

04:CV-281262CP

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

EDWARD JOSEPH

Plaintiff

- and -

LEFAIVRE INVESTMENTS (OTTAWA) LTD. operating as CASH COW,
BYTOWN CAPITAL (OTTAWA) LTD., BYTOWN CAPITAL (IT) INC.

Defendants

(PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT*, 1992)

STATEMENT OF CLAIM

TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyers or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LEGAL AID OFFICE.

Date Dec 22/04

Issued by A. Sadeghi
Local Registrar

Address of
court office: 393 University Ave., 10th Floor
Toronto, Ontario M5G 1E6

TO: LEFAIVRE INVESTMENTS (OTTAWA) LTD.
operating as CASH COW
1580 Merivale Road, Suite 204
Ottawa, ON K2G 4B5

BYTOWN CAPITAL (OTTAWA) LTD.
1580 Merivale Road, Suite 204
Ottawa, ON K2G 4B5

BYTOWN CAPITAL (IT) INC.
1580 Merivale Road, Suite 204
Ottawa, ON K2G 4B5

CLAIM

1. The Plaintiff claims:

- (a) an Order pursuant to the *Class Proceedings Act, 1992*, certifying this action as a class proceeding and appointing Edward Joseph ("Mr. Joseph") as representative Plaintiff for the Class (defined below);
- (b) a declaration that the borrowing fee and/or brokerage fee and any other fees charged by the Defendants, or any of them, in relation to a Payday Loan (defined below) constitute interest within the meaning of section 347 of the *Criminal Code*;
- (c) a declaration that the NSF Service Fee and/or the collection fee charged by the Defendants in relation to Payday Loans constitute interest within the meaning of section 347 of the *Criminal Code*, or, alternatively, are unenforceable penalties and are not genuine pre-estimates of liquidated damages;
- (d) a declaration that each of the agreements for Payday Loans between the Defendants and a class member is illegal and, therefore, void and unenforceable in whole or in part, and a declaration that each class member who has a Payday Loan with the Defendants overdue or outstanding at the date of certification of this action as a class proceeding is not required to repay the Defendants in whole or in part;
- (e) in the alternative to (d), a declaration that the provisions in each of the Payday Loan agreements between the Defendants and a member of the Class that provide for the payment of interest within the meaning of section 347 of the *Criminal Code* are illegal, void and unenforceable, and are severed from the other terms of the Payday Loan agreement;
- (f) a declaration that the Defendants wrongfully, maliciously and unlawfully conspired to charge and collect interest at a criminal rate;

- (g) a declaration that the Defendants have been unjustly enriched at the expense of Mr. Joseph and the other members of the Class;
- (h) a declaration that the Defendants are not entitled to retain the interest they received in relation to Payday Loans, including any fee, fine, penalty, commission or similar charge or expense ("Interest") and must disgorge the said Interest to the Class;
- (i) a declaration that the Defendants hold the Interest in a constructive trust for the benefit of Mr. Joseph and the other members of the Class;
- (j) a declaration that the Interest charged by the Defendants to Mr. Joseph and the other members of the Class on Payday Loans since the incorporation of the Defendants violates section 347 of the *Criminal Code*;
- (k) damages in the amount of the aggregate of all Payday Loans including principal and Interest paid by the members of the Class, or alternatively, in the amount equal to the total Interest charged and/or received on all Payday Loans, and an accounting thereof;
- (l) an equitable tracing order for the aggregate Interest on all Payday Loans advanced by the Defendants;
- (m) punitive damages in the amount of \$15,000,000.00, or such other sum as this Honourable Court deems appropriate;
- (n) an interim, interlocutory, and permanent injunction restraining the Defendants from charging Interest in a manner that violates the *Criminal Code*;
- (o) the costs of administering the plan of distribution of the recovery in this action;

- (p) an interim injunction prohibiting the Defendants from distributing the aggregate Interest on all Payday Loans advanced by the Defendants, or any part thereof, until the disposition of the trial of the common issues;
- (q) pre-judgment and post-judgment interest at the rate of 59% per annum, or, alternatively, at such other rate fixed by the Court pursuant to the *Courts of Justice Act*;
- (r) costs of this proceeding on a full indemnity basis; and
- (s) such further and other relief as this Honourable Court deems appropriate.

Overview

2. This is a proposed class proceeding for damages and other relief arising from Interest charges applied to Payday Loans made by the Defendants to the Class. The Actual Interest Rate charged by the Defendants, including interest described as a "brokering fee" or "borrowing fee" and interest described as an "NSF Service Charge" and a collections fee, contravenes the criminal interest rate provisions of the *Criminal Code*. Indeed, Mr. Joseph paid \$920.01 on a \$300.00 Payday Loan. Consequently, the Payday Loan agreements entered into by the members of the Class with the Defendants are illegal and unenforceable, and the Class is entitled to restitution of all amounts paid under the Payday Loan agreements.

3. The members of the Class are entitled to, *inter alia*, damages in the aggregate amount of principal and Interest for all Payday Loans advanced since the Defendants' respective dates of incorporation or, alternatively, in the aggregate amount of all Interest charged and received on all Payday Loans since the respective dates of their

incorporation. Any Payday Loans that remain outstanding are illegal and unenforceable and, therefore, do not have to be repaid by the members of the Class.

The Parties

4. Mr. Joseph is an individual who resides in Navan, Ontario.
5. Lefavre Investments (Ottawa) Ltd. ("Lefavre") was incorporated on April 23, 2002 pursuant to the federal laws of Canada. It carries on business under the name "Cash Cow" in Ontario at various retail locations, with its head office in Ottawa, Ontario. Lefavre operates in the alternative consumer credit industry and offers Payday Loans.
6. Bytown Capital (Ottawa) Ltd. ("Bytown") was incorporated on April 23, 2002 pursuant to the federal laws of Canada. It carries on business at various locations in Ontario with its head office in Ottawa, Ontario. Bytown Capital (IT) Inc. ("Bytown IT") was incorporated on August 31, 2004 pursuant to laws of the province of Ontario. Bytown and Bytown IT carry on business with Lefavre in the alternative consumer credit industry. Bytown and Bytown IT sometimes describe themselves as a division of Lefavre Investments. Bytown, Bytown IT and Lefavre are hereinafter collectively referred as the "Defendants".
7. The Defendants have conspired together to make Payday Loans to individuals and charge and receive Interest on the Payday Loans at rates that contravene s. 347 of the *Criminal Code*.

The Class

8. Mr. Joseph brings this action under the *Class Proceedings Act, 1992* on behalf of a class (the "Class") consisting of all persons in Canada who, at any time up to the date of judgment in this matter:

- (i) have taken a Payday Loan from the Defendants, and
- (ii) have paid or have been charged Interest on a Payday Loan from the Defendants.

Cash Cow Payday Loans

9. One of the services offered by the Defendants is to provide short-term loans to gainfully employed individuals, or individuals in receipt of regular pension payments. The Defendants loan a percentage of the net amount to be paid to the individual (the "Borrower") on his or her next payday or pension payment (the "Payday Loan").

10. The Payday Loans are subject to the following terms and conditions:

- (a) The Defendants will lend to the Borrower an agreed upon sum, which is a percentage of the Borrower's next pay cheque or pension cheque, to a maximum of \$1,000.00 (the "Principal");
- (b) The Payday Loan is due on the Borrower's next pay date or pension cheque date ("Due Date");
- (c) The Borrower is required to execute four documents at the time he or she takes out a Payday Loan:
 - (i) Statement of Disclosure for Payday Advance Agreement, which discloses, *inter alia*, the principal amount of the loan, the alleged

annual percentage rate of interest charged (stated to be 59%), the term of the loan and the borrowing or brokerage fee for the loan;

- (ii) Advance Agreement, under which the Borrower agrees to pay the principal, interest at the purported rate of 59%, an NSF Service Charge in the amount of \$35.00, and a collections fee in the amount of \$190.00;
 - (iii) Declaration of Wage Assignment, under which the Borrower purports to sign the "total sum owed" including the "NSF service charge & accrued interest & penalties" to the Defendants; and
 - (iv) Authorization to Debit an Account, under which the Borrower authorizes the Defendants to issue on his or her behalf any cheque, payment, order or request drawn on the Borrower's financial institution and payable to the order of the Defendants.
- (d) In addition to the execution of these documents, the Borrower is required to provide to the Defendants a personal cheque post-dated to the Due Date in the total amount of the loan, inclusive of principal, interest at the alleged effective annual rate of 59% per annum plus the borrowing or brokerage fee.
- (e) The cheque is deposited to the credit of the Defendants on the Due Date;
- (f) If the cheque is not honoured, the Defendants impose the additional \$35.00 NSF Service Charge and the \$190.00 collection fee;

- (g) Instead of repaying the principal and Interest on the Due Date, the Borrower may elect to repay the Interest in full, and extend the term of the Payday Loan to his or her next payday or pension cheque date. The Borrower is obliged to pay Interest (including another borrowing or brokerage fee) on the new Due Date. This practice is known in the industry as a "Rollover".

The Defendants Charge Interest at a Criminal Rate

11. Section 347 of the *Criminal Code* makes it an offence to charge interest at a "criminal rate". "Criminal rate" is defined in section 347(2) as "an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principals that exceeds 60% on the credit advanced under an agreement or arrangement".

12. "Interest" is defined in section 347(2) of the *Criminal Code* as:

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

13. On all Payday Loans, the Defendants charge Interest in excess of 60%. They charge interest at a purported effective annual rate of 59% plus a borrowing or brokerage fee on all Payday Loans. The Defendants do not disclose to the Borrower how the borrowing or brokerage fee is calculated. It varies with the amount of the

Payday Loan. In addition, where a Borrower's cheque is not honoured, they charge additional fees or penalties that fall within the *Criminal Code* definition of interest, specifically, the NSF service charge of \$35.00 and the collection fee of \$190.00.

14. Each of the charges listed in paragraph 13, above, constitutes Interest within the definition of section 347 of the *Criminal Code*. Thus the actual effective annual rate of interest charged to Mr. Joseph and the other members of the Class ("Actual Interest Rate") vastly exceeds the criminal rate of 60%. The Defendants have been charging an illegal rate of interest and have taken illegal profits in relation to all of the Payday Loans they have advanced since they commenced carrying on business.

Mr. Joseph's Payday Loans

15. Mr. Joseph entered into at least two Payday Loans with the Defendants. Each Payday Loan was governed by the process and terms described in paragraph 10 above.

16. Full particulars of the Payday Loans, including dates of the initial loans, number of Rollovers, and total Interest charged by the Defendants to Mr. Joseph, are not known to Mr. Joseph, but are within the knowledge of the Defendants.

17. Mr. Joseph took a Payday Loan from the Defendants in late 2002 or early 2003. This Payday Loan was likely the subject of one or more Rollovers. Ultimately, Mr. Joseph repaid this loan in full, inclusive of principal and Interest (at an Actual Interest Rate well in excess of 60% per annum), by cheque in the amount of \$528.28 dated January 29, 2003 made payable to "Lefavre Investments (Ottawa) Ltd."

18. Mr. Joseph entered into another Payday Loan with the Defendants later in 2003. This loan was the subject of one or more Rollovers. Its ultimate due date was November 18, 2003. The post-dated cheque Mr. Joseph had provided to the Defendants in accordance with their standard practice was returned NSF.

19. Lefavre commenced an action in Small Claims Court on March 3, 2004 claiming \$585.01, as calculated below, plus pre-judgment interest at 59% per annum and costs:

(1)	principal	\$300.00
(2)	interest at the purported rate of 59% per annum	\$ 6.79
(3)	borrowing fee	\$ 53.22
(4)	NSF service charge	\$ 35.00
(5)	collection costs	<u>\$190.00</u>
	Total	\$585.01

20. Mr. Joseph was not served with this claim.

21. On April 21, 2004, Lefavre sought and obtained default judgment against Mr. Joseph for \$870.21, comprising the following:

(1)	principal	\$300.00
(2)	interest at the purported rate of 59% per annum	\$ 6.79
(3)	borrowing fee	\$ 53.22
(4)	NSF service charge	\$ 35.00
(5)	collection costs	\$190.00
(6)	pre-judgment interest at the rate of 59% per annum	\$ 90.20
(7)	costs of the Small Claims Court action	<u>\$195.00</u>
	Total	\$870.21

22. That same day a notice of garnishment was issued in favour of Lefavre in the amount of \$920.21.

23. Mr. Joseph was not aware of the claim, let alone the default judgment or notice of garnishment, until it was served upon his employer in or around May 2004. The Defendants successfully garnished Mr. Joseph's wages for the full amount of the notice of garnishment (\$920.21). In the result, Mr. Joseph repaid in excess of three times the principal for a loan that was outstanding for approximately seven months. Again, the Actual Interest Rate was well in excess of the criminal rate.

Defendants' Liability

24. Since the dates of their respective incorporations, the Defendants have profited illegally at the expense of Mr. Joseph and other members of the Class by charging and receiving interest at a rate criminal rate, contrary to the provisions of the *Criminal Code*.

25. On behalf of the Class, Mr. Joseph claims that the Payday Loans are illegal and unenforceable and claims damages being the aggregate of all Payday Loans, including principal and Interest paid or payable by the members of the Class.

26. In the alternative, Mr. Joseph claims damages in the amount of the aggregate Interest paid or payable by the members of the Class on Payday Loans.

Unjust Enrichment, Restitution and Constructive Trust

27. The aggregate amount of Interest collected by the Defendants from the members of the Class is not known to the Plaintiff but is known to the Defendants. The Defendants have been unjustly enriched by the receipt of this sum from the members of the Class.

28. The members of the Class have suffered a corresponding deprivation.

29. There is no juristic reason for the Defendants to retain the aggregate Interest. The Defendants should not be allowed to retain the aggregate Interest as they received it in direct contravention of the *Criminal Code*.

30. The Defendants hold the aggregate Interest pursuant to a constructive trust for the benefit of the Class. The Class is therefore entitled to an accounting and restitution of the aggregate Interest paid to the Defendants.

31. In the alternative, Mr. Joseph pleads that justice and good conscience requires the Defendants to hold the aggregate Interest in trust for the members of the Class.

32. The Defendants are constituted as constructive trustees in favour of the members of the Class because, *inter alia*:

- (a) the integrity of the marketplace would be undermined if the court did not impose a constructive trust;
- (b) the members of the Class have suffered a loss and the Defendants have been unjustly enriched;
- (c) the Interest was paid in such circumstances that the Defendants may not, in good conscience, retain it;
- (d) the Interest was derived from arrangements or agreements which required payment to the Defendants of interest at a criminal rate;
- (e) the Defendants received the Interest contrary to the provisions of the *Criminal Code*;
- (f) there are no factors which rendered the imposition of a constructive trust unjust in this case.

Unpaid Payday Loans are Illegal, Void and Unenforceable

33. All members of the Class who have Payday Loans with the Defendants that are outstanding or overdue, in whole or in part, are not required to pay the Defendants any sums allegedly owing, including principal or Interest, because the Defendants charged, and are seeking to receive from them, interest at a criminal rate, contrary to the provisions of the *Criminal Code*. Alternatively, the members of the Class with outstanding Payday Loans with the Defendants are only required to repay the principal and are not required to repay any Interest associated with the Payday Loans.

34. At the time a Payday Loan is taken out, the Defendants require the Borrower to execute a declaration of wage assignment to secure payment of the debt. The declaration of wage assignment is unlawful and contravenes s. 7(7) of the *Wages Act*, R.S.O. 1990, c.W1. Any declaration of wage assignment executed by a member of the Class in favour of the Defendants, or any of them, is illegal and unenforceable. The Defendants knew or ought to have known that the assignment of wages is illegal and they knowingly engaged in an unfair trade practice and took further advantage of the members of the Class.

Punitive or Exemplary Damages

35. The Payday Loan agreements are intentionally misleading, and worded in such a way as to intentionally deceive the Class with respect to the actual cost of borrowing that they incur when entering into a Payday Loan.

36. The conduct of the Defendants in advancing Payday Loans to the members of the Class on terms which contravene the *Criminal Code* and by receiving, or attempting

to receive, Interest in contravention of the *Criminal Code*, pursuant to contracts that are materially misleading in nature and which were intended to and, in fact, did exploit the economic vulnerability of the members of the Class, including Mr. Joseph, is conduct of such a high-handed and scandalous nature that it offends the moral standards of the community and is deserving of the condemnation of this Honourable Court by an award of punitive and/or exemplary damages. On behalf of the Class, the Plaintiff seeks punitive and/or exemplary damages in the amount of \$15,000,000.00, or such other sum as this Honourable Court deems appropriate.

Administration Costs

37. Further, Mr. Joseph and the other members of the Class are entitled to recover as damages or costs, in accordance with the *Class Proceedings Act*, the costs of administering the plan for distribution of the recovery in this action.

Pre-Judgment and Post-Judgment Interest Rate

38. Because the Defendants purported to charge members of the Class interest at a rate of 59% annually, and have sought and obtained pre-judgment interest at a rate of 59% annually in lawsuits against members of the Class including Mr. Joseph, the Defendants should pay pre-judgment and post-judgment interest at this rate in this action.

General

39. The Plaintiff, on behalf of the members of the Class, pleads and relies on the provisions of the *Class Proceedings Act, 1992*, R.S.O. 1992, c.6, the *Criminal Code of*

Canada, R.S.C. 1985, c.C-46, the *Courts of Justice Act*, R.S.O. 1990, c.43, and *Wages Act*, R.S.O. 1990, c.W1.

40. Mr. Joseph proposes that this action be tried at Toronto, Ontario.

December 22, 2004

**PALIARE ROLAND ROSENBERG
ROSENBERG LLP**

Barristers
Suite 501
250 University Ave.
Toronto, ON M5H 3E5

Margaret Waddell (LSUC #29860U)

Tel: (416) 646-4329

Fax: (416) 646-4301

Odette Soriano (LSUC #37326J)

Tel: (416) 646-4306

Fax: (416) 646-4307

Solicitors for the Plaintiff

580561_1.DOC

04-CV-291262 CP

Court File No.:

EDWARD JOSEPH

- and -

**LEFAIVRE INVESTMENTS (OTTAWA) LTD. operating as CASH COW,
BYTOWN CAPITAL (OTTAWA) LTD., BYTOWN CAPITAL (IT) INC.**

Plaintiff

Defendants

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at TORONTO

STATEMENT OF CLAIM

**PALIARE ROLAND ROSENBERG
ROTHSTEIN LLP**

Barristers
250 University Ave.
Suite 501
Toronto, ON M5H 3E5

Margaret Waddell (LSUC #29860U)

Tel: (416) 646-4329

Fax: (416) 646-4301

Odette Soriano (LSUC #37326J)

Tel: (416) 646-4306

Fax: (416) 646-4307

Solicitors for the Plaintiff