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ARBITRATION AGREEMENTS AND CLASS PROCEEDINGS

Class Actions CLE – February 2005

by

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ARBITRATION AGREEMENTS AND CLASS PROCEEDINGS

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I. INTRODUCTION

> As early as 1698,…Parliament enabled the courts to enforce agreements to arbitrate….In fine, Parliament, by such legislation, is not denying access to the courts save to those who by agreement have surrendered their constitutional right of access. (*Stancroft Trust Ltd. v. Can-Asia Capital Co.* (1990), 43 B.C.L.R. (2d) 341 (C.A.), at p. 345, per Southin J.A.)
>
> I think it is also clear that an action commenced under the *Class Proceedings Act* is, even before the certification application, more that just "any old action": it is an action with ambition. (*MacKinnon v. National Money Mart Company*, 2004 BCCA 472, at para. 33, per Saunders J.A.)

The case known colloquially as the "Payday Loan Class Action," and more particularly described as *MacKinnon v. National Money Mart Company and others*[1], has to date generated a number of very interesting legal issues. One of these concerns the interplay between agreements to arbitrate and class proceedings.[2]

Kurt MacKinnon, the sole named plaintiff in *MacKinnon v. Money Mart*, was party to over 20 arbitration agreements with National Money Mart Company ("Money Mart"). The question whether Mr. MacKinnon's action, so far as it concerned Money Mart, should be stayed came before the B.C. courts as a matter of first impression. Money Mart's application for a stay was refused at first instance by Madam Justice Brown (see *MacKinnon v. National Money Mart Company* (2004), 26 B.C.L.R. (4th) 172 (S.C.), 2004 BCSC 136). Money Mart's appeal was allowed (see *MacKinnon v. National Money Mart Company*, 2004 BCCA 473), and the matter was remitted back to Brown J. for reconsideration on the application for certification. This application was argued in September and October, 2004, and, as of early February, 2005, judgment is reserved.

Can a defendant can "immunize" itself from a class proceeding using an arbitration agreement? At present, there is no clear answer in B.C., as the parties await Madam Justice Brown's decision on certification.

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1 The action (referred to in this paper as "*MacKinnon v. Money Mart*") was filed on January 29, 2003 in the Supreme Court of British Columbia, Vancouver Registry Action No. S030527. 27 defendants were named.

2 The author would like to acknowledge the contributions, reflected in this paper, of her colleagues (and co-counsel) Jill Yates and John Brown.

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At the same time as the B.C. courts have been grappling with the interplay between arbitration agreements and class proceedings, they have also been considering the effect of an exclusive jurisdiction clause in proposed class proceedings. Such a clause has been enforced, and a proposed class action stayed (see *Ezer v. Yorkton Securities Inc.*, 2003 BCSC 487, affirmed 2005 BCCA 22).

Of note, arbitration and class proceedings from the Québec perspective has been the subject of a recent article published in the September 2004 issue of the Canadian Bar Review: see Donald Bisson and Shaun Finn, "A Disputed Alternative to Alternative Dispute Resolution – A Discussion of Class-Wide Arbitration and its relevance for Québec Class Action Litigants and Practitioners," (2004), 83 Can. Bar Rev. 309.

II. SETTING THE STAGE

A. The Facts in MacKinnon v. National Money Mart

The facts are straightforward.

In the period between 1999 and 2002, Mr. MacKinnon entered into over 50 "Fast Cash Advance" agreements with Money Mart.

In January, 2001, Money Mart introduced a term in all of its Fast Cash Advance agreements whereby Money Mart and the customer agreed that, at the election of either party, they would submit their disputes to arbitration. Specifically, Mr. MacKinnon and Money Mart agreed (in over 20 Fast Cash Advance agreements):

> Any claim, dispute or issue whether in contract, tort or otherwise, arising out of or in connection with the Loan or this Loan Agreement or any prior or future loan agreement between the parties, including any issue regarding related fees, advertising, promotion or any oral or written statement or the absence thereof, of payment, and/or the relationship between the parties shall, upon election by either party be resolved by binding arbitration in accordance with the *Commercial Arbitration Act* of B.C. as amended (the "Act"). No joinder or consolidation of claims with other persons are permitted without the consent of the parties hereto. In the event of a conflict between this arbitration provision and the Act, the terms of this arbitration provision shall govern.

In 2001 and 2002, Mr. MacKinnon also obtained payday loans from companies other than Money Mart, including Canadian Cheque Advance, Stop 'N' Cash and "Payroll Loans." None of these companies had arbitration agreements.

Mr. MacKinnon's action was filed on January 29, 2003. He alleged that fees charged as part of payday loan transactions, which (allegedly) were collected when a payday loan was repaid, constituted interest for the purpose of s. 347(1) of the *Criminal Code* and that the effective annual rate of interest exceeded 60%. In short, Mr. MacKinnon alleged that defendants in the

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"payday loan business" routinely charged and collected interest at a criminal rate from their customers.

On February 10, 2003, Money Mart's solicitors wrote to Mr. MacKinnon's solicitors, electing arbitration of Mr. MacKinnon's claims. Among other things, Money Mart agreed to pay the costs of the arbitrator, and to waive any right to recover costs against Mr. MacKinnon if he was unsuccessful in the arbitration. Mr. MacKinnon (through his solicitors) refused to arbitrate, claiming (among other things) that the arbitration agreements were unconscionable and void for illegality. Money Mart reaffirmed its election to arbitrate, and in addition offered to participate in non-binding mediation (without lawyers, with Money Mart paying the costs of the mediator). On February 27, 2003, Mr. MacKinnon rejected Money Mart's proposals.

On March 25, 2003, Money Mart delivered its motion applying for a stay of proceedings under s. 15 of the *Commercial Arbitration Act*. This section provides in relevant part (*italics* added):

> s. 15(1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may apply, before or after entering an appearance and before delivery of any pleadings or taking any other step in the proceedings, to the court to stay the legal proceedings.
>
> (2) In an application under subsection (1), *the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed*.

B. Rulings made by Brown J. prior to the hearing of the application for a stay

The first case management conference was held before Madam Justice Brown on May 15, 2003. By that time, a number of motions had been delivered by various defendants, including motions to strike the claim brought on behalf of defendants from whom Mr. MacKinnon had never borrowed money. The Instaloans defendants ("Instaloans") were in this group. After *MacKinnon v. Money Mart* was filed, Instaloans added an arbitration agreement to their written agreements,[3] and they also brought an application for a stay under s. 15 of the *Commercial Arbitration Act*. Madam Justice Brown directed the parties to deliver written submissions on how all of the pending motions, and the certification application, should be scheduled.

By the end of May, 2003, written submissions on scheduling had been delivered to Madam Justice Brown, and Mr. MacKinnon's solicitors had also delivered the application for certification and a number of affidavits in support. These affidavits included one from a person

[3] The Instaloans arbitration agreement (in the period from February 14 to July 22, 2003) provided: "Both parties agree to resolve disputes, claims or controversies by way of binding arbitration, rather than litigation, within the laws of the province [of British Columbia]."

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claiming to be a Money Mart customer, who had not dealt with Money Mart after January, 2001 and was not party to any arbitration agreements with Money Mart.

On June 26, 2003, Madam Justice Brown issued oral reasons for judgment on the scheduling issues.[4] The key provisions of her order, so far as Money Mart's application for a stay was concerned, were that (*italics* added):

> The Applications brought by various Defendants to stay the action…will proceed on September 29 and 30, 2003 and, *if it is necessary to determine those motions*, in conjunction with a determination pursuant to s. 4(1)(d) of the *Class Proceedings Act* of whether arbitration or a class proceeding is the preferable procedure for the fair and efficient resolution of any common issues raised by the claims of the proposed class.
>
> The Defendants shall not be required to file any Affidavit materials in response to the Plaintiff's certification application until a determination of the motions to strike and to stay *as the first phase of the certification hearing.*
>
> The participation in the first phase of the certification hearing by those Defendants who have delivered motions to stay will be without prejudice to any rights those Defendants have under s. 15 of the *Commercial Arbitration Act* and shall not be construed as the taking of any step in the proceedings for the purposes of s. 15 of [that Act].

On July 24, 2003, following the second case management conference, Madam Justice Brown issued some further directions concerning the hearing of the applications for a stay, specifically:

> The interplay between s. 15 of the *Commercial Arbitration Act* and s. 4(1)(d) of the *Class Proceedings Act* will be considered on the Arbitration Motions as part of the certification hearing without a determination of the common issues, if any, that arise in the proposed class proceeding.
>
> For the purposes of the September 30, 2004 hearing, Money Mart and the other Stay Defendants are not required to submit any evidence to comply with subsections (4) and (5) of s. 5 of the *Class Proceedings Act*, and nothing done in connection with the hearing of the Arbitration Motions shall be considered a "step" for the purposes of s. 15 of the *Commercial Arbitration Act*.

[4] These are now available on the B.C. judgments website: see *MacKinnon v. National Money Mart*, 2004 BCSC 1532.

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C. The Legal Background

1. B.C. Judges regularly held people to their agreements to arbitrate

There is a well-developed body of case law in B.C. (developed since 1986, when the arbitration legislation was revised and modernized) addressing the circumstances in which a stay of proceedings should be ordered (or refused) under s. 15 of the *Commercial Arbitration Act*.[5]

The three pre-requisites for a stay are:

(a) a party to an arbitration agreement must commence legal proceedings against another party to the agreement;

(b) the legal proceedings must be in respect of a matter that the parties agreed would be submitted to arbitration; and

(c) the stay application must be timely, i.e. before the applicant takes any step beyond filing an appearance in the proceeding.

See *Prince George (City) v. McElhanney Engineering Services Ltd.* (1995), 9 B.C.L.R. (3d) 368 (C.A.) ("*Prince George*"), at para. 22. Where the pre-requisites are met, a stay is mandatory unless the arbitration agreement is void, inoperative or incapable of being performed.

The judicial history of *Prince George* is instructive. The City of Prince George had entered into a construction contract with one of the defendants (Sims, the contractor) that contained an arbitration agreement. The other defendant (McElhanney) was nominated as a consultant under the contract but was not a party to the contract, and, accordingly, not party to any arbitration agreement. When the parties had difficulties completing the work, the City sued Sims for delay, negligence and breach of contract, and McElhanney for negligent design and supervision of the project. Sims applied for a stay of proceedings based on its arbitration agreement with the City.

At first instance,[6] Mr. Justice Parrett had refused to order a stay. He concluded that the arbitration agreement was both inoperative and incapable of being performed because there were broad issues between the City and McElhanney that were interrelated with the issues raised with Sims.[7] Mr. Justice Parrett went on to say that if he was wrong in his interpretation of s. 15(2) of the *Commercial Arbitration Act*, he could invoke the "residual discretion" which he said was identified by Hinkson J.A. in *Gulf Canada Resources Ltd. v. Arochem International Ltd.* (1992), 66 B.C.L.R. (2d) 113 (S.C.) ("*Gulf Canada*"), and refuse to grant a stay. In the Court of Appeal, Mr. Justice Cumming held that Parrett J. had misinterpreted Hinkson J.A.'s judgment in *Gulf Canada*, and that there was no such "residual discretion" to refuse a stay.[8]

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5 Appendix A is a list of the cases and other authorities referred to by the parties in the Court of Appeal (many of which, and more, had also been before Madam Justice Brown at the original hearing).

6 *Prince George (City) v. McElhanney Engineering Services Ltd.* [1994] B.C.J. No. 3072 (Q.L.) (S.C.) ("*Prince George (BCSC)*").

7 *Prince George (BCSC)*, at paras. 34-41.

8 *Prince George*, at paras. 52-54.

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Money Mart's position was that the notion that B.C. judges had any significant residual discretion to refuse a stay of proceedings where the parties had agreed to arbitrate had been firmly put to rest by the Court of Appeal in *Gulf Canada* and *Prince George*. This meant that a creative interpretation of "void, inoperative or incapable of being performed" – in effect creating a judicial discretion – was not permitted.

2. In B.C., a proposed class proceeding is (was) an ordinary action before certification

The B.C. *Class Proceedings Act*, unlike the Ontario *Class Proceedings Act, 1992*,[9] contains a definition of "class proceeding" in s. 1:

> "Class proceeding" means a proceeding certified as a class proceeding under Part 2.

Several B.C. Supreme Court judges had observed, in the light of this definition, that pre-certification, a proposed class action was simply an ordinary action: *Edmonds v. Accton Super-Save Gas Stations and others*, [1996] B.C.J. No. 2050 (Q.L.) S.C.), 5 C.P.C. (4th) 101; *Scott v. TD Waterhouse Investor Services (Canada) Inc.* (2000), 83 B.C.L.R. (3d) 365 (S.C.), 2000 BCSC 1786, in particular at paras. 26-28; *Olsen v. Behr Process Corporation*, 2003 BCSC 429, [2003] B.C.J. No. 627 (S.C.), at para. 6.

The B.C. *Class Proceedings Act* also required (by s. 5) delivery of affidavit evidence from a defendant who intended to oppose certification. The existence of such an obligation appeared to be quite incompatible with the case law (going back over 100 years) dealing with applications to stay on the basis an arbitration agreement. The law was clear that the application for a stay must be made *promptly*, before participation in the proceedings before the court.

3. The "interplay" between arbitration agreements and class proceedings had been specifically considered in Ontario

While this was a matter of first impression in B.C., the interplay between arbitration agreements and class proceedings had come before Ontario courts in two cases: *Huras v. Primerica Financial Services Ltd.* (2000), 13 C.P.C. (5th) 114 (Ont. S.C.J.), aff'd (in the result) (2001), 50 O.R. (3d) 449 (C.A.) ("*Huras*"); and *Kanitz v. Rogers Cable Inc.* (2002), 58 O.R. (3d) 299 (S.C.J.) ("*Kanitz*"). It had also been considered by the Ontario Legislature in the form of the Ontario *Consumer Protection Statute Law Amendment Act*, S.O. 2002, c. 30 (not yet in force).

The stay provisions in the Ontario *Arbitration Act, 1991*, S.O. 1991, c. 17 are somewhat different than the stay sections in the B.C. statutes. The Ontario *Act* provides, in s. 7:

> 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.

[9] *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

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> (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.

Huras was a proposed class proceeding being brought on behalf of a class consisting of persons who entered into the defendant's training program for sales representatives. The plaintiff alleged that the defendant had failed to pay a minimum wage, and alternatively claimed the defendant was unjustly enriched. The defendant sought a stay on the basis of an arbitration agreement. Among other things, the alleged "agreement" purported to bind trainees such as the plaintiff but did not bind Primerica, required a 3-person arbitration panel, required the arbitration to be held at a place convenient to Primerica, required a transcript to be made of the proceeding, and required the losing party to pay the winning party's costs (including legal expenses) of the arbitration.[10] The defendant's application came on before Mr. Justice Cumming.

Mr. Justice Cumming dismissed the application, on the grounds that the subject matter of the dispute was outside the scope of the arbitration agreement. However, he went on to discuss other issues – including whether the arbitration agreement was invalid because it was unconscionable – although (as the learned judge recognized) a ruling on these issues was not necessary to the result. Mr. Justice Cumming concluded that the arbitration agreement was unconscionable, and observed (at para. 46) that the arbitration clause, "if enforceable, would defeat the public policy inherent in" the Ontario *Class Proceedings Act*.

On appeal by Primerica, the Court of Appeal agreed with the result reached by Mr. Justice Cumming and dismissed the appeal. However, Borins J.A. (for the court) said (at para. 20):

> There is no doubt that it was unnecessary for the motion judge to decide these [other] issues in order to determine whether to stay the [plaintiff's] action under s. 7(1) of the *Arbitration Act, 1991*. These findings are clearly *obiter dicta* and, therefore, not binding as precedent.

In *Kanitz*, on the other hand, Rogers Cable was successful in obtaining a stay of a proposed class proceeding. The plaintiffs were former subscribers to Rogers' high-speed Internet access service. The user agreement between Rogers and its subscribers provided that Rogers could

[10] The arbitration agreement is quoted at para. 9 of the judgment of Cumming J., 13 C.P.C. (5th) pp. 117-118

amend the agreement at any time by posting notice of such changes on its web site or sending notice via e-mail or postal mail, and that continued use of the service following notice meant that the subscriber agreed to the changes. Rogers amended the user agreement to add an arbitration clause that provided that any claim or dispute would be referred to and determined by arbitration, to the exclusion of the courts, and that the subscriber waived any right to commence or participate in any class action against the defendant. The amendment was posted on Rogers' web site, and the plaintiffs continued using the service after the posting of the notice.

On the issue of the "interplay" between arbitration and class proceedings, Mr. Justice Nordheimer said (at pp. 315-316):

> [50] The plaintiffs, however, continue their attack on the arbitration clause by asserting that the prohibition against class actions is, by itself, sufficient to constitute the entire clause as unconscionable because it has the effect of defeating the public policy inherent in the *Class Proceedings Act*, 1992. The problem with that assertion is two-fold. First, it has been held on many occasions by our courts that the *Class Proceedings Act*, 1992 is procedural and not substantive. As Mr. Justice Winkler said in *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130, 37 C.P.C. (4th) 175 (S.C.J.) at p. 143 O.R.:
>
> > Moreover, this court has noted on multiple occasions that there is no jurisdiction conferred by the *Class Proceedings Act* to supplement or derogate from the substantive rights of the parties. It is a procedural statute and, as such, neither its inherent objects nor its explicit provisions can be given effect in a manner which affects the substantive rights of either plaintiffs or defendants.
>
> [51] Secondly, it is apparent that there are two public policies at issue here which may, to some degree, conflict. While the *Class Proceedings Act, 1992* represents one public policy, the *Arbitration Act, 1991* represents another. There is no reason to prefer one over the other if there should be a conflict between the two. However, these public policies do not have to be interpreted in a manner such that they do conflict. They can be interpreted in a manner where they co-exist if the plaintiffs' interpretation, which would have the *Class Proceedings Act, 1992* first conflict with, and then take precedence over, the *Arbitration Act, 1991*, is not accepted.
>
> [52] There is no reason to believe that the legislature intended the interpretation urged by the plaintiffs. The *Class Proceedings Act, 1992* was passed after the *Arbitration Act, 1991*. If the legislature had intended that the former was to be given precedence

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over the latter, it could have so provided. The legislature could have expressly exempted class proceedings from the effects of the *Arbitration Act, 1991*, as it did with situations of default or summary judgment. It could have enacted any number of other provisions which would have had the same effect. The legislature chose not to do so.

[53] Further, the *Class Proceedings Act, 1992* itself requires the court to consider whether a class action is the preferable procedure for the resolution of the common issues before granting a certification order. In considering whether a class action is the preferable procedure, the court must take into account alternative methods of redressing the putative class members' complaints. As Chief Justice McLachlin said in *Hollick v. Toronto (City)*, 2001 SCC 68, [2000] S.C.J. No. 67, at para. 31:

> I think it clear, too, that the court cannot ignore the availability of avenues of redress apart from individual actions. As noted above, the preferability requirement was intended to capture the question of whether a class proceeding would be preferable "in the sense of preferable to other procedures such as joinder, test cases, consolidation and so on": [citations omitted].

It would seem unarguable that the arbitration of claims is one such other procedure.

Some months after the release of *Kanitz*, the Ontario Legislature enacted the *Consumer Protection Statute Law Amendment Act*, S.O. 2002, c. 30. Among other things, this Act provides:

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.

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> **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.
> …….
>
> **Non-application of *Arbitration Act*, 1991**
>
> (5) Subsection 7 (1) of the *Arbitration Act*, 1991 does not apply in respect of any 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.

However, as of January 28, 2005, this legislation has not yet been proclaimed in force.

III. THE HEARING BEFORE BROWN J.: THE ARBITRATION AGREEMENT IS "INOPERATIVE"

The applications of Money Mart and the Instaloans Defendants[11] came on for hearing before Madam Justice Brown on September 29 and 30, 2003. In her reasons, Madam Justice Brown said (para. 8):

> The parties have provided me with comprehensive argument raising many issues. I do not propose to review all of the issues raised because I have concluded that the arbitration agreement is inoperative. In my view, the other arguments advanced by the plaintiff cannot succeed. On these issues, I accept the argument of the applicant, National Money Mart Company.

The "comprehensive argument" included a full-fledged attack – ultimately unsuccessful – by Mr. MacKinnon on the validity of the arbitration agreements. Mr. MacKinnon argued that the

[11] A third defendant, Money Sense Check Services Inc., also made an application for a stay.

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arbitration agreements were void both because they were unconscionable,[12] and because they were "infected with illegality" since the agreements in which they were contained (allegedly) violated s. 347(1) of the *Criminal Code*. Madam Justice Brown rejected these submissions.

Madam Justice Brown framed the issue before her as whether an arbitration clause in a consumer loan agreement precludes class proceedings arising from that contract. The learned Chambers Judge found (para. 13) that s. 15 of the *Commercial Arbitration Act* conflicted with the *Class Proceedings Act*, and held that the two statutes could be read "harmoniously" provided that "in the face of a class proceeding, the arbitration agreement is inoperative" (para. 30). Her Ladyship continued (**bold** in original), at para. 32:

> The legislature, by including "inoperative" in s. 15(2), contemplated a situation where the arbitration clause was not void or incapable of being performed, but was ineffective for some other reason. In my view, that wording applies to these circumstances: where a proceeding meets the requirements of s. 4 of the *Class Proceedings Act*, the court **must** certify it as a class proceeding; the arbitration clause is, therefore, inoperative. If the acts are read together in this way, they are not in conflict. In my view, this is the correct interpretation.

IV. IN THE COURT OF APPEAL

A. Leave to Appeal is granted

Both Money Mart and Instaloans applied for and were granted leave to appeal by Mr. Justice Braidwood (*MacKinnon v. Instaloans Financial Solution Centres (Kelowna) Ltd.*, 2004 BCCA 137). A stay of proceedings was refused, as (among other things) counsel involved expected to have the appeals heard at an early date and were co-operating in that regard.

Mr. Justice Braidwood also made a specific direction to address the possible prejudice to Money Mart (and Instaloans) of being forced to take steps in the proceedings below while their appeals were pending. It was a term of the order granting leave that any step taken, whether initiated by

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[12] On this point, in addition to cases such as *Harry v. Kreutziger* (1978), 95 D.L.R. (3d) 231 (B.C.C.A.), Mr. MacKinnon's counsel cited a number of U.S. cases including *ACORN v. Household International*, 211 F. Supp. 2d 1160 (N.C. Cal, 2002); *Comb v. Paypal*, 218 F. Supp. 2d 1165 (N.D. Cal. 2002); *Ferguson v. Countrywide Credit Indus.* 298 F. 3d 778 (9th Cir. Cal. 2002); *Leonard v. Terminix International Co., L.P.*, 2002 Ala. LEXIS 316 (Ala. Oct. 18, 2002); *Arnold v. Goldstar Financial Systems*, 2002 U.S. Dist. LEXIS 15564 (N.D. Ill. 2002); *Luna v. Household Finance Corp.* 236 F. Supp. 2d 1166 (W.D. Wash. 2002); *Szetela v. Discover Bank*, 97 Cal. App. 1094 (Cal. App. 2002). Plaintiff's counsel also cited a lengthy journal article by Jean R. Sternlight, "As Mandatory Binding Arbitration Meets the Class Action, will the Class Action survive?" (2000), 42 Wm. and Mary L.R. 1. Money Mart countered with (among other U.S. authorities) *Green Tree Financial Corp. v. Bazzle*, 123 S. Ct. 2402, 2003 LEXIS 4798 (U.S.S.C.); *Brown v. Surety Finance Service Inc.* 2000 U.S. Dist. LEXIS 5734 (N.D. Ill. 2000); *In re: RealNetworks, Inc.* 2000 U.S.Dist. LEXIS 6584 (N.D. Ill.); *Brower v. Gateway2000 Inc.*, 676 N.Y.S. 2d 569 (App. Div., 1998); and *Gray v. Conseco, Inc.*, 2000 U.S.Dist. LEXIS 14821.

the appellants or in response to an initiative of Mr. MacKinnon, would be without prejudice to the appellants' position that they are entitled to a stay of proceedings upon the true construction of s. 15 of the *Commercial Arbitration Act*.[13]

B. Submissions in the Court of Appeal

In the Court of Appeal, Money Mart asserted that Madam Justice Brown had made two errors. First, Money Mart said that her Ladyship's conclusion that there was a conflict between s. 15 of the *Commercial Arbitration Act* and the *Class Proceedings Act* was wrong. Second, Money Mart said that her Ladyship was wrong to interpret "inoperative" in s. 15(2) of the *Commercial Arbitration Act* to mean "inoperative whenever an action is brought under the *Class Proceedings Act*."

On the second point, Money Mart argued that Madam Justice Brown's interpretation of "inoperative" produced absurd consequences. This was because an arbitration agreement was rendered "inoperative" whenever an action is filed with "Brought under the *Class Proceedings Act*" in the style of cause, and whether or not the action is ever certified as a class proceeding.

In response to Madam Justice Brown's expressed concern that granting a stay would undermine the objects of the *Class Proceedings Act*, Money Mart argued that the concern was not justified on the facts of the case. As a general matter, arbitration removes disputes from the judicial forum completely, so that judicial economy is fostered, not undermined. Money Mart also argued that Mr. MacKinnon had no apparent interest in getting "access to justice" since the litigation placed him months or potentially years away from having his claim adjudicated on its merits, when he could have had it arbitrated at Money Mart's expense. Finally, Money Mart pointed out that Mr. MacKinnon had the opportunity to encourage behaviour modification by refusing to provide his business to Money Mart and instead giving his business to Money Mart competitors who did not have arbitration agreements in their loan documents. On the evidence, Mr. MacKinnon in fact did this on occasion, but apparently preferred to deal with Money Mart. Money Mart also argued that by her ruling, Madam Justice Brown instituted by judicial decree a proposal for law reform. Money Mart said that this was a matter for legislature, not the courts.[14]

Mr. MacKinnon, of course, argued that Madam Justice Brown was correct in holding that the arbitration agreements were inoperative. In addition, Mr. MacKinnon argued there were two alternative grounds supporting dismissal of the stay application: that the arbitration clauses were unconscionable,[15] and that they were "infected with illegality."

Mr. MacKinnon argued that the standard form payday loan contacts were "classic adhesion contracts," and that there was "a clear inequality of bargaining power" arising out of "the obvious need of the borrower for the payday loan." However, Mr. MacKinnon faced the insurmountable obstacle that no such findings of fact had been made by Madam Justice Brown

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[13] A similar direction had been made in *Prince George*.

[14] Money Mart pointed to the solution adopted (but not yet proclaimed in force) in Ontario via the *Consumer Protection Statute Law Amendment Act*.

[15] No distinction was made between the terms in Money Mart's arbitration agreement, and those in Instaloans' agreement.

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(assuming in the circumstances they could have been). Undeterred by Madam Justice Brown's rejection of these submissions, Mr. MacKinnon again also cited U.S. case law and the article by Jean Sternlight in support of his argument that the arbitration agreements were unconscionable.[16]

On this point, Money Mart argued that in both *Gulf Canada* and *Prince George*, the B.C. Court of Appeal repeated the theme that the relevant points (e.g., that an agreement is void) must be *clear* on the evidence before a stay is refused.[17] Therefore the onus was on Mr. MacKinnon to demonstrate clearly both that the arbitration agreements were unenforceable because they were unconscionable, and that on those grounds the agreements were therefore void (rather than merely voidable). Mr. MacKinnon failed to do this.

Money Mart also argued that the U.S. case law to which Mr MacKinnon referred on the issue of unconscionable operation of arbitration agreements provided little real assistance. The cases cited by Mr. MacKinnon had been discussed – and distinguished – in a recent decision of the Illinois Court of Appeal, *Hutcherson and Wilson v. Sears Roebuck & Company and others*, 342 Ill. App. 3d 109, 793 N.E. 2d 886, 2003 Ill. App. LEXIS 826 (Ill. App. 2003) ("Hutcherson"). Among other things, the Illinois Court disagreed with the conclusions reached in *Szetela v. Discover Bank*.[18]

C. The Court's Ruling

In the result, Levine J.A. (writing for a 5-judge panel) held that, while she was in agreement with Brown J.'s reasoning, the order refusing a stay was premature:

> If a proceeding is certified as a class proceeding, it logically and legally follows that an arbitration agreement is "inoperative." That decision cannot be made, however, before the court determines whether the proceeding will be certified. I would therefore allow the appeals from her order dismissing the applications for a stay of the action and remit the matter to the case management judge for reconsideration on the certification application.[19]

Madam Justice Levine reiterated that, before certification, a proposed class action was not "any old action" but was "an action with ambition."[20] This was key to her ruling that the stay application must await the court's ruling on the certification application.

Madam Justice Levine agreed with Money Mart that in considering s. 15 of the *Commercial Arbitration Act*, the courts have taken a deferential approach, and have placed importance on the

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[16] Ironically, the named plaintiff in *Szetela v. Discover Bank* (one of the cases cited by Mr. MacKinnon) had been compelled to proceed to arbitration, where Mr. Szetela was successful. He then filed his appeal.

[17] *Gulf Canada*, at paras. 39 and 42 (where Hinkson J.A. uses the term "perfectly clear"); *Prince George*, para. 53.

[18] see *Hutcherson*, N.E. 2d, pp. 895-896.

[19] *MacKinnon v. Money Mart*, 2004 BCCA 473, at para. 4.

[20] *Ibid*., para. 24.

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need for certainty and predictability in the interpretation of arbitration statutes because of their international implications. However she continued (para. 33):

> The objectives of freedom of contract and certainty and predictability in the international context have limited applicability in this case. The arbitration agreements in question were not negotiated between parties of equal bargaining power, but were inserted by the appellants into a standard form consumer agreement between parties of unequal bargaining power [citations omitted]. There is no international element to this dispute, and no conflicting interpretations of "inoperative" in the context of class proceedings that have been drawn to the Court's attention.

After referring to *Prince George* and other cases in which stays were granted, Levine J.A. said (para. 36):

> Thus, the court's jurisdiction to refuse a stay of an action in favour of arbitration is limited. The approach of the courts has been deferential to arbitration agreements in the interests of freedom of contract, international comity and expected efficiency and cost-savings. "Inoperative" has been given a narrow interpretation in the context of commercial arbitration agreements. None of the authorities which have considered the meaning of "inoperative", however, has done so in the context of a class proceeding.

Under the heading "Arbitration Agreements, Class Proceedings and Consumer Transactions," Madam Justice Levine noted (para. 37) that:

> In Ontario and the United States, the analysis of the enforceability or validity of arbitration clauses in standard form agreements governing consumer transactions in the face of class proceedings focuses on whether the arbitration clauses are "unconscionable". While some of the same factors are relevant to the consideration of whether an arbitration agreement is "inoperative", the threshold for establishing that an agreement is "unconscionable" is higher. Thus, the Ontario and U.S. cases are of limited assistance.

Levine J.A. briefly mentioned the decisions in *Huras* and *Kanitz*, the Ontario *Consumer Statute Law Amendment Act*, some of the U.S. case law, and the U.K. *Arbitration Act 1996*. She concluded on this point (para. 46):

> In British Columbia, the legal tests are different. The court is mandated by the *Class Proceedings Act* to determine if a class proceeding is the preferable procedure and to certify it if all of the requirements are met, and by the *Commercial Arbitration Act* to stay a legal proceeding unless the arbitration agreement is found to be "inoperative". The Legislature has not dealt with the competing

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> statutory mandates directly. In this context, the balancing of public policies and statutory objectives is required. It is not necessary that the court conclude that the arbitration agreement is unenforceable because it is "unconscionable"; the test is whether the arbitration agreement is "inoperative" in the face of a procedure that the court finds "preferable".

Madam Justice Levine ruled (para. 48) that Brown J. had *correctly* interpreted the word "inoperative" in the context of a class proceeding when Madam Justice Brown said "where a proceeding meets the requirements of s. 4 of the *Class Proceedings Act*, the court **must** certify it as a class proceeding; the arbitration clause is, therefore, inoperative." The error was to declare the arbitration agreement inoperative before completing the certification analysis:

> It is only when the court has completed its analysis of the certification application and determines that it must certify the proceeding as a class proceeding that it can legally conclude that the arbitration agreement is "inoperative". It is inoperative because the court, following the direction of the Legislature, has determined that the class proceeding is the "preferable procedure" and the other requirements for certification have been met.[21]

With respect to the alternative grounds raised by Mr. MacKinnon, Levine J.A. said (para. 56):

> Mr. MacKinnon claims that if the arbitration agreements are not inoperative, the case management judge erred in failing to find they are unenforceable on the alternative grounds that they are either unconscionable or void. I do not find it necessary to deal with these alternative arguments.

Summarizing her conclusions, Madam Justice Levine wrote (paras. 57-58):

> The refusal to grant a stay of the action was premature. An arbitration agreement can be said to be "inoperative" only after the court has determined that a class proceeding must be certified because it is the preferable procedure and has met the other requirements for certification. The decision whether to grant a stay of an intended class proceeding should not be made before the court determines whether the action will be certified as a class proceeding.
>
> The apparent procedural conflicts between s. 15 of the *Commercial Arbitration Act* and the certification provisions of the *Class Proceedings Act* may be resolved through appropriate directions or orders during the certification process. The stay application should be considered as part of the application for certification. The

[21] *Ibid*., para. 52.

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> applicants for a stay should not be prejudiced by filing a statement of defence and other materials required to respond to the application for certification. The court may also make an order staying arbitration until the conclusion of the certification application (s. 13 of the *Class Proceedings Act*). These types of orders and directions will give the case management judge the opportunity to fully consider the certification application before deciding the outcome of the stay applications.

Money Mart's (and Instaloans') appeal was therefore allowed. The matter was remitted back to Madam Justice Brown for reconsideration in the context of the whole of the application for certification.

V. EXCLUSIVE JURISDICTION CLAUSES ARE BEING ENFORCED

Forum selection (or exclusive jurisdiction) clauses are closely related to arbitration agreements, since both contain an election to submit disputes to a particular forum for resolution (see *Sarabia v. "Oceanic Mindoro"* (1996), 4 C.P.C. (4th) 11 (B.C.C.A.), at para. 32). However, in contrast to arbitration agreements, forum selection agreements are being enforced in proposed class proceedings, and actions have been stayed at the outset.

A. In B.C.

The same week that the appeals in *MacKinnon v. Money Mart* were being heard, Mr. Justice Goepel delivered judgment on an application by a defendant in a proposed class proceeding to stay the action on the ground of a forum clause: *Ezer v. Yorkton Securities and Danzig*, 2004 BCSC 487.

Mr. Ezer (a law student who represented himself at the hearing) had opened a brokerage account at the Toronto office of Yorkton. He signed a New Client Application Form (the "Account Agreement") in Vancouver and forwarded it to Toronto, where it was accepted by Yorkton. The Account Agreement contained the following terms:

> 2. That this agreement and every transaction carried out for the account of the Client is subject exclusively to the laws and regulations of the Province of Canada in which Yorkton accepts this agreement. …
>
> 3. Any disputes arising between Yorkton and the Client shall be exclusively within the jurisdiction of the Courts of the Province in which Yorkton accepts this agreement.

In the result, Mr. Justice Goepel ruled that the choice of forum clause was enforceable, following the decision in *Scalas Fashions Ltd. v. Yorkton Securities Inc.* (2003), 17 B.C.L.R. (4th) 6 (C.A.), in which the court had interpreted an identical agreement. Goepel J. exercised his discretion in favour of granting a stay, as Mr. Ezer had failed show "strong cause" why a stay should not be granted. Among the reasons Mr. Ezer advanced were differences between the class proceedings legislation in Ontario and B.C. with respect to costs.

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In the Court of Appeal, Mr. Ezer (still representing himself) alleged a number of errors, including that the certification application should have been heard first, before the chambers judge considered the stay applications, relying on the Court of Appeal's decision in *MacKinnon v. Money Mart.* Madam Justice Levine (Donaldson and Smith JJ.A. concurring) dismissed Mr. Ezer's appeal.

With respect to Mr. Ezer's reliance on the decision in *MacKinnon v. Money Mart*, Levine J.A. said (paras. 18-20, *italics* added):

> The issue in *MacKinnon* was whether an arbitration clause in the contract was "inoperative" in the face of a class proceeding. This Court found that there was a conflict between s. 15 of the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55, and s. 4 of the *Class Proceedings Act*. The conflict could only be resolved by determining whether the class proceeding met the requirements for certification, including determining that a class proceeding "would be the fair and preferable procedure for the fair and efficient resolution of the common issues". This could only be determined after considering the application for certification.
>
> There is no such statutory conflict in this case. The question is whether the jurisdiction in which the action may be brought is determined by the contract between the parties. *If the exclusive jurisdiction clause is enforceable, Mr. Ezer cannot bring any action against Yorkton in B.C., including a class proceeding, and there is no action to be certified. The issues of whether a class proceeding is the fair and preferable procedure or there are common issues do not arise*.
>
> The chambers judge clearly recognized this when he pointed out that other members of the purported class who are not subject to an exclusive jurisdiction clause may commence class action proceedings against Yorkton in B.C.

Note also that in *Marren v. Echo Bay Mines Ltd.* (2003), 13 B.C.L.R. (4th) 177 (C.A.), the Court of Appeal allowed the defendant's appeal and granted a stay of a proposed wrongful dismissal class action, on the grounds that the B.C. court had no jurisdiction over the defendant.[22]

B. In Ontario

Five years earlier, Mr. Justice Winkler had ordered a stay of a proposed class proceeding against Microsoft, in *Rudder v. Microsoft Corp.* (1999), 40 C.P.C. (4th) 394 (Ont. S.C.J.).

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[22] The panel on the appeal consisted of Huddart, Donald and Mackenzie JJ.A. Huddart J.A. for the court concluded the plaintiff had failed to establish a real and substantial connection between the court and either the defendant or the subject-matter of the action.

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Microsoft's motion for a stay was based on two alternative grounds: the parties had agreed to the exclusive jurisdiction and venue of the courts in Kings County, Washington, in respect of any litigation; alternatively, Ontario was not the appropriate forum. The action was being brought on behalf of a proposed class (estimated to be about 89,000 people) consisting of all persons resident in Canada who subscribed for the provision of Internet access or information or services from or through MSN, The Microsoft Network, since September 1, 1995. The plaintiffs claimed damages for breach of contract, breach of fiduciary duty, misappropriation and punitive damages, together with an accounting and injunctive relief.

As Mr. Justice Winkler described (para. 5):

> The contract which the plaintiffs allege to have been breached is identified by MSN as a "Member Agreement". Potential members of MSN are required to electronically execute this agreement prior to receiving the services provided by the company. Each Member Agreement contains the following provision:
>
> > 15.1 This Agreement is governed by the laws of the State of Washington, U.S.A., and you consent to the exclusive jurisdiction and venue of courts in King County, Washington, in all disputes arising out of or relating to your use of MSN or your MSN membership.
>
> The defendant relies on this clause in support of its assertion that the intended class proceeding should be permanently stayed.

Mr. Justice Winkler considered the forum selection clause dispositive and granted the stay. In explaining the reasons for his conclusion, Mr. Justice Winker said (paras. 8-9; *italics* added):

> Forum selection clauses are generally treated with a measure of deference by Canadian courts. Madam Justice Huddart, writing for the court in *Sarabia v. "Oceanic Mindoro"* (1996), 4 C.P.C. (4th) 11 (B.C.C.A.), leave to appeal denied [1997] S.C.C.A. No. 69, adopts the view that *forum selection clauses should be treated the same as arbitration agreements.* She states at 20:
>
> > Since forum selection clauses are fundamentally similar to arbitration agreements, ... there is no reason for forum selection clauses not to be treated in a manner consistent with the deference shown to arbitration agreements. Such deference to forum selection clauses achieves greater international commercial certainty, shows respect for the agreements that the parties have signed, and is consistent with the principle of international comity. (Emphasis added.)
>
> Huddart J.A. further states at 21 that "a court is not bound to give effect to an exclusive jurisdiction clause" but that the choice of the

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> parties should be respected unless "there is strong cause to override the agreement." The burden for a showing of a "strong cause" rests with the plaintiff and the threshold to be surpassed is beyond the mere "balance of convenience". The approach taken by Huddart J.A. is consistent with that adopted by courts in Ontario.

Mr. Justice Winkler was troubled at the plaintiffs' "selectivity": on the one hand, they were seeking to have certain terms of the contract with Microsoft enforced, while on the other hand they were seeking to avoid the consequences of the forum selection clause. He continued (para. 17):

> Moreover, given that both of the representative plaintiffs are graduates of law schools and have a professed familiarity with Internet services, their position is particularly indefensible.

The plaintiffs were ordered to pay Microsoft's costs of the application.

VI. REFLECTIONS ON THE STATUS (FOR THE TIME BEING) IN B.C.

As the parties in *MacKinnon v. Money Mart* (and their counsel) await the ruling on the certification application, some key points can be summarized:

1. An exclusive jurisdiction clause is more effective than an arbitration clause in obtaining a stay of proceedings in a proposed class proceeding. With an exclusive jurisdiction clause, the burden is on the plaintiff to show "strong cause" to override the agreement. Stays have been granted at a preliminary stage, and the defendant has not been required to prepare for or argue a certification application.

2. Assuming there is no exclusive jurisdiction clause removing the case from B.C., a defendant who has an arbitration agreement (governed by B.C. law) with a plaintiff in a B.C. action "brought under the *Class Proceedings Act*" will still have to prepare for and argue the certification application, just like a defendant without an arbitration agreement.

3. The Court of Appeal's judgment in *MacKinnon v. Money Mart* is **not** restricted to the consumer context. Compare this with the scope of the relevant sections in the Ontario *Consumer Protection Law Amendment Act*.

4. Overreaching in the drafting of an arbitration agreement is likely counter-productive for a defendant, as illustrated by *Huras*, and some of the U.S. case law. When the court is considering arbitration as an alternative dispute resolution procedure for purposes of s. 4(1)(d) of the *Class Proceedings Act*, a harsh, one-sided arbitration agreement that can or will require a claimant to incur significant costs up front will not help a defendant's cause.

5. The other side of overreaching is an arbitration agreement that provides evidence a defendant is serious about alternative dispute resolution, rather than litigation, and has thought about making arbitration truly a "preferable procedure" to resolve

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disputes. For example (in the consumer context), a defendant who undertakes to pay for the costs of the arbitration is already ahead of the defendant in *Huras*.

6. In addition to a thoughtfully drafted arbitration agreement, evidence of a track record of use of ADR to actually resolve claims can be very helpful. See, e.g., *Williams v. Mutual Life Assurance Co. of Canada* (2000), 51 O.R. (3d) 54 (S.C.J.), aff'd (2002), 17 C.P.C. (5th) 103 (Ont. Div. Ct.), aff'd (2003), 226 D.L.R. (4th) 112 (Ont. C.A.), involving "vanishing premiums." Here, opinion evidence from an expert in ADR, reviewing and commenting favourably on the ADR system that had been put in place, was tendered by the defendant.[23] In the result, certification was refused.

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[23] On the other hand, evidence (including expert evidence from an applied micro-economist) concerning actual resolution of consumer complaints (which the defendants argued were relatively few in number in any event) was tendered in *Olsen v. Behr Process Corporation*. Although Oppal J. (as he then was) said that he had no doubt many people had been assisted and many complaints resolved, certification was granted nevertheless: see (2003), 17 B.C.L.R. (4th) 315 (S.C.), 2003 BCSC 1252.

APPENDIX A

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Continental Securities (a Firm) v. McLeod (1995), 10 B.C.L.R. (3d) 307, 27 B.L.R. (2d) 31 (S.C.)

Cooper v. Deggan, [2003] B.C.J. No. 1638 (Q.L.) (C.A.), 2003 BCCA 395, 184 B.C.A.C. 231, 16 B.C.L.R. (4th) 248, 34 B.L.R. (3d) 278 (B.C.C.A.)

Degelder Construction v. Dancorp Developments, [1998] 3 S.C.R. 90, 58 B.C.L.R. (3d) 1

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International Commercial Arbitration Act, R.S.B.C. 1996, c. 233

Ontario *International Commercial Arbitration Act*, R.S.O. 1990, c. I. 9 (excerpts only)

International Commercial Arbitration Act, S.B.C. 1986, c. 14

Miscellaneous Statutes Amendment Act (No. 2), S.B.C. 1988, c. 46 (excerpts only, see in particular s. 11)

Trade Practice Act, R.S.B.C. 1996, c. 457

UNCITRAL Model Law on International Commercial Arbitration

APPENDIX B
SAMPLE ARBITRATION AGREEMENTS AND OUTCOMES

1. *Huras v. Primerica Financial Services Ltd.* (2000), 13 C.P.C. (5th) 114 (Ont. S.C.J.), aff'd (2001), 55 O.R. (3d) 449 (C.A.) (proposed class proceeding for trainees of Primerica):

Arbitration Agreement: "15. (a) Except as otherwise provided in this Agreement or another written agreement between you and ... [Primerica], any dispute between you and ... [Primerica], between you and ... [Primerica] affiliate (or any of their past or present officers, directors or employees) or between you and another ... [Primerica] representative (as long as ... [Primerica] or any of their personnel is also involved as a party to the dispute) will be settled solely through good faith negotiation (as described in the then current Operating Guideline on Good Faith Negotiation) or, if that fails, binding arbitration. "Dispute" means any type of dispute in any way related to your relationship with ... [Primerica] that under law may be submitted by agreement to binding arbitration, including allegations of breach of contract, personal or business injury or property damage, fraud and violation of federal, provincial or local statutes, rules or regulations. [Primerica] ... may exercise rights under this Agreement without first being required to enter into good faith negotiations or initiate arbitration for disputes covered by this section.

"(b) The arbitration will be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association ("AAA"). The arbitration, will be held in the metropolitan area nearest where the relevant [Primerica] ... has its principal place of business. Each party to the arbitration will select his, her or its arbitrator, and provide the arbitrator's name, address and telephone number to the other party. These arbitrators (who need not be neutral) will appoint a third, neutral arbitrator. If the parties' arbitrators cannot agree on a third arbitrator, the AAA will select the third arbitrator. A transcript of the proceeding will be made, and the arbitrators will state their findings of fact and conclusions of law along with their award. If any court is asked to review the award, the court will review the entire record of the arbitration proceeding. The rules of evidence that would apply in any civil case in the Ontario Court (General Division) will apply in the arbitration. Neither you nor ... [Primerica] will be entitled to consequential or punitive damages in any matter, arbitrated or not. If one party prevails over the other party, the losing party will pay the winning party's expenses (including legal fees) in handling the arbitration or court proceeding to enforce arbitration or the arbitration award. If for any reason there is an actual court case on any matter, you and ... [Primerica] waive the right to a jury trial .... [Primerica] and their officers, directors or employees and, if named as a party to a dispute with the foregoing, any other [Primerica] representative, is intended to be a third party beneficiary of this provision and has the same right to enforce it as do you and [Primerica]. [Primerica] acts as an [sic] representative for each [Primerica] Company, affiliate and their past or present officers, directors and employees for the limited purpose of providing arbitration and good faith negotiation for them for disputes covered by this section."

Outcome: Action not stayed; agreement unconscionable (in obiter).

2. *Kanitz v. Rogers Cable Inc.* (2002), 58 O.R. (3d) 299 (S.C.J.) (proposed class proceeding for Rogers high-speed internet customers):

Arbitration Agreement: "Arbitration. Any claim, dispute or controversy (whether in contract or tort, pursuant to statute or regulation, or otherwise, and whether pre-existing, present or future) arising out of or relating to: (a) this Agreement; (b) Rogers@Home; (c) oral or written statements, advertisements or promotions relating to this Agreement or to Rogers@Home or (d) the relationships which result from this Agreement (including relationships with third parties who are not signatories to this Agreement) (collectively this "Claim"), will be referred to and determined by arbitration (to the exclusion of the courts). You agree to waive any right you may have to commence or participate in any class action against us related to any Claim and, where applicable, you also agree to opt out of any class proceedings against us.

"If you have a Claim you should give written notice to arbitrate to us at the address specified in Section 6. If we have a claim we will give you notice to arbitrate at your address. Arbitration of Claims will be conducted in such forum and pursuant to such rules as you and we agree upon, and failing agreement, will be conducted by one arbitrator pursuant to the laws and rules relating by commercial arbitration in the province in which you reside that are in effect on the date of the notice to arbitrate."

Outcome: Action stayed.

3. *Hutcherson and Wilson v. Sears Roebuck & Company and others*, 342 Ill. App. 3d 109, 793 N.E. 2d 886, 2003 Ill. App. LEXIS 826 (Ill. App., 2003) (proposed class proceedings by Sears credit card holders who were billed automatically for the Sears "Account Car Plan" although neither enrolled in the plan):

Arbitration Agreement: "Any and all claims, disputes or controversies of any nature whatsoever…arising out of, relating to, or in connection with (a) this Agreement…(e) the establishment, operating, handling or termination of the Account; (f) any transaction or attempted transaction relating to the Account; or (g) the validity, scope or enforceability of this Agreement or any prior credit card agreement…shall be resolved, upon your election or our election, by final and binding arbitration before a single arbitrator, on an individual basis without resort to any form of class action, except that each party retains the right to seek relief in a small claims court, on an individual basis without resort to any form of class action, for claims within the scope of the jurisdiction of the small claims court.

"YOU UNDERSTAND AND AGREE THAT, UNDER THIS AGREEMENT, IF ARBITRATION IS CHOSEN BY YOU OR US, YOU WILL NOT HAVE THE RIGHT TO GO TO COURT (EXCEPT FOR SMALL CLAIMS COURT) ON THAT CLAIM OR TO HAVE A JURY TRIAL ON THAT CLAIM. IF ARBITRATION IS CHOSEN, YOU ALSO NOT BE ABLE TO PARTICIPATE AS A REPRESENTATIVE OR MEMBER OF ANY CLASS OF CLAIMANTS PERTAINING TO THAT CLAIM AND YOU WILL HAVE ONLY THOSE RIGHTS THAT ARE AVAILABLE IN ARBITRATION. THE DECISION OF THE

ARBITRATOR WILL BE FINAL AND BINDING EXCEPT AS PROVIDED IN THE FEDERAL ARBITRATION ACT."

"We [Sears] will advance any fees required of you by the [National Arbitration Forum] or any alternative arbitrator or arbitration organization if you send us a written request." The arbitrator could order a refund of any fees advanced "only if the arbitrator determines that your claims or defenses were frivolous."

Outcome: Trial court's denial of defendants' motions to compel arbitration and stay proceedings reversed, and case remanded back to trial court for disposition in the light of appellate court's ruling. *Szetela* not followed.

4. *Gray v. Conseco, Inc.* 2000 U.S. Dist. LEXIS 14821 (a proposed class action by customers of Conseco, who alleged misrepresentation, double-billing, overcharging and various violations of federal and state statutes)

Arbitration Agreement: "All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract, or the validity of this arbitration clause or the entire contract, shall be resolved by binding arbitration by one arbitrator selected by you [the lender] with consent of us [the borrower]. This arbitration contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. Section 1. Judgment upon the award rendered may be entered in any court having jurisdiction. The parties agree and understand that they choose arbitration instead of litigation to resolve disputes. The parties understand that they have a right or opportunity to litigate disputes through a court, but that they prefer to resolve their disputes through arbitration, except as provided therein. THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL, EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY YOU [the lender] (AS PROVIDED HEREIN). The parties agree and understand that all disputes arising under case law, statutory law and all other laws including, but not limited to, all contract, tort and property disputes, will be subject to binding arbitration in accord with this contract. The parties agree and understand that the arbitrator shall have all powers provided by the law and the contract. These powers shall include all legal and equitable remedies including, but not limited to, money damages, declaratory relief, and injunctive relief. Notwithstanding anything hereunto the contrary, you [the lender] retain an option to use judicial or non-judicial relief to enforce a mortgage, deed of trust or other security agreement relating to the real property secured in a transaction underlying this arbitration agreement, or to enforce the monetary obligation secured by the real property or to foreclose on the real property. Such judicial relief would take the form of a lawsuit. The institution and maintenance of an action for judicial relief in a court to foreclose upon any collateral, to obtain a monetary judgment, or to enforce the mortgage or deed of trust, shall not constitute a waiver of the right of any party to compel arbitration regarding any other dispute or remedy subject to arbitration in this contract, including the filing of a counterclaim in a suit brought by you pursuant to this provision."

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Outcome: The court granted the defendants' motion to compel arbitration on all claims, except those based in equity, and granted a stay.

5. *Green Tree Financial Corp. nka Conseco Finance Corp. v. Bazzle*, 123 S.Ct. 2402, 2003 U.S. LEXIS 4798 (U.S.S.C.) (proposed class action by customers of Green Tree alleging breach of South Carolina statue. The issue was whether class arbitration was proper.)

Arbitration Agreement: "ARBITRATION – All disputes, claims or controversies arising from or relating to this contract or the relationship which result from this contract… shall be resolved by binding arbitration by one arbitrator selected by us with consent of you. This arbitration contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 USC section 1… THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL, EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO COURT ACTION BY US (AS PROVIDED HEREIN)… The parties agree and understand that the arbitrator shall have all powers provided by the law and the contract. These powers shall include all legal and equitable remedies, including but not limited to, money damages, declaratory relief and injunctive relief."

Outcome: The U.S. Supreme Court vacated the judgment that had ruled a class arbitration was proper, and remanded the case to the trial court.

6. *Leonard v. Terminix International Co., L.P.*, 2002 Ala. LEXIS 316 (Ala. S.C.) (putative class action by customers of Terminix under a "termite bond"):

Arbitration Agreement: "9. ARBITRATION. The Purchaser and Terminix agree that any controversy or claim between them arising out of or relating to this agreement shall be settled exclusively by arbitration. Such arbitration shall be conducted in accordance with the Commercial Arbitration rules then in force of the American Arbitration Association. The decision of the arbitrator shall be a final and binding resolution of the disagreement which may be entered as a judgment by any court of competent jurisdiction. Neither party shall sue the other where the basis of the suit is this agreement other than for enforcement of the arbitrator's decision. In no event shall either party be liable to the other for indirect, special or consequential damages or loss of anticipated profits."

Outcome: On appeal, the arbitration clause was held to be unconscionable, and therefore unenforceable.

7. *Luna v. Household Finance Corp. III*, 236 F. Supp.2d 1166 (W.D. Wash. 2002) (putative class action by customers of Household Finance):

Arbitration Agreement: "This Arbitration Rider is signed as part of your Agreement with Lender and is made a part of that Agreement. By signing this Arbitration Rider, you agree that either Lender or you may request that any claim, dispute or controversy (whether based upon

contract; tort; intentional or otherwise; constitution; statute; common law; or equity and whether pre-existing, present or future), including all initial claims, counter-claims, and third party claims, arising from or relating to this Agreement or the relationships which result from this Agreement or the relationships which result from this Agreement, including the validity or enforceability of this arbitration clause, any party thereof or the entire Agreement ("Claim"), shall be resolved, upon the election of you or us, by binding arbitration pursuant to this arbitration provision and the applicable arbitration rules or procedures of the arbitration administrator selected at the time the Claim is filed…

…

"If the Lender files a Claim, Lender shall pay all the filing costs. If you file a Claim, the filings costs shall be paid as follows…

…

"THE PARTIES ACKNOWLEDGE THAT THEY HAD A RIGHT TO LITIGATE CLAIMS THROUGH A COURT BEFORE A JUDGE OR JURY, BUT WILL NOT HAVE THAT RIGHT IF EITHER PARTY ELECTS ARBITRATION. THE PARTIES HEREBY KNOWINGLY AND VOLUNTARILY WAIVE THEIR RIGHTS TO LITIGATE SUCH CLAIMS IN A COURT BEFORE A JUDGE OR JURY UPON ELECTION OF ARBITRATION BY EITHER PARTY."

Outcome: Stay of action denied; stay of arbitration granted. Although the arbitration clause would not have been seen as unconscionable in a contract between 2 commercial entities, it was unconscionable in view of the consumer nature of the transactions. (The quotation of the "Arbitration Rider" occupied about 2 full columns in the law report.)

8. *Livingston v. Associates Finance, Inc. et al.*, 339 F.3d 553, 2003 U.S. App. LEXIS 16141 (proposed class action by a group of customer of the defendant, alleging violations of the Truth in Lending Act.)

Arbitration Agreement: (In the words of the court) "The Arbitration Agreement provides that either party 'has an absolute right to demand that any dispute be submitted to an arbitrator', either directly or in response to the filing of a lawsuit by the other party, and that such right encompasses 'all claims and disputes arising out of, in connection with, or relating to' any loans, documents relating to loans, negotiations or the validity of the Arbitration Agreement (among other things). The Agreement also provides that the party seeking arbitration is required to pay the filing fees, but the Livingstons may ask Associates to pay the fee if they believe they are financially incapable of paying it themselves. It further states that the Commercial Arbitration Rules will determine which party will pay the costs associated with arbitration, including attorneys' fees and the cost of the sharing and those Rules provide that arbitration costs 'shall be

borne equally by the parties unless they agree otherwise or unless the arbitrator… assesses such expenses… against any specified party.'"

Outcome: The district court's denial of arbitration reversed on appeal. The Appeals court found the arbitration agreement "controlling" and the defendant's offer to pay arbitration fees sufficient to protect against potentially prohibitive costs. The Appeals court vacated its class certification determination and remanded the case to the district judge with instructions to stay the case and allow the parties to proceed on their claims in arbitration.

9. *Szetela v. Discover Bank*, 97 Cal. App. 4th (Cal. App. 2002) (Discovery Bank credit card holders):

Arbitration Agreement: "Arbitration: We are Adding a New Section to Read as Follows: Arbitration of Disputes. In the event of any past, present or future claim or dispute (whether based upon contract, tort, statute, common law or equity) between you and us arising from or relating to your Account, any prior account you have had with us, your application, the relationships which result from your Account or the enforceability or scope of this arbitration provision, of the Agreement or of any prior agreement, you or we may elect to resolve the claim or dispute by binding arbitration. If Either You or We Elect Arbitration, Neither You Nor We Shall Have the Right to Litigate That Claim in Court or to Have a Jury Trial on That Claim. Pre-Hearing Discovery Rights and Post-Hearing Discovery Rights Will Be Limited. Neither You Nor We Shall Be Entitled to Join or Consolidate Claims in Arbitration by or Against Any Other Cardmembers with Respect to Other Accounts, or Arbitrate Any Claims as a Representative Member of a Class or in a Private Attorney General Capacity. Even if all parties have opted to litigate a claim in court, you or we may elect arbitration with respect to any claim made by a new party or any new claims later asserted in that lawsuit, and nothing undertaken therein shall constitute a waiver of any rights under this arbitration provision."

Outcome: On appeal, the court concluded that an arbitration clause, to the extent it prohibits class treatment of small individual claims, is unconscionable, both procedurally and substantively, and granted Discovery "a 'get out of jail free' card." The order directing Szetela to arbitrate was vacated, and the trial court was ordered to strike the portion of the arbitration clause prohibiting class or representative actions.