

CITATION: Smith v. National Money Mart, 2010 ONSC 1334
COURT FILE NO.: CV-08-363659-00CP
DATE: March 3, 2010

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**Kenneth Smith, as as Estate Trustee of the Last Will and Testament of Margaret Smith,
deceased, and Ronald 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. and Linda Rothstein for the Plaintiffs
F. Paul Morrison and John P. Brown for the Defendant, National Money Mart Company
Mahmud Jamal, Jean-Marc Leclerc and Jason MacLean for the Defendant, Dollar Financial Group, Inc.
Terrence J. O'Sullivan and James Renihan for Class Counsel

HEARING DATE: February 22, 2010

REASONS FOR DECISION

PERELL, J.

Introduction and Overview

[1] There are four matters before the court; namely: (1) the variation of a certification order in a class action to expand the class definition; (2) a request for court approval of a settlement in that class action; (3) a request that one of the representative plaintiffs be paid \$3,000; and (4) a request for approval of Class Counsel's \$27.5 million fee.

[2] On January 5, 2007, Justice Hoy certified the 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 certification order was amended by order dated April 20, 2007.

[3] 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.

[4] In the litigation plan approved by Justice Hoy, class counsel is defined as follows: "The plaintiff's counsel group is comprised of Sutts, Strosberg, Paliare Roland Rosenberg Rothstein LLP, Koskie Minskie and David Stratas."

[5] In the class action, lawyer of record and lead Class Counsel was the law firm of Sutts, Strosberg LLP., but Class Counsel was actually a consortium of law firms among whom the legal work was delegated by Harvey Strosberg, Q.C. of Sutts, Strosberg, LLP. All of the law firms agreed to act on the same contingency fee basis as had been agreed between the representative plaintiffs and Sutts, Strosberg LLP. The other firms were: Heenan Blaikie LLP., with David Stratas being the major contributor; Paliare Roland Rosenberg Rothstein LLP., with Linda Rothstein and Ken Rosenberg being the major contributors; and Koskie Minsky LLP., with Kirk Baert being the major contributor.

[6] Unilaterally and without court order, Class Counsel has included in its counsel group, law professor Vern Krishna, the law firm, Fraser Milner Casgrain LLP, financial analyst Jay Anand, and consulting firm Pricewaterhouse Coopers LLP ("PwC"). All these additional members of the counsel group, some of whom are not licensees of the Law Society of Upper Canada, provided services for the class, and they agreed to act on the same contingency fee basis as Class Counsel.

[7] The Defendants are National Money Mart Company ("Money Mart") and Dollar Financial Group Inc. ("Dollar Financial"). Dollar Financial is an American corporation, and it is the sole shareholder of 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. Money Mart offers a payday loan known as a "Fast Cash Advance."

[8] F. Paul Morrison and John Brown of McCarthy Tetrault LLP. acted for the defendant Money Mart and Mahmud Jamal of Osler, Hoskin & Harcourt LLP. acted for the Defendant Dollar Financial.

[9] Both the late Mrs. Smith and Mr. Oriet were payday loan borrowers. Payday loans are small loans with a due date for repayment connected to the borrower's payday. A payday loan is a loan of a relatively small amount of money (up to approximately \$1,500 and typically up to around \$500) for a relatively short period (up to approximately a month).

[10] In the class action, which began in 2003, Mr. Smith and Mr. Oriet allege that Money Mart's Fast Cash Advances contravene s. 347 of the *Criminal Code*, R.S.C. 1985, c.46 and that Money Mart charges a criminal rate of interest. The alleged result is an illegal contract, and Messrs. Smith and Oriet, 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 from charging a criminal rate of interest. Under the certification order, the class members are approximately 210,000 payday loan borrowers in Ontario. At one time, Mr. Smith and Mr. Oriet believed that the amount in issue in their action would exceed \$500,000,000, including pre-judgment interest.

[11] It is to do injustice to the notion of understatement to say that Mr. Smith's and Mr. Oriet's class proceeding has been hard fought. There have been many interlocutory motions and many appeals. Among other things, there were two motions to stay the action, a certification motion, a decertification motion, and a motion for summary judgment. Many issues were litigated, and some were re-litigated. There was one leave application to the Divisional Court, four appeals to the Court of Appeal, and three leave applications to the Supreme Court of Canada. There were 39 orders, 12 endorsements, and 4 judgments. Eventually, the action was called to trial in April 2009, and there were 17 days of trial before Justice Spies. That trial has been adjourned pending the outcome of the motion now before the court.

[12] The motion is made because the parties have signed a settlement agreement. The Defendants consent to the relief sought on this motion.

[13] The settlement, which I will describe in more detail is comprised of five elements, which Class Counsel value at approximately \$120 million. As I will explain, I do not agree with that valuation, but the five elements along with Class Counsel's attribution of value are as follows: (1) a \$27.5 million cash payment in installments by the Defendants; (2) \$56,388,071 debt forgiveness by the Defendants; (3) \$30 million in transaction credits provided by Money Mart; (4) a \$3 million payment to Class Proceedings Fund; and (5) \$2 million in administrative costs.

[14] As explained in more detail below, the basic structure of the settlement is that class membership is expanded from the class identified in the original certification order. The settlement class is then divided into two groups: (1) the Debt Forgiveness Group and (2) the Transaction Credit Group. The Debt Transaction Group will have their indebtedness to Money Mart in the aggregate amount of \$56,388,071 released. The members of the Transaction Credit Group (but not the Debt Forgiveness Group) will receive: (a) pro-rated shares of \$30 million worth of \$5 transaction credits that are usable for 4 years; and (b) a pro-rated share of cash from what is left - if anything - after the payment of Class Counsel's fee from installment payments of \$27.5 million, which are to be completed by July 2011. The Class Action Fund is to receive \$3 million and a share of the entitlements of the Transaction Credit Group.

[15] Mr. Smith and Mr. Oriet move for an order amending and expanding the class definition and for an order approving the settlement. Class counsel requests approval of its counsel fee and a \$3,000 payment to Mr. Oriet. Class counsel adamantly submits that the settlement is excellent and that they more than earned their fee of \$27.5 million.

[16] For the reasons that follow, I approve the amendment of the class definition, the settlement, and the \$3,000 payment to Mr. Oriet. I approve a counsel fee of \$14.5 million inclusive of applicable taxes and disbursements.

[17] To explain my reasons:

- First, I shall set out some general principles about settlement approvals and about approvals of class counsel's fees, and I will discuss the court's role and responsibilities in the approval processes.
- Second, I will describe the factual background for settlement approval in this case, including some circumstances that are said to have motivated the settlement. As will be seen, those circumstances include the enactment of new legislation to regulate payday loans in Ontario and the nature of the relationship between the Defendants and their secured creditors. In this section, I will also address the matter of the amendment of the class definition and the certification of the class action for the new class members.
- Third, I will describe the factual background for the fee approval in this case. In this section, I will explain why I am not treating Mr. Krishna, Fraser Milner Casgrain LLP, Mr. Anand Anand, and PwC as members of the Class Counsel Group. I will explain why I am treating the fee claims of this group in the conventional manner as a disbursement without mark-up or participation in the contingency fee agreement.
- Fourth, I will describe the highlights of the proposed settlement.
- Fifth, I will discuss the Plaintiffs' rationale for the settlement, and I will make my own observations about the settlement and explain my opinion that although the settlement should be approved, it is to spin a silk purse from a sow's ear to suggest that the result was excellent. My view is that the settlement result was driven by changing circumstances and that the result is adequate or satisfactory, but it is hardly excellent.
- Sixth, I will apply the law about counsel fee approvals to approve a reduced but still substantial counsel fee of \$14.5 million, which I believe reasonable and fair in the circumstances.
- Seventh, I will conclude by setting out some of the terms of the court's order.

Principles of Settlement Approval and of Fee Approval

[1] To approve a settlement of a class proceeding, the court must find that in all the circumstances the settlement is fair, reasonable, and in the best interests of those affected by it: *Dabbs v. Sun Life Assurance*, [1998] O.J. No. 1598 (Gen. Div.) at para. 9; *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at paras. 68-73. In determining whether to approve a settlement, the court, without making findings of facts on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 10.

[18] When considering the approval of negotiated settlements, the court may consider, among other things: (a) likelihood of recovery or likelihood of success; (b) amount and nature of discovery, evidence or investigation; (c) settlement terms and conditions; (d) recommendation and experience of counsel; (f) future expense and likely duration of litigation and risk; (g)

recommendation of neutral parties, if any; (h) number of objectors and nature of objections; (i) the presence of good faith, arm's length bargaining and the absence of collusion; (j) the degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation; and (k) information conveying to the court the dynamics of and the positions taken by the parties during the negotiation: *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.) at 440-44, aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused Oct.22, 1998; *Parsons v. The Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at paras. 71-72; *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (S.C.J.) at para. 8; *Kelman v. Goodyear Tire and Rubber Co.*, [2005] O.J. No. 175 (S.C.J.) at paras. 12-13; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (S.C.J.) at para. 117; *Sutherland v. Boots Pharmaceutical plc*, [2002] O.J. No. 1361 (S.C.J.) at para. 10.

[19] A settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions and is an objective standard that allows for variation depending upon the subject matter of the litigation and the nature of the damages for which the settlement is to provide compensation. See: *Parsons v. The Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at para. 70; *Dabbs v. Sun Life Assurance* (1998), 40 O.R. (3d) 429 (Gen. Div.), aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to the S.C.C. ref'd, [1998] S.C.C.A. No. 372.

[20] A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally: *Fraser v. Falconbridge Ltd.*, [2002] O.J. No. 2383 (S.C.J.) at para 13; *McCarthy v. Canadian Red Cross Society*, [2007] O.J. No. 2314 (S.C.J.) at para. 17.

[21] Turning to the matter of the approval of class counsel's fee, the fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the lawyer in conducting the litigation and the degree of success or result achieved: *Maxwell v. MLG Ventures Ltd.* (1996), 30 O.R. (3d) 304 (Gen. Div.); *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 (Gen. Div.); *Serwaczek v. Medical Engineering Corp.*, [1996] O.J. No. 3038 (Gen. Div.); *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (S.C.J.).

[22] Where the fee arrangements are a part of the settlement, the court must decide whether the fee arrangements are fair and reasonable, and this means that counsel are entitled to a fair fee which may include a premium for the risk undertaken and the result achieved, but the fees must not bring about a settlement that is in the interests of the lawyers, but not in the best interests of the class members as a whole: *Sparvier v. Canada (Attorney General)*, [2006] S.J. No. 752 (Q.B.) at para. 43, aff'd [2007] S.J. No. 145 (C.A.).

[23] Fair and reasonable compensation must be sufficient to provide a real economic incentive to lawyers to take on a class proceeding and to do it well: *Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) 417 (C.A.); *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (S.C.J.); *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (S.C.J.) at paras. 59-61.

[24] Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement: *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (S.C.J.) at para. 67; *Endean v. Canadian Red Cross Society*, [2000] B.C.J. No. 1254 (S.C.); *Wamboldt v. Northstar Aerospace (Canada)* [2009] O.J. No. 2583 (S.C.J.) at para. 33.

[25] Where a representative plaintiff can show that he or she rendered active and necessary assistance in the preparation or presentation of the case and that such assistance resulted in monetary success for the class, the representative plaintiff may be compensated on a quantum meruit basis for the time spent: *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 (Gen. Div.) at para. 28.

[26] The above principles about how the court goes about determining whether a settlement is fair, reasonable, and in the best interests of those affected by it and of determining whether counsel's fee is fair and reasonable compensation are well known. It is also well known that the court finds itself in a difficult position in carrying out its responsibilities of determining whether a settlement and class counsel's fee should be approved or rejected.

[27] Normally, courts make determinations in the context of the dynamics of the adversary system where opposing views are heard. The theory of the adversary system is that truth and justice will emerge from the crucible of the opposing arguments and presentations of competing cases. However, for settlement and fee approvals because of the obvious conflict of interest of class counsel, the absent class members - who will be bound by the settlement - have no one to make their argument, unless a class member comes forward to raise an objection, which rarely occurs, or unless the court takes on the role of being an active advocate for the class, which the court is ill-equipped to do.

[28] Professor Garry Watson in "Settlement Approval – The Most Difficult and Problematic Area of Class Action Practice," a paper prepared for the NJI Conference on Class Actions in April 2008 discusses the problems of lack of adversarial presentation. Professor Watson states:

Although the court is entitled to insist on sufficient evidence to permit the judge to exercise an objective, impartial, and independent assessment of the fairness of the settlement, it is questionable whether common law judges (trained in the adversarial tradition and inexperienced in inquisitorial decision-making) are well-equipped to make these kinds of inquiries in the absence of adversarial presentation. Indeed I would make this point more strongly. Day in and day out common law judges rely on adversarial presentation by the parties to decide cases and to "get it right." Non-adversarial hearings are rare, and typically arise on *ex parte* applications which are frequently followed by an adversarial hearing when the original absent party (if he or she fees aggrieved) moves to set aside the *ex parte* order. I will argue below that judges should give serious thought to

precipitating an adversarial hearing by appointing counsel to advise the court and oppose the settlement if appropriate.

[29] The *Manual for Complex Litigation* (4th) (Washington, D.C.: Federal Judicial Centre, 2004) discusses the judicial role in reviewing a proposed class action settlement. While this is an American publication, on this issue, there is no difference between Canada and the United States. The authors state at pp. 309-11:

To determine whether a proposed settlement is fair, reasonable, and adequate, the court must examine whether the interests of the class are better served by the settlement than by further litigation. Judicial review must be exacting and thorough. The task is demanding because the adversariness of litigation is often lost after the agreement to settle. The settling parties frequently make a joint presentation of the benefits of the settlement without significant information about its drawbacks. If objectors do emerge, there may be no lawyers or litigants criticizing the settlement or seeking to expose flaws or abuses. Even if objectors are present, they might simply seek to be treated differently than the class as a whole, rather than advocating for class-wide interests. The lack of significant opposition may mean that the settlement meets the requirements of fairness, reasonableness, and adequacy. On the other hand, it might signify no more than inertia by class members

Factors that moved the parties to settle can impede the judge's efforts to evaluate the terms of the proposed settlement, to appraise the strength of the class' position, and to understand the nature of the negotiations. Because there is typically no client with the motivation, knowledge, and resources to protect its own interests, the judge must adopt the role of a skeptical client and critically examine the class certification elements, the proposed settlement terms, and procedures for implementation.

There are a number of recurring potential abuses in class action litigation that judges should be wary of as they review proposed settlements: ...

- Granting class members illusory non-monetary benefits, such as discount coupons for more of the defendants' product, while granting substantial monetary attorney fee awards;
- Imposing such strict eligibility conditions or cumbersome claims procedures that many members will be unlikely to claim benefits, particularly if the settlement provides that the unclaimed portions of the funds will revert to the defendants;
- Treating similarly situated class members differently (for example, by settling objectors' claims at significant higher rates than class members' claims); ...

- Releasing claims of parties who received no compensation in the settlement;
- Setting attorney fee based on a very high value ascribed to non-monetary relief awarded to the class, such as medical monitoring injunctions or coupons, or calculating the fee based on the allocated settlement funds; rather than the funds actually claimed by and distributed to class members; and
- Assessing class members for attorney fees in excess of the amount of damages awarded to each individual.

[30] Barbara J. Rothstein & Thomas E. Willging, in *Managing Class Action Litigation: A Pocket Guide for Judges* (Washington, D.C.: Federal Judicial Center, 2005) discuss the judge's role in settlement and fee approval, and they suggest it is the most important and challenging assignment that judges face. Rothstein and Willging state at p. 8:

Reviewing proposed settlements and awarding fees are usually the most important and challenging assignments judges face in the class action area. Unlike settlements in other types of litigation, class action settlements are not an unmitigated blessing for judges. Rule changes, precedent, recent legislation, and elemental fairness to class members direct you not to rubber-stamp negotiated settlements on the basis of a cursory review. Current rules ... unambiguously place you in the position of safeguarding the interests of absent class members by scrutinizing settlements approved by class counsel. Be aware that the adversarial clashes usually end with the settlement. Thus, you need to take independent steps to get the information that you'll undoubtedly need to review a settlement agreement.

[31] Professor Jasminka Kalajdzic in "Access to a Just Result: Revisiting Settlement Standards and Cy Près Distributions" (2010), 6 *Canadian Class Action Review* (publication pending), after noting that a judge tasked with assessing the fairness of a class action settlement, has the onerous task of safeguarding the interests of absent class members, states:

There is a further reason why strict scrutiny and as a corollary, the absence of a strong presumption of fairness, is the preferable approach to settlement approval. Unlike judges who approve settlements on behalf of infants or a party under disability, class action judges do not have the assistance of counsel charged only with protecting the interests of absent class members. That is, while an infant's interest may be represented by the Office of the Children's Lawyer, or those of a party under disability by the Public Guardian and Trustee, absent class members do not have a representative to closely scrutinize the proposed settlement free of any vested interests. Courts and commentators alike have recognized that class counsel's neutrality in this regard is compromised by an inherent conflict of interest. Both plaintiff and defence counsel seek to have the settlement approved, and there is the risk that the interests of the absent class members, and the deficiencies in the proposed settlement, will not be fully presented. This dynamic creates an adversarial void that a judge alone is hard-pressed to fill. Indeed some judges fundamentally disagree that it is a judge's role to fill the void at all, relying

instead on class counsel to abide their obligation to make full and frank disclosure of material information. And legal scholars have opined that the void created by settlement simply can never be filled. Among others, John Kleefeld (“Class Actions as Alternative Dispute Resolution” (2001), 39 Osgoode Hall L.J. 817.) has queried whether courts are “up to the task”.

[32] I do not agree that judges are not up to the task of determining whether to approve settlements and class counsel fees, but I do agree with all the commentators that the tasks are difficult and made more difficult by the adversarial void.

[33] The tasks were made more difficult still in the case at bar because, as will soon become apparent, the proposed settlement has some of the warning signs that alert judges to be skeptical when they review the merits of proposed settlements, including: (a) non-monetary benefits, such as discount coupons for more of the defendants’ product; (b) substantial monetary class counsel fee awards; treating class members differently; (c) the possibility that some class members will receive no benefit; and (d) setting class counsel’s fee based on a very high value ascribed to non-monetary relief. To these warning signs, there are also the warning signs of: (e) optics that suggest that the settlement is more favourable to class counsel than to the members of the class; (f) the unauthorized addition of non-lawyers to claim contingency fees; and (g) the absence of behavior modification and rather an incentive to continue the defendant’s behavior that prompted the class action.

Factual Background to Settlement Approval

[34] I will describe the factual background only as far as necessary for the purposes of deciding the four issues before the court. Additional details are available in Justice Hoy’s judgment and also in my reasons and the Court of Appeal’s reasons for decision on cross motions for a stay and for a summary judgment; see *Smith Estate v. National Money Mart Co.*, [2008] O.J. No. 2248 (S.C.J.), aff’d [2009] O.J. No. 4327 (C.A.).

[35] Money Mart provides a variety of financial services. It 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. Among Money Mart’s lines of business is making “payday loans” to consumers. It also has a cheque cashing business.

[36] For a fee that involves both a fixed and a variable component, Money Mart will immediately cash cheques. Beginning in 1996, Money Mart began to offer “Fast Cash Advances” which are payday loans. Under these loans, the borrower is obliged to 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*, is ultimately what the class action was all about.

[37] The plaintiffs provided a Fast Cash Advance transaction between Money Mart and Mr. Oriet as an illustration of the dispute between the parties. On January 14, 2004, Mr. Oriet received “the advance amount” of \$100, and 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.

[38] The result is that Mr. Oriet paid \$19.18 for a 9-day loan of \$100.00. If all of the \$19.18 paid by Mr. Oriet is interest, the uncontradicted actuarial evidence is that the effective annual rate of interest charged by Money Mart is 123,060.2%.

[39] The parties, however, have competing characterizations of the charges that are triggered when a borrower does not repay the loan in cash before its due date. It is the Plaintiffs' position that the charges are interest as that term is defined under the *Criminal Code*. The Defendants' position that the Cheque Cashing Fees are not included in the cost of the loan and are for a separate service that is offered for the convenience of the customer in not having to return to the Money Mart store to repay the fast cash advance in cash before payday.

[40] There were many Money Mart customers similar to Mr. Oriet. At the now adjourned trial, there was evidence that 264,425 persons had entered into 4,544,577 fast cash advance transactions during the class period and that they had paid Money Mart cheque cashing fees totaling \$202,742,094 and interest of \$22,049,413 for a total of total payment of \$224,791,507. If the class definition is expanded as proposed, 306,714 settlement class members paid Money Mart \$300,179,649 plus interest at an annual rate of approximately 59%.

[41] In the class action, Money Mart also advanced a counterclaim because there are 103,282 settlement class members who are indebted to Money Mart in the amount of \$56,388,071. For reasons that will become apparent later, it is worth noting that most of this indebtedness has already been written off or reserved in Money Mart's financial records.

[42] To pursue the litigation on behalf of the class of Money Mart customers, the representative plaintiffs signed contingency fee agreements with the law firm of Sutts, Strosberg, LLP. The agreements provided for the payment of legal fees contingent on success in the action, as follows: (1) any disbursements not yet paid by the defendant as costs plus taxes and interest; (2) plus the greater of: (i) one-third of the class' recovery; or (ii) the actual fees incurred by class counsel, multiplied by four; (3) minus any solicitors' fees that have already been paid by the defendants through costs awards; and (4) plus taxes.

[43] The Plaintiffs applied for and were granted funding from the Class Proceedings Fund.

[44] The class action began in 2003, and the evidence is that from the outset, in addition to contemplating simply recovering and distributing, a judgment in the hundreds of millions of dollars, Class Counsel contemplated selling the class action judgment to a bank or hedge fund or selling the class judgment to the Defendants in exchange for equity in a reorganized Money Mart. I mention these aspirations because Class Counsel submitted that all of them were ruled out by the recent economic downturn, and that this was a factor in rationalizing the settlement.

[45] As noted above, on January 5, 2007, Justice Hoy certified the action as a class proceeding. The class definition as amended by Justice Hoy's order of April 20, 2007 is:

All persons who, in the period August 19, 1997 to September 9, 2007 received a Fast Cash Advance and/or Payday Loan 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, payable to Money Mart or a franchisee of Money Mart.

[46] In the motion before the court, the Plaintiffs seek an amendment to the Certification Order so that the class definition be amended to read as set out below:

All persons who, in the period August 19, 1997 to December 15, 2009, entered into a payday loan and/or fast cash advance in Ontario with Money Mart or a franchisee of Money Mart which was repaid using a first party personal cheque delivered at the time the loan was obtained provided such cheque was honoured by the bank, excluding persons who opted-out on or before March 9, 2008 or who will opt-out in accordance with the Approval Order.

[47] I understand that this amendment of the class definition has the effect of including in the class all of the original class members and adding a group of customers who entered into transactions between the publication of the original certification order and December 15, 2009 when, because of the enactment of the legislation discussed below, it could no longer be said that the transactions contravened s. 237 of the *Criminal Code*.

[48] I am satisfied for the reasons expressed by Justice Hoy in the original certification decision that the conditions for certification have been satisfied for this additional group and that the class definition should be amended. I conclude that, in so far as the class definition is being amended (with the effect that the number of class members is being increased), that the action should be certified as a class proceeding for the new class members. They are entitled to the usual rights to opt-out. The details of the certification order can be attended to as a part of settling the order for this motion.

[49] The definition of the class in the certification order and in the revised definition encompasses some non-residents of Ontario because Money Mart customers may have moved out of the province or they may have only been visiting Ontario at the time of doing business with Money Mart. According to Money Mart's records, as of January, 2010, approximately 25,000 class members were of this sort. The parties have agreed that if the settlement is approved, any Non-Resident Class Member with a payday loan in Ontario during the Class Period who became a non-resident before September 10, 2007, should have a right to opt-out of the class action if he or she completes and signs a declaration certifying that he or she became a non-resident before September 10, 2007.

[50] In the class action, as noted above, both before and after certification, there was a great deal of interlocutory activity. For present purposes, I do not need to describe those events.

[51] Between June 2007 and April 2009, there were also unsuccessful settlement negotiations between class counsel and US counsel for the Defendants.

[52] While the litigation and the unsuccessful settlement efforts were continuing, there were also developments outside of the litigation that would come to affect the course of the litigation and the settlement negotiations.

[53] In May 2007, s. 347 of the *Criminal Code* was amended by Bill C-26, *An Act to Amend the Criminal Code*. The effect of the amendment is to exempt small short term loans from s. 347 in provinces that introduce legislation to regulate the payday loan industry. To date, legislation has been introduced to regulate the payday loan industry in British Columbia, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island, Saskatchewan, and Ontario.

[54] The Ontario legislation was enacted in June 2008 as the *Payday Loans Act*, S.O. 2008, c. 9 and, on April 1, 2009, certain sections were proclaimed. On March 13, 2009, certain sections of Ontario Regulation 98/09 were proclaimed, including s. 23 which sets the maximum total cost of payday loan borrowing at \$21 per \$100 borrowed. On December 15, 2009, s. 23 of O. Reg. 98/09 came into force.

[55] I pause here to note the irony that the example chosen by the Plaintiffs of Mr. Oriet's \$100 loan, \$19.18 charge, and alleged interest rate of 123,060.2% is apparently now legal in the Province of Ontario and indeed Money Mart can charge Mr. Oriet an additional \$2.

[56] In any event, I am told that the *Payday Loans Act* was influential in creating an environment in which it became possible to settle the class action. I am told that before this legislation came into force, there was no prospect of settlement because Class Counsel could not recommend to the court any settlement that allowed Money Mart to continue marketing what Class Counsel believed were illegal contracts and thus criminal activity, and Money Mart could not settle on any basis that prevented it from continuing to market and enter into loan transactions using its usual form of contract.

[57] The activation of the new legislation occurred as the parties were preparing for trial, but it did not interrupt the start of the trial in April 2009. However, at the suggestion of Justice Spies, on April 29, 2009, a mid-trial mediation was held with Justice Colin Campbell as mediator. The mediation session failed to achieve a settlement, and the trial resumed.

[58] Money Mart was leading evidence at trial when a second mid-trial mediation took place. Mediation sessions took place on May 28 and 29, 2009 and June 3 and 5, 2009. The Honourable Frank Iacobucci was the mediator, and this time, a settlement agreement was reached.

[59] Mr. Iacobucci observed that the negotiations for settlement were hard fought, comprehensive, and thorough, and it was his opinion that the settlement was fair and reasonable and in the best interests of all concerned. Given Mr. Iacobucci's credentials as a scholar, law professor, law dean, judge, mediator, and business executive, this is a substantial factor in favour of approving the settlement.

[60] As already noted, the Plaintiffs submit that the implementation of the new payday loan regulations influenced the settlement negotiations. They submit further that the negotiations and the structure and the terms of the eventual settlement were substantially affected by the recent serious economic recession in Canada and throughout the world and by the nature of the Defendants' financing agreements with their secured creditors. Put bluntly, it is submitted that

the nature of Money Mart's secured debts meant that the class members could recover an empty judgment if they pursued their class action to a judgment.

[61] The affidavit material filed on this motion indicates that as of March 31, 2009, the enterprise of which the Defendants were a part had long term debt of US\$574 million and current liabilities of US\$104.6 million. Under several credit agreements, the long term debt included US\$367.3 million in term loans, and it included US\$200 million under Senior Convertible Notes. Under the credit agreements, the assets of the enterprise were security for the loans. The several credit agreements and the convertible notes stipulated that unsatisfied judgments of specified amounts would be events of default that would entitle the secured creditors to seize the Defendants' assets. There is no insurance policy which would indemnify either of the defendants from the claims asserted in this class action.

[62] Thus, the Plaintiffs and Class Counsel submitted that a judgment against Money Mart would be a pyrrhic victory, because it would trigger events of default under the Defendants' credit agreements. If Class members recovered a judgment in excess of US\$15 million against Dollar Financial or Money Mart and the judgment was upheld on appeal and was not paid within 30 days, this would be an event of default. If an event of default occurs, the secured creditors would have a number of rights including the right to renegotiate the terms of the agreement, to terminate the revolving credit facilities, to demand repayment of all monies owing and to exercise remedies against the assets of the Defendants that were pledged as security.

[63] The Plaintiffs submit that a judgment would probably prompt CCAA proceeding in Ontario and bankruptcy proceedings in the US. The Plaintiffs and Class Counsel submit that the practical result of a judgment in the range of \$150 million, which is what they anticipated recovering after setting off the Money Mart counterclaim would be that: Class Members would not immediately recover any money or any benefit; any recovery would be, at best, for a fraction of the judgment amount; and any recovery would likely be many years in the future even though Money Mart's business was profitable.

[64] Money Mart's business in Ontario is highly profitable. According to its 2007 Ontario income tax return for the year end June 30, 2007, Money Mart earned taxable net income in Ontario of \$64.34 million.

[65] Class Counsel decided that the settlement had to be structured so as not to trigger a default in the lending agreements between the Defendants and their secured creditors, and indeed the settlement is in large part structured to avoid triggering an event of default under the Defendants' several security agreements. For instance, the settlement utilizes the fact that under accounting rules, transaction credits can be treated as a future incentive and not a current liability. Similarly, the treatment of unused transaction credits, described in the next section, is designed so as to avoid the creation of a current liability.

[66] As a part of the settlement, the defendants wished to expand the class to eliminate all liability in Ontario. The Plaintiffs agreed that the Class should be expanded to include new members.

[67] On May 29, 2009, the settlement terms were reduced to a term sheet. On June 5, 2009, the term sheet was reduced to a summary settlement agreement that required that a detailed settlement agreement be negotiated. Further negotiations followed, and the settlement agreement was signed by the parties in November, 2009.

[68] In November, 2009, Class Counsel posted on a class action website, among other things, particulars of the proposed settlement and the notice of the approval hearing. Class Counsel also posted on the website the notice of motion and the affidavits (without exhibits and with signatures redacted) filed in support of the motion to approve the settlement.

[69] On January 4, 2010, Money Mart posted the notice of the Approval Hearing in all of its corporate and franchise stores in Ontario. Money Mart also published the notice of the Approval Hearing in approximately 61 community newspapers in Ontario.

[70] In January 2010, Money Mart gave notice of the Approval Hearing to Settlement Class Members whose last known address is in a province other than Ontario or Quebec by publishing the notice in the Vancouver Sun and the Calgary Herald and by mailing the notice to each Settlement Class Member who conducted a transaction at any Money Mart store from and after January 7, 2009.

[71] Four persons delivered objections to the settlement. However, I need not describe two of the objections because they have been withdrawn. Of the two remaining objections, Mr. Ali Zareie, a student in British Columbia, complains about the interest rate charged on Money Mart loans and Mr. Guy Laporte from Ontario objects that the settlement is unfair because he and his wife have already repaid between \$45,000 to \$60,000 in ten-years' of loan transactions from Money Mart, and he sees no benefit from the proposed settlement.

[72] I will comment about Mr. Laporte's objection further below, but for the moment, with some grammatical corrections, I will let his e-mail message speak for itself. In an e-mail message, Mr. Laporte writes:

Now their proposition to erase our current amount owing and give us some credits, that's not fair because my self and probably a lot of other people have already paid them back. I was finally able to pay them off last year – after 10 years of misery. The credit that they want to offer, that's a joke. They want us to go and use their services again by giving us credits against some of their services for which they will probably increase the fees. That way they won't lose any money, but it's going to make them look good. They put limitations on the credits. For example, if you still owe money, they will forgive the debt, but they won't offer you any credits. Again that's not right. They still get away with a lot of money that they do not have to repay and with a maximum credit of \$5 per transaction how long is it going to take me to use up all my credit that they will owe me!? This does not make sense. I do not want to use Money Mart services ever again. I do not want credits! I want an apology, and I want a refund of some of the money that they stole from us by overcharging us interest. That would be justice!! I believe that Money Mart deserves to be fined severely and they should reimburse all the money they have overcharged all their customers even if that

means putting them out of business. This has gone on long enough, and it is time that it got stopped. ... I hope that this settlement will be fair to us, the small people that lost all that money, and that this will set a proper example for the companies in this type of business.

[73] Class Counsel recommends that the settlement be approved by the court. Class Counsel's opinion is that the settlement is fair, reasonable, and in the best interests of the class. Mr. Smith and Mr. Oriet favour the settlement and request approval of it.

[74] Assuming that the settlement is approved, the parties request that the court's judgment address certain contingencies that may arise because there is a similar class action in British Columbia, and it is scheduled for trial in March 2010. If the British Columbia plaintiffs should succeed and obtain a judgment against Dollar Financial or Money Mart, there is a risk that the Defendants will become insolvent. If insolvency occurs, the Ontario Settlement Class Members will be disadvantaged because they have compromised their claims and their judgment may not have been fully satisfied. To mitigate this risk, the parties agree that if the settlement is approved, the Order should include a provision that gives the Settlement Class Members the option of proving a better claim.

Factual Background to Approval of Class Counsel Fee

[75] Class counsel request approval of their counsel fee in the amount of \$27.5 million.

[76] Class Counsel have received \$770,052.66 in costs awards paid by the Defendants.

[77] The time and applicable GST for the four law firms that are mentioned in the litigation plan approved by Justice Hoy have total fees and GST of \$10,237,525.00, broken down as follows:

Firm	Time	GST	Total
Sutts, Strosberg LLP.	\$5,990,081.50	\$299,504.08	\$6,289,585.58
Heenan Blaikie LLP.	\$2,627,076.00	\$131,358.00	\$2,758,429.80
Paliare Roland Rosenberg Rothstein LLP.	\$794,452.00	\$39,722.00	\$834,174.00
Koskie Minsky	\$338,414.50	\$16,920.73	\$355,335.23
Totals:	\$9,750,024.00	\$487,501.20	\$10,327,525.20

[78] Many senior and junior lawyers and law clerks provided legal services to the Plaintiffs in the class action, but for present purposes, I need mention only the details set out in the following chart. This chart sets out the hours and charges of the top ten lawyer contributors from the

consortium of law firms that comprised Class Counsel. The work of these 10 lawyers is valued at \$8.8 million, which is about 90% of the work for which payment is being sought.

Contributor	Year of Call	Average Hourly Rate	Hours	Time Value
H. Strosberg	1971	\$808.58	4,076.5	\$3,296,186.50
L. Rothstein	1982	\$696.06	547.9	\$317,365.00
H. Rumble Peterson	1985	\$507.29	1,060.5	\$537,983.00
P. Speight	1986	\$517.25	2,882.8	\$1,491,130.00
D. Stratas	1988	\$666.30	2,993.1	\$1,994,297.00
M. Waddell	1989	\$497.53	441.1	\$219,461.00
K. Baert	1990	\$615.21	183.1	\$112,644.50
J. Kalajdzic	1997	\$261.26	499.1	\$248,824.50
T. Guy	2006	\$277.43	1,653.2	\$458,676.50
N. Brown	2002	\$408.99	327.5	\$133,944.00

[79] The four law firms mentioned in the litigation plan incurred disbursements with applicable taxes in the amount of \$929,004.48.

[80] In addition to the above claims, Class Counsel seeks to include in its application for approval of the Class Counsel Fee remuneration for the work of Professor Krishna, Fraser Milner Casgrain LLP., Mr. Anand, and PwC, all of whom accepted a retainer agreement on the same terms as between the representative plaintiffs and Sutts, Strosberg LLP.

[81] It should be noted that PwC's work was not to provide expert evidence. It was retained because the litigation required analysis of millions of small loan transactions and Class Counsel did not have the skill set or the resources to manage and analyze the transaction data.

[82] The time, taxes, and disbursements for the work of Professor Krishna, Fraser Milner Casgrain LLP., Mr. Anand, and PwC total \$894,669.49, broken down as follows:

Firm	Time	GST	Disbursements & GST	Total

PwC	\$774,873.00	\$38,743.65	\$22,012.38	\$835,629.03
Fraser Milner Casgrain LLP.	\$25,131.67	0.00	\$6,871.29	\$32,002.96
J. Anand	\$16,000.00	\$800.00	\$0.00	\$16,800.00
V. Krishna	\$9,750.00	\$487.50	\$0.00	\$10,237.50
Totals:	\$825,754.67	\$40,031.15	\$26,023.97	\$894,669.49

[83] Pausing here, in the review of the factual background, in my opinion, the claim for remuneration of PwC, Fraser Milner Casgrain LLP., Mr. Anand, and Mr. Krishna cannot be treated as a part of the claim for counsel fees by Class Counsel. It can only be treated in the conventional way as a claim for disbursements incurred by Class Counsel in the amount of \$894,669.49.

[84] I come to this conclusion for several reasons: First, none of this group was appointed Class Counsel, and two members of this group, PwC and Mr. Anand, are not qualified as lawyers and so cannot be appointed Class Counsel. Second, the *Class Proceedings Act, 1992* does not envision contingency fee agreements with other than properly appointed class counsel. Rather, s.32 (2) of the Act provides that an agreement respecting fees and disbursements “between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor.” The Act does not envision an agreement between a non-lawyer and a representative party, and the Act does not envision a motion being brought on behalf of a non-lawyer, like PwC. Third, there might not be compliance with the Law Society’s Rules of Professional Conduct with respect to contingency fees and fee splitting (see rules 2.08 (3) and 2.08 (8) of the *Rules of Professional Conduct*). Fourth, the law with respect to champerty and maintenance still exists, and this law might be applicable when non-lawyers would purport to participate in a contingency fee agreement that involves sharing a fee that is the greater of one-third of the class recovery or the actual fees incurred multiplied by four or a multiple of four of the non-lawyer’s base fee.

[85] During the argument of the motion, Class Counsel submitted that one of the virtues of the settlement and a justification for its fee request was precisely the feature that PwC had agreed to a contingency fee. Further, it was submitted that the access to justice achieved by and the future viability of the *Class Proceedings Act, 1992* depended upon just this type of arrangement where a consultant would be retained to do take on the burden of providing specialized forensic services that do not involve legal advice and that cannot feasibly be performed by a lawyer. There was no evidence to support this submission.

[86] In my opinion, in the absence of any evidence to support it, it would be both foolish and improper to make what would amount to a fundamental change to the design of the Act by agreeing with Class Counsel’s submission. Further, the conclusion that the future of class proceedings depends upon approving contingency fee agreements with consultants is not the type

of conclusion that should be reached on what is essentially an *ex parte* motion where the voices against any change are not being heard. Further still, if there is any merit at all in this submission then this is a matter that should be attended to by the Legislature and not as an exercise of law reform on an uncontested fee approval motion.

[87] I, therefore, will simply treat the claims of PwC, Fraser Milner Casgrain LLP., Mr. Anand and Mr. Krishna in the conventional manner as claims for disbursements, and I approve payment of these disbursements in the amount of \$894,669.49.

[88] Returning to conclude the factual background, the sum of \$7.5 million has been paid to class counsel under an order of Justice Spies as costs in any event of the cause. It is acknowledged that Class Counsel must credit this money on account of any class counsel fees that may be awarded. If the settlement is not approved, the \$7.5 million will be retained by Class Counsel on account of costs in the action, and they will account for this amount at the time the class action is resolved.

[89] Class Counsel are of the opinion that Mr. Oriet's contribution to the class action exceeded that which is normally expected of a representative plaintiff, and they ask that he be paid \$3,000. I agree that it is appropriate to make this payment to Mr. Oriet.

The Highlights of the Proposed Settlement

[90] The highlights of the Settlement Agreement are:

- The certification order will be amended to extend the class period and thereby add new class members.
- A new class member may opt-out during the opt-out period and non-resident class members will be given a further opportunity to opt-out.
- The settlement will resolve claims for the period August 19, 1997 to December 15, 2009.
- The class will be divided into two mutually exclusive groups: (1) the Debt Forgiveness Group and (2) the Transaction Credit Group.
- **Debt Forgiveness:** Members of the Debt Forgiveness Group will have their \$56,388,071 of debts to Money Mart forgiven. There are 103,282 members in the Debt Forgiveness Group.
- **Transaction Credits:** Members of the Transaction Credit Group (which excludes members of the Debt Forgiveness Group) will share transaction credits totalling \$30 million and a share of a cash credit, if any, after payment of class counsel's fee.
- Money Mart will offer \$30 million in transferable Transaction Credits to the members of the Transaction Credit Group.
- The credits may be used for four years. At the expiration of four years, if the transaction credits are not all used, then the amount of unused credits will be calculated and the court

will order Money Mart to reduce the price of its fast cash advance product in such a manner that the future customers of Money Mart will receive a benefit in the amount of the unused credits. The manner of the application of the Unused Credits will be fixed by the court taking into consideration commercial reasonableness and competitive circumstances.

- Members of the Transaction Credit Group will be allocated Transaction Credits on the following basis: (a) Money Mart will hold credits totalling \$300,000 (1% of \$30 million) in the Transaction Reserve Fund to pay any awards made by the Referee; (b) a member of the Transaction Credit Group's pro rata share of the Transaction Credits is the total of that person's Cheque Cashing Fees for Eligible Fast Cash Advance Transactions divided by the total Cheque Cashing Fees paid by all Credit Class Members multiplied by \$29.7 million (99% of \$30 million); (c) each member of the Transaction Credit Group whose pro rata share of Transaction Credits is \$25 or less will be allocated \$25 in Transaction Credits, that is, (five) \$5 Transaction Credits which, because of rounding, increases the issued Transaction Credits to \$32,235,910; and (d) each member of the Transaction Credit Group whose pro rata share of Transaction Credits is more than \$25 will be allocated Transaction Credits in an amount rounded up or down to the nearest \$5.
- The Transaction Credits are subject to the following terms: (a) they will be available in \$5 increments; (b) they will be usable in all Money Mart Stores; (c) a single Transaction Credit (\$5) may be applied against the purchase of any Eligible Service per transaction, except that in the case of income tax preparation services, a maximum of five Transaction Credits (\$25) may be applied per transaction; (d) they will be fully transferable, electronically or in paper form; (e) the transferee of a Transaction Credit may use the Transaction Credit for an Eligible Service as if he or she was a member of the Transaction Credit Group, subject to normal qualification criteria; (f) a Transaction Credit will remain unused until the credit is actually applied by Money Mart as a credit in conjunction with a contract for an Eligible Service; and (g) the credits will be distributed following the deadline for receipt of Requests for Exclusion from New Class Members.
- Money Mart will pay the Transaction Credits that were allocated to persons who opt-out into the Transaction Reserve Fund.
- A member of the Transaction Credit Group may determine the Transaction Credits to which he or she is entitled or a certificate of that entitlement by: (a) calling a toll-free number established and maintained by Money Mart; (b) accessing a secure internet website created and maintained by Money Mart; or (c) attending at any Money Mart Store.
- Because of rounding, the value of the Transaction Credits is \$32,235,910. Notwithstanding this adjusted value, on the Expiration Date the value of the Unused Credits will be calculated by deducting from \$30,000,000 the number of Transaction Credits that have been used.
- **Cash Payments:** Money Mart will pay \$30.5 million in cash, including \$3 million to the Class Proceedings Fund. Of this sum, \$7.5 million has been paid on account of the

settlement or on account of costs in the event of no settlement. If the settlement is approved, \$2.5 million will be paid on approval. A further \$10 million will be paid on July 15, 2010 and the balance of \$7.5 million is to be paid on July 15, 2011. Money Mart will also pay interest at the prejudgment rate, if it fails to pay in accordance with this timetable.

- Class counsel's fees in the amount determined by the court are the first charge on the proceeds of settlement, and the balance will be distributed as Cash Credits to members of the Transaction Credit Group.
- Members of the Transaction Credit Group Members will be allocated Cash Credits on the following terms: (a) the pro rata share will be the total of each member's Cheque Cashing Fees for Eligible Fast Cash Advance Transactions divided by the total Cheque Cashing Fees paid by all Credit Class Members for all their Eligible Fast Cash Advance Transactions multiplied by 89% of the amount of cash to be distributed among the Credit Class Members; (b) a member will not be allocated a Cash Credit if his or her pro rata share of Cash Credits does not equal or exceed \$10; (c) each pro rata share of Cash Credits which exceeds \$10 will be rounded up or down to the nearest dollar; (d) members will not be paid interest on their pro rata share of the Cash Credits; and (e) any portion of the Cash Credits remaining after this distribution will be allocated to the Cash Reserve Fund.
- If the court directs that Cash Credits are to be paid to the Credit Class Members, Money Mart will pay the amount from and after July 15, 2011, on the following terms: (a) Money Mart will hold 1% of the amount available for distribution as Cash Credits in the Cash Reserve Fund to pay any awards relating to Cash Credits made by the Referee; (b) Cash Credits are neither transferable nor assignable and will expire on the Expiration Date; (c) Cash Credits will be paid only to Credit Class Members; and (d) 10% of the amount of each Cash Credit will be paid to the Class Proceedings Fund.
- A member of the Transaction Credit Group may determine the Cash Credit to which he or she is entitled by: (a) calling a toll-free number established and maintained by Money Mart; (b) accessing a secure internet website created and maintained by Money Mart; or (c) attending at any Money Mart Store.
- A member of the Transaction Credit Group may obtain payment of his or her Cash Credit: (a) if the Cash Credit is \$200 or less by attending at any Money Mart Store or by calling a toll-free number established and maintained by Money Mart to have a cheque mailed in the amount of the Cash Credit to him or her and Money Mart agrees to cash the cheque at any Money Mart Store without charge; or (b) if the Cash Credit is more than \$200, by calling a toll-free number established and maintained by Money Mart to have a cheque in the amount of the Cash Credit mailed to him or her and Money Mart agrees to cash the cheque at any Money Mart Store without charge.
- Any cash that is not paid to members of the Transaction Credit group by the Expiration Date and any interest accruing on the cash component of the settlement will be paid *cy près* to the Access to Justice Fund of the Law Foundation of Ontario.

- **Administration:** Money Mart will pay the cost of disseminating notices and administering the settlement through its computer system, which has an attributed value of around \$2 million.
- Money Mart will: (a) administer the Settlement under the oversight of the court and Class Counsel Representative; (b) maintain reasonably detailed records of its activities, until one year after the court order that all Settlement Obligations are satisfied, which will be made available to the Class Counsel Representative, the court and the Auditor; and (c) provide Class Counsel Representative, the Auditor and the Referee with access to the Cash Credits Database, the Transaction Credits Database, the Debt Release Database, the Unused Credits Database, the master database, the Transaction Reserve Fund and the Cash Reserve Fund as required.
- The Referee will resolve any dispute regarding entitlement to Debt Release, Cash Credits, Transaction Credits, or Unused Credits, or regarding the amount of or receipt of an allocated share of any such credit which cannot be resolved by Money Mart within 30 days of receiving notice of the dispute.
- The Auditor will deliver to the court, to Money Mart and to Class Counsel Representative, reports on Money Mart's compliance with its obligations with respect to: (a) Debt Release, Transaction Credits, Cash Credits, Unused Credits and payments to the CPF; and (b) accrued interest and the payments to the Law Foundation.
- Money Mart will pay the reasonable fees, disbursements and taxes of Class Counsel Representative, the Referee and the Auditor, which will be fixed by the court.

Rationale, Evaluation and Approval of the Proposed Settlement

[91] The Plaintiffs, Class Counsel, and the counsel representing the Class Counsel for the purposes of seeking approval of the Class Counsel's fee, all submit that the settlement agreement that I have just highlighted is an excellent result and one creatively structured around the practical realities that a settlement infused with more immediate cash would trigger the Defendants' demise and leave the class with no benefit from the settlement.

[92] That the settlement is excellent may be true for the Defendants, but I think class member Guy Laporte was right in expressing disappointment about the settlement.

[93] Mr. Laporte correctly points out that those Class Members who have no indebtedness for Money Mart to forgive, receive only vouchers and thus, if they are to get any benefit from this settlement, it is by entering into more payday loans with Money Mart.

[94] Assuming, as is being proposed, that Class Counsel's fee takes up all the cash portion of this settlement, then the Class Members who have repaid their loans to Money Mart will get no repayment of the allegedly illegal fees, which repayment was the rallying point for the class action campaign against Money Mart in the first place.

[95] A better version of the settlement and the one that I am approving is that Class Counsel's fee does not take up all the cash portion of the settlement and there is some repayment to the members of the Transaction Credit Group.

[96] The transaction credits that members of the Transaction Credit Group will receive can be characterized as a business promotion scheme under which Money Mart discounts its price and makes less profit from a profitable transaction, but Money Mart obtains business it would otherwise not have obtained. In lauding the virtues of the settlement, the Plaintiffs and Class Counsel extol the fact that it is anticipated that Money Mart's competitors are likely to honour the transaction credits. This just demonstrates that the transaction credits are a business promotion for more payday loans. It is hard to paint this as a success for the mission of this class proceeding.

[97] From Money Mart's perspective, the value of this settlement is certainly not \$120 million, which is the value that the Plaintiffs and Class Counsel would attribute to the settlement. The \$30.5 million payment of cash is a real cost to Money Mart, but releasing bad debts that have already been written off and that may in any event have been uneconomic to recover (given their small value and the expense of collection) is not to incur any financial hardship from the settlement. Rather, it is a normal cost and risk of Money Mart's small loans business. The \$2 million administrative cost of the settlement can be regarded as a cost associated with a new business promotion scheme to increase transactions.

[98] It was interesting and informative to note that, unlike most settlement approval and certification motions, there was not a peep about behaviour modification, and there was little about access to justice in the Plaintiffs' motion material. Mr. Laporte's message indicates that he does not feel that the class obtained access to justice.

[99] And it would seem that there is no behaviour modification in this class action. Under the new regulations for payday loans, Money Mart may continue its business more or less as it has done in the past. I express no view whatsoever about the propriety or social value of Money Mart's payday loan business, but for the members of the Transaction Credit group, if they are to obtain a benefit under this settlement it is by abandoning the original purposes of this class action, which was to enjoin, not encourage, payday loans pricing policies. Once again, it is hard to paint this as a success for the mission of this class proceeding.

[100] What then is the value of this settlement to the class and should it be approved as in the best interests of the class members?

[101] I accept that for 103,282 members of the Debt Forgiveness Group, the release of \$56,388,071 in indebtedness is a real value, although practically speaking, the value is not symmetrical with any new corresponding expense to Money Mart, because, as already noted, Money Mart has already written off this indebtedness. However, as a matter of law, to forgive a debt is to provide something of value, and thus, this element of the settlement should be regarded as worthy or worthwhile.

[102] Class Counsel also suggested that the release of this indebtedness had value because it would remove blemishes on the credit ratings of members of the Debt Forgiveness Group. With

respect, I rather suspect that if a member of the Debt Forgiveness Group has a credit rating problem, it likely goes beyond indebtedness to Money Mart.

[103] I also accept that the \$30.5 million in cash is value in the settlement, but this sum probably should be present-valued because it is being paid in installments over approximately two and a half years and there is no interest until the payments are due and there is no interest on the pro-rata cash payments to members of the Transaction Credit Group.

[104] A good aspect of the settlement that I will be approving is that some of the cash value will be received by members of the Transaction Credit Group. As I have already foreshadowed, because I am approving a Class Counsel fee of \$14.5 million (and not \$27.5 million), members of the Transaction Credit Group will receive \$11.7 million (90% of \$13 million) and the Class Proceedings Fund will receive \$4.3 million. This distribution responds to Mr. Laporte's objections to the proposed settlement, and this distribution provides more benefit to the class members who are not members of the Debt Forgiveness Group.

[105] While it is a good thing that there is no reversion to Money Mart, I do not regard the transaction credits as being a benefit equal to their face value. The credits will benefit some members of the Transaction Credit Group, but I am skeptical that there will be much of a take up and, in my opinion, the more likely beneficiaries will be future Money Mart customers who are to receive the value of the unused credits in a manner to be fixed by the court taking into consideration commercial reasonableness and competitive circumstances. Given that there will be millions of transactions, the pro-rated amount of the individual benefit to future customers, however, will probably be miniscule and once again this benefit is essentially a business promotion scheme for Money Mart.

[106] The proposed settlement has the usual advantages of any settlement. It provides some reasonable recovery, and it avoids the risk of the adverse costs consequences of failure at trial.

[107] It is not for me to say anything about the merits of this class action, especially given that the trial has been adjourned, but I can say that the outcome of any litigation about the criminal interest provisions of the *Criminal Code* is uncertain and many judgments are appealed including appeals to the Supreme Court of Canada. In contrast to the uncertainties and the duration of litigation, the proposed settlement brings some recovery to class members and some recovery soon.

[108] I, therefore, conclude that the factors of likelihood of recovery or likelihood of success, the amount and nature of discovery, evidence or investigation that has occurred to date, and future expense and likely duration of litigation favour approving the proposed settlement.

[109] I have already mentioned Mr. Iacobucci's comments, and his neutral recommendation commands great respect and favours approving the settlement. In the case at bar, there is also the recommendation and experience of counsel, who are among the most experienced and respected members of the class action bar, and I have no doubt that Class Counsel did the best that they could in negotiating benefits for the class.

[110] The nature of the hard and prolonged bargaining that led to the settlement agreement favour its approval.

[111] There is also some merit to Class Counsel's submission that the proposed settlement of some monetary and some non-monetary benefits is better than what would be a Pyrrhic victory of a \$220 million judgment if the adjourned trial was successfully completed. The weakness I see in this submission is that notwithstanding Class Counsel's dreams of buying an equity interest in a reorganized Money Mart that have vanished in the current economy, it seems to me that the problem that a substantial judgment would bankrupt the Defendants and leave the class with a dry judgment was a problem that existed from the outset of the proposed class action and succumbing to this reality does not prove that the current settlement proposal is an excellent result.

[112] Overall, I conclude that although the outcome is not excellent for the class, the proposed settlement does have tangible and real benefits to all class members and is reasonable and in their best interests.

[113] In the result, I conclude that with Class Counsel's fee approved at \$14.5 million all inclusive, the proposed settlement of this class action should be and is approved in accordance with the provisions of the *Class Proceedings Act, 1992*.

Fee Approval

[114] I turn now to the matter of the counsel fee for the authorized members of the Class Counsel group. Class Counsel says the value of the settlement is \$120 million, which is important because under the terms of the contingency fee agreement, they are entitled to at least 30% of the value of the settlement. Further, they submit that if they were paid in accordance with the contingent fee agreement, described above, they would be entitled to a \$40 million counsel fee [(\$10 million fee + \$130,000 disbursements) times four]. They are seeking only \$27.5 million.

[115] Mr. Oriet and Mr. Smith believe that the counsel fee of \$27.5 million is fair and reasonable. I disagree, and I reject the argument of Class Counsel that given the risks they took on and the excellent result achieved, it is "necessary" to award them \$27.5 million.

[116] I begin my explanation for these conclusions, by saying that for the reasons I have already expressed, I do not regard the settlement as excellent and I do not value it as worth \$120 million to the members of the class.

[117] Everybody agrees that as a measure of value "cash is king," and I would have thought it obvious that the settlement in the case at bar, which involves cash, coupons, and releases, is not worth \$120 million, but Class Counsel were adamant that the settlement had the same value as a settlement of \$120 million cash. That the settlement, however, is not worth \$120 million for the purposes of a contingency fee agreement can be demonstrated by contrasting the client's ability to pay a \$40 million contingency fee when there is a recovery of \$120 cash and the client's ability to pay a \$40 million contingency fee when the recovery is \$30 million cash, \$58 million in debt forgiveness, \$30 million in transaction credits from Money Mart, and \$2 million in expenses incurred by the defendants.

[118] In the first case, to pay the lawyer, the client would pay \$40 million from the \$120 million in cash. In the second case, the client would pay \$40 million from cash and transaction

credits. However, transaction credits are not the same as cash because they buy only one thing, Money Mart products, and so, practically speaking, the client would not be able to pay the lawyer. Put differently, in the case at bar, Class Counsel would not likely accept an assignment of \$27.5 million of transaction credits as payment of their counsel fee. This demonstrates that the transaction credits cannot be valued as if they were cash for the purposes of the contingency fee agreement.

[119] In any event, given the nature of the benefits under the settlement in this case, I do not find an assessment of the value of the settlement particularly helpful in determining the fairness and reasonableness of the class counsel fee. For the reasons that I have already expressed, the settlement in this case is in the best interests of the class as a whole but it is not an excellent result for the class in terms of the access to justice and behavior modification that was actually sought by the class.

[120] I turn from success achieved by the settlement to the other factors relevant to assessing the reasonableness of class counsel's fee. These factors were set out earlier in these Reasons for Decision. Of these, I conclude that the class action at bar dealt with matters at the high end of factual and legal complexity and that the class action had substantial monetary value and was important to the class, and from my own observation, I know that Class Counsel (and the Defendants' lawyers) performed with competence and admirable skill.

[121] With respect to the factor of the class's ability to pay, the settlement has been structured in a way that the class is able to pay Class Counsel's fee, but that is the self-serving design of Class Counsel, and as I have already explained, the class would not have been able to pay the contingency fee if Class Counsel had been able to enforce the contingency fee agreement based on its own self-serving evaluation of the value of the settlement.

[122] With respect, I give no weight to the opinion of the representative plaintiffs that a \$27 million counsel fee would be fair and reasonable. I commend them for their loyalty to Class Counsel, but the outcome achieved by Class Counsel was a disappointment to the class, and while the settlement was satisfactory, it was not, as submitted, an excellent result, but rather one that was primarily motivated so as to avoid a financially empty judgment rather than achieving access to justice and behaviour modification.

[123] I accept that Class Counsel took on a high risk when they took on this class action, and I accept that taking on risk should be rewarded.

[124] Recognizing risk as a factor relevant to determining the fairness and reasonableness of Class Counsel's fee provides an incentive to Class Counsel to encourage them to be a vehicle for access to justice for the class and behavior modification for society. That said, risk is only one factor connected to other factors, and it is a difficult factor from which to extrapolate a monetary award, because all litigation has risk, and every case raises the question of whether litigating would be worth the risk. In addition to being idiosyncratic, the evaluation of risk is also problematic because risk changes as social and legal conditions change. For instance, without speaking about the case at bar, there are many areas of mass wrongs where the risk of a proposed class proceeding not being certified is arguably less than it used to be in the early days of the legislation.

[125] The acceptance of risk is not the paramount factor in the assessment of a reasonable fee or multiplier. In this regard, it is interesting to note that the Legislature did not enact a provision in the draft legislation approved by the Attorney General's Advisory Committee on Class Action Reform that provided that in fixing a multiplier, the court should only have regard to the risk incurred and the manner in which the solicitor conducted the proceedings. The acceptance of risk and the solicitor's performance are not privileged factors in the determination of a reasonable fee probably because the risk factor does not differentiate between a bad settlement and good one.

[126] Nevertheless, Class Counsel submit categorically that the fee in the case at bar must necessarily be \$27.5 million so that Class Counsel are provided with real incentives to take on the risk of class proceedings to thereby ensure that individual litigants with legitimate claims can have access to the courts. I accept that Class Counsel's compensation must be sufficient to provide a real economic incentive to lawyers to take on a class proceeding and to do it well, and I plan to give appropriate weight to this factor. I do not accept, however, that it is the role of the court in this particular case to determine class counsel's fees so as create incentives for lawyers to take on other class action cases and to ignore the other factors that are relevant to the determination of a reasonable fee.

[127] What then should be the amount of Class Counsel's fee? Recalling that disbursements totalling \$770,052.66 have already been paid, an all-inclusive award of \$14.5 million, which is a premium of \$3.5 million over Class Counsel's base fee of around \$10 million, in my opinion, is ample compensation and a reasonable fee.

[128] I think this result is fair even if I were to value the settlement as being worth \$120 million. With a \$120 million valuation for the settlement, a \$13.5 million counsel fee would equal a contingency fee of 11.25%, which is not out of line with the trend of awards in other cases. In *Fantl v. Transamerica Life Canada*, [2009] O.J. 4324 (S.C.J), I discussed the trend in awards and I noted that in "Rethinking the Approval of Class Counsel's Fees in Ontario Class Actions," (2007), *Canadian Class Action Review* 15, Professor Benjamin Alarie analyzed a sample of 27 reported Ontario class action decisions. His study revealed that as a percentage of the value of the settlement, Class Counsel's fee averaged 14.85% with a median of 14.73%. Professor Alarie's study revealed that Class Counsel's fees increase with the value of the settlement but not proportionately to the increase in the settlement amount. I recognize that a 11.25% recovery in the case at bar is below the average and the median of the sample of cases, but that does not make a \$14.5 million all inclusive counsel fee unreasonable or unfair in the case at bar.

[129] In the case at bar, the award for Class Counsel for the risk they took is that they will receive \$10 million at their not bargain-basement hourly rates plus a premium of \$3.5 million. Despite the argument of counsel for Class Counsel, I see no necessity to award more having regard to the success achieved and the risk taken and having regard to the other factors that the court should consider when setting a reasonable counsel fee in the context of class proceedings. Having regard to all the factors, an all-inclusive award of \$14.5 million is a reasonable fee in the circumstances of this case.

Conclusion

[130] Accordingly, I order that the class definition be amended and that the action be certified as a class proceeding for the new members of the class. In accordance with the *Class Proceedings Act, 1992*, I approve the settlement and I approve a counsel fee as described above.

[131] I order that Mr. Oriet be paid \$3,000 out of Class Counsel's fee.

[132] I appoint John P. Brown to receive requests for exclusions and that he report the names of persons, if any, who opt-out of the action.

[133] I appoint Reva Devins as referee.

[134] I appoint Patricia Speight as Class Counsel representative.

[135] I appoint Grant Thornton LLP as auditor.

[136] I order that notice be given to class members about the settlement approval and that new class members and non-resident class members shall be given notice of their right to opt-out.

[137] I order that the notice program described in the draft order filed with the court satisfies the requirements of s. 17 (3) to 17 (6) of the *Class Proceedings Act, 1992*.

[138] I order that the approval order is binding upon each class member, including those persons who are minors or mentally incapable, and that the requirements of rules 7.04(1) and 7.08 (4) of the *Rules of Civil Procedure* are dispensed with.

[139] I order that the new class members and non-resident class members may opt-out of this action and the settlement within the opt-out period by delivering a request for exclusion.

[140] I order that any person who opts-out is excluded from the settlement and shall receive no benefits under the settlement agreement.

[141] I order that the approval order contain releases and a post-approval event provision as set out in the draft order filed with the court.

[142] Order accordingly.

Perell, J.

Released: March 3, 2010

CITATION: Smith v. National Money Mart, 2010 ONSC 1334
COURT FILE NO.: CV-08-363659-00CP
DATE: March 3, 2010

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**Kenneth Smith, as as Estate Trustee of
the Last Will and Testament of Margaret
Smith, deceased, and Ronald Adrien
Oriet**

Plaintiffs

- and -

**National Money Mart Company and
Dollar Financial Group, Inc.**

Defendants

REASONS FOR DECISION

Perell, J.

Released: March 3, 2010