

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE CONSUMER PROTECTION ACT

**IN THE MATTER OF a Hearing respecting certain aspects of the
Consumer Protection Act relating to payday loans**

SUBMISSION OF

CANADIAN PAYDAY LOAN ASSOCIATION

March 3, 2008

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NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF: **The *Consumer Protection Act*, R.S.N.S. 1989, c.92 as amended**

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

**SUBMISSION OF
CANADIAN PAYDAY LOAN ASSOCIATION (“CPLA”)**

Introduction

On October 4, 2007, the Utility and Review Board (the “Board”) issued an Order outlining the subject matter and the procedural directives for a Hearing respecting certain aspects of the *Consumer Protection Act* relating to payday loans. Notice of this Hearing was published in the Chronicle-Herald, the Mail Star, the Daily News, and the Cape Breton Post on October 10, 17, and 24, 2007, and on January 3, 2008. The Board issued an Intervenor List and a Final Issues List on November 2, 2007, in accordance with its schedule. Extensive evidence was pre-filed on November 14, 2007, followed by numerous Information Requests and Responses. Finally, rebuttal evidence was filed on January 10, 2008. The Hearing itself lasted 5 full days, from January 21 to January 25, 2008.

In passing the amendments to the *Consumer Protection Act* that gave rise to this Hearing, the Government of Nova Scotia has made a determination that payday lending should be treated as a legitimate enterprise in this province and that the service provided by payday lenders should be available to consumers in Nova Scotia. This legislation requires the Board to balance consumer protection with the desire of payday lenders to provide their services and compete for a market share.

In its letter of January 31, 2008, the Board specifically listed 14 separate issues that the Intervenors should address in their final written submissions. Although the Board emphasized that its proposed list of issues is not intended to be exhaustive, the CPLA finds the Board’s list to be comprehensive and has structured its final submission in accordance with this list.

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

The CPLA submits the Board has more than sufficient evidence before it to determine the issues raised in this matter. Extensive evidence on these issues has been submitted by both the leading payday loan industry association in Canada, the CPLA, and by the payday loan operator with the greatest number of outlets in Nova Scotia, The Cash Store Inc. and Assistive Financial Corp (“Rentcash”). These intervenors also put forward experts to testify with respect to the costs facing payday loan operators and the prices being charged for payday loan services across Canada. The CPLA also commissioned Pollara to conduct and present the first statistically relevant survey ever completed on payday loan customers in Nova Scotia and New Brunswick. These panels and expert witnesses were cross-examined on their evidence by the parties and the Board, with the interests of consumers represented by both Service Nova Scotia and the Consumer Advocate. Nathan Slee of 310-Loan, an Internet lender, filed evidence and responded to questions from the parties and the Board. Representatives of Credit Counselling Services also provided the Board with input and recommendations during the public submission session.

Board Counsel retained two experts who reviewed the evidence put forward in this case. Michael Casey noted in his Rebuttal testimony [Exhibit PD-27] at p. 3 that: “The evidence submitted appears to be thoughtful, and well researched and referenced. It is obvious that time, money and effort has gone into its preparation.” David Martin candidly expressed his view on the sufficiency of the evidence in response to questions from Mr. Stringer at p.1279-1280:

Q. And in your view, do you consider that the Board has sufficient evidence before it at this time to set a maximum rate for the cost of borrowing for a payday loan in Nova Scotia?

A. I have to be honest and say that, you know, listening to all the proceedings, and going right back to Manitoba, it became obvious early on that the cost factors and the cost information was somewhat missing, and less than perfect. However, I was – I gained a lot from the intervenors. I found them very forthcoming. I enjoy the mixture of academic views and business views, which I thought were very relevant. And that, together with the market information, which has certainly come forward, and which some of it was available already, certainly leads me to be comfortable with the recommendation, yes.

The CPLA believes it is important that the Board draw a clear distinction between “sufficient” evidence and “perfect” evidence in this case. For example, Dr. Lawrence Gould acknowledged in response to questions from the Consumer Advocate that 2007 data on operational costs in Nova Scotia would “have been of benefit” (p. 400). However, in Dr. Gould’s expert opinion, this additional information was not necessary in order for him to put forward a recommendation [emphasis added]:

Q. And that was exactly my next question, Dr. Gould. Given your model, that's what you – that's the kind of data you need in order to make a accurate recommendation under a cost plus model.

A. No. It would be additional data that certainly I would have benefited from, but **it was not data that I needed to make my recommendation.**

Q. Are you saying the data in the report was not data that –

A. I'm saying that I could make the recommendation based on the Ernst & Young data and based on a review of Rentcash and based on a view of Dollar Financial and based on a view of the Deloitte Manitoba report. And had I had another report which dealt with costs from Nova Scotia, I would have benefited from that, but I didn't need it. (p. 399)

The CPLA recognizes that other parties may allege that the Board lacks specific information relating to the 2007 operational costs of payday lenders in Nova Scotia, or verification as to the specific rates currently being charged for payday loans by these companies. The CPLA submits that this additional information, although perhaps desirable, is not required for the Board to make its final determination in this case. Again, as Dr. Gould explained in cross-examination by Mr. Farrar (p. 347):

A. In my judgment, the analysis of the Ernst & Young data and material subsequent to that is useful information for the Board. There's an unlimited amount of time and money that can be spent generating additional information. I feel that this is useful and can be relied on to make a judgment.

The Board has before it the most up-to-date and comprehensive cost surveys on the operational costs of payday lenders that are currently available, along with the benefit of Dr. Lawrence Gould's analysis and explanation of this data and information obtained subsequent to it. Even if the Board concludes that this information alone is insufficient, the Board can also rely on the extensive survey information compiled by Dr. Kevin Clinton regarding the prices being charged by payday lenders across Canada, including the results of his recent investigation of prices being quoted by Nova Scotia companies. Service Nova Scotia also provided indicative information as to the proposed charges originally submitted to it by various companies (e.g., Cash Corner, Cash Money, Cash-X, The Loan Store, The Money Pro\$) [Ex. PD-55]. Rentcash and 310-Loan provided evidence as to their current charges in the Nova Scotia market and across the country.

The Board may, as part of its decision in this case, implement various mechanisms in which more specific cost and/or pricing data can be collected. However, for reasons which the CPLA will elaborate on below, it is imperative that the Board make its initial decision with respect to the issues in this matter to allow comprehensive regulation of this industry to begin. Gordon Reykdal confirmed on behalf of Rentcash that it would be beneficial both for consumers and for companies that operate in the payday loan business to see a decision of this Board as quickly as possible (p. 993). The CPLA agrees, and submits that the Board has more than sufficient evidence to make the required determinations.

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

The CPLA submits that the Board does not have the jurisdiction enabling it to decline to set the maximum cost of borrowing, nor would it be desirable for the Board to do so if it found it did have such jurisdiction.

Section 4(1) of the Utility and Review Board Act states that: “The Board has those functions, powers and duties that are, from time to time, conferred or imposed on it by (a) ...any enactment.” In this case, Bill No. 87 was proclaimed in force on August 31, 2007. This Bill amends the Consumer Protection Act, R.S. 1989, c. 92, in part, by adding a new section 18T(2), which states [emphasis added]:

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.

This language should be compared with section 18T(3), which states [emphasis added]:

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.

Importantly, the CPLA believes that the Board must fix maximum costs of borrowing as a result of this hearing so that payday lenders in Nova Scotia may qualify for an exemption under Bill C-26. The CPLA believes that this was one of the key intentions of the government in passing Bill No. 87. In rising for the second reading of that Bill on November 14, 2006, the Honourable James Muir, Minister of Service Nova Scotia and Municipal Relations, noted as follows:

“On October 6, 2006, Bill C-26 was introduced in the House of Commons to provide an exemption for payday lenders in provinces that had legislative measures in place to regulate payday lenders. Our bill is intended to meet the requirement for the exemption that will be allowed when Bill C-26 passes... The Utility and Review Board has been

designated to determine the maximum interest and fees payday lenders can charge.”

As CPLA’s Secretary Norman Bishop noted in his Opening Statement [Ex. PD-35] at p. 2, Federal Bill C-26 “amends Section 347 of the Criminal Code to provide that if a province introduces regulations and sets rates with respect to payday lenders, then section 347 would not apply to lenders in that province.” This Bill became law in May of 2007, and added section 347.1 to the Criminal Code as follows [emphasis added]:

347.1 (1) The following definitions apply in subsection (2).

“interest” has the same meaning as in subsection 347(2).

“payday loan” means an advancement of money in exchange for a post-dated cheque, a pre-authorized debit or a future payment of a similar nature but not for any guarantee, suretyship, overdraft protection or security on property and not through a margin loan, pawnbroking, a line of credit or a credit card.

(2) Section 347 and section 2 of the Interest Act **do not apply** to a person, other than a financial institution within the meaning of paragraphs (a) to (d) of the definition “financial institution” in section 2 of the Bank Act, in respect of a payday loan agreement entered into by the person to receive interest, or in respect of interest received by that person under the agreement, **if**

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

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

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

(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.**

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

The CPLA submits that this legislative language clearly requires that limits on the maximum cost of borrowing must be set before a province can be designated under this section for the purposes of exempting payday lenders from section 347 of the Criminal Code. In other words, if no legislative measures are in place that provide for such limits,

then the uncertainty regarding the application of section 347 to the payday loan industry will continue.

The CPLA believes that any delay in the decision-making process would not be in the best interests of any party to these proceedings. Consumers of payday loan products will obviously be better off once enforceable regulations are in place to protect their interests and ensure that charges beyond certain limits are prohibited. Nathan Slee also confirmed in response to questions from Mr. Farrar that it was his position that: “the sooner we get through this process... the better off the consumer will be because the competition will improve in the marketplace.” (p. 704) Rentcash’s expert, Dr. Kevin Clinton (at p. 1176-1177) and Board expert David Martin (at p. 1280) both agreed in response to questions from Mr. Stringer that such regulatory certainty in the marketplace is important for lenders in the marketplace.

Accordingly, not only does the CPLA believe that the Board must set a maximum cost of borrowing as a result of this process, the CPLA also believes that such an outcome is in the public interest. The Board has not formulated a precise definition of “public interest” in its past decisions. However, in *re Sale of Assets of Kentville Electric Commission* [1998] N.S.U.A.R.B. No. 100, Board Counsel made submissions on the issue of public interest, which the Board quoted in its decision. Essentially, the Board held that it must consider “all of the positive and negative aspects” associated with that application (p. 42).

The legislature has clearly delegated the power and duty to set the maximum cost of borrowing to the Board. The CPLA submits that the Board must exercise its jurisdiction in this area. As such an exercise of the Board’s jurisdiction will prove beneficial for both consumers of payday loans and for companies that operate in the payday loan business, such a finding by the Board will also be in the public interest.

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

The CPLA submits that the Board should adopt a straightforward “maximum cost of borrowing per \$100 of payday loans” in setting the maximum cost of borrowing. This maximum cost of borrowing per \$100 should be determined, first, by assessing the approximate fees necessary to cover the costs of offering payday loans while providing an opportunity for payday loan companies to earn a fair rate of return on capital, as recommended by Dr. Lawrence Gould. In making this determination, the Board should also have regard to the prices generally being charged in the marketplace to ensure that the maximum cost of borrowing is set sufficiently high enough to allow for adequate competition amongst large, medium, and small payday loan operators in the Province.

As Dr. Gould notes at p. 20 of his report [Ex. PD-10]:

“It is possible to construct any number of different fee structures to produce the same revenue as the fee per \$100 of payday loans... My recommendation is in terms of a fee per \$100 of payday loans. It is the measure used in the E&Y Report and the payday loan industry. It also has the advantage of simplicity and ease of understanding by borrowers.”

Dr. Gould outlined some additional difficulties in attempting to set a variable fee structure in which the maximum cost of borrowing would change depending on the size of the loan or whether the borrower was a first-time or repeat customer (see, generally, p. 378 to 389.) Such fee structures would not only prove more difficult for payday loan customers to fully understand, but they may also affect the behaviour of payday loan operators in unintended ways. For example, if the Board set a lower maximum cost of borrowing as the size of the loan increased, payday loan operators may choose not to make loans for higher amounts. Customers who take out smaller-sized loans and pay more proportionately may end up subsidizing customers who take out larger loans if the rate structure does not accurately allocate costs.

If fees were adjusted to reflect differences in costs between a first-time and repeat customer, then it would become more costly for a payday loan customer to choose a new payday lender. In short, from a pragmatic point of view, the number of potential operational problems and complexities exceed any benefits that may occur as a result of a different rate design. A simple, flat structure will facilitate comparison shopping and enforcement, as customers will be able to easily assess the offered rates and ensure they are in compliance with the regulatory regime without resorting to complicated formulas involving several calculations. The CPLA agrees with Dr. Gould, and recommends that the Board adopt the “maximum cost of borrowing per \$100 of payday loans” fee structure.

The CPLA will elaborate on the specific methodology to be used in determining this maximum cost of borrowing per \$100 in Nova Scotia, along with its recommendation in this proceeding, in section (e) of this submission.

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

The CPLA believes that the Board must consider regulatory costs as an additional component in setting the maximum cost of borrowing under s. 18T(2)(a), but is not in a position to attribute a specific amount to these costs. As Norman Bishop frankly acknowledged in response to questions from the Chair (p.192):

A. This is an unusual process, and we don't have a figure for you. And maybe we could discuss how we come up with that figure, but at this point in time, I have no idea. I think we're just saying this is an expensive process, and please consider it. I know that's not much help.

According to Schedule C in Michael Casey's rebuttal testimony [Ex. PD-27], the estimated regulatory costs associated with the \$3000 licensing fee is roughly \$0.76 per \$100 of payday loan in Nova Scotia. This amount does not include any costs that will be incurred in complying with the new regulatory regime, nor does it include the costs involved in participating in regular hearings and reviews before the Board. These costs, although difficult to quantify precisely, are also substantial regulatory costs that will be borne by payday lenders and should be taken into account. Gordon Reykdal, in cross-examination by Mr. Stringer, confirmed that he believes this cost should be somewhat less than two dollars and fifty cents (\$2.50) per hundred that Rentcash recommended in Manitoba. (p. 996)

It is important for industry participants to be able to participate in the regulatory process and provide the Board with insight into their operations and ensure compliance with the regulations. The CPLA submits that the Board should incorporate an allowance for regulatory costs in setting the overall maximum cost of borrowing in Nova Scotia.

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

The CPLA continues to support the recommendation put forward by its expert, Dr. Lawrence Gould, with respect to the maximum cost of borrowing. Although he recommends a range of \$20 to \$23 per \$100 of payday loan in his report [Ex. PD-10], Dr. Gould concluded his direct evidence in this case by stating as follows (p. 254, lines 15-23):

I would recommend really the top of that range at twenty-three for the reasons that I've specified, permitting smaller companies to operate, the acknowledgement that there has been some inflation in costs over the period, and that this is, in fact, our first step in getting to know what it's like to regulate the payday loan companies, and perhaps proceeding with caution would be advisable.

Furthermore, Dr. Gould confirmed, in cross-examination by the Chair, that the upper end of his range was effectively \$23.60, as the cost of capital estimate used in the Ernst & Young report failed to adjust for corporate taxes and Dr. Gould felt this understated the costs he relied on by approximately \$0.60 per \$100 of payday loans (p. 447-448). Dr. Gould also confirmed in response to questions from Board Member Morash that it would be reasonable to apply some inflationary factor to the Ernst & Young report costs if the Board considered it appropriate (p. 444). Finally, Dr. Gould stated in his direct evidence that his recommendation did not include regulatory costs.

During cross-examination of the Rentcash panel, the Chair highlighted one of the key advantages in employing a cost model, namely that it provides some "objective evidence" that competition is working to keep costs down to the benefit of consumers (p. 1059, lines 9-16):

Q. ... is it fair to say that using the cost model, that there would be some objective evidence that there was some protection for the consumers, versus the market model, where, really, there has to be – there's implicit in there a trust on the competitive model, the market – you know, that the market is going to obtain the best price for the consumer.

The Chair also raised this concern in relying solely on the market approach with Dr. Kevin Clinton in cross-examination (p. 1152):

Q. So if we were to adopt that model, what assurance would we have that the prices that are being charged are reasonable and not – you know, the word gouging has been used, what's the assurance that we have?

A. The assurance is competition, and the main aspect of competition is not the number of firms, although it is encouraging to see quite a large

number of firms already operating in Nova Scotia, the key to competition is free entry...

However, although Dr. Clinton testified to his belief that there is “absolutely” full competition in the marketplace (p. 1161), he also acknowledged in cross-examination by Mr. Stringer that some form of price cap would be of benefit to the minority of borrowers who are unable to price shop or are poorly informed (p. 1243-1244). The CPLA submits that the Board should have regard to the costs generally facing payday lenders in determining where to set such a fee limit.

Dr. Gould’s cost-based methodology, especially his reliance on the specific data contained in the Ernst & Young report in recommending a maximum cost of borrowing, was contested to various degrees during cross-examination by some of the intervening parties, as well as by certain Board members. The CPLA believes the main objections to Dr. Gould’s methodology and recommendation can be broadly summarized in four key categories. The CPLA shall address these in turn.

Objection 1 - The data in the Ernst & Young report contains only estimated costs, not the actual costs incurred by payday lenders

During the cross-examination of both Dr. Gould (p. 314-319) and Dean Schinkel of Deloitte & Touche (p. 574-583), Mr. Farrar suggested that the Ernst & Young report provided an “estimated cost of providing payday loans in Canada”, as opposed to actual costs, and it is certainly true that the terminology in the Ernst & Young report refers to the preparation of “final estimates”. However, the CPLA believes it is important to clarify that the cost information provided in the Ernst & Young report is not merely Ernst & Young’s estimates as to what the costs of providing payday loans should be. Rather, the costs in the Ernst & Young report were based on specific survey reports received from payday lenders, as well as company financial statements. Ernst & Young made efforts to verify the accuracy of these costs as reported by the companies.

Thus, the average cost information presented in the Ernst & Young report should not be mischaracterized as mere high-level “estimates” of the costs involved in providing payday loans. These “estimates” draw on actual costs for different companies in order to determine average results for small, medium, and large operators, and the industry as a whole, as Dean Schinkel attempted to explain (p. 582-583):

Q. That’s correct. So that when you come up with a final number, it has to be an estimate of what it is in the industry, because the industry is not constant throughout. That’s what you – that’s the exercise, is it not?

A. You may be confusing the word estimate with average. In that case, we have specific data points that show actual for different companies. And do you show an average, or each one? That could be different. Different amounts, as different companies have different costs, as you’ve stated.

The CPLA submits that the Ernst & Young report relied upon by Dr. Gould contains a summary of actual cost data received from the participating companies. The report’s references to “estimates” are merely reflective of reality and the fact that the costs per \$100 of loans cannot be precisely identified.

Objection 2 - The Ernst & Young report is based largely on data from 2003, and is therefore outdated

The Rentcash panel identified significant concerns with the use of the Ernst & Young report in response to questions from Board Member Morash (p. 1053-1054):

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

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

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

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

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

A. (Bland) Correct.

On this point, the CPLA would emphasize that Dr. Gould did not simply accept the costs in the Ernst & Young report as conclusive. As Dr. Gould explained in his direct evidence (p. 247, emphasis added):

The next part of my report really deals with what happened after the Ernst & Young report. And it had been -- this report was done in 2004. There was no more current report, no better report on costs available. **But I felt that I should look at what had happened since then in terms of changes in the industry and costs as well as I could measure them.**

Dr. Gould elaborated on his approach during cross-examination by Mr. Farrar (p. 306)

Q. But getting back to the point, sir, the analysis has not been done to determine what has occurred from a cost/revenue point of view in the payday loan industry from your point of view in coming to the determination of your numbers since 2003?

A. Well, as I said, I looked at the data for both Money Mart and Rentcash over the 2005-2007 period and I had access to the costs as determined by Deloitte and I formed a judgment based on that that this range was a reasonable range.

Dr. Gould also noted in response to Board Member Morash that (p. 442, emphasis added):

Certainly costs have increased over the period, inflationary costs, and I recognize that that's the case, but also these are based – they're volume-related as well and **there has been some increase in volumes over the period as well**, and I've sort of tried to take that into account in saying that as a result of that the twenty to twenty-three range, especially at the top, **is a recommendation that would allow these firms to function.**"

Nevertheless, the CPLA recognizes that the Board may have concerns with respect to the accuracy of the cost information provided in the Ernst & Young report. The CPLA agrees with Board Member Morash and Dr. Gould that it would be reasonable to apply an inflationary factor to the E&Y costs, other things being equal (p. 444-445), as discussed below, to take this concern into account.

Objection 3 - The Ernst & Young report does not contain specific information on costs faced by payday lenders operating in Nova Scotia

The CPLA notes the following exchange between Board Member Morash and Dr. Gould regarding the lack of specific information with respect to Nova Scotia (p. 443-444):

Q. One of the difficulties, as I think you indicated, is that there really is very little information with respect to Nova Scotia. We have E&Y's survey that was done in 2004 but we don't really have any assurance – all the assurance we have is that those numbers – one of those numbers is representative of Atlantic Canada. We don't know whether or not Nova Scotia is included in that. The Deloitte Touche work for Nova Scotia really provided no additional information and I – my – as I understand – what you're basically saying is that the best evidence you had, or have, is the E&Y work that was done in 2004. And that's why you relied on it. Is that a fair statement?

A. Well, that – it is the only major survey of the non-public companies, but in addition, we have the data from Rentcash and Money Mart which reflect 18 or so stores out of 29 in Nova Scotia. So that that data is there, although you can't break out the specific results for Nova Scotia.

Q. But they are useful in establishing trends.

A. I think that the data is indicative. I'm – again, the fact that we have representative data across the country and for the chains, I think can be used for payday loan companies in Nova Scotia.

The Consumer Advocate and Rentcash also raised concerns regarding this lack of available Nova Scotia-specific cost information. The CPLA believes that the evidence in this hearing demonstrates that costs facing payday lenders do not differ substantially among payday lenders across Canada. Gordon Reykdal confirmed in cross-examination by the Consumer Advocate that “there are no notable extra costs associated with operating rural or small town stores compared to urban stores.” (p. 806-807). Mr. Reykdal also stated that “the costs, the net costs, are the same across the country.” (p. 832) In cross-examination by Board Member Cochrane, Nathan Slee noted that in his experience, although there may be slight differences in costs, there is “nothing bad enough to make me change my policy from one province to another.”

Furthermore, during cross-examination by Mr. Stringer, Gordon Reykdal confirmed that it is his experience that the three major national companies that operate in Nova Scotia and elsewhere in Canada generally charge the same rate across Canada, with certain exceptions (p. 1011-1012). The CPLA submits that the Board can rely on the Ernst & Young report and Dr. Gould's subsequent analysis of the public companies as being indicative of the costs facing Nova Scotia lenders.

Objection 4 – In order to follow a cost-based approach, the Board would need to collect detailed information from each company operating in Nova Scotia, such information is too difficult and too costly to obtain, and in any event could not be relied upon by the Board.

During questioning by Board Member Morash, Nancy Bland identified several reasons why Rentcash rejects the adoption of any cost-type approach in setting the maximum cost of borrowing. She stated, in part (p. 1051-1053):

A. ...We're in a market where there's – I think we've got 13 or 14 different customers – or competitors, opening books is only half the story, and that's going to be difficult in itself, and there's a lot of different ways of estimating what the cost is... The market is very volatile to loan volumes, and so your cost per is very volatile to change as well. And even if you did come up with a methodology to open everybody's books to get an accurate picture of the costs associated and whether they're efficient or not and whether they should be included, you'd still have to look at the other side on what the market needs and what the competitor needs, and there are some of those higher cost companies that are completely legitimate because of the risk tolerance or the service levels or the locations or any of those other things we've mentioned. And so for us the cost-plus methodology just has a whole bunch of problems.

Q. Very complicated, very complex.

A. Very complicated.

Q. It would certainly be very costly.

A. Very costly.

Board Member Morash also raised concerns regarding the difficulty in obtaining reliable cost data in an exchange with Dr. Kevin Clinton (p. 1143-1144):

Mr. Morash

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

Dr. Clinton

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

Mr. Morash

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

Dr. Clinton

Yes, it is.

Mr. Morash

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

The CPLA appreciates (and to a great extent shares) the concerns raised regarding the collection of information on costs from the various payday loan companies in Nova Scotia. The CPLA would emphasize that it is not in favour of the detailed and exhaustive process of data collection that appears to be contemplated in these comments. In fact, Dr. Gould explicitly stated during cross-examination by Mr. Farrar that he does not favour such an approach (p. 292, emphasis added):

A. The problem here that I try to outline in my report is that in order to take into account any individual variations, this is what differentiates or creates a problem in terms of applying a fee regulation to a group of companies, is the only way around that would be to analyze each individual company separately, **which, I mean, for pragmatic reasons I don't think is possible.**

Moreover, Dr. Gould's recommendation specifically contemplates that his maximum cost of borrowing would be set at a level above the average to encourage competition among small, medium, and large operators and accommodate sufficient variations among payday lenders (p. 293-294). Accordingly, the costs incurred by many payday loan operators would necessarily fall below the maximum cost of borrowing set in Nova Scotia. Dr. Gould's approach is not meant to require data collection and a complete review of all costs incurred by each separate payday loan company in Nova Scotia. Dr. Gould's report clearly states that the Board's task in this case is unlike the case of regulating a single company (i.e. a pure "public utility" approach to regulation). The rationale for his methodology is rather to provide a degree of objective evidence that the fees charged by payday lenders are broadly in line with costs involved in providing the product in the marketplace.

The CPLA acknowledges that, although it feels the criticisms of Dr. Gould's methodology are overstated as noted above, some of these objections do raise legitimate concerns, particularly since the Board's decision in setting the maximum cost of borrowing could have a significant impact on the current payday loan industry. The CPLA is also mindful that s. 18T(5) requires that an order fixing the maximum cost of borrowing "must be one that the Board considers just and reasonable in the circumstances, having regard to the factors and data considered by the Board."

Therefore, the CPLA believes that the Board should also have regard to other sources of evidence in this hearing, namely the prices currently being charged in the Canadian marketplace as submitted by Dr. Kevin Clinton in an Undertaking, U-10. Here, Dr. Clinton provides a summary of the fees from several recent surveys of payday lender fees. Dr. Clinton notes that the fee quoted in each case is per \$100 dollars lent and includes all costs essential for disbursement of the loan.

The CPLA believes that this information indicates that the upper end of the range proposed by Dr. Gould, including adjustments for inflationary and regulatory costs, is generally high enough to allow for adequate competition among large, medium, and small payday loan operators currently doing business in Nova Scotia. For example, in Clinton's 2006 Ontario survey, he notes that the average 14 and 31 day cost is \$25.18. Yet a look at the individual numbers shows that 9 of the 12 companies offer a fee of \$25 or less per 31 day loan. Similarly, although the average 14 and 31 day cost in Clinton's 2007 Manitoba survey is stated as \$27.63, 11 of the 14 companies offer a fee of \$25 or less per 14 day loan. In Buckland's 2007 survey, 17 of 21 companies in Manitoba quoted a fee of \$25 or less per 12 day loan. In Robinson's 2005 survey, 10 of 11 companies quoted a fee of \$25 or less per 14 day loan. Finally, in 310-Loan's 2007 survey, 10 of 11 companies also quoted a fee of \$25 or less per 14 day loan.

The fact that the vast majority of companies in the payday loan industry recently surveyed charge \$25 or less per \$100, absent any mandatory rate cap, should indicate to the Board that the costs per \$100 cited in the Ernst & Young report remain roughly accurate. The Board's expert, David Martin, explained in cross-examination by Mr. Fraser how pricing information in general allowed him to draw conclusions regarding the costs of offering payday loans (p. 1282-1283):

Q. Mr. Martin. You – I'll be very brief with you. Again, turning to PD-28, which Mr. Stringer had you on a moment ago. After the question, "Why

do you make this recommendation,” if you go two paragraphs below, and state:

“The recommended range is reasonable in relation to overall costs, while still allowing both large and small size lenders to participate and offer competitive pricing and services.”

I take it when you refer to overall costs, you’re relying on the evidence as to costs as filed by Ernst – in the Ernst & Young report and the two Deloitte & Touche reports, is that fair?

A. Yes. But I’ve also gained information – costs, to me, are also implicit in the pricing. And if there is – if one of the market leaders is pricing their services at twenty dollars (\$20), I assume that there’s cost and there’s profit built into that, as well. So, I take all of that into consideration, not just the cost information that’s provided in the surveys.

David Martin’s recommendation of \$23 to \$27 per \$100 of payday loan, inclusive of only that portion of regulatory costs associated with the licensing fee, is in the same general range as that proposed by Dr. Gould and the CPLA.

The CPLA submits that the cost-based methodology employed by Dr. Gould provides the Board with objective evidence as to the appropriate maximum cost of borrowing that should be set for payday loans in Nova Scotia. This recommendation - \$23.60 + an allowance for regulatory costs and a possible inflationary adjustment – strikes an appropriate balance that provides safeguards to consumers while allowing for continued strong competition in the industry in both pricing and service levels.

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

The CPLA submits that the Board should fix the maximum fee, charge, or penalty for default at \$40, exclusive of interest chargeable at a maximum of 60% per annum. As the CPLA noted at p. 25 of its pre-filed evidence:

“Payday lenders incur no less costs than other lenders in collecting arrears and we believe therefore that the maximum charge that may be levied on default exclusive of interest should not be less than \$40.”

The CPLA notes that this maximum \$40 default fee would not be charged unless the cheque or pre-authorized debit is actually processed. Such a fee is necessary to reimburse lenders for the administrative time, charges, costs, and expenses incurred when the customer defaults. In response to questions from the Chair, Board expert David Martin confirmed that a fee of this amount is consistent with current practice in the financial services industry generally (p. 1292-1293):

A. I think the financial services industry generally – usually does levy a default charge to cover administrative costs and so on. I think the numbers that have been mentioned have been anywhere from maybe

thirty dollars (\$30) to forty dollars (\$40). And that's probably a reasonable figure today.

Q. Right. And that would be comparable to what any –

A. That's comparable to –

Q. – for chartered banks even?

A. Yes, it would, to say an NSF cost or a – just the administrative costs of dealing with that default. In addition then, of course, the interest cost ongoing, as far as any views about that, I mean, the maximum under law is 60 percent.

With respect to interest on arrears, David Martin went on to state at p. 1293 that: “as for the maximum rate, that's a tough one, that's a difficult one. Anywhere between, I guess, 18 and 60 percent, I imagine would be the right rate, somewhere in there.” The CPLA noted in its pre-filed evidence that the current Code of CPLA Best Business Practices requires that after 13 weeks, the effective annual interest rate shall not exceed 36%. However, this Code represents a voluntary restriction by CPLA members. In cross-examination by the Consumer Advocate, Norman Bishop explained why the CPLA was not recommending this practice (p. 134-135):

A. Well, I think today across Canada, with all lending products, 60 percent is the maximum rate of interest, whether it's short term or long term, and for the purposes of the Board to set a cap on charges in default, of course there should be an interest rate cap, and it needs to be simple. And whether lenders or members of our association choose to have something more restrictive, for the purposes of setting the rates and the laws in Nova Scotia I think it would be very difficult to have different interest rates kicking in depending on the length and term of the loan. It would be difficult to monitor, and I don't know that there would really be a need to do that. So we thought for the sake of simplicity that's what – just leave the law the same with respect to interest rates.

The CPLA submits that the maximum interest rate on an amount in arrears set by the Board should be no different for payday lenders than the current maximum rate chargeable by any other lender in Canada. Monitoring compliance with respect to the limit would be straightforward, and payday lenders would have the option of charging a lower interest rate depending on the circumstances or to differentiate their service from a competitor.

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

The CPLA does not believe it is necessary for the Board to set the maximum amount that may be charged, required or accepted in respect of any specific component at this time, as contemplated in s. 18T(3). The Board retains a degree of discretion under the legislation with respect to this issue. The CPLA submits that, so long as the overall maximum cost of borrowing is set by the Board, payday loan companies should be free to offer their services as they see fit, provided the total charge is at or below this

maximum level. In the absence of evidence that there is abuse in the industry in relation to a particular component, there is no need for the Board to make such an order.

In response to a question from Board member Morash, Dr. Gould clarified that his recommendation was designed to capture all charges that are essential to getting the payday loan (p. 415, emphasis added):

What I'm saying is that any – my recommendation, I haven't tried to look at the different specifics of many of the charges that relate to, say, cards but **my general principle is that if it's essential to getting the payday loan, it's not a true option, that it's included in my range.** In other words, I'm not adding something else into that. If it's a true option that is provided that is not required for the payday loan, that a service is being offered, then that would be a separate fee.

The CPLA recognizes that the Board may choose to set the maximum amount associated with potential "optional" components that constitute the cost of borrowing of a payday loan. CPLA members operating in Nova Scotia do not currently charge for such optional services. Therefore, the CPLA has not adopted a position with respect to any appropriate limits that may apply to such charges.

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

The CPLA believes that there does appear to be an inconsistency in the prohibition of rollovers in the *Consumer Protection Act*, on the one hand, and the sections which purport to allow extensions or renewals, on the other. Norman Bishop explained the CPLA's view on this apparent inconsistency in response to questions from Board Member Cochrane (p. 146 to 156). He noted that where rollovers are prohibited, payday lenders "have the option of treating the loan as a loan in default, or forbearing collection efforts, or working with the consumer to receive payment. But what they cannot do is they cannot say 'Come in and just give us another sixty dollars (\$60)' or whatever fee 'and we will give you more time.'" (p. 149-150)

However, the CPLA notes that s. 18A(c) defines rollover as "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" (emphasis added). Therefore, if s. 18T(2)(b) (which requires the Board to fix the maximum amount to be charged in respect of the extension or renewal of a payday loan) is interpreted as applying solely to the maximum charges associated with interest, then the CPLA suggests that this apparent inconsistency could be reconciled. In other words, under s. 18T(2)(b), the Board would only be setting the maximum annual effective interest rate that payday lenders may charge if the borrower and lender agree to extend or renew the loan.

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

As noted above in section (h), the CPLA believes that any additional fees associated with the “extension” or “renewal” of a loan effectively constitutes a rollover of the loan, which is currently prohibited under the legislation. Thus, a payday borrower making such a request should not be charged the same as a first-time borrower. Rather than setting the maximum annual effective interest rate that would apply in the case of extensions or renewals, the Board should ensure that these charges be lower than those paid by a first-time borrower.

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

The CPLA is pleased that many of the best practices mandated by the CPLA’s Code are reflected in the disclosure requirements now set out in s. 18I of the *Consumer Protection Act*. At this time, the CPLA does not have any further recommendations with respect to disclosure.

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

As part of the CPLA’s recommendation on the appropriate methodology and the amount at which the maximum cost of borrowing should be set, the CPLA acknowledges that the Board may require certain information in order to appropriately set the maximum cost of borrowing in Nova Scotia in the future.

At this stage, the CPLA is interested in pursuing collaboration with the Board and its consultants regarding appropriate data collection that would be available to the Board at the time of its next review hearing. The CPLA believes this approach would allow the Board to gather objective, independently verifiable evidence, beyond the prices in the marketplace, to confirm that payday loan customers are not being charged excessive fees. Reporting of this data should be mandatory, but not burdensome to payday lenders.

Therefore, the CPLA recommends that the Board oversee a collaborative process to determine the type of data to be filed. The CPLA believes that this essential information may include current pricing offered by industry participants, the extent of competition in the marketplace, and some high-level data on costs facing payday lenders so as to provide the Board with confidence in the maximum cost of borrowing. The CPLA submits that a collaborative process is crucial to minimize the complexity and costs to industry associated with the gathering and reporting of information relevant to the Board in its setting of the maximum cost of borrowing and allow all companies to participate. The CPLA would look forward to participating in such a process.

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

The CPLA submits that the language in s. 18T(7) clearly sets out the broad factors that the Board should consider in determining whether to review any existing order on a more frequent basis than every three years. The CPLA does not believe it is necessary for the Board to specify what might constitute “circumstances in the payday lending industry” that have “changed substantially”, or the type of “new evidence” that would be required. Rather, the CPLA believes that it should be open to industry participants or Service Nova Scotia, as the case may be, to apply to the Board requesting a review of an existing order. Upon receipt of submissions from interested parties, the Board could then make its decision as to whether a full review of its existing order is required.

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

The CPLA firmly believes that the market in Nova Scotia will provide sufficient protection for payday consumers once the Board issues its decision in this case to set the maximum cost of borrowing and the Governor-in-Council brings into force the *Payday Lenders Regulations* filed as Exhibit PD-38.

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

The CPLA does not have any specific recommendations for the Minister at this time, with one exception. If the Board determines that the amendments to the *Consumer Protection Act* contain an inconsistency with respect to its setting of a maximum amount to be charged for the extension or renewal of a payday loan and the prohibition of rollovers, then the Board should request that the Minister clarify the government’s position on this issue.

Summary

The CPLA submits that the Board has more than sufficient evidence before it to determine the issues presented in this matter and it does not have the jurisdiction to decline to set the maximum cost of borrowing. The CPLA recommends that the Board set the maximum cost of borrowing, prior to default, expressed as an amount per \$100 of payday loans and in the range of \$23.60, plus any allowance for regulatory costs associated with licensing fees, compliance, and participation in Board reviews, as well as any inflationary adjustments the Board deems appropriate. The CPLA notes that the majority of companies recently surveyed across Canada appear to charge prices below this maximum recommendation. Upon default, the CPLA recommends that the Board fix the maximum fee, charge, or penalty for default at \$40, with any additional interest chargeable capped at a maximum of 60% per annum.

The CPLA also recommends that the Board and its consultants oversee a collaborative process involving industry participants to determine the data to be collected and filed prior to the next review hearing conducted by the Board.

All of which is respectfully submitted this 3rd day of March, 2008.

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