

CU-11-428100-COCP
Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

BRAD MOYLE

Plaintiff

- and -

CASH MONEY CHEQUE CASHING INC. and JOSEPH P. GENOVA

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: June 6, 2011

Issued by 
Local Registrar

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

**TO: Cash Money Cheque Cashing Inc.
Joseph P. Genova**

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Lawyers for the Defendants

CLAIM

1. The Plaintiff claims:

- (a) An order pursuant to the *Class Proceedings Act, 1992*, certifying this action as a class proceeding, and appointing the Plaintiff as representative plaintiff for the Class (defined below);
- (b) A declaration that the Interest (defined below) charged by the Defendant, Cash Money Cheque Cashing Inc. ("Cash Money") to the Class on payday loans (the "Payday Loans") made by Cash Money to the Class during the Class Period (defined below) violates or violated section 347 of the *Criminal Code* and that the Payday Loans made by Cash Money during the Class Period (defined below) were or are illegal and void, and any unpaid principal and/or interest on outstanding Payday Loans does not have to be repaid to Cash Money by the Class;
- (c) A declaration that the Payday Loan Agreements (defined below) are therefore void and unenforceable, or in the alternative that the interest provisions of the Payday Loan Agreements are void and unenforceable;
- (d) An accounting of all Interest paid by the Class to Cash Money on the Payday Loans during the Class Period;
- (e) An accounting of all management fees, dividends, salary or other remuneration that is attributable to income earned by Cash Money from Payday Loans during the Class Period received by Joseph P. Genova ("Genova") from Cash Money during the Class Period (collectively, the "Remuneration");
- (f) A declaration that Cash Money has been unjustly enriched by the amount of Interest it received during the Class Period, and that all such Interest is held by Cash Money for the benefit of the Class pursuant to a constructive or resulting trust;

- (g) A declaration that Genova has been unjustly enriched by the amount of Remuneration he received during the Class Period and that all such Remuneration is held by Genova for the benefit of the Class pursuant to a constructive or resulting trust;
- (h) An order tracing any Interest received by Cash Money during the Class Period and paid by Cash Money to Joseph Genova in the form of Remuneration or otherwise, and an order that the Defendants pay corresponding restitutionary damages forthwith to the Class;
- (i) Exemplary or punitive damages in the amount of \$100,000.00 or such other sum as this Honourable Court deems fit;
- (j) Prejudgment interest in accordance with the *Courts of Justice Act*, or alternatively at the rate of 59% per annum or such other rate as this Honourable Court deems fit;
- (k) Post-judgment interest in accordance with the *Courts of Justice Act*, or alternatively at the rate of 59% per annum or such other rate as this Honourable Court deems fit; and
- (l) Costs of this proceeding on a full indemnity basis.

DEFINITIONS

2. Terms used in the Claim:

(a) **Class:**

- (i) All persons who obtained one or more Payday Loan(s) from Cash Money in Manitoba between June 15, 2009 and October 18, 2010 (“Manitoba Class Members”);
- (ii) All persons who obtained one or more Payday Loan(s) from Cash Money in New Brunswick between June 15, 2009 and the date of certification of this action as a class proceeding (“New Brunswick Class Members”);

- (iii) All persons who obtained one or more Payday Loan(s) from Cash Money in Nova Scotia between June 15, 2009 and August 1, 2009 (“Nova Scotia Class Members”); and
 - (iv) All persons who obtained one or more Payday Loan(s) from Cash Money in Ontario between June 15, 2009 and December 15, 2009 (“Ontario Class Members”).
- (b) **Class Period:**
- (i) For Payday Loans obtained by Manitoba Class Members, June 15, 2009 to October 18, 2010;
 - (ii) For Payday Loans obtained by New Brunswick Class Members, June 15, 2009 to the date of certification of this action as a class proceeding;
 - (iii) For Payday Loans obtained by Nova Scotia Class Members, June 15, 2009 to August 1, 2009; and
 - (iv) For Payday Loans obtained by Ontario Class Members, June 15, 2009 to December 15, 2009.
- (c) **Default Charge:** a \$40 fee which Cash Money charged on each Payday Loan if the borrower did not repay the Payday Loan on the Repayment Date.
- (d) **Interest:** the Service Cost, the Default Charge, and the Overdue Account Interest, all of which are “interest” as defined in s. 347 of the *Criminal Code*.
- (e) **Overdue Account Interest:** interest at an annual percentage rate of 59% which Cash Money charged on Payday Loans not repaid on the Repayment Date.
- (f) **Payday Loans:** short-term loans which Cash Money provided to borrowers throughout the Class Period in amounts from \$100.00 to \$1,500.00, up to a

maximum of 50% of the net amount that would be paid to the borrower on his or her next payday.

- (g) **Payday Loan Agreement:** the written terms and conditions which govern(ed) the Payday Loans.
- (h) **Principal:** the agreed-upon sum which Cash Money loaned to the borrower in each of the Payday Loans, exclusive of Interest.
- (i) **Repayment Date:** the date each Payday Loan became due, generally the borrower's next payday.
- (j) **Service Cost:** a fee of \$20 for each \$100 borrowed which Cash Money charged on the Payday Loans.

THE PARTIES

3. Bradley Moyle ("Moyle") resides in Toronto, Ontario. From time to time during the Class Period, he entered into Payday Loans with Cash Money.

4. Cash Money is a privately held corporation incorporated pursuant to the laws of Ontario. It carries on business in Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia and Ontario at various retail locations, with its head office in Mississauga, Ontario. Cash Money is a retail financial services company, and provides Payday Loans to consumers.

5. Joseph P. Genova ("Genova") resides in the Province of Ontario. At all material times he was the sole officer and director of Cash Money. Genova has received and continues to receive a percentage of the Interest through the Remuneration paid to him by Cash Money. Genova directed Cash Money to make such payments to him, and at all times knew that the Remuneration included Interest that was received by Cash Money at a criminal rate.

6. Cash Money charged and received Interest on Payday Loans at rates that contravened section 347 of the *Criminal Code* during the Class Period. Genova knew Cash

Money received Interest in contravention of s. 347 of the *Criminal Code*, and that the Remuneration included such Interest. Accordingly, the defendants have also breached section 462.31(1) of the *Criminal Code*.

THE CLASS

7. The Plaintiff brings this action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 on behalf of the Class as defined above.

CASH MONEY PAYDAY LOANS

8. One of the services offered by Cash Money is to provide short-term loans to consumers. During the Class Period, Cash Money provided Payday Loans of up to 50% of the net amount that would be paid to the borrower on his or her next payday (or the date upon which the borrower was to receive another regularly scheduled income payment - "payday").

9. The Payday Loans were subject to the following written terms and conditions (the "Payday Loan Agreement"):

- (a) Cash Money would lend to the borrower an agreed upon sum, which was a percentage of the borrower's next net pay cheque (the Principal);
- (b) The Principal, together with the Service Cost, was due on the borrower's next payday (the "Repayment Date");
- (c) On execution of the Payday Loan Agreement, the borrower was required to either:
 - (i) endorse and provide to Cash Money a post-dated personal cheque dated for the due date in the total amount of the Payday Loan, inclusive of Principal and the Service Cost; or
 - (ii) execute a pre-authorized debit form which permitted Cash Money to debit the borrower's bank account in the amount of the Principal and the Service Cost;

- (d) If the Principal and the Service Cost were not repaid by the Repayment Date, then the borrower was deemed to have opted to repay the Payday Loan and Service Cost by way of the post-dated cheque or pre-authorized debit;
- (e) Cash Money then effected the preauthorized debit from the borrower's account or deposited the endorsed personal cheque to its own credit at its bank, as a holder in due course;
- (f) If the borrower did not repay the Principal and Service Cost on the Repayment Date, Cash Money charged the borrower:
 - (i) Overdue Account Interest; and
 - (ii) a Default Charge;
- (g) Under the terms of the Payday Loan Agreement, Cash Money also reserved the right to apply payment on overdue Payday Loans to "reasonable charges in respect of legal costs incurred by Cash Money in collecting and attempting to collect" payment.

10. The Service Cost, the Default Charge, and the Overdue Account Interest are all interest as defined in s. 347 of the *Criminal Code*, and are properly included in the calculation of effective annual interest rate for the purposes of s. 347 of the *Criminal Code*.

11. Cash Money charged Interest on each Payday Loan on the bases set forth above, and all such charges and all Cash Money Payday Loans made during the Class Period were or are in violation of s. 347 of the *Criminal Code* as it was during the Class Period, and are illegal, void and unenforceable.

CASH MONEY CHARGED INTEREST AT A CRIMINAL RATE

12. During the Class Period, s. 347 of the *Criminal Code* made 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 principles that exceeded 60% on the credit advanced under an agreement or arrangement."

13. The Interest on the Payday Loans is "interest" within the meaning of section 347(2) of the *Criminal Code*, which provides:

"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.
[emphasis added]

Hence each of the fees, however described, that were charged by Cash Money in respect of the Payday Loans is Interest for the purposes of s. 347 of the *Criminal Code*.

14. In 2007, the *Criminal Code* was amended to exempt payday loans from the criminal interest provisions. Under s. 347.1 of the *Criminal Code*, payday loans are exempt from s. 347 provided:

- (a) they are in compliance with provincial regulations in the province where the loan is offered; and
- (b) the Governor-in-Council has designated the province a regulator of payday loans.

15. Subsequently, in 2009 and 2010, each of the provinces in which Cash Money offers Payday Loans, except New Brunswick, has passed regulations and been designated by the Governor-in-Council. Hence, these Payday Loans offered by Cash Money are no longer in breach of the *Criminal Code* as of:

- (a) October 18, 2010 in Manitoba;

- (b) August 1, 2009 in Nova Scotia; and
- (c) December 15, 2009 in Ontario.

16. The effective annual rate of Interest charged to the Class on each Payday Loan vastly exceeds an effective annual rate of 60%. Therefore, Cash Money charged a criminal rate of interest, and took illegal profits through the Payday Loans without juridical entitlement, and it has been unjustly enriched at the expense of the Class Members. Through the Remuneration, Genova has also been unjustly enriched at the expense of the Class Members.

MR. MOYLE'S PAYDAY LOANS

17. From time to time during the Class Period, Mr. Moyle entered into Payday Loan Agreements with Cash Money. Each Payday Loan Agreement was in substantially the same form and includes the terms for repayment set forth above in paragraph 9 above.

18. Details of Mr. Moyle's loans are as follows:

| Date Loan Obtained | Date Repaid | Term | Principal | Interest |
|---------------------------|--------------------|-------------|------------------|-----------------|
| August 2, 2009 | August 14, 2009 | 12 days | \$200 | \$40 |
| October 6, 2009 | October 15, 2009 | 9 days | \$600 | \$120 |
| October 15, 2009 | October 30, 2009 | 15 days | \$300 | \$60 |
| November 28, 2009 | December 15, 2009 | 17 days | \$600 | \$120 |
| December 8, 2009 | December 15, 2009 | 7 days | \$120 | \$24 |

19. The Interest charged by Cash Money to Mr. Moyle varied depending on the term of the loan, but in all cases, it exceeded an effective annual rate of 60%. Mr. Moyle's Payday Loans and the Payday Loan Agreements he entered into are, therefore, illegal and void and unenforceable.

20. The amounts and short duration of all of the Payday Loans were such that Cash Money charged Interest at an effective annual rate in excess of 60% on every Payday Loan. All of the Payday Loans and Payday Loan Agreements are, therefore, illegal and unenforceable.

21. Mr. Moyle, and all of the Class Members, are entitled to restitution of all the Interest paid to Cash Money in respect of each of the Payday Loans during the Class Period.

THE PAYDAY LOANS CONTRAVENE THE CRIMINAL CODE

22. The Payday Loan Agreements are standard form contracts of adhesion created by Cash Money for the purpose of charging and receiving Interest at an effective annual rate that far exceeds 60% per annum. Cash Money has, therefore, breached s. 347(1)(a) of the *Criminal Code*, by entering into agreements for the intended purpose of charging interest at a criminal rate. The Payday Loan Agreements were or are, therefore, void *ab initio*, and unenforceable in law.

23. Cash Money received payments of Interest at rates in excess of an effective annual rate of 60% per year from members of the Class throughout the Class Period. The receipt of all such payments contravened section 347(1)(b) of the *Criminal Code*. All such payments are therefore void, and Cash Money has been unjustly enriched by the receipt thereof. Genova has likewise been unjustly enriched through the Remuneration.

24. As the Interest received by Cash Money was paid at an effective annual rate in excess of 60%, the Class is entitled to restitution of all Interest paid by it to Cash Money. Cash Money holds all the Interest paid to it by the Class in favour of the Class pursuant to a constructive or resulting trust.

UNJUST ENRICHMENT

25. The total amount collected by Cash Money as Interest from the Class is not known by the Plaintiff, but is known to the Defendants. Cash Money intended to and, in fact, did enrich itself by committing the unlawful acts of charging and receiving interest at a rate in excess of that permitted by s. 347(1) of the *Criminal Code*.

26. The Class has suffered a corresponding deprivation.

27. There is no juristic reason for the Defendants to retain the Interest charged and received at a criminal rate. The Defendants have, therefore, been unjustly enriched, and hold the Interest pursuant to a constructive or resulting trust for the benefit of the Class.

28. The Class is entitled to an accounting and restitution of all the Interest they have paid to Cash Money and a declaration that the Payday Loans are void and unenforceable.

29. In all of the circumstances, it is just and equitable that the Defendants be declared to be constructive or resulting trustees in favour of the members of the Class, holding the Interest for their benefit. The Interest should therefore be disgorged by the Defendants, and if any portion of the Interest is no longer in their possession, then there should be judgment in favour of the Class against the Defendants in an equal amount.

PUNITIVE OR EXEMPLARY DAMAGES

30. The Defendants created a scheme for the purpose and intent of contravening s. 347 of the *Criminal Code*, and with actual knowledge that they were doing so, and with the intent to cause harm to the Class.

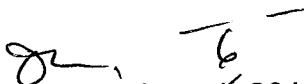
31. The Payday Loan Agreements were intentionally misleading, and worded in such a way as to deceive the Class with respect to the actual cost of borrowing that they incur when entering into a Payday Loan, and were intended to deceive the Class into believing that the Payday Loan Agreements are not in contravention of the *Criminal Code*.

32. The conduct of the Defendants in advancing the Payday Loans to the Class on terms which knowingly and intentionally contravene the *Criminal Code*, pursuant to a contract that was materially misleading in nature, and which was intended to and did exploit the economic vulnerability of the Class, including the Plaintiff, is conduct of such wanton and high-handed character that it is deserving of the condemnation of this Honourable Court by way of an award of punitive and/or exemplary damages in the amount of \$100,000.00, or such other sum as this Honourable Court deems fit.

GENERAL

33. The Plaintiff, on behalf of the Class, pleads and relies on the *Class Proceedings Act*, 1992, R.S.O. 1992, c. 6, the *Criminal Code of Canada*, R.S.C. 1985, c. 46, c.30, and the *Courts of Justice Act*, R.S.O. 1990, c. 43.

34. The Plaintiff proposes that this action be tried at Toronto, Ontario.


June 1, 2011

**PALIARE ROLAND ROSENBERG
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Court File No.:

BRADLEY MOYLE
Plaintiff

v.

CASH MONEY CHEQUE CASHING INC., and JOSEPH P. GENOVA
Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceedings Commenced in Toronto

STATEMENT OF CLAIM

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Lawyers for the Plaintiff

Service of a true copy herof accepted
this *14th* day of *June*, 2011
Stephanie Raymond
Solicitors for *Raymond & Co.*