DECISION **NSUARB-PD-07-001**
2008 NSUARB 87

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE CONSUMER PROTECTION ACT

- and -

IN THE MATTER OF certain aspects of the *Consumer Protection Act* relating to payday loans, including setting the maximum cost of borrowing and fees, and setting charges for extensions or renewals, relating to loans up to $1,500 granted for periods of 62 days or less

BEFORE: Roland A. Deveau, LL.B., Panel Chair
Wayne D. Cochrane, Q.C., Member
John A. Morash, C.A., Member

INTERVENORS:

THE CASH STORE INC. AND ASSISTIVE FINANCIAL CORP.
David P.S. Farrar, Q.C.
J. Andrew Fraser, LL.B.
Mark S. Freeman, LL.B.

PROVINCE OF NOVA SCOTIA -
SERVICE NOVA SCOTIA AND MUNICIPAL RELATIONS
James Fanning, LL.B.
Richard Shaffner, Director of Consumer and Business Policy

CANADIAN PAYDAY LOAN ASSOCIATION
John D. Stringer, Q.C.
James A. MacDuff, LL.B.

CONSUMER ADVOCATE
David A. Cameron, LL.B.
Jason T. Cooke, LL.B.

THE MONEY PRO$ INCORPORATED
Kelly P. Shannon (Not Present)

310-LOAN
Nathaniel Slee

BOARD COUNSEL: Richard J. Melanson, LL.B.

BOARD COUNSEL CONSULTANTS: David Martin
Michael D. Casey, C.A., of Hemming Weir Casey Inc.

HEARING DATES: January 21 to 25, 2008

FINAL SUBMISSIONS: March 18, 2008

SUPPLEMENTARY SUBMISSIONS: July 14, 2008

DECISION DATE: **July 31, 2008**

DECISION:

1) Market Approach chosen to determine the maximum cost of borrowing;

2) Maximum cost of borrowing set at $31 per $100;

3) Upon default, fees set at maximum of $40 per loan;

4) Disclosure under the amendments to the *Consumer Protection Act* and the draft *Regulations* is sufficient; and

5) Board orders that a further review occur in two years, rather than three.

TABLE OF CONTENTS

INTRODUCTION

[1] This decision is further to a public hearing conducted by the Nova Scotia Utility and Review Board (the "Board" or "NSUARB") respecting certain aspects of the *Consumer Protection Act*, R.S.N.S. 1989, c. 92, as amended S.N.S. 2006, c. 25, relating to payday loans. The *Act* was amended in 2006 to provide for the regulation of payday loans.

[2] A payday loan is typically a small loan payable over a short term, generally to be repaid on or before the customer's next payday. The typical loan is less than $300, with a term not exceeding two weeks.

[3] According to a survey presented at the hearing, the vast majority of payday loan customers (76%) are employed full-time and have household incomes generally on a par with the general population. While 56% of the general population report household incomes of less than $50,000 per year, only 51% of payday loan customers report household incomes below $50,000 per year. The majority of payday loan customers (i.e., 59%) have a post-secondary education: community college (34%), university (18%) or post-graduate/professional programs (7%).

[4] About 84% of payday loan customers indicate that they have paid all of the loans back on time. They also say they were highly satisfied with their understanding of the terms of their payday loan and when payment was due.

REGULATION OF THE PAYDAY LOAN INDUSTRY

[5] The payday loan industry emerged in Canada in the mid-1990s and has rapidly expanded. While there were between 300 and 400 payday loan outlets across the country in 2003, these numbers grew to as many as 1,400 outlets as of 2007. The payday loan market is expected to peak at between 2,500 and 3,000 outlets before the market reaches maturity.

[6] However, the conduct of the payday loan business, and its growth, have been somewhat tempered by the uncertainty resulting from the application of the *Criminal Code* provisions which have long prohibited the charging of a "criminal rate" of interest. This is defined in the *Criminal Code* as an effective annual rate of interest, calculated in accordance with generally accepted actuarial practices and principles, that exceeds 60%. Without the amendment to the *Code* which occurred in 2007, all fees or charges (in addition to interest) imposed by payday lenders would be used in calculating an annualized interest rate, and the resulting figure would be much in excess of 60%.

[7] While some industry participants have entered the payday loan market, including large entities such as Money Mart and The Cash Store, the evidence suggests that the regulatory uncertainty has prevented payday lenders from expanding their number of outlets and entering new markets or regions, or even stopped others from entering the industry at all. According to evidence at the hearing, this has reduced the level of competition among payday lenders in the marketplace. Many of the witnesses indicate that the reduced competition negatively impacts consumers.

[8] Starting in about 2000, the Consumer Measures Committee, a committee of the Parliament of Canada, began studying the need for regulating the payday loan industry in order to address this uncertainty. The work undertaken by this Committee ultimately led to the introduction of Bill C-26, which proposed to amend the relevant provisions of the *Criminal Code*.

[9] In 2007, the Parliament of Canada amended the *Criminal Code* provisions dealing with criminal rates of interest, effectively providing for the regulation of payday loans by the provinces. Bill C-26, which received Royal Assent on May 3, 2007, states in its introduction:

> The expanding presence of payday loan companies suggests that some Canadians are willing to pay rates of interest in excess of those permitted under the Criminal Code for their payday loans. Bill C-26 is designed to exempt payday loans from criminal sanctions in order to facilitate provincial regulation of the industry. Thus, the exemption applies to payday loan companies licensed by any province that has legislative measures in place designed to protect consumers and limit the overall cost of the loans.

[10] Because of the 2007 amendment, the provisions in s. 347 of the *Criminal Code* relating to criminal rates of interest no longer apply to payday loans, where the requirements of s. 347.1 are met:

> **Definitions**
> **347.1 (1)** The following definitions apply in subsection (2).
>
> "interest" has the same meaning as in subsection 347(2).
>
> "payday loan" means an advancement of money in exchange for a post-dated cheque, a pre-authorized debit or a future payment of a similar nature but not for any guarantee, suretyship, overdraft protection or security on property and not through a margin loan, pawnbroking, a line of credit or a credit card.
>
> **Non-application**
> **(2)** Section 347 and section 2 of the Interest Act do not apply to a person, other than a financial institution within the meaning of paragraphs (a) to (d) of the definition "financial institution" in section 2 of the Bank Act, in respect of a payday loan agreement entered into

by the person to receive interest, or in respect of interest received by that person under the agreement, if

(a) the amount of money advanced under the agreement is $1,500 or less and the term of the agreement is 62 days or less;

(b) the person is licensed or otherwise specifically authorized under the laws of a province to enter into the agreement; and

(c) the province is designated under subsection (3).

Designation of province
(3) The Governor in Council shall, by order and at the request of the lieutenant governor in council of a province, designate the province for the purposes of this section if the province has legislative measures that protect recipients of payday loans and that provide for limits on the total cost of borrowing under the agreements.

Revocation
(4) The Governor in Council shall, by order, revoke the designation made under subsection **(3)** if requested to do so by the lieutenant governor in council of the province or if the legislative measures described in that subsection are no longer in force in that province.

[11] As was noted during the hearing, s. 347.1(3) is of crucial importance to any province's attempt to regulate its payday lending industry. Before a payday lender can benefit from the certainty or protection afforded by s. 347.1(2), subsection (3) requires the affected province to enact "legislative measures that protect recipients of payday loans and that provide for limits on the total cost of borrowing under the agreements".

[12] In 2006, Nova Scotia amended the *Consumer Protection Act* to provide for the regulation of payday loans: S.N.S. 2006, c. 25. The amendments provide, among other things, for the licensing of payday lenders (ss. 18C-18H), the disclosure to be provided by payday lenders to their borrowers (ss. 18I and 18O), various provisions aimed at protecting the borrower (ss. 18L-18N, 18Q-18R), the Board's powers to set the maximum cost of borrowing and other charges or rates (s. 18T), provisions prohibiting

payday lenders from charging fees or rates in excess of those set by the Board (s. 18J), provisions requiring the retention of loan documentation by payday lenders (ss. 18M and 18S), as well as a provision allowing the Governor in Council ("Cabinet") to make regulations respecting a broad variety of aspects of payday lending.

[13] Among the issues that were canvassed by the Board in this proceeding were the maximum cost of borrowing to be charged by payday lenders to borrowers in respect to a payday loan, in respect of the extension or renewal of a payday loan, or in respect of any fee, charge or penalty that is provided in the *Regulations*.

PAYDAY LOAN LEGISLATION IN NOVA SCOTIA

[14] Two provisions of the 2006 amendments to the Nova Scotia *Consumer Protection Act* (i.e., ss. 18A and 18T), relating to payday loans, were proclaimed and took effect on August 31, 2007. Section 18A defines payday lender, payday loan and rollover:

> **18A** In this Section and Sections 18B to 18U,
>
> (a) "payday lender" means a person who offers, arranges or provides a payday loan;
>
> (b) "payday loan" means any advancement of money with a principal of one thousand five hundred dollars or less and a term of sixty-two days or less made in exchange for a post-dated cheque, a pre-authorized debit or a future payment of a similar nature but not for any guarantee, suretyship, overdraft protection or security on property and not through a margin loan, pawnbrokering, a line of credit or a credit card;
>
> (c) "rollover" means the extension or renewal of a loan that imposes additional fees or charges on the borrower, other than interest, or the advancement of a new payday loan to pay out an existing payday loan, or a transaction specified in the regulations.

[15] The Board's powers are set out in s. 18T:

> **18T** **(1)** In this Section, "Board" means the Nova Scotia Utility and Review Board.
>
> **(2)** The Board shall, by order,

(a) fix the maximum cost of borrowing, or establish a rate, formula or tariff for determining the maximum cost of borrowing, that may be charged, required or accepted in respect of a payday loan;

(b) fix the maximum amount, or establish a rate, formula or tariff for determining the maximum amount, that may be charged, required or accepted in respect of the extension or renewal of a payday loan; and

(c) fix the maximum amount, or establish a rate, formula or tariff for determining the maximum amount, that may be charged, required or accepted in respect of any fee, charge or penalty that is provided for in the regulations.

(3) The Board may, by order, fix the maximum amount, or establish a rate, formula or tariff for determining the maximum amount, that may be charged, required or accepted in respect of any component of the cost of borrowing of a payday loan.

(4) When making an order under this Section, the Board may consider

(a) the operating expenses and revenue requirements of payday lenders in relation to their payday lending business;

(b) the terms and conditions of payday loans;

(c) the circumstances of, and credit options available to, payday loan borrowers generally, and the financial risks taken by payday lenders;

(d) the regulation of payday lenders and payday loans in other jurisdictions;

(e) any other factor that the Board considers relevant and in the public interest; and

(f) any data that the Board considers relevant.

(5) An order made under this Section must be one that the Board considers just and reasonable in the circumstances, having regard to the factors and data considered by the Board.

(6) The Board shall review its existing orders under this Section at least once every three years and, after the review, the Board shall make a new order that replaces the existing orders.

(7) Whenever the Board is satisfied that circumstances in the payday lending industry have changed substantially, or that new evidence has come to its attention that may affect an existing order made under subsection (2) or (3), the Board may review any existing order and, after the review, the Board shall make a new order that continues, modifies or replaces the order that was reviewed.

(8) Before making an order under this Section, the Board shall notify the Registrar and give public notice and hold a public hearing in respect of the subject matter of the order.

> **(9)** As soon as practicable after the Board makes an order under this Section, the Registrar shall give written notice of the order to every payday lender who holds a permit or whose application for a permit is under consideration by the Registrar.
>
> **(10)** The Board may make recommendations to the Minister on matters in respect of payday loans and payday lenders.
>
> **(11)** The Utility and Review Board Act applies *mutatis mutandis* to a proceeding by the Board under this Section.

[16] The remaining 2006 amendments to the *Act* have not been proclaimed (i.e., ss. 18B - 18S and s. 18U).

[17] Section 18U(1) of the *Act* provides that the Cabinet may make regulations respecting several matters relating to payday loans. While s. 18U, which takes effect upon proclamation, is not yet proclaimed, the Board was advised by Service Nova Scotia and Municipal Relations ("SNSMR") that Executive Council had approved *Regulations* for the use of participants in the present hearing (the "draft *Regulations*"), noting that these draft *Regulations* still require final approval following proclamation of s. 18U. The draft *Regulations* were filed as an exhibit during the hearing (Exhibit PD-38).

[18] The Board, together with the formal intervenors who participated at the hearing, proceeded on the understanding that the draft *Regulations*, or other regulations substantively similar in content, will be approved by Cabinet upon issuance of the Board's Order in this proceeding. The Board infers that the remaining amendments of the *Consumer Protection Act* will be proclaimed at the same time.

REGULATION OF PAYDAY LENDERS ACROSS CANADA

[19] In making an order fixing the cost of borrowing in respect of a payday loan, s. 18T(4)(d) provides that the Board may consider "the regulation of payday lenders and payday loans in other jurisdictions".

[20] Most of the provinces are only in the initial stages of formulating their policy on the issue of payday loans. At the time of the present hearing held by the Board, only Manitoba had held a hearing into issues similar to those in this matter. The Manitoba hearing was conducted by the Manitoba Public Utilities Board.

[21] According to the evidence filed in the present hearing, the status of payday loan policy development in the other provinces, as of the date of the hearing, can be summarized as follows:

- British Columbia - passed a statute respecting payday loans on October 24, 2007. Consultations are to begin with stakeholders in advance of drafting regulations and fixing rates.

- Alberta - intends to regulate the payday lending industry by passing regulations pursuant to its *Fair Trading Act* rather than introducing separate payday loan legislation. A consultation document is about to be released to stakeholders.

- Saskatchewan - in the Spring of 2007, it passed an *Act respecting Payday Loan Agreements, Payday Lenders and Borrowers*. The province has retained the services of a chartered accounting firm, which has issued a questionnaire similar to the one prepared by Ernst & Young which was filed in the present proceeding by the CPLA. The province had intended to issue draft regulations by November 2007, followed by a consultation with stakeholders in December 2007.

- Manitoba - has already passed the *Consumer Protection Amendment Act* and *Regulations* to govern payday loans. Payday loan rates will be fixed by the Manitoba Public Utilities Board, which began hearings on November 13, 2007.

- Ontario - has introduced a consultation document to all stakeholders and intends to introduce legislation to regulate the payday lending industry.
- New Brunswick - had intended to introduce payday loan legislation during the 2007 Fall session of its Legislature.

[22] Final closing submissions were filed in the Nova Scotia hearing on March 10, 2008. During the NSUARB's deliberations in the present matter, the Manitoba Public Utilities Board released its 326 page decision respecting payday loans on April 4, 2008.

[23] As noted above, s. 18T(4)(d) of the *Consumer Protection Act* provides that, in making an order fixing the cost of borrowing in respect of a payday loan, the Board may consider "the regulation of payday lenders and payday loans in other jurisdictions". With respect to all provinces except Manitoba, they have not yet begun or are still in the policy development process and are in various stages of consultation with stakeholders. Accordingly, little guidance can be extracted from those jurisdictions.

[24] Taking into account its review of the Manitoba decision and the submissions of legal counsel, the NSUARB concludes, for the reasons outlined later in this decision, that the Manitoba decision provides no guidance to the Board in the present proceeding and it places no weight upon it.

PROCEEDINGS AND FORMAL INTERVENORS

[25] By Order issued October 4, 2007, the Board directed that a hearing be conducted respecting this matter and it established a timeline for the filing of requests for formal standing, the filing of evidence and information requests, the filing of letters of comment by the public and requests to speak at the evening session and the scheduling of the hearing.

[26] The Notice of Public Hearing was published in the **Chronicle Herald** and **Mail Star**, the **Daily News** and the **Cape Breton Post** on October 10, 17 and 24, 2007 and January 3, 2008. Further to s. 18T(8) of the *Consumer Protection Act*, the Board also provided the Notice of Public Hearing to the Registrar of Credit, by letter dated October 4, 2007.

[27] On November 2, 2007, following submissions from the formal intervenors, the Board set out a Final Issues List which specifically identified those matters which would be the focus of the public hearing. A total of seven formal intervenors responded to the Board's Notice of Public Hearing, as set out immediately below.

[28] The Canadian Payday Loan Association (the "CPLA") is a federally incorporated not-for-profit association whose mandate includes working with government to achieve regulation that will allow for a viable payday loan industry and protect consumers. It represents twenty-three companies comprising 501 out of the 1,235 retail outlets in the country. One of its largest members, Money Mart, operates in the Province of Nova Scotia with six retail outlets. The CPLA was represented at the hearing by its legal counsel, John D. Stringer, Q.C., and James A. MacDuff.

[29] The CPLA called various witnesses at the hearing, including its President, Stan Keyes, and its Secretary, Norman Bishop. Mr. Bishop is legal counsel for Money Mart. Dr. Larry Gould also testified. He is a professor at the University of Manitoba, and was qualified by the Board to testify as an expert able to provide opinion evidence on finance, accounting and taxation, including testimony about methodologies for setting the maximum cost of borrowing. Dean Schinkel, C.A., CBV, of Deloitte & Touche, was qualified by the Board to provide opinion evidence on business valuation and accounting matters. Finally, Michael Marzolini testified on behalf of the CPLA. Mr. Marzolini is Chairman of POLLARA Strategic Public Opinion and Market Research, which conducted various public opinion surveys on behalf of the CPLA in various Canadian provinces, including Nova Scotia. He was qualified by the Board to testify as an expert able to provide opinion evidence on public opinion polling, including the collection, survey, segmentation and analysis of public data and opinion generally, and specifically as these areas relate to the payday loan industry in Nova Scotia.

[30] The Cash Store Inc. and Assistive Financial Corp. also participated as formal intervenors in the hearing and were represented by their legal counsel, David P.S. Farrar, Q.C., J. Andrew Fraser and Mark S. Freeman. The Cash Store Inc. is a subsidiary of Rentcash Inc., which is the only publicly traded Canadian company providing payday loans across Canada, excluding Quebec and Nunavut. It operates 358 outlets of The Cash Store, with 12 outlets located in Nova Scotia. Assistive Financial Corp. is a privately held company that provides loan capital to borrowers through The Cash Store outlets. For the

purposes of this decision, The Cash Store Inc. and Assistive Financial Corp. will be referred to collectively as "Rentcash".

[31] Rentcash called three witnesses at the hearing, including Gordon Reykdal, its Chair and Chief Executive Officer, Nancy Bland, its Chief Financial Officer, and Dr. Kevin Clinton, who was qualified by the Board to testify as an expert able to provide opinion evidence on various issues, including economics and policy advice with respect to the financial sector and the regulation of financial markets; regulatory frameworks, and the implementation of policy in the financial sector; and with respect to household sector finances.

[32] Another industry participant, 310-LOAN, also participated in the hearing, represented by its President Nathaniel Slee. According to the evidence filed by 310-LOAN, it claims to be Canada's largest "direct" payday lender, using a combination of phone, fax and internet to accept loan applications, sign loan agreements and issue funds. Mr. Slee indicated at the hearing that the Company conducts 97% of its business by telephone. It employs 22 people at its head office in British Columbia and provides payday loans to customers across Canada. It also has two storefront outlets in BC.

[33] The Money Pro$ Incorporated also applied and was granted formal intervenor status, but it did not file any evidence nor did it participate in the hearing. It was represented in this matter by its legal counsel, Kelly P. Shannon.

[34] SNSMR also participated as a formal intervenor at the hearing and was represented by its legal counsel, James Fanning and Richard Shaffner, Director of Consumer and Business Policy - SNSMR. This Department is responsible for

administration of the *Consumer Protection Act* and was involved in developing the amendments to the *Act* and *Regulations* pertaining to payday loans. SNSMR did not file any evidence at the hearing, with the exception of a list of payday lenders holding permits to conduct business in Nova Scotia and copies of sample loan documentation filed by such payday lenders with SNSMR. This evidence was filed at the request of the Board.

[35] A Consumer Advocate was also appointed by the Province and granted formal standing in this proceeding. Solicitor David A. Cameron acted as the Consumer Advocate, assisted by solicitor Jason T. Cooke. According to the terms of reference accompanying the application for formal standing, the Consumer Advocate's purpose of participating in this hearing was to provide "consumers' perspectives and represent the interests of Nova Scotian consumers in the payday loans hearings process". While the Consumer Advocate participated in the hearing and cross-examined witnesses called by the other parties, he did not present any evidence.

[36] Some months before the hearing, Dalhousie Legal Aid Service ("DLAS") requested intervenor status (on October 16, 2007) through Megan Leslie, Community Legal Worker. Such status, if granted, as it almost assuredly would have been, would have given DLAS status to present evidence and cross examine witnesses at the hearing. However, DLAS withdrew its request on November 19, 2007.

[37] Following its usual practice, the Board also ordered that persons who were not parties could present submissions at an evening session during the hearing (which began in late January 2008), provided they gave prior notice, and disclosed any documents they intended to present. Two organizations (as noted in the following paragraphs) did so

and presented. DLAS did not give any such notice, and did not disclose any documents. Nevertheless, DLAS asked to present at the evening session, and to introduce extensive written evidence (which, again, had not been previously disclosed). This request was denied by the Board.

[38] The present decision is the result of the Board's deliberations upon the evidence and submissions in the course of a hearing which commenced on January 21, 2008. While the hearing had been scheduled to continue for up to three weeks, it concluded on January 25, 2008, after five days of testimony.

[39] The Board also held an evening session on January 23, 2008. Two parties complied with the Board's Notice of Public Hearing, requesting in advance to speak at the evening session. Credit Counselling Services of Atlantic Canada ("Credit Counselling Services") is a non-profit organization founded in 1994. John Eisner, its President and founder, as well as Linda Wilkie, a Certified Credit Counsellor, appeared on its behalf. It has 12 offices in Atlantic Canada, including six offices in Nova Scotia (i.e., Halifax, Sydney, Kentville, New Glasgow, Truro and Bridgewater, with another to open soon in Yarmouth). Counsellors from this organization speak with consumers about debt, budgeting and money management. Mr. Eisner indicated that over the past year his organization booked in excess of 10,000 appointments with consumers. He stated that consumer debt continues to grow and that more consumers are getting involved with payday loans.

[40] Becky Kent, MLA, also made a presentation at the evening session on behalf of the Nova Scotia NDP Caucus. She is Official Opposition Critic for Consumer Affairs.

[41] Mr. Eisner, Ms. Wilkie and Ms. Kent outlined a number of recommendations involving various aspects of payday lenders and payday loans, most of which are addressed later in this decision.

WHAT IS A PAYDAY LOAN?

[42] The *Consumer Protection Act* describes a payday loan as follows:

> **18A (b)** "payday loan" means any advancement of money with a principal of one thousand five hundred dollars or less and a term of sixty-two days or less made in exchange for a post-dated cheque, a pre-authorized debit or a future payment of a similar nature but not for any guarantee, suretyship, overdraft protection or security on property and not through a margin loan, pawnbrokering, a line of credit or a credit card;

[43] According to the evidence tendered at the hearing, a payday loan is typically a small loan payable over a short term, generally to be repaid on or before the customer's next payday. In a survey of payday loan customers in this region, POLLARA found that almost 2/3 of customers borrowed less than $300 when getting a payday loan (Exhibit PD-6, p. 2). In his testimony, Mr. Schinkel of Deloitte & Touche stated that the results of his survey of Nova Scotia payday lenders indicate that the average loan size in this province is $202.74 (Exhibit PD-9, Part IV.2, p. 2), while Mr. Reykdal of Rentcash stated that $247.47 is the average loan size in Nova Scotia for The Cash Store. This type of loan is unsecured and is not generally available through chartered banks or other conventional financial institutions.

[44] The CPLA described the procedures in obtaining a payday loan:

> A payday loan is a small sum short-term loan, typically a $300.00 advance for a period of 8-14 days to coincide with the payday loan customer's next payday. A payday loan is not a long term financial product but is intended to meet unexpected emergencies or short-term financial needs. These loans are unsecured and are repayable on the payday loan

> customer's next pay date. To obtain a payday loan the payday loan customer will go to a payday loan outlet, provide proof of employment and residence and bank account. At the time of the advance, the payday loan customer will provide the lender a post-dated cheque or pre-authorized debit for the amount of the loan and the loan fee which is dated for the payday loan customer's next payday. When the loan comes due, the lender deposits the cheque or obtains funds through the pre-authorized debit. The payday loan customer does not need to return to the loan outlet to repay the loan. A payday loan customer can obtain a payday loan quickly and without having established a long-term financial relationship as would be required with a bank, trust company or credit union.
>
> [CPLA Pre-filed evidence, Exhibit PD-4, p. 3]

[45] While the *Consumer Protection Act* defines a payday loan as involving up to $1,500 and a term up to 62 days, most payday loans are less than $300 and for a period of 14 days or less.

[46] In addition to providing payday loans, many lenders also offer a range of other products and services such as cheque cashing, money orders, money transfers, foreign currency exchange, prepaid Mastercard, tax preparation and refunds, stored value debit cards, as well as other services. Some of these services or products, like cheque cashing, debit cards and cash cards, are often related to the providing of payday loans.

[47] According to a survey presented at the hearing, the vast majority of payday loan customers (76%) are employed full-time and have household incomes generally on a par with the general population. While 56% of the general population report household incomes of less than $50,000 per year, only 51% of payday loan customers report household incomes below $50,000 per year. The majority of payday loan customers (i.e., 59%) have a post-secondary education: community college (34%), university (18%) or post-graduate/professional programs (7%).

[48] About 84% of payday loan customers indicate that they have paid all of the loans back on time and were highly satisfied with their understanding of the terms of their payday loan and when payment was due.

[49] While the cost of borrowing from payday lenders has been described by some as excessive, particularly when it is equated to an effective rate of interest over a one year time frame, witnesses testifying at the hearing on behalf of payday lenders stated that this comparison is not helpful, or not even relevant, for the purposes of this review. In his report, Dr. Gould provided the following example in support of his assertion:

> With those characteristics for a payday loan, consider the following illustration. Assume a company operates with a total fee of $20 per $100 of payday loan. An individual borrowing $300 for two weeks writes a post-dated cheque for 3 x $20 + 300 = $360, dated two weeks hence. Critics of the payday loan interest claim that the $20 fee per $100 of payday loan is usurious, amounting to over 500% as an annual percentage return, or over 11,000% as an effective annual return, which includes compounding. These calculations are provided in Table I for periods of one week, two weeks and one month.
>
> Although the numbers in Table I make lurid headlines or catchy sound bites, the calculations are an incorrect application of financial theory. *The annual percentage return and the effective annual return measures are very useful for adjusting the different ways that interest rates are quoted and their compounding methods for loans of similar term. There is no meaning to annualizing the cost of a one or two week loan, or compounding it to an annual figure as an effective annual return.*
>
> Furthermore, the $60 fee in this example is not interest, but interest plus an administrative charge*. Many financial institutions have one-time administrative charges when establishing a loan, for example, fees required to obtain a mortgage. However, these charges decrease in importance as the size of the loan increases*. This is illustrated in Table 2. A $60 fee on a five year $100,000 mortgage is .01%, compared to 520% for a two week $300 loan.
>
> **Conclusions**
>
> *The fee charged for a payday loan has to cover operating costs, as well as interest cost. It is misleading to annualize or calculate an effective annual rate of return for this combined cost*. Payday loans are high cost because of their design as short-term, small loans. With that understanding, the focus can be on the problem of determining the fee necessary to cover the costs of a payday loan and provide a fair rate of return on capital to the payday loan companies. [Emphasis added]
>
> [Gould Report, Exhibit PD-10, pp. 5-6]

[50] Dr. Gould elaborated on this point during his testimony:

> ...I've used as an example here a three hundred dollar ($300) loan with a twenty dollar ($20) fee, twenty dollars ($20) per hundred, to see what the charge would be for that fee if you put it in terms of an annual interest rate. And you can see that, for example, for a 2-week loan that works out to be 520 percent, and if you compound this -- what is called an effective annual rate of return -- you get numbers like 11,000 percent, which really sound staggering. And again that's often in the press and it makes a nice catchy headline when people read the papers in terms of what these costs are, but from a financial theory point of view it's really -- there's no real relevance in annualizing that figure. We annualize -- we can annualize a lot of figures and sometimes it's useful. If you're comparing different methods of compounding, for example, it is useful to put that in an effective annual rate of return to compare, say, quarterly versus semi-annual compounding. But I don't think it's very useful to do in this sense any more than, *for example, if I check into my hotel -- I know what the charge for the room is, it might be two hundred dollars ($200) a night as an example, a nice hotel in Halifax, but it doesn't provide me with much useful information for them to tell me that it's -- that's the equivalent to seventy-three thousand dollars ($73,000) a year. You can buy a small house in Winnipeg for that. So that when you annualize it doesn't convey the right information.* [Emphasis added]
>
> [Transcript, January 22, 2008, pp. 237-238]

[51] He elaborated on this comparison later in questions from the Board:

> ... I think it's more relevant to look at the dollar figure. And the example I gave earlier comparable to a hotel room charge, you don't really care what's [expenses] in it, you want to know what you pay per night, and when you know that figure you can compare to other hotel rooms. You wouldn't want to multiply that by 365 days to get a yearly figure, it wouldn't convey very much information.
>
> [Transcript, January 22, 2008, p. 437]

[52] Dr. Clinton echoed these comments, suggesting that in some circumstances payday loans may sometimes be a lower out-of-pocket cost alternative to banks:

> ...This service meets a class of credit needs neglected by banks and other traditional financial institutions. Payday loans are for much smaller amounts, and much shorter periods than conventional household credit (mortgages, credit cards, personal loans, and so on), which therefore does not provide close substitutes.
>
> Where the alternatives involve larger amounts of borrowing, and longer pay-back periods, or late charges and penalties, a payday loan would often be the cost-saving option. *Even though the cost expressed as an annual effective interest rate may look high out of context, the dollar cost - which is what matters - may be relatively low. ...* [Emphasis added]
>
> [Clinton Report, Exhibit PD-3, p. 4]

[53] The Board concludes that persons who use payday lenders (the majority of them being people who earn above average incomes and who have at least some post-secondary education) are willing to pay, and content to pay, charges which, if calculated on an annualized basis may be in the hundreds or even thousands of per cent. The basis for their satisfaction with such loans is rooted in several factors, including: the wish for an immediate loan without waiting days or longer for processing; very little paperwork, in comparison with other forms of lending; privacy, in that friends or relations need not be aware of the borrower's immediate need for $200-300; and the fact that fixed charges which may be imposed by traditional borrowers (such as banks), while acceptable to borrowers for larger loans, may be proportionally large for small loans of the payday type - making a traditional lender more expensive than a payday lender, even though the traditional lender's interest rate (exclusive of fixed charges) may be much lower.

[54] The analogy to hotel rooms, as pointed to by Dr. Gould above, may be helpful in understanding the paradox of borrowers who are nonetheless completely satisfied with what appear to be very expensive payday loans. People may pay perhaps $150-200, or even more, for a hotel room in Halifax for one night, even though hotel rooms do not usually have kitchens, and are generally very small in comparison to a typical apartment or house. Using the figure of $150, plus tax, for the cost of a hotel room for one night in Halifax, results in about $170 per night, or about $62,050 a year ($5,170 per month).

[55] If one were to use the annualized interest model which many people apply to payday loans (a practice which Dr Gould criticizes, in the quotation above) to such hotel room rentals, the nightly charge for a relatively small hotel room would appear wildly

expensive. Yet people willingly pay it. Why? Because, as in payday loans, they are able to obtain the hotel space: immediately; relatively informally, with, relatively little paperwork; without disproportionately large fixed charges such as damage deposits; and without committing themselves even for a second night, much less a month, a year or even longer. Thus, what may appear to be an unacceptably high cost of one night's accommodation (when measured against the cost of a house or an apartment - which $5,170 per month would easily purchase, through mortgage payments, or rent) can make perfect sense to a highly rational purchaser.

[56] However, payday loans have also attracted other criticism. In their presentations at the evening session, Mr. Eisner, Ms. Wilkie and Ms. Kent made a number of recommendations respecting various aspects of payday loans. These recommendations included limiting the amount of NSF charges on dishonoured cheques or pre-authorized transactions, prohibiting the granting of rollover loans, prohibiting wage assignments or the taking of security for a loan, requiring a signed contract between a payday lender and its borrower, requiring that the signed contract outline all the terms and conditions of the loan and disclose the annualized rate of interest being charged, requiring payday lenders to be licensed annually, and requiring that payday lenders comply with the requirements of the *Collection Agencies Act*.

[57] While other recommendations were made in the course of the evening session (many of which are dealt with later in this decision), the Board observes that most, if not all, of the above recommendations enumerated in the previous paragraph have been incorporated into the 2006 amendments to the *Consumer Protection Act* and in the draft *Regulations*.

ISSUES

[58] As noted above, on November 2, 2007, the Board directed that the following Final Issues List apply to this proceeding:

(a) the maximum cost of borrowing or any component thereof (or the rate, formula or tariff for determining the maximum cost of borrowing or any component thereof) that may be charged in respect of a payday loan;

(b) the maximum amount (or the rate, formula or tariff for determining the maximum amount) that may be charged in respect of the extension or renewal of a payday loan or in respect of any fee, charge or penalty that is provided in the Regulations;

(c) operating expenses and revenue requirements of payday lenders as they relate to the payday lending business;

(d) terms and conditions of payday loans;

(e) credit options generally available to payday loan borrowers and financial risks taken by payday lenders;

(f) payday regulations in other jurisdictions;

(g) any other factor that the Board considers relevant and in the public interest;

(h) any data that the Board considers relevant; and

(i) the model to be used by the Board in making its determination.

[59] As the Board and the formal intervenors canvassed the above issues during the hearing, a number of specific questions arose. The Board considers that in addressing the above issues it was first necessary to canvass the said questions. Accordingly, the Board requested that the formal intervenors address the following questions in the closing submissions, in addition to any other issues they wished to identify:

a) Does the Board have sufficient evidence before it to determine the issues in this matter?

b) Does the Board have the jurisdiction enabling it to decline to set the maximum cost of borrowing?

c) What methodology should the Board adopt to set the maximum cost of borrowing?

d) What type of expenses comprise regulatory costs?

e) Prior to default, at what amount should the Board set the maximum cost of borrowing?

f) Upon default, at what amount should the Board set any fee, charge or penalty in respect of the default?

g) Should the Board set any "component" of the maximum cost of borrowing?

h) Is there a contradiction in the *Consumer Protection Act* which prohibits rollovers, but purports to allow extensions or renewals?

i) Should a payday borrower requesting an extension or renewal be charged the same as a first-time borrower?

j) In addition to that required under s. 18I of the *Consumer Protection Act*, should the Board require any other disclosure by payday lenders to borrowers?

k) Should the Board direct payday lenders to file data in advance of the next review?

l) What factors should the Board consider in determining whether to schedule a review to occur in less than three years?

m) Does the current state of the market in Nova Scotia provide sufficient protection for payday consumers?

n) Should the Board make any recommendations to the Minister?

ANALYSIS AND FINDINGS

a) Does the Board have sufficient evidence before it to determine the issues in this matter? If not, what is the nature of the evidence that the Board is lacking? If evidence is, allegedly, lacking, explain how you feel the missing information would be material to any decision the Board might make.

[60] This issue was first raised by the Consumer Advocate near the completion of the hearing, as well as in his closing submissions. In his opinion, there is insufficient evidence before the Board for it to set the maximum cost of borrowing and to determine the other issues canvassed in this matter.

[61] The industry participants at the hearing (i.e., the CPLA, Rentcash, and 310-LOAN), together with SNSMR, all submit that there is sufficient evidence before the Board and that it can proceed with its deliberations in this matter.

[62] The Consumer Advocate asserts that the alleged lack of evidence is of particular concern because the Board is required to determine the initial rates that will be charged in this province's payday loan marketplace.

[63] The Nova Scotia market has not previously been the subject of a "regulated rate". Thus, the Consumer Advocate asserts the Board must address this issue with extreme caution. On the issue of setting an initial rate, he cited *WBA Management Society v. Beverage Container Management Board*, [2003] A.J. No. 828, a decision of the Alberta Court of Queen's Bench. Also, he says that the Board must ensure, on the basis of the evidence before it, that the rates are just and reasonable, because s. 18T(5) of the *Act* requires the Board to ensure its Order is one that the Board considers just and reasonable.

[64] On the issue of a "just and reasonable rate", the Consumer Advocate submitted:

> The concept of a “just and reasonable rate” has been developed in a number of decisions. In Dartmouth (City), Re (1976), 17 N.S.R. (2d) 425, the predecessor to this Board referred several questions of law to the Nova Scotia Supreme Court, Appeal Division for its consideration. At paragraph 11 of the Appeal Division’s decision, the Court quoted from one of the Board’s previous decision with approval regarding a “just” and “reasonable” rate setting:
>
> > [11] In its decision of November 12, 1974, the Board commented:
> >
> > The application is being made by the City of Dartmouth under the provisions of Section 60 of the Public Utilities Act, which provides that a public utility shall not collect any compensation for any service performed by it until the Board has approved a schedule of rates, tolls and charges for the service. There is no statutory requirement setting out how the Board must determine rates, although Section 41 of the Act requires that any order of the Board regarding rates must be 'just'. *Customers expect a utility to supply good services at a reasonable rate. The concept of a reasonable rate is a heritage from the common law when it was called a 'reasonable price' (pro mercede rationabili) or 'whatever is deserving' (quantum meruit). The statutory element of 'just' complements the 'reasonable' test of the common law, so it can now be said that the Board must determine rates that are 'just and reasonable.*'
> >
> > *In determining a just and reasonable rate, the objective of the Board is to protect both the customer and utility, and to safeguard the overall public interest.* The actual determination of rates is a complicated exercise. One must keep in mind the 'cost of service' concept as far as the utility is concerned. The concepts of 'value of service' and 'quality of service' are both of importance to the customers of the utility. [Emphasis added in original]
>
> [Consumer Advocate Closing Submission, March 3, 2008, pp. 5-6]

[65] On the issue of just and reasonable rates, the Consumer Advocate also cites *Northwestern Utilities Ltd. v. Edmonton (City)*, [1929] S.C.R. 186, in which the decision of an Alberta board reducing the rate of return of a natural gas supplier was unsuccessfully challenged. He makes reference to the following excerpts of Lamont, J., describing the relevant factors to consider in fixing a just and reasonable rate:

> In order to fix just and reasonable rates, which it was the duty of the Board to fix, the Board had to consider certain elements which must always be taken into account in fixing a rate which is fair and reasonable to the consumer and to the company. One of these is the rate base, by which is meant the amount which the Board considers the owner of the utility has invested in the enterprise and on which he is entitled to a fair return. Another is the percentage to be allowed as a fair return.
>
> ...
>
> The duty of the Board was to fix fair and reasonable rates; rates which, under the circumstances, would be fair to the consumer on the one hand, and which, on the other hand, would secure to the company a fair return for the capital invested. By a fair return is meant that the company will be allowed as large a return on the capital invested in its enterprise (which will be net to the company) as it would receive if it were investing the same amount in other securities possessing an attractiveness, stability and certainty equal to that of the company's enterprise. In fixing this net return the Board should take into consideration the rate of interest which the company is obliged to pay upon its bonds as a result of having to sell them at a time when the rate of interest payable thereon exceeded that payable on bonds issued at the time of the hearing. To properly fix a fair return the Board must necessarily be informed of the rate of return which money would yield in other fields of investment. Having gone into the matter fully in 1922, and having fixed 10% as a fair return under the conditions then existing, all the Board needed to know, in order to fix a proper return in 1927, was whether or not the conditions of the money market had altered, and, if so, in what direction, and to what extent.
> ...

[66] Accordingly, the Consumer Advocate submits that the determination of a “just and reasonable" rate involves the Board making a finding on two elements: 1) the amount invested by the company, described as a “rate base”, and 2) the amount of return the company should receive.

[67] He also makes reference to *Bell Canada v. Canada (Canadian Radio-Television & Telecommunications Commission)*, [1989] 1 S.C.R. 1722. At paragraph 37 of the decision, the Supreme Court of Canada echoed comments in the *Northwestern Utilities* decision, finding that provisions providing for a just and reasonable fee require a balancing of the respective interests:

> ...Such provisions require the administrative tribunal to balance the interests of the customers with the necessity of ensuring that the regulated entity is allowed to make sufficient revenues to finance the costs of the services it sells to the public.

[68] Based on the Consumer Advocate's submission that the Board must rely on a "Public Utilities" methodology to determine the maximum cost of borrowing (discussed in more detail below), he submits that before the Board can render a decision, it requires sufficient data on the relevant costs incurred by payday loan lenders operating in Nova Scotia. The Consumer Advocate suggests that the Board has no evidence before it with respect to costs, or that any such evidence relates only to lenders in other provinces.

[69] In its closing submission, the CPLA submits that the Board has more than sufficient evidence before it to determine the issues raised in this matter. It noted that extensive evidence was presented by the CPLA (describing itself as the leading payday loan association in Canada) and by the payday loan lender having the greatest number of outlets in Nova Scotia (i.e., The Cash Store). The CPLA also noted that these two parties called experts to testify with respect to the costs facing payday loan lenders, and the prices being charged for their services across Canada, and in Nova Scotia. Further, it was noted that CPLA retained POLLARA to conduct and present the first statistically relevant survey ever completed on payday loan customers in Nova Scotia. These witnesses, including the expert witnesses, were cross-examined by the parties and the Board. Finally, the CPLA noted that the interests of consumers were represented by both the Consumer Advocate and SNSMR.

[70] In conclusion, the CPLA stated:

> The Board has before it the most up-to-date and comprehensive cost surveys on the operational costs of payday lenders that are currently available, along with the benefit of Dr. Lawrence Gould's analysis and explanation of this data and information obtained subsequent to it. Even if the Board concludes that this information alone is insufficient, the Board can also rely on the extensive survey information compiled by Dr. Kevin Clinton regarding the

> prices being charged by payday lenders across Canada, including the results of his recent investigation of prices being quoted by Nova Scotia companies. Service Nova Scotia also provided indicative information as to the proposed charges originally submitted to it by various companies (e.g., Cash Corner, Cash Money, Cash-X, The Loan Store, The Money Pro$) [Ex. PD-55]. Rentcash and 310-Loan provided evidence as to their current charges in the Nova Scotia market and across the country.
>
> [CPLA Closing Submission, March 3, 2008, p.3]

[71] Rentcash noted in its closing submission that this proceeding was launched by the Board when it issued its Order for procedural directions and disclosure on October 4, 2007, adding that it was open for any persons or parties to file notice of their intention to intervene in the matter.

[72] Counsel for Rentcash also noted that extensive pre-filed evidence was received by the Board from the formal intervenors, including several experts' reports. It noted that Board Counsel retained two experts of its own to file evidence in this matter. Rentcash noted that many Information Requests were exchanged amongst the parties and rebuttal evidence was later filed by some of the parties. Finally, counsel for Rentcash noted that the Board received five full days of direct evidence and extensive cross-examination during the hearing, adding that the Board itself asked many questions that were addressed at length by the various witnesses.

[73] Rentcash also noted that the public was afforded an opportunity to file letters of comment and to speak at the evening session held on January 23, 2008.

[74] In its closing submission, SNSMR submitted that the Board has sufficient evidence before it to set the maximum cost of borrowing, as it relates to the existing payday loan lenders in the market. SNSMR noted that the Board is aware of what payday

lenders are charging and that seeking detailed cost data would be too difficult, time consuming and costly:

> The Board has sufficient information to make an order. The Board is aware of what payday lenders are charging currently. It should set a maximum cost of borrowing that accommodates existing payday lenders, except for any that are exceptionally higher than the norm. The Board does not need to set a maximum cost of borrowing that is fine tuned to payday lenders' costs of operating. Scale of operations, the product/service mix of an operator and loan criteria are just a few of the variables among operators that can affect operating costs of payday lending activity. Attempting to establish a precisely calculated maximum cost of borrowing would be extremely difficult, time consuming and costly.
>
> [SNSMR Closing Submission, March 3, 2008, p.1]

[75] In her submission during the evening session, Ms. Kent echoed the urgency of bringing the draft *Regulations* into effect, for the protection of borrowers:

> Specifically, Section 8 of the draft regulations deals with requirements for displaying rates and fees, and Section 9 deals with disclosures to borrowers. The NDP caucus would urge the Nova Scotia government to bring these regulations into force as soon as possible.
>
> [Kent Evening Submission, Exhibit PD-44, p. 5]

[76] As noted above, the draft *Regulations* and the remaining amendments to the *Consumer Protection Act*, will likely not come into effect until the Board issues its Order in this matter, because a number of the legislative provisions contemplate the existence of a maximum cost of borrowing set by the Board.

[77] The Board observes that this proceeding was initiated by the Board's Order for procedural directions and disclosure issued in October 2007, which outlined the process for any person or party interested in participating in the hearing. A Notice of Public Hearing was widely advertised in various newspapers with large circulations. The formal intervenors pre-filed extensive evidence, including expert evidence. Board Counsel also filed two experts' reports. The pre-filed evidence was the subject of an extensive Information Request process, followed by the filing of rebuttal evidence. While the Board

recognizes that the Consumer Advocate was appointed by the Province relatively late in the process, he had ample opportunity, well before the hearing commenced, to arrange for additional evidence (if he thought it appropriate), or to seek additional time for obtaining such evidence. He did neither, and did not suggest that there were gaps in the evidence which was filed by others (all of which he was aware of weeks before the hearing) until the hearing was underway.

[78] Moreover, this matter involved a hearing consisting of five full days of testimony, together with an evening session for members of the public. All witnesses, including expert witnesses, were subjected to full cross-examination by the other formal intervenors and questioning by the Board. The body of evidence consists of evidence respecting the costs of payday lenders, as well as the rates charged by them in Nova Scotia and elsewhere in Canada. Further, the interests of consumers were represented at the hearing by the Consumer Advocate and the SNSMR. The two presentations at the evening session contained various recommendations aimed at protecting payday loan borrowers.

[79] In the Board's view, it must weigh the public interest of delaying this proceeding, perhaps for an extended period, to allow more evidence to be gathered on the issues identified by the Consumer Advocate, versus the public interest of issuing its Order now, on the basis of the evidence already before it. In balancing these interests, the Board must also consider whether the information identified by the Consumer Advocate could materially affect its deliberations in this proceeding. The Board is confident that it would

not. Taking all of the above points into account, the Board is satisfied that there is sufficient evidence before it to allow the Board to proceed with its determination of the issues in this matter.

b) Does the Board have the jurisdiction enabling it to decline to set the maximum cost of borrowing (including the amounts set out in s. 18T(2)(a)-(c) of the *Consumer Protection Act*)? If so, what factors should it consider in determining whether to decline to set the maximum cost of borrowing in this matter?

[80] During the questioning of witnesses at the hearing, counsel for Rentcash seemed to suggest at various times that the Board was not required to fix the maximum cost of borrowing at the end of this proceeding. In asking such questions, it appeared to the Board that Rentcash was attempting to elicit from certain witnesses that one possible result of the present proceeding would be for the Board, after hearing all of the evidence, to decide that it should not set the maximum cost of borrowing. The Board infers that the result of such a finding would allow payday lenders to be free to charge the rates and charges they deem appropriate (without any maximum at all) and, presumably, borrowers would be protected by existing competition in the marketplace.

[81] Based on the above, the Board determined that it would be appropriate to seek submissions from the parties on this issue. However, in its closing submissions, counsel for Rentcash addressed the point summarily, stating simply "that the Board need not set the maximum cost of borrowing, but if it determines it should, [s. 18T(2)(a)-(c) of the *Consumer Protection Act*] would permit it to do so".

[82] All other industry participants at the hearing, together with SNSMR, the Consumer Advocate, and Board Counsel, submit that the Board does not have the jurisdiction to decline to set the maximum cost of borrowing.

[83] The Board considers that s. 347.1(3) of the *Criminal Code* is instructive on this issue. It provides:

> **Designation of province**
> **347.1 (3)** The Governor in Council shall, by order and at the request of the lieutenant governor in council of a province, designate the province for the purposes of this section *if the province has legislative measures that protect recipients of payday loans and that provide for limits on the total cost of borrowing under the agreements.* [Emphasis added]

[84] Thus, before payday lenders are entitled to be afforded the "exemption" contained in s. 347.1(2) respecting the charging of a criminal rate of interest, subsection (3) requires the affected province to enact "legislative measures that protect recipients of payday loans and that provide for limits on the total cost of borrowing under the agreements". To the extent that a province has not enacted such legislative measures, payday lenders in that province remain under the current scope of s. 347(1) of the *Criminal Code*.

[85] Following the enactment of the *Criminal Code* amendments, the Legislature in Nova Scotia amended the *Consumer Protection Act* to provide for the regulation of payday loans: S.N.S. 2006, c. 25. As noted above at paragraph 12, these amendments include various provisions which, among other things, deal with the disclosure to be provided by payday lenders to their borrowers, measures to protect borrowers, and provisions conferring power upon the Board to set the maximum cost of borrowing.

[86] In the Board's opinion, the mandatory language of the Legislature's direction to the Board is also significant. Section 18T provides, in part, as follows:

> **18T(2)** The Board *shall*, by order,
>
> (a) fix the maximum cost of borrowing, or establish a rate, formula or tariff for determining the maximum cost of borrowing, that may be charged, required or accepted in respect of a payday loan;
>
> (b) fix the maximum amount, or establish a rate, formula or tariff for determining the maximum amount, that may be charged, required or accepted in respect of the extension or renewal of a payday loan; and
>
> (c) fix the maximum amount, or establish a rate, formula or tariff for determining the maximum amount, that may be charged, required or accepted in respect of any fee, charge or penalty that is provided for in the regulations.
>
> **(3)** The Board may, by order, fix the maximum amount, or establish a rate, formula or tariff for determining the maximum amount, that may be charged, required or accepted in respect of any component of the cost of borrowing of a payday loan. [Emphasis added]

[87] Taking into account the legislative provisions relating to this issue, including the amendments to the *Criminal Code* and the 2006 amendments to the *Consumer Protection Act*, the Board concludes that it does not have the jurisdiction to decline to set the maximum cost of borrowing (including the amounts set out in s. 18T(2)(a)-(c) of the *Consumer Protection Act*). In the Board's opinion, any failure to set the maximum cost of borrowing would defeat the primary purposes of the 2006 amendments to the *Consumer Protection Act*, that is, to put legislative measures into effect to provide the payday lending industry with regulatory certainty afforded by the *Criminal Code* amendments and, further, to provide protection to borrowers.

[88] Having found that there is sufficient evidence before it to address these issues following the hearing, the Board finds that it must set or fix the amounts outlined in s. 18T(2)(a)-(c) and it will proceed to do that in the remainder of this decision.

c) What methodology should the Board adopt to set the maximum cost of borrowing?

[89] More than one methodology was presented to the Board for determining the maximum cost of borrowing. The CPLA suggests that the Board should adopt a Cost Approach, while Rentcash submits that a Market Approach is more appropriate.

[90] Testifying on behalf of the CPLA, Dr. Gould indicated that a Cost Approach can be used to determine the maximum cost of borrowing. He adopted the methodology developed by Ernst & Young in its report to the CPLA's predecessor dated October 2004 and repeated by Deloitte & Touche in its report dated September 17, 2007. The Cost Approach described by Ernst & Young and Deloitte & Touche involves the collection of cost data from payday lenders operating in the payday market. In the Deloitte & Touche report, the components of the Cost Approach are set out as follows:

> - Operating costs - cost to provide payday loans such as labour, rent, and utilities
> - Cost of capital - actual and opportunity costs for providing capital for loans
> - Cost of supplementary capital - for infrastructure and working capital
> - Bad debt costs - lost principal and operating costs for issuance and processing of loans
>
> These costs are combined and presented as a 'cost per $100 loan'...
>
> [Deloitte & Touche Report, Exhibit PD-9, p. 1]

This report concluded that the cost (per $100) of providing payday loans in 2004 was a weighted average of $15.69 per $100 (ranging from $15.35 for larger businesses and $21.22 for small lenders). However, it was noted during the hearing that this 2004 report is now outdated (i.e., it does not account for inflation), and it does not take regulatory costs into account (as explained elsewhere in this decision, such costs may be at least $0.76 per $100 in Nova Scotia). A more recent report conducted in 2007 by Deloitte & Touche in

Manitoba, concluded that the cost of providing payday loans is $26.89 per $100, excluding regulatory costs. The Board places greater weight on the more recent study.

[91] Dr. Clinton, appearing on behalf of Rentcash, on the other hand, prefers a Market Approach over the Cost Approach described above (Dr. Clinton also referred to the Cost Approach as a "public utilities model"). Dr. Clinton's approach involves, in his view, less intrusion into the industry and relies on the competitive market to prevent excessive fees for the consumer:

> The Board could not rely on some limited sample of firms to implement the public utilities model in a consistent, non-discriminatory, manner. It would be obliged to ask *all* lenders to report the relevant cost data, e.g. on an annual basis. This would be an extremely expensive exercise for smaller firms, and I do not recommend it. The conceptual problems of the public utilities model would not be solved.
>
> A simpler, and less arbitrary, approach to setting fee limits would directly address the concerns of consumers. Borrowers are directly interested in the fees they pay. They are not interested in arcane details relating to average costs, and judgments about fair rates of return.
>
> From this viewpoint, the objective would be prevention of excessive fees. On the supply side, a competitive market is the main means to this end. Over the long run, lenders could systematically overcharge - i.e. realize excess profits - only if there were barriers to entry to new suppliers.
>
> There are no economic barriers to entry in payday lending. Capital and other entry costs are remarkably low - a new store can be opened for an initial investment of $200 thousand, which is well within the range of many Canadian entrepreneurs.
>
> Of course, to stay in business a store would have to achieve a rate of return *at least* equivalent to that in other retail sectors. The necessary return on investment in payday lending would have to include a risk premium over and above the normal return in other businesses, reflecting the high and variable rates of loan default. The rate of return requirement reflects the opportunity cost of capital and other entrepreneurial resources.
>
> From the viewpoint of the economy as a whole, this ensures that resources are put to work in the most productive uses. Thus, this requirement is very different from a barrier to entry imposed by law, or by large economies of scale.
>
> The approach that I prefer - with a direct linkage between the fee limit instrument and the objective of protecting the consumer from excessive fees - can be implemented without a

> heavy regulatory apparatus. At the outset, a practical limit can be derived on the basis of rates actually charged in the current, unregulated, market. This maximum fee, set in this way, can be implemented in a prudent, incremental manner, with adjustments implemented over time in line with the emerging facts, at the 3-year reviews.
>
> [Clinton Rebuttal Report, Exhibit PD-23, pp. 4-5]

[92] The witnesses for Rentcash described the weaknesses of the Cost Approach. Mr. Reykdal and Ms. Bland stated, in response to questions from the Board:

> Q. (Mr. Morash) --- and hence the cost or market models, and you seem to have shied away from using cost.
>
> A. (Bland) Yeah.
>
> Q. What's the reason for that?
>
> A. (Bland) There's several reasons for that. Most significantly, I think, is I've been through a general rate application process with the Electrical Utilities Board up in the Northwest Territories and the application that we filed as one company was -- the binders were taller than I was, and that was to get an understanding of what the customers were, what they required, what the capital needed was. It was a full range, not just the total cost aspect of it, and that's in a market where there's one competitor and opening your books is not a problem because there's no one else to see them or care about them as far as competitors go. We're in a market where there's -- I think we've got 13 or 14 different customers -- or competitors, opening books is only half the story, and that's going to be difficult in itself, and there's a lot of different ways of estimating what the cost is. We went through the process that D&T took and E&Y took. When you look at their methodology, they estimated the cost based on a proration of costs on revenues. Is that the best way of doing it? I don't know. There's some companies that, if they took out their other revenue sources, still would have 99 to 100 percent of the costs that are left behind, the other ones are just gravy. So, if you took out any costs for them and took out any one of their revenue streams, their costs would increase still. The market is very volatile to loan volumes, and so your cost per is very volatile to change as well. And even if you did come up with a methodology to open everybody's books to get an accurate picture of the costs associated and whether they're efficient or not and whether they should be included, you'd still have to look at the other side on what the market needs and what the competitor needs, and there are some of those higher cost companies that are completely legitimate because of the risk tolerance or the service levels or the locations or any of those other things that we've mentioned. And so for us the cost-plus methodology just has a whole bunch of problems.
>
> Q. Very complicated, very complex.
>
> A. (Bland) Very complicated.
>
> Q. It would certainly be very costly.
>
> A. (Bland) Very costly.

Q. And is it your view that the -- you mentioned the E&Y and Deloitte & Touche reports -- that the E&Y report, which was done in 2004 based on 2003 data -- would that have any relevance today to you?

A. (Bland) We don't believe so, just from -- we know that we had included data in that particular study and our costs per have increased significantly since then. Just in a matter of looking at our loan volumes, our loan volumes have gone down from that time and our costs have gone up, and so one key person in that weighted average of the two big companies, costs per have gone way up, so even the bottom denominator is nowhere near what it was at that point, so we don't think it's relevant at this particular time.

A. (Reykdal) And also with the E&Y study at the time when we participated, the company was conducting rollovers and that also -- I mean, the point that Nancy is making about lower -- decreased loan volumes, that certainly did occur once we stopped doing the rollovers and the costs went up significantly. So, that information would be somewhat dated with respect to providing a proper cost analysis of the business overall. With the rollovers being eliminated it is more expensive to do business, there's no ifs, ands or buts about that.

A. (Bland) And when you look at the comparison of small companies from Ernst & Young's to the Deloitte & Touche, there's a fairly significant increase there as well, and so the data, we think, has its faults for sure.

Q. So, to sum up what you're saying, you're saying it's really of very little, if any, value in today's context?

(Bland) Correct.

[Transcript, January 24, 2008, pp. 1051-1054]

[93] In his testimony, Dr. Clinton reiterated this view:

Q. (Mr. Morash) Dr. Clinton, I just have one more question on this topic. Do you think it would be -- or would you recommend, that the Board have access to this information on costs?

A. No.

Q. Why?

A. I would say your interest and the consumer interest finally is in the price that the consumer charges. The consumer is not interested in these esoteric discussions about what a fair rate of return is, or how you divide up cheque-cashing revenue from payday lending revenue, and whether -- they couldn't care less about that. What they're interested in is the fees. So I would say let's all focus on the fees, and it's a big enough job, at the moment, to try to compare fees across companies. It's not that easy. So I think the most important function in data collection that the Board would do, and it would not be very expensive either for the Board or for the companies concerned, it would be to have all of the licensed lenders reporting on their fees on a standardized format that you determine for them. Oh, and by the way, in the disclosure site, there is a practice that I've come across as I've contacted companies, sometimes in person but more often over the phone, some lenders -- I actually did not find one in Nova Scotia, so that doesn't mean that you shouldn't worry about the problem because such lenders could arrive, so I think in your disclosure requirements you

should also have that the consumer would be given an estimate of the cost of their loan before they provide a whole lot of personal information. Now, in Nova Scotia, the lenders were quite willing to give me prices or fees without me telling them anything about my financial situation except that I was in receipt of a monthly pension cheque. However, some lenders, particularly the internet-based lenders, but some of them are not, as soon as you ask them a question they come back asking you questions about your personal financial details. In other words, they won't give you a price until you do that. So I think, in making your recommendations as to what they should disclose, I would advocate eliminating that practice. I don't see why an individual should be having to give out personal financial information in order to know what the cost of the loan should be.

Q. Just following up on your comment about the necessity to have cost information, it's not just a matter of sending a survey out and asking them to provide cost information, or, indeed, to provide financial statements, it's a matter of making them comparable, isn't it, so that -- which strikes me would not be a very easy job to do because each entity has their own peculiarities or particular ways of treating things in their accounts.

A. This is correct. *So what happens is the regulator has to tell them a standardized format in which it wants to receive the data. Fine. The problem for the individual firms is they may not already be keeping records in that format. So now they have to keep two sets of records, and this is why it starts to get very expensive.*

Q. And that came out in the E&Y report where they had to do analyses and make assumptions in discussing with the various entities. It's a very difficult thing to do.

A. Yes, it is.

Q. And, at the end of the day, as a result of assumptions and estimates, you could possibly wind up with a figure that really doesn't represent anything.

A. The way they've gone about it, yes. If you were to go about it as a regulator, you couldn't live with that mess. You would have to specify them the data you need, and they would have to provide you not educated guesses, and all that, but something on which a senior executive is prepared to sign off. *And what happens in the federally-regulated financial institutions very often is that those institutions will have at least three sets of reports, one for tax purposes, one for their annual report and so forth, and one for the regulator, and it becomes extremely expensive.*

Q. *And even after you receive the reports from the stores or the companies, somebody would have to take the responsibility of ensuring that they're in the format and there's nothing included in there that's inappropriate.*

A. *This is absolutely correct, and I happen to know about that because, for many years, I was working at the Bank of Canada in the department where we received financial data, because the data published, for example, by the supervisor, OSFI, and by Statistics Canada, that comes from the Bank of Canada, and it's a huge operation. So you would need, at the Board, at the minimum, a Data Manager and a couple of statistical assistants. Data Managers cost, that can do this kind of work, in the region of sixty-five thousand to ninety-five thousand a year, okay. On the lenders' side, they would need people with similar qualifications supplying you the data, and they talk to each other to reconcile any discrepancies that are noticed, and so on. It's a big job. It's expensive. And, in the end, subject to error.* [Emphasis added]

[Transcript, January 25, 2008, pp. 1141-1146]

[94] As noted in the above testimony, Dr. Clinton prefers the Market Approach for various reasons, including the cost of maintaining another set of records for the purposes of regulatory compliance and the expense related to monitoring the filed data.

[95] It should be noted at this point that, in conjunction with the adoption of a Market Approach, Dr. Clinton recommends that the Board require appropriate and consistent disclosure by payday lenders to its potential borrowers. The issue of disclosure is discussed in greater detail below.

[96] In his closing submissions, legal counsel for Rentcash urged the Board not to adopt a cost or public utilities approach:

> ... A public utilities approach to setting a maximum cost of borrowing would be inappropriate for the Board to adopt for this industry. First, and most importantly, there is no monopoly or near monopoly in the payday loan market in Nova Scotia - there is healthy competition. Secondly, this process is in the nature of an intervention. There is no applicant seeking approval of its proposed rates. Thirdly, if the Board were to even consider taking a public utilities approach to setting the maximum cost of borrowing it would have required a different and much more complex process. Information as to lenders' costs and anticipated profits would have been required, put before the Board (assuming confidentiality issues could be resolved), and tested through an extremely long hearing process. The approach and procedural apparatus, which are incidental to the public utilities/costs plus model, are not appropriate here given the complexity, confidentiality issues and increased costs associated with such a process.
>
> [Rentcash Closing Submission, March 3, 2008, p. 4]

[97] While the Consumer Advocate submits that there is insufficient evidence to apply any methodology, he also states that a Cost method should be selected to determine the maximum cost of borrowing. He submits that once the Board has received sufficient evidence, the "Cost-plus" model proposed by Dr. Gould is consistent with the approach that is needed to determine a just and reasonable rate.

[98] At this point, the Board notes that in reviewing the Consumer Advocate's closing submissions, they seem unclear as to which specific model the Consumer Advocate was proposing be used to determine the maximum cost of borrowing. At times, he referred to a "Cost-plus" model, while at other times he seemed to be asking the Board to adopt a "Public Utilities" model. In the view of the Board, the latter model typically involves the setting of a rate associated with the determination of a "Rate Base". Such a model is usually applied in the case of a large public utility operating as a monopoly and comprised of a heavy investment in fixed assets required to produce its service. The former model, described by the Consumer Advocate as "Cost-plus" model is considered by the Board to reflect an industry containing a much lower investment in fixed assets, with the methodology being more related to determining operating costs and adding a specified rate of return. While both of these models can be interpreted to be a variation to a Cost Approach, the Board sees them as being very different.

[99] As noted above from paras. 62 to 68, the Consumer Advocate submits that the Board must consider two elements in setting the maximum cost of borrowing: 1) the importance of determining an initial rate, i.e., to establish a rate in a market which has not previously been the subject of a "regulated rate", and 2) the necessity of determining a just and reasonable rate.

[100] In support of his assertion that the Board must adopt a "Cost-plus" approach to determine the maximum cost of borrowing, the Consumer Advocate submitted a number of case authorities (including *WBA Management Society*, *Northwestern Utilities*, and *Bell*

Canada, *supra)* which, in effect, support a "Public Utilities" model. In his view, the Board must set a just and reasonable rate to ensure that payday lenders earn a reasonable rate of return, but not excessive profits.

[101] In its rebuttal submission, counsel for Rentcash distinguishes the above authorities from the present case. With respect to the Alberta Court of Queen's Bench decision in *WBA Management Society v. Alberta (Beverage Container Management Board)*, he submits that the decision involves the regulation of a monopolistic industry and has no application to the present matter.

[102] As noted by counsel for Rentcash, Bielby, J., identifies the monopolistic nature of the industry which is the subject of the *Beverage Container Management Board* decision:

> [1] The Beverage Container Management Board ("the Board") is an administrative tribunal ... charged with setting the handling commissions which beverage manufacturers must pay to bottle depots in Alberta for the return of empty beverage containers... the Board may and has passed bylaws governing the mechanism by which those handling commissions are established. *Those bylaws require the Board to set those commissions by balancing the need for a "fair return to maintain a viable bottle depot network across the province" with the "need for the lowest possible cost to consumers".* An acceptable method of setting those commissions is to have the Board obtain and apply the information needed to calculate the following:
>
> > operating costs of bottle depots + rate of return currently available in industries or on investments bearing similar business risk to that of bottle depots X amount of capital invested in depots by their owners = total handling commissions for all containers
> >
> > and from that calculate the handling commission per beer bottle or can which may reflect disproportionately high handling costs associated with certain types of containers.
>
> [2] The figures used for operating costs may be adjusted to account for differences in overhead costs for bottle depots due to location or size and other relevant considerations.

> [3] *This approach is mandated by the monopolistic nature of this industry, in which manufacturers are required to pay set handling commissions for each container returned by a bottle depot and must accept all containers returned by bottle depots.* Market forces are therefore not at play as a mechanism for setting a fair return to bottle depots. An approach to setting handling commissions which focusses only on operating costs of bottle depots fails to respect all aspects of the Board's legislated mandate as interpreted by existing jurisprudence.
>
> [4] The Board lost jurisdiction by purporting to set handling commissions in regard to beer cans and bottles without seeking or obtaining the information needed to make the above calculations and by using, instead, an approach focussing on bottle depot operating costs...
>
> ...
>
> [51] I observe that business type bears no logical relation to the concept of "fair return", nor does the scope of the rate-setting activity. The Board is not exempted from compliance with the Supreme Court of Canada's definition of "fair return" by the fact it does not set the price of beer in Alberta. Rather, *the Supreme Court of Canada was addressing the proper method of calculating profit for a legislated monopoly, in a situation where normal market forces cannot be relied upon to generate a proper rate of return on investment. In this respect the bottle depots are very much like Northwestern Utilities or Bell Canada.* They are entitled by law to receive a set price for each beer bottle and can they return to a brewer. Each depot, no matter where it is located, independent of the volume of returns it processes is entitled to be paid the same amount per container returned. Conversely, the brewers are required to pay that amount for every container returned, and to accept every container returned.
>
> *[52] This is not a situation where demand/supply and quality of service dictate price and profit. It is not a situation where the consumer has a choice of whether or not to buy; the brewers must buy all the beer containers tendered, at the price set by the Board, a body created by statute. The government limits entry into the market, assigning locations for bottle depots on the basis of the size of the population base in different areas. This lack of competition creates a captive market, another aspect of monopoly.* [Emphasis added]

[103] Counsel for Rentcash submits that the circumstances in the above decision are different in various ways from the issues before the Board in the present matter. First, he notes that the tribunal in the Alberta decision was required under the legislation to consider the concept of a "fair return", which necessarily involves a cost based approach. He notes that there is no such requirement in the Nova Scotia payday loan legislation. Second, he notes that the Alberta decision involved the regulation of a monopolistic industry, where normal market forces did not apply. He refers the Board to the extensive

evidence in this proceeding outlining the competitive nature of this Province's payday lending industry.

[104] Based upon its review of the evidence in the present matter, the Board is satisfied that the payday loan marketplace in Nova Scotia is competitive, and it so finds as fact. Further, the Board accepts the evidence of Dr. Clinton to the effect that competition will even increase once regulation takes effect. As noted earlier in this decision, regulation of the payday loan market will occur upon proclamation of the remaining amendments to the *Consumer Protection Act*, the approval of the draft *Regulations* and the issuance of the Board's Order in these proceedings.

[105] The Board considers that the competitive nature of the payday loan market is an important factor which it must take into account in determining which methodology to adopt to set the maximum cost of borrowing. As noted during the hearing, the "Public Utilities" model is generally used by regulators in a monopolistic environment as a substitute for competition. That is not the market environment that applies in the present case. On that point, the basis for the decision in *Beverage Container Management Board* is distinguishable.

[106] Further, as noted by counsel for Rentcash, there is nothing in the *Consumer Protection Act* which would appear to require the Board to adopt a "Cost-plus" or a "Public Utilities" model and, for that matter, there is nothing that would appear to restrict the Board from adopting a Market-based approach.

[107] The Board is mindful that s. 18T(5) requires the Board to make an order which it considers "just and reasonable":

> **18T** **(5)** An order made under this Section must be one that the Board considers just and reasonable in the circumstances, having regard to the factors and data considered by the Board.

[108] The Consumer Advocate urged the Board, on the basis of s. 18T(5), to adopt a "Cost-plus" approach.

[109] However, the Board notes that the use of the phrase "just and reasonable" in the context of s. 18T(5) applies to the Board Order itself, and not specifically to rates. In this regard, the Board refers to the relevant provision of the *Public Utilities Act*, R.S.N.S. 1989, c. 380, which is applied by the Board in the setting of rates for the electric and water utilities it regulates (these utilities operating in monopolistic environments). Section 45(1) provides as follows:

> **Amount utility entitled to earn annually**
> **45 (1)** *Every public utility shall be entitled to earn annually such return as the Board deems just and reasonable on the rate base as fixed and determined by the Board for each type or kind of service furnished, rendered or supplied by such public utility*, provided, however, that where the Board by order requires a public utility to set aside annually any sum for or towards an amortization fund or other special reserve in respect of any service furnished, rendered or supplied, and does not in such order or in a subsequent order authorize such sum or any part thereof to be charged as an operating expense in connection with such service, such sum or part thereof shall be deducted from the amount which otherwise under this Section such public utility would be entitled to earn in respect of such service, and the net earnings from such service shall be reduced accordingly. [Emphasis added]

[110] In the context of s. 45(1), the term "just and reasonable" applies directly to the rates, which are set by the Board using a "Public Utilities" methodology. As noted above, the methodology contemplated by s. 45 typically also involves the setting of a rate applicable to a utility characterized by significant investment in fixed assets. Clearly, that is not the case here.

[111] The Board considers that the variety of business models used in the current payday loan market is another factor which the Board may take into account in determining which methodology to adopt to set the maximum cost of borrowing. This topic was the subject of much evidence during the hearing, including the Ernst & Young report, which the Board finds very helpful on this point. The Ernst & Young report confirmed the different cost models experienced by large and small payday lenders. Further, there was evidence at the hearing that lenders in rural areas of the province may incur different costs than those located in the metropolitan area of HRM. Lastly, it was noted by the various payday lenders at the hearing that the cost models of different lenders will also vary depending upon the types of payday loan products and services provided to their customers (e.g., cash vs. debit cards and different treatment on default), including the risk level different payday lenders are willing to assume in terms of its borrowers. One example, among many of the different business models, is that of the on-line or telephone-based payday lender. Payday lenders can, more than many other commercial operators, carry on business in the Province without having to even invest in any rental space, employees, etc. Thus, it is possible to effectively carry on a payday loan operation in Nova Scotia from, for example, Vancouver, simply via the telephone or internet, presumably at a much lower cost than a payday lender who is operating one or more outlets in the Province.

[112] The Board also notes the language of s. 18T(2), which does not make reference to a certain set rate. Rather, this provision requires the Board to "fix the maximum cost of borrowing, or establish a rate, formula or tariff for determining the maximum cost of borrowing ...". The Board considers that the language used in s. 18T(2)

must be interpreted and applied in a manner which recognizes that this is a competitive industry in which different lenders are charging different amounts for different products and services. In such circumstances, the Board considers that a Market Approach is more appropriate to set the maximum cost of borrowing than a Cost Approach or Rate Base Approach.

[113] The Board also accepts the evidence of Dr. Clinton respecting the difficulties which would be encountered in the event the Cost Approach was selected to determine the maximum cost of borrowing. In this regard, Dr. Clinton noted the difficulties in developing a standardized format to obtain cost data from different lenders.

[114] On this point, SNSMR states:

> ... The Board is aware of what payday lenders are charging currently. It should set a maximum cost of borrowing that accommodates existing payday lenders, except for any that are exceptionally higher than the norm. The Board does not need to set a maximum cost of borrowing that is fine tuned to payday lenders' costs of operating. Scale of operations, the product/service mix of an operator and loan criteria are just a few of the variables among operators that can affect operating costs of payday lending activity. Attempting to establish a precisely calculated maximum cost of borrowing would be extremely difficult, time consuming and costly.
>
> [SNSMR Closing Submission, March 3, 2008, p.1]

[115] The Board concludes that the adoption of a Cost Approach, or any variation thereof, would significantly increase the cost of the regulatory environment for the payday lending market. This would involve significant costs for payday lenders in terms of compliance with such a regulatory scheme and increase the cost of monitoring by SNSMR. In the end, these costs would ultimately have to be borne by the consumers, which the Board does not believe would be in their best interests.

[116] Taking into account all of the evidence and the submissions of the parties, the Board concludes that it should adopt a Market Approach to determine the maximum cost of borrowing outlined in s. 18T(2).

d) What type of expenses comprise regulatory costs and to what extent should the Board consider them in its deliberations?

[117] Regulatory costs are not defined in the *Act* or the draft *Regulations*. Section 18T(4) of the *Act* states that:

> **18T(4)** When making an order under this Section, the Board may consider
> ...
> (a) the operating expenses and revenue requirements of payday lenders in relation to their payday lending business

[118] Section 6 of the draft *Regulations* made pursuant to s. 8(U) of the *Act* states that:

> **Permit Fee**
> **6**. The annual fee for a permit and renewal of a permit as a payday lender is $3000.

[119] Michael D. Casey, C.A., retained by Board Counsel, stated the following in his report concerning the estimated cost of regulation:

> As instructed by Counsel, we have been asked to estimate the cost of regulation, in particular the license fee of $3,000 per outlet. This amount understates, of course, total regulatory costs because additional costs of regulation such as bonding and costs of hearings are not included.
>
> [Casey Report, Exhibit PD-27, p. 5]

[120] The CPLA in its closing submission, stated that:

> The CPLA believes that the Board must consider regulatory costs as an additional component in setting the maximum cost of borrowing under s.18T(2)(a), but is not in a position to attribute a specific amount of these costs.
>
> ...

> According to Schedule C in Michael Casey's rebuttal testimony [Ex. PD-27], the estimated regulatory costs associated with the $3000 licensing fee is roughly $0.76 per $100 of payday loan in Nova Scotia. This amount does not include any costs that will be incurred in complying with the new regulatory regime, nor does it include the costs involved in participating in regular hearings and reviews before the Board. These costs, although difficult to quantify precisely, are also substantial regulatory costs that will be borne by payday lenders and should be taken into account. Gordon Reykdal, in cross-examination by Mr. Stringer, confirmed that he believes this cost should be somewhat less than two dollars and fifty cents ($2.50) per hundred that Rentcash recommended in Manitoba.
>
> [CPLA Closing Submission, March 3, 2008, p. 7]

[121] Mr. Reykdal did not explain how he arrived at the $2.50 amount for regulatory costs.

[122] While the CPLA is not able to suggest to the Board how a figure for regulatory costs should be determined, it believes that the Board must include a component for regulatory costs in setting the maximum costs of borrowing.

[123] Rentcash, in its closing submission, stated that while these costs currently include licensing fees and bonding fees, such fees will increase as a result of participating in the hearing process. It states that costs associated with hearings will include consultant and legal fees, travel, etc.,and that such costs will increase if the $3,000 permit fee is implemented. It also notes that regulatory costs will increase as lenders and brokers comply with changes in disclosure and reporting requirements (Exhibit PD-57, p.5).

[124] The Consumer Advocate, in his closing submission, stated that only the annual permit fee of $3,000 should be considered as a regulatory cost. He stated that the Board should not consider the costs of the current process as regulatory costs, as should it do so, “it would be effectively awarding Intervenor costs to the industry” (Exhibit PD-59, p.29).

[125] After considering this matter, the Board is of the view that other than annual permit costs which are set out in the draft *Regulations*, it would be a very difficult task to determine what reasonable regulatory costs should be. However, it is clear to the Board that regulatory costs, including permit costs, are part of the operating costs of the payday loan business, which must be recovered by lenders in order to make a profit.

[126] Elsewhere in this decision, the Board has set out the reasons why it is not feasible or practical to base the maximum fee level for payday loans on a "cost approach". These reasons apply equally to the issue of regulatory costs.

e) Prior to default, at what amount should the Board set the maximum cost of borrowing?

[127] While one of the parties (Rentcash) submitted to the Board that no maximum cost of borrowing for payday loans should be set, the Board has concluded it should set a maximum, and has decided that this should be set now at $31 per $100.

[128] The Board, based on all the evidence before it, as is discussed elsewhere in this decision, views competition as being - both at present and in the future - the most effective control on the cost of borrowing, be it through payday lenders or through other lending institutions, such as banks.

[129] Related to this, and for reasons also discussed elsewhere in this decision, the Board places little weight upon cost data for lenders. The Cost Approach, or any variation thereof, is of little practical use in regulating the payday lending industry, which is characterized by numerous lenders, and easy movement of lenders into and out of the

market. As is noted elsewhere in this decision, the Board considers that there is evidence before it of significant competition in the payday loans industry.

[130] The market data before the Board points to rates typically being charged in Nova Scotia of $20-35 per $100 loans. In one instance, the rate was $15. The rates quoted, however, are not, in the view of the Board, necessarily comparable.

[131] The Board will illustrate this point by reference to the following example.

[132] The Board finds that the evidence before it points to payday borrowers expecting to obtain the cash they are borrowing immediately upon qualifying for a loan. In other words, the typical borrower (who, as the Board has noted elsewhere in the decision, is a person with a household income generally on average with that of the population as a whole) expects to be able to enter the office of a payday lender (or make contact by telephone or by Internet, with lenders such as 310-LOAN) and, upon satisfying the lender that they qualify for the loan, be able to immediately receive the desired amount of cash, or the equivalent.

[133] One of the payday lenders, Rentcash, does not pay out the proceeds of its loans to its customers in the form of cash at all. Customers who wish to have the money that day can only do so by means of a special debit or credit card, for both of which an extra fee is charged. If a customer receives the payment in the form of a cheque, no extra fee is charged, but the cheque is not available on the day that the person has qualified for the loan. While, according to the evidence, it is commonly available the following day, it may be a few days before the loan is available.

[134] SNSMR asserted, as part of its written submissions, that fees of this type:

> ...must be included in the cost of borrowing except if they are truly optional. They are truly optional only if the borrower who declines the option is not disadvantaged relative to a borrow who accepts the option, for example, by not receiving the loan this quickly.
>
> [SNSMR Closing Submission, March 3, 2008, p.2]

[135] The Board agrees. In the view of the Board, given the emphasis of payday loan customers upon being able to receive cash or the equivalent immediately upon qualifying for the loan, the fees charged for a debit or credit card (where they are the only means to obtain the money the same day) are, properly speaking, charges which are not merely "optional" fees (as argued by Rentcash and its counsel), but a cost of borrowing.

[136] The Board considers that the effectiveness of competition, as the principal tool for the protection and benefit of consumers, is increased by ensuring a very high degree of disclosure of the cost of borrowing. This disclosure should include *all* of the expenses which must be borne by a qualified borrower, if that person is to actually receive the requested cash (or the equivalent) immediately upon it being determined by the lender that the borrower is so qualified; it should also include all expenses (such as "cheque cashing" fees) which must be sustained to repay the loan.

[137] The Board received suggestions that it should add inflationary factors and regulatory costs to any maximum that it sets. The rationale for this argument is that inflation can be significant, and that regulatory costs can be very large. On the other hand, the Board has before it the evidence which points in the other direction, including that of Dr. Clinton, who suggested that:

> ... inflation should look after itself ...
>
> [Transcript, January 25, 2008, p. 1239]

[138] He noted that as long as the costs of the payday industry are rising at the same rate as other factors in the economy,

> ... people will just be borrowing larger amounts and the industry will be receiving larger fees, because this is on a per one hundred dollar ($100) basis ...
>
> [Transcript, January 25, 2008, p. 1239]

[139] There is no evidence before the Board to suggest that the costs of operation in the payday loan industry will be rising faster, or slower, than costs in the economy generally. At present, the Board does not see inflation as an item of such significance that it need be included; it is possible, of course, that at some future time, the Board may be called upon to reconsider this view.

[140] With respect to regulatory costs, the Board considers these to be extremely variable in any regulatory environment, even long-established ones. Certain types of stakeholders incur large regulatory costs; others may incur practically no expense at all.

[141] The payday loan industry is relatively new, and regulation of it is brand new. While one can point to the out of pocket expense needed to be licenced under the *Act* as a regulatory expense, even this is not actually capable of precise calculation. Because the licensing fee is charged per outlet, the actual cost of licensing per $100 loaned will vary, depending upon the amount of business being transacted by a particular outlet. Apart from the licensing fees, the nature and extent of expenses associated with other activities, such as periodic reviews of the industry by the Board, are not at present clear. While the Board accepts that such costs can indeed be significant, at least for certain players within an industry, the Board considers that, given the level at which it has decided to set the

maximum cost of borrowing, it would be inappropriate for it to add a factor for regulatory costs. Indeed, the Board considers that to even consider adding in such a factor amounts to an implied acceptance, at least in part, of the Cost Approach, or any variation thereof, which the Board has, elsewhere in this decision, rejected.

[142] Evidence supplied by Dr. Clinton shows the following costs per $100, quoted to him in a telephone survey conducted by him during the week of the Board hearing in this matter. While the survey was an informal one, the accuracy of his data has not been challenged in any significant way, nor has any rebuttal evidence been offered by any other party. It shows a range from a high of $31 to a low of $15.

Table 1

Company	Location	Per $100
MoneyPros	Halifax	$31
CashX	Bridgewater	$30
Little Loan Shoppe	Washington State (Internet)	$30
Cash Corner	Glace Bay	$27
Cash Store	Halifax	$27
Cash Money	Dartmouth	$22
MoneyMart	Halifax	$19
Quick Cash	Dartmouth	$18
Cash 4 Less	Bedford	$15

[Exhibit PD-53]

[143] The range demonstrated in the table is a wide one. The Board considers, however, that the evidence before it does not point to, for example, the more expensive

operations necessarily being either more profitable, or less efficient. Instead, it is apparent that there is a variety of business models at work - for example, some businesses are comfortable with loaning money to a higher-risk clientele, while others are not; some choose to locate in areas where the rental costs are higher, while others are in cheaper locations, etc. Further, the evidence before the Board does not point to anyone in the industry, across Canada, earning excess profits, despite the relatively high prices being charged for such loans. Additionally, the Board notes that the figures in the above table cannot be assumed to be strictly comparable - for example, it is possible that some lenders may impose charges that are not reflected in the quoted rates (just as The Cash Store's quoted rate does not include the fee for special debit or credit cards).

[144] The evidence of Dr. Clinton was consistent with that given by the panel composed of Mr. Reykdal and Ms. Bland. Mr. Reykdal said that a survey done on behalf of his firm showed the rates in Nova Scotia as ranging between $20 per $100 to $35 per $100:

Table 2

Company	Per $100
Money Pro$	$35
CashX	$30
Cash Corner	$27
Cash Money	$20
MoneyMart	$20

[145] Mr. Reykdal testified at the hearing that The Cash Store charges $25 per $100 in Nova Scotia (and across most of Canada).

[146] Taking into account all of the evidence, the Board is of the opinion that, even assuming all of the numbers referred to in the evidence are accurate, they are not strictly comparable - in the Board's opinion, the services which may be included in one firm's rate per $100 are not necessarily the same as those included in another's. As an illustration, the Board refers to The Cash Store's requirement that a special debit or credit card (for both of which an extra fee is charged) is necessary, if a borrower is to receive money the same day.

[147] The Board is mindful that the survey results of Dr. Clinton and Rentcash (i.e., Tables 1 and 2 above) do not take into account the new regulatory regime which will come into effect upon implementation of the *Act*, the draft *Regulations*, and the Board's Order resulting from this decision. The new regulatory environment will require all non-optional costs, charges and fees of a payday loan (including interest) to be included in the maximum cost of borrowing charged by lenders. The present rates charged by lenders may not be reflective of all such fees or charges. Further, present rates do not account for new regulatory costs which will have to be assumed by lenders participating in the market.

[148] In its submissions following the hearing, the CPLA suggested that the Board set the maximum cost of borrowing at the top end of the range from $20.60 to $23.60 per $100, plus an amount to account for inflation and regulatory costs. Rentcash submitted that the rate be set slightly above $35 per $100 to reflect the upper end of the current market range and allowing for increased regulatory costs. 310-LOAN suggested a rate of 27% of the loan amount (i.e., $27 per $100). Further, it noted that the wide divergence in

current market rates is explained by lenders assuming different credit risks, lenders having different economies of scale and doing business in different geographic locations.

[149] David Martin, a consultant with significant experience in the banking industry, who was retained by Board Counsel, stated that a maximum cost of borrowing set within a range of $23 - $27 per $100 loan (which figure includes any regulatory cost for the $3000 per outlet licensing fee, but no other regulatory costs) would encourage competition in pricing and services, while eliminating the possibility of extreme rates. The Board also observes that a more recent report conducted in 2007 by Deloitte & Touche in Manitoba, concluded that the cost of providing payday loans is $26.89 per $100, excluding regulatory costs.

[150] The Board concludes that increased competition, accompanied by improved disclosure to borrowers, will afford proper protection to consumers. Fostering an environment which requires better disclosure, and which provides more regulatory certainty, should allow existing payday lenders to continue to operate in the Province and should encourage new payday lenders to enter the marketplace. In this regard, the Board received, and accepts, expert evidence given at the hearing which outlined the benefits of increased competition in the marketplace.

[151] In setting the maximum cost of borrowing, the Board does not accept the Consumer Advocate's argument (an approach applied by the Manitoba Board) that the NSUARB should set a maximum rate such that only the "lowest cost" lenders will remain in the Nova Scotia marketplace, implying that such lenders are the only efficient lenders

participating in the market. In the view of the NSUARB, based on the evidence presented at the hearing (especially that of Dr. Clinton), market competition provides a catalyst for efficiency. If there are fewer lenders in the market, there will be little or no incentive for them to be efficient and prices will tend to rise for consumers. Moreover, if rates are capped too low, near or below an amount which permits lenders to recover their costs and earn a reasonable profit, even the most "efficient" lenders will most likely withdraw from the market. The Board concludes that such scenarios would not be in the best interests of consumers and the Board considers it should address this point by setting a rate that will foster a healthy competitive marketplace.

[152] Further, based on its review, the Board must set a maximum cost of borrowing that recognizes the different business models that exist in the marketplace, in addition to those that may choose to enter in the future. This will help to ensure that consumers will continue to be offered a range of different products and services.

[153] The maximum rate set by the Board must be sufficiently high to allow the marketplace to function properly, while also preventing lenders from charging excessive fees and charges.

[154] In setting a cap on the charge for borrowing, the Board is not drawing a conclusion based on the Cost Approach, for the reasons explained elsewhere in this decision. It is, instead, simply setting a cap which reflects the maximum charge imposed in the mainstream of this industry. Thus, one of its key purposes is to prevent an uninformed borrower from being charged a cost of borrowing which is completely

inconsistent with the mainstream of the industry. To illustrate, the Board heard evidence referring to one lender in Manitoba charging $50 per $100, which was much in excess of that charged by other lenders.

[155] Having taken into account all the evidence, the Board sets the maximum cost of borrowing at $31 per $100, inclusive of all expenses (including interest) which must be borne by a qualified borrower in order to actually receive the cash requested (or the equivalent) immediately after it being determined by the lender that the borrower is so qualified. With respect to any loan for an amount other than $100, the above rate of $31 shall be applied *pro rata*.

[156] A related issue which was discussed at certain points in the course of the Board hearing was the question of whether or not the cost of borrowing for a repeat customer should be less than that charged to a first-time customer.

[157] In the view of the Board, the evidence before it with respect to this subject does not point to any significant utility in legislatively mandating such a requirement. As the Board has discussed elsewhere in this decision, the evidence before the Board points, on balance, to the advantages of applying the market approach to this specific industry. If a lender considers that it can gain a competitive advantage by making loans to repeat customers for a reduced rate, it is, of course, open to the lender to do so. On the other hand, for the Board to require that a lender provide a reduced rate to a repeat customer is a proposal which - however attractive it may seem on a superficial level - is likely to be, ultimately, problematic. For example, a person may be a repeat customer, but have, at least sometimes, failed to pay on time. Related to this, certain kinds of lenders may, as

part of their business model, lend to customers who are much higher risk than other lenders would be willing to contemplate. Further, a significant amount of time may have elapsed since the customer last made a loan, and his or her financial circumstances may have changed.

f) Upon default, at what amount should the Board set any fee, charge or penalty in respect of the default?

[158] On this point, the Consumer Advocate asserted that it would be "premature" to set any such fee, charge, or penalty. In the view of the Board, however, it is not engaged in a hypothetical exercise, attempting to determine in advance the charges which would be payable by an industry once that industry begins to operate. Instead, the payday loan industry is in full operation in Nova Scotia, and, according to all the evidence, growing as rapidly here as it has been elsewhere in the country. In the view of the Board, it would be imprudent for it to fail to set a maximum until it receives further evidence.

[159] There is evidence before the Board relating to fees which are actually charged by chartered banks. While there was general reference in some of the oral evidence to these fees being between $30 and $40, the Board found the written submission from 310-LOAN on this point to be specific and helpful: it shows the default fees charged by CIBC, Scotiabank, TD Canada Trust, RBC Royal Bank and Bank of Montreal as being, at a minimum, of $35 and a maximum of $40. David Martin, who was retained by Board Counsel, agreed that the $30 to $40 range is consistent with the default charges currently applied by chartered banks. Given the overall nature of the industry, the

Board considers that the maximum penalty chargeable with respect to default should be at $40 per loan.

[160] In the view of the Board, “default” means simply a failure to pay on the date specified in the contract, and a default fee can be charged even if the cheque or pre-authorized debit had not yet been processed. The Board considers that any payday lender will incur costs, directly or indirectly, upon default by a borrower, even if that default is relatively short term. The evidence before the Board is that at least some lenders, if informed by a borrower that a cheque or pre-authorized debit will be dishonoured, refrain from attempting to process the cheque or the pre-authorized debit, thus avoiding imposing upon the borrower the resulting bank charges.

[161] The Board considers that the interest rate specified in the loan (up to the maximum of 60%) is the interest rate which should apply, in the case of default, to any balance outstanding on the loan (in addition to the $40 default fee noted above).

g) Should the Board set any "component" of the maximum cost of borrowing, as contemplated under s. 18T(3) of the *Consumer Protection Act*?

[162] Section 18T(3) of the *Consumer Protection Act* states:

> **18T** **(1)** In this Section, “Board” means the Nova Scotia Utility and Review Board.
>
> **(3)** The Board may, by order, fix the maximum amount, or establish a rate, formula or tariff for determining the maximum amount, that may be charged, required or accepted in respect of any component of the cost of borrowing of a payday loan.

[163] Having established a "cap" of $31 per $100 borrowed and having made findings with respect to a requirement for full disclosure of all costs, the Board considers it need not set a maximum for any component of the maximum cost of borrowing, apart

from fixing the maximum interest rate chargeable at 60% (as calculated in accordance with the *Act* and the draft *Regulations*). All parties to the hearing assumed that a maximum interest rate of 60% would apply and the Board considers this appropriate in the circumstances. However, under no circumstances must the total cost of borrowing exceed $31 per $100.

h) Is there a contradiction in the *Consumer Protection Act* between s. 18N(h) which prohibits rollovers [defined in s. 18A(c)] and s. 18T(2)(b), which purports to allow extensions or renewals? If so, can it be reconciled?

[164] One negative aspect of the payday lending business over the years has been the practice of granting "rollovers" to payday loan customers, whereby a lender offers a second payday loan to payout an original payday loan which is in default. In such circumstances, the second loan is typically for an amount which covers the original loan, the borrower's default fees and interest, as well as the additional costs of making the second payday loan.

[165] Critics of this practice assert that granting "rollover" loans keeps defaulting borrowers in a continuous cycle of debt, unable to escape because of the escalating costs and accumulating high interest.

[166] Ms. Wilkie, of Credit Counselling Services, testified that some payday borrowers fall into a "trap" or "cycle" when they are unable to pay their original loan, leading them to seek "rollover" loans. Using an original $300 loan as an example (at a cost of $25 per $100), she described this cycle:

> ... well, it's the cycle, right. You go in, you can't pay it back but you can pay your, in this case, say, seventy-five dollars ($75) and you can borrow your three hundred dollars ($300) back, and it's that trap, because next pay something else is going to come up, like you've got to pay

> rent out of that, or, you know -- unless you're getting a bonus or unless you're getting some free money or some unexpected money, generally people use all their pay cheques, or people who are going to be frequenting payday loan places are most commonly using all their pay cheque, so there isn't anything extra. So they need it next week, next time, too, and they need it the time after. So the trap is that you just keep paying to borrow your same three hundred dollars ($300) or whatever the amount is.
>
> [Transcript, January 23, 2008, pp. 738-739]

[167] Mr. Eisner also identified a new trend associated with the "cycle":

> ...the new trend that we're seeing is that there's more than one payday loan involved in the consumers coming in. We're not just talking one, we're seeing three to five different institutions as part of the total debt load. So they're not just going, utilizing one. I think in the perfect world, ... if they worked through the Payday Loan [industry] and they had a central bank that could be utilized, I know it's -- we're going to talk about cost, but surely when we're charging 800/900/1000 percent interest rate you should be able to build that in. The banks have a tool, financial institutions have a tool to explore what the consumers are doing with other financial institutions. The same should apply with the Payday Loan [industry]. They should have a mechanism where they know what the consumer is doing with all the others. That's one way to get ... a registry, to get a better handle on it. That would be the perfect world.
>
> [Transcript, January 23, 2008, pp. 738-739]

[168] Due to the negative aspects of "rollover" loans, various payday lenders (including Money Mart and The Cash Store) have decided, on their own initiative, to stop the practice of offering such loans. While refusing to provide such loans has had a negative impact on revenues for payday lenders, this voluntary prohibition is seen by lenders as exhibiting corporate responsibility in the marketplace. Some lenders have incorporated the ban on rollover loans into their Code of Best Business Practices or Ethics.

[169] A prohibition on "rollover" loans has been included in the 2006 amendments to the *Consumer Protection Act*. Section 18N(h) incorporates the prohibition against rollover loans, which are defined in s. 18A(c) as follows:

> **18A(c)**"rollover" means the extension or renewal of a loan that imposes additional fees or charges on the borrower, other than interest, or the advancement of a new payday loan to pay out an existing payday loan, or a transaction specified in the regulations.

[170] However, during their testimony at the hearing, several witnesses expressed confusion over the apparent similarity between a "rollover", which is prohibited, on the one hand, and an "extension or renewal", on the other hand, which is permitted under s. 18T(2)(b) of the *Consumer Protection Act*. That provision states:

> **18T(2)** The Board shall, by order
> ...
> **(b)** fix the maximum amount, or establish a rate, formula or tariff for determining the maximum amount, that may be charged, required or accepted in respect of the extension or renewal of a payday loan; ...

[171] The phrase "extension or renewal" is not specifically defined in the *Act*.

[172] In their closing submissions, all parties submitted that no contradiction exists in the provisions dealing with rollovers and extensions or renewals. While the Consumer Advocate did suggest that there is a contradiction, he concluded that it can be reconciled by the Board.

[173] Following its review, the Board concludes that there is no contradiction in the *Act* as it relates to rollovers and extensions or renewals. Under the *Act*, it is clear that extensions or renewals of payday loans are permitted, provided that only interest is charged to the borrower. The Board considers this conclusion to be implicit in a reading of s. 18A(c), which defines a rollover as an "extension or renewal of a loan that imposes additional fees or charges on the borrower, other than interest". Thus, to the extent that other fees or charges are imposed, in addition to interest, such loans fall within the scope of the definition of "rollover" and are prohibited under the *Act*. However, extensions or renewals that do not impose additional fees or charges are permitted.

i) Should a payday borrower requesting an extension or renewal be charged the same as a first-time borrower?

[174] All formal intervenors recognized that only interest can be charged to a borrower requesting an extension or renewal of a loan. As noted under the previous issue, to the extent that other fees or charges are imposed for extensions or renewals of payday loans, in addition to interest, such loans fall within the scope of the definition of a "rollover" and are prohibited under the Act: see s. 18N(h).

[175] In its closing submissions, the formal intervenors differed on whether a repeat borrower should be charged the same rate of interest as a first-time borrower. Rentcash and SNSMR submitted that the same rate of interest should apply to both a borrower seeking an extension or renewal and to a first-time borrower. The Consumer Advocate suggested that a borrower requesting an extension or renewal should be charged less interest than that charged to a first-time borrower. For its part, 310-LOAN noted that payday lenders should be permitted flexibility in setting rates within the maximum allowable rate set by the Board.

[176] In the view of the Board, the same interest rate should apply to a borrower seeking an extension or renewal as that applied to a first-time borrower. As 310-LOAN noted, however, individual lenders may choose to offer different rates of interest, provided those rates are within the maximum set by the Board. The Board considers this to be an example where different lenders may, for competitive reasons, elect to charge lower interest rates to some borrowers.

j) In addition to that required under s. 18I of the *Consumer Protection Act*, should the Board require any other disclosure by payday lenders to borrowers? If so, what specific disclosure requirements should be directed, and at what time should such disclosure occur?

[177] The Board received evidence at the hearing respecting the importance of disclosure by lenders to payday borrowers. The Board has concluded that comprehensive and explicit requirements for disclosure are essential.

[178] Disclosure requirements are outlined in s. 18I of the *Consumer Protection Act*, which provides:

> **18I** A payday lender shall provide, in writing and in plain language, the following information to a borrower:
>
> (a) the total amount borrowed expressed as one sum in dollars and cents, that is comprised of
>
> (i) the sum actually received by the borrower, and
>
> (ii) the sum of official fees and premiums for insurance paid by the lender at the request of the borrower;
>
> (b) the cost of borrowing expressed in dollars and cents and itemized into interest and any other charges;
>
> (c) the interest payable as a percentage rate;
>
> (d) the cost of borrowing as a percentage of the total amount borrowed expressed at an annual rate; and
>
> (e) the total amount to be repaid;
>
> (f) the regulated maximum rates or fees for the cost of borrowing or any other charges applying to payday loans as determined by the Nova Scotia Utility and Review Board;
>
> (g) charges payable in the event the loan is not repaid by the due date and the allowable maximum charges as determined by the Nova Scotia Utility and Review Board;
>
> (h) how a loan may be cancelled;
>
> (i) the borrower's rights if the lender charges amounts prohibited under Section 18J;
>
> (j) the amount of fees and charges that can be applied to any extension or renewal as determined by the Nova Scotia Utility and Review Board;
>
> (k) a copy of the loan agreement;

(l) a copy of a document signed by the borrower stating that the borrower has received the information set out in this Section; and

(m) such other information as prescribed in the regulations.

[179] The draft *Regulations* filed in this hearing with respect to payday loans set out further requirements impacting on disclosure:

Signs displaying rates and fees for payday loans
8 (1) The display of rates and fees for payday loans required by Section 180 of the Act must be in the form of a sign that is immediately visible to persons when entering the payday lender's place of business.

(2) Signs required by subsection (1) must be a minimum of 61 cm wide by 76 cm high and shall contain lettering in a colour clearly contrasting with the background.

(3) A sign displaying rates and fees must contain the following information only:

(a) the heading "Payday Loans Are High-Cost Loans" in letters that are at least 3 cm in height;
(b) immediately under the heading in clause (a), the subheading "Example: $300 loan for 14 days" in letters that are at least 2.5 cm in height;
(c) immediately under the subheading in clause (b), the following lines of text in letters that are at least 2.5 cm in height:
(i) "Principal Amount $300.00";
(ii) "Total Cost of Borrowing" followed by the total cost of borrowing in dollars and cents for $300,
(iii) "Total to Repay" followed by the sum of $300 and the total cost of borrowing in dollars and cents for $300,
(iv) "Annual Percentage Rate - APR followed by the annual percentage rate for $300.

(4) A payday lender that offers more than one loan option, resulting in differing total costs of borrowing or annual percentage rates for a $300, 14-day loan, must include the total costs of borrowing, totals to repay and annual percentage rates for each loan option offered by the payday lender in the manner described in clause (c) on any sign displaying the rates and fees under this Section.

Disclosures to borrower
9 (1) The information required by clauses 18I (a) to (j) of the Act and the following information must be provided by the payday lender to a borrower in the loan agreement when a payday lender gives a borrower funds or access to funds under a payday loan:

(a) all of the following information for the payday lender and any agent of the lender representing the payday lender to the borrower:
(i) name,
(ii) business address,
(iii) mailing address,
(iv) telephone number,
(v) fax number,
(vi) e-mail address.
(b) the borrower's name and address;

(c) the date that the advance is made or a cash card is provided;
(d) the amount of the advance;
(e) the term of the loan;
(f) the date on which repayment is due or, if repaid by installments, the dates on which payments are due;
(g) an itemization of all fees, charges, commissions, interest, penalties and any other amount to be paid or that could be paid by the borrower;
(h) a statement of the borrower's right to obtain a copy of the loan agreement from the lender at any time upon request;
(i) if a cash card is issued to a borrower, the terms and conditions of the cash card, including all of the following:

(i) the amount of credit available on the cash card,
(ii) any date the cash card expires,
(iii) that charges by a third party may apply for using the cash card at locations other than the payday lender.

(2) The copy of the loan agreement required by clause 18I(1) of the Act must be signed by both the borrower and the lender.

[180] Section 18 of the draft *Regulations* also indirectly deals with disclosure:

Charges included in cost of borrowing
18 (1) Any charges or fees that a payday lender requires a borrower to pay in relation to the advance of a payday loan, except for penalties or charges relating to renewals or extensions, must be included in the cost of borrowing, including the following:
(a) interest;
(b) administration fees;
(c) commissions;
(d) cheque cashing fees on cheques used to repay a payday loan, even if the loan is past due;
(e) fees related to pre-authorized debits used to repay a payday loan, even if the loan is past due;
(f) fees relating to issuing and loading a cash card, even if payable to a third party;
(g) cash card transaction fees charged at the payday lender's place of business;
(h) agent of lender or broker fees.

(2) A payday lender must not charge for any default by a borrower of a payday loan except as permitted by an order of the Board under Section 18T of the Act and disclosed to the borrower in the loan agreement.

[181] CPLA, in its closing submission, with respect to the issue of disclosure, stated that it:

> … is pleased that many of the best practices mandated by CPLA's Code are reflected in the disclosure requirements now set out in s.18I of the Consumer Protection Act. At this time, the CPLA does not have any further recommendations with respect to disclosure.
>
> [CPLA Closing Submission, March 3, 2008, p. 18]

The CPLA offered no comments concerning the draft *Regulations* in its closing submission.

[182] In its closing submission, Rentcash asserted that it has advocated full disclosure to the borrower throughout the payday loan hearing process. It supports the statutory disclosure requirements set out in s. 18I of the *Act*, and it indicated that it supports a further disclosure requirement that "contact information for the Registrar of Credit (or the appropriate authority) and for the payday lender be included in the loan agreement by which the borrower can register a complaint or raise questions". In addition, Rentcash believes that such disclosure requirements (including the manner in which disclosure information is available to the borrower) should be applied consistently to all lenders.

[183] With respect to the draft *Regulations*, Rentcash stated that it does not support them, except where they are consistent with the points and principles set out above. In its supplementary brief of March 18, 2008 (Exhibit PD-68), it specifically commented on various aspects of the draft *Regulations*. In summary, Rentcash stated the following:

- The draft *Regulations* will most likely have to be revised following the Board's decision in this proceeding.
- Draft *Regulation* 23(2) is vague and ambiguous, and if it is intended to interfere with the broker model for payday loans in Nova Scotia, then Rentcash objects to it.
- Rentcash reiterates its previous submissions, as related to draft *Regulation* 18(1), that optional charges (or fees), and/or default charges (or fees), should not be included in the "cost of borrowing" in respect of payday loans.
- Should the Board make any recommendations to the Minister with respect to the content of the *Regulations*, any such recommendations must be consistent with the following steering principle:

> Borrowers should be protected through full and standardized disclosure as to the charges associated with payday loans, while at the same time having

> their right to choose different services, offered by competing lenders or brokers, preserved. Put another way, transparent disclosure of costs and charges (including any related to optional services and default) need not, and should not, mean that competing lenders/brokers can only offer the same kind of payday services or products. To do otherwise, would remove consumer choice and reward one business model over others.

- The Consumer Advocate, in his closing submission, submitted that the Board has a restricted ability with regard to ordering disclosure to borrowers by payday lenders. The Consumer Advocate points out that while the disclosure requirements are set out in s. 18I, the Board's authority is found in s. 18T of the *Act*, and that nowhere in Section 18T is there any linkage to disclosure, nor any linkage to s. 18I.

- The Consumer Advocate indicates that: "to the extent there are references to the Board's role in setting maximum rates or the like in Subsection 18T [which are found at (f), (g), and (j)], we submit it is within the Board's jurisdiction to stipulate to lenders: 1) The methods in writing to be utilized to communicate the maximum rates to borrowers; and 2) The "plain language" content.

- With respect to the Consumer Advocate's closing submission concerning the draft *Regulations* (Exhibit PD-66), he points out that the draft *Regulations* are issued under the authority of the Governor in Council, rather than the Board. He observed that although the Board has no authority to make regulations, it does have the power, pursuant to s.18T(10), to recommend to the Minister various matters pertaining to payday loans. Thus, should the Board desire to do so, it may make recommendations to the Minister with respect to the draft *Regulations*.

- The Consumer Advocate discusses a number of issues related to the draft *Regulations*, and then concludes its submission by stating that the draft *Regulations* provides necessary protection to Nova Scotia consumers, and that he supports them. Further, he has not suggested that the Board provide any specific recommendations to the Minister with respect to the draft *Regulations*.

[184] Taking into account all of the evidence, the Board is satisfied that the disclosure requirements set out in s. 18I of the *Consumer Protection Act*, together with the requirements set out in ss. 8, 9 and 18 of the draft *Regulations*, provide appropriate disclosure by payday lenders to borrowers as this Province embarks on a newly regulated marketplace after the legislation takes effect.

[185] On this issue, the Board considers that it is not necessary for it to make any further provision for disclosure to borrowers (whether that be in the form of provisions contained in the Board's Order or in the form of recommendations to the Minister). With respect to the submissions made by Rentcash, the Board considers that the disclosure requirements set out in the legislation intend that disclosure of loan costs to a borrower be all-inclusive.

[186] As noted above, the Board agrees with an approach which requires full disclosure of *all* of the expenses which must be borne by a qualified borrower, if that person is to actually receive the requested cash (or the equivalent) immediately (or within a reasonable time thereafter such as two hours).

[187] As noted later in this decision, the Board will hold a future review of the issues related to the payday loan market in Nova Scotia, at which time it may revisit the matter of disclosure. In the intervening time period, it is appropriate to monitor the functioning of the payday loan marketplace with the Board's Order and the legislation in effect.

k) Should the Board direct payday lenders to file data in advance of the next review? If so, what type of data should be filed and at what frequency?

[188] Section 18T(6) of the *Act* provides that the Board shall review its existing orders made under s. 18T at least once every three years and, after the review, it shall make a new order replacing the existing orders.

[189] At this point, it is appropriate to consider what type of data should be filed by payday lenders in advance of such reviews and, further, at what frequency should such data be filed.

[190] It is noted that s. 18T(4)(f) provides that, in making an order, the Board may consider "any data that the Board considers relevant".

[191] During the hearing, various witnesses, in support of their respective submissions about the setting of the maximum cost of borrowing, urged the Board to set a rate immediately and to use the time period leading to the next review in order to collect data to be used during that next review.

[192] Elsewhere in this decision, the Board has concluded that there is sufficient evidence before it to set the maximum cost of borrowing and to canvass the issues in this matter.

[193] In its deliberations in the present matter, and during future reviews, the Board may consider several points under s. 18T(4):

> **(4)** When making an order under this Section, the Board may consider
>
> (a) the operating expenses and revenue requirements of payday lenders in relation to their payday lending business;
>
> (b) the terms and conditions of payday loans;
>
> (c) the circumstances of, and credit options available to, payday loan borrowers generally, and the financial risks taken by payday lenders;
>
> (d) the regulation of payday lenders and payday loans in other jurisdictions;
>
> (e) any other factor that the Board considers relevant and in the public interest; and
>
> (f) any data that the Board considers relevant.

[194] In their closing submissions, the parties made a number of suggestions respecting the type of information the Board should canvass in future reviews, together with suggestions about the frequency in which this information should be filed.

[195] The CPLA submitted:

> At this stage, the CPLA is interested in pursuing collaboration with the Board and its consultants regarding appropriate data collection that would be available to the Board at the time of its next review hearing. The CPLA believes this approach would allow the Board to gather objective, independently verifiable evidence, beyond the prices in the marketplace, to confirm that payday loan customers are not being charged excessive fees. Reporting of this data should be mandatory, but not burdensome to payday lenders.
>
> Therefore, the CPLA recommends that the Board oversee a collaborative process to determine the type of data to be filed. The CPLA believes that this essential information may include current pricing offered by industry participants, the extent of competition in the marketplace, and some high-level data on costs facing payday lenders so as to provide the Board with confidence in the maximum cost of borrowing. The CPLA submits that a collaborative process is crucial to minimize the complexity and costs to industry associated with the gathering and reporting of information relevant to the Board in its setting of the maximum cost of borrowing and allow all companies to participate. The CPLA would look forward to participating in such a process.
>
> [CPLA Closing Submission, March 3, 2008, p. 18]

[196] In its closing submission, Rentcash stated:

> [Rentcash] submit that the Board make a recommendation to the Minister that regulations be passed to allow for the collection and compilation of information, including the rates which licensed payday lenders are charging and maintain confidentiality over such information. Such information would be useful in subsequent hearings or review, subject to addressing confidentiality concerns. The Board could make such a recommendation under s. 18T(10) of the *Act*. That information would be made available by lenders to Service Nova Scotia upon Service Nova Scotia's written request.
>
> [Rentcash Closing Submission, March 3, 2008, p.9]

[197] SNSMR suggested that the Board should request the semi-annual or annual filing of "actual loan charges" by payday lenders, such information to be filed with SNSMR.

[198] Ms. Kent recommended that the Board seek data respecting the number of repeat loans and the number of defaults:

> There have also been suggestions that the number of repeat loans be limited through regulation...It has also been suggested in Manitoba that there be a limit...placed on the number of payday loans a consumer can take in a year.

> It may be premature - and maybe even beyond the Board's mandate - to impose such limits in Nova Scotia. However, the Board should ensure that payday lenders provide data on their experience with repeat loans, as well as the number of loans granted, the size of loans and the number of defaults. Such data would increase our understanding of the industry and could form the basis for action by governments...
>
> [Kent Evening Submission, Exhibit PD-44, p. 4]

[199] In the Board's opinion, some of the information identified by Ms. Kent may prove helpful in future reviews conducted by the Board. Accordingly, it finds that data concerning the number of loans granted per outlet, the average size of loans per outlet, and the number of defaults per outlet will be sought in advance of future reviews. In this regard, the Board will recommend to the Minister (as discussed below in this decision) that the draft *Regulations* be amended to provide that all payday lenders file such information with the Registrar on an annual basis.

[200] The Board observes that the draft *Regulations* also contain a number of provisions requiring the filing of information with SNSMR, as well as the retention of records by all licensed payday lenders.

[201] For example, s. 5 of the draft *Regulations* requires any applicant for a permit to submit a sample loan agreement for a $300 loan for a 14 day term that shows that the cost of borrowing, and any charges, do not exceed the maximums set by the Board. Section 7 also provides that a payday lender must submit any changes to its loan agreement to the Registrar (i.e., SNSMR) at least 21 days before the revised loan agreement is used.

[202] With respect to the retention of records, payday lenders must retain copies of all loan agreements and receipts issued to borrowers for a minimum of three years from

the date the loan was advanced or the receipt was issued: see s. 22(1) of the draft *Regulations* and ss. 18M and 18S of the *Act*.

[203] The Board considers that any further requirement to file or retain any other information or data would require an amendment to the *Act* or to the draft *Regulations*.

[204] The Board is mindful of the confidentiality issue raised by Rentcash and the CPLA, together with their concern about the Board's ability to obtain such information from SNSMR or from the payday lenders. However, the Board has powers under the *Utility and Review Board Act*, S.N.S. 1992, c. 11, to compel the production of such information filed with SNSMR or retained by payday lenders, as it did in the present proceeding.

[205] Taking into account the Board's adoption of a Market Approach to determine the maximum cost of borrowing, the Board considers that the information filed under ss. 5 and 7 of the draft *Regulations* is important for the purposes of future reviews. Further, as noted above, the Board will require data to be filed in future reviews respecting the number of loans granted, the average size of loans and the number of defaults (all such data to be compiled per outlet). In future hearings, the confidentiality of such data can be addressed by the Board as noted in the preceding paragraph.

[206] If the Board, during future reviews, receives evidence that competitive forces are not working properly, the Board may revisit the issue of what information or data should be received in evidence. It can also seek such evidence during the hearing process.

l) Under s. 18T(7) of the *Consumer Protection Act*, what factors should the Board consider in determining whether to schedule a review to occur in less than three years?

[207] Section 18T(6) of the *Act* provides that the Board shall review its existing orders made under s. 18T at least once every three years and, after the review, it shall make a new order replacing the existing orders.

[208] However, in certain circumstances, s. 18T(7) allows the Board to review any existing order:

> **18T(7)** Whenever the Board is satisfied that circumstances in the payday lending industry have changed substantially, or that new evidence has come to its attention that may affect an existing order made under subsection (2) or (3), the Board may review any existing order and, after the review, the Board shall make a new order that continues, modifies or replaces the order that was reviewed.

[209] In their closing submissions, all parties recognized the Board's power to schedule a review before the three year period directed under s. 18T(6). Most of the submissions also recognized that the factors contemplated by s. 18T(7) were difficult to foresee (see Consumer Advocate Closing Submission, pp. 38-39) and submitted that it is not necessary at this point for the Board to specify what might constitute circumstances leading it to schedule an earlier review (see CPLA Closing Submission, p. 19).

[210] In her submission at the evening session, Ms. Kent recommended that the Board's Order be temporary and that the Board hold another review after it has been able to collect more data on costs:

> We would also recommend that any schedule of rates and fees that emerges from these hearings be considered temporary. Bill 87 states that the UARB is to review its orders with respect to fees at least once every three years, and may review an order at any time that it is satisfied a review is warranted. In view of the shortage of data specific to Nova Scotia, any rate order from this hearing should be temporary and reviewed as soon as the Board has been able to collect more data on costs.
>
> [Kent Evening Submission, Exhibit PD-44, p. 5]

[211] As noted earlier in this decision, it is the Board's understanding that its Order, together with the remaining 2006 amendments to the *Consumer Protection Act* and the draft *Regulations*, will come into effect at approximately the same time. The evidence presented at the hearing by Dr. Clinton, whose evidence the Board accepts, was to the effect that competition in the payday loan marketplace will increase once this regulatory scheme takes effect (i.e., the Board Order, the *Act* and the draft *Regulations*). This increased competition, in and of itself, will provide further protection to consumers. According to the evidence, the certainty fostered by the new regulatory environment will also attract new payday lenders into the market, further increasing competition and enhancing the benefits to consumers.

[212] It is important to recognize that from this point forward, consumers will not only benefit from the protection of a competitive market, but will also benefit from the disclosure and other requirements outlined in the *Act* and the draft *Regulations*, when they come into effect. In the view of the Board, once the maximum cost of borrowing has been established pursuant to the Board's Order, and the remaining provisions of the *Consumer Protection Act* and the draft *Regulations* come into effect, it will be appropriate to allow the competitive market to function and to monitor its progress.

[213] Further to the evidence respecting the regulation of payday lenders in other jurisdictions, it appears that Nova Scotia may indeed be the second province in Canada to put in place a "regulated marketplace", as contemplated under the recent amendments to the *Criminal Code*. In such circumstances, the Board considers it appropriate, after

monitoring the market for a short period through the filing of data with SNSMR, to direct that an earlier review be conducted.

[214] While the Board is mindful that an earlier review may result in additional costs for payday lenders participating in the process, the Board must balance those interests with the interests of borrowers. A properly functioning marketplace must recognize the interests of all participants, including both lenders and borrowers.

[215] Upon reflection, the Board agrees with Ms. Kent's suggestion that a review occur in less than three years. Based on its review, the Board considers it appropriate that a review be scheduled in two years. At that time, the Board will be able to assess how the payday loan marketplace has functioned and make any adjustments or recommendations that it deems appropriate. In making this finding, the Board finds as fact that the introduction of a new regulatory framework (i.e., the Board's Order, the *Consumer Protection Act* and the draft *Regulations*) will effectively result in substantially changing the circumstances in the payday lending industry, as provided in s. 18T(7). Allowing the marketplace to function for two years, while monitoring its progress, will provide the Board with sufficient data to review the Order issued following this proceeding. In the interim, if a critical issue is brought to the Board's attention, it is possible that a review (whether comprehensive, or on a specific point) might occur in less than two years.

m) Does the current state of the market in Nova Scotia provide sufficient protection for payday consumers? If not, what steps, within the jurisdiction of the Board, may be taken to improve consumer protection?

[216] It is clear that the intent of the 2006 amendments to the *Consumer Protection Act* is to protect payday loan borrowers.

[217] Thus, in light of the Board's decision to adopt a Market Approach to set the maximum cost of borrowing, the Board determines that it is appropriate to consider whether a Market Approach, and its reliance upon competitive market forces to establish a rate or a series of rates, provides sufficient protection to consumers.

[218] The Consumer Advocate submitted that the Board has little evidence before it to determine the state of the payday loan market. Thus, he states that the Board is unable to determine whether the market provides sufficient protection to borrowers. The Consumer Advocate adds that there is little or no evidence respecting the level of competition in small towns across Nova Scotia.

[219] With the exception of the Consumer Advocate, all other formal intervenors who responded to this issue in their closing submissions (including SNSMR), agreed that the current state of the market in Nova Scotia will provide sufficient protection for payday loan consumers, considering the other protections which will be in effect, including the *Act*, the draft *Regulations*, and the Board's Order resulting from this decision. These formal intervenors noted that the legislation and the Board's Order will help to provide certainty in the marketplace (due to the clarity provided by the *Criminal Code* amendments), which, in turn, will foster even greater competition and protection for consumers.

[220] Taking into account the protection afforded to payday loan consumers by the issuance of the Board's Order, as well as the provisions of the *Act* and the draft *Regulations* (when they come into full effect), the Board is satisfied that the competitive nature of the payday loan market should provide sufficient protection for payday loan consumers. Further, as noted above, a review of the Board's Order will be scheduled to occur in two years. Thus, the issue of consumer protection can be reassessed at that time.

n) Should the Board make any recommendations to the Minister pursuant to s. 18T(10) of the *Consumer Protection Act*?

[221] Section 18T(10) of the *Act* provides that the Board may make recommendations to the Minister of SNSMR on matters in respect of payday loans and payday lenders.

[222] As noted above in this decision, the Board concluded that it would be useful for it to have data in future reviews respecting the number of loans granted, the average size of loans and the number of defaults (all of this information compiled on an annual basis for each location operated by a payday lender). Accordingly, the Board recommends to the Minister that the draft *Regulations* be amended to provide that all payday lenders file such data with the Registrar on a yearly basis.

[223] In his testimony, Dr. Clinton also made the following recommendation:

> ... I think in your disclosure requirements you should also have that the consumer would be given an estimate of the cost of their loan before they provide a whole lot of personal information. Now, in Nova Scotia, the lenders were quite willing to give me prices or fees without me telling them anything about my financial situation except that I was in receipt of a monthly pension cheque. However, some lenders, particularly the internet-based lenders, but some of them are not, as soon as you ask them a question they come back asking you

> questions about your personal financial details. In other words, they won't give you a price until you do that. So I think, in making your recommendations as to what they should disclose, I would advocate eliminating that practice. I don't see why an individual should be having to give out personal financial information in order to know what the cost of the loan should be.
>
> [Transcript, January 25, 2008, p. 1143]

[224] The Board considers this to be an appropriate recommendation. In its view, a properly functioning market requires that all borrowers be informed as to the choices available to them. Given the characteristics of the payday loan market, and the urgency with which borrowers require funds (as described in the testimony during the hearing), such borrowers must be able to ascertain and compare rates between different lenders.

[225] Accordingly, the Board recommends to the Minister that the draft *Regulations* be amended to allow individuals to determine rates from payday lenders without having to disclose personal financial information, with the exception of their name.

[226] In its closing submissions, Rentcash suggested that the loan agreement used by payday lenders should contain contact information for the Registrar of Credit (or any other appropriate authority) and for the payday lender involved in the loan. Rentcash submits that this would allow a borrower to register a complaint or raise questions respecting the loan. The Board is satisfied that such information would be useful for borrowers and it recommends to the Minister that s. 9 of the draft *Regulations* be amended to require that such contact information be included in the loan agreement.

[227] During the testimony of Credit Counselling Services, Mr. Eisner and Ms. Wilkie made several other recommendations, which they indicated were based on information given to them by consumers they have counselled over the years, from the

CPLA's Code of Best Business Practices and from their own experience dealing with hundreds of clients with payday loans. In addition to the recommendations noted elsewhere in this decision, their recommendations were as follows:

- A fixed fee for payday loans;
- Interest, if it is being charged, should not be compounded;
- Borrowers should have the option, if needed, to extend the time period to 60 days and be able to pay off the debt in this period by instalments;
- If a borrower defaults after 60 days, the interest rate or fees should not exceed 30% per annum for the next 13 weeks;
- A payday lender must not grant a loan for more than 25% of the net amount of the next pay cheque;
- A payday lender must have proof of the borrower's income that is less than 90 days old;
- The *Regulations* must be enforceable and there must be significant consequences when those *Regulations* are broken, including suspension or revocation of permits; and
- If a consumer defaults on a loan repayment, the consumer should be encouraged to seek help from a credit counselling agency.

[228] In his closing submissions, the Consumer Advocate repeated a number of the above recommendations made by Credit Counselling Services, including the recommendation that there be a "cooling off" period, before a borrower takes another payday loan.

[229] Ms. Kent, MLA, also made a formal presentation at the evening session, which included a number of recommendations:

- There should be different rates for first-time and repeat customers to reflect the difference in cost. This should apply not only to extensions or renewals, but to all repeat loans;
- There be a limit be placed on the number of payday loans a consumer can take in a year;
- Default fees that reflect the lender's costs and penalizes the borrower to a reasonable extent; and
- Limited and standardized requirements for personal information from consumers.

[230] In its written submissions, 310-LOAN submitted that the Board should not make any recommendations to the Minister respecting additional measures, in order to allow the market to adjust to the new regulated marketplace.

[231] The Board considers the submission of 310-LOAN to be reasonable. With the exception of the three recommendations noted below, the Board concludes that the payday loan marketplace should be allowed to operate, with no additional changes, while the new regulatory framework is monitored. The Board is comforted in this conclusion by the fact that the new regulatory scheme coming into effect (i.e., the *Act*, the draft *Regulations*, and the Board Order resulting from this decision) will implement a number of measures which will afford protection to payday loan borrowers. These measures include some of the other recommendations noted by Mr. Eisner, Ms. Wilkie and Ms. Kent (see paras. 56 - 57 above).

[232] Accordingly, the Board makes the following three recommendations to the Minister under s. 18T(10) of the *Act*:

a) That the draft *Regulations* be amended to provide that all payday lenders file with the Registrar of Credit, on an annual basis, the following data (on a per outlet basis): the number of loans granted, the average size of loans, and the number of defaults;

b) That the draft *Regulations* be amended to allow prospective borrowers to determine the cost of borrowing from a payday lender without having to disclose personal financial information, with the exception of their name; and

c) That s. 9 of the draft *Regulations* be amended to provide that the loan agreement contain contact information for the Registrar of Credit (or any other appropriate authority) and for the payday lender in the event any borrower wishes to register a complaint or raise questions.

o) Consideration of the Manitoba Decision

[233] Final closing submissions were filed in the Nova Scotia hearing on March 10, 2008. During the NSUARB's deliberations in the present matter, the Manitoba Public Utilities Board released its 326 page decision respecting payday loans on April 4, 2008. For the reasons explained below, the NSUARB concluded that the Manitoba decision provides no guidance with respect to the setting of the maximum cost of borrowing and, accordingly, the NSUARB placed no weight upon it.

[234] With respect to maximum rates, the Manitoba Public Utilities Board, after a lengthy analysis, concluded:

> **5.4.1 Cost of Credit**
>
> The maximum cost of credit that may be charged, required or accepted in respect of a payday loan, excepting for loans to persons on employment insurance or social assistance, or for loans in excess of 30% of the applicant/borrower's expected next pay, net of deductions, will be:
>
> a) 17% of value received to $500; plus
> b) 15% of value received from $501 to $1,000; and
> c) 6% of value received between $1,000 and $1,500.

> For payday loans to persons on employment insurance or social assistance, or in excess of 30% of the applicant/borrower's expected next pay net of deductions, the maximum cost of credit shall be 6% of value received to $1,500.00.
>
> If a payday loan is fully repaid more than five (5) days prior to the loan's due date, but after the 48-hour cooling off period, the cost of credit shall be retrospectively set at the original cost of credit, less $3.00 for each day over five (5) days the loan is repaid early, with a minimum cost of credit of $10.00.
>
> In determining adherence to this maximum, all charges and interest of any and all kinds, however determined or levied, are to be included in the calculation. In its next review of maximum charges (which is to take place no later than three years from the date of the government's Regulation setting maximum charges) the Board intends to review the thresholds at which these amounts are now established, to address any effects of inflation.
>
> [Manitoba Decision, April 4, 2008, p. 225]

[235] Taking into account s. 18T(4)(d) of the *Act* in this Province, the NSUARB provided the intervenors in the present hearing an opportunity to file their written submissions respecting any issues arising from the Manitoba decision. The submissions were completed by April 24, 2008.

[236] On May 8, 2008, the NSUARB was advised that an Application for Reconsideration was filed by the CPLA and a Notice of Motion for Leave to Appeal to the Manitoba Court of Appeal was filed by The Cash Store, with respect to the decision of the Manitoba Public Utilities Board issued April 4, 2008. The Application and the Notice of Motion were both filed in Manitoba on May 2, 2008. The NSUARB allowed the formal intervenors an opportunity to make submissions with respect to these developments involving the Manitoba decision, directing that submissions, if any, were to be filed no later than May 29, 2008. Counsel for the parties advised the NSUARB that no further submissions would be filed.

[237] The Manitoba Public Utilities Board released a decision respecting the Application for Reconsideration on June 27, 2008, which resulted in minor variations to its previous decision. The NSUARB allowed the formal intervenors a further opportunity to make submissions, which were completed on July 14, 2008. Counsel for the CPLA and Rentcash reasserted their position, outlined in greater detail below, that the Manitoba decisions are irrelevant and that the NSUARB should attribute little or no weight to both Manitoba's original decision and to its subsequent decision respecting the Application for Reconsideration. The Consumer Advocate repeated his view that the Manitoba decision was helpful to the NSUARB (as explained later in this decision).

[238] In its written submissions, legal counsel for the CPLA suggested that the Manitoba Public Utilities Board failed to appreciate the scope and effect of the federal and provincial regulatory scheme with respect to the payday loan industry. The CPLA stated:

> The CPLA respectfully submits that the Board give little or no weight to the Manitoba Decision during its deliberations in the current proceeding. Section 18T(4)(d) of the Consumer Protection Act is a permissive provision, not a mandatory one. Manitoba is simply the first of many jurisdictions to render its initial decision, and, importantly, the time periods for reconsideration and/or appeal of the decision have not yet lapsed. Furthermore, many of the "main premises" underlying the Manitoba Decision remain problematic in certain key respects.
>
> Based on an initial review of the Manitoba Decision, the Manitoba Board appears to have taken a fundamentally different philosophical approach to the provincial regulation of the payday loan industry than the CPLA suggests. As stated in Mr. Stringer's Opening Statement, the CPLA believes that the Nova Scotia hearing is not about whether payday loan lenders deserve to exist, but rather should be "focused on determining regulatory parameters that best protect consumers from excessive fees while ensuring that all Nova Scotians have access to payday loan services at fair rates in a competitive and viable marketplace." (Ex. PD-31, p. 2)
>
> In contrast, the Manitoba Board adopted a clear opinion as to the questionable legitimacy of the industry. While this tone permeates the entire Manitoba Decision" it is stated perhaps most explicitly in the fourth paragraph of the Executive Summary (p. 4):

> "Prospective payday borrowers should realize that payday loans are so expensive that they should be avoided, to be considered only in the absence of access to credit from mainstream lenders, family or "doing without'."

> With respect, the CPLA submits that the Manitoba Board has failed to fully appreciate what the respective federal and provincial governments have sought to achieve in putting regulatory mechanisms for the payday loan industry in place. Furthermore, the Manitoba Board's view that payday loans "should be avoided" appears to have unduly influenced many of its underlying conclusions, as discussed in more detail below.

> [CPLA Submission, April 23, 2008, pp. 1-2]

[239] Legal counsel for Rentcash was even more direct in its submission, alleging that the Manitoba Public Utilities Board showed a bias against payday lenders and that its decision should be of no use to the Board's proceedings in Nova Scotia:

> Rentcash submits the Manitoba Decision and the order therein (the "Order") should be of no use to this Board and are irrelevant. As will be put in more detail below, the Manitoba Board acted beyond its jurisdiction and approached its duties with an obvious bias against payday lenders, which bias coloured its interpretation of evidence and controlled its conclusions. The Manitoba Board demonstrated an intent to drive payday lenders out of Manitoba and produced an Order which will have that effect.

> [Rentcash Submission, April 23, 2008, p. 1]

[240] In its written submission, Rentcash specifically objected to the portrayal of the payday lending industry by the Manitoba Public Utilities Board:

> The intent of the Manitoba Board, in making the kind of comments excerpted above, is to denigrate payday lenders and cast them as shady, manipulative of their customers and only one step ahead of the police and prosecutors. The Manitoba Board, in rendering the Order, lost sight of the fact that the payday lending industry has emerged as a credible and legitimate part of the marketplace, offering products desired by consumers. It has ignored the fact that payday lenders, prior to this hearing process, were regulated and licenced by provincial authorities, such as Service Nova Scotia and its equivalent in Saskatchewan. The Manitoba Board fails to acknowledge, in assailing the industry, that some payday lenders, such as Rentcash, are publicly traded companies (Rentcash is traded on the TSE) who provided much sensitive commercial information about themselves before the Manitoba Board and answered, fully, the many questions asked of them.
>
> The Manitoba Board also pauses to address "ethics". At page 62, it noted that the hearing focused on "every aspect of the payday loan industry except for the question of ethics". Ultimately, the Manitoba Board took the view that the payday loan industry is not an ethical one, and that rates should be set so low as to drive lenders out of business. Such an approach was beyond the Manitoba Board's mandate. The Board, by legislation, was to set the maximum cost of credit, not sift through academic papers which cast the industry in the

> most negative light. Implicit in the Federal Government's Bill C-26, and the Manitoba Government's response, is governmental acknowledgement that there is, indeed, space in the marketplace for payday lenders.
>
> [Rentcash Submission, April 23, 2008, p. 4]

[241] Legal counsel for Rentcash referred to the following passages, among others, as support for the conclusion that the Manitoba Public Utilities Board exhibited bias in its decision:

> In short, most payday lenders structure their charges to evade the intent of Section 347 [of the Criminal Code] as understood by the Board and as argued by the plaintiffs of the class actions suits.
>
> ...
>
> The Board is struck by the payday loan industry's longstanding disregard for the intent of s. 347 of the Criminal Code (as perceived by the Board and as concluded by Manitoba court decisions) and an equally longstanding disregard by the government of pursuing compliance with that intent through prosecution of firms in breach of the anti-usury provision. Prosecutions based on single individual small balance short-term loans would have suffered inattention competing with cases involving violence and large dollar values for scarce prosecutorial and court time and (sic) resources. The 'forest may have been lost but for the trees'.
>
> ...
>
> Rather than proposing changes to the Criminal Code to allow for payday lending rates at well above the 60% cap (which it did eventually pursue and advocate), the industry began by flouting it. However, following the commencement of several private prosecutions (in the form of class action suits), the industry began calling for regulation. Regulation would allow for the legitimization of payday loans and, presumably, an end to the risk of damages that could range into the hundreds of millions of dollars if the class action suits succeed.
>
> [Manitoba Decision, April 4, 2008, pp. 17 and 217-218]

[242] The industry participants who filed written submissions with respect to the Manitoba decision were unanimous in their view that the decision would result in the departure of numerous payday lenders from the Manitoba marketplace, to the detriment of consumers.

[243] The Manitoba decision expressly acknowledges this result:

> The Board anticipates that the maximum charges established by this Order will result in some, if not many, payday lenders exiting Manitoba, and acknowledges that such a result will bring transitory hardship to some payday loan borrowers who will either have to establish an alternative source of credit or do without. The Board also anticipates that some relatively efficient payday lenders will continue to operate at the lower level of authorized rate charges, and that those surviving firms will assume some of the market demand that may become available with the closure of some of the existing payday lenders.
>
> [Manitoba Decision, April 4, 2008, p. 10]

[244] Rentcash stated in its written submission:

> ... Many lenders in Manitoba, if not all, will be driven out of business and the Manitoba Board has appropriated for itself the power to decide that Manitoba would be better off without payday loans. Moreover, the Manitoba Board has decided (again, beyond its mandate) that if any payday loans are to be made, the banks and credit unions are the only actors to be trusted to make them.
>
> [Rentcash Submission, April 23, 2008, p. 5]

[245] The CPLA reached a similar conclusion on its reading of the Manitoba decision:

> ... the Manitoba Decision sets the maximum cost of borrowing at a level that will certainly cause responsible small and medium-sized payday lenders to leave the industry. The Manitoba Decision expressly acknowledges this point at p. 233, but fails to consider that this could harm consumers by limiting access to credit. The CPLA firmly believes that regulation which allows for adequate competition amongst large, medium, and small payday loan operators in both urban and rural areas is in the best interests of consumers.
>
> [CPLA Submission, April 23, 2008, p. 2]

[246] The same conclusion was made by 310-LOAN in its submission:

> The PUB's order will reduce the number of lenders in the Manitoba market and limit the number of people who will qualify for a payday loan. Because the rates stipulated by the PUB are drastically lower than the cost of issuing those loans for many lenders, the magnitude of the aforementioned reductions is likely to be severe.
>
> With their order, the PUB set out to reduce the financial impact of payday loan use on Manitoba borrowers. They acknowledged that their order will force some borrowers to "do without," but were satisfied that those who do obtain payday loans in the future will enjoy a dramatically lower rate.
>
> The PUB has erred in its failure to accurately account for the impact its order will have on those who will no longer have access to the product. Barring a dramatic change in economic conditions that affords every Manitoban abundant savings and a good credit rating, the number of people who find themselves in need of short-term, small-sum credit will not change in the near future. While those who still qualify for a payday loan will save 20% to 50% on their future loan, those who cannot access the product will see their costs rise, some quite dramatically.

> As the Policies study illustrates, some newly excluded borrowers may pay up to ten times the amount that they currently pay in order to borrow $100 from an illegal source of credit. Some will temporarily relinquish their personal assets in order to obtain a pawn loan and others will do without. Of the borrowers who do without, those who knew how to weigh the difference between the cost of a payday loan and the cost of bouncing a cheque will be worse off.
>
> The net benefit to Manitoba customers is difficult to measure. Some borrowers will enjoy much cheaper payday loans and others will be forced to deal with less pleasant and far more expensive sources of credit. While well intended, it is our position that the Manitoba PUB order has needlessly abandoned an entire class of borrowers and in doing so contradicted its consumer protection objective.
>
> [310-LOAN Submission, April 23, 2008, p.7]

[247] The Consumer Advocate, on the other hand, submitted that the Manitoba decision provides helpful guidance to the proceedings in Nova Scotia. He stated:

> In summary, the Manitoba PUB, on its examination of amendments to Manitoba's *Consumer Protection Act,* amendments substantially similar to those effected by the Nova Scotia Legislature under Bill No. 87, has interpreted its regulatory mandate as one that will allow the industry to exist, but not tolerate businesses operating within that industry who are unable or unwilling to provide rates that are "just and reasonable" to the consumer.
>
> [Consumer Advocate Submission, April 23, 2008, p. 3]

[248] In its submission respecting the Manitoba decision, SNSMR stated that s. 18T(4)(d) of the *Act* requires the NSUARB to consider the Manitoba decision in making its own decision. Otherwise, SNSMR offered no comments.

[249] Having reviewed the Manitoba decision and the submissions of counsel, the NSUARB concludes that the decision of the Manitoba Public Utilities Board provides no helpful guidance to the consideration of the issues in the present proceeding in Nova Scotia.

[250] The Manitoba Board chose to adopt a position which, at least in part, sees payday loans as wrong on policy grounds, something:

> "... so expensive that they should be avoided, to be considered only in the absence of access to credit from mainstream lenders, family or 'doing without'.
>
> [Manitoba Decision, April 4, 2008, p. 4]

[251] In contrast, it is the view of the NSUARB that the Parliament of Canada and the Legislature of Nova Scotia have already decided that payday loans (which have a loan cost, counting all charges and interest, exceeding 60% of the principal advanced) are, as matter of policy, acceptable. The payday loan amendments to the *Criminal Code*, as the introduction to the amending Bill states, specifically contemplate that Canadian payday borrowers "are willing to pay rates of interest in excess of those permitted under the *Criminal Code*". The amendments to the *Code* exempt payday lenders from the *Code's* provisions, but only if a province chooses to adopt legislation under s. 347.1 of the *Code*. The Province of Nova Scotia, as well as Manitoba, have adopted such legislation.

[252] The Manitoba Board suggested that:

> ... the federal government appears to have 'walked away' from what some presenters to the hearing considered a moral responsibility to protect consumers ...
>
> [Manitoba Decision, April 4, 2008, p. 223]

and, further, that the government of Manitoba had stepped in to protect consumers. As the NSUARB has just noted, under the 2007 *Criminal Code* amendments, the former provisions of the *Code* remain in full force and effect, unless a province enacts corresponding legislation, as both Manitoba and Nova Scotia did.

[253] Administrative tribunals operate under, and are restricted to, the subject matter of, the enabling statutes which set them up and which give them authority over particular areas - be that setting electricity rates, or determining municipal planning appeals, or issuing liquor licences, or hearing criminal injury compensation appeals, or any of the myriad topics dealt with by modern administrative tribunals. While the topics which tribunals may deal with are broad, the only areas over which tribunals have authority are

those assigned to them by statute. Thus, for example, administrative tribunals have no jurisdiction to make findings of guilt or innocence under the *Criminal Code* - matters which are reserved to provincial and supreme courts, under the overall supervisory jurisdiction of appellate courts and the Supreme Court of Canada.

[254] The Manitoba Board, however, referred to the payday loan industry as being in violation of the *Criminal Code* until the 2007 Code amendments, and also commented upon prosecutors and other relevant authorities having failed to carry out prosecutions for these alleged violations prior to 2007. Whatever the mandate of the Manitoba Board, it is the view of the NSUARB that its own jurisdiction does not permit it to make what amount to findings of guilt in relation to payday loans made prior to the 2007 *Criminal Code* amendments, and to draw negative inferences about payday lenders as being allegedly guilty parties.

[255] Even more, it would be wrong for the NSUARB to base its recommendations for the operation of the payday loan industry after the 2007 amendments upon such findings. In the opinion of the NSUARB, whether payday loans prior to the 2007 amendments to the *Criminal Code* were legal is not relevant to the task given the NSUARB by the Legislature. The 2007 amendments expressly say that loan costs in excess of 60% are legal, when accompanied by provincial regulatory legislation.

[256] The Manitoba decision discusses arguments for and against banning the payday industry entirely - a matter upon which, as the NSUARB has just noted, Parliament and the provincial Legislature have already made the governing decision. More than once,

the Manitoba decision returns to discussions of whether payday loans are "morally acceptable", "morally right", etc.

[257] It is the opinion of the NSUARB that it is not its task, under the legislation which empowers it, to place its own view of the morality of an industry above that of the elected federal and provincial legislatures - particularly where (as here) there is no suggestion of infringement of the *Charter of Rights and Freedoms*. Parliament and the Nova Scotia Legislature have determined that payday loans can be legally made at loan costs in excess of 60%.

[258] The NSUARB must proceed from that foundation: its task is to set maximum rates and determine related matters under the enabling legislative amendments, using relevant evidence relating to, among other things, cost and market factors. That evidence includes evidence with respect to minimum rates which permit a wide range of competitors to remain in business. The Manitoba Board specifically discounted such evidence, and recognized in its decision that the rates it set would drive competitors from the marketplace:

> *The Board anticipates that the maximum charges established by this Order will result in some, if not many, payday lenders exiting Manitoba, and acknowledges that such a result will bring transitory hardship to some payday loan borrowers who will either have to establish an alternative source of credit or do without.* The Board also anticipates that some relatively efficient payday lenders will continue to operate at the lower level of authorized rate charges, and that those surviving firms will assume some of the market demand that may become available with the closure of some of the existing payday lenders. [Emphasis added]
>
> [Manitoba Decision, April 4, 2008, p. 10]

[259] The NSUARB has determined, as explained earlier in this decision, that effective competition, accompanied by, and facilitated by, improved disclosure to borrowers, will afford proper protection to consumers. As a corollary, the NSUARB has determined that fostering an environment which requires better disclosure, and which provides more regulatory certainty, should allow existing payday lenders to continue to operate in the Province and should encourage new payday lenders to enter the marketplace. In this regard, the NSUARB received, and accepted, expert evidence which outlined the benefits of increased competition in the marketplace. Moreover, the NSUARB also recognizes that the maximum cost of borrowing should accommodate a variety of lenders which offer different products and services to borrowers (for example, servicing borrowers with different levels of risk).

[260] On a final note, the Board observes that the maximum rate established by the Manitoba Public Utilities Board (i.e., $17 per $100 for loans up to $500, $15 per $100 for loans between $500 to $1,000 and $6 per $100 for loans from $1000 to $1,500), is in most, if not all, cases, below the cost for providing such services as outlined in the 2004 Ernst & Young report, a national study that was placed in evidence in both the Manitoba and Nova Scotia proceedings.

[261] A more recent report conducted in 2007 by Deloitte & Touche in Manitoba, concluded that the cost of providing payday loans is $26.89 per $100, excluding regulatory costs.

[262] In the view of the NSUARB, based on the conclusions in the 2004 Ernst & Young and 2007 Deloitte & Touche reports, the adoption of maximum rates similar to those

determined by the Manitoba Board would, at best, result in several payday lenders departing the Nova Scotian marketplace or, as a worse case scenario, could result in most lenders leaving the Province. It would also discourage new competitors from entering the marketplace. The NSUARB concludes that this would be contrary to the legislative intent of s. 347.1 of the *Criminal Code* and of the amendments to the Nova Scotia *Consumer Protection Act* and, further, would not be in the overall best interests of consumers, as explained later in this decision.

[263] As noted above, s. 18T(4)(d) of the *Consumer Protection Act* provides that, in making an order fixing the cost of borrowing in respect of a payday loan, the Board may consider "the regulation of payday lenders and payday loans in other jurisdictions".

[264] Taking into account its review of the Manitoba decision and the submissions of legal counsel, the NSUARB concludes, for the reasons outlined in the foregoing paragraphs, that the Manitoba decision provides no guidance to the Board in the present proceeding and it places no weight upon it.

SUMMARY

[265] The *Consumer Protection Act* confers authority to the Nova Scotia Utility and Review Board respecting certain aspects of the regulation of payday loans, which includes setting the maximum cost of borrowing to be charged by payday lenders to borrowers in respect to a payday loan, in respect of the extension or renewal of a payday loan, or in respect of any fee, charge or penalty.

[266] A payday loan is typically a small loan payable over a short term, generally to be repaid on or before the customer's next payday. The typical loan is less than $300, with a term not exceeding two weeks.

[267] A vast majority of payday loan customers (76%) are employed full-time and have household incomes generally on a par with the general population. While 56% of the general population report household incomes of less than $50,000 per year, only 51% of payday loan customers report household incomes below $50,000 per year. A majority of payday loan customers (59%) have a post-secondary education.

[268] In addition to providing payday loans, many payday lenders also offer a range of other products and services such as cheque cashing, money orders, money transfers, foreign currency exchange, prepaid Mastercard, tax preparation and refunds, stored value debit cards, as well as other services. Some of these services or products, like cheque cashing, debit cards and cash cards, are often related to the providing of payday loans and should be included in the stated rate for such loans if these products or services are not truly optional.

[269] Without an amendment to the *Criminal Code* which occurred in 2007, all fees or charges (in addition to interest) imposed by payday lenders would be used in calculating an annualized interest rate, and the resulting figure would be much in excess of the 60% maximum set by the *Criminal Code*.

[270] In 2007, the Parliament of Canada amended the *Criminal Code* provisions dealing with criminal rates of interest, effectively providing for the regulation of payday loans by the provinces.

[271] Before a payday lender is exempted from the *Criminal Code* amendment, a province must enact "legislative measures that protect recipients of payday loans and that provide for limits on the total cost of borrowing under the agreements". Nova Scotia has amended the *Consumer Protection Act* to provide for the regulation of payday loans. The amendments provide, among other things, for the licensing of payday lenders, the disclosure to be provided by payday lenders to their borrowers, various provisions aimed at protecting the borrower, the Board's powers to set the maximum cost of borrowing and other charges or rates, provisions prohibiting payday lenders from charging fees or rates in excess of those set by the Board, and provisions requiring the retention of loan documentation by payday lenders.

[272] By Order issued October 4, 2007, the Board directed that a hearing be conducted respecting this matter and it established a timeline for the filing of requests for formal standing, the filing of evidence (including experts' reports) and information requests, the filing of letters of comment by the public and requests to speak at the evening session

and the scheduling of the hearing. A Notice of Public Hearing was widely advertised in various newspapers with large circulations.

[273] Several formal intervenors responded to the Notice of Public Hearing:

- The Canadian Payday Loan Association - One of its largest members, the Money Mart, operates in the Province of Nova Scotia with six retail outlets.

- The Cash Store Inc. and Assistive Financial Corp. - The Cash Store Inc. is a subsidiary of Rentcash Inc., which operates 358 outlets of The Cash Store, with 12 outlets located in Nova Scotia.

- 310-LOAN - It claims to be Canada's largest "direct" payday lender, using a combination of phone, fax and internet to accept loan applications, sign loan agreements and issue funds.

- The Money Pro$ Incorporated - it did not file any evidence nor did it participate in the hearing.

- Service Nova Scotia and Municipal Relations - This Department is responsible for administration of the *Consumer Protection Act* and was involved in developing the amendments to the *Act* and *Regulations* pertaining to payday loans. It did not file any evidence at the hearing, with the exception of a list of payday lenders holding permits to conduct business in Nova Scotia and copies of sample loan documentation filed by such payday lenders.

- Consumer Advocate - was appointed by the Province and granted formal standing in this proceeding. While he participated in the hearing and cross-examined witnesses called by the other parties, he did not present any evidence.

[273] The hearing was held from January 21 to 25, 2008. The Board also held an evening session on January 23, 2008, with presentations from John Eisner and Linda Wilkie of Credit Counselling Services of Atlantic Canada and Becky Kent, MLA, a member of the Nova Scotia NDP Caucus and Official Opposition Critic for Consumer Affairs. Many of the recommendations mentioned by these speakers are incorporated into the amendments to the *Consumer Protection Act* and in the draft *Regulations*.

[274] The Board rejected the Cost Approach as a methodology for determining the maximum cost of borrowing. It involves the collection of cost data from payday lenders operating in the payday market. The Board finds that the Cost Approach would pose difficulties in developing a standardized format to obtain reliable and meaningful cost data from different lenders and would also greatly increase the cost of the regulatory environment for the payday lending market. This would involve significant costs for payday lenders in terms of compliance with such a regulatory scheme and increase the cost of monitoring by government. In the end, these costs would ultimately have to be borne by the consumers.

[275] The Board concludes that it should adopt a Market Approach to determine the maximum cost of borrowing.

[276] Increased competition, accompanied by improved disclosure to borrowers, will afford proper protection to consumers. Fostering an environment which requires better disclosure, and which provides more regulatory certainty, should allow existing payday lenders to continue to operate in the Province and should encourage new payday lenders to enter the marketplace. The Board received, and accepts, expert evidence given at the hearing which outlined the benefits of increased competition in the marketplace. The Board considers it should set a rate that will foster a healthy competitive marketplace.

[277] In setting the maximum cost of borrowing, the Board considers that it should avoid setting a maximum rate such that only the "lowest cost" lenders will remain in the Nova Scotia marketplace. Based on the evidence presented at the hearing (especially that of Dr. Clinton), market competition provides a catalyst for efficiency. If there are fewer

lenders in the market, there will be little or no incentive for them to be efficient and prices will tend to rise for consumers. Moreover, if rates are capped too low, near or below an amount which permits lenders to recover their costs and earn a reasonable profit, even the most "efficient" lenders will most likely withdraw from the market. Such scenarios would be contrary to the legislative intent of the amendments to the *Criminal Code* and of the amendments to the Nova Scotia *Consumer Protection Act* and, further, would not be in the overall best interests of consumers.

[278] Further, based on its review, the Board must set a maximum cost of borrowing that recognizes the different business models that exist in the marketplace, in addition to those that may choose to enter in the future. This will help to ensure that consumers will continue to be offered a range of different products and services.

[279] Also, the maximum rate set by the Board must be sufficiently high to allow the marketplace to function properly, while also preventing lenders from charging excessive fees and charges.

[280] The Board considers that one of its key purposes is to prevent an uninformed borrower from being charged a cost of borrowing which is completely inconsistent with the mainstream of the industry. To illustrate, the Board heard evidence referring to one lender in Manitoba charging $50 per $100, which was much in excess of that charged by other lenders. The Board received evidence that payday loan rates in Nova Scotia ranged from $15 per $100 up to $35 per $100.

[281] Having taken into account all the evidence, the Board sets the maximum cost of borrowing at $31 per $100, inclusive of all expenses (including interest) which must be borne by a qualified borrower in order to actually receive the cash requested (or the equivalent) immediately after its being determined by the lender that the borrower is so qualified.

[282] The Board made a number of other findings during the hearing which are summarized as follows:

- The Board considers that the maximum penalty chargeable with respect to default on a payday loan should be $40 per loan, which is consistent with that charged by chartered banks.

- The Board considers that 60% (as calculated in accordance with the *Act* and the draft *Regulations*) is the maximum interest rate which should apply, in the case of default, to any balance outstanding on the loan.

- The Board considers that the maximum interest rate chargeable on a payday loan must not exceed 60% (as calculated in accordance with the *Act* and the draft *Regulations*). Apart from fixing the maximum interest rate at 60%, the Board determines that it need not set a maximum for any other component (charges or fees) of the maximum cost of borrowing. However, under no circumstances must the total cost of borrowing (including interest and other charges) exceed $31 per $100.

- The Board has concluded that comprehensive and explicit requirements for disclosure are essential. The Board is satisfied that the disclosure requirements set out in s. 18I of the *Consumer Protection Act*, together with the requirements set out in ss. 8, 9 and 18 of the draft *Regulations*, provide appropriate disclosure by payday lenders to borrowers as Nova Scotia embarks on a newly regulated marketplace after the legislation takes effect.

- The Board agrees with such an approach which requires full disclosure of *all* of the expenses which must be borne by a qualified borrower, if that person is to actually receive the requested cash (or the equivalent) immediately (or within a reasonable time thereafter such as two hours).

- In addition to information required to be filed under the draft *Regulations*, the Board will also require data to be filed in future reviews respecting the number of loans granted, the average size of loans and the number of defaults (all such data to be compiled per outlet).

- If the Board, during future reviews, receives evidence that competitive forces are not working properly, the Board may revisit the issue of what information or data should be received in evidence.

- Section 18T(6) of the *Act* provides that the Board shall review its existing orders made under s. 18T at least once every three years and, after the review, it shall make a new order replacing the existing orders. The Board considers it appropriate that a review be scheduled in two years. At that time, the Board will be able to assess how the payday loan marketplace has functioned and make any adjustments or recommendations that it deems appropriate. In the interim, if a critical issue is brought to the Board's attention, it is possible that a review (whether comprehensive, or on a specific point) might occur in less than two years.

- Taking into account the protection afforded to payday loan consumers by the issuance of the Board's Order, as well as the provisions of the *Act* and the draft *Regulations* (when they come into full effect), the Board is satisfied that the competitive nature of the payday loan market should provide sufficient protection for payday loan consumers.

- The Board makes the following three recommendations to the Minister under s. 18T(10) of the *Act*:

    a) That the draft *Regulations* be amended to provide that all payday lenders file with the Registrar, on an annual basis, the following data (on a per outlet basis): the number of loans granted, the average size of loans, and the number of defaults;

    b) That the draft *Regulations* be amended to allow prospective borrowers to determine the cost of borrowing from a payday lender without having to disclose personal financial information, with the exception of their name; and

    c) That s. 9 of the draft *Regulations* be amended to provide that the loan agreement contain contact information for the Registrar of Credit (or any other appropriate authority) and for the payday lender in the event any borrower wishes to register a complaint or raise questions.

[283] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 31st day of July, 2008.

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Roland A. Deveau

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Wayne D. Cochrane

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John A. Morash