DECISION **2015 NSUARB 64**
M06084

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
Roland A. Deveau, Q.C., Vice-Chair
Wayne D. Cochrane, Q.C., Member

COUNSEL:

CANADIAN PAYDAY LOAN ASSOCIATION
Hon. Stan Keyes, P.C., President
Norman J.K. Bishop, Q.C., Corporate Secretary

CONSUMER ADVOCATE
David J. Roberts, LL.B.
Jillian Houlihan, LL.B.

CREDIT COUNSELLING SERVICES OF ATLANTIC CANADA, INC.
Gordon Arsenault
Linda Wilkie

PROVINCE OF NOVA SCOTIA
SERVICE NOVA SCOTIA
Mark V. Rieksts, LL.B.

BOARD COUNSEL: S. Bruce Outhouse, Q.C.

HEARING DATE: February 10, 2015

WRITTEN BRIEFS: March 11, 2015

DECISION DATE: **March 30, 2015**

DECISION:

1) **Market approach retained to determine the maximum cost of borrowing;**
2) **Maximum cost of borrowing reduced to $22 per $100;**
3) **Board will recommend that the Minister consider placing restrictions on repeat and concurrent loans;**
4) **Board will recommend to the Minister that lenders display comparisons of borrowing costs of alternative financial products in dollar terms; and**
5) **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 ("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 ("*Act*"), relating to payday loans. The *Act* was amended in 2006 to provide for the regulation of payday loans.

[2] A payday loan is typically a small loan payable over a short term, generally to be repaid on or before the customer's next payday. The *Consumer Protection Act* defines a payday loan as involving up to $1,500 and a term up to 62 days. In prior hearings held by the Board, the typical loan was described as being less than $300, with a term not exceeding two weeks. However, in data filed in this proceeding, it appears that the average loan is now about $430. For payday loans that are in default, the average loan is about $525.

[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 effective April 1, 2011.

[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. 18I 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* ("*Regulations*"), effective August 1, 2009.

[7] The Board conducted its second hearing respecting payday loans in 2010-2011. In its Decision, 2011 NSUARB 22, dated February 1, 2011, the Board concluded, among other findings, that it should continue to 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 $25 per $100, inclusive of all expenses (including interest); that the maximum penalty chargeable with respect to default on a payday loan should remain at $40 per loan; and that 60% be the maximum interest rate which should apply, in the case of default, to any balance outstanding on a loan. The Board also concluded that the disclosure requirements set out in s. 18I of the *Consumer Protection Act* and the

Regulations were adequate, but recommended to the Minister that payday lenders be required to disclose the cost of payday loans in their advertising.

[8] Further, the Board recommended to the Minister that more data be collected respecting repeat loans and 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.

[9] The Board also determined that it should conduct a review of its Order in three years.

[10] In a Supplementary Decision, 2011 NSUARB 58, dated May 4, 2011, the Board, after having reviewed submissions from the parties, made recommendations to the Minister with respect to the regulation of online payday loans (both Decision 2011 NSUARB 22 and Supplementary Decision 2011 NSUARB 58 shall be referred to in this Decision, collectively, as "*Payday 2011*").

II REGULATION OF THE PAYDAY LOAN INDUSTRY

[11] 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.

[12] 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 in any province which enacts payday loans legislation, and is designated under s. 347.1(3):

> **Designation of province**
> **347.1(3)** The Governor in Council shall, by order and at the request of the lieutenant governor in council of a province, designate the province for the purposes of this section

> *if the province has legislative measures that protect recipients of payday loans and that provide for limits on the total cost of borrowing under the agreements.* [Emphasis added]

[13] 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

[14] 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 borrowers (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.

[15] 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,
>
> (aa) "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.

[16] 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.
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> **(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.
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> **(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.
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> **(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.

[17] The remaining 2006 amendments to the *Act* (i.e., ss. 18B - 18S and s. 18U) were proclaimed August 1, 2009.

[18] 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.

[19] Following the Board's issuance of *Payday 2011*, the Cabinet amended the *Regulations* in 2011 regarding the disclosure of the cost of payday loans in lenders' advertising and providing for the collection of data from lenders about repeat loans. In 2012, the *Act* and *Regulations* were amended to allow for online payday loans provided through the internet.

[20] 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), a provision setting out the information that must accompany an application for the licensing of payday lenders (s. 5), and provisions respecting the provision of online payday loans (ss. 8A and 8C).

IV PROCEEDINGS AND FORMAL INTERVENORS

[21] By Order issued October 29, 2014, 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 November 8, 2014 and January 10, 2015. Further to s. 18T(8) of the *Consumer Protection Act*, the Board also advised the Registrar of Credit about the hearing, by letter dated November 19, 2014, enclosing the Final Issues List.

[23] On November 19, 2014, 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 appeared at the Public Hearing, as set out immediately below.

[24] The Canadian Payday Loan Association ("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 19 companies comprising 816 out of the 1,537 payday retail outlets and licensed internet lenders in the country. Four of its members operate in Nova Scotia with 15 retail outlets and internet lending licenses.

[25] The CPLA was represented at the hearing by its Corporate Secretary, Norman J.K. Bishop, Q.C. Written submissions were filed by its President, the Hon. Stan Keyes, P.C.

[26] The CPLA called two witnesses at the hearing, including Mr. Bishop and Leonard Preeper, the President of Thinkwell Research Inc., 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.

[27] Service Nova Scotia ("SNS") also participated as a formal intervenor at the hearing and was represented by its legal counsel, Mark Rieksts, LL.B. This Department is responsible for administration of the *Consumer Protection Act* and the *Regulations* pertaining to payday loans. At the request of the Board, SNS filed the list of payday lenders holding permits to conduct business in Nova Scotia, copies of sample loan documentation filed by such payday lenders with SNS, 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.

[28] A Consumer Advocate was also appointed by the Board and granted formal standing in this proceeding. David J. Roberts, LL.B., acted as the Consumer Advocate, assisted by Jillian Houlihan, LL.B. The Consumer Advocate called two

witnesses. Michael Gardner, of Gardner Pinfold Consultants Inc., was qualified by the Board to testify as an expert able to provide opinion evidence on economic and policy analysis in the fields of regulated industries and public administration. Dr. Arla Day is a Professor at Saint Mary's University in Halifax. She was qualified by the Board to testify as an expert able to provide opinion evidence in survey questionnaire design, development, interpretation, validation, implementation, as well as statistical analysis, both quantitative and qualitative.

[29] Credit Counselling Services of Atlantic Canada, Inc. ("Credit Counselling Services") is a not-for-profit, charitable organization founded in 1994. Linda Wilkie and Gordon Arsenault appeared on its behalf. It has 10 offices in Atlantic Canada, including five offices in Nova Scotia (i.e., Dartmouth, Sydney, New Glasgow, Truro and Kentville).

[30] 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.

[31] S. Bruce Outhouse, Q.C., acted as Board Counsel.

[32] The Board also held an evening session on February 10, 2015. Six individuals or groups made presentations to the Board. These presenters at the evening session outlined a number of recommendations involving various aspects of payday lenders and payday loans, some of which are addressed later in this Decision.

V ISSUES

[33] The final list of issues established 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;

(d) whether the Board should vary the existing maximum cost of borrowing set at $25 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) whether the Board should recommend regulations to control the provision of repeat loans to, or multiple loans by, customers of payday lenders (an example being recent provisions adopted in the United Kingdom);

(i) do the current sections of the *Act* and *Regulations* satisfactorily regulate internet payday loans;

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

(k) any other issue the Board is asked to take into account under the *Regulations*.

VI ANALYSIS AND FINDINGS

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

[34] 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.

[35] In a chart compiled by the CPLA, it reported:

COMPANY	LOCATION	RATE
Cash Corner	Glace Bay	$25.00
Cash Money	Dartmouth	$24.00
Cash for Less	Bedford	$19.99
Cash Store	Halifax	$25.00
Instaloans	Halifax	$25.00
CashX	Bridgewater	$25.00
Expefinancial Services	Dartmouth	Did not disclose
LTP Financial	New Minas	$21.00
Need Fast Major Cash	Halifax	$17.00
Money Mart	Halifax	$25.00
Money Pros		$25.00 ($18.91 for 7 days)
Quick Cash		$25.00

INTERNET

COMPANY	LOCATION	Rate
310-LOAN	Bedford	$25.00
My Canada Payday	Dartmouth	$25.00

[Exhibit PD-4, p. 5]

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

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

[37] 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".

[38] 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, most provinces have enacted regulations which are, or will soon become, effective.

[39] The information provided by the CPLA 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	$25.00	$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	January 1, 2012
Manitoba	$17.00	$20.00	2.5% per month	October 18, 2010
Ontario	$21.00	$50.00	60% per annum	December 15, 2009
Prince Edward Island	$25.00	Reasonable charge	60% per annum	Imminent

[40] The Board understands that the Provinces of Newfoundland and Labrador and Quebec have decided not to regulate payday loans.

[41] 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)

[42] 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. This finding was confirmed in *Payday 2011*.

[43] 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.

[44] In the present proceeding, the Board received differing views from the various parties and public presentations as to whether the Board should maintain its present maximum of $25 per $100, or reduce it. The CPLA, alone, submitted the rate should be maintained. None of the parties in the present proceeding advocated that the Board use the cost approach, rather than the market approach.

[45] In this proceeding, just as in *Payday 2008* and *Payday 2011*, the Board considers that the market approach, as opposed to the cost approach, is the correct one for it to use. Nevertheless, as noted in its prior Decisions, 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 $25 per $100

[46] The central issue in the hearing was to review the maximum cost of borrowing per $100. This was set by the Board in 2008 at $31, and reduced to $25 in 2011.

[47] The table below shows the range of maximum rates per $100 which currently apply in Canada:

Comparison – Across Canada (Jan 2015) Fee per $100	
Ontario	$21
British Columbia	$23
Alberta	$23
Manitoba	$17
Saskatchewan	$23
Nova Scotia	$25
Prince Edward Island (imminent)	$25

[48] CPLA argued that the Board should not change the existing maximum cost of borrowing. In its Final Argument it stated:

> Both Prince Edward Island and Nova Scotia have a rate of $25 per hundred. The Provinces of Alberta, British Columbia, Saskatchewan and Ontario have, after extensive consultation with industry and consumer groups, set rates of $23 and $21 respectively. These rates have been in effect for approximately 5 years (except Saskatchewan whose rate came into effect in 3 years ago) and none of those provinces has adjusted their rates. The above maximum rates are not significantly lower than Nova Scotia. Each of these provinces has a population significantly greater that Nova Scotia which allows for economies of scale. For that reason we believe the maximum rate in Nova Scotia is appropriate.
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> Manitoba is an outlier with a maximum rate of $17 per hundred. The industry in Manitoba contracted significantly since the introduction of regulation. While the Manitoba Public Utility Board concluded the industry remained "financially viable" in its 2013 Payday Loan Review it was the view of the CPLA in that hearing that the majority of short term lending in that province was in fact being provided by unlicensed lenders. The Manitoba Board stated it was "very concerned with the risk of financial harm to Manitoba consumers from product offerings by unlicensed and unregulated lenders". The Manitoba Board however had no concrete recommendations regarding unlicensed lenders. Competition from unlicensed lenders is a major concern of our members.
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> [CPLA Final Argument, March 3, 2015, pp. 3-4]

[49] The Consumer Advocate argued that the maximum cost of borrowing should be reduced to $21 per $100, noting that Nova Scotia's rate is tied for the highest in the country. The Consumer Advocate argued that setting the maximum cost of borrowing at a high level initially could have been beneficial to Nova Scotia customers if it had resulted in price competition below the maximum. However, the Consumer Advocate argued that did not happen. Instead, he observed payday lenders have generally defaulted to the maximum allowable cost.

[50] The Consumer Advocate's expert Mr. Gardner noted, based on his review of American security filings, that the Canadian operations of Money Mart, for example, are twice as profitable as the parent operations in the United Stated and Europe. The Consumer Advocate noted that Money Mart, which has had most of its expansion in Ontario, operates there at a borrowing cost of $21 per $100 borrowed.

[51] Mr. Gardner observed that companies appear to be "charging what the market will bear" in the sense that they are charging the maximum allowable in Nova Scotia. In his view, the only way to cause companies to go below the current maximum, given what is, in his view, very limited price competition, is to lower the maximum.

[52] Several of the evening presenters recommended lowering the maximum to $2.50 per $100. However, the Board does not consider that to be realistic in the context of the payday loan marketplace.

[53] In its Decision *Payday 2008* the Board explained its rationale in setting the maximum cost of borrowing:

> [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.
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> [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.
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> [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.
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> [2008 NSUARB 87, paras. 277-279]

[54] The Board observes, however, that the level of competition the Board anticipated with respect to the cost of borrowing has not happened, meaning competitive pressures have not forced down the actual borrowing rates.

[55] During the course of filings in advance of the hearing, information was filed to indicate that Cash Store Financial Services Inc., including its subsidiaries, The Cash Store Inc. and Instaloans Inc. (referred to herein, collectively, as "The Cash Store"), had made a filing under the *Companies' Creditors Arrangement Act*. There was evidence filed by the Consumer Advocate that The Cash Store had encountered regulatory difficulties in various Canadian provinces. In letters to Service Nova Scotia, The Cash Store, the largest payday lender in Nova Scotia, confirmed that it was selling 14 of its Cash Store and Instaloans outlets to National Money Mart and would close the remaining 10 outlets in the Province, an action it repeated across Canada.

[56] With recent consolidation in the industry, the chance of competition on cost of borrowing happening appears less likely. Accordingly, the Board believes it should reduce the maximum cost of borrowing to reflect the apparent lack of competition in Nova Scotia.

[57] Having reviewed all of the evidence before it, the Board has concluded that it will set the maximum cost of borrowing at $22 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 $22 shall be applied *pro rata*.

[58] As noted in *Payday 2011,* the Board decided to include any cost to the consumer of insurance sold by or though the payday lender within the maximum cost of borrowing of $22 per $100.

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

[59] In *Payday 2011*, 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.

[60] Evidence was presented in the pre-filed materials about the current charges imposed in Nova Scotia by the Canadian chartered banks upon default by a customer. The amount requested by the banks has generally risen to $45 since *Payday 2011.* The CPLA submits that the current default fee should be increased accordingly.

[61] The Consumer Advocate submitted that the $40 default fee bears no relationship to the actual costs incurred when a borrower defaults on a payday loan. It suggested the default charge should be lowered to $20, the same charge imposed in British Columbia and Saskatchewan.

[62] 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%)

[63] 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. This finding was confirmed in *Payday 2011*.

[64] The CPLA submits that the current maximum interest rate of 60% should be maintained.

[65] However, the Consumer Advocate asserts the rate should be reduced to 30%, which is the rate allowed in the four western provinces.

[66] Ontario has set its maximum interest rate at 60%.

[67] 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.

[68] As it did in 2008 and 2011, having set the total maximum cost of borrowing (i.e., in this proceeding it has been set at $22 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 again 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*

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

[70] From its first review of the Payday loan industry seven years ago, in *Payday 2008* to the present, all Board decisions have included observations upon the importance of disclosure of adequate amounts of information to borrowers. The better the information borrowers have, the more they are protected, and the better equipped they are to make decisions.

[71] 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 NSUARB 87, para. 136]

[72] In *Payday 2011*, the Board once again returned to the topic of disclosure. Among other findings, it made a recommendation to the Minster that payday lenders be required to disclose the cost of payday loans in advertising directed to borrowers in the Province [*Payday 2011*, see, in particular, paragraphs 215 and 133].

[73] In the present proceeding, the Board again received submissions from the parties with respect to the matter of disclosure. Having considered the evidence and submissions before it in the present proceeding, and taking into account earlier findings by the Board, the Board is persuaded that it would be of benefit to present and prospective borrowers to have still more information provided about the cost of borrowing.

[74] This should be in a format which is simple to understand, and likely to help consumers make more informed decisions.

[75] On this point, the Board notes with approval, and adopts, part of a written submission made by James Sawler, an Associate Professor in the Economics Department at Mount St. Vincent University in Halifax. Professor Sawler's submission includes the following paragraph:

> In addition to the current requirements, **payday loan providers should be required to clearly display comparisons of the cost of alternate financial options in dollar terms.**
>
> For example:
>
> - Taking out a payday loan of $500 over two weeks will cost $150.
> - Putting $500 on a credit card for a month at a 20% annual interest rate will cost $8.33.
> - Borrowing $500 through a line of credit for a month at an 8% annual interest rate will cost $3.33. [Emphasis added in original]
>
> [Exhibit PD-15, p. 19]

[76] In this Decision, the Board recommends that the Minister adopt regulations which would implement the approach put forward by Professor Sawler.

(h) Whether the Board should recommend regulations to control the provision of repeat loans to, or multiple loans by, customers of payday lenders (an example being recent provisions adopted in the United Kingdom)

[77] A significant issue in the hearing was concern expressed by the Consumer Advocate, SNS, Credit Counselling Services and the evening speakers about concurrent loans and repeat loans. As a result of requests the Board made in *Payday 2011*, SNS made available to the Board much more information with respect to these loans. SNS advised that the year-over-year data indicates an increased number of repeat loans granted in the loan periods 2012-2013 and 2013-2014. The data also

shows that for 2013-2014, 52% of payday loans granted were repeat loans and almost 30% of repeat borrowers had been granted more than eight repeat loans.

[78] It is also difficult to track concurrent loans. The Board notes that even with the change in reporting requirements made after *Payday 2011*, concurrent loans are not being tracked.

[79] SNS, the Consumer Advocate, and the evening speakers expressed a concern about borrowers being caught in a circle of payday loan debt.

[80] CPLA urged caution in dealing with the issue of multiple loans:

> As an association of responsible lenders the CPLA acknowledges that as part of consumer protection there is a need to address excessive use of the product by some consumers. However the CPLA does not agree with what appear as simplistic solutions contained in the recommendations made by a number of the presenters in the evening session of the Hearing that would amount to extinguishing the licensed industry and/or denying borrowers access to a licensed loan product or certain recommendations of the CCA. This area is very complex and these recommendations would result in unintended consequences. Any recommendations of the Board regarding access to credit should be cautious and carefully thought through.
>
> It is important that any changes provide a solution rather than mask the problem. It has been shown that a government denying or restricting access to credit to a borrower is not a solution. Payday lenders are in response to consumer demand for the product.
>
> [CPLA Final Argument, March 3, 2014, p. 4]

[81] One solution CPLA supported was the implementation of a voluntary extended payment plan for repeat borrowers to create a "soft landing" for borrowers by extending the time period within which they must repay the loan. Otherwise, CPLA argued that "Government should regulate the conduct of the lender and not the borrower". It argued that borrowers' access to credit should not be limited and that *Regulations* only impact licensed lenders and will not affect unlicensed competitors.

[82] Credit Counselling Services suggested the establishment of a central registry where a lender would be able to see if a consumer has other payday loans outstanding at the time and the amount of such loans.

[83] The Consumer Advocate made several suggestions.

> 107. The Board should recommend the following measures to deal with repeat loans and concurrent borrowing:
>
> • Licensed payday lenders should be asked by Service Nova Scotia to report loans, as they are issued, to existing credit reference agencies. If the response to the request for voluntary compliance is not adequate, payday lenders should be required by regulation to report their loans to credit reference agencies.
>
> ...
>
> • Payday lenders should require proof that payment for any previous loan issued to a borrower has cleared the bank account of the borrower before issuing a new loan.
>
> • Payday lenders should be required to wait 24 hours after a borrower has paid off a loan before issuing a new loan.
>
> • Where a borrower takes out more than two loans in a 62 day period, repayment of the third loan and any subsequent loans should be extended over a minimum of three pay periods, if the borrower is paid bi-weekly, or a minimum of two pay periods if the borrower is paid on a less frequent basis: Section 23, British Columbia Payday Loan Regulation.
>
> ...
>
> [CA Closing Submission, March 3, 2014, pp. 23-24]

[84] Evidence before the Board, both from Credit Counselling Services and from the evening speakers, illustrated the significant problem posed by repeat and concurrent loans. Indeed, Ms. Wilkie described the circumstances of one retired couple on fixed incomes juggling 11 payday loans between them which totalled in excess of $6,000. The Board believes stronger action needs to be taken to control repeat and concurrent loans.

[85] The evidence and submissions before the Board suggest that effective control of repeat and concurrent loans must include two things:

- first, a requirement that payday lenders report all loans to some central database (referred to in more detail below);
- second, a requirement that a payday lender, before agreeing to lend money, must first check with the central database to see if the prospective borrower has any outstanding payday loans.

[86] The Board sees these two steps as being, in principle, simple. However, determining the appropriate nature of the central database may not, it seems, necessarily be so simple.

[87] The Board does not consider that it has adequate information before it to make a firm recommendation as to the correct approach to a central database. It will, accordingly, allude to only two possible options, and leave it to SNS to determine whether one of these, or some other approach, may be the most administratively effective.

Option 1: Credit Reporting Agencies

[88] One solution (mentioned by the Consumer Advocate) might be to use existing credit reporting agencies as the central database. Payday lenders would then be required to report loans to such agencies, and to check with such agencies on the existence of any outstanding loans with other payday lenders.

[89] A major advantage of this option is that it does not require the creation of any new agency or body to operate the central database – credit reporting agencies already exist, have convenient mechanisms by which they may be contacted by lenders, have protocols with respect to confidentiality, and have economies of scale.

[90] One possible disadvantage is that such inquiries – without adequate protection being in place – might be perceived as potentially damaging the credit rating of prospective payday borrowers. Ways that this might conceivably happen include: first, there is at least a perception that the simple fact of a credit check having been requested (even where it is for the sole purpose of determining the existence of an outstanding payday loan) may damage an individual's credit rating; second, if information about payday loans – prospective or actual – were to be retained by a credit agency in the individual's file, that might be seen as damaging in itself.

Option 2: Dedicated Database

[91] Another option would be to establish, or participate in, a separate, dedicated database, not accessible to the financial industry generally, but only to payday lenders. That dedicated database might be run by the provincial government, by the payday industry itself, or by some third party provider. This might avoid the credit rating issues just referred to by the Board, but could involve significant additional expense, particularly if the dedicated database served only the relatively small Nova Scotia market. Further, there might be confidentiality concerns about the management of personal information by the operator of the database which would have to be addressed.

[92] Whatever approach is adopted would almost certainly require a legislative change, presumably through regulation.

[93] The Board also agrees with the Consumer Advocate that payday lenders should require proof that payment of any previous payday loan issued to a borrower has cleared the bank account of the borrower at least 24 hours before a new loan is issued.

Adoption of this recommendation would affect the reporting requirements under the *Regulations* with respect to repeat loans.

[94] Finally, the Board recommends that where a borrower takes out more than two loans in a 62 day period, repayment of a third loan and any subsequent loan should be extended over a minimum of three pay periods, if the borrower is paid bi-weekly, or a minimum of two pay periods if the borrower is paid on a less frequent basis. The Board understands this is the current regulation in British Columbia.

(i) Do the current sections of the *Act* and *Regulations* satisfactorily regulate internet payday loans

[95] In *Payday 2011* the Board invited participants to provide additional submissions regarding the regulation of online payday loans. Post-hearing submissions were received by CPLA and the Consumer Advocate.

[96] After reviewing the submissions, the Board issued a Supplementary Decision which made the following nine recommendations to Government with respect to online payday loans:

1. The Board Recommends that the Minister Adopt Regulations Requiring Licensing for Online Payday Loans in Nova Scotia, and Providing that Payday Loans not be enforceable Against the Borrower by an Unlicensed Lender

2. The Board Recommends that Service Nova Scotia Inform the Public that Online Payday Loans will be Regulated

3. The Board Recommends that no Special Regulations are Needed for the Timely Delivery of Funds to Online Payday Borrowers

4. The Board Recommends that Online Payday Lenders be Required to Have a Registered Office in Nova Scotia, but not be Required to Have a Bricks and Mortar Outlet

5. The Board Recommends that Personal Information About Online Payday Borrowers be Protected Using Existing Legislation, such as *PIPEDA*

6. Requirement for Provision of Clear and Understandable Information to Payday Borrowers

(a) The Board Recommends that Display of Cost Information, and Other Similar Requirements, for Online Lenders Should be Similar in Substance to that for Loans Made Though "Bricks and Mortar" Outlets

(b) The Board Recommends that Regulations With Respect to Advertising by Online Lenders Should be the Same as that for Bricks and Mortar Lenders

(c) The Board Recommends that Regulations Should Require Easy Access by Online Borrowers to Copies of Loan Agreement Forms Both Prior To, And After Execution

(d) The Board Recommends that Online Lending Regulations Should Provide for: Express Consent to Entry into a Payday Loan Agreement; Record of Consent; and Explanations of Repayment Mechanisms

7. The Board Recommends that Fees Charged by Service Nova Scotia for Licensing Payday Websites Should be the Same as those Charged for Bricks and Mortar Outlets

8. Regulations Should Require that Online Lenders Report Their Loan Activities in the Same Fashion as Bricks and Mortar Lenders

9. The Regulations Adopted by Nova Scotia Should, Where Practical, be the Same, or Similar, to Provisions Adopted Elsewhere Which are Intended to Achieve a Similar Result.

[*Payday 2011* Supplementary Decision, pp. 21-22]

[97] Subsequently, Government updated the *Consumer Protection Act* to permit online payday loans, taking into account the Board's recommendations, with the exception of requiring "Bricks and Mortar" operations. Government also imposed a one hour time limit requirement for the advance of funds by internet lenders.

[98] Mr. Bishop, on behalf of CPLA, suggested that the market is being served by a multitude of unlicensed internet lenders due to the reluctance of companies to establish a physical presence in Nova Scotia just to offer online loans.

[99] Mr. Bishop went on to make the following suggestion:

> ... we would urge the Board to make a recommendation to the Province to amend the regulations to remove the requirement of having an operating outlet to obtain an online lending license and instead require an online lender to have a legal existence and registered office in the province and have a computer terminal at that location in Nova Scotia where all electronic records are made available for review and audit and remove the requirement to deposit funds within the account of the borrower within one hour.
>
> [*Payday 2014*, Transcript, p. 30]

[100] Mr. Bishop also raised concerns with respect to s.18H(c) of the *Act* which requires that funds must be advanced within one hour of entering the online loan agreement. CPLA pointed out that the online lender, after instructing its bank to advance the funds to a borrower, does not control the time when those funds are deposited in the borrower's bank account and, therefore, it is not possible for the lender to ensure compliance with that section of the *Act*.

[101] SNS, in its response to Board Staff IR-4, explained that this one hour requirement was designed to ensure that online borrowers are not disadvantaged relative to those borrowers who obtain a loan from a branch location, where funds, or the equivalent, are received before the borrower leaves the location.

[102] SNS, in its final argument, agreed that the one hour requirement may not be practical due to money being advanced by a third party banking institution, not the lender.

[103] SNS offered to work with stakeholders to formulate wording that would amend the time component of internet payday loan advances.

[104] The Board agrees that this provision appears to be impractical in its application and welcomes SNS' offer to work with stakeholders to formulate new wording. Critical to that new wording would be a provision that the loan period does not start until the borrower, in fact, receives funds.

[105] With respect to SNS' "Bricks and Mortar" requirement, referred to by Mr. Bishop, the Board notes that was contrary to a recommendation made by the Board in *Payday 2011.* The Board recommended that the payday lender be required to merely have a registered office in Nova Scotia.

[106] The Board observes there was no evidence presented in this proceeding which persuades the Board that the "Bricks and Mortar" requirement is justified. At the same time, the Board observes that there is significant lending activity in Nova Scotia undertaken by unlicensed internet lenders that are not subject to the *Act* and *Regulations*.

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

[107] 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.

[108] Citing regulatory costs and its assertion that growth in the payday loan industry has plateaued, the CPLA submits that the Board should recommend that the *Act* be amended to provide that the next review should occur in five years.

[109] The Consumer Advocate suggests a review should occur in no later than three years. SNS adopts a similar view.

[110] Having reviewed this matter, the Board considers it appropriate that the next review be scheduled in three years. In the Board's view, the industry is still evolving. Further, the Board notes that the Federal Government and Provinces are actively reviewing payday loans and other related financial products.

[111] However, as the Board noted in its prior Decisions, 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*

[112] Except as canvassed elsewhere in this Decision, there is no other issue to be considered by the Board.

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

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

[114] 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 clearly display comparisons of the cost of alternative financial products in dollar terms.

b) That the Minister consider amending the *Regulations* to place restrictions on repeat and concurrent loans.

c) That the *Regulations* be amended to provide that payday lenders be required to require proof that payment of any previous payday loan issued to a borrower has cleared the bank account of the borrower at least 24 hours before a new loan is issued.

d) That the *Regulations* be amended to provide that where a borrower takes out more than two loans in a 62 day period, repayment of a third loan and any subsequent loan should be extended over a minimum of three pay periods, if the borrower is paid bi-weekly, or a minimum of two pay periods if the borrower is paid on a less frequent basis.

e) That the *Regulations* be amended with respect to online payday loans to change the one hour requirement for the receipt of funds by the borrower, provided that the loan period does not commence until the borrower receives the funds.

VII SUMMARY

[115] An Order will issue, effective May 1, 2015, to allow sufficient time to payday lenders and the Minister to implement this Decision.

DATED at Halifax, Nova Scotia, this 30th day of March, 2015.

Peter W. Gurnham

Roland A. Deveau

Wayne D. Cochrane