Sample moving party's factum (motion)

Court file no. 31538

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

DOLLAR FINANCIAL GROUP, INC.

Applicant
(Appellant/Defendant)

– and –

MARGARET SMITH

Respondent
(Respondent/Plaintiff)

MARGARET SMITH'S MOTION TO EXPEDITE CONSIDERATION OF DOLLAR FINANCIAL GROUP, INC.'s APPLICATION FOR LEAVE TO APPEAL

(Application for leave to appeal under s. 40(1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26 Memorandum filed under Rule 47 of the *Supreme Court Rules*, SOR 2002-156)

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MEMORANDUM OF THE RESPONDENT, MARGARET SMITH

PART I – STATEMENT OF FACTS

1. Margaret Smith seeks an order expediting this Court's consideration of the application for leave to appeal.

2. Although the motion for certification in this proposed class proceeding has not yet even been heard, this is the second application brought to this Court by Dollar Financial Group Inc. ("Dollar Financial") and National Money Mart Company ("Money Mart"). In fact, the very existence of this second application for leave to appeal is now being relied upon by Dollar Financial and Money Mart as a reason to delay further the motion for certification, a motion that has now been pending for two-and-a-half years. Meanwhile, Dollar Financial and Money Mart continue to exact illegal interest amounts from borrowers. In order to prevent further delay and predation of borrowers, Margaret Smith asks this Court to expedite its determination of the application for leave to appeal.

A. The Nature of this Proceeding

3. The central issue in this proposed class action is whether Dollar Financial and Money Mart charge an effective annual rate of interest of over sixty per cent in breach of s. 347 of the *Criminal Code* on the loan transactions described in paragraphs 3-6 of Margaret Smith's memorandum responding to the application for leave to appeal.

4. In this proposed class action, Margaret Smith seeks a declaration that the loan transactions at issue in this action violate s. 347 of the *Criminal Code* and an injunction prohibiting Money Mart, Dollar Financial and the franchisees from continued violations of the law. They also seek damages against Money Mart and Dollar Financial for conspiracy.

B. Delays by Money Mart and Dollar Financial

5. On March 1, 2004, Ms. Smith, then the sole plaintiff, served her motion record seeking certification of this action as a class proceeding. Two months later, on May 3, 2004, Dollar Financial served a motion record in the Ontario Superior Court challenging the jurisdiction of the Ontario court and seeking a stay of this action on the grounds of an arbitration clause in some of the contracts.

Affidavit of Jasminka Kalajdzic, paras. 7-8

6. Those motions have delayed the certification motion. Money Mart and Dollar Financial have availed themselves of every possible appeal route. The present application for leave to appeal represents the second time that this matter has reached the Supreme Court of Canada.

Affidavit of Jasminka Kalajdzic, paras. 9-14

7. The certification motion is currently scheduled to be heard during the week of October 23, 2006, some two and a half years since the motion was brought.

C. Money Mart and Dollar Financial lie in the weeds

8. On April 6, 2006, at a case conference attended by counsel for Dollar Financial and Money Mart, the Honourable Justice Hoy scheduled the certification motion for the week of October 16, 2006. On April 12, 2006, the certification motion was rescheduled for the week of October 23, 2006 on consent. Counsel for Dollar Financial did not ask Justice Hoy to consider incorporating into this schedule the potential for an application for leave to appeal to the Supreme Court of Canada. He let the certification motion be scheduled.

Affidavit of Jasminka Kalajdzic, para. 17

Exhibit "A" to the Affidavit of Jasminka Kalajdzic: the April 12, 2006 order

D. Dollar Financial tries to delay the certification motion and fails

9. On May 8, 2006, the Court of Appeal for Ontario dismissed Dollar Financial's appeal on the jurisdictional issue.

Affidavit of Jasminka Kalajdzic, para. 16

10. At a case conference on June 23, 2006, Dollar Financial sought to adjourn the certification motion until after the Supreme Court of Canada disposed of Dollar Financial's application for leave to appeal (which it had not yet filed) and its appeal, if leave to appeal is granted. Justice Hoy refused to adjourn the certification motion.

Affidavit of Jasminka Kalajdzic, para. 17

Exhibit "A" to the Affidavit of Jasminka Kalajdzic: Dollar Financial's memorandum

Exhibit "B" to the Affidavit of Jasminka Kalajdzic: minutes of the attendance before Justice Hoy

11. Taking 65 days to file its application for leave to appeal – rather than the normal maximum of 60 days – Dollar Financial served its application for leave to appeal to this Court on July 11, 2006.

Affidavit of Jasminka Kalajdzic, para. 18

E. Dollar Financial again tries to delay the certification motion

12. On July 13, 2006, Dollar Financial brought a motion to a single judge of the Court of Appeal for Ontario seeking an order "staying the proceedings in respect of the order of the Court of Appeal for Ontario dated May 8, 2006 and staying this proceeding including all pending motions until the decision of the Supreme Court of Canada in respect of Dollar Financial's application for leave to appeal in this action is released." This motion has not yet been decided.

Affidavit of Jasminka Kalajdzic, para. 19

F. Dollar Financial refuses to consent to this motion to expedite

13. Counsel for Dollar Financial declined to consent to an order to expedite the application for leave to appeal but advised that he would not object to it. Why Dollar Financial would decline to consent to this motion is unknown. It is open to this Court to draw an inference that Dollar Financial does not have any grounds to oppose expedition but does not want to do anything that would speed up the determination of the application for leave to appeal – in the hope of maximizing its chances on the motion to stay the progress of the proceeding in the Ontario courts.

Affidavit of Jasminka Kalajdzic, para. 20

Exhibit "D" to the Affidavit of Jasminka Kalajdzic: e-mail dated July 19, 2006

G. Delay benefits Money Mart and Dollar Financial

14. During the two-and-a-half year period that Money Mart and Dollar Financial have taken all of the steps described above, Money Mart has received significant revenue generated by what the plaintiffs assert is the product of usurious and illegal conduct. In fiscal 2005, Money Mart generated US$48,682,000 from all Fast Cash Advances in Canada. In addition, Dollar Financial has continued to receive royalty payments from Money Mart.

Affidavit of Jasminka Kalajdzic, para. 21

H. The consequences associated with the motion to expedite

15. If the motion to expedite this application for leave to appeal is not granted, the certification motion may be delayed (over the plaintiffs' objection), resulting in Money Mart and Dollar Financial enjoying more months of revenues which may be found to be illegal with consequent injury to the borrowers. Expediting the determination of this application for leave to appeal will ensure that the certification motion is heard during the week of October 23, 2006.

Affidavit of Jasminka Kalajdzic, para. 22

PART II – STATEMENT OF THE QUESTIONS IN ISSUE

16. Should the application for leave be expedited?

PART III – STATEMENT OF ARGUMENT

17. The application for leave to appeal should be expedited for the following reasons:

(a) From the facts set out above, particularly the conduct concerning the scheduling of the certification motion and later attempts to frustrate that schedule, it is open to you to draw the inference that Money Mart and Dollar Financial have been delaying the progress of the proceeding unnecessarily;

(b) This application for leave to appeal, the second so far in this proceeding, is being used as the foundation of a motion to delay the proceedings in the Ontario Superior Court even further;

(c) Failure to expedite might delay the progress of the proceedings in the Ontario Superior Court resulting in:

- perpetuation of illegal conduct;
- profiting from illegal conduct;
- continued injury being suffered by borrowers from the illegal conduct; and

(d) Money Mart and Dollar Financial are not opposing the granting of the relief sought because they do not have any grounds to oppose expedition. They decline to consent to the relief sought because they do not want to do anything that would speed up the determination of the application for leave to appeal – in the hope of maximizing their chances on the motion to stay the progress of the proceeding in the Ontario courts.

PART IV – SUBMISSIONS CONCERNING COSTS

18. Margaret Smith submits that the costs of the motion and the related application for leave to appeal be granted to her in any event of the cause.

PART V – ORDER SOUGHT

19. The Respondent (Respondent/Plaintiff), Margaret Smith, respectfully requests an order expediting this Court's consideration of the application for leave to appeal, with costs, in any event of the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Harvey T. Strosberg, Q.C.	David Stratas (of Heenan Blaikie LLP)

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