect of a Supreme Court pronouncement of the law, that Justices Brown, Levine, Macdonald, Weiler, and Hoy erred in how they interpreted the statutory provisions that govern in British Columbia and Ontario respectively.

[241] The Defendants' arguments for a stay of this class proceeding depend upon their interpretation of what the Supreme Court decided in *Dell Computer* and in *Rogers*

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Wireless, and it is obviously necessary to review these judgments and the cases that followed them with some considerable care. In this part of my Reasons for Decision, I will give these cases a close reading, and I will address the parties' arguments about their significance to the immediate case and to cases across this country.

[242] In the *Dell Computer* case, Oliver Dumoulin, and 353 other Québec consumers ordered computers from Dell Computer Corporation ("Dell") at prices that had been incorrectly posted on Dell's English-language Web site. When Dell refused to honour the orders, Mr. Dumoulin and the Union des consommateurs ("the Union"), a consumers' advocacy group, filed a motion for authorization to institute a class action on behalf of the consumers. Relying on an arbitration agreement contained in its standard form conditions of sale, Dell applied for a referral of Mr. Dumoulin's claim to arbitration. Mr. Dumoulin and the Union countered that the arbitration agreement was null under the *Civil Code of Québec* ("C.C.Q.").

[243] The trial judge decided that article 3149 of the C.C.Q. applied and did make the arbitration agreement null. In reaching this decision, she followed the law of *Québec* and the rule in *Dominion Bridge Corp. v. Knai*, [1998] R.J.Q. 321 (C.A.), which required her to decide whether the case involved a "foreign element" for the purposes of the rules of Québec private international law. She concluded that there was a foreign element because the arbitration provision stipulated arbitration in the United States. Thus, in her view, article 3149 applied to nullify the arbitration agreement, and, in the result, Mr. Dumoulin's action could be and was authorized for a class action.

[244] Dell appealed to the Québec Court of Appeal. Disagreeing with the trial judge, the Québec Court of Appeal held that the arbitration provision was not contrary to article 3149 of the C.C.Q. The court concluded that the arbitration provision did not contain a foreign element, but the appellate court held that the provision was contrary to article 1435 of the C.C.Q., which nullifies an external agreement in a consumer contract (which would include Dell's arbitration provision), unless it is expressly brought to the attention to the consumer at the time of formation of the contract. In the result, for a different reason, Dell's arbitration agreement was nullified and the class action could proceed.

[245] Dell appealed to the Supreme Court of Canada, and in the final result, the Supreme Court reversed both the trial judge and also the Québec Court of Appeal. The Supreme Court allowed Dell's appeal, referred Mr. Dumoulin's claim to arbitration, and dismissed the motion for authorization to institute a class action. The majority judgment was written by Justice Deschamps for herself and McLachlin C.J. and Binnie, Abella, Charron and Rothstein JJ.

[246] Justices Bastarache, LeBel and Fish dissented, and they would not have stayed the class action.

[247] In the Supreme Court, Mr. Dumoulin and the Union repeated the arguments that Dell's arbitration provision had been nullified by articles 3149 and 1435 of the C.C.Q., and they added other arguments in their effort to nullify the arbitration provision contained in Dell's standard form contract. Their arguments included the submission that

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the arbitration provision was unconscionable and that it was contrary to yet another article of the C.C.Q.; namely, article 2639, which specifies that "disputes over the status and capacity of persons, family matters or other matters of public order" cannot be submitted to arbitration. In the view of Justice Deschamps, all of these arguments failed, and at para. 11 of the judgment, she stated:

> 11. The parties have raised many issues. In my view, the most significant one in the context of this case concerns the application of art. 3149 C.C.Q. This question is not only a potentially decisive one for the parties, but also one that involves the ordering of the rules in the *Civil Code of Québec*; the answer to it will have repercussions on the interpretation of the other provisions of the title in which this article appears and on the interpretation of the *Code* in general. The analysis of this issue will lead me to consider the influence of international rules on Québec law. These rules are also relevant to another issue: whether the competence-competence principle applies to the review of the application to refer the dispute to arbitration. The conclusion I will reach is that an arbitrator has jurisdiction to assess the validity and applicability of an arbitration clause and that, although there are exceptions, the decision regarding jurisdiction should initially be left to the arbitrator.

[248] In this paragraph, amongst other things, Justice Deschamps identifies what she regards as the most significant issue in the *Dell Computer* case, which was the interpretation of article 3149 of the C.C.Q., and it is convenient to set out this article now. It states:

> 3149. A Québec authority also has jurisdiction to hear an action involving a consumer contract or a contract of employment if the consumer or worker has his domicile or residence in Québec; the waiver of such jurisdiction by the consumer or worker may not be set up against him.

[249] In paragraph 11 of her judgment, Justice Deschamps also states a conclusion that is fundamentally important to the Defendants' argument in the case at bar. She concludes that although there are exceptions, in the first instance, it is for the arbitrator and not for the court to determine the scope and validity of an arbitration provision. This conclusion arose because Dell submitted that based on the "competence-competence" principle implicitly adopted by the Supreme Court in *Desputeaux v. Éditions Chouette (1987) Inc.*, [2003] 1 S.C.R. 178, courts must leave it to the arbitrator to consider the availability and scope of his or her jurisdiction.

[250] Pausing here, as noted earlier in this judgment, the Defendants in the case at bar rely on the "competence-competence" principle as overruling the law in Ontario and elsewhere, which is that the court can determine whether a matter should be arbitrated in the context of evaluating the preferable procedure criteria of a motion to certify an action as a class proceeding. In the last section, I have explained why I regard this submission as wrong, but I will address this point again later.

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[251] Justice Deschamps dedicates paragraphs 12 to 67, 56 paragraphs of her 121 paragraph judgment, to the issue of whether article 3149 of the C.C.Q. applied to Dell's standard form contract. For her, this issue raised profound and fundamental doctrinal questions how one should approach interpreting the *Civil Code of Québec*. She examines the history of the civil law tradition, and she reflects about the significance of codification as such and of the separation and ordering of the articles that comprise the code as aspects of interpreting the *Code*. She examines whether the C.C.Q. has a taxonomic structure, and she asks what significance should be taken from the fact that Article 3149 is found in Title Three, entitled "International Jurisdiction of Québec Authorities," found in Book Ten of the *Civil Code of Québec*, entitled "Private International Law."

[252] Justice Deschamps' analysis leads her to the conclusion that the organization of the *Civil Code of Québec* is significant. She notes that for the *Dell Computer* case, articles 31 and 1000 were the provisions that conferred jurisdiction over class actions on the Québec Superior Court. Article 3149, which precludes contracting out from the court's jurisdiction, is found in a different part of the Code associated with international law. At para. 24 of her judgment, she reasons that: "Given that domestic disputes are governed by the general provisions of Québec domestic law, there is no reason to apply the rules relating to the international jurisdiction of Québec authorities to a dispute that involves no foreign element."

[253] For the case before her, Justice Deschamps concludes at para. 37 of her judgment that it must be asked whether the choice of arbitration procedure gave rise to a foreign element that would warrant the application of article 3149 C.C.Q. Justice Deschamps ultimately reasons that arbitration, as such, does not involve a foreign element, and she concludes that there was no foreign element in *Dell Computer* that would trigger the application of article 3149. Thus, she interprets article 3149 narrowly and as not applying generally to arbitration agreements. Therefore article 3149 did not stand in the way of referring Mr. Dumoulin's claim to arbitration.

[254] Pausing here in this exegesis of Justice Deschamps' judgment for the majority, it is in the main about how to interpret the *Civil Code of Québec* and about how to interpret one particular provision in it. In this, there is nothing that would change the law about the relationship between arbitration and class actions in Ontario or in other common law provinces. Justice Deschamps' chief concern here is about general principles of statutory interpretation under Québec law, and her discussion is an illustration that <u>some</u> aspects of *Dell Computer* clearly are not applicable to Ontario.

[255] However, there is one additional line of argument in the first half of her judgment that arguably suggests that she has something to say about the law outside the *Civil Code of Québec*. (This line of argument is found in paragraphs 61 to 65 of her judgment under the title "Ordering of the Rules on Arbitration." In these paragraphs of her judgment, Justice Deschamps refutes the argument of the dissenting judges that the reach of article 3149 was not confined to cases with a foreign element). In this line of argument, referring to article 2638 of the *Civil Code of Québec*, which states that "an arbitration agreement is a contract by which the parties under to submit a present or future dispute to the decision

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of one or more arbitrators, to the exclusion of the courts," Justice Deschamps states that the *Code* recognizes these contracts as valid with an exception for certain cases in which the jurisdiction of the Québec courts cannot be ousted by the parties.

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[256] From this line of argument, Money Mart and Dollar Financial deduce as a proposition, said to operable in the common law provinces, that where contracting parties have entered into an arbitration provision, the court has no jurisdiction or that the court has no choice but to refer a matter to arbitration. In other words, they argue that when there is an arbitration agreement, the court's subject matter jurisdiction is absolutely ousted. In my opinion, the Defendants' deduction is not correct. As I explained in the previous section of these Reasons for Decision an arbitration agreement, as such, does not oust the jurisdiction of the court. It requires statutory intervention to oust the court's jurisdiction.

[257] Justice Deschamps' judgment actually confirms this point, because she notes that it is the *Civil Code of Québec* that defines an arbitration agreement as an agreement by which the parties agree to submit their dispute to arbitrators "to the exclusion of the courts." As noted earlier in these Reasons for Decision, there is no similar language in the definition of arbitration agreement in Ontario, and in any event, as a matter of doctrine, whatever the situation may be in *Québec* under the C.C.Q., the court's jurisdiction in Ontario is not ousted by the presence of an arbitration agreement, but rather the court's jurisdiction is governed by its own jurisdiction and by s. 7 of the *Arbitration Act, 1991,* as I have discussed above.

[258] In the next section of her judgment, Justice Deschamps considers the question of whether it is the arbitrator or a court that should rule first on the parties' arguments on the validity or applicability of an arbitration agreement. She begins by noting that that there are two schools or approaches to this issue: (1) the interventionalist approach, where the court makes the initial ruling; and (2) the "competence-competence" approach, where the court regards the arbitrator as competent to rule on his or her competence. Under the "competence-competence" approach, arbitrators are allowed to rule on their own jurisdiction. Justice Deschamps concludes that there is no international consensus about the appropriate approach, although there is a growing tendency to defer to arbitrators, and she turns to consider the state of Québec law on this issue.

[259] I pause here to note that Justice Deschamps is once again focusing exclusively on Québec statutory law. She immediately sets out the operative articles, this time from the Québec *Code of Civil Procedure*. Thus, she states in para. 79 of her judgment:

> 79 The legal framework governing referral to arbitration is set out in the *Code of Civil Procedure.* The relevant provisions read as follows:
>
> > 940.1 Where an action is brought regarding a dispute in a matter on which the parties have an arbitration agreement, the court shall refer them to arbitration on the application of either of them unless the case has been inscribed on the roll or it finds the agreement null.

> The arbitration proceedings may nevertheless be commenced or pursued and an award made at any time while the case is pending before the court.
>
> 943. The arbitrators may decide the matter of their own competence.
>
> 943.1 If the arbitrators declare themselves competent during the arbitration proceedings, a party may within thirty days of being notified thereof apply to the court for a decision on that matter.
>
> While such a case is pending, the arbitrators may pursue the arbitration proceedings and make their award.
>
> 943.2 A decision of the court during the arbitration proceedings recognizing the competence of the arbitrators is final and without appeal.
>
> While such a case is pending, the arbitrators may pursue the arbitration proceedings and make their award.

[260] Justice Deschamps then goes on, in effect, to interpret the four sections of the *Code of Civil Procedure* that she has identified as providing the legal framework governing referral to arbitration. It is in this context that she states at paras. 83 to 87 of her judgment.

> 83. Article 940.1 C.C.P. refers only to cases where the arbitration agreement is null. However, since this provision was adopted in the context of the implementation of the New York Convention (the words of which, in art. II(3), are "null and void, inoperative or incapable of being performed"), I do not consider a literal interpretation to be appropriate. It is possible to develop, in a manner consistent with the empirical data from the Québec case law, a test for reviewing an application to refer a dispute to arbitration that is faithful to art. 943 C.C.P. and to the *prima facie* analysis test that is increasingly gaining acceptance around the world.
>
> 84. First of all, I would lay down a general rule that in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator. A court should depart from the rule of systematic referral to arbitration only if the challenge to the arbitrator's jurisdiction is based solely on a question of law. This exception is justified by the court's expertise in resolving such questions, by the fact that the court is the forum to which the parties apply first when requesting referral and by the rule that an arbitrator's decision regarding his or her jurisdiction can be reviewed by a court. It allows a legal argument relating to the arbitrator's jurisdiction to be resolved once and for all, and also allows the parties to avoid duplication of a strictly legal debate. In addition, the danger that a

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> party will obstruct the process by manipulating procedural rules will be reduced, since the court must not, in ruling on the arbitrator's jurisdiction, consider the facts leading to the application of the arbitration clause.
>
> 85. If the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration, as arbitrators have, for this purpose, the same resources and expertise as courts. Where questions of mixed law and fact are concerned, the court hearing the referral application must refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence in the record.
>
> 86. Before departing from the general rule of referral, the court must be satisfied that the challenge to the arbitrator's jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding. This means that even when considering one of the exceptions, the court might decide that to allow the arbitrator to rule first on his or her competence would be best for the arbitration process.
>
> 87. Thus, the general rule of the Québec test is consistent with the competence-competence principle set out in art. 16 of the Model Law, which has been incorporated into art. 943 C.C.P. As for the exception under which a court may rule first on questions of law relating to the arbitrator's jurisdiction, this power is provided for in art. 940.1 C.C.P., which in fact recognizes that a court can itself find that the agreement is null rather than referring this issue to arbitration.

[261] As I read Justice Deschamps' judgment, she is interpreting specific provisions of the *Code of Civil Procedure*, including a provision that says "the arbitrators may decide the matter of their own competence." Her design is to find a means to interpret article 940.1 C.C.P. - which empowers the court to find an arbitration agreement null, - in such a way that the court will normally permit the arbitrator first to rule on his or her jurisdiction.

[262] Justice Deschamps' analysis is about the situation in Québec, but if the above passages about the competence-competence approach are read to apply across the country, then one can extract the following general principles when there is an arbitration agreement: (a) both the court and the arbitrator may rule on whether the arbitrator has jurisdiction; (b) if the challenge to the arbitrator's jurisdiction is solely a question of law, then the court should rule on the arbitrator's jurisdiction; (c) if the challenge to the arbitrator's jurisdiction is a mixed question of fact and law, the arbitrator should rule, unless the questions of fact require only superficial consideration of the documentary evidence, in which case the court should rule; (d) subject to these exceptions, the general rule is that the court should refer a challenge to the arbitrator's jurisdiction to be resolved by the arbitrator.

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[263] One can accept all of these principles taken from *Dell Computer* as being the law in Ontario, but these principles do not "effectively overrule" the law articulated or applied by Justices Macdonald, Hoy, and Weiler because these passages do not address their approach to interpreting s. 7 of the *Arbitration Act, 1991,* and their approach to reconciling the tension between s. 7 (1) of the *Arbitration Act, 1991* and s. 5(1) of the *Class Proceedings Act, 1992*.

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[264] Moreover, it cannot be successfully argued from the above passages of Justice Deschamps' judgment that Courts in Québec and the rest of the country actually do not have the subject matter jurisdiction to decide issues that might be decided by an arbitrator. In this regard, it is informative to note what Justice Deschamps immediately says in paragraphs 88 and 89 of her judgment, and even more revealing is what she does in the rest of her judgment. Paragraphs 88 and 89 state:

> 88 In the case at bar, the parties have raised questions of law relating to the application of the provisions on Québec private international law and to whether the class action is of public order. There are a number of other arguments, however, that require an analysis of the facts in order to apply the law to this case. This is true of the attempt to identify a foreign element in the circumstances of the case. Likewise, the external nature of the arbitration clause requires not only an interpretation of the law, but also a review of the documentary and testimonial evidence introduced by the parties. According to the test discussed above, the matter should have been referred to arbitration.
>
> 89. Considering the status of the case, it would be counterproductive for this court to refer it to arbitration, thereby exposing the parties to a new round of proceedings. It would therefore be preferable to deal with all the questions here. I have already discussed the application of art. 3149 C.C.Q. and the question of the foreign element. I will now consider the external clause issue.

[265] Here, Justice Deschamps says that according to her articulation of the law in Québec, the applicability of the arbitration provision in the standard form Dell contract ought to have been a matter referred to arbitration, but considering the status of the case, it would be counterproductive to refer those issues to arbitration, and, therefore, she will go on to consider the issues of whether the arbitration agreement should be struck down. In other words, notwithstanding the presence of an arbitration agreement. Justice Deschamps was herself not restrained from exercising subject matter jurisdiction and ruling on issues that might have been decided first by the arbitrator.

[266] In the end result, although the resolution of Mr. Dumoulin's dispute about the formation of a binding contract with Dell was referred to an arbitrator, Justice Deschamps pre-empted the arbitrator ruling on his or her own jurisdiction. For example, Justice Deschamps goes on to rule on several issues that the arbitrator was capable of ruling on about his or her jurisdiction under the arbitration agreement. In paragraphs 90 to 104 of her judgment, she rules on the argument that pursuant to art. 1435 C.C.Q., the arbitration

agreement is null because it is an external clause and because it has not been proven that Mr. Dumoulin knew of its existence. Article 1435 states:

> 1435. An external clause referred to in a contract is binding on the parties.
>
> In a consumer contract or a contract of adhesion, however, an external clause is null if, at the time of formation of the contract, it was not expressly brought to the attention of the consumer or adhering party, unless the other party proves that the consumer or adhering party otherwise knew of it.

Justice Deschamps dismisses Mr. Dumoulin's argument that article 1435 C.C.Q. nullified the arbitration provision in the Dell contract. The arbitrator could have been asked to rule on this issue. For present purposes, it is not necessary to explicate Justice Deschamps' reasoning.

[267] In paragraphs 105 to 110, Justice Deschamps addresses another argument about the applicability of the Dell arbitration agreement that could have been decided by the arbitrator. To put these paragraphs in context, as I already noted above, article 2639 of the C.C.Q. provides, amongst other things, that if a dispute is of "public order," it cannot be submitted to arbitration.

[268] Thus, Mr. Dumoulin and the Union argued that class actions are of "public order" because they facilitate access for justice and are in the public interest. Justice Deschamps rejected this argument because she reasoned that the class action is a procedure and its purpose is not to create a new right. In her view, a class action is merely a special mechanism to collectivize an existing substantive individual right. In paragraphs 108 and 109 of her judgment, she stated:

> 108. In the case at bar, the parties agreed to submit their disputes to binding arbitration. The effect of an arbitration agreement is recognized in Québec law: art. 2638 C.C.Q. Obviously, if Mr. Dumoulin had brought the same action solely as an individual, the Union's argument based on the class action being of public order could not have been advanced to prevent the court hearing the action from referring the parties to arbitration. Does the mere fact that Mr. Dumoulin instead decided to bring the matter before the courts by instituting a class action affect the admissibility of his action? In light of the reasons of LeBel J., writing for the majority in *Bisaillon*, at para. 17, the answer is no: "[the class action] cannot serve as a basis for legal proceedings if the various claims it covers, taken individually, would not do so."
>
> 109 Moreover, the Union's argument that the class action is a matter of public order that may not be submitted to arbitration has lost its force as a result of this Court's decision in *Desputeaux*. In that case, one of the parties had invoked the same provision, art. 2639 C.C.Q., to argue that the dispute over ownership of the copyright in a fictitious character, Caillou, was a question of public order that could not be submitted to arbitration. The Court

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> held that the concept of public order referred to in art. 2639 C.C.Q. must be interpreted narrowly and is limited to matters analogous to those enumerated in that provision: paras. 53-55. In the case at bar, neither Mr. Dumoulin's hypothetical individual action nor the class action is a dispute over the status and capacity of persons, family law matters or analogous matters.

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[269] The Defendants, in the case at bar, attempt to tweak a judicial error in Ontario out of the idea that class actions are a procedure and not a substantive right. However, when the Ontario courts decided that the application of an arbitration provision should be considered in the context of assessing the criteria for a class proceeding, they may be taken to have known that a class proceeding is a procedure and not a substantive right. In deciding to treat the availability of arbitration as an aspect of the certification of a class proceeding, the courts were not making substantive law altering the law of contract. The right to a class proceeding remains a procedural right. As I have tried to explain above in the previous section of these Reasons for Decision, the court was not relying on the *Class Proceedings Act, 1992* to make substantive law; rather it was interpreting its jurisdiction to grant an exception to a stay under s. 7 of the *Arbitration Act, 1991.*

[270] Thus, I find nothing in the majority judgment of Justice Deschamps in *Dell Computer* that overturns the law in Ontario about the interrelationship between arbitration agreements and court proceedings including class actions.

[271] That completes my analysis of the majority judgment in the *Dell Computer* case. Before discussing the minority's judgment, it is convenient first to turn to *Rogers Wireless,* which was a companion judgment.

[272] In *Rogers Wireless*, Dr. Muroff, a Québec resident, applied for authorization to institute a class action in Québec against Rogers, a wireless phone service. His proposed class action was on behalf of himself and all other Rogers' subscribers who had been charged for a roaming service. The Rogers' service contract, however, included an arbitration agreement, so Dr. Muroff challenged both the roaming charge and the arbitration agreement, arguing that they were abusive, contrary to art. 1437 of the *Civil Code of Québec*, S.Q. 1991, c. 64 ("C.C.Q."), and s. 8 of the *Consumer Protection Act*, R.S.Q., c. P-40.1.

[273] Relying on article 940.1 of *Code of Civil Procedure*, Rogers argued that the court had no jurisdiction to decide Dr. Muroff's claim.

[274] Chief Justice McLachlin delivered a judgment for herself and Binnie, Fish, Abella, Charron, and Rothstein, JJ. Justice LeBel concurred. The Chief Justice begins her judgment by noting it was about "the effect of an arbitration clause on a court's jurisdiction under Québec civil law." At paras. 11 and 13, of her judgment, she stated:

> 11 In *Dell*, the Court was unanimous in finding that under art. 940.1 C.C.P., arbitrators have jurisdiction to rule on their own jurisdiction (the "compétence-compétence principle"). The majority of the Court held that, when an arbitration clause exists, any challenges to the jurisdiction of the

> arbitrator must first be referred to the arbitrator. Courts should derogate from this general rule and decide the question first only where the challenge to the arbitrator's jurisdiction concerns a question of law alone. Where a question concerning jurisdiction of an arbitrator requires the admission and examination of factual proof, normally courts must refer such questions to arbitration. For questions of mixed law and fact, courts must also favour referral to arbitration, and the only exception occurs where answering questions of fact entails a superficial examination of the documentary proof in the record and where the court is convinced that the challenge is not a delaying tactic or will not prejudice the recourse to arbitration.
>
> 13 Applying the standard endorsed by the majority in *Dell*, the trial judge was therefore correct to refer the matter to arbitration, unless the nature of the challenge and its evidentiary implications justified a departure from the general rule of deference to arbitral jurisdiction.

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[275] Thus, the *Rogers Wireless* case is about article 940.1 C.C.P. in Québec. No mention is made about the legal situation in any other jurisdiction, and in my opinion, the *Rogers Wireless* case cannot be used to argue that Ontario courts do not have the jurisdiction to refuse to stay an action pursuant to s. 7 of the *Arbitration Act, 1991*. As explained above, in Ontario, as a matter of statutory interpretation, room has been made for an exception to the stay otherwise directed by s. 7(1) of the Act when an action may be certified as a class proceeding.

[276] Turning now to the minority judgment in *Dell Computer,* the dissenting reasons of Bastarache, LeBel and Fish JJ. were delivered by Justices Bastarache and LeBel. When they begin their analysis at para. 130 of the report, they state that the primary question in the appeal was: did the courts below err in law by refusing to refer the parties to arbitration? After a detailed and intricate analysis of the *Civil Code of Québec,* they conclude in para. 204 that "an arbitration clause is itself sufficient to trigger the application of art. 3148, para. 2, and hence the exceptions that apply to it, including art. 3149." The minority's key conclusion, which is contrary to the view of Deschamps, J., is that article 3149 of the C.C.Q., which is found in the international jurisdiction book of the *Code* and which precludes a person from contracting out of the Québec court's jurisdiction, applied. For them, this conclusion was determinative that the lower courts were correct in declining to refer Mr. Dumoulin's claim to arbitration.

[277] Justices Bastarache, LeBel and Fish JJ.'s dissenting judgment is overwhelming about the operation of arbitration agreements under Québec law. Apart from the fact that it is a dissenting judgment, I do not read it as suggesting the approach in Ontario to staying an action for arbitration when there is a class proceeding has been overruled.

[278] Money Mart and Dollar Financial, however, extract sentences from various passages from the dissenting judgment to support their argument that the effect of an arbitration agreement is to remove the court's subject matter jurisdiction. With their emphasis added, in their factum under the title "An arbitration agreement removes the court's subject matter jurisdiction," paragraphs 48 to 50 the Defendants state:

48. In *Dell*, both the majority and the dissent accepted that the legal effect of a mandatory arbitration agreement is to remove the court's subject-matter jurisdiction, thus rendering it irrelevant whether the certification test is met. Deschamps J. for the majority noted:

> […] the essential purpose of the arbitration agreement is […] "to displace judicial intervention" and […] "by conferring jurisdiction on arbitrators, [one] ousts the usual jurisdiction of the judiciary." [para. 61]

49. Bastarache and LeBell JJ., dissenting in the result, agree with the majority on this point:

> Exclusive arbitration clauses operate to create a "private jurisdiction" that implicates the loss of jurisdiction of state-appointed forums for dispute resolution, such as ordinary courts and administrative tribunals, rendering contractual arbitration both different and exclusive of the latter entities […] [para. 132]
>
> Exclusive arbitration and forum selection clauses operate very similarly. The effect of both is to derogate from the jurisdiction of ordinary courts, who would otherwise have jurisdiction to hear the matter. [para. 135]
>
> […] arbitration clauses raised primarily a question of jurisdiction […] [para. 148]
>
> It is well established that the effect of a valid undertaking to arbitrate is to remove the dispute from the jurisdiction of the ordinary courts of law […] [para. 150]
>
> […] the effect of the exclusive arbitration clauses is to create a "private jurisdiction" that implicates the loss of jurisdiction of state-appointed authorities for dispute resolution, such as domestic courts and administrative tribunals. [para. 200]

50. Importantly, Bastarache and LeBell JJ. added that the result is identical in the common law provinces. As they explained:

> In the common law provinces, courts will stay in their jurisdiction in the presence of either a valid form selection or arbitration clause. [para. 135]

[279] For the reasons expressed earlier in these Reasons for Decision, I do not read any of these quotes as supporting the broad proposition advanced by the Defendants that the mere presence of an arbitration provision actually removes the court's subject matter jurisdiction over a matter. It requires legislation to do that, and the legislation in Ontario has been interpreted in a way that allows the matters of referring a matter to arbitration

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and of staying a class proceeding to be determined as a part of the preferable procedure analysis of a class proceeding certification motion.

[280] Moreover, it should be noted that in the next sentence after Bastarche and LeBell JJ.'s observation about the law in the common law provinces, they acknowledge that when a common law court is confronted with an arbitration agreement and it stays an action, it has subject matter jurisdiction but has decided not to exercise it. The next sentence in para. 135 of the *Dell Computer* judgment states:

> The power to do so [i.e. to stay] stems from the court's inherent jurisdiction; however, different statutes provide for certain factors that should be taken into account in determining whether to grant the stay depending on whether the court is faced with a forum selection or a domestic or international arbitration clause. Québec has also tended to treat exclusive arbitration and forum selection clauses analogously, the history of which we will now turn to.

[281] Both the majority and the minority judgments in *Dell Computer* and the judgment in *Rogers Wireless* are about the interpretation of statutory provisions that expressly direct the court to defer to arbitration. In this regard, it is worthwhile to set out again article 940.1 C.C.Q. which states:

> 940.1 Where an action is brought regarding a dispute in a matter on which the parties have an arbitration agreement, the court shall refer them to arbitration on the application of either of them unless the case has been inscribed on the roll or it finds the agreement null.

While this article of the C.C.Q. directs that the court "shall refer" to arbitration, it provides for the exemptions "unless the case has been inscribed on the roll or it finds the agreement null." Since there are exemptions, it cannot be that said even in Québec that the mere presence of an arbitration agreement categorically removes the court's subject matter jurisdiction over a matter.

[282] Moreover, although not set out in either the majority and minority judgment, the sections of the *Code of Civil Procedure* that accompany article 940.1, most particularly articles 940.2 and 940.3, reveal, in my opinion, that the Québec court never absolutely loses its subject matter jurisdiction, and that jurisdiction is ousted only in the sense that the court is directed not to exercise the subject matter jurisdiction that it continues to have. This interpretation explains why Justice Deschamps could deal with the issues that she did without referring them to be decided by the arbitrator.

[283] I set out the articles that accompany article 940.1 in the *Code of Civil Procedure* including the articles not mentioned in the Supreme Court's judgments:

> BOOK VII
>
> ARBITRATIONS

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TITLE I

ARBITRATION PROCEEDINGS

CHAPTER I

GENERAL PROVISIONS

940. The provisions of this Title apply to an arbitration where the parties have not made stipulations to the contrary. However, articles 940.2, 941.3, 942.7, 943.2, 945.8 and 946 to 947.4, as well as article 940.5 where the object of the service is a judicial proceeding, are peremptory.

940.1. Where an action is brought regarding a dispute in a matter on which the parties have an arbitration agreement, the court shall refer them to arbitration on the application of either of them unless the case has been inscribed on the roll or it finds the agreement null.

The arbitration proceedings may nevertheless be commenced or pursued and an award made at any time while the case is pending before the court.

940.2. Except in the case of article 940.1 or matters under the exclusive jurisdiction of the Superior Court, the court or judge referred to in this Title is the court or judge having jurisdiction to decide the matter in dispute submitted to the arbitrators.

940.3. A judge or the court cannot intervene in any question governed by this Title except in the cases provided for therein.

940.4. A judge or the court may grant provisional measures before or during arbitration proceedings on the motion of one of the parties.

940.5. The service of documents shall be made in accordance with this Code.

940.6. Where matters of extraprovincial or international trade are at issue in an arbitration, the interpretation of this Title, where applicable, shall take into consideration

> 1) the Model Law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law on 21 June 1985;
>
> 2) the Report of the United Nations Commission on International Trade Law on the work of its eighteenth session held in Vienna from 3 to 21 June 1985;

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> 3) the Analytical Commentary on the draft text of a model law on international commercial arbitration contained in the report of the Secretary-General to the eighteenth session of the United Nations Commission on International Trade Law.

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[284] In any event, whatever the law may be in Québec, the crucial question remains whether there is some principle by which it can be said that *Dell Computer* and *Rogers Wireless* have "effectively overruled" *MacKinnon v. National Money Mart Company* (2004), 50 B.L.R. (3d) 291 (B.C.C.A.); *Smith* v. *National Money Mart Co.*, [2005] O.J. No. 2660 (S.C.J.), appeal quashed [2005] O.J. No. 4269 (C.A.), leave to appeal to S.C.C. refused, [2005] S.C.C.A. My reading of *Dell Computer* and *Rogers Wireless* yields the conclusion that while these cases may articulate the law about such things as the scope of an arbitrator to determine his or her own jurisdiction to arbitrate a dispute, the cases do not overrule the law that a court in Ontario or British Columbia may determine whether to stay or not stay an action within the context of the preferable procedure analysis of a certification motion.

[285] I reach my conclusion notwithstanding that in Saskatchewan, in *Frey v. Bell Mobility Inc*., [2008] S.J. No. 105, (Q.B.), Justice Gerein applied *Dell Computer* to preclude a class action in favour of arbitration.

[286] *Frey* was a consumer class action against several cell phone companies that invoked their arbitration agreements. Justice Gerein initially followed *MacKinnon,* and he ruled that an application for a stay based on an arbitration agreement should await the certification hearing, and he certified the action. However, following the release of *Dell Computer* and *Rogers Wireless*, he amended the court's certification order to remove those defendants with arbitration agreements, and he referred the claims against them to arbitration. Without any discussion or analysis, Justice Gerein simply stated that the cases were authority for the proposition that a binding arbitration agreement removes a dispute from the jurisdiction of a superior court and of necessity precludes participation in a class action and that the validity of the arbitration agreement must be referred to an arbitrator in first instance. As I have explained above, in my opinion, *Dell Computer* and *Rogers Wireless* do not stand for those propositions in Ontario.

[287] Finally, in reaching my decision that the judgments of Justices Brown, Levine, Macdonald, Weiler, and Hoy remain good law, I rely on Justice Brown's recent decision on the renewed stay motion in British Columbia, which I mentioned earlier. See *MacKinnon v. National Money Mart Company*, (May 13, 2008, not yet reported). Justice Brown reached conclusions quite similar to my own, and I add her reasons to my own.

[288] For all of the above reasons, I dismiss the Defendants' motion for a stay.

The Motion for Summary Judgment-Introduction

[289] Since I have decided to dismiss the Defendants' motion for a stay, I may now turn to the Plaintiffs' motion for a partial summary judgment. As I indicated at the outset

of these Reasons for Decision, I have decided to dismiss the Plaintiffs' motion. In the following sections of the Reasons, I will explain why.

[290] The Plaintiffs' Notice of Motion states that their motion is for:

> 1. An order granting summary judgment in favour of the Class by declaring that for each Fast Cash Advance and Payday Loan made in Ontario in the Class Period and repaid by cheque that:
>
> > (a) the total of the interest, percentage cheque cashing fee and fixed item fee is the aggregate of all charges paid for the advancement of credit and therefore interest as defined by s. 347 (2) of the *Criminal Code*; and
> >
> > (b) as a result, Money Mart and its franchisees received interest in excess of an effective annual interest rate of 60%, when calculated in accordance with generally accepted actuarial practices and principles in breach of s. 347 of the *Criminal Code*;
>
> Thereby determining the following Common Issues:
>
> > (c) Common Issue 1: Have Money Mart and the Franchisees received interest in excess of an effective annual rate of 60%, when calculated in accordance with generally accepted actuarial practices and principles, on each Fast Cash Advance and Payday Loan in Ontario in the Class Period which was repaid by a cheque dated on the day after the due date specified in the Fast Cash Advance Payment and Payday Loan Agreement?
> >
> > (d) Common Issue 2: Is each Fast Cash Advance Agreement and Payday Loan Agreement made in Ontario with a Class Member in the Class Period void or invalid? If so, why?
> >
> > (e) Common Issue 3: Alternatively, are the provisions relating to interest, cheque cashing fees and item fees in each Fast Cash Advance Agreement and Payday Loan Agreement made in Ontario with a Class member in the Class Period invalid or void by reason of illegality? If not, what effective annual interest rate, if any, were `Money Mart and the Franchisees entitled to charge on each such Fast Cash Advance and Payday Loan?

[291] My explanation for dismissing the motion for summary judgment will be both short and long.

[292] The short explanation for dismissing the motion for a summary judgment is that rule 20(2)(a) of the *Rules of Civil Procedure* provides that the court shall grant summary judgment "if satisfied that there is no genuine issue for trial with respect to a claim or

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defence." Since, in my opinion, in the case at bar, there is a genuine issue for trial, therefore, I shall not grant summary judgment.

[293] In what I regard as a quite close call, there is a genuine issue for trial about the legal characterization of the "item fee" and the "cheque cashing fee," charged to each member of the class under a Fast Cash Advance Agreement.

[294] To be clear, I am not saying that it is a close call as to whether the item fee and the cheque cashing fee are "interest;" that remains to be determined. Rather, as a matter of civil procedure and having regard to the jurisdiction under Rule 20, it is a close call about whether a motions judge can classify these charges, and I have decided that the jurisdiction to decide rests with a trial judge.

[295] The long answer for dismissing the motion for a summary judgment may be summarized by the following line of argument that underlies my discussion below:

- Notwithstanding the Defendants' submissions to the contrary, the court has jurisdiction to grant a partial summary judgment in this class proceeding in order to resolve some common issues, even though more common issues would remain outstanding and even though the ultimate issue of liability would remain to be determined.

- The court having jurisdiction, the argument moves to whether there is a "genuine issue for trial," which, in practical terms, means a question that goes beyond what can properly be decided by interlocutory motion under Rule 20 and therefore must be decided with the machinery of a trial. To use an analogy from mathematics, some problems can be solved with arithmetic, and those would be appropriate for a summary judgment, but other problems require the power of trigonometry, and those problems are genuine issues for trial.

- Turning to identifying the issues, the Plaintiffs submit that they are entitled to a summary judgment because: (i) there is no genuine issue for trial that that the "item fee" and the "cheque cashing fee" charged to each member of the class under a Fast Cash Advance Agreement are "interest" because these amounts are "paid or payable for the advancing of credit under an agreement or arrangement" under s. 347 of the *Criminal Code*; and (ii) if that is true, the Plaintiffs submit that there is no genuine issue for trial that these amounts give rise to an effective annual interest rate of 60% or more when "calculated in accordance with generally accepted actuarial practices and principles."

- The Defendants, however, submit that the Plaintiffs are not entitled to a summary judgment because there are three issues in the case at bar that qualify as genuine issues for trial; namely: (i) whether s. 347 of the *Criminal Code* violates section 7 of the *Charter*; (ii) whether Money Mart has a "voluntary payment" defence; i.e. a defence arising from *Nelson v. C.T.C. Mortgage Corp.* (1984), 16 D.L.R. (4th) 139 (B.C.C.A.), aff'd [1986] 1 S.C.R. 749; and (iii) whether the "item fee" and the

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"cheque cashing fee" charged to each member of the class under a Fast Cash Advance Agreement constitute "interest."

- In the context of the case at bar, the issues to be resolved have been identified, but the question remains whether those issues can be determined on a motion for a summary judgment. In the case at bar, the answer is that only the third of the three issues qualifies as a genuine issue for trial.

- In other words, s. 347 of the *Criminal Code* does not violate section 7 of the *Charter* and Money Mart has no voluntary payment defence; however, there is a genuine issue for trial about whether the "item fee" and the "cheque cashing fee," are "interest." Since there is a genuine issue for trial, the motion for a summary judgment must be dismissed.

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[296] It may be noted that had it been the case that there was no genuine issue for trial that the item fee and the cheque cashing fee are interest, then there would have been no genuine issue for trial that these amounts give rise to an effective annual interest rate of 60% or more when "calculated in accordance with generally accepted actuarial practices and principles." Thus, but for the single issue of the characterization of the item fee and the cheque cashing fee, the Plaintiffs would have been entitled to a summary judgment.

[297] In what follows, I will under several headings discuss the above long chain of argument beginning with arguments that are about the scope of the court's jurisdiction on a motion for summary judgment in the context of a class proceeding.

Summary Judgment and Partial Summary Judgment in the Context of Class Proceedings

[298] Separate from the parties' arguments about whether there is a genuine issue for trial, the Defendants advance several arguments about the scope of the court's jurisdiction to grant a summary judgment in the context of a class proceeding. These arguments focus attention on the fact that the Plaintiffs are seeking "a partial summary" judgment that would answer the first common issue and only partially answer aspects of two more common issues but then would leave 13 common issues and the fundamental issue of the Plaintiffs claim for unjust enrichment and the determination of remedies yet to be resolved.

[299] Ignoring for the moment that what is being sought is a partial summary judgment that will resolve some of the common issues in a class proceeding, the general nature of the court's jurisdiction on a motion for summary judgment is well known. The court's function on a motion for a summary judgment is not to resolve any issue of fact but to determine whether a genuine issue of fact exists: *Aguonie v Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 (C.A.); *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.); *Canada (Attorney General) v. Lameman*, 2008 SCC 14.

[300] In *Guarantee Co. of North America v. Gordon Capital Corp.* (1999), 178 D.L.R. (4th) 1 (S.C.C.), the Supreme Court of Canada stated that the test for a summary judgment

is satisfied when the moving party shows that there is no genuine issue for trial, and then to defeat the motion, the respondent must establish that his or her claim is one with a real chance of success.

[301] The motion for summary judgment places the responding party under an evidentiary burden, and the motions judge is entitled to assume that the parties have respectively advanced their best case and that the record contains all the evidence that the parties will present at trial: *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.); *Bluestone v. Enroute Restaurants Inc.* (1994), 18 O.R (3d) 481 (C.A.). However, the onus always remains on the moving party to show that there is no genuine issue for trial, but the responding party must present its best case or risk losing.

[302] In *Rozin v. Ilitchev* (2003), 66 O.R. (3d) 410 (C.A.), at para. 8, Sharpe, J.A. stated for the Court of Appeal:

> While a judge must avoid making findings on contested factual issues on a summary judgment motion, a judge is also required to assess the record with a view to determining whether there is a genuine issue of disputed facts. Self-serving affidavits that merely assert defences without providing some detail or supporting evidence are not sufficient to create a genuine issue for trial: *Guarantee Co. of North America v. Gordon Capital Corp*., [1999] 3 S.C.R. 423, 178 D.L.R. (4th) 1 at para. 31. As stated by Borins J. (as he then was) in *Rogers Cable TV Ltd. v. 373041 Ontario Ltd*. (1994), 22 O.R. (3d) 25 (Gen. Div.), at p. 28, "The requirement that the parties put their 'best foot forward' goes together with the requirement that the motions judge 'take a hard look at the merits of the action at this preliminary stage' to determine whether the moving party has succeeded in establishing that there is no genuine issue for trial."

[303] Underlying the idea of a genuine issue for trial is the idea that as a matter of procedural fairness and given the primacy of trials (a litigant’s day in court) as the preferred means to resolve civil disputes, most disputes should be resolved by a trial but a summary judgment should be available when a trial is not necessary to fairly resolve the dispute. Thus, a summary judgment should be granted only when there is no genuine issue that requires a trial.

[304] The Defendants, however, develop what might be described as a combined jurisdictional and utility argument. The argument is that a partial summery judgment that determines only some of the common issues in a class proceeding and that does not determine the plaintiffs’ claim is outside the reach of Rule 20 and is of no utility because it will not reduce the need for a trial and indeed might interfere with the trial judge’s ability to determine the dispute.

[305] The Defendants rely on the statement of Justice Nordheimer in *Kanitz v. Rogers Cable Inc.* (2002), 58 O.R. (3d) 299 (S.C.J.) that the nature of a class action does not lend itself to summary judgment. In that case, Justice Nordheimer stated at paragraph 66:

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"[T]he very nature of a class action, with the necessary requirement that common issues exist for determination, strongly suggests to me that class actions generally would not be amenable to resolution by way of the summary judgment procedure."

[306] The Defendants also rely on the judgment of the Court of Appeal in *Ford Motor Company of Canada, Limited v. Ontario Municipal Employees Retirement Board* (1997), 36 O.R. (3d) 384 (C.A.), a leading authority about partial summary judgment. In that case, Justice Osborne, listed the types of cases in which partial summary judgments have been granted. He stated in paragraph 46 of his judgment:

> 46. The cases in which summary judgment have been granted for "part of" a claim seem to me to fall into three groups:
>
> (a) actions where the evidence establishes that there is no genuine issue for trial in respect of a discrete claim. These partial summary judgment cases require no further comment except to say the result of summary judgment for "part of" a claim is consistent with the purpose of Rule 20; the partial summary judgment removes a discrete issue from the issues to be tried and thus shortens the trial. This is consistent with "procedural justice" concerns referred to by Morden A.C.J.O. in *Ungerman* and with the purpose of Rule 20 as referred to in *Jockey Club*;
>
> (b) actions in which there is an admission that may properly engage both Rule 20 and Rule 51.06. . . .
>
> (c) actions in which there is no admission but the plaintiff seeks a partial summary judgment in some amount equal to or less than his/her inevitable recovery at trial.

[307] Contrary to these submissions by the Defendants, in my opinion, as a matter of jurisdiction, the court has the jurisdiction under Rule 20 and under the *Class Proceedings Act, 1992* to grant a summary judgment that would resolve only some of the common issues, and it is further my opinion that it could be useful to exercise that jurisdiction in the case at bar.

[308] Section 35 of the *Class Proceedings Act, 1992,* provides that the rules of court; i.e. the *Rules of Civil Procedure,* apply to class proceedings. The *Rules* apply to class proceedings, but the court has a discretion to limit, vary, or alter the operation of them: *Segnitz v. Royal & Sun Alliance Insurance Co. of Canada*, [2003] O.J. No. 78 (S.C.J.) at para. 28; *Wilson v. Servier Canada Inc.*, [2003] O.J. No. 156 (S.C.J.) at para. 11. The court has broad powers under the *Class Proceedings Act, 1992* to ensure that a class action proceeds in both an efficient and fair manner: *Guglietti v. Toronto Area Transit Operating Authority (c.o.b. Go Transit)*, [2000] O.J. No. 2144 (S.C.J.) at para. 6. In considering any motion in a class proceeding, the court must keep in mind the underlying policy objectives of the *Class Proceedings Act, 1992*, including expeditious access to justice and judicial efficiency: *Wilson v. Servier Canada Inc.*, [2003] O.J. No. 156 (S.C.J.) at para. 12.

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[309] In the case at bar, it is not necessary to alter or vary the operation of Rule 20; rather, having regard to the purposes and the scheme of the *Class Proceedings Act, 1992*, it is simply productive to use the resources already available in Rule 20 to advance a class proceeding by resolving some common issues. It is useful here to recall that the case law about a common issue has developed to the point that an issue can be a common issue if it makes a substantial contribution to resolving the class' claims and even though many individual issues remain to be decided after its resolution: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at para. 53, leave to appeal to the S.C.C. refused, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.).

[310] In the case at bar, resolving the issues of (i) whether s. 347 of the *Criminal Code* violates section 7 of the *Charter*; (ii) whether Money Mart has a "voluntary payment" defence; and (iii) whether the "item fee" and the "cheque cashing fee," charged to each member of the class under a Fast Cash Advance Agreement are "interest" would go some considerable distance in resolving the litigation. Substantial ingredients of the Plaintiffs' unjust enrichment claim would be determined, and the availability of several defences advanced by the Defendants would be determined. If any of the defences were found to be available, the litigation would be over.

[311] As a matter of precedent, Rule 20 has been used to grant what amounts to a partial summary judgment in closely analogous cases. As described later in this judgment, several summary judgments were granted in *Garland v. Consumers' Gas Co.*, [1998] 3 S.C.R. 112. A great deal more will be said about *Garland* below, but for present purposes, all that needs to be noted is that in a proposed class action, the Supreme Court of Canada decided in a summary fashion whether a late payment charge imposed by Consumers' Gas contravened s. 347 of the *Criminal Code*. The issue of whether or not a payment constitutes illegal interest has been determined in a summary fashion in other cases; see: *Tracy v. Instalons Financial Solution Centres (B.C.) Ltd.* 2008 BCSC 669 (S.C.); *Kilroy* v. *A OK Payday Loans Inc.*, [2007] B.C.J. No. 820 (C.A.), aff'g [2006] B.C.J. No. 1885 (S.C.); *Canadian Business Centre Ltd. v. Bridge Holdings Ltd.*, [2005] B.C.J. No. 2773 (S.C.); *Matthison v. R.A. Bradburn Enterprises*, [2005] 1 W.W.R. 762 (Alta. Q.B.); *Re D.C. Properties Ltd.*, [1990] 5 W.W.R. 332 (B.C.C.A.); *Bon Street Developments Ltd. v. Terracan Capital Corp*. (1992), 9 B.L.R. (2d) 257 (B.C.S.C.); *TerraCan Capital Corp. v. Pine Projects, Ltd.*, [1993] B.C.J. No. 203 (C.A.); *ICI Mortgage Managers Inc. v. Brantec Developments Inc.*, [2004] A.J. No. 692 (Q.B.); *426008 B.C. Ltd. v. Simons*, [2007] 12 W.W.R. 114 (B.C.C.A.)

[312] I appreciate that in *Ford Motor Company of Canada, Limited v. Ontario Municipal Employees Retirement Board,* Justice Osborne indicated that there was a limited scope for partial summary judgment, but he was not being comprehensive, and he was not considering the matter from the context of a class proceeding, and more to the point, he was concerned about the utility of granting a partial summary judgment as a factor in determining whether it should be granted, and in my opinion, the class proceeding in the case at bar would be significantly advanced by the resolution of the several common issues associated with s. 347 of the *Criminal Code.*

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[313] In advancing the argument that the court has no jurisdiction to grant a partial summary judgment to decide a few common issues in a class proceeding or that the court ought not to do so, the Defendants relied on the judgment of Justice Spence in *HSBC Securities (Canada) Inc. v. Davies, Ward & Beck* [2004] O.J. No. 3806 (S.C.J.).

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[314] In that case, an action for damages for solicitor's negligence, Justice Spence held that a summary judgment was unavailable where the plaintiff sought a partial summary judgment with respect to a discrete element or issue in the negligence claim. In his judgment, Justice Spence doubted that the determination of just "an issue" in a plaintiff's claim could ground a summary judgment because under rule 1.03 of the *Rules of Civil Procedure*, judgment "means a decision that finally disposes of an application or action on its merits …". At paras. 127 to 134 of his Reasons for Decision, Justice Spence doubted that the court could grant a partial summary judgment to determine an issue when that would not yield a judgment as the term had been defined.

[315] The concern raised by Justice Spence, however, is answered in the context of class proceedings, where the Act actually envisions a judgment on a common issue. I need only refer to s. 27 of the *Class Proceedings Act, 1992,* which describes a judgment on common issues. Section 27 states:

> *Judgment on common issues*
>
> 27. (1) A judgment on common issues of a class or subclass shall,
>
> > (a) set out the common issues;
> >
> > (b) name or describe the class or subclass members;
> >
> > (c) state the nature of the claims or defences asserted on behalf of the class or subclass; and
> >
> > (d) specify the relief granted.
>
> *Effect of judgment on common issues*
>
> (2) A judgment on common issues of a class or subclass does not bind,
>
> > (a) a person who has opted out of the class proceeding; or
> >
> > (b) a party to the class proceeding in any subsequent proceeding between the party and a person mentioned in clause (a).

Idem

(3) A judgment on common issues of a class or subclass binds every class member who has not opted out of the class proceeding, but only to the extent that the judgment determines common issues that,

(a) are set out in the certification order;

(b) relate to claims or defences described in the certification order; and

(c) relate to relief sought by or from the class or subclass as stated in the certification order.

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[316] A reading of s. 27 of the *Class Proceedings Act, 1992,* reveals that it envisions a form of judgment that would resolve legal or factual issues without necessarily finally disposing of the class action on its merits. A summary judgment on a common issue or on a few common issues, therefore, is not objectionable as a matter of jurisdiction under the *Rules of Civil Procedure* and the *Class Proceedings Act, 1992*. I therefore conclude that the Plaintiffs' motion for a partial summary judgment should be decided on its merits and not dismissed on procedural grounds.

Section 347 of the Criminal Code in Criminal and Civil Cases

[317] I turn then to determining whether there are any genuine issues for trial in the case at bar, and the discussion here must begin with a description of s. 347 of the *Criminal Code* because the keystone of the Plaintiffs' motion for summary judgment is their demonstrating that there is no genuine issue for trial that the "item fee" and the "cheque cashing fee" associated with a Fast Cash Advance Agreement are "interest" under s. 347 of the *Criminal Code.* If this is shown, then it is not contested that Money Mart will have received an effective annual interest rate of 60% or more when calculated in accordance with generally accepted actuarial practices and principles.

[318] Section 347 of the *Criminal Code*, which I will set out below, criminalizes two commercial activities. First, it makes it a crime to enter into a contract that charges interest at a rate that exceeds sixty per cent per annum. In the case law, this is sometimes referred to as the s. 347(1)(a) offence. Second, it makes a crime to receive, i.e. to be paid interest under an agreement at a rate that exceeds sixty per cent per annum. In the case law, this is sometimes referred to as the s. 347(1)(b) offence. (I will discuss the *mens rea* aspects of s. 347 later in this judgment.)

[319] The Defendants, however, are not accused persons in a criminal case. This is a civil case, and as a matter of the civil law, the victims of what could be a crime under s. 347 of the *Criminal Code* have the remedy of an action for restitution to restore to them some or all of what they have paid to the perpetrator of that crime. Under the law of restitution, payments made under an illegal contract may be recovered, and a contract may be found to be illegal, if it is contrary to public policy.

[320] There are common law illegalities; for example, a contract in restraint of trade may be illegal on the grounds of being contrary to public policy, and there are statutory illegalities, in which case the contract is contrary to public policy as expressed by a statute. Receiving a criminal rate of interest is contrary to public policy, and a contract providing for a criminal rate of interest qualifies as an illegal contract for which there may be a remedy including a restitutionary remedy: *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R 629; *Transport North American Express Inc*. v. *New Solutions Financial Corporation*, [2004] 1 S.C.R. 249; *Kilroy* v. *A OK Payday Loans Inc.*, [2007] B.C.J. No. 820 (C.A.), aff'g [2006] B.C.J. No. 1885 (S.C.); *Kotello v. Dimerman*, [2006] 9 W.W.R. 443 (Man. C.A.); *William E. Thomson Associates Inc. v. Carpenter* (1989), 69 O.R. (2d) 545 (C.A.); *Affordable Payday Loans v. Beaudette*, [2004] O.J. No. 3235 (S.C.J.).

[321] In the case at bar, the representative Plaintiffs and the class are seeking a restitutionary remedy against Money Mart, and they add claims against Dollar Financial as an *alter ego* or a co-conspirator. To succeed, for themselves and on behalf of the class, the Plaintiffs must prove in this civil action that Money Mart violated s. 347 of the *Criminal Code*.

[322] Here, it is convenient to note that effective as of May 2007, s. 347.1 was added to the *Criminal Code*. This provision, amongst other things, exempts payday loans from the operation of the criminal interest rate provisions of the *Criminal Code* in provinces that have enacted legislative measures that protect recipients of payday loans and that provide for limits on the total cost of borrowing under the agreements. Legislative measures protecting recipients of payday loans have been enacted in several provinces and are pending in Ontario. See O. Reg. 17/05 as amended, ss. 53-71 (effective August 1, 2007), which proscribe disclosures required for payday loans, and Bill 48 *Payday Loans Act, 2008,* (Second Reading, May 1, 2008).

[323] I will also set out s. 347.1 below, but for the purposes of this motion for summary judgment, I am going to ignore it because: s. 347.1 has not yet changed the law applicable to this case; it may not ever do so. See *Tracy v. Instalons Financial Solution Centres (B.C.) Ltd.* 2008 BCSC 669 (S.C.). During argument, I do not recall s. 347.1 being mentioned save in passing.

[324] Here, it is also convenient to note that without any change of substance, the alignment of the clauses of subsection 347(1) has recently been altered by Parliament, with the result that the two offences found in the subsection are no longer identified by separate clauses (a) and (b) in s. 347(1), which clauses now refer to the punishments for the offences. Thus, in its entirety, s. 347 of the *Criminal Code* states:

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

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

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

Definitions

(2) In this section,

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

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

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

"interest" means the aggregate of all charges and expenses, whether in the form of a fee, fine, penalty, commission or other similar charge or expense or in any other form, paid or payable for the advancing of credit under an agreement or arrangement, by or on behalf of the person to whom the credit is or is to be advanced, irrespective of the person to whom any such charges and expenses are or are to be paid or payable, but does not include any repayment of credit advanced or any insurance charge, official fee, overdraft charge, required deposit balance or, in the case of a mortgage transaction, any amount required to be paid on account of property taxes;

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

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

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or guaranteed, in whole or in part, by the Québec Deposit Insurance Board;

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

Presumption

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

Proof of effective annual rate

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

Notice

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

Cross-examination with leave

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

Consent required for proceedings

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

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Application

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

Definitions

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

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

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

Non-application

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

> (*a*) the amount of money advanced under the agreement is $1,500 or less and the term of the agreement is 62 days or less;
>
> (*b*) the person is licensed or otherwise specifically authorized under the laws of a province to enter into the agreement; and
>
> (*c*) the province is designated under subsection (3).

Designation of province

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

Revocation

(4) The Governor in Council shall, by order, revoke the designation made under subsection (3) if requested to do so by the lieutenant governor

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> in council of the province or if the legislative measures described in that subsection are no longer in force in that province.

Garland v. Consumers' Gas and the Characterization of the Impugned Charges

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[325] The Plaintiffs rely heavily on *Garland v. Consumers' Gas Co.*, [1998] 3 S.C.R. 112 in support of their motion for summary judgment and in support of their argument that there are no genuine issues for trial. In *Garland*, Consumers' Gas sold natural gas to its customers, including the plaintiff Gordon Garland. A customer who did not pay his or her bill on time before a specified date each month was charged a five percent penalty – the late payment penalty or LPP. Mr. Garland alleged that the late payment penalty charge was interest, and he alleged that the LPP was interest at a criminal rate contrary to s. 347 of the *Criminal Code*. In a judgment written by Justice Major, the Supreme Court of Canada agreed.

[326] The *Garland* case concerns the interpretation and application of s. 347 of the *Criminal Code*, and its significance to the case at bar cannot be overstated. The Plaintiffs rely on it, not only as an authority that they argue determines in their favour the case at bar but also as an illustration of a similar case where a partial summary judgment was granted in a case that was brought as a class proceeding on behalf of over 500,000 customers, although at the time of the motion for summary judgment it had not yet been certified.

[327] The summary judgment in *Garland* was partial because it decided only the issue of the illegality of the late payment penalty under s. 347 of the *Criminal Code*, and Mr. Garland's and the putative classes' unjust enrichment claim remained outstanding. Significantly, the unjust enrichment claim was later also adjudicated as a summary judgment in the Supreme Court of Canada. See *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, and eventually, Mr. Garland's case was certified as a class proceeding for settlement purposes. See *Garland v. Consumers' Gas*, [2006] O.J. No. 4273 (S.C.J.) and [2006] O.J. No. 4907 (S.C.J.).

[328] In *Garland*, Justice Major noted in paragraph 26 of his judgment that the extent of s. 347's scope was the topic of the appeal, and the central issue in the case was whether the late payment penalty was interest. Justice Major noted that there was evidence that the primary purpose of the LPP was to encourage customers to pay bills on time and that the Energy Board, the regulator who approved the charge, appreciated that if calculated as an interest charge, it could be a very high rate of interest depending on when the customer paid. He also noted that Consumers' Gas incurred expenses because of late payments and the LPP was seen as a fair way to ensure that the burden was imposed on the customers who had caused the costs to be incurred.

[329] Justice Major set out the definition of interest in s. 347, and in paragraphs 27 to 29 of his judgment, he observed that interest was "an extremely comprehensive term." It encompassed many types of payments that would not normally be considered interest. It included one-time payments, whether payable at the outset of a transaction (e.g. fees and

commissions) or later in the transaction (e.g. fines and penalties). He noted that Parliament had opted for a cost of loan concept and that Parliament presumably intended to prevent lenders from manipulating the form of payment to disguise interest. Justice Major held that it was the substance and not the form of a charge or expense that determines whether it is interest. See also *Mira Design Co. v. Seascape Holdings Ltd.*, [1982] 1 W.W.R. 744 (B.C.S.C.).

[330] Pausing here, it may be noted that in other cases about the scope of s. 347 of the *Criminal Code*, a variety of different types of payments have been treated as interest charges because on the facts of the case, they were charges paid or payable for the advancing of credit. Thus, interest has included: legal fees, monitoring fees; standby fees; facility fees; commitment fees; brokerage fees; late fees; initial loan fees; fees for extensions; administrative fees, processing fees; and late payment charges: *J.D.M. Capital Ltd. v. Smith*, [1998] B.C.J. No. 2946 (C.A.) at para. 17; *Transport North American Express Inc*. v. *New Solutions Financial Corporation*, [2004] 1 S.C.R. 249 at para. 11; *Kilroy* v. *A OK Payday Loans Inc.*, [2007] B.C.J. No. 820 (C.A.), aff'g [2006] B.C.J. No. 1885 (S.C.); *Affordable Payday Loans v. Beaudette*, [2004] O.J. No. 3235 (S.C.J.); *TerraCan Capital Corp. v. Pine Projects, Ltd.*, [1993] 3 W.W.R. 724 (B.C.C.A.); *William E. Thomson Associates Inc. v. Carpenter* (1989), 69 O.R. (2d) 545 (C.A.); *Ayrton* v. *PRL Financial (Alta.) Ltd*., [2006] 2 W.W.R. 536 (Alta. Q.B.), aff'd [2006] 7 W.W.R. 36 (Alta. C.A.).

[331] Returning to the case at bar, based on these authorities about the nature of interest under s. 347 of the *Criminal Code*, the Plaintiffs have a strong argument that the item fee and the cheque cashing fee are interest. It is certainly arguably that Money Mart advanced credit to class members through to payday (one day past the due date) and charged them the fixed fee and the cheque cashing fee in order for the class members to obtain that credit. In other words, the fixed fee and the cheque cashing fee are part of the cost of financing for those who borrowed money until their payday.

[332] However, Justice Major stated that not every charge will be characterized as interest within the meaning of s. 347 of the *Criminal Code*. Money Mart has the argument that the fixed fee and the percentage fee were exclusively for something else. In paragraph 30 of his judgment, Justice Major stated:

> It is equally clear, however, that not every charge or expense will be subject to the criminal interest rate provision. In order to constitute "interest" under s. 347, a charge – whatever its form – must be "paid or payable for the advancing of credit under an agreement or arrangement" (emphasis added). To contend that the LPP comes within the scope of s. 347 simply because it is a "penalty" is a formalistic and unpersuasive argument. The issue is whether the penalty constitutes, in substance, a cost incurred by customers to receive credit under an arrangement with Consumers' Gas.

[333] Justice Major noted that Mr. Garland and Consumers' Gas disputed the characterization of the LPP and that this dispute was the dispositive question for the case.

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In paragraph 32 of his judgment, he stated that: "the Court should look to the substance, not merely the form, of the payment relationship which exists between Consumers' Gas and its customers." Justice Major then went on to analyze the relationship, and he determined that the relationship between Consumers' Gas and its customers involved an advancement of credit by the deferral of payment for goods and services and that the late payment penalty was imposed under an arrangement for the advancement of credit under the broad language adopted in s. 347 of the *Criminal Code*.

[334] In the last regard, Justice Major dismissed the argument of Consumers' Gas that it had not intended to enter into an arrangement to advance credit and rather that the intended purpose was to encourage early payments and to discourage the taking of credit in the first place. Justice Major rejected this argument and stated at paragraph 48:

> Even if deterrence were the only intended purpose of the LLP, that would not be determinative of the issue before the Court. The nature of the arrangement between Consumers' Gas and its customers is a question of law. The question turns on how the LLP operates in substance not on what the respondent hopes to achieve by imposing it.

[335] The observation by Justice Major that the nature of the arrangement between the parties is a question of law brings me to what I regard as the rub or the central or most important difficulty of the motion for summary judgment that I am required to decide. The precise difficulty is that unlike the situation in *Garland*, where Justice Major said that the basic features of the relationship between the customers and Consumers' Gas were not in dispute (See paragraph 32 of his judgment.), in what I have described as a close call, I have concluded that there is a genuine issue for trial about the characterization of the fixed fee and the cheque cashing fee in the Fast Cash Advance Agreement. There seems to be more here than a question of law and as a matter of the jurisdiction of Rule 20, the crucible of a trial is required to grind out a determination of the legal question.

[336] The recent case of *Joy Estate v. 1156653 Ontario Ltd.*, [2007] O.J. No. 2315 (S.C.J.) illustrates the rub of the case at bar. The rudimentary facts of this case are that the late B. Thomas Joy was the principal owner of Windsor Raceway Inc., which owned a horse track in Windsor, Ontario. For reasons that for present purposes need not be described, Mr. Joy urgently needed funds for Windsor Raceway. J. Douglas Lawson, a Windsor lawyer who had acted from Mr Joy and Windsor Raceway in the past, Arthur Barat, another Windsor lawyer, and Alphonso Fanelli, a Windsor businessman agreed to lend two million dollars to Mr. Joy, who in turn would lend it to Windsor Raceway. The lenders were Mr. Lawson and two corporations represented by Mr. Barat and Mr. Fanelli. Mr. Joy was obliged to repay the loan with interest at 8% per annum, and Windsor Raceway provided a guarantee. The written loan agreement also included in its paragraph 5 a "Consulting Agreement" under which Windsor Raceway hired Mr. Wilson and Messrs Barat's and Fanelli's corporations as consultants. Under the agreement, the consultants were to receive an ongoing right to share in certain revenues from the racetrack subject to a buyout provision. The loan was eventually repaid, and Mr. Lawson received interest payments of $59,342.52 and the two lender corporations received each

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interest payments of $29,671.26. Ultimately, Windsor Raceway paid the corporations $971,800.00 each as compensation for consulting services and then bought them out by paying each corporation $831,512.00. Mr. Lawson continued to receive compensation for consulting services until December 2003, and he was paid $1,683,784.50 in total for such services. Mr. Joy died and his estate and Windsor Raceway, which now had new owners, sued Mr. Lawson and the two corporations for repayment of the sums paid under the Consulting Agreement. The plaintiffs submitted that no consulting services had actually been provided and that the Consulting Agreement was a ruse to disguise what was in truth a cost of the loan and a criminal rate of interest within the meaning of s. 347 of the *Criminal Code*. In the alternative, the plaintiffs argued that even if consulting services were actually provided and there was no ruse, the payment for the consulting services was interest within the meaning of s. 347 of the *Criminal Code*.

[337] Justice Leitch dismissed the plaintiffs' action. After an extensive review of the evidence about the circumstances before and after the loan, Justice Leitch found that consulting services were provided and that there was no ruse to disguise a criminal rate of interest. Then, after agreeing with the plaintiffs' submission that even if the consulting arrangement was not a ruse, the payment for such services could still be found to be interest within the meaning of s. 347 of the *Criminal Code*, she concluded that the consulting fees were not interest. She agreed with the defendants' assertion that there was in fact two discrete agreements: (1) a loan agreement, and (2) a *bona fide* contract for consulting services.

[338] In her judgment, Justice Leitch examined judgments from Canada and from the United States where defendants had argued that the payments alleged to be interest payments were actually payments for something else, for example royalty payments or payments as a return on equity. In paragraphs 240 to 242, she stated:

> 240. The analysis undertaken by Justice Iacobucci in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank,* [1992] 3 S.C.R. 558 is useful in assessing the appropriate approach to determine whether an agreement should be characterized as an equity or debt arrangement. He described the legal process of analysis as follows (at p. 588):
>
>> As in any case involving contractual interpretation, the characterization issue facing this Court must be decided by determining the intention of the parties to the support agreements. This task, perplexing as it sometimes proves to be, depends primarily on the meaning of the words chosen by the parties to reflect their intention. When the words alone are insufficient to reach a conclusion as to the true nature of the agreement, or when outside support for a particular characterization is required, a consideration of admissible surrounding circumstances may be appropriate.
>
> 241. In *Canada Deposit* the court made clear that a determination of the true nature of a transaction requires an examination of its substance

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> particularly where there are indicia of both a loan and a capital investment present. He noted that: "instead of trying to pigeonhole the entire agreement ... in one of two categories" there was "nothing wrong in recognizing the arrangement for what it is, namely one of a hybrid nature, combining elements of both debt and equity but which, in substance, reflects a debtor-creditor relationship ... It is permissible, and often required, or desirable, for debt and equity to co-exist in a given financial transaction without altering the substance of the agreement. Furthermore, it does not follow that each and every aspect of such an agreement must be given the exact same weight when addressing the characterization issue." He concluded that the equity features were "nothing more than supplementary to and not definitive of the essence of the transaction. When a court is searching for the substance of a particular transaction, it should not too easily be distracted by aspects which are, in reality, only incidental or secondary in nature to the main thrust of the agreement."
>
> 242. The reasoning in *Canada Deposit* was applied in *Boyd v. International Utility Structures Inc.*, [2002] B.C.J. No. 1770 at para. 29 (C.A.). In that case, the court analyzed whether a royalty given "as a further inducement" to make a loan was in substance "interest." This required a determination of the substance of the parties' entire relationship with respect to the transaction in question. The court reached the conclusion that the substance of the financial transaction between the parties was one of creditor and debtor. The court concluded that since the words used in the documents were sufficient to reach a conclusion as to the true nature of the agreement; the evidence of the surrounding circumstances of the lenders' desire to make an equity investment "in the business and the negotiations that took place in agreeing to the royalty were not relevant." The court declined to construe the royalty agreement separately from the loan agreement to determine the substance of their relationship. Rather, the focus was placed on the substance of the entire relationship with respect to the transaction.

[339] From these paragraphs of Justice Leitch's judgment, I believe the crucial passage is her quote from the judgment of Justice Iacobucci in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank,* at p. 588, where he states:

> As in any case involving contractual interpretation, the characterization issue facing this Court must be decided by determining the intention of the parties to the support agreements. This task, perplexing as it sometimes proves to be, depends primarily on the meaning of the words chosen by the parties to reflect their intention. When the words alone are insufficient to reach a conclusion as to the true nature of the agreement, or when outside support for a particular characterization is required, a consideration of admissible surrounding circumstances may be appropriate.

[340] Returning to the case at bar and to the court's jurisdiction under Rule 20, I am just not confident whether the words of the Fast Cash Advance Agreement along with the

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evidence of the surrounding circumstances are sufficient for me to reach a conclusion as to the true nature of the item fee and the cheque cashing fee.

[341] From a jurisdictional point of view, I view the immediate case as different from *Garland* and other contract interpretation cases, for example, *Guarantee Co. of North America v. Gordon Capital Corp.* (1999), 178 D.L.R. (4th) 1 (S.C.C.), a leading case about the scope of the court's jurisdiction on a motion for summary judgment, where the court was able to decide the issue summarily.

[342] Accordingly, I conclude that there is in the classification of the item fee and the cash chequing fee a genuine issue for trial, and the classification of these charges should be left to the trial judge.

Does s. 347of the Criminal Code Contravene s. 7 of the Charter?

[343] The Defendants also submit that there is a genuine issue for trial that s. 347 of the *Criminal Code* contravenes s. 7 of the *Charter*, which provides that everyone has the right to life, liberty and security of the person and the right not to be deprived of these rights except in accordance with the principles of fundamental justice.

[344] Although the Plaintiffs took on the Defendants on the merits of their *Charter* challenge, the Plaintiffs raised the objection that being corporations the Defendants do not possess s. 7 *Charter* rights and that they do not have the standing to challenge the legislation, since they are defendants to civil proceedings and not accused persons or persons subject to state action.

[345] During argument of the motion and in their factums, there was a fulsome debate about the Defendants' standing to assert a *Charter* challenge, and a discussion of such cases as: *R. v. Big M Drug Mart Ltd.* ("*Big M*"), [1985] 1 S.C.R. 295; *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Wholesale Travel Group Inc.* ("*Wholesale Travel*"), [1991] 3 S.C.R. 154; *Canadian Council of Churches v. Canada (Minister of Employment and Immigration),* [1992] 1 S.C.R. 236; *Hy and Zel's Inc. v. Ontario (Attorney General)*; *Paul Magder Furs Ltd. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675; *R. v. Pontes*, [1995] 3 S.C.R. 44 and *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157.

[346] Without deciding the issue, I will simply assume that the Defendants have standing to raise their *Charter* challenge as a possible genuine issue for trial, and I will address the issue on its merits.

[347] The Defendants' argument is that the second of the two offences found in s. 347 of the *Criminal Code* (receipt of interest) contravenes section 7 of the *Charter* because it is a criminal offence imposing imprisonment that wants for any element of *mens rea*: *R. v. Finlay*, [1993] 3 S.C.R. 103; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486.

[348] It would appear that the Defendants' direct their attack at the second offence in s. 347 because there is already authority, some of which is binding on me, that the first

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offence (which makes it a crime to enter into a contract that charges interest at a rate that exceeds sixty per cent per annum) is constitutionally sound because it has the element of *mens rea* that the accused can be found at fault only if he or she or it intended to enter into an agreement. See: *R v. McRobb* (1988), 20 C.C.C. (3d) 493 (Ont. Co. Ct.), aff'd (1986), 32 C.C.C. (3d) 479 (Ont. C.A.); *William E. Thomson Associates Inc. v. Carpenter* (1989), 69 O.R. (2d) 545 (C.A.); *R. v. Marsy*, [2006] A.J. No. 1685 (Prov. Ct.); *R. v. Dimerman* (1992), 82 Man. R. (2d) 184 (Man. Q.B.).

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[349] I view this authority as applying to s. 347 generally and as not limited to the first offence in the section. Both branches of the offences in s. 347 are tied to agreements. If one has regard to the definitions of "credit advanced," "criminal rate" and "interest", it becomes apparent that to be convicted of either offence under s. 347, the accused must have intended to enter into an agreement of the impugned sort. For a conviction, the offence includes an element of *mens rea* and accordingly does not contravene s. 7 of the *Charter.*

[350] Thus, I see no merit to the Defendants' argument that there is a genuine issue for trial about the constitutional validity of s. 347 of the *Criminal Code*. There is no issue here at all, and one does not need the machinery of a trial to determine the point.

Is There a Genuine Issue for Trial about the Voluntary Payment Defence?

[351] In my opinion, it is also the case that there is no genuine issue for trial for what I have called the voluntary payment defence. The short answer is that Money Mart misconceives the nature of this defence, and more to the point, it does not raise a genuine issue for trial.

[352] The phenomena underlying the voluntary payment defence begins with the mathematics of calculating the effective interest rate when the amount of the interest is fixed but the time of payment is not.

[353] Three simple examples illustrate the phenomena. In all the examples, Jack is the lender, Jill is the borrower, and she may repay the loan whenever she chooses. In all examples, Jill borrows and repays $100 principal and $8 of interest. The only difference is the time of payment.

[354] In the first example, Jill pays in 365 days. In the second example, she repays in 180 days, and in the third example she pays the day after the loan. In the first example, the rate of interest received by Jack is 8.0% *per annum*. In the second example, the rate of interest received by Jack is 14.6% *per annum*. In the third example, the rate of interest received by Jack is 2920% *per annum.* In these examples, the lender never receives more than an $8 payment of interest on the $100 loan, but depending on the will of the borrower as to when payment is made, the annual interest rate ranges from 8.0% to 2920% *per annum.* These examples, also demonstrate that the interest rate for a fixed amount of interest progressively diminishes the longer the payment of interest is delayed.

[355] The legal significance of the phenomena that the effective rate of interest may depend upon when the payment was received was considered in *Garland* and in the companion decision of the Supreme Court of Canada in *Degelder Construction Co. v. Dancorp Developments Ltd.*, [1998] 3 S.C.R. 90. In both cases, following *Nelson v. C.T.C. Mortgage Corp.* (1984), 16 D.L.R. (4th) 139 (B.C.C.A.), aff'd [1986] 1 S.C.R. 749, the Supreme Court held that there is no violation of s. 347(1)(b) when a payment of interest at a criminal rate arises from a voluntary act of the debtor; that is, an act wholly within the control of the debtor and not compelled by the lender or by the occurrence of a determining event set out in the agreement.

[356] In the case at bar, Money Mart argues that there can be no violation of the second offence under s. 347 because the payment of the fixed fee and the cheque cashing fee are the voluntary act of the borrower. It argues that the payment of interest is voluntary because under the Fast Cash Advance Agreement, the borrower has the option of paying cash to repay the loan along with its 59% *per annum* interest charge imposed *per diem*.

[357] Money Mart's argument is fallacious because it does not address the legal point in question at all. The legal point arises only if: (a) the payment of interest is made at a time when the effective rate of interest is a criminal rate and (b) that act of payment by the debtor could have been made later at a time when the effective rate of interest is not a criminal rate. However, under the Fast Cash Advance Agreement, there is only one time when the fixed fee and the cheque cashing fee are paid, which arises precisely because the loan is not paid in cash. Money Mart confuses a triggering event for the payment of the impugned charge from an option of not paying the impugned charge at all. At the time when the payment of the fixed fee and the cheque cashing fee are received, they constitute a criminal rate of interest and the borrower does not have a choice of paying at a later time when a criminal rate of interest would not have occurred.

[358] In any event, Money Mart's argument is negated by Justice Major's judgment in *Garland* where Consumers' Gas similar argument was rejected. In paragraph 61 of his judgment, Justice Major stated:

> 61. [Consumers' Gas's] assertion that customers "voluntarily pay" the LLP is unpersuasive. The prepayment of the mortgage in *Nelson* was a voluntary act because it was wholly at the debtor's initiative and was not compelled by the lender's demand or by a determining event set out in the agreement. A customer's failure to pay the LPP by a named date is not voluntary in the same sense. The LLP is automatically triggered by an event specified in the arrangement between the parties; i.e., the passage of time.

[359] In the case at bar, the payment of the fixed fee and the cheque cashing fee are compelled by the determining event set out in the Fast Cash Advance Agreement that the borrower has not paid in cash and the payment of the fixed fee and the cheque cashing fee is compelled by Money Mart's demand to be repaid.

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[360] Thus, I see no merit to the Defendants' argument that there is a genuine issue for trial about the voluntary payment defence. Once again there is no issue here at all, and one does not need the machinery of a trial to determine the point.

Conclusion

[361] For the above reasons, I dismiss the Defendants' motion for a stay and the Plaintiffs' motion for a summary judgment.

[362] A case conference is required to address the manner in which the matter of costs is to be resolved and to plan the next steps in the class action.

[363] Orders accordingly.

[364] I conclude by thanking all counsel for your exemplary advocacy, professionalism, and civility. I am grateful for the way you represented the parties and argued their two very challenging motions.

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Perell, J.

Released: June 06, 2008

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COURT FILE NO.: 03-CV-1275CP
DATE: 20080606

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

KENNETH SMITH, as Estate Trustee of the Last Will and Testament of Margaret Smith, deceased, and ROBERT ADRIEN ORIET

Plaintiffs

- and -

NATIONAL MONEY MART COMPANY and DOLLAR FINANCIAL GROUP, INC.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

REASONS FOR DECISION

Perell, J.

Released: June 06, 2008

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