o) Consideration of the Manitoba Decision

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

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

> **5.4.1 Cost of Credit**
>
> The maximum cost of credit that may be charged, required or accepted in respect of a payday loan, excepting for loans to persons on employment insurance or social assistance, or for loans in excess of 30% of the applicant/borrower's expected next pay, net of deductions, will be:
>
> a) 17% of value received to $500; plus
> b) 15% of value received from $501 to $1,000; and
> c) 6% of value received between $1,000 and $1,500.
>
> For payday loans to persons on employment insurance or social assistance, or in excess of 30% of the applicant/borrower's expected next pay net of deductions, the maximum cost of credit shall be 6% of value received to $1,500.00.
>
> If a payday loan is fully repaid more than five (5) days prior to the loan's due date, but after the 48-hour cooling off period, the cost of credit shall be retrospectively set at the original cost of credit, less $3.00 for each day over five (5) days the loan is repaid early, with a minimum cost of credit of $10.00.
>
> In determining adherence to this maximum, all charges and interest of any and all kinds, however determined or levied, are to be included in the calculation. In its next review of maximum charges (which is to take place no later than three years from the date of the government's Regulation setting maximum charges) the Board intends to review the thresholds at which these amounts are now established, to address any effects of inflation.
>
> [Manitoba Decision, April 4, 2008, p. 225]

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

[236] On May 8, 2008, the NSUARB was advised that an Application for Reconsideration was filed by the CPLA and a Notice of Motion for Leave to Appeal to the Manitoba Court of Appeal was filed by The Cash Store, with respect to the decision of the Manitoba Public Utilities Board issued April 4, 2008. The Application and the Notice of Motion were both filed in Manitoba on May 2, 2008. The NSUARB allowed the formal intervenors an opportunity to make submissions with respect to these developments involving the Manitoba

decision, directing that submissions, if any, were to be filed no later than May 29, 2008. Counsel for the parties advised the NSUARB that no further submissions would be filed.

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

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

> The CPLA respectfully submits that the Board give little or no weight to the Manitoba Decision during its deliberations in the current proceeding. Section 18T(4)(d) of the Consumer Protection Act is a permissive provision, not a mandatory one. Manitoba is simply the first of many jurisdictions to render its initial decision, and, importantly, the time periods for reconsideration and/or appeal of the decision have not yet lapsed. Furthermore, many of the "main premises" underlying the Manitoba Decision remain problematic in certain key respects.
>
> Based on an initial review of the Manitoba Decision, the Manitoba Board appears to have taken a fundamentally different philosophical approach to the provincial regulation of the payday loan industry than the CPLA suggests. As stated in Mr. Stringer's Opening Statement, the CPLA believes that the Nova Scotia hearing is not about whether payday loan lenders deserve to exist, but rather should be "focused on determining regulatory parameters that best protect consumers from excessive fees while ensuring that all Nova Scotians have access to payday loan services at fair rates in a competitive and viable marketplace." (Ex. PD-31, p. 2)
>
> In contrast, the Manitoba Board adopted a clear opinion as to the questionable legitimacy of the industry. While this tone permeates the entire Manitoba Decision" it is stated perhaps most explicitly in the fourth paragraph of the Executive Summary (p. 4):
>
> > "Prospective payday borrowers should realize that payday loans are so expensive that they should be avoided, to be considered only in the absence of access to credit from mainstream lenders, family or "doing without'."

> With respect, the CPLA submits that the Manitoba Board has failed to fully appreciate what the respective federal and provincial governments have sought to achieve in putting regulatory mechanisms for the payday loan industry in place. Furthermore, the Manitoba Board's view that payday loans "should be avoided" appears to have unduly influenced many of its underlying conclusions, as discussed in more detail below.
>
> [CPLA Submission, April 23, 2008, pp. 1-2]

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

> Rentcash submits the Manitoba Decision and the order therein (the "Order") should be of no use to this Board and are irrelevant. As will be put in more detail below, the Manitoba Board acted beyond its jurisdiction and approached its duties with an obvious bias against payday lenders, which bias coloured its interpretation of evidence and controlled its conclusions. The Manitoba Board demonstrated an intent to drive payday lenders out of Manitoba and produced an Order which will have that effect.
>
> [Rentcash Submission, April 23, 2008, p. 1]

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

> The intent of the Manitoba Board, in making the kind of comments excerpted above, is to denigrate payday lenders and cast them as shady, manipulative of their customers and only one step ahead of the police and prosecutors. The Manitoba Board, in rendering the Order, lost sight of the fact that the payday lending industry has emerged as a credible and legitimate part of the marketplace, offering products desired by consumers. It has ignored the fact that payday lenders, prior to this hearing process, were regulated and licenced by provincial authorities, such as Service Nova Scotia and its equivalent in Saskatchewan. The Manitoba Board fails to acknowledge, in assailing the industry, that some payday lenders, such as Rentcash, are publicly traded companies (Rentcash is traded on the TSE) who provided much sensitive commercial information about themselves before the Manitoba Board and answered, fully, the many questions asked of them.
>
> The Manitoba Board also pauses to address "ethics". At page 62, it noted that the hearing focused on "every aspect of the payday loan industry except for the question of ethics". Ultimately, the Manitoba Board took the view that the payday loan industry is not an ethical one, and that rates should be set so low as to drive lenders out of business. Such an approach was beyond the Manitoba Board's mandate. The Board, by legislation, was to set the maximum cost of credit, not sift through academic papers which cast the industry in the most negative light. Implicit in the Federal Government's Bill C-26, and the Manitoba Government's response, is governmental acknowledgement that there is, indeed, space in the marketplace for payday lenders.
>
> [Rentcash Submission, April 23, 2008, p. 4]

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

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

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

[243] The Manitoba decision expressly acknowledges this result:

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

[244] Rentcash stated in its written submission:

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

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

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

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

> The PUB's order will reduce the number of lenders in the Manitoba market and limit the number of people who will qualify for a payday loan. Because the rates stipulated by the PUB are drastically lower than the cost of issuing those loans for many lenders, the magnitude of the aforementioned reductions is likely to be severe.
>
> With their order, the PUB set out to reduce the financial impact of payday loan use on Manitoba borrowers. They acknowledged that their order will force some borrowers to "do without," but were satisfied that those who do obtain payday loans in the future will enjoy a dramatically lower rate.
>
> The PUB has erred in its failure to accurately account for the impact its order will have on those who will no longer have access to the product. Barring a dramatic change in economic conditions that affords every Manitoban abundant savings and a good credit rating, the number of people who find themselves in need of short-term, small-sum credit will not change in the near future. While those who still qualify for a payday loan will save 20% to 50% on their future loan, those who cannot access the product will see their costs rise, some quite dramatically.
>
> As the Policies study illustrates, some newly excluded borrowers may pay up to ten times the amount that they currently pay in order to borrow $100 from an illegal source of credit. Some will temporarily relinquish their personal assets in order to obtain a pawn loan and others will do without. Of the borrowers who do without, those who knew how to weigh the difference between the cost of a payday loan and the cost of bouncing a cheque will be worse off.
>
> The net benefit to Manitoba customers is difficult to measure. Some borrowers will enjoy much cheaper payday loans and others will be forced to deal with less pleasant and far more expensive sources of credit. While well intended, it is our position that the Manitoba PUB order has needlessly abandoned an entire class of borrowers and in doing so contradicted its consumer protection objective.
>
> [310-LOAN Submission, April 23, 2008, p.7]

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

> In summary, the Manitoba PUB, on its examination of amendments to Manitoba's *Consumer Protection Act,* amendments substantially similar to those effected by the Nova Scotia Legislature under Bill No. 87, has interpreted its regulatory mandate as one that will allow the industry to exist, but not tolerate businesses operating within that industry who are

> unable or unwilling to provide rates that are "just and reasonable" to the consumer.
>
> [Consumer Advocate Submission, April 23, 2008, p. 3]

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

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

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

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

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

[252] The Manitoba Board suggested that:

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

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

[253] Administrative tribunals operate under, and are restricted to, the subject matter of, the enabling statutes which set them up and which give them authority over particular areas - be that setting electricity rates, or determining municipal planning appeals, or issuing liquor licences, or hearing criminal injury compensation appeals, or any of the myriad topics dealt with by modern administrative tribunals. While the topics which tribunals may deal with are broad, the only areas over which tribunals have authority are those assigned to them by statute. Thus, for example, administrative tribunals have no jurisdiction to make findings of guilt or innocence under the *Criminal Code* - matters which

are reserved to provincial and supreme courts, under the overall supervisory jurisdiction of appellate courts and the Supreme Court of Canada.

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

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

[256] The Manitoba decision discusses arguments for and against banning the payday industry entirely - a matter upon which, as the NSUARB has just noted, Parliament and the provincial Legislature have already made the governing decision. More than once, the Manitoba decision returns to discussions of whether payday loans are "morally acceptable", "morally right", etc.

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

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

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

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

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

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

[262] In the view of the NSUARB, based on the conclusions in the 2004 Ernst & Young and 2007 Deloitte & Touche reports, the adoption of maximum rates similar to those determined by the Manitoba Board would, at best, result in several payday lenders departing the Nova Scotian marketplace or, as a worse case scenario, could result in most lenders leaving the Province. It would also discourage new competitors from entering the marketplace. The NSUARB concludes that this would be contrary to the legislative intent of s. 347.1 of the *Criminal Code* and of the amendments to the Nova Scotia *Consumer Protection Act* and, further, would not be in the overall best interests of consumers, as explained later in this decision.

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

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