

NOVA SCOTIA UTILITY AND REVIEW BOARD



IN THE MATTER OF THE CONSUMER PROTECTION ACT

- and -

IN THE MATTER OF A HEARING respecting certain aspects of the Consumer Protection Act relating to payday loans

BEFORE: Peter W. Gurnham, Q.C., Chair
Wayne D. Cochrane, Q.C., Member
Roland A. Deveau, Q.C., Member

COUNSEL: **THE CASH STORE INC.**
J. Andrew Fraser, LL.B.
Nancy G. Rubin, LL.B.

PROVINCE OF NOVA SCOTIA
SERVICE NOVA SCOTIA AND MUNICIPAL RELATIONS
J. Mark McCrea, Q.C.
C.A. Mark Coffin, Deputy Registrar of Credit

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

CONSUMER ADVOCATE
David J. Roberts, LL.B.
Meredith Wain, LL.B.

BOARD COUNSEL: S. Bruce Outhouse, Q.C.
Richard J. Melanson, LL.B.

HEARING DATE: November 1 and 2, 2010

EVENING SESSION: November 1, 2010

WRITTEN BRIEFS: November 26, 2010

DECISION DATE: February 1, 2011

- DECISION:**
- 1) Market approach retained to determine the maximum cost of borrowing;
 - 2) Maximum cost of borrowing reduced to \$25 per \$100;
 - 3) Maximum cost of borrowing to include any cost for insurance;
 - 4) Board will recommend to the Minister that online payday loans be regulated;
 - 5) Board will recommend to the Minister that lenders disclose the cost of payday loans in their advertising; and
 - 6) Board orders that the next review occur in three years.

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I 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. While the *Consumer Protection Act* defines a payday loan as involving up to \$1,500 and a term up to 62 days, the typical loan is less than \$300, with a term not exceeding two weeks.

[3] In addition to providing payday loans, many lenders also offer a range of other products and services such as cheque cashing, operation of bank accounts, money transfers, credit cards, debit cards, and borrowers' insurance, each of which is typically sold for a separate and additional price, over and above the stated cost of borrowing.

[4] The purpose of this hearing was to conduct a review of the Board's existing Order on payday loans made under s. 18T of the *Act* and issued July 31, 2008.

[5] The Board conducted its first hearing respecting payday loans in 2008. In its Decision, 2008 NSUARB 87, dated July 31, 2008 ("*Payday 2008*"), the Board made numerous findings, including, among others, that it should apply a market approach (rather than a cost approach) to determine the maximum cost of borrowing; that the maximum cost of borrowing be set at \$31 per \$100, inclusive of all expenses (including interest); that the maximum penalty chargeable with respect to default on a payday loan

should be \$40 per loan; that 60% be the maximum interest rate which should apply, in the case of default, to any balance outstanding on a loan; and that the disclosure requirements set out in s. 181 of the *Consumer Protection Act*, together with the requirements set out in ss. 8, 9 and 18 of the *Regulations* (in draft form at the time), provided appropriate disclosure by payday lenders to borrowers as Nova Scotia embarked on a newly regulated marketplace after the legislation took effect. Also, the Board determined that it should conduct a review of its Order in two years.

[6] Nova Scotia was the first province in Canada to enact regulations respecting payday loans when it enacted the *Payday Lenders Regulations* (the "*Regulations*"), effective August 1, 2009.

[7] According to a survey presented at the hearing (evidence which the Board accepts), the majority of payday loan customers (62%) are employed full-time. Seventy percent (70%) of payday loan customers report household incomes greater than \$25,000 per year, with the largest group falling between \$25,000 and \$50,000 per year (41%). The majority of payday loan customers (i.e., 55%) have a post-secondary diploma or degree: community college (34%), university (17%) or post-graduate/professional programs (4%). The most common reasons for needing a payday loan are emergency cash to pay for necessities (36%) and to help out with an unexpected expense (24%). A further 9% noted that it was to help avoid late charges on routine bills.

[8] Almost every payday loan customer surveyed had previously used a debit card (96%), followed by 77% who have used a major credit card. However, more than half of the customers (57%) choose a payday loan instead of other financial products

and services because they believe the process is "quick and easy", with 14% more stating the reason as "convenience". The vast majority (89%) of payday loan customers indicate that they have paid back all of their loans on time. The customers indicated that they were very satisfied with their understanding of the terms of their loan and, when payment was due, how they were treated by their customer service representative and about their overall customer service experience.

[9] The level of satisfaction expressed by payday borrowers appears to be borne out by the relatively small number of complaints made to Service Nova Scotia and Municipal Relations ("SNSMR") by payday consumers. Since the *Regulations* came into effect on August 1, 2009, SNSMR has received only seven complaints (one of them being about online lending, which Nova Scotia does not presently regulate).

II REGULATION OF THE PAYDAY LOAN INDUSTRY

[10] 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.

[11] 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, provided, pursuant to s. 347.1(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.* [Emphasis added]

[12] Thus, before a payday lender can benefit from the 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".

III PAYDAY LOAN LEGISLATION IN NOVA SCOTIA

[13] 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.

[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* (i.e., ss. 18B - 18S and s. 18U) were proclaimed August 1, 2009.

[17] Section 18U(1) of the *Act* provides that the Cabinet may make regulations respecting several matters relating to payday loans. The *Regulations* also took effect August 1, 2009.

[18] The *Regulations* contain a number of provisions, including provisions dealing with the displaying of rates and fees by payday lenders in their outlets (s. 8), the disclosure to be provided by payday lenders to their borrowers (s. 9), requirements intended to protect borrowers with respect to the repayment of payday loans (ss. 10 - 17), limits on the charges that can be included in the cost of borrowing (s. 18), provisions requiring the retention of loan documentation by payday lenders (s. 22), and a provision setting out the information that must accompany an application for the licensing of payday lenders (s. 5).

IV BOARD'S PAYDAY 2008 DECISION FINDINGS

[19] The Board's findings in *Payday 2008* were summarized as follows:

[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. 18l 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.

[Board Decision, 2008 NSUARB 87, paras. 274-282]

[20] The Board notes that the *Regulations* were amended to incorporate the above three recommendations made by the Board.

V PROCEEDINGS AND FORMAL INTERVENORS

[21] By Order issued May 27, 2010, the Board directed that a hearing be conducted respecting this matter and 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.

[22] The Notice of Public Hearing was published in the Chronicle Herald and the Cape Breton Post on July 28, August 4 and 11, and October 6, 2010. 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 September 29, 2010.

[23] On September 10, 2010, 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. Four formal intervenors responded to the Board's Notice of Public Hearing, as set out immediately below.

[24] The Canadian Payday Loan Association (the "CPLA") is a federally incorporated not-for-profit association whose mandate includes "working with government on development and implementation of balanced regulation that allows for a viable [payday loan] industry and protects consumers." It represents 24 companies

comprising 555 out of the 1,604 payday retail outlets in the country. One of its largest members, Money Mart, operates in the Province of Nova Scotia with eight retail outlets. The CPLA was represented at the hearing by its legal counsel, John D. Stringer, Q.C., and James A. MacDuff.

[25] The CPLA called three witnesses at the hearing, including its President, Stan Keyes, P.C., its Corporate Secretary, Norman J.K. Bishop, Q.C., and Leonard Preeper, the President of Thinkwell Research, which conducted a public opinion survey on behalf of the CPLA in Nova Scotia, New Brunswick and Prince Edward Island. He was qualified by the Board to testify as an expert able to provide opinion evidence on public opinion polling in general, including the collection, segmentation, and analysis of public opinion data.

[26] The Cash Store Inc. ("The Cash Store") also participated as a formal intervenor in the hearing and was represented by its legal counsel, J. Andrew Fraser and Nancy G. Rubin. The Cash Store and its sister company, Instalozans Inc. ("Instalozans"), provide various financial services to consumers in Nova Scotia, including brokering payday loans and providing bank accounts through retail chains. The Cash Store and Instalozans have 23 branches operating in Nova Scotia (up from 12 outlets in 2008), located in both HRM and towns across the Province.

[27] The Cash Store's parent company, The Cash Store Financial Services Inc., previously known as Rentcash Inc. ("Cash Store Financial"), is a publicly traded company on both the Toronto Stock Exchange and the New York Stock Exchange. As of June 30, 2010, Cash Store Financial operated 523 branches (358 outlets in 2008) in

200 cities and towns across Canada, making it one of the largest suppliers of payday loans in the country.

[28] The Cash Store called three witnesses at the hearing, including Gordon J. Reykdal, its Chair and Chief Executive Officer, Michael J. Thompson, its Senior Vice-President and Corporate Secretary, 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 in the implementation of policy in the financial sector; and household sector finances.

[29] SNSMR also participated as a formal intervenor at the hearing and was represented by its legal counsel, J. Mark McCrea, Q.C. This Department is responsible for administration of the *Consumer Protection Act* and the *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, copies of sample loan documentation filed by such payday lenders with SNSMR, and, on a confidential basis, data on a "per outlet" basis respecting the number of loans granted, the average size of loans, and the number of defaults. This evidence was filed at the request of the Board.

[30] A Consumer Advocate was also appointed by the Board and granted formal standing in this proceeding. David J. Roberts, acted as the Consumer Advocate, assisted by Meredith Wain. The Consumer Advocate called Dr. Michael Bradfield and Dr. James Sawler to testify on its behalf. For many years, Dr. Bradfield was an Economics Professor at Dalhousie University (now retired, he is Adjunct Professor),

while Dr. Sawler is Associate Professor in Economics in the faculty at Mount Saint Vincent University. They were both qualified by the Board to give opinion evidence in the following areas: micro-economics; the theories of firm, consumer and market behaviour and their application to imperfectly competitive markets; and economic data analysis.

[31] S. Bruce Outhouse, Q.C. and Richard J. Melanson acted as Board Counsel.

[32] The Board also held an evening session on November 1, 2010. Three groups made presentations to the Board. Credit Counselling Services of Atlantic Canada, Inc. ("Credit Counselling Services") is a not for profit, charitable organization founded in 1994. Linda Wilkie, a Certified Credit Counsellor, and Josee Makin, Director of Client Services, appeared on its behalf. It has nine offices in Atlantic Canada, including four offices in Nova Scotia (i.e., Halifax, Sydney, New Glasgow, and Truro).

[33] Credit Counselling Services provides confidential and professional credit counselling, education outreach services and debt repayment programs to families and individuals. It is an accredited member agency of Credit Counselling Canada and describes itself as a community service offering an effective alternative to bankruptcy.

[34] It highlighted a September 13, 2010, report of the Organization for Economic Co-operation and Development ("OECD") warning that many Canadians are vulnerable to financial hardship due to record high debt levels and, with the economy slowing, this will have a great impact on Canadian households. Ms. Wilkie stated that more Nova Scotian consumers are falling into a "precarious debt situation".

[35] The Anglican Church of Canada was represented by Bishop Sue Moxley and Reverend Kees Zwanenburg. Bishop Moxley expressed the concerns of her Church regarding payday loans. She advocated the adoption of the recommendations of Dr. Bradfield and Dr. Sawler, including a reduction of the effective rate of interest paid by payday borrowers, the removal of insurance fees, and the implementation of strict enforcement measures in the payday loans industry.

[36] Garry Smith appeared on behalf of the Nova Scotia Government and General Employees Union ("NSGEU"). Joan Jessome, President of the NSGEU, had previously filed a written submission outlining a number of recommendations respecting payday loans, including a reduction of the maximum cost of borrowing.

[37] The above presenters at the evening session outlined a number of recommendations involving various aspects of payday lenders and payday loans, most of which are addressed later in this Decision.

VI ISSUES

[38] The final list of issues outlined by the Board for this hearing is as follows:

- (a) The cost of borrowing currently charged by different payday lenders in Nova Scotia.
- (b) Payday regulations in other jurisdictions, including limits on the maximum cost of borrowing.
- (c) Whether the market approach remains the methodology to be used by the Board in making its determination of the maximum cost of borrowing (market approach v. cost approach).
- (d) Whether the Board should vary the existing maximum cost of borrowing set at \$31 per \$100.
- (e) Whether the Board should vary the existing maximum fee, charge or penalty chargeable on default set at \$40 per loan.
- (f) Whether the Board should vary the existing limit on the maximum interest rate chargeable on a payday loan set at sixty percent (60%).

- (g) The adequacy of the existing disclosure requirements imposed upon payday lenders under the Regulations.
- (h) The continued use of rollover payday loans versus extensions and/or renewals of payday loans.
- (i) The presence and regulation of online payday lenders in Nova Scotia.
- (j) The scheduling of the next review to be conducted by the Board.
- (k) Any other issue the Board is asked to take into account under the *Regulations* (i.e., insurance).
- (l) Should the Board make any recommendations to the Minister?

VII ANALYSIS AND FINDINGS

(a) The cost of borrowing currently charged by different payday lenders in Nova Scotia

[39] Prior to commencing its analysis of the issues, the Board considers it instructive to examine the cost of borrowing currently being charged by different payday lenders in the Province.

[40] In a chart compiled by Dr. Clinton, he reported:

**Nova Scotia Posted Payday Loan Fees
Cost per \$100 (Rounded): Notional \$300 2-week loan**

		2008	2010
CASH STORE	Halifax	27	31
CASH CORNER	Glace Bay	27	31
CASH MONEY	Dartmouth	22	22
CASH 4 LESS	Bedford	15	18
CASH X	Bridgewater	30	22
MONEYMART	Halifax	19	19.50
MONEY PROS	Halifax	31	30
QUIK CASH	Dartmouth	18	24
MAJOR CASH	Halifax	new	17
NATIONAL EXCHANGE	Dartmouth	new	25
ABSOLUTE CASH		new	closed
PREMIER CASH ADVANCE		new	closed
INTERNET			
LITTLE LOAN SHOPPE		30	closed
310 LOAN		24	16
Average		24.34	23.21

[Exhibit PD-13, p. 5]

[41] The data in the above chart was not challenged by any of the parties.

[42] Dr. Clinton calculated that the average fee (i.e., the cost of borrowing) across all lenders, per \$100, declined from \$24.34 in 2008 to \$23.21 in 2010. The Board notes, as asserted by Drs. Bradfield and Sawler, that these amounts are not weighted averages.

(b) Payday regulations in other jurisdictions, including limits on the maximum cost of borrowing

[43] 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".

[44] As the Board noted earlier in this Decision, Nova Scotia was the first province to have payday loan regulations in effect. The *Regulations* were effective August 1, 2009. Since that date, some provinces have enacted regulations. Other provinces are still in the consultation or policy development process.

[45] The information provided by the CPLA and The Cash Store respecting the state of payday loan regulations in other provinces was compiled by the Board in the following table:

	Cost per Hundred	Default Fee	Maximum Interest on Arrears	Effective Date
Nova Scotia	\$31.00	\$40.00	60% per annum	August 1, 2009
British Columbia	\$23.00	\$20.00	30% per annum	November 1, 2009
Alberta	\$23.00	\$25.00	2.5% per month	March 1, 2010
Saskatchewan	\$23.00	\$20.00	30% per annum	Not yet in force
Manitoba	\$17.00	Fee charged by bank	2.5% per month	Not yet in force
Ontario	\$21.00	\$50.00	60% per annum	December 15, 2009

[46] The Board received evidence at the hearing that the Province of Newfoundland and Labrador has decided not to regulate payday loans.

[47] Most, if not all, other provinces that have regulated the payday loan industry have included provisions in their legislation with respect to online lenders.

(c) Whether the market approach remains the methodology to be used by the Board in making its determination of the maximum cost of borrowing (market approach v. cost approach)

[48] In *Payday 2008*, the Board explored two different methodologies, the market approach, and the cost approach, as tools to assist in determining an appropriate maximum cost of borrowing. For reasons discussed in that Decision (see, for example, *Payday 2008*, para. 89 and following), the Board selected the market approach as the more appropriate.

[49] The Board notes that, in using the term "cost approach" here, it is referring to the model commonly used in the regulation of public utilities, such as electricity or natural gas. In brief, that model involves determining the reasonable cost of providing a service (including capital and operating expenses), and then applying whatever rate of return on capital the regulatory body has determined to be reasonable in the circumstances.

[50] In the present proceeding, the Board received sharply differing views from the various parties as to whether the Board should maintain its present maximum of \$31 per \$100, or reduce it. None of the parties in the present proceeding advocated that the Board use the cost approach, rather than the market approach. In the Board's view, however, certain aspects of the evidence and submissions made on behalf of the

Consumer Advocate could be seen as amounting to an implicit adoption of at least certain aspects of the cost approach.

[51] In the present proceeding, just as in *Payday 2008*, the Board considers that the market approach, as opposed to the cost approach, is the correct one for it to use. Nevertheless, just as in the 2008 decision, the Board does not consider that its adoption of the market approach in general means that it ought not to intervene, where it thinks it appropriate.

(d) Whether the Board should vary the existing maximum cost of borrowing set at \$31 per \$100

[52] One issue which was clearly of importance to all participants in the hearing was the maximum cost of borrowing per \$100. This was set by the Board in 2008 at \$31.

[53] The Consumer Advocate, among others, urged that the Board set it at a lower level, with the Consumer Advocate suggesting \$21. The Board has decided to set the maximum at \$25 in the present proceeding, for the reasons set out below.

[54] Across the country, a common focus for discussion about the payday loan industry is the apparently extraordinarily high interest rates which apply to such loans, when these are calculated on an annualized basis. The report of the *Maximum Total Cost of Borrowing Advisory Board for the Ontario Payday Lending Industry* (the "*Ontario Report*"), issued on February 6, 2009, says it is "inappropriate" to use the annual percentage rate of interest to measure the cost of payday borrowing, a point of view which was also, in effect, adopted by the Board in *Payday 2008* (and is dealt with in more detail below).

[55] To illustrate, even at \$21 per \$100 (the figure proposed by the Consumer Advocate, and Ontario's maximum), the annualized rate of interest (compounding annually) is 548%. At \$31 per \$100 (the rate set by the Board in *Payday 2008*), the annual rate is 808%; at \$25 (the rate set by the Board in the present Decision), the rate is 652%; at \$17 (Manitoba's maximum), the rate is 443%. If one compounds daily, the rates go up exponentially - to, for example, 14,253% for \$21.

[56] Paradoxically, despite these high rates of interest, the payday loans industry is not (whether in Nova Scotia, or elsewhere in the country) a particularly profitable one, because the costs of operation are also relatively high.

[57] Some evidence before the Board points to profit margins ranging from a loss through to a profit of about 17 per cent. For purposes of comparison, Statistics Canada data in evidence before the Board suggests that the average operating profit margin for all Canadian industries in 2007 was 8.8 per cent. Non-financial industries had an average profit margin of 6.9 per cent, while financial and insurance industries averaged 26.4 per cent.

[58] The Board regards the data to which it has just referred as incomplete - as is, in the Board's judgment, much of the data before it relating to this surprisingly complex subject. Nevertheless, the Board is satisfied that all the evidence indicates that the profits earned in the payday loan industry are significantly less than those earned in the financial and insurance industry as a whole.

[59] The table below shows the range of maximum rates per \$100 which currently apply in Canada.

Comparison – Across Canada Fee per \$100	
Ontario	\$21
British Columbia	\$23
Alberta	\$23
Manitoba	\$17
Saskatchewan	\$23
Nova Scotia	\$31
Newfoundland, Prince Edward Island, New Brunswick*	\$25
*Payday loan industry not formally regulated in these Provinces	

[60] In *Payday 2008*, the Board reviewed, and, in essence, did not accept, the reasoning underlying the \$17 figure adopted by the Manitoba Board.

[61] The figure of \$21 was adopted by Ontario much more recently, however. The Ontario legislation reflects the recommendations found in the *Ontario Report*.

[62] The *Ontario Report* was referred to extensively in evidence before the Board in the present proceeding. The Board considers that it contains an analysis of, and conclusions relating to, the payday loan industry which are similar in many - but not all - material ways to the conclusions reached by this Board in *Payday 2008*.

[63] In remarking on this similarity of viewpoints, the Board will refer to only a few key issues.

[64] For example, the *Ontario Report* sees the payday loans industry as "not making exorbitant profits from lending activities." [*Ontario Report*, p.17]

[65] Further, the *Ontario Report* considers that the use of an annual percentage rate of interest to measure the cost of payday loan borrowing is one which is "inappropriate", and distorts analysis of the issue, noting, for example:

The media often report that the industry charges astronomical interest rates. For example, a \$100 loan for a fee of \$20 would represent an annual percentage rate of 20 per cent if the term is one year. But the annual percentage rate balloons to 520 per cent, uncompounded, when the term is two weeks, as is normally the case with payday loans. Expressing the cost of a small, short-term loan on an annualized basis makes no more

sense than expressing the cost of a night in a hotel on a yearly basis. At \$200 per night, a hotel room would cost more than \$73,000 for a full year - a sum no one would ever pay because no one would take a room at the nightly rate for a full year - which is the point.

[Exhibit PD-20, Appendix "B", p. 14]

[66] In *Payday 2008*, the Board reached a similar conclusion:

[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.

[Board Decision, 2008 NSUARB 87, paras. 53-55]

[67] The *Ontario Report* also reached similar conclusions to those in *Payday 2008* with respect to the relatively high costs experienced by payday lenders in the industry (which, as the Board has noted earlier lead to the surprisingly small profits, despite the apparently high charges for such loans).

[68] On this point, the Board has before it evidence of a number of different studies dealing with the cost to lenders of payday loans. These contain widely differing figures with respect to the average costs incurred by payday lenders. The top end of the range, contained in a report prepared by Deloitte & Touche in evidence before the Board, points to an average cost of \$27 per \$100. The *Ontario Report* makes particular reference to an Ernst & Young study which concluded that the average cost of a payday loan, among the firms sampled for the study, was \$21.50 per \$100 loaned. The same study pointed to an even lower profit rate than the Board referred to earlier in this Decision, suggesting that (again, among the firms sampled), less than 7% of the total revenue was available to pay for the cost of capital, including profit.

[69] Faced with evidence, which it accepted, that pointed to an average cost to the lender of, very roughly, \$21 per \$100, the *Ontario Report* still chose to fix the maximum cost of borrowing at \$21. This was (as the *Report* itself acknowledges) setting a maximum revenue which was, quite obviously, less than the costs actually being incurred by many of the lenders.

[70] The *Ontario Report* was, in the view of the Board, admirably direct as to its reasoning in so setting the figure. The authors of the *Report* expressly note that they did not suggest a figure of \$21 because profits are too high in the industry, nor, it seems, did they do so because of a perceived lack of competition.

[71] Instead, they did so because they wished to eliminate borrowers whom they considered to be too high risk. The express intent of the \$21 maximum is to deter lenders:

...from making excessively risky loans. We are quite certain that lenders will not make loans at the upper end of the risk curve if they cannot charge enough to cover their loan losses.

[Exhibit PD-20, Appendix B, p. 18]

[72] Authors of the *Ontario Report* expected that setting a \$21 cap would mean that lenders whose costs were more than \$21 would have to reduce them in order to stay in business. In turn, the authors of the *Report* expected that this would happen through lenders decreasing their exposure to high risk loans (which increase operating expenses), and by cutting operating expenses in other areas.

[73] The preponderance of evidence before the Board, however (and, in particular, the evidence of Mr. Reykdal on behalf of The Cash Store), is that this has not occurred. The Cash Store has an extensive, and rapidly growing, presence in Ontario. He testifies that his Company's lending policies have not changed, and, in particular, his Company has not changed its policies with respect to higher risk loans. At least to his knowledge, neither have those of other lenders. He did testify that his firm has reduced some of its costs in connection with staff training, which now has more of an online component than previously.

[74] Mr. Reykdal says that The Cash Store (and other more expensive lenders, with rates previously in excess of \$21 per \$100) has, to a large degree, coped with Ontario's \$21 maximum by increasing profits from the sale of what the Board will call "additional products." Additional products can include such things as cheque cashing, operation of bank accounts, money transfers, credit cards, debit cards, and borrowers' insurance, each of which is sold for a separate and additional price, over and above the stated cost of borrowing, e.g., \$21 per \$100.

[75] In evidence given to the Board in the present proceeding, Dr. Clinton suggested that an additional factor might be at work, pointing to a table appearing at page 16 of the *Ontario Report*, which breaks down the average cost per \$100 of the payday loan. That table shows the operating costs to be about four times higher than bad debt costs. Dr. Clinton suggested that this is an explanation for companies not changing their lending practices in relation to high risk loans.

[76] In deciding on \$21, the *Ontario Report* contemplated not simply that higher risk loans would be reduced, but that other types of cost cutting would occur. The *Report* gives as an example the fact that payday lenders often compete for customers on the basis of location and customer service, remarking that costs (and, impliedly, the quality of services) in relation to these will have to be reduced with a \$21 rate.

[77] In effect, the position taken in the *Ontario Report* is one which, in part, is intended to reduce what was referred to in the evidence before the Board as "product differentiation," which the Board will, in this Decision, distinguish from the sale of "additional products."

[78] "Product differentiation" refers to a variety of characteristics which a consumer may wish to take into account in choosing one product over another. These may include the most obvious, being price, but also such things as locating payday loan offices in more attractive suburban neighbourhoods, or higher traffic commercial areas (with associated higher rents), investing in higher levels of training for staff (with associated higher labour costs), and provision of additional customer services (such as The Cash Store's practice of always calling a borrower prior to a loan payment coming

due, and refraining from cashing the borrower's cheque, or making an automatic bank debit, if the borrower states he or she is unable to pay). In the view of the Board, product differentiation can also include different levels of risk tolerance, with some lenders being more willing to lend to higher risk borrowers than are others.

[79] Mr. Reykdal, testifying on behalf of The Cash Store, pointed to an emphasis within his company on such things as: staff training; selection of branch locations to provide maximum convenience for consumers; contacting borrowers prior to a loan's due date.

[80] According to Mr. Bishop, who testified on behalf of the Canadian Payday Loan Association (of which Money Mart, a low-cost lender with a rate of \$19.50 per \$100 is an important member), the telephone call to a borrower prior to the due date for a loan payment is a unique feature offered by The Cash Store and is not, to his knowledge, provided by any other lender.

[81] Some critics of the industry would prefer to minimize product differentiation, and focus entirely upon reducing costs. In the view of Dr. Bradfield, this is the approach which Ontario has taken. It is a policy that is intended to lead to an industry in which most lenders provide mostly the same range of services at mostly the same cost per \$100. It is an approach to which Dr. Bradfield himself personally agreed. In essence, he spoke against product differentiation, and in favour of homogeneity, saying, in effect, that the only product that should be available is a "low cost" one. Using cars as his analogy, he suggested that payday loans with the additional features were like luxury cars, whereas payday loans with fewer features were like lower priced

cars. The specific examples used in his evidence were a Cadillac and a Corolla. In Dr. Bradfield's view:

I think we should all have Corollas.

...

MR. outhouse: ...Are you saying that regulation in this province should, should seek to avoid product differentiation?

DR. Bradfield: ...like Ontario, the province should not be afraid of homogeneity...

[Transcript, pp. 526-527]

[82] In relation to Dr. Bradfield's "Corolla" comment, Dr. Clinton remarked:

...I've worked a lot in Eastern Europe and there they had a theory that you only needed one product for everybody and you'd produced that at minimum price.

[Transcript, p. 216]

[83] He asserted that:

...in a market economy, diversification of products is actually the rule...

[Transcript, p. 94]

[84] Certainly, any observer of the payday loan industry, whether in Ontario, or Nova Scotia, or elsewhere, cannot help but be struck by the fact that, right across the country, competing payday lenders operate successfully on the same street, with drastically different prices. This point was specifically touched on in the *Ontario Report*, and was quite evident in the evidence before the Board. As but one example, in Cape Breton Regional Municipality there is a Money Mart (charging \$19.50 per \$100) at 1165 Kings Road and a Cash Store (charging \$31) at 1290 Kings Road.

[85] The table in paragraph 40 above illustrates the wide range in the cost per \$100 currently being charged in Nova Scotia (i.e., from \$16 to \$31).

[86] What evidence, direct or indirect, that there is before the Board with respect to consumer satisfaction points to most users (although not all, of course) of payday loans being satisfied with the product. Indeed, it seems that the rate of

complaints against payday lenders, in Nova Scotia, Ontario, and elsewhere, may be substantially less than that experienced by the financial industry as a whole. Only seven complaints have been filed in Nova Scotia during the period of regulation, and the rate of complaint in Ontario has been similarly low.

[87] In response, critics of the payday loan industry sometimes suggest - expressly or impliedly - that even if borrowers feel satisfied, they may be making less than optimal decisions because of such things as allegedly lower education levels, inadequate consumer knowledge, etc.

[88] Once again, the Board will first note that the evidence before it on these points is often contradictory, and always fragmentary. Further, the evidence was developed not just within Nova Scotia but elsewhere in Canada, and in some instances in the United States.

[89] Dealing first with the argument that payday borrowers are not adequately informed, the Board notes that this was a theme, at least initially, of the evidence given by Drs. Bradfield and Sawler on behalf of the Consumer Advocate. They suggested that consumers did not have adequate amounts of understandable information; however, they acknowledged on cross-examination that they not only had not read the consumer protection measures which are mandated by the *Payday Lenders Regulations*, but were in fact unaware of their existence (a point dealt with elsewhere in this Decision).

[90] With respect to education levels, Drs. Bradfield and Sawler made reference to Statistics Canada's 2005 Survey of Financial Studies (SFS), and

subsequently asserted in their evidence that "payday loan users have considerably lower levels of education than non-users."

[91] As Counsel for The Cash Store points out, however, the SFS itself indicates only that:

...The SFS indicates, however, that 81% of borrowers in Canada have at least a high school diploma, compared to only 76% of the general population. Further, the percentage of users with post-secondary education is 45%, compared to 50% for non-users. This data fails to reveal any significant educational disparity between borrowers and non borrowers...

[The Cash Store Final Submission, November 19, 2010, p. 8]

[92] Likewise, two surveys referred to in evidence before the Board (Pollara and Thinkwell) point to 55% to 59% of borrowers in Nova Scotia and New Brunswick, or in the Atlantic Provinces as a whole, possessing a post-secondary diploma or degree. In making this statement, the Board has considered the criticisms directed by the witnesses for the Consumer Advocate against, in particular, the Thinkwell study.

[93] Dr. Clinton suggests, and the Board agrees, that the evidence before the Board in the present proceeding justifies a conclusion that the "vast majority" of borrowers in Nova Scotia are:

...well educated enough to understand the product they are buying and its cost...it turns out in Nova Scotia that borrowers are well educated; they know what the prices are.

[Exhibit PD-35, p. 3]

[94] While the Board will not touch in detail on the evidence with respect to income, it concludes that the income of payday borrowers is (as Dr. Clinton put it in his Report):

...not much out of line with the income distribution of working class and middle [class] Canada.

[Exhibit PD-35, pp. 2-3]

[95] Rather than such things as a lack of information or education, the Board concludes that product differentiation is, according to the preponderance of the evidence before it, an important factor in the surprising (to many observers, at least) satisfaction that borrowers have with payday loans, whether the rate is lower, such as \$19.50, or higher, such as \$31.

[96] Product differentiation can mean that borrowers have a range of choice before them, including what rates they are willing to pay and what services they wish to be included. Indeed, Dr. Bradfield, who testified on behalf of the Consumer Advocate, acknowledged on cross-examination that product differentiation was a "possible explanation" for the apparent preference by some borrowers for more expensive operations such as The Cash Store.

[97] The evidence before the Board, however, establishes that The Cash Store's included services in Nova Scotia, as well as their maximum rate, are now different from elsewhere in the country. While The Cash Store's rate was \$27 at the time of *Payday 2008*, it recently raised its rate in Nova Scotia (but not anywhere else in Canada) to \$31, the maximum permitted by the Board. When it raised its rate, it included a MasterCard free of charge to each borrower. A MasterCard is not needed to receive a payday loan, as the lenders can now instantly advance funds to borrowers through electronically generated cheques; it may, however, be a convenience in other ways to borrowers.

[98] It seems that other lenders in Nova Scotia and elsewhere in Canada (including The Cash Store, outside Nova Scotia) sell MasterCards to their customers as an additional product, which is not included in the cost of the loan (e.g., \$25 per \$100).

[99] The evidence before the Board varies with respect to the retail price charged to borrowers for such MasterCards, but the price may be as high as \$20. The Cash Store charges \$17.95 outside Nova Scotia for this card.

[100] The lenders' actual cost per card is, however, only \$5. Further, once it has been issued to a borrower, the card remains valid after the payday loan has been repaid. Thus, if a borrower chooses to borrow again in future, the MasterCard remains useable for whatever purpose the borrower may have for it.

[101] In Nova Scotia, under the \$31 rate currently charged by The Cash Store, a borrower who has acquired a MasterCard free in the course of the first loan would still have the card for any subsequent loan; however, the borrower would still be charged the same \$31 figure for the subsequent loan.

[102] On cross-examination in relation to his Company's decision to raise its rate in Nova Scotia to \$31, while including the MasterCard, Mr. Reykdal seemed to suggest that if his Company ceased providing the MasterCard as an included service, its rate could be reduced to its former level of \$27 or below.

[103] The Consumer Advocate was critical of The Cash Store's use of the free MasterCard to justify increasing its rate to \$31:

85. According to The Cash Store, the "hard cost" of the MasterCard is \$5: Testimony of Gordon Reykdal, November 1, 2010, Transcript p. 134. If that cost is applied to a loan of \$500, the cost to The Cash Store is \$1 for every \$100 lent. If the customer takes out five loans of that amount for the time they hold The Cash Store MasterCard, the cost of the card to The Cash Store is 20 cents for every \$100 lent. The borrower is paying a premium of \$6 per \$100 for a card that costs the lender 20 cents.

[CA Final Submission, November 19, 2010, p. 21]

[104] The above calculation by the Consumer Advocate was not rebutted by The Cash Store.

[105] As the Board has stated elsewhere in this Decision, the basic approach which it is taking in this Decision, just as in *Payday 2008*, is the market approach. The Board, however, has a duty under the legislation to intervene in the market approach where it considers it appropriate to do so.

[106] The Board has previously explored in this Decision some of the considerations leading to the *Ontario Report's* recommendation of a \$21 maximum. As part of that discussion, the Board has noted that the authors of the *Ontario Report* found that the average cost of payday loans was, at least according to one study they relied on, \$21 or slightly more; other studies have pointed to the average cost to the lender in extending a \$100 loan to be as much as \$27.

[107] The Board is conscious of the advantages which an enterprise such as a payday loan business can have in a more densely populated, urban setting. For example, the evidence before the Board suggests that such operating costs as staff salaries, computer systems, and building occupancies are the largest component in the cost structure. To a large degree, these costs must be incurred, no matter how large or how small the loan volume is of a particular outlet. In his evidence, Dr. Clinton pointed out that, while wages may be assumed to be higher in Ontario, the unit labour costs (e.g., the cost of labour for each \$100 lent) could well end up being lower in Ontario. This is because of the higher volumes which outlets in that highly urbanized province (as well as some in the increasingly urbanized provinces of Alberta and British Columbia) can be expected to experience.

[108] Related to this, the Board considers it a reasonable inference from the changes to the *Criminal Code* and the provincial consumer protection legislation, that

both the Government of Canada and the Government of Nova Scotia wish to allow payday loans to be available within the Province. The Board considers that proper fulfillment of this mandate includes facilitating the availability of payday loans in the less urban parts of the Province, and not just, for example, in Halifax. Such lenders can reasonably be expected to have higher unit labour costs (and indeed higher unit costs of various types).

[109] To set the maximum cost of borrowing at too low a level may have the unintended effect of eliminating, or unfairly reducing, the availability of such loans in rural areas. In this regard, the Board also takes note of the fact that a significant part of the growth in the number of payday loan outlets outside Halifax since 2008 has occurred in the form of The Cash Store outlets, which charge \$31.

[110] The Board notes Dr. Bradfield's support of the idea of homogeneity in payday loans, and his belief that homogeneity is a key concept in the approach taken in the *Ontario Report*, in recommending its \$21 rate. He illustrated this through an automotive analogy, referring to his preference that everyone be required to buy the same kind of car, a lower-cost Corolla, with the Cadillac equivalent not being available at all.

[111] While the Board takes note of Dr. Bradfield's preference for homogenization, it notes as well Dr. Clinton's contrary view, and reference to wider product choices, and a freer market, being the norm in North America.

[112] Certainly, the Board does not infer from the provincial legislation under which it is operating any wish by the Province that the forces of competition be limited in such a way that it leads to reduced availability of services in rural areas, or the

elimination of services (such as a telephone call to a borrower prior to the loan's due date) which some borrowers seem to like and are willing to pay for.

[113] By the same token, however, the Board is not persuaded by the evidence before it that it should maintain the maximum cost of borrowing at its present level of \$31.

[114] Having reflected on all of the evidence before it, the Board has concluded that it will set the maximum cost of borrowing at \$25 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 rate of \$25 shall be applied pro rata.

[115] The Board also notes that, under section (k), which appears later in this Decision, the Board has decided to include any cost to the consumer of insurance sold by or through the payday lender within the maximum cost of borrowing of \$25 per \$100.

(e) Whether the Board should vary the existing maximum fee, charge or penalty chargeable on default set at \$40 per loan

[116] In *Payday 2008*, the Board held that the maximum penalty chargeable with respect to a default on a payday loan should be \$40 per loan, which was consistent with that charged at the time by chartered banks.

[117] Evidence was presented in the pre-filed materials about the current charges imposed by the Canadian chartered banks upon default by a customer. While the amount requested by the banks has generally risen since *Payday 2008* (i.e., the

range now being \$40 to \$42.50), the CPLA and The Cash Store submit that the current default fee should remain at the present level.

[118] The Consumer Advocate notes that the default fee in Nova Scotia is significantly higher than in British Columbia, Alberta and Saskatchewan. However, he concluded that the Board heard no evidence that would suggest the current default fee should be revised [CA Final Submission, November 19, 2010, para. 135].

[119] The Board is satisfied that the maximum penalty chargeable with respect to a default on a payday loan should remain at \$40 per payday loan.

(f) Whether the Board should vary the existing limit on the maximum interest rate chargeable on a payday loan set at sixty percent (60%)

[120] In *Payday 2008*, the Board determined that it would not set a maximum for any component of the maximum cost of borrowing under s. 18T(3), apart from fixing the maximum interest rate chargeable at 60% (as calculated in accordance with the *Act* and the *Regulations*). However, the Board noted that, under no circumstances, may payday lenders charge an amount that exceeds the total cost of borrowing set by the Board.

[121] The CPLA and The Cash Store both submit that the current maximum interest rate of 60% should be maintained.

[122] However, the Consumer Advocate noted that:

Payday borrowers in Nova Scotia pay the highest rates in the country for other costs associated with payday loans. Nova Scotia allows a maximum annual rate of interest of 60% on arrears. The other provinces, except Ontario, only allow an interest rate of 30%...

[CA Final Submission, November 19, 2010, p. 20]

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

[124] As it did in 2008, having set the total maximum cost of borrowing (i.e., in this proceeding it has been set at \$25 per \$100), the Board does not consider it necessary to set a maximum for any component of the maximum cost of borrowing, except that it again sets the maximum interest rate chargeable at 60% (as calculated in accordance with the *Act* and the *Regulations*). In making this finding, the Board notes that any interest charged is, in any event, but one component of the total cost of borrowing that must not exceed that set by the Board.

(g) The adequacy of the existing disclosure requirements imposed upon payday lenders under the *Regulations*

[125] The *Act* (section 18I) and the *Regulations* combine to impose various disclosure requirements on payday lenders.

[126] In *Payday 2008*, the Board noted the importance of disclosure in the context of the market approach:

[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.

[Board Decision, 2008 NSUAR 87, para. 136]

[127] The Cash Store, in its evidence, spoke to the adequacy of the existing disclosure requirements:

... With that in mind, The Cash Store believes that since the *Consumer Protection Act* has been amended and supplemented by the new regulatory regime, best practices in the industry with respect to disclosure have become mandatory, and the objective of protecting consumers has been achieved. Consumers are in a position to appreciate the costs associated with different products and services as well as the total cost of borrowing. This has the added benefit of facilitating not only consumer awareness, but also comparison shopping, which works to foster a healthy competitive marketplace.

The Cash Store believes the existing disclosure requirements in Nova Scotia are adequate.

[Exhibit PD-12, p. 9]

[128] Dr. Clinton's opinion was as follows:

Nova Scotia's new regulatory framework for payday lending involves a set of regulations, which should be judged as a whole. It includes measures to:

- require lender licensing, and monitor and enforce compliance
- enhance disclosure requirements
- ensure that consumers have access to relevant information
- allow consumers time to re-think their transactions
- prohibit fees above the regulated limit (\$31).

These rules provide a coherent arrangement, which is intended to work in line with the competitive market, to ensure the efficient provision to consumers of the variety of services they demand.

[Exhibit PD-13, p. 11]

[129] The witnesses on behalf of the Consumer Advocate, in their pre-filed evidence and more particularly in cross-examination, spoke to the need for stricter enforcement of the *Regulations* and disclosure of adequate information. In their direct evidence, Drs. Bradfield and Sawler stated as follows:

E. Enforcement of regulations

Payday lenders elsewhere have misinterpreted or ignored regulations and industry guidelines in order to obtain an effective rate of interest beyond that permitted. We recommend that

Payday lenders be carefully monitored to ensure the strict enforcement of the regulations set for the industry.

[Exhibit PD-9, p. 19]

[130] While the witnesses for the Consumer Advocate supported stricter enforcement and further disclosure, they seemed to be unaware of some of the existing requirements of the *Act* and *Regulations*:

MS. RUBIN: Are you aware, sirs, that in order to become licensed in Nova Scotia, the regulations require that every loan document in use must be submitted to Service Nova Scotia and Municipal Relations?

DR. BRADFIELD: I wasn't aware of that, no.

MS. RUBIN: And that all the contracts and documents that are now in place, those that have been submitted in this hearing, have been approved by the government?

DR. BRADFIELD: Which documents are you referring to; all the documents with respect to the industry or all the evidence filed?

MS. RUBIN: No, I'm referring to the contracts in place, the application documents, the repayment agreements. Those have all been approved by Service Nova Scotia and Municipal Relations. Are you aware of that?

DR. BRADFIELD: I wasn't aware they had a process for that.

MS. RUBIN: You had access to the actual contracts and firms now in place in Nova Scotia as they've been filed as part of this proceeding?

DR. BRADFIELD: We didn't get into looking at those because of the volume of evidence that we were provided with and the timeframes with which we had to respond, so we didn't get into the contracts.

MS. RUBIN: Okay. So you could have done an assessment of the clarity of the forms and the contracts and the information provided but you didn't because you had too much else to do?

DR. BRADFIELD: Exactly.

[Transcript, pp. 417-418]

[131] In his final submission, under the heading "Disclosure Requirements", the Consumer Advocate only recommended that payday lenders be required to disclose the cost of payday loans in advertising distributed in the province.

[132] As noted elsewhere in this Decision, SNSMR has received few complaints about the day-to-day operations of payday lenders. The Board did not receive any submissions from the public with respect to the adequacy of disclosure.

[133] The Board agrees with the suggestion of the Consumer Advocate that the Board should recommend to the Minister that payday lenders be required to disclose the cost of payday loans in their advertising. The Board will be making such a recommendation.

[134] Otherwise, the Board is satisfied that the amount of disclosure currently provided for in the *Act* and *Regulations* is complete and adequate.

(h) The continued use of rollover payday loans versus extensions and/or renewals of payday loans

[135] Rollover loans, as defined in s. 18A(c) of the *Act*, are prohibited under s. 18N(h).

[136] In *Payday 2008*, the Board identified the distinction between "rollovers" versus "extensions" or "renewals":

[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. [Emphasis in original]

[Board Decision, 2008 NSUARB 87, para. 173]

[137] In response to Information Requests from the Board, all parties confirmed that they agreed with the distinction identified by the Board.

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

[139] Notwithstanding the above, the evidence at this hearing suggested that payday lenders, at least the larger ones, do not offer extensions or renewals. Instead, their business model compels a borrower to first pay off a payday loan, at which point a new loan (generally at the full fee) is made, often with no waiting period.

[140] An associated topic relates to some consumers having multiple loans. There is nothing in the *Act* that prohibits a borrower from accessing concurrent or overlapping payday loans at once, from different payday lenders. Further, there does not appear to be a consistent practice among lenders to request or verify the existence of loans by its consumers with different payday lenders.

[141] Ms. Wilkie, of Credit Counseling Services, testified about a client who was juggling up to eight payday loans from multiple lenders every payday, borrowing more than the value of his paycheck. In addition to the stress caused, the loan payments became so onerous that he had to cut back on necessities such as electricity and groceries.

[142] Other presentations or comments from the public echoed concerns about the ability of consumers to enter repeat loans, resulting, in many cases, to a "cycle" or "trap" of debt. For the purposes of this Decision, a repeat loan is a loan taken out within 24 hours of the repayment of a prior loan.

[143] On the issue of repeat loans and extensions generally, the Consumer Advocate offered the following submission:

117. The Consumer Advocate submits the Board should recommend a series of measures to mitigate the harmful effects of multiple payday loans to consumers:

1. Payday lenders should be required to conduct a more searching inquiry into the ability of individuals to repay their loans including whether the perspective borrowers have a current loan with another payday lender;
2. Payday lenders should be prohibited from issuing a payday loan to a borrower who has an outstanding loan with another lender;
3. Payday lenders who accept payment by post-dated cheque for a payday loan should be prohibited from granting another loan until the repayment cheque has cleared the bank;
4. Payday lenders should not be permitted to issue a new loan to a borrower on the same day the borrower has repaid a previous loan;
5. Nova Scotia should adopt Section 23 of the Payday loans Regulation of British Columbia and limit the amounts that may be required for repayment where a borrower takes out more than two loans from a lender in a 62 day period.

[CA Final Submission, November 19, 2010, para. 117]

[144] The Consumer Advocate also submitted that the Board may wish to consider an amendment to s. 5(d) of the *Regulations* to collect data on repeat loans in the industry.

[145] The Board notes that the Thinkwell Research survey found that customers are strongly opposed to "government" setting limits on the amount of loans that an individual can receive and that consumers should be able to obtain a loan whenever they need it. Further, consumers are even more opposed to payday lenders being able to share personal information about consumers with other lenders.

[146] Based on its review, the Board concludes that it should make no recommendation, at this time, that repeat loans or back to back loans be prohibited, or that any waiting period be introduced into the *Regulations*. In the Board's opinion, there is not sufficient evidence before it about how such prohibitions would be implemented or, even if they were adopted, that they would succeed in their objectives.

[147] However, the Board considers that more data should be collected on this phenomenon. Accordingly, it recommends to the Minister that the *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 repeat loans, the number of customers who have taken out repeat loans, and the number of repeat loans taken out by individual customers.

(i) The presence and regulation of online payday lenders in Nova Scotia

[148] The *Act* and the *Regulations* do not regulate online payday loans or lenders granting online payday loans. CPLA, in their pre-filed evidence, provided some background:

From a historical perspective, the first province in Canada to introduce payday loan legislation was the Province of Manitoba and that initial bill did not include regulation of internet lenders. Nova Scotia was the next province to pass legislation regulating payday lenders and it was very similar to the Manitoba legislation. Consequently, the Nova Scotia legislation did not provide for the licensing of internet payday lenders. The next province to introduce legislation was the Province of British Columbia and it was the first province

to include internet lenders under its legislation. Subsequently, the provinces of Alberta, Saskatchewan, Ontario and Prince Edward Island followed British Columbia by including internet lenders in their legislation. For unrelated reasons, the Province of Manitoba introduced amendments to their legislation and took the opportunity at that time to include internet lenders in their licensing regime. As a result Nova Scotia is the only province with legislation that does not include internet lenders.

[Exhibit PD-4, pp. 7-8]

[149] In *Payday 2008*, the Board noted the importance to the customer of being able to obtain the funds the day they apply for the loan, including online loans:

[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.

[Board Decision. 2008 NSUARB 87, para. 132]

[150] The Cash Store, in its pre-filed evidence, had no objection to online payday loans and lenders:

The Cash Store does not currently offer or broker payday loans online, but it has no objection to the online payday lending business model.

The Cash Store believes payday lenders should have considerable freedom to determine which business model suits them, and on what basis they will compete. The Cash Store further believes, within the context of the existing market, that online lenders help to broaden and diversify the scope of competition, while increasing the number of options available to consumers.

[Exhibit PD-12, p. 9]

[151] CPLA, in its pre-filed evidence, suggested there is a need to regulate online payday loans:

There is no doubt that a growing sector of the industry provides payday loans over the internet. We have seen growth of the internet lending sector, including an online platform offered by bricks and mortar lenders in those jurisdictions where internet lending is licensed. We believe it is logical for complete protection of the consumer and clear and consistent guidelines for industry to license all payday lending in the Province of Nova Scotia including loans granted to borrowers in Nova Scotia over the internet.

[Exhibit PD-4, p. 8]

[152] Mr. Keyes said in his opening statement on behalf of the CPLA:

...Nova Scotia is the only province with legislation that does not include internet lenders. Given that a growing sector of the industry provides payday loans over the internet, including an online platform offered by bricks and mortar lenders in those jurisdictions where internet lending is licensed, we believe it is only logical that consumers be protected and consistent guidelines be created to license all payday lending in Nova Scotia including loans granted to Nova Scotians over the internet.

[Exhibit PD-43, pp. 5-6]

[153] SNSMR, in its reply to Board Staff IR's, outlined the current situation in Nova Scotia:

...

Request IR-3:

Does SNSMR allow the registration of payday lenders that offer solely online services? If so, how is that registration accommodated in respect of the "per location" permit process contemplated under s. 18C and s. 180 of the *Act*?

Response to IR-3:

No. the Department does not recognize the internet as a "location" and therefore does not license on-line lenders.

...

Request IR-5:

Is SNSMR or the Registrar aware of any payday lenders offering online loans to Nova Scotians from outside the province (whether or not they hold a valid permit in this province)? Has the Registrar refused to issue a permit to any payday lender who offers online loans exclusively?

Response to IR-5:

Yes. SNSMR has heard from borrowers who took out Payday Loans with unlicensed "offshore" lenders, i.e. from outside Nova Scotia. These 'offshore' lenders are not Payday Lender Permit holders in Nova Scotia.

Yes, the Registrar has refused to issue a permit to two payday lenders who offer online loans exclusively.

Request IR-6:

Does SNSMR or the Registrar have any administrative policy respecting payday lenders who offer online payday loans **in addition to** such loans offered at retail payday locations in Nova Scotia?

Response to IR-6:

Yes, in that the Department's policy is that online loans cannot be offered in addition to such loans offered at retail payday locations in Nova Scotia.

[Exhibit PD-15, pp. 2-3]

[154] The Consumer Advocate, in his final submission, suggested that the issue of online payday loans needs more work and identified questions where further research is required:

133. There are a number of issues that should be reviewed before the Board makes a recommendation about the regulation of online lending:

- a. How will the license fees for online lenders be structured?
- b. How will disclosure requirements be applied in the online environment?
- c. Will the ease and speed of borrowing in an online environment increase the likelihood that borrowers will make unwise decisions?
- d. How will online lending effect the viability of existing payday loan outlets in the Province?

134. These are issues that need to be fully explored before the Board is in a position to recommend the regulation of online lending by payday loan companies in Nova Scotia. The Board should recommend to the Minister that Service Nova Scotia be asked to review the implications of allowing payday lenders to provide loans through the internet to borrowers in Nova Scotia, with particular reference to the experience in those provinces where internet lending is permitted.

...

139. It is too early to make definitive recommendations about the regulation of online lending. More work must be done before the Board can fully understand the implications of regulating payday lending on the Internet.

[CA Final Submission, November 19, 2010, pp. 31-33]

[155] CPLA, in their final submission, recommended:

The CPLA submits that the Board recommend to Service Nova Scotia that payday lending on the Internet should also be regulated in Nova Scotia, and that Service Nova Scotia consult with interested stakeholders to consider how such regulations can be developed and implemented to best protect Nova Scotia consumers.

[CPLA Final Submission, November 19, 2010, p. 10]

[156] Ms. Wilkie, on behalf of Credit Counseling Services, during her oral presentation, stated that regulating online lenders can be quite difficult:

...the presence in regulations of online payday lenders in Nova Scotia. They have no physical presence in Nova Scotia but are lending money to Nova Scotians. There is no regulation to this industry, and we are aware that entities such as this are hard to

regulate. Consumers [who] utilize these services may be unaware that they are not regulated.

[Transcript, p. 305]

[157] Ms. Wilkie also recommended that online lenders be regulated in the same manner as bricks and mortar lenders:

...Online payday lenders should be regulated in the same manner as payday lenders with a physical presence in Nova Scotia...

[Transcript, p. 306]

[158] Of the jurisdictions that have payday loan regulations that apply to online loans, the majority require lenders to disclose information on the introductory page of their websites for borrowers in that province. The information that is routinely required is the same as is required for bricks and mortar lenders, and includes, but is not limited to, the following:

- The lender licence number
- The maximum cost of borrowing allowed in the province per \$100 borrowed
- The amount that the lender charges per \$100
- The cost of borrowing on a typical \$300 loan
- The Annual Percentage Rate charged for a \$300 loan borrowed over 14 days
- A statement saying the disclosure meets the Act or Regulations

[159] In addition to the above disclosure requirements, other provinces require that funds borrowed from online lenders must be provided the day the agreement is made.

[160] The Board understands that regulating and licensing online payday lenders poses challenges, especially for lenders that are not based in Nova Scotia. The

risk, however, is that these loans may be offered to Nova Scotian consumers on an unregulated basis.

[161] The internet is a pervasive presence in many aspects of business and in society generally today. By not regulating online payday loans the Board is very concerned that there is potential for a regulatory gap in relation to payday loans in Nova Scotia whereby borrowers who borrow online do not enjoy the comprehensive protections outlined in the *Act* and *Regulations*.

[162] While the Consumer Advocate recommends more study, the industry participants were in general agreement that online payday loans should be subject to regulation. However, there was little discussion as to the form of regulation.

[163] Although not filed in evidence, the Board had an opportunity to review the *Regulations* as they relate to online payday loans in British Columbia, Alberta, Ontario and Manitoba.

[164] The Board intends to recommend to the Minister that online payday loans be regulated under the *Act* in the sense that they both be allowed and be subject to the disclosure and other requirements. The presence of more payday lenders in Nova Scotia supports the market approach adopted by the Board, by providing more borrower choice, but the *Regulations* should protect online payday borrowers.

[165] To ensure the Board has as much information as possible in making its recommendation to the Minister, the Board will provide parties with an opportunity to make additional submissions as to the form of regulation of online payday loans that would be appropriate in Nova Scotia. Parties may wish to canvass the *Regulations* in the other provinces (as has the Board) and any other information they might have. The

Board would ask for written submissions on this point from any interested party who chooses to do so within 30 days of the date of this Decision.

[166] Following that the Board will issue a supplementary decision containing details of the recommendation to the Minister.

(j) The scheduling of the next review to be conducted by the Board

[167] 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.

[168] The CPLA and The Cash Store submit that the next review should occur in three years. They note that the regulated market is still relatively new and that it would be beneficial to wait three years to provide a sufficient opportunity to see how the sector is functioning.

[169] The Consumer Advocate suggests a review should occur before three years, noting that the industry is evolving rapidly and the issue of online lending requires study.

[170] Having reviewed this matter, the Board considers it appropriate that the next review be scheduled in three years. The regulated market is still relatively young in Nova Scotia (even more so in the remainder of the country) and the Board has not seen sufficient changes in the industry since the last hearing that would warrant an earlier review, nor does it foresee, on the basis of the evidence before it, any significant issues arising in the near future. In these circumstances, the next scheduled review should occur in three years.

[171] However, as the Board noted in *Payday 2008*, if a critical issue is brought to the Board's attention in the interim, it is possible that a review (whether comprehensive, or on a specific point) might occur in less than three years.

(k) Any other issue the Board is asked to take into account under the Regulations (i.e., insurance)

[172] As the Board noted earlier in this Decision, payday loan companies do more than just loan money to their customers; many also sell a variety of "additional products", including: cheque cashing, operation of bank accounts, money transfers, credit cards, debit cards, and borrowers' insurance. Some of these additional products are highly profitable, according to evidence before the Board, including, for example, cheque cashing.

[173] Indeed, in the evidence before the Board, it appears that at least a significant number of payday loan outlets in Ontario have compensated for Ontario's sharply reduced rate of \$21 per \$100 rate by increasing their sales of additional products. Thus, in Ontario, before adoption of the \$21 rate, about 17% of the revenues of The Cash Store came from such additional products; since regulation, about 25% do.

[174] In this Decision, the Board makes no findings, negative or positive, in relation to the provision of such additional products or services, with one exception. That exception is insurance relating to loss of employment, illness, or death, sold by the payday lender to a borrower at the time the loan was granted.

[175] It was the Board's preliminary conclusion, in the preparation of this Decision, that it should simply prohibit payday lenders from making available such

insurance, whether directly, or indirectly (as The Cash Store does, in selling insurance on behalf of a third party, and receiving a commission).

[176] Ultimately, however, the Board has concluded that it will permit such insurance to be made available, provided that the cost of the insurance to the borrower be included in the calculation of the maximum cost of borrowing, which the Board has fixed elsewhere in this Decision at \$25. The \$25 figure is, as is explained in more detail in this Decision, inclusive of all expenses which a borrower is required to incur. For greater certainty, while not setting an additional specific component for insurance, the maximum cost of any loan in Nova Scotia which includes insurance cannot exceed \$25 per \$100.

[177] At present, the information before the Board indicates that only one firm, The Cash Store, offers such insurance to its customers. Members of the CPLA (which, in Nova Scotia, means Money Mart, with a \$19.50 rate) do not offer such insurance to their borrowers. This does not reflect a policy choice on the part of CPLA, i.e., CPLA does not disapprove, in principle, of such insurance.

[178] According to the evidence before the Board, The Cash Store offers this insurance through what Mr. Reykdal referred to as an "arms length provider," Trans Global Insurance. The cost of the insurance, according to Mr. Reykdal's evidence, is between 2½ and 3% of a customer's loan. Mr. Reykdal's firm is paid a commission by the third-party insurer for each policy sold to a customer. The third-party firm declined to permit The Cash Store to disclose to the Board the size of this commission.

[179] The insurance thus purchased provides coverage only for the life of that particular loan, i.e., the policy would normally have a term of two weeks.

[180] Bishop Moxley, in her submissions on behalf of the Anglican Church, urged, among other things, that insurance fees be banned. The Board also received a letter of comment in this matter from W. Augustus Richardson, Q.C., relating to insurance fees charged by payday lenders. This insurance usually covers loss of life and loss of employment.

[181] Dr. Bradfield said that "at least one" province bans such insurance, although he could not recall which one. By way of explanation for his views, Dr. Bradfield spoke of a hypothetical borrower aged 25 to 35 years old. He implied that the risk of an average person of that age dying, or being injured, or losing his or her job in the brief two-week life of the loan, can be taken to be very small. The Board agrees. The evidence from Mr. Reykdal is that the cost of such insurance is 2½ to 3%. If the Board uses the lower of Mr. Reykdal's figures, i.e., 2½ %, the cost on a \$300 loan would be \$7.50 for two weeks coverage.

[182] As the Board has noted previously, it considers that the use of annualized interest rates in discussing payday loans is misleading. Further, a great deal of evidence points to payday loan customers not being repeat customers over extended periods, and rarely taking out more than three loans in a year. If, however, one were to - for present purposes only - hypothesize a payday loan customer who has a \$300 loan outstanding for an entire year of two week loan terms, the premium paid for the insurance in question would be about \$195, i.e., almost 2/3 of the potential loss of \$300.

[183] The cost of this insurance becomes even more disproportionate, in the view of the Board, when one considers that evidence before the Board in 2008, which

the Board did not see as changed significantly in the present proceeding, indicates that it is rare for payday lenders to take civil action against a borrower for failure to pay.

[184] As the Board has noted, it considered, in its deliberations in the present proceeding, the possibility of prohibiting such insurance.

[185] Ultimately, it has decided that such insurance can continue to be made available. Unlike all other additional products, however, the Board directs that the cost to the consumer of such insurance be included in the calculation of the total cost of borrowing which is applicable to a particular payday lender in question.

[186] Other suggestions made by the parties and the public relating to other aspects of payday loans, though considered by the Board, were not adopted.

(I) Should the Board make any recommendations to the Minister?

[187] 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.

[188] Based on the Board's findings earlier in this Decision, the Board makes the following recommendations to the Minister under s. 18T(10) of the *Act*:

- a) That the *Regulations* be amended to provide that payday lenders be required to disclose the cost of payday loans in their advertising directed to borrowers in the Province.
- b) That the *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 repeat loans (i.e., a loan taken out within 24 hours of the repayment of a prior loan), the number of customers who have taken out repeat loans, and the number of repeat loans taken out by individual customers.

[189] As noted earlier in this Decision, the Board concluded that it would recommend that the Province regulate online payday loans. To ensure the Board has

as much information as possible in making its recommendation to the Minister, the Board will provide the parties with an opportunity to make additional submissions as to the form of regulation of online payday loans that would be appropriate in Nova Scotia. Written submissions on this point will be filed within 30 days of the date of this Decision. The Board will then issue a supplementary decision containing details of the recommendation to the Minister.

VIII SUMMARY

[190] 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.

[191] Nova Scotia was the first province in Canada to enact regulations respecting payday loans when it enacted the *Payday Lenders Regulations* (the "*Regulations*"), effective August 1, 2009.

[192] The purpose of this hearing was to conduct a review of the Board's existing Order on payday loans made under s. 18T of the *Act* and issued July 31, 2008.

[193] 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.

[194] In addition to providing payday loans, many lenders also offer a range of other products and services such as cheque cashing, operation of bank accounts,

money transfers, credit cards, debit cards, and borrowers' insurance, each of which is sold for a separate and additional price, over and above the stated cost of borrowing.

[195] According to a survey presented at the hearing (evidence which the Board accepts), the majority of payday loan customers (62%) are employed full-time. Seventy percent (70%) of payday loan customers report household incomes greater than \$25,000 per year, with the largest group falling between \$25,000 and \$50,000 per year (41%). The majority of payday loan customers (i.e., 55%) have a post-secondary diploma or degree: community college (34%), university (17%) or post-graduate/professional programs (4%). The most common reasons for needing a payday loan are emergency cash to pay for necessities (36%) and to help out with an unexpected expense (24%). A further 9% noted that it was to help avoid late charges on routine bills.

[196] Almost every payday loan customer surveyed had previously used a debit card (96%), followed by 77% who have used a major credit card. However, more than half of the customers (57%) choose a payday loan instead of other financial products and services because they believe the process is "quick and easy", with 14% more stating the reason as "convenience". The vast majority (89%) of payday loan customers indicate that they have paid back all of their loans on time. The customers indicated that they were very satisfied with their understanding of the terms of their loan and, when payment was due, how they were treated by their customer service representative and about their overall customer service experience.

[197] The level of satisfaction expressed by payday borrowers appears to be borne out by the relatively small number of complaints made to SNSMR by payday

consumers. Since the *Regulations* came into effect on August 1, 2009, SNSMR has received only seven complaints (one of them being about online lending, which Nova Scotia does not presently regulate).

[198] By Order issued May 27, 2010, 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.

[199] The Notice of Public Hearing was published in the Chronicle Herald and the Cape Breton Post.

[200] Several formal intervenors participated in the hearing.

[201] The Canadian Payday Loan Association represents 24 companies comprising 555 out of the 1,604 payday retail outlets in the country. One of its largest members, Money Mart, operates in the Province of Nova Scotia with eight retail outlets.

[202] The Cash Store, which along with its sister company, Instalozans Inc., operate 523 branches in 200 cities and towns across Canada, making it one of the largest suppliers of payday loans in the country. There are 23 The Cash Store and Instalozans branches operating in Nova Scotia, located in both HRM and towns across the Province.

[203] SNSMR is the Department responsible for administration of the *Consumer Protection Act* and the *Regulations* pertaining to payday loans.

[204] A Consumer Advocate was also appointed by the Board and granted formal standing in this proceeding.

[205] Board Counsel also participated in the hearing.

[206] The hearing was held on November 1 and 2, 2010, including an evening session. Three groups made presentations at the evening session, including Credit Counselling Services of Atlantic Canada, Inc. (represented by Linda Wilkie, a Certified Credit Counsellor, and Josee Makin, Director of Client Services), the Anglican Church of Canada (represented by Bishop Sue Moxley and Reverend Kees Zwanenburg), and the Nova Scotia Government and General Employees Union, or NSGEU, represented by Garry Smith. Joan Jessome, President of the NSGEU, had previously filed a written submission outlining a number of recommendations.

[207] In its Decision and Order issued in 2008 ("*Payday 2008*"), the Board set the maximum cost of borrowing at \$31 per \$100, inclusive of all expenses (including interest), which represented the maximum amount that can be charged by a payday lender to borrower. In this hearing, the Board noted the wide range in the cost per \$100 currently being charged in Nova Scotia by payday lenders (i.e., from \$16 to \$31).

[208] There is also a range of maximum costs per \$100 currently being charged in other provinces across Canada, including Manitoba at \$17 per \$100, Ontario at \$21, and British Columbia, Alberta and Saskatchewan at \$23. The Province of Newfoundland and Labrador has decided not to regulate payday loans. Other provinces are still in the consultation or policy development process.

[209] In the present proceeding, just as in *Payday 2008*, the Board considers that the market approach, as opposed to the cost approach, is the correct one for it to use to determine the maximum cost of borrowing. Nevertheless, the Board does not

consider that its adoption of the market approach in general means that it ought not to intervene, where it thinks it appropriate.

[210] Based on its review in this proceeding, the Board has concluded that the maximum cost of borrowing should be reduced to \$25 per \$100.

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

[212] The Board is satisfied that the maximum penalty chargeable with respect to a default on a payday loan should remain at \$40 per payday loan.

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

[214] 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 *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 \$25 per \$100.

[215] The Board will recommend to the Minister that payday lenders be required to disclose the cost of payday loans in their advertising directed to borrowers in the Province. Otherwise, the Board is satisfied that the amount of disclosure currently provided for in the *Act* and *Regulations* is complete and adequate.

[216] Based on its review, the Board concludes that it should make no recommendation, at this time, that repeat loans or back to back loans be prohibited, or

that any waiting period be introduced into the *Regulations*. In the Board's opinion, there is not sufficient evidence before it about how such prohibitions would be implemented or, even if they were adopted, that they would succeed in their objectives.

[217] However, the Board will recommend to the Minister that the *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 repeat loans (i.e., a loan taken out within 24 hours of a prior loan), the number of customers who have taken out repeat loans, and the total number of repeat loans taken out by individual customers.

[218] Most, if not all, other provinces that have payday loan regulations have provisions that apply to online loans which are designed to protect consumers. Nova Scotia does not. By not regulating online payday loans the Board is very concerned that there is potential for a regulatory gap in relation to payday loans in Nova Scotia whereby borrowers who borrow online do not enjoy the comprehensive protections outlined in the *Act* and *Regulations*. The Board intends to recommend to the Minister that online payday loans be regulated under the *Act*. To ensure the Board has as much information as possible in making its recommendation to the Minister, the Board will provide the parties with 30 days to make additional written submissions and it will issue a supplementary decision.

[219] The Board considers it appropriate that the next review be scheduled in three years. However, if a critical issue is brought to the Board's attention in the interim, it is possible that a review (whether comprehensive, or on a specific point) might occur in less than three years.

[220] The Board has concluded that it will permit lenders to make insurance available to borrowers (including insurance relating to loss of employment, illness, or death), provided that the cost of the insurance to the borrower be included in the calculation of the maximum cost of borrowing.

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


- a) That the *Regulations* be amended to provide that payday lenders be required to disclose the cost of payday loans in their advertising directed to borrowers in the Province.
- b) That the *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 repeat loans (i.e., a loan taken out within 24 hours of the repayment of a prior loan), the number of customers who have taken out repeat loans, and the number of repeat loans taken out by individual customers.

[222] An Order will issue, effective April 1, 2011, to allow sufficient time to payday lenders and SNSMR to implement this Decision.

DATED at Halifax, Nova Scotia, this 1st day of February, 2011.



Peter W. Gurnham



Wayne D. Cochrane



Roland A. Deveau