Court file no. 31233

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

BETWEEN:

NATIONAL MONEY MART COMPANY

Applicant
(Appellant/Defendant)

– and –

MARGARET SMITH

Respondent
(Respondent/Plaintiff)

RESPONSE OF THE RESPONDENT, MARGARET SMITH
(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 27 of the *Supreme Court Rules*, SOR 2002-156)

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MEMORANDUM OF THE RESPONDENT, MARGARET SMITH

PART I – STATEMENT OF FACTS

A. Introduction

1. The issues raised by Money Mart in its application for leave to appeal:

- are not the subject of conflicting appellate court decisions;
- have been conceded by Money Mart elsewhere to be either unmeritorious or not deserving of leave;
- are interlocutory;
- are premature;

- concern how a motions judge exercised her discretion – a decision which attracts considerable deference – rather than any fundamental issues of law;
- are based on the specific wording in Ontario's statutes and so this case is unique to Ontario;
- in light of a legislative amendment, are not even live in Ontario anymore;
- will have no real practical positive impact on the public or the parties; and
- will delay the progress of this proceeding, thereby allowing an illegal loan scheme to continue to damage cash-strapped Canadians for longer than it otherwise should.

This Court must dismiss Money Mart's application for leave to appeal.

B. Money Mart's scheme

2. Margaret Smith, 66, has only $1,100 a month to live on. Four times she borrowed from National Money Mart Company ("Money Mart") for basic needs, such as buying groceries for her unemployed son. The *Criminal Code*, R.S.C. 1985, c. C-46, s. 347, prescribes 60% as the maximum rate of interest. But Money Mart charged Margaret more – much more.

3. Here is how that happened. Money Mart's scheme, as disclosed by the lending contracts that Margaret Smith signed and as disclosed on cross-examination, is to lend small amounts of money to what it calls "asset limited income constrained" people on an interest rate stated to be 59% (along with a 2.99% "cheque cashing fee" and a $14.99 "item fee"), with the due date for the loan being the day before the borrower receives his or her next cheque, be it salary, welfare or, in Margaret's case, Canada Pension Plan payment. A day after the due date,

when the borrower's cheque arrives, he or she is "late" and is suddenly liable for all the charges. These charges all form part of the "effective interest rate" under s. 347 of the *Criminal Code*. In Margaret Smith's case, the lowest "effective interest rate" on her loans was 329%. The highest was 578%.

> Transcript of the cross-examination of Patti Smith, p. 64, QQ. 267-274; *Respondent's Record*, Tab B, p. 31.
>
> Fresh Statement of Claim, *Respondent's Record*, Tab B, p. 38-39.

4. Money Mart deployed this scheme against thousands of people, like Margaret Smith, who borrowed small amounts of money under the scheme and who had nowhere else to go. These thousands, each of whom paid Money Mart monies over and above the legal amounts allowed by s. 347 of the *Criminal Code*, constitute the potential class in this class proceeding.

5. The illegal amounts extracted by Money Mart in each individual transaction involving each individual borrower are relatively small, but taken together they run into the hundreds of millions of dollars for Money Mart. These are hundreds of millions of dollars that, although illegally obtained, Money Mart is presently able to keep: no one individual borrower would ever think of retaining a lawyer and paying legal fees and the cost of an actuary to try to recover the small amounts. The *Class Proceedings Act, 1992*, S.O. 1992, c. 6, however, is a problem for Money Mart. It allows for class actions in appropriate circumstances to allow these small borrowers to combine and recover the amounts illegally extracted from them.

C. Money Mart's other scheme

6. To avoid that consequence, Money Mart developed another scheme, a scheme designed to avoid the *Class Proceedings Act, 1992*. The motions judge in this case found as a fact that Money Mart intended to avoid the *Class Proceedings Act, 1992*. The Court of Appeal reaffirmed that fact. Money Mart's scheme was to insert into a number of borrowing contracts certain language designed to prevent borrowers from agreeing to become a representative

plaintiff in any class proceedings litigation or to participate in class actions litigation and requiring borrowers to submit to mediation, failing which their disputes would be arbitrated, not litigated. This scheme, if upheld by the courts, would advance Money Mart's interests perfectly: the dispute would avoid the *Class Proceedings Act, 1992* and, in the event of an adverse ruling by an arbitrator, that ruling would affect only that individual case, not all cases.

> Motions judgment, paras. 18 and 19 (the relevant provisions of the borrowing agreement)
>
> Motions judgment, para. 24: "I see the arbitration provisions of the agreements with Money Mart as an attempt on the part of Money Mart to immunize itself from the *Class Proceedings Act* and more generally the jurisdiction of the Superior Court."

7. Money Mart brought a motion under s. 7 of Ontario's *Arbitration Act, 1991*, S.O. 1991, c. 17 to stay Margaret Smith's class proceeding and force her to proceed to mediation and arbitration. The motions judge dismissed Money Mart's motion. The Court of Appeal quashed Money Mart's attempt to appeal that ruling on the basis of s. 7(6) of the *Arbitration Act, 1991* which forbids any appeal from a ruling under s. 7 of the *Arbitration Act, 1991* and also on the basis that the order was interlocutory, not final.

> Reasons of the Motions Judge; *Leave Application*, pp. 19-30
>
> The Decision of the Court of Appeal; *Leave Application*, pp. 35-39

8. In the course of its reasons, the Court of Appeal correctly described what the motions judge had decided:

> [4] In detailed and comprehensive reasons, the motions judge exercised her discretion to refuse to stay the proceedings pursuant to s. 7(2) of the *Arbitration Act* and dismissed the motion. She held that the broad wording of Money Mart's arbitration clause was an attempt to immunize itself from the *Class Proceedings Act* and more generally the jurisdiction of the Superior Court. Under the *Class Proceedings Act*, only a justice of the Superior Court has jurisdiction over class proceedings and arbitrators cannot assume jurisdiction.
>
> [5] She further held that the appropriate time at which to determine whether the matter should be arbitrated or litigated was at the certification motion when the court decides whether proceeding under s. 5 of the *Class Proceedings Act* is the preferable procedure.
>
> [6] In her reasons, the motions judge noted that Smith is seeking a declaration that the interest rate charged by Money Mart exceeds the maximum permitted by s. 347 of the *Criminal Code* and referred to jurisprudence holding that she could not be prohibited from pursuing her right to obtain such a declaration on the ground of public policy.
>
> The Decision of the Court of Appeal; *Leave Application*, p. 36

9. The Court of Appeal agreed with the motions judge, finding that "a final determination has yet to be made as to whether or not the claims of Smith and others will be arbitrated" and that "the legality of the arbitration provision should be determined at the certification hearing and that it is premature to attempt to stay the action beforehand". Money Mart's scheme to avoid accountability under the *Class Proceedings Act, 1992* was frustrated. Money Mart now seeks the assistance of this Court by applying for leave to appeal.

The Decision of the Court of Appeal, para. 13; *Leave Application*, p. 37

PART II – STATEMENT OF THE QUESTIONS IN ISSUE

10. Should leave be granted?

PART III – STATEMENT OF ARGUMENT

A. There are no conflicting appellate decisions

11. There are only two decisions of provincial appellate courts on the issue of the enforceability of arbitration clauses designed to oust class proceedings legislation: *MacKinnon v. National Money Mart Co.* (2004), 50 B.L.R. (3d) 291 (C.A.), which Money Mart identifies, and the decision of the Court of Appeal in this case. Money Mart has not shown any inconsistency between the two decisions, the Court of Appeal did not see any inconsistency between them (see para. 14 of its decision; *Leave Application*, p. 38) and there is none. This Court should grant leave only where the law is uncertain, where there is fundamental disagreement in the jurisprudence.

B. Money Mart's concession

12. Money Mart and the other defendants withdrew their application for leave to appeal from the decision of the British Columbia Court of Appeal in *MacKinnon v. National Money Mart Co.* (2004), 50 B.L.R. (3d) 291 (C.A.). It obviously concluded that the decision of that Court on the issue of the enforceability of arbitration clauses designed to oust class proceedings legislation was either correct or that the issue was not of sufficient public importance to warrant an application to this Court for leave to appeal. The same is true in the case at bar.

C. What is in issue is an exercise of discretion (*i.e.*, a question of mixed fact and law on which deference is owed) on an interlocutory issue

13. Money Mart seems to suggest that the motions judge was legally obligated to stay Margaret Smith's proceeding and send the matter to mediation and arbitration. This is not the case. Whether or not a motions judge should stay a court proceeding is a discretionary matter under ss. 7(2) of the *Arbitration Act, 1991*, which specifies several reasons why a stay might be refused. One reason is the illegality of the loan agreements. In light of *Transport North American Express Inc. v. New Solutions Financial Corp.*, [2004] 1 S.C.R. 249 the legality of the loan agreement, including the arbitration clause, is a live issue here. Another reason is the fact that whether a class proceeding should proceed is not a subject matter on which an arbitrator can adjudicate. As both the motions judge and the Court of Appeal noted, only Superior Court justices have jurisdiction over class proceedings under the *Class Proceedings Act, 1992*.

The Decision of the Court of Appeal for Ontario, para. 4; *Leave Application*, p. 36
Reasons of the Motions Judge, para. 27; *Leave Application*, p. 28

14. Discretionary decisions, decisions on questions of mixed fact and law, are owed deference. The motions judge refused to grant a stay at this time relying on several facts, including Money Mart's intention to avoid the application of the *Class Proceedings Act, 1992*. The motions judge also relied on other factors under s. 7(2) of the *Arbitration Act, 1991* that

support her exercise of discretion, such as the fact that the validity of the borrowing agreements was in issue on account of the breach of s. 347 of the *Criminal Code*. All of these considerations are proper considerations under s. 7 of the *Arbitration Act, 1991*. There is no ground for interference with the motions judge's discretion and thus there is no live issue for this Court to consider.

Housen v. Nikolaisen, [2002] 2 S.C.R. 235
H.L. v. Canada (Attorney General), [2005] 1 S.C.R. 401

D. The issue on which leave is sought is premature

15. The motions judge exercised her discretion under s. 7 of the *Arbitration Act, 1991* by refusing to grant a stay *at this time*. She has not conclusively rejected Money Mart's request that the matter be arbitrated. She has not conclusively accepted Margaret Smith's request that it proceed as a class action. Instead, she has appropriately delayed consideration of that discretionary decision until the motion for certification. The motions judge on the certification motion is bound to consider whether the route of mediation and arbitration, proposed by Money Mart, is a "preferable procedure for the resolution of the common issues" within the meaning of s. 5(1)(d) of the *Class Proceedings Act, 1992*. If she agrees, Margaret Smith's court proceeding will be stayed and the dispute will proceed to arbitration and mediation at that time. Hence, the issue raised by Money Mart is premature. This Court should not grant leave to appeal in a case involving a premature issue.

E. The Ontario Courts correctly interpreted the interrelationship between the Ontario statutes

16. There are two competing arguments regarding how the *Arbitration Act, 1991* and the later *Class Proceedings Act, 1992*, interrelate:

- *Money Mart's argument.* There is a discretionary test for a stay of a court proceeding under s. 7 of the *Arbitration Act, 1991*. There is a discretionary test for certification of a class proceeding under s. 5 of the *Class Proceedings Act, 1992* which includes under s. 5(1)(d) a consideration of whether "a class proceeding would be the preferable procedure for the resolution of the common issues". In Money Mart's view, the courts never get to the discretionary test for certification of a class proceeding because the matter must (despite the discretionary nature of the stay under s. 7 of the *Arbitration Act, 1991*) go to arbitration. As a result, in Money Mart's view, the *Arbitration Act, 1991* "trumps" the *Class Proceedings Act, 1992*. This happens even though the *Class Proceedings Act, 1992* was passed after *Arbitration Act, 1991*: somehow, on Money Mart's view of things, the Legislature was not thinking of arbitrations when it used the phrase "preferable procedure for the resolution of the common issues" in s. 5(1)(d) of the *Class Proceedings Act, 1992*. The public policy in the *Class Proceedings Act, 1992* – promotion of judicial economy, improved access to justice and behaviour modification of potential or actual wrongdoers – is always trumped.

- *Margaret Smith's argument.* There is a discretionary test for a stay of a court proceeding under s. 7 of the *Arbitration Act, 1991*. There is a discretionary test for certification of a class proceeding under s. 5 of the *Class Proceedings Act, 1992* which includes under s. 5(1)(d) a consideration of whether a class proceeding is the "preferable procedure for the resolution of the common issues". The Legislature passed the *Class Proceedings Act, 1992*, and its requirement that a certification judge consider which is the "preferable procedure" after it passed the *Arbitration Act, 1991* which grants to a judge the discretion to stay a proceeding in favour of an arbitration. In the *Class Proceedings Act, 1992*, the Legislature did not oust the possibility that a dispute might be arbitrated – arbitration might be a "preferable procedure". Nor did it set out a rule (which Money Mart would like to see) that prohibits class proceedings from being

certified whenever there is an arbitration clause. Instead, in s. 5(1)(d) it vested a judge hearing a certification motion with the discretion to decide which is the preferable procedure: a series of individual arbitrations or a class proceeding. On this view of the interrelationship of the statutes, the judge hearing the certification motion is able to consider the public policies behind both the *Arbitration Act, 1991* and the *Class Proceedings Act, 1992* and assess how they apply on the facts of a particular case. Sometimes a series of arbitrations will be ordered; sometimes, a class proceeding will be certified. Neither statute trumps the other, and in the end, the judge will allow whichever is the "preferable procedure" on the facts to go forward.

17. The courts below have agreed with Margaret Smith's argument. The British Columbia Court of Appeal in *MacKinnon v. National Money Mart Co.* (2004), 50 B.L.R. (3d) 291 (C.A.), while considering different statutory language, has also largely agreed with Margaret Smith's argument. There are no conflicting appellate cases on point.

F. The granting of leave to appeal in this case has no substantive legal consequences for the public or the parties

(a) The public

18. Ontario has enacted new legislation to make it clear that Money Mart's view of the interrelationship of the *Class Proceedings Act, 1992* and the *Arbitration Act, 1991* is definitely not the public policy or the law in Ontario. The scheme followed by Money Mart – to have borrowers sign contracts of adhesion that purport to oust the *Class Proceedings Act, 1992* – has been specifically forbidden. This case is the last of its kind in Ontario.

Consumer Protection Act, 2002, S.O. 2002, c. 30, Sch. A, s. 7

19. By amending the Act, Ontario has made it clear what the public policy of Ontario is. Attempts to oust the *Class Proceedings Act, 1992* in consumer contracts, such as Money

Mart's attempt in this case, are not to be countenanced. The granting of leave in this case would run counter to that public policy. The Court of Appeal, referring specifically to the new legislation, refused to countenance Money Mart's attempt. Neither should this Court.

Consumer Protection Act, 2002, S.O. 2002, c. 30, Sch. A, ss. 7-8

(b) The parties

20. If leave is granted and Money Mart is correct, then this Court will have to remit the matter back to the motions judge for redetermination under s. 7 of the *Arbitration Act, 1991* or this Court itself will have to engage in a reweighing of the factors under s. 7 of the *Arbitration Act, 1991*. Those factors point toward the stay being denied and the court proceeding continuing. In particular, as the Court of Appeal noted (at paragraph 15 of its reasons for decision), s. 7(2) of the *Arbitration Act, 1991* permits a judge to refuse a stay of a court proceeding if the judge finds that the agreement in which the arbitration clause was invalid. Further, the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sch. A, ss. 7-8, expresses a public policy against clauses in agreements that purport to oust the *Class Proceedings Act, 1992*. In the end result, all that will have happened is over a year of delay and all the expense of proceedings in this Court, with no substantive legal effect.

Transport North American Express Inc. v. New Solutions Financial Corp., [2004] 1 S.C.R. 249 (invalidity of agreements that charge illegal interest rates; in some circumstances, agreements are void *ab initio* in their entirety)

G. However, the granting of leave does have damaging consequences

21. The granting of leave has two damaging consequences:

- In this proceeding, Margaret Smith seeks more than just damages. She seeks a permanent injunction stopping Money Mart from charging illegal rates of interest. In short, she seeks to end the sort of predation and exploitation associated with the

scheme described in paragraph 3, above. Right now, that scheme continues, trapping many more cash-strapped people into paying illegal interest amounts. Delay means no injunction. No injunction means more victims of illegality.

- As the decision of the motions judge states, Money Mart remits a sizeable portion of its profits earned from the scheme to a related company in the United States. Money Mart says that the Ontario courts do not have jurisdiction over those companies. The motions judge rejected Money Mart's arguments on jurisdiction but Money Mart has appealed this issue to the Court of Appeal. If Money Mart is correct on the issue of jurisdiction, and if Margaret Smith ends up winning her proceeding and getting damages and her injunction, then on Money Mart's view of things the delay means more money will go to the United States beyond the jurisdiction of the Ontario courts.

  On December 2, 2005, the parties argued in the Court of Appeal for Ontario the appeal from the motions judge's reasons on the jurisdictional issue (*Smith v. Dollar Financial Group Inc.*, Court of Appeal for Ontario, court file no. C43768, judgment reserved)

22. Delay is in Money Mart's interest and it has acted to further that interest: the certification motion has not even been heard yet, but Money Mart has already dragged Margaret Smith to the Court of Appeal twice, seeks leave in this case and will no doubt seek leave in the other case too. Margaret Smith asks this Court to expedite the consideration of this leave application and dismiss it as soon as possible.

Smith v. Dollar Financial Group Inc., Court of Appeal for Ontario, court file no. C43768, judgment reserved)

The Decision of the Court of Appeal for Ontario; *Leave Application*, pp. 35-39

PART IV – SUBMISSIONS CONCERNING COSTS

23. Margaret Smith submits that costs be granted on a substantial indemnity or solicitor client basis in any event of the cause. Class proceedings by poor persons against large financial institutions are expensive to prosecute and disincentives must be created against those who launch applications for leave to appeal such as this.

PART V – ORDER SOUGHT

24. The Respondent (Respondent/Plaintiff), Margaret Smith, respectfully requests an order dismissing the application for leave to appeal, with costs on a substantial indemnity or solicitor and client basis in any event of the cause. In light of the submissions in paragraph 21, above, concerning the impact of delay, Margaret Smith requests that this application be considered on an expedited basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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PART VI – TABLE OF AUTHORITIES

Authority	Paras.
H.L. v. Canada (Attorney General), [2005] 1 S.C.R. 401	14
Housen v. Nikolaisen, [2002] 2 S.C.R. 235	14
MacKinnon v. National Money Mart Co. (2004), 50 B.L.R. (3d) 291 (C.A.)	11, 12, 17
Transport North American Express Inc. v. New Solutions Financial Corp., [2004] 1 S.C.R. 249	13, 20

PART VII – LEGISLATIVE PROVISIONS

***Criminal Code*, R.S.C. 1985, c. C-46**

Criminal interest rate

347. (1) Notwithstanding any Act of Parliament, every one who

(*a*) enters into an agreement or arrangement to receive interest at a criminal rate, or

(*b*) receives a payment or partial payment of interest at a criminal rate,

is guilty of

(*c*) an indictable offence and is liable to imprisonment for a term not exceeding five years, or

(*d*) an offence punishable on summary conviction and is liable to a fine not exceeding twenty-five thousand dollars or to imprisonment for a term not exceeding six months or to both.

(2) In this section,

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

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

***Code criminel*, L.R. 1985, ch. C-46**

Taux d'intérêt criminal

347. (1) Nonobstant toute autre loi fédérale, quiconque, selon le cas :

a) conclut une convention ou une entente pour percevoir des intérêts à un taux criminel;

b) perçoit, même partiellement, des intérêts à un taux criminel,

est coupable :

c) soit d'un acte criminel et passible d'un emprisonnement maximal de cinq ans;

d) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible d'une amende maximale de vingt-cinq mille dollars et d'un emprisonnement maximal de six mois, ou de l'une de ces peines.

(2) Les définitions qui suivent s'appliquent au présent article.

«capital prêté» L'ensemble des sommes d'argent et de la valeur pécuniaire globale de tous biens, services ou prestations effectivement prêtés ou qui doivent l'être dans le cadre d'une convention ou d'une entente, déduction faite, le cas échéant, du dépôt de garantie et des honoraires, agios, commissions, pénalités, indemnités et autres frais similaires résultant directement ou indirectement de la convention initiale ou de toute convention annexe.

«dépôt de garantie» La somme déterminée ou déterminable dont le dépôt ou le placement par l'emprunteur ou pour son compte est exigé

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

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

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

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

"required deposit balance" means a fixed or an ascertainable amount of the money actually advanced or to be advanced under an agreement or arrangement that is required, as a condition of the agreement or arrangement, to

comme une condition de la convention ou de l'entente de prêt, et destinée à revenir au prêteur en cas de défaillance de l'emprunteur.

«frais d'assurance» Le coût de l'assurance du risque assumé ou devant être assumé par le prêteur, assurance dont la garantie ne peut dépasser le capital prêté.

«frais pour découvert de compte» Les frais, d'un maximum de cinq dollars, payables lorsqu'un compte est à découvert ou lorsqu'il y a aggravation de ce découvert, et perçus soit par une caisse populaire ou *credit union* groupant uniquement ou principalement des personnes physiques, soit par un établissement recevant des fonds en dépôt, lesquels sont entièrement ou partiellement garantis par la Société d'assurance-dépôts du Canada ou par la Régie de l'assurance-dépôts du Québec.

«intérêt» L'ensemble des frais de tous genres, y compris les agios, commissions, pénalités et indemnités, qui sont payés ou payables à qui que ce soit par l'emprunteur ou pour son compte, en contrepartie du capital prêté ou à prêter. La présente définition exclut un remboursement de capital prêté, les frais d'assurance, les taxes officielles, les frais pour découvert de compte, le dépôt de garantie et, dans le cas d'un prêt hypothécaire, les sommes destinées à l'acquittement de l'impôt foncier.

«taux criminel» Tout taux d'intérêt annuel effectif, appliqué au capital prêté et calculé conformément aux règles et pratiques actuarielles généralement admises, qui dépasse soixante pour cent.

«taxe officielle» La taxe perçue, en vertu d'une loi, par une administration pour valider les sûretés consenties dans une convention ou une entente de prêt.

be deposited or invested by or on behalf of the person to whom the advance is or is to be made and that may be available, in the event of his defaulting in any payment, to or for the benefit of the person who advances or is to advance the money.

Presumption

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

Proof of effective annual rate

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

Notice

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

Cross-examination with leave

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

Présomption

(3) Quiconque reçoit paiement, total ou partiel, d'intérêts à un taux criminel est présumé connaître, jusqu'à preuve du contraire, l'objet du paiement et le caractère criminel de celui-ci.

Preuve du taux annuel effectif

(4) Dans toute poursuite intentée en vertu du présent article, l'attestation du taux annuel effectif applicable à un capital prêté, fait foi jusqu'à preuve du contraire si elle est faite par un Fellow de l'Institut canadien des actuaires avec chiffres et éléments justificatifs à l'appui; il n'est pas nécessaire de prouver l'authenticité de la signature qui y est apposée ou la qualité officielle du signataire.

Préavis

(5) L'attestation visée au paragraphe (4) n'est admissible en preuve que si la partie qui entend la produire donne de son intention à l'accusé ou au défendeur un préavis suffisant accompagné d'une copie de l'attestation.

Contre-interrogatoire de l'actuaire

(6) L'accusé ou le défendeur contre lequel est produite l'attestation visée au paragraphe (4) peut, sur autorisation du tribunal saisi, exiger la comparution de l'actuaire aux fins du contre-interrogatoire.

Consent required for proceedings

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

Application

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

***Class Proceedings Act, 1992*, S.O. 1992, c. 6**

Certification

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

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

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

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

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

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

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

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

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

Autorisation des poursuites

(7) Il ne peut être engagé de poursuites pour une infraction prévue au présent article sans le consentement du procureur général.

Domaine d'application

(8) Le présent article ne s'applique pas aux opérations régies par la *Loi sur la cession du droit au remboursement en matière d'impôt*.

***Loi de 1992 sur les recours collectifs*, L.O. 1992, ch. 6**

Recours collectif certifié par le tribunal

5. (1) Le tribunal saisi d'une motion visée à l'article 2, 3 ou 4 certifie qu'il s'agit d'un recours collectif si les conditions suivantes sont réunies :

a) les actes de procédure ou l'avis de requête révèlent une cause d'action;

b) il existe un groupe identifiable de deux personnes ou plus qui se ferait représenter par le représentant des demandeurs ou des défendeurs;

c) les demandes ou les défenses des membres du groupe soulèvent des questions communes;

d) le recours collectif est le meilleur moyen de régler les questions communes;

e) il y a un représentant des demandeurs ou des défendeurs qui :

(i) représenterait de façon équitable et appropriée les intérêts du groupe,

(ii) a préparé un plan pour l'instance qui propose une méthode efficace de faire avancer l'instance au nom du groupe et d'aviser les membres du groupe de l'instance,

(iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe, en ce qui concerne les questions communes du groupe.

***Arbitration Act, 1991*
S.O. 1991, c. 17**

Stays

7. (1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.

Exceptions

(2) However, the court may refuse to stay the proceeding in any of the following cases:

1. A party entered into the arbitration agreement while under a legal incapacity.

2. The arbitration agreement is invalid.

3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.

4. The motion was brought with undue delay.

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

Arbitration may continue

***Loi de 1991 sur l'arbitrage*
L.O. 1991, c. 17**

Sursis

7. (1) Si une partie à une convention d'arbitrage introduit une instance à l'égard d'une question que la convention oblige à soumettre à l'arbitrage, le tribunal judiciaire devant lequel l'instance est introduite doit, sur la motion d'une autre partie à la convention d'arbitrage, surseoir à l'instance. 1991, chap. 17, par. 7 (1).

Exceptions

(2) Cependant, le tribunal judiciaire peut refuser de surseoir à l'instance dans l'un ou l'autre des cas suivants :

1. Une partie a conclu la convention d'arbitrage alors qu'elle était frappée d'incapacité juridique.

2. La convention d'arbitrage est nulle.

3. L'objet du différend ne peut faire l'objet d'un arbitrage aux termes des lois de l'Ontario.

4. La motion a été présentée avec un retard indu.

5. La question est propre à un jugement par défaut ou à un jugement sommaire.

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

Effect of refusal to stay

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

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

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

Agreement covering part of dispute

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

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

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

No appeal

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

Poursuite de l'arbitrage

(3) L'arbitrage du différend peut être engagé et poursuivi pendant que la motion est devant le tribunal judiciaire.

Conséquences du refus de surseoir

(4) Si le tribunal judiciaire refuse de surseoir à l'instance :

a) d'une part, aucun arbitrage du différend ne peut être engagé;

b) d'autre part, l'arbitrage qui a été engagé ne peut être poursuivi, et tout ce qui a été fait dans le cadre de l'arbitrage avant que le tribunal judiciaire ne rende sa décision est sans effet.

Convention s'appliquant à une partie du différend

(5) Le tribunal judiciaire peut surseoir à l'instance en ce qui touche les questions traitées dans la convention d'arbitrage et permettre qu'elle se poursuive en ce qui touche les autres questions, s'il constate :

a) d'une part, que la convention ne traite que de certaines des questions à l'égard desquelles l'instance a été introduite;

b) d'autre part, qu'il est raisonnable de dissocier les questions traitées dans la convention des autres questions.

Décision sans appel

(6) La décision du tribunal judiciaire n'est pas susceptible d'appel.

Consumer Protection Act, 2002
S.O. 2002, c. 30, Schedule A

No waiver of substantive and procedural rights

7. (1) The substantive and procedural rights given under this Act apply despite any agreement or waiver to the contrary.

Limitation on effect of term requiring arbitration

(2) Without limiting the generality of subsection (1), any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under this Act.

Procedure to resolve dispute

(3) Despite subsections (1) and (2), after a dispute over which a consumer may commence an action in the Superior Court of Justice arises, the consumer, the supplier and any other person involved in the dispute may agree to resolve the dispute using any procedure that is available in law.

Settlements or decisions

(4) A settlement or decision that results from the procedure agreed to under subsection (3) is as binding on the parties as such a settlement or decision would be if it were reached in respect of a dispute concerning an agreement to which this Act does not apply.

Non-application of Arbitration Act, 1991

(5) Subsection 7 (1) of the Arbitration Act, 1991 does not apply in respect of any

Loi de 2002 sur la protection du consommateur, L.O. 2002, ch. 30

Aucune renonciation aux droits substantiels et procéduraux

7. (1) Les droits substantiels et procéduraux accordés en application de la présente loi s'appliquent malgré toute convention ou renonciation à l'effet contraire.

Restriction de l'effet d'une condition exigeant l'arbitrage

(2) Sans préjudice de la portée générale du paragraphe (1), est invalide, dans la mesure où elle empêche le consommateur d'exercer son droit d'introduire une action devant la Cour supérieure de justice en vertu de la présente loi, la condition ou la reconnaissance, énoncée dans une convention de consommation ou une convention connexe, qui exige ou a pour effet d'exiger que les différends relatifs à la convention de consommation soient soumis à l'arbitrage.

Procédure de règlement de différend

(3) Malgré les paragraphes (1) et (2), le consommateur, le fournisseur et les autres personnes touchées par un différend au sujet duquel le consommateur peut introduire une action devant la Cour supérieure de justice peuvent convenir de le régler au moyen de toute procédure que prévoit la loi.

Règlement ou décision

(4) Le règlement ou la décision qui résulte de la procédure convenue en vertu du paragraphe (3) lie les parties dans la même mesure que s'il avait été atteint à la suite d'un différend relatif à une convention que ne vise pas la présente loi.

proceeding to which subsection (2) applies unless, after the dispute arises, the consumer agrees to submit the dispute to arbitration.

Class proceedings

8. (1) A consumer may commence a proceeding on behalf of members of a class under the Class Proceedings Act, 1992 or may become a member of a class in such a proceeding in respect of a dispute arising out of a consumer agreement despite any term or acknowledgment in the consumer agreement or a related agreement that purports to prevent or has the effect of preventing the consumer from commencing or becoming a member of a class proceeding.

Procedure to resolve dispute

(2) After a dispute that may result in a class proceeding arises, the consumer, the supplier and any other person involved in it may agree to resolve the dispute using any procedure that is available in law.

Settlements or decisions

(3) A settlement or decision that results from the procedure agreed to under subsection (2) is as binding on the parties as such a settlement or decision would be if it were reached in respect of a dispute concerning an agreement to which this Act does not apply.

Non-application of *Arbitration Act, 1991*

(4) Subsection 7 (1) of the *Arbitration Act, 1991* does not apply in respect of any proceeding to which subsection (1) applies

Non-application de la Loi de 1991 sur l'arbitrage

(5) Le paragraphe 7 (1) de la Loi de 1991 sur l'arbitrage ne s'applique pas à l'instance visée au paragraphe (2), sauf si, après la naissance du différend, le consommateur consent à le soumettre à l'arbitrage.

Recours collectif

8. (1) Le consommateur peut, en vertu de la Loi de 1992 sur les recours collectifs, introduire une instance au nom des membres d'un groupe ou devenir membre d'un groupe dans une telle instance à l'égard d'un différend relatif à une convention de consommation malgré toute condition ou reconnaissance, énoncée dans la convention de consommation ou une convention connexe, qui aurait ou a pour effet de l'empêcher d'introduire un recours collectif ou de devenir membre d'un tel groupe.

Procédure de règlement de différend

(2) Le consommateur, le fournisseur et les autres personnes touchées par un différend qui peut donner lieu à un recours collectif peuvent convenir de le régler au moyen de toute procédure que prévoit la loi.

Règlement ou décision

(3) Le règlement ou la décision qui résulte de la procédure convenue en vertu du paragraphe (2) lie les parties dans la même mesure que s'il résultait d'un différend relatif à une convention que ne vise pas la présente loi.

Non-application de la *Loi de 1991 sur l'arbitrage*

(4) Le paragraphe 7 (1) de la *Loi de 1991 sur l'arbitrage* ne s'applique pas à l'instance visée au paragraphe (1), sauf si le

unless, after the dispute arises, the consumer agrees to submit the dispute to arbitration.

consommateur consent à soumettre le différend à l'arbitrage.