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April 23, 2008

VIA ELECTRONIC MAIL

Mora Stevens
Clerk of the Board
Nova Scotia Utility and Review Board
3rd Floor, Summit Place
1601 Lower Water Street
Halifax, NS B3J 3P6:

Dear Ms. Stevens:

**Re: The Cash Store Inc. and Assistive Financial
Manitoba Decision**

We write with reference to the Board's letter to the intervenors, dated April 10, 2008, wherein the Board invited the intervenors to make submissions relating to the April 4, 2008 decision of the Manitoba Public Utilities Board (the "Manitoba Board") respecting payday loans (the "Manitoba Decision"). Please accept the following as the submissions of The Cash Store Inc. and Assistive Financial Corp. (collectively, "Rentcash").

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

The main aspect of the Order was that the maximum cost of credit which may be charged is to be:

- (a) 17% of value received to \$500; plus
- (b) 15% of value received from \$501 to \$1,000; and
- (c) 6% of value received between \$1,000 and \$1,500.

In determining the maximum, all charges and interest of any and all kinds, however determined or levied, is to be included in the calculation.

Further, the Order specifies that:

- The maximum amount that may be charged with respect to an extension, renewal or replacement loan is 5% of the balance extended, renewed or replaced. No separate interest or other charge may be levied.
- The maximum amount that may be charged in the event of default will be \$20 plus a maximum rate of interest of 2.5% per month, not to be compounded unless an extension, renewal or replacement loan is provided.
- In respect of debit/credit card charges, where the borrower does not have the option of receiving cash, the aggregate amount of any charges that may be levied – including the estimated or known charge by a third party based on the assumption of one transaction – is to be added to the cost of credit and, if the sum exceeds the maximum cost of credit as set out above, then the excess is to be deducted from the cost of credit.

Rentcash has the following submissions.

1. Manitoba Board's Bias Against Payday Lenders Steered the Manitoba Decision and the Order

The Manitoba Decision reflects a plain and very substantial bias on the part of the Manitoba Board against payday lenders, including Rentcash. It was through the prism of bias that the Board viewed the evidence and reached its conclusions, ultimately reflected in the Order.

This close-mindedness on the part of the Manitoba Board is evident in many passages. Rentcash will highlight some (but not all) of such comments.

Payday lenders are likened to “wolves” (at pp.5-6):

“While, as indicated, receiving a payday loan may assist a borrower in meeting an immediate need, there are problems with payday loans, and not the least of these is the very high cost of credit associated with them. The saying *homo homini lupus* (man is a wolf to man), from a play by *Plautus* and later paraphrased by the philosopher *Thomas Hobbes* as “*Man to Man is an arrant Wolfe*” (*De Cive, Philosophical Rudiments Concerning Government and Society*), is suggestive of the situation of too many vulnerable consumers when it comes to payday loans”. (emphasis of original)

In the same vein, payday loan industry borrowers are said (at page 6) to find themselves in “a similar situation to that of patrons of the pawn shops”.

The Manitoba Board’s distaste for payday lenders is clear (at page 8) where it states that:

“Rather than either actively *prosecuting payday lenders for breaching s. 347* of the Criminal Code or directly banning the practice, Canada [the Federal Government] delegated regulatory oversight of payday lenders to provinces establishing a provincial

regulatory framework deemed adequate to protect consumers, allowing payday lenders to continue”. (emphasis added)

Evidently, although not part of its mandate, the Manitoba Board has concluded that all payday lenders, including the intervenors in Manitoba, have breached the *Criminal Code*.

The Manitoba Board’s philosophy is further evident in its comment (at page 7) that the *Criminal Code* has rarely been enforced because of, in part, “the risk that the destruction of the payday loan industry would either drive credit-damaged consumers to loan sharks, thievery or doing without”. The implication is clear. As far as the Manitoba Board’s animating philosophy goes, payday lenders are in an industry which is one step above loan sharks and thievery.

The Manitoba Board makes repeated reference to certain payday lenders being subject to class action lawsuits so as to imply that payday lenders are likely liable, even though those cases are still before the Courts. For instance, the Board wrote (at page 17):

“In short, most payday lenders structure their charges to *evade* the intent of Section 347 [of the Criminal Code] as understood by the Board and *as argued by the plaintiffs of the class actions suits*”. (emphasis added)

The same sentiment is found in the following passages (at pages 217 and 218 respectively):

“The Board is struck by the payday loan industry’s longstanding disregard for the intent of s. 347 of the Criminal Code (as perceived by the Board and as concluded by Manitoba court decisions) and an equally longstanding disregard by the government of pursuing compliance with that intent through prosecution of firms in breach of the anti-usury provision. Prosecutions based on single individual small balance short-term loans would have suffered inattention competing with cases involving violence and large dollar values for scarce prosecutorial and court time and (*sic*) resources. The ‘forest may have been lost but for the trees’.

...

Rather than proposing changes to the Criminal Code to allow for payday lending rates at well above the 60% cap (which it did eventually pursue and advocate), the industry began by flouting it. However, following the commencement of several private prosecutions (in the form of class action suits), the industry began calling for regulation. Regulation would allow for the legitimization of payday loans and, presumably, an end to the risk of damages that could range into the hundreds of millions of dollars if the class action suits succeed.”

So, not only are payday lenders said to be “breaching” the *Criminal Code* (as noted above) they are said to be “evading” its intent and, with that swipe, the Manitoba Board implies that they are involved in criminal activity.

This negative animus towards payday lenders and the industry generally is further revealed where the Manitoba Board wrote (at page 8):

“Licensed payday lenders are to be exempted from the application of Section 347, and this will remove a major legal risk for payday lenders, a risk associated with the class action suits previously indicated. With licensing, payday lenders will be able to continue charging annual percentage rates (APRs) of 100 times or more the lowest rate obtainable from a chartered bank or credit union. *It is not surprising that payday lenders sought and encouraged Parliament to act*”. (emphasis added)

The Manitoba Board is suggesting that Parliament is the dupe of the payday lenders. Parliament did not act on behalf of the industry; it acted on behalf of all stakeholders including consumers.

The intent of the Manitoba Board, in making the kind of comments excerpted above, is to denigrate payday lenders and cast them as shady, manipulative of their customers and only one step ahead of the police and prosecutors. The Manitoba Board, in rendering the Order, lost sight of the fact that the payday lending industry has emerged as a credible and legitimate part of the marketplace, offering products desired by consumers. It has ignored the fact that payday lenders, prior to this hearing process, were regulated and licenced by provincial authorities, such as Service Nova Scotia and its equivalent in Saskatchewan. The Manitoba Board fails to acknowledge, in assailing the industry, that some payday lenders, such as Rentcash, are publicly traded companies (Rentcash is traded on the TSE) who provided much sensitive commercial information about themselves before the Manitoba Board and answered, fully, the many questions asked of them.

The Manitoba Board also pauses to address “ethics”. At page 62, it noted that the hearing focused on “every aspect of the payday loan industry except for the question of ethics”. Ultimately, the Manitoba Board took the view that the payday loan industry is not an ethical one, and that rates should be set so low as to drive lenders out of business. Such an approach was beyond the Manitoba Board’s mandate. The Board, by legislation, was to set the maximum cost of credit, not sift through academic papers which cast the industry in the most negative light. Implicit in the Federal Government’s Bill C-26, and the Manitoba Government’s response, is governmental acknowledgement that there is, indeed, space in the marketplace for payday lenders.

The Manitoba Board all but declares its bias with the following commentary (at page 224):

“Neither the Act nor the Board were or are focused on sustaining the payday loan industry for the benefit of its owners and employees. The Board’s particular focus is assisting and protecting those consumers now relying on payday loans to meet short-credit needs, yet unable to access short-term credit from a lower-cost source.”

The mechanism chosen by Manitoba includes the role provided to the Board, that being to set the maximum rate allowable for payday loan charges. The Board interprets the intention of the legislature was not to “drive out” the payday loan

industry, inferring that the legislature's unwillingness to end the practice of payday lending was due to a concern that to do so would leave some consumers without access to short-term credit and therefore, subject to the long-feared loan sharks, or other illegal sources of funds.

The Board views Manitoba's actions to regulate the payday industry not to be an endorsement of the industry but rather, an action to mitigate a bad situation and improve the lot of desperate borrowers."

2. *Manitoba Decision and Order Will Drive Lenders Out of Business*

The Manitoba Board observes, almost off-handedly, that the Order will drive many current payday lenders out of business in Manitoba. The Manitoba Board wrote (at p.10):

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

It is also important to note that the Manitoba Board, in rendering the Decision, has, despite its written comments to the contrary, lost sight of the Manitoba Government's purpose in amending the legislation to allow the Manitoba Board to set maximum limits. The Minister stated, as quoted in the Manitoba Decision (at p. 13), that the Government's purpose for the amendments to the Act, for licensing and regulating lenders ". . . *was not to drive the companies out of business*, because people are showing an interest in having this service, but to make sure that when they offer the service, they do it in a way that's just and reasonable" (emphasis added).

Immediately thereafter (at p. 14), the Board attempts to justify its hostile approach to payday lenders in the Manitoba Decision and writes:

"The Board understands the Minister's statement within the context of the amendments, and does not interpret the remark as a directive to avoid setting maximum rates resulting in some payday lenders exiting the industry".

Rentcash, with respect, finds that comment of the Manitoba Board disingenuous. Many lenders in Manitoba, if not all, will be driven out of business and the Manitoba Board has appropriated for itself the power to decide that Manitoba would be better off without payday loans. Moreover, the Manitoba Board has decided (again, beyond its mandate) that if any payday loans are to be made, the banks and credit unions are the only actors to be trusted to make them.

3. *The Manitoba Board Attempted to Do Indirectly what it had No Authority to Directly: Shut Down the Payday Loans Business in Manitoba.*

The Manitoba Board has attempted to do indirectly what it had no authority to do directly: drive payday lenders out of business. In addition to excerpts noted above, that sentiment is glimpsed when the Manitoba Board makes comments such as (at page 4):

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

Added to that is the comment (at page 5):

“The Board finds it distressing that an increasing and significant number of Manitobans are taking out payday loans . . .”

The Manitoba Board’s intent to drive payday lenders out of business is also made evident under “Board Findings” (at p. 217) where the Manitoba Board wrote:

“... the Board recommends steps be undertaken by a government to promote and effect a marked reduction in the utilization of payday loans by consumers”.

It is clear the Manitoba Board has taken the view that payday loans are objectionable products and that the rates it has imposed will ensure that the industry fails. That approach is beyond the Manitoba Board’s authority. It is at odds with the will of consumers, pay lenders and government – all of whom desire payday loans which are accessible, understandable and reasonable in price.

Further, s.164(4) of the Manitoba *Consumer Protection Act* dictates that the Order be one that the Manitoba Board considers “just and reasonable”. Among factors which the Board could consider were the operating expenses and revenue requirements of payday lenders. Rentcash offered; at the Manitoba hearings, to provide the Manitoba Board with detailed financial data about its operations. The Manitoba Board declined the offer, stating that it would not accept such information unless Rentcash agreed to make it public. That response was unrealistic and failed to recognize Rentcash’s need to keep certain information private and away from its competitors. It also shows that the Manitoba Board then went on to set rates in an information vacuum.

The Order and approach taken by the Manitoba Board is neither just, nor reasonable, for the reasons stated within these submissions. In short, the Manitoba Board did not attempt to balance the interests of payday lenders and consumers – it was determined from the outset to set rates designed to oust payday lenders from the marketplace.

4. *If Applied in Nova Scotia, the Manitoba Order Would Drive Payday Lenders Out of Business*

Were the rates ordered in the Manitoba Decision applied in Nova Scotia, all existing payday lenders would very likely be driven out of business. The only payday lender in Nova Scotia charging less than \$17 per \$100 loaned is Cash + Less (at \$15), based on the information before the Nova Scotia Utility and Review Board. Were the rates set for Manitoba imposed in Nova Scotia, virtually every payday lender currently operating in Nova Scotia would be forced out since they could not operate at such a low return rate. This would be a most unfortunate result and represent a mishandling of the Nova Scotia UARB's responsibility. There is a plain and legitimate demand in Nova Scotia for payday loans and the task of the Nova Scotia UARB is to balance the interest of consumers with those of payday lenders.

The Order is all the more imbalanced and unacceptable when one considers that built into the maximum cost of credit are all charges of interest. For example, if a borrower is advanced and receives \$100, the maximum that a lender may charge is \$17, including administrative charges, interest and any charges related to debit or credit cards where the borrower does not have the option of receiving cash.

Further, by setting a maximum cost of credit at 15% for value received from \$501 to \$1000, and 6% for that received between \$1,000 and \$1,500, the Manitoba Board has virtually ensured that no lender would make such larger loans given their costs and the risks associated with larger loans. By setting the rate at 6% for value received of between \$1,000 and \$1,500, the Manitoba Board has purposely set the limit at a rate which is below the cost of providing the product and service.

5. *Manitoba Board Exceeding its Authority by Defining "Cost of Credit"*

The Manitoba Board exceeded its jurisdiction by "defining cost of credit", as opposed to "fixing the maximum cost of credit", or a component thereof. This is evident by reviewing ss. 163(1) and 164(2) and (3) of the *Consumer Protection Act* (of Manitoba). That statute confers power upon the Lieutenant Governor in Council to make regulations "defining cost of credit", while limiting the Manitoba Board's authority to "fixing" (but not defining) the maximum cost of credit, or a component thereof. In the Manitoba Decision, the Manitoba Board purported (at page 225) to include "all charges and interest of any and all kinds, however determined or levied" in fixing the maximum cost of credit. In so doing, the Manitoba Board was defining cost of credit, rather than setting a maximum for it; the Manitoba Board had no power to do so.

6. *Sliding Scale Should Not Be Used*

The Order sets maximum cost of credit using a scale as opposed to rate caps per \$100 loaned. It is Rentcash's understanding that no intervenor suggested the sliding scale approach to the Manitoba Board. Among those recommending a rate cap was the "Coalition", which recommended a cap of \$15 per \$100 loaned (which figure was at odds with their expert, Dr. Robinson, who suggested \$17 per \$100 loaned which would, even still, eliminate the vast

majority of lenders currently operating in Manitoba). Caps are more easily understood and administered, and that is why even the Nova Scotia Utility and Review Board's own experts recommended caps based on \$100 advanced.

7. *Manitoba Board Attempts Social Engineering*

The Board wrote (at page 10):

“Accordingly, the Board suggests a *general societal objective be considered*, that of *reducing* the number of Manitobans availing themselves of payday loans, pawnshops and rent-to-own firms”. (emphasis added)

This is startling. It was not within the Manitoba Board's mandate to attempt social or societal engineering. The Manitoba Board's statutory mandate was to set the maximum cost of credit after considering relevant information and hearing evidence.

The Board also patronizes those who wish to take out a payday loan and pay it back in a timely way (as most do, according to Pollara's evidence before the NSUARB). Under the heading “General Assessment” (at page 9), the Board writes:

“The Board considers consumer reliance on payday lenders to be injurious to the financial health of repeat borrowers, and a contributor to economic lives being kept outside the much lower-cost financial mainstream”.

8. *The Manitoba Decision is Unclearly Written and Reasoned*

The exhibits from the Manitoba hearings are not available on the Manitoba Board's website. In reviewing the Manitoba Decision it is not clear at certain points whether the Manitoba Board is drawing on evidence presented to it, material offered by “presenters” (some of whom were sworn and/or cross-examined, some of whom were not), or material the Manitoba Board, through its own efforts, located. See for instance “2.10 Jurisdictional Scan” (at pp.55-60), and “2.10 Jurisdictions With No Payday Lending” (pp.60-62). The same observation holds true for the section of the Manitoba Decision entitled “2.12 Ethics and Social Responsibility” (at pp. 62-70). Within that topic area (at p.68), the Manitoba Board indicates it considered two papers on ethics and business. It would appear such literature was obtained by the Manitoba Board for its consideration without Rentcash and other intervenors having the opportunity to make submissions thereon. In any event, a vast exploration of such literature would seem far a field from the Manitoba Board's statutory duty to set the maximum cost of credit.

9. *No Lawyer Among Manitoba Board's Panel*

The panel which sat at the hearings wrote the Manitoba Decision and rendered the Order, did not include a lawyer. Rentcash submits, respectfully, that given the subject matter and necessary interpretation of the Manitoba Board's statutory mandate, a lawyer should have been a member of the panel. This point is well made by considering the undue attention the

Manitoba Board paid to attempting to interpret s.347 of the *Criminal Code*, case law and their obvious departures from their statutory mandate. For example, Rentcash notes that as part of information the Manitoba Board considered as "background" (for some unknown reason), was ten pages of case law (pp.20-30) in which it attempted to analyze s. 347.

10. *The Order and Manitoba Decision is Punitive*

To the extent the Manitoba Board complains about the Federal Government's alleged failure to enforce s.347 of the *Criminal Code* and then sets rates which it knows will drive payday lenders out of the market, the Order is punitive. That is a fundamental misuse of the Manitoba Board's power and is beyond its authority.

In summary, for the reasons set out above, the Manitoba Decision and the Order should be of no assistance to the Nova Scotia UARB which must reach its own conclusions and avoid such a plainly biased and unfair decision, well outside the Manitoba Board's authority.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,



David P.S. Farrar

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