M A N I T O B A	**)**	**Order No. 89/08**
	)	
THE PUBLIC UTILITIES BOARD ACT	**)**	**June 27, 2008**

BEFORE: Graham Lane, CA, Chairman
Monica Girouard, CGA, Member
Susan Proven, P.H.Ec., Member

RECONSIDERATION OF BOARD ORDER 39/08:
MAXIMUM CHARGES FOR PAYDAY LOANS

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SUMMARY

By this Order, the Public Utilities Board (Board) varies Board Order 39/08 to delete the determination with respect to retrospective adjustments to the cost of credit, clarifies its intent respecting the comprehensive nature of the kinds of charges that are to be covered by the maximums set respecting the cost of credit for payday loans, and clarifies its intent with respect to the approach it recommends for loan extensions, renewals and replacement loans.

Two parties to the proceeding that led to Order 39/08 provided formal criticism of the Order:

1. Canadian Payday Loan Association (CPLA) filed an application with the Board seeking review and vary of certain directions of Order 39/08; and

2. The Cash Store Financial Services Inc (Cash Store) filed a motion with the Court of Appeal seeking leave to appeal and a suspension of Order 39/08.

While the Board circulated Order 39/08 widely, including to all parties appearing and presenting at the proceeding that led to Order 39/08, only Cash Store (which appeared as Rentcash at the hearing) and CPLA sought amendments.

CPLA's motion for review and vary sought specific changes to a limited number of elements of Order 39/08, while Cash Store went directly to the Court of Appeal, rather than seeking a review and vary by the Board. While it is for the Court to conclude on Cash Store's motions, seeking leave to appeal and suspension of Order 39/08, the Board would be remiss if it ignored Cash Store's stated grounds for its appeal while conducting a reconsideration of Order 39/08 as a result of CPLA's application for review and vary.

Accordingly, the Board's Notice of Review was also widely issued, including to all parties involved in the proceeding leading to Order 39/08. The Notice of Review advised of the Board's review process and indicated that the Board's reconsideration would take place through written submissions. CPLA's request for review and vary and Cash Store's appeal motion to the court were circulated to all parties, consistent with past practice and the Board's Rules of Practice and Procedure.

Only CPLA, the Coalition (comprised of Consumers Association of Canada (Manitoba Division), Manitoba Society of Seniors and Winnipeg Harvest) and Sorensen's Loans Til Payday responded to the Board's Notice of Review by providing submissions. CPLA also filed a reply submission. Subsequent to receiving and reviewing these submissions, the Board confirms the findings, determinations and recommendations of Order 39/08, excepting for the variances noted above and as contained in the directives at the conclusion of this Order.

The Board issued Order 39/08 following a thorough review of the evidence and a careful assessment of the implications that the Order has for the industry and its borrowers.

This Order should be read in conjunction with Order 39/08.

2.0 INTRODUCTION

Order 39/08 followed public hearings held in Thompson, Brandon and Winnipeg over the months November 2007 through to February 2008. The hearings proceeded through a process that involved a pre-hearing conference and an extensive interrogatory procedure.

Prior to the Board's public payday loan proceeding, the Board had held a public hearing leading to the Board exercising its authority to set maximum fees for the cashing of government cheques. Through that earlier hearing and the process that led to it, which also included a pre-hearing conference, interrogatories and public hearings within and

outside Winnipeg, and which led to Order 72/07, the Board researched the payday loan industry, providing the Board initial background knowledge of the industry's practices.

By Order 39/08 the Board established the maximum charges that payday lenders may assess their customers. The Board understands that Order 39/08, as now varied, will take effect when sections 147, 152 and 153 of *The Consumer Protection Act* come into force.

Order 39/08, as well as Order 72/07, expressed the Board's continuing opinion that the Board's determinations are in accordance with the Board's mandate as provided by the legislature of Manitoba.

Noting that it found it "distressing that an increasing and significant number of Manitobans are taking out payday loans, notwithstanding that payday loans … may only defer and make worse a borrower's financial problem", the Board, in Order 39/08, then commented:

> "While the maximums now set are expected to reduce the cost of payday loans to Manitoba borrowers by 20% to 50%+, the average annual percentage rate (APR) associated with payday loans will remain ten or more times the 60% limit established by Section 347 of the Criminal Code … payday loans will remain a very high-cost short-term consumer credit option (and) prospective payday borrowers should realize that payday loans are so expensive that they should be avoided …".

The Board, having then considered the practices of the industry and its effects with respect to borrowers, and having reviewed Manitoba Court decisions related to loans found to be in breach of Section 347 of the *Criminal Code* (a review that is on the record of the hearing proceeding and was not contested by any party to that hearing in closing argument), encapsulated its view of payday lending and lenders with the expression *homo homini lupus* (man is a wolf to man), suggesting that *some* payday borrowers are exploited.

In Order 39/08, the Board noted that its primary concern was not about so-called average wage earners with credit options other than payday loans who may take out an occasional payday loan, but rather with those members of the public who were "frequent" users of the service; the evidence of the proceeding clearly indicated, without being disputed by any party, that the payday loan industry depends on "repeat" customers.

The Board placed on the record of that proceeding evidence suggesting that the average payday borrower took out six or more payday loans per year, and, within Order 39/08, set out a chart providing a comparison of the cost of credit for frequent payday borrowers compared to bank credit at prime.

> "Payday loans are very expensive for consumers, 100 times or more than the lowest annual consumer rates available in the market."

Payday firm (Winnipeg)**	**Loan Size**	**Amount Due**	**Charges Levied**	**Section 347 Max.**	**Secured LOC* Charge**	**Additional Cost** (over Section 347)	**Additional Cost** (over secured LOC)
A	$250	$295	$ 47.99	$ 4.93	$ 0.49	$ 43.06	$ 47.50
B	$250	$359	$109.00	$ 4.93	$ 0.49	$104.07	$108.51
C	$250	$348	$ 96.12	$ 4.93	$ 0.49	$ 91.19	$ 95.63
K	$250	$300	$ 50.00	$ 4.93	$ 0.49	$ 45.07	$ 49.51
N	$250	$294	$ 44.00	$ 4.93	$ 0.49	$ 39.07	$ 43.51

*LOC- line-of-credit, based on 6% per annum.

**Extracted from evidence provided by an Intervener (Coalition) arising out of a "Mystery Shopper" exercise.

The Board then-noted:

> "… most Canadians tak(e) out loans … at rates below 10% … Credit card holders unable to pay off their full account on the due date incur rates of between 9.9% and

> 28.8% … customers of finance companies … pay rates between 15% and 36% per annum … And, these other lenders offer repayment terms that are not restricted to the borrower's next payday. Payday loan industry borrowers are not so fortunate … the combination of interest and other charges incurred by payday borrowers for loans, with durations as short as 2 days but more commonly of 12 days, result in equivalent annual interest rates from hundreds to thousands percent of the loan."

Also in Order 39/08, the Board observed:

> "The levying of separately-identified other charges and fees as well as interest (by payday lenders), and/or the structuring of the loan's terms towards separating interest from the other charges, has provided payday lenders an argument that the 60% interest rate cap of Section 347 of the *Criminal Code* has not been breached. The lenders' arguments, refuted by both Court decisions and a common sense understanding of Section 347, are currently being tested in a half-dozen or so class action suits."

And,

> "Rather than either actively prosecuting payday lenders for breaching section 347 of the *Criminal Code* or directly banning the practice, Canada delegated regulatory oversight of payday lenders to provinces establishing a provincial regulatory framework deemed adequate to protect consumers, allowing payday lenders to continue. Licensed payday lenders are to be exempted from the application of Section 347, and this will remove a major legal risk for payday lenders … 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."

And,

> "With few exceptions, the combination of interest and other charges incurred by payday borrowers for loans, with durations as short as 2 days but more commonly of 12 days, result in equivalent annual interest rates from hundreds to thousands percent of the loan. The levying of separately-identified other charges and fees as well as interest, and/or the structuring of the loan's terms towards separating interest from the other charges, has provided payday lenders an argument that the 60% interest rate cap of Section 347 of the *Criminal Code* has not been breached. The lenders' arguments, refuted by both Court decisions and a common sense understanding of Section 347, are currently being tested in a half-dozen or so class action suits."

In short, in Order 39/08 the Board found payday loans to be far from desirable for consumers, costing consumers far more than considered lawful by the *Criminal Code*, and requiring the setting of maximum rates and charges to better ensure consumers are not exploited.

In arriving at the maximum rates and charges it set, the Board was aware of:

- allowable rate schedules in place in the United States, schedules providing for rates below the 17% set by the Board in Order 39/08;

- public filings of financial information in the United States by National Money Mart's American owner Dollar Financial, which suggested (if not supported) that profitable operations could occur with a 17% maximum rate;

- public filings of financial information in the United States by Advance America, the largest payday lender in the United States, which had just entered the Manitoba market as National Cash, which suggested (if not fully supported) that profitable operations could occur with a 17% maximum rate;

- models developed by Coalition witness Dr. Robinson, which provided a basis for an economic return for efficient payday lenders at or below the 17% rate set by the Board;

- the Board's expectation (stated during the proceeding and not contradicted by any party to the proceeding), that, due to the "legalization of the industry" by way of licensing (following the implementation of the Board's determination of maximum rates and charges), the payday industry could anticipate both the opportunity to obtain judgments in cases of non-payment as well as the ability to secure lower cost operating funds, with the risk of class action suits and prosecution pursuant to the *Criminal Code* reduced or eliminated; and

- the Board's expectation (stated in Order 39/08 and expressed by expert witnesses during the proceeding and not disputed by any party to the proceeding), that if a payday lender left the Manitoba market as a result of the Board's maximums, it could be reasonably assumed that remaining payday lenders could anticipate higher volumes – and higher volumes generally were understood to provide for reasonable if not higher operating profits.

Subsequent to the release of Order 39/08, Dollar Financial, the owner of National Money Mart, issued a press release indicating that it intended to operate (if not expand) in Manitoba within the maximums set by the Board.

3.0 APPLICATIONS

Following the issuance of Order 39/08, two applications seeking changes to the determinations and recommendations of the Order were filed, one in the form of a motion to review and vary, the other by way of a motion for leave to appeal to the Manitoba Court of Appeal.

3.1 Cash Store

Cash Store, a national payday lender headquartered in Alberta and trading on the TSE Venture Exchange, and in the form of its previous name Rentcash, was an intervener to the proceeding that led to Order 39/08.

Cash Store operates under the broker model (described in Order 39/08 as involving third-party lenders funding the loans provided to Cash Store's clients), and offers payday loans at rates and charges that in total were (at the time of the hearing) considerably higher than those provided for by Order 39/08.

Cash Store's customers are lent money by a firm or firms separate from Cash Store, and Cash Store provides the brokerage service that brings the borrower and the lender together. Cash Store's advertisement of its services does not highlight that it is a broker, and when Cash Store's "lenders" incur a bad debt, i.e. a borrower does not repay, Cash Store may and, as it reported to the Board, regularly repays the lender its loss through what Cash Store identifies as "retention payments". Cash Store reported to the Board that its "third party" lenders are not related to the Cash Store, and that these lenders demand significant net interest returns for their participation in these transactions. The net effect to the borrower is as if Cash Store made the loans to them directly. The definition of cost of credit set by *The Consumer Protection Act* includes brokerage fees.

Cash Store engaged one expert witness, Dr. Kevin Clinton, who appeared before the Board at the proceeding, whose testimony was summarized and commented on in Order 39/08.

Rather than seek the Board's reconsideration of Order 39/08 (an available remedy pursuant to the Board Rule 36), Cash Store, noting that the Board's decisions may have implications for other jurisdictions and opining that "payday lenders will be put out of business" due to the Board's decisions, filed an application with the Court, seeking:

a) leave to appeal the Board's Order towards having the Manitoba Court of Appeal (CA) quash the Order, noting matters involving jurisdiction, points of law, and facts cited by the Board in Order 39/08 which the firm disagrees with; and

b) an Order of the Court suspending the operation of Board Order 39/08 "until a final Order by the Court for which all appeal periods have expired".

Cash Store seeks judicial review of the Order on the following grounds:

"The Board erred in law and exceeded its jurisdiction by not directing its mind to the following fundamental tests and principles enunciated in expert evidence in the proceedings and the scheme and objects of *The Consumer Protection Act* and *The Public Utilities Board Act,* and instead issued an Order which is contrary to them: (a) all rates charged must be just, reasonable and sufficient and not discriminatory or preferential; (b) the service must be adequately, efficiently and reasonably supplied to all members of the public requiring the service; and (c) the Board regulatory power is a proxy for competition, not an instrument of social policy."

As well, the firm claims:

a) The Board erred in law and exceeded its jurisdiction by directing itself as being mandated to drive certain payday loan companies out of business and by issuing an Order intended to achieve that result when it was expressly stated by the Minister responsible for the legislation that "The intention is not to drive companies out of business … but to make sure that when they offer the service they do it in a way that's just and reasonable."

b) The Board erred in law and in fact by finding that the payday loan industry had a longstanding disregard for the intent of Section 347 of the *Criminal Code* and that

The Cash Store Financial Services Inc., which brokers loans for consumers seeking payday loans from lenders, such as Assistive Financial Corporation, an intervener, was attempting to "get around" Section 347.

c) The Board erred in law and exceeded its jurisdiction by fixing different maximums in respect of payday loans when its jurisdiction was limited to fixing one maximum or one rate, formula or tariff for determining the maximum cost of credit in respect of payday loans.

d) The Board erred in law and exceeded its jurisdiction by setting maximum rates which, based on its findings of fact, effectively prohibit loans provided to and requested by consumers:

    (i) needing amounts in excess of 30% of their expected next pay net of deductions;

    (ii) with higher risk profiles;

    (iii) who are temporarily unemployed.

e) The Board erred in law and exceeded its jurisdiction by issuing an Order purporting to regulate fees with respect to debit cards and credit cards owned by banks which are federally regulated.

f) The Board erred in law and exceeded its jurisdiction by purporting to change the definition of the cost of credit to, inter alia, "all charges and interest of any and all kinds, however determined or levied: instead of fixing the maximum for the cost of credit as that phrase is presently defined in and pursuant to *The Consumer Protection Act*.

g) The Board erred in law and exceeded its jurisdiction by failing to provide to payday lenders, their employees and consumers:

   (i) due notice that its primary criteria would not be criteria enunciated in public notices or any other notice issued by it, but rather would be criteria such as the ethics of the payday loan industry which it viewed as "predators" and "loan sharks" and a criteria in setting a maximum rate which should "result in some, if not many, payday lenders exiting Manitoba" but not "the closure of all payday lenders in Manitoba", and

   (ii) the full opportunity to produce evidence and be heard on these criteria. Compliance with these requirements is mandatory pursuant to Section 48 of *The Public Utilities Board Act*, when the Board makes an Order which will result in losses to payday lenders, their employees and consumers or the deprivation of services to consumers.

h) The Board erred in law and exceeded its jurisdiction by making recommendations not directed to the minister and unrelated to matters in respect of payday loans and payday lenders.

While Cash Store's application will be adjudicated by the Court, the Board concluded that given the significance of Order 39/08 to the payday loan industry and its clients and the necessity for the Board to conclude on whether to suspend Order 39/08 ahead of the Court's determination, and given the Board decision to reconsider elements of the Order as a result of CPLA's application to the Board, that it was appropriate to consider Cash Store's grounds in its reconsideration of Order 39/08.

3.2 CPLA

CPLA represents National Money Mart (Money Mart), the largest payday lender in Canada and Manitoba, and a number of smaller payday firms. It was an intervener to the Board's proceeding and engaged a number of witnesses that appeared before the Board.

CPLA seeks reconsideration of three elements of Order 39/08:

b) the restriction imposed by the Board with respect to the maximum cost of credit "for loans in excess of 30% of the applicant/borrower's expected pay net of deductions";

c) providing for refunds of charges if loans are paid off ahead of the due date ("if a 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 fore each day over five (5) days the loan is repaid early, with a minimum cost of credit of $10.00"); and

d) the absence of any allowance to reflect regulatory costs incurred by payday lenders, including the costs of participating in public hearings before the Board.

With respect to the first review element, CPLA asserts that the restriction imposed by the Board of a maximum charge of 6% for loans in excess of 30% of a borrower's net pay was not properly canvassed or examined during the oral hearing phase. And, CPLA submits that the Board gave no indication that it was contemplating such a term. As a result CPLA held that the matter was not meaningfully addressed and that the consequences will be, for its member lenders, that they will not be able to extend loans above the 30% restriction. CPLA addressed the implications of the limitation in its submissions, based upon average individual employment income in Manitoba and a current average sized payday loan amount. CPLA also submits that the restriction

imposes legal uncertainties for lenders and may cause greater administrative challenges and costs to lenders. Finally, CPLA asserted that the practical consequences the impact of a 30% net pay restriction were not addressed and not considered by the Board. CPLA seeks to rescind this term.

Under review element two of CPLA's submission, it asserted that the retrospective reduction of the original cost of credit, in cases of early repayment, exceeds the Board's jurisdiction. CPLA says that *The Consumer Protection Act* already contains such a refund formula, which puts the Board's term potentially in conflict with the existing legislative provision. CPLA seeks to rescind this term.

The third review element advanced by CPLA suggests that the Board did not take into account CPLA members' regulatory expenses and costs respecting licensing and mandatory bonding in Manitoba in setting the maximum charges. CPLA asserts that maximum charges should allow efficient payday lenders to recover reasonable hearing participation expenses, licensing fees and costs of mandatory bonding. CPLA seeks an adjustment on this basis.

4.0 BOARD'S MANDATE

The *Criminal Code* was amended to allow provinces licensing payday lenders to regulate the lenders and set the maximum charges they may make. Manitoba was the first province to seek to control the practices of payday lenders.

Recent amendments to *The Consumer Protection Act (CPA),* Manitoba, and the enactment of Regulations 226/2006 and 99/2007 to the CPA (the latter denoted as The Payday Loans Regulation (*PDR*), are concerned with the regulation of payday loans in Manitoba.

CPA amendments require the Board to fix:

a) the maximum cost of credit, or establish a rate, formula or tariff for determining the maximum cost of credit that may be charged, required or accepted in respect of a payday loan;
b) 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 or in respect of a replacement loan; and
c) 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 a default by a borrower under a payday loan.

The *PDR* added specific definition to the terms “value received” and ”value given”, towards the determination of cost of credit for a payday loan, as well as to set out licensing and consumer notice conditions under which payday lenders are to operate in Manitoba.

The Board’s mandate also provides for making recommendations to government on matters with respect to payday loans. In introducing the legislation, Manitoba Finance Minister Selinger advised that the amended *CPA* would require payday lenders to be licensed and bonded, and be subject to maximum charges to be set by the Board. As well, Minister Selinger stated that additional fees would not be allowed when loans are renewed, extended or replaced by a new loan, unless authorized by the Board, and borrowers would have the right to cancel a loan without penalty within 48 hours of taking out a payday loan.

Under the Act, the Board was provided authority to consider in its discretion any factors the Board finds relevant, including and such as:

- payday lender operating requirements and financial risks;
- lending competition and consumer borrowing options;
- the particular circumstances of consumers obtaining payday loans;
- the regulation of payday lenders and payday loans in other jurisdictions;

- such other relevant information as may come to the Board's attention; and
- the public interest.

In introducing the legislation, Minister Selinger stated that the government's purpose for the Act amendments, for licensing and regulating payday 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".

As indicated in Order 39/08, the Board understands the Minister's statement within the context of the amendments and does not interpret the statement as a directive to avoid setting maximum rates that may result in any payday lender exiting the industry. The Board notes the published comments of the Minister following the release of the Order, which support the Board's interpretation.

5.0 INTERVENER PERSPECTIVES

5.1 Cash Store

In response to the Board's process for reconsideration, Cash Store objected to the Board's taking into account Cash Store's grounds for seeking leave to appeal in the Board's reconsideration of Order 39/08. Cash Store held that by doing so the Board was both breaching "natural justice" and attempting to "usurp the role of the Manitoba Court of Appeal".

With respect to the claim of breaching natural justice, Cash Store opined that the Board's process was flawed in that:

a) the Public Notice for the hearing leading to Order 39/08 did not indicate "… that the PUB would be exercising its mandate to make recommendations in respect of payday loans and payday lenders"; and

b) by the Board's May 14, 2008 Notice of its intent to reconsider Order 39/08, the Board inappropriately provided "hearing rights" to presenters to the hearing; and

c) the Board provided no notice of its recommendations pertaining to insurance products and debit/credit cards, matters of particular importance to lenders that would be obliged to operate under a 17% sliding fee schedule.

Cash Store made no other submissions to the Board in its reconsideration process.

5.2 Coalition

In response to the Board's review process notice, Coalition provided the following submission:

5.2.1 Cash Store Grounds

With respect to Cash Store's assertion that the Board "failed to direct its mind to the fundamental tests enunciated in expert evidence and the schemes and objects of *The Consumer Protection Act* and *The Public Utilities Board Act*", the Coalition rejected the assertion and opined that "… the Board is not obliged to apply any alleged test set out in the evidence of any expert. Only Part I of *The Public Utilities Board Act* applies to the Board's deliberations … Part I does not appear to annunciate any of the tests alleged by (Cash Store)." The Coalition reminded the Board of the premises the Board set out in Order 39/08 in support of its decisions, and suggested that Order 39/08 contained substantive evidence of the Board's careful deliberations and attention to various matters related to the elements of its decision.

As to Cash Store's assertion that the Board "… exceeded its jurisdiction by directing itself as being mandated to drive certain payday loan companies out of business and by issuing an Order intended to achieve that result, the Coalition noted:

a) "many parties including (Cash Store) expected that the rate ceiling would result in some exit from the marketplace";

b) "the Board expressly found that the legislative intent was not to destroy the payday lending industry", noting various commentary expressed in the order;

c) "Like many intervenors , the PUB recognized that the consequences of a rate ceiling might be that some firms left the market", and recalled the Board's statement on pages 13 and 14 of Order 39/08 that "Minister Selinger stated that the government's purpose for the Act amendments, for licensing and regulating payday lenders '… was not to drive the companies out of business, because people are showing an interest in having the service, but to make sure that when they offer the service they do it in a way that's just and reasonable'"; and

d) the Board as having stated in Order 39/08 "The Board is of the view that the maximums it will set herein will be adequate to allow for the survival and continuance in business of efficient payday lenders, though it acknowledges that the approach may result in considerable consolidation in the industry and will likely result in the exit from the industry of several firms and outlets."

The Coalition noted Cash Store's assertion that "… the Board erred by finding that the payday loan industry had a longstanding disregard for the intent of Section 347 of the *Criminal Code* and that Cash Store … which brokers loans … was attempting to 'get around' Section 347", but opined "little turns on the allegation", as "the Board's finding of a longstanding disregard for the intent of Section 347 simply led to its recommendation that it was important to maintain close supervision of payday loan providers to ensure that both the 'letter and spirit of the maximum charges is respected."

The Coalition observed "The Board's findings of a disregard for s. 347 are not related to the setting of the maximum rates (and)… a review of the major premises underlying the determination of the maximum rates (as contained within the order) makes this conclusion evident." The Coalition also found support in the Order for its view that "there is sufficient information on the record for a trier of fact to reasonably conclude that some payday lenders may have had a disregard for the intent of section 347 … and structured their business enterprises in a an effort to 'get around' the section."

The Coalition addressed Cash Store's claim that the "Board exceeded its jurisdiction by fixing different maximums … when its jurisdiction was limited to fixing one maximum or one rate …". In citing *Advocacy Centre for Tenants Ontario and Income Security Advocacy Centre and the Ontario Energy Board* as support, the Coalition noted that the Board "has a broad mandate … broader than it would be if the Board's jurisdiction flowed from *The Public Utilities Board Act* or the *Crown Corporations and Public Accountability Act*", as "*The Consumers Protection Act* is to be interpreted in a fair, large and liberal manner … The language of section 164 provides the Board with the authority to set a rate, formula or tariff… (and) The use of terms such as formula or tariff allows for the provision of more than one rate depending upon what the Board considers just and reasonable in the circumstances."

The Coalition rejected Cash Store's suggestion that the "… Board exceeded its jurisdiction by setting maximum rates, which, based on its findings of facts, effectively prohibit loans provided to and requested by consumers a) needing amounts in excess of 30% of … net pay net of deductions; b) with higher risk profiles; c) who are temporarily unemployed."

Again, the Coalition cited the Board's broad mandate and opined on how that mandate is to be interpreted, finding support for its view by, in part, citing the *Advocacy Centre* case cited immediately above, and, in particular, the portion of that decision which reads "Section 36 of the Act has broad language empowering the (Ontario Energy) Board to set just and reasonable rates for the distribution of natural gas … the Board is authorized to employ any method or technique that it considers appropriate." The Coalition noted that, in its decision, the Court specifically found that "to further the objective of protecting the interests of consumers this could mean taking into account income levels in pricing to achieve the delivery of affordable energy to low income consumers on the basis that this meets the objectives of protecting the interests of consumers ….".

The Coalition opposed Cash Store's assertion that the Board had exceeded its jurisdiction "by issuing an Order purporting to regulate fees with respect to debit cards and credit cards owned by banks which are federally regulated", with the following comment:

> "Cash Store has mischaracterized the Board's order. The Board has not sought to regulate or set 'fees with respect to debit cards and credit cards owned by banks', it has simply said any fees associated with loaded debit or credit cards will be factored into the calculation of the maximum cost of credit calculated for a payday loan."

The Coalition noted the Board's recommendation "that loan advances be made either by cash or direct deposit to the borrower. It will encourage those methods of advancing credit by requiring that if loaded debit or credit cards are used, any fees associated with the cards … will be factored into the calculation for the determination of the maximum charge limit."

With respect to Cash Store's assertion that the Board exceeded its jurisdiction "by changing the definition of the cost of credit to all charges and interest of any and all kinds" instead of using the phrase as currently defined in the Act, in the Coalition's view, the definition given under s.3 of the Act is broad, and the "Board's language merely attempts to synthesize the language". The Coalition suggested that the Board "may simply wish to replicate the exact language of the Act and replace the language referred to by the Cash Store."

Cash Store claimed that the Board erred in law "by failing to provide a) due notice that its primary criteria in setting a maximum which should result in some (if not many) payday lenders exiting the industry; and b) the full opportunity to produce evidence and be heard on these criteria, as it is obliged to do under section 48 of the PUB Act.

For the Coalition, Cash Store has again mischaracterized the Board's order and findings. The Coalition noted that the "Board did not aim to drive firms out of the market or use that objective as a criteria for determining a just rate (though) … did recognize that some firms might be forced to exit if they did not become more efficient … (a) reality

acknowledged by a number of industry players including 310 Loan, Rentcash (Cash Store) and the CPLA." The Coalition advised that "parties (to the hearing) were fully aware of this reality and canvassed it extensively in their closing remarks."

The Coalition also advised that the ethics of the payday lending industry "does not relate to the maximum rate ceiling (set by the Board), but to the Board's recommendation that it was important to maintain close supervision of payday loan providers to ensure that both the letter and spirit of the maximum charges is respected." The Coalition concluded on this matter by reminding the Board that "parties … had ample opportunity to address both the potential impact of potential rates on firm exit and issues related to ethics" and references numerous comments related to ethics contained within Order 39/08.

5.2.2 CPLA Grounds

With respect to CPLA's contention that the Board did not provide adequate notice during the hearing that it was contemplating placing restrictions with respect to the maximum cost of credit for loans in excess of 30% of net pay, the Coalition:

a) disagreed with CPLA that such notice was required, citing the Manitoba Court of Appeal's decision in *Coalition of Manitoba Motorcycle Groups Inc. v. Manitoba (1995):*

   "The issue of natural justice and the issue of Board jurisdiction are inextricably linked. If the Board has discretion to (approve) any rate that is fair and reasonable upon the evidence and in the public interest, then all aspects of the rates are 'in issue' when the Board holds a public hearing on rates. Notice of a rate hearing, in general terms, is notice that a rate applied for may vary in either direction."

b) noted that "a review of the record and the Board's Order also makes it clear that the issue of payday loans as a percentage of pay was clearly of interest both to regulators and to parties presenting".

As to the matter of retrospective adjustments raised by the CPLA, which argued that it "received no notice that a provision of this type was being considered and that (the Board's direction in this matter) exceeds the Board's jurisdiction by addressing the actual cost of credit rather than the maximum", the Coalition disagrees with the CPLA and indicated that the Board's mandate is sufficiently broad and the evidence on the record adequate to support the Board's determination.

Finally, with respect to CPLA's concern that "there was no indication in the Board's order that it took into account regulatory costs associated with the hearing", the Coalition notes that the Board's Order "expressly states that it carefully considered 'all information put forward and reviewed".

5.3 CPLA

CPLA responded to the Coalition's submission:

a) with respect to the Coalition's perspective on the CPLA's critique of the Board's determination as to the maximum cost of credit for loans in excess of 30% of net pay, CPLA opined the evidence on the record was insufficient to justify the Board's determination and suggested that while limits on borrowing is a matter of interest, the matter should be a public policy matter with the determination as to the matter best left to government after more research;

b) with respect to the Coalition's rejection of the CPLA's concern with retrospective adjustments, the CPLA opined that the Coalition has not addressed the jurisdictional issue and suggests that sections 164(2) and (3) of *The Consumer Protection Act* takes precedence over the Board's determination; and

c) with respect to the Coalition's rejection of CPLA's concern that the Board's determination of maximum rates does not take any specific note of regulatory costs, the CPLA reminded the Board that its Order does not provide the Board's rationale for ignoring regulatory costs in the maximums set.

5.4 Sorensen's Loans Til Payday

Sorensen's Loans Til Payday (Sorensen) filed a letter of submission with the Board to address the review. The submission supported the review application and submission of CPLA. Sorensen submits that it will have to curtail business in Manitoba and plans to do loans via telephone and e-mail because of the restrictions to be imposed.

Sorensen comments that banks and financial institutions are not as restricted as payday loan companies in Manitoba. Finally, Sorensen sought to provide additional evidence from customers regarding their willingness to pay Sorensen's rates; such evidence was presumably available at the time of the public hearing, though not introduced by Sorensen. Ultimately, such additional evidence was not filed in the review process.

6.0 BOARD FINDINGS

The Board took a considerable period of time to understand the payday loan industry before it reached its determinations and issued Order 39/08. As previously indicated, ahead of the proceeding that led to Order 39/08, the Board, with the same panel that set the maximum fees to be charged by payday lenders, held the hearing that led to Order 72/07, with respect to maximum fees for the cashing of government cheques. In short, the Board panel that issued Order 39/08 was involved in exercises requiring an in-depth understanding of payday loan firms from the summer of 2006 through to this reconsideration, June 2008.

Payday loans and the cashing of government cheques are but two of the services provided by many payday loan firms, and many of these firms depend not only on the revenue from payday lending and the cashing of cheques (government and other), but are also involved in larger loans (title loans, mortgage loan referrals), wire transfers of remittances, income tax refunds and the issuance and loading of debit and credit cards.

In issuing Order 39/08, just as was the case with Order 72/07, the Board did not seek to put the industry or any particular firm within the industry "out of business". The Board took note of Minister Selinger's comments with respect to the government's intentions and, as well, considered the reality of the current situation, which includes banks and credit unions not active in promoting short-term small-balance unsecured loans to less affluent households.

The Board's establishment of maximum fees represents a careful balancing of interests, a balancing of interests that the Board has considerable experience with due to its other regulatory functions. The Board's overall mandate does not extend only to Crown and municipal corporations providing monopoly services; the Board also has oversight responsibilities with respect to industries and firms in competitive businesses, such as natural gas brokers, a propane distributor and cemetery and crematorium owners, and has provided arbitration services to firms in other fields.

As cited in Order 39/08, "The Board establishe(d) … maximums on the following major premises:

a) There is a significant population in need of short-term small loans. This population is often characterized by an absence of savings, static after-tax household income, poor or no ongoing credit relationship with a bank or credit union, and limited or exhausted access to other family assistance for the day-to-day type of access to credit that more affluent households manage without major problems.
b) The "maximums" will become the tariff for many (if not most) payday lenders; it is unlikely any (or at least many) payday lenders from within the industry's current rolls will set charges lower than the maximums established herein (with payday lending made "legal" by regulation), and it is possible that some other lenders (finance companies being the most likely) may enter the market, which requires licensing (see below).

c) The federal and provincial governments, acting together to allow for an exemption from the restrictions of section 347 of the *Criminal Code* for provincially-licensed payday lenders, have and are acting in a *paternalistic* manner, and have rejected the market as being capable of protecting consumers of payday loans in the absence of rate caps, opting instead for regulation.

d) Neither level of government seeks the abolition of the industry, but they desire lower charges than have been prevalent.

e) The intent of governments is to protect consumers.

f) There is no public interest reason supporting inefficient payday lending, anymore than one might expect a pizza restaurant to survive by selling only eight pizzas a day – competition will address pizza market issues, but regulation is required for payday loans (in the absence of a "competitive" market), to ensure that the consumers of payday loans are served by efficient payday lenders.

g) The payday loan industry in Manitoba is very concentrated, with the two largest firms operating more than half the outlets with more than 75% of the total loan volume.

h) While competition is present among the firms, the nature of the competition is not based on rates – the Board infers from the evidence given that firms within the industry have a symbiotic relationship with each other; borrowers who exhaust their credit at a lower-cost payday firm access higher-cost payday firms for concurrent, additional or new loans unavailable from the lower-cost firm.

i) Economies of scale exist in most (if not all) industries, and with lower maximum charges and the closure of some higher-cost payday lenders, the remaining lenders may experience higher volumes, reducing the cost of operations per loan.

j) Credit criteria set so "loose" as to result in bad debt ratios higher than 5% are not in the public interest; the industry would have the Board set maximums at a level which would allow payday lenders experiencing very large bad debt losses to continue with their particular "riskier" loan policies, with the costs of those riskier policies met, in the end, by payday borrowers who do repay.

k) By licensing payday lenders, the government will, in essence, be protecting the lenders from the application of section 347's 60% annual interest rate limit, and this protection may motivate other non-bank lenders (such as finance companies) to enter the field, in effect increasing the rates they now charge to their customers. By establishing lower maximums for loans in excess of $500, the Board acts to dissuade other lenders from "moving up" their rates and shortening the duration of loans offered, to allow for higher yields.

l) Once licensed, payday lenders will have a major business risk disappear, the risk of application of section 347's 60% annual interest rate limit, and this should enable surviving payday loan firms to seek out and secure lower cost loans and investments from owners/shareholders, and the reduction in cost of funds should be reflected in the rates charged to the borrowers.

m) American payday lenders operate in states where the maximum charges are lower than the maximum charge per $100 loan established herein, and this suggests that industry viability will not be challenged or made impossible with the maximums set herein.

n) If finance companies begin (as expected) to offer personal unsecured loans in excess of $500, payday borrowers who find fewer payday lenders willing to advance loans in excess of $500 (as a consequence of the maximums set herein) will have the opportunity to approach these finance companies; the rates, though very high compared to banks and credit unions, are considerably lower than the APRs of payday loans, and the durations of the loans more amenable to gradual repayment.

o) Those individuals relying on social assistance, Employment Insurance or other forms of fixed income generally do not have the financial capacity to easily meet their day-to-day living expenses, let alone repay very high APR loans within 62 days.

p) For loans in default, repayment is likely to arise beyond the 62 day maximum set for payday loans, and credit should not cost hundreds or thousands percent for

mid-term loans, thus extensions for loans in default should reflect mid-term (rather than short-term) rates, and be at lower rates than short-term payday loans.

q) For most loans (other than payday loans) the interest rate set by the lender assumes a particular default and bad debt rate, and an assumption as to collection costs; default costs allocated to payday borrowers should not be excessive.

r) Creditors' insurance on payday loans, with commission payments to payday lenders by the insurer of up to 50%, are not in the public interest, but are designed to produce profits for the payday firm, insurer and broker involved.

Manitoba Court decisions, as reviewed in some depth in Order 39/08, support the intention of s. 347 of the *Criminal Code* that interest described as various charges is nonetheless interest pursuant to s. 347, and that the purpose of the section is consumer protection."

The section of Order 39/08 that outlines the Board's findings is germane to an understanding of the Board's determinations of Order 39/08, including the Board's review of rejected options.

It is for the Board to ultimately consider the merits of allowing any of the issues to proceed to review, and, on that threshold issue, the Board finds the issues raised by CPLA and Cash Store as being of sufficient public interest as to merit a reconsideration.

6.1 CPLA

As previously indicated, CPLA sought reconsideration of:

1. the rate restriction imposed by the Board "for loans in excess of 30% of the applicant/borrower's expected pay net of deductions";
2. providing for refunds of charges paid off ahead of the due date; and
3. the absence of any allowance to reflect regulatory costs incurred by payday lenders.

With respect to issue 1, CPLA contended that it was not aware that the Board was considering the restriction of rates based upon a 30% of net income limitation and was accordingly unable to bring forward evidence and argument on the matter. The reality is that the hearing was very comprehensive and the Board received evidence on a wide variety of matters, including the potential for restricting rates based on a percentage of a borrower's net pay. But one example of this are charts that were filed as evidence with the Board by interveners, setting out various state regulatory regimes in the United States for payday loans, which include for some states maximum limits on borrowing based on a percentage of a borrower's net pay.

The Board concluded (Order 39/08) that the overall effect from the maximum rates and charges established by the Board would be such that efficient payday loan firms would be able to operate in Manitoba. The Board noted in its Order that it anticipated that continuing and/or new payday firms granted licenses to operate by the Province would benefit from the "legalization" of payday lending, and that continuing firms would also benefit from the opportunity to increase their volumes of business if and as other payday firms closed operations in Manitoba.

The Board's mandate is broad and allows for the Board to take the action it did, which it considers to be just and reasonable and representing a fair balance between the interests of lenders and those of consumers.

As to CPLA's third issue, CPLA made a costs application subsequent to the hearing (which was denied), supporting their request to revisit the ruling to add a costs component to the rate structure. It is important to note that the Board advised all interveners to the proceeding of its criteria for the making of cost awards, and it was made clear to CPLA and other industry interveners that it was very unlikely the Board would exercise its unfettered discretion to award a cost to industry representatives. CPLA represents commercial firms with both means and a direct pecuniary interest in the outcome of the proceeding, conditions that did not warrant an award of costs.

The Board considers regulatory costs to be a component of an enterprise's overall costs, and did take the fact of regulatory costs into account when making its determination of maximum charges. The Board gave serious consideration to establishing a 15% maximum rather than 17% for the initial loan, but established 17% to take into account regulatory costs and the establishment of a reduced maximum for larger loans. The Board's mandate does not require the Board to fix maximums for any cost component, and it chooses not to.

With respect to CPLA's second issue, respecting the rate reduction for early payment portion of the order, this was a review request based on existing legislation and the integration of the legislation with the Order. It is a legal question of statutory effect and was not considered in Board Order 39/08, and has merit.

After a thorough reconsideration of the matter, the Board agrees with the CPLA that sections 164(2) and (3) of *The Consumer Protection Act* adequately deal with the matter in conjunction with existing provisions of *The Consumer Protection Act.* Therefore, the Board will repeal the following determination of Order 39/08:

> "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."

The Board considers it significant that CPLA did not seek review and vary with respect to the vast majority of the Board's determinations of Order 39/08, and it is of considerable importance to note that CPLA member firm National Money Mart issued a press release following the issuance of Order 39/08 indicating that the firm expected it would prosper in Manitoba under the new rules.

6.2 Cash Store

Of its own volition, the Board can decide to reconsider other matters, including matters under leave to appeal.

Upon receiving Cash Store's motion, the Board determined that it would be appropriate to reconsider those matters if the Board anticipated that it may change its decision on reconsideration (so as to correct errors, for example, or to change the ruling so as to remove the need for a part of the appeal). Secondly, the Board concluded that it was important for the Board to be transparent with respect to its rationale for not suspending its own Order while Cash Store's application was before the Court.

On review of all of the grounds identified by Cash Store, the Board confirms that there is a need to address one particular ground:

> "The Board erred in law and exceeded its jurisdiction by purporting to change the definition of the cost of credit to, inter alia, "all charges and interest of any and all kinds, however determined or levied: instead of fixing the maximum for the cost of credit as that phrase is presently defined in and pursuant to *The Consumer Protection Act*."

Cost of credit is a defined term in the *PDR*. The Board had no intention of changing that definition by virtue of the challenged directive, but rather was attempting to indicate that whatever label was put on various fees or charges imposed on borrowers, such charges, if mandatory in practice, are to be included in the maximum charges for payday loans as set out in the directives of Order 39/08.

Accordingly, with respect to this specific ground set out by Cash Store, the Board has concluded that it will vary this directive of Order 39/08 the variance to be as follows:

> "In determining adherence to this maximum, all <u>mandatory</u> 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."

While some might argue the Board's determination represented an act of social policy and that such policy is the purview of government, the Board differs. Government has regularly sought and allowed the Board to make such policy in the absence of stated government policy.

Recent examples of this can be found in the Board's determination in a recent MPI rate hearing, with respect to the allocation of accidents wherein the Board's decision reflected the philosophical position that most often an accident is just that, an accident. Other examples can be found with the Board's mandate related to natural gas service disconnections, where government has provided the Board with a mandate that allows it to direct a utility, in this case a Crown Corporation, to reconnect regardless of delinquency, for social and health reasons.

In short, after considering each of the grounds set out by Cash Store and upon consideration of the submissions of Coalition and CPLA, the Board finds no reason to suspend its Order. The Board accepts Coalition's submissions on the Cash Store grounds and, but for the one variation noted above, does not find that any of the remaining grounds lead the Board to conclude that further variances upon the remaining grounds are warranted.

6.3 Definition of extensions, renewal and replacement loans

Upon reflection following the issuance of Order 39/08, reflection brought on by the motion for review and vary, the Board concludes that the definition of an extension and of renewal and replacement loans would benefit from clarification.

While the Board recognizes that such definition is not within its mandate (this falling to the regulations attendant to the *CPA)*, it will take this opportunity to clarify its views, and make recommendation on, what the definition should be.

The Board based its maximums on the premise that new loans are to involve new and additional advances to the borrower, beyond the funds issued with the original loan, i.e. new money, not simply money to repay the original loan. Loans issued within seven days of the due date of the original loan, and loans issued without any additional advance of funds to the borrower, represent an extension, renewal or replacement loan and should be subject to the determinations of the Board respecting such loans or conditions as set out in Order 39/08.

6.4 Other Matters

The first directive of Order 39/08 under Section 7.0 at page 260 contains the following:

> "Legal language to reflect the following statements of maximum charges for or related to a payday loan is to be developed and approved by the Board prior to being set out by regulation pursuant to *The Consumer Protection Act*."

That term is to be deleted as a variance to this order, as the Board has since determined that there will be no formal regulation to implement the terms of Order 39/08. The directive is therefore superfluous.

6.5 Concluding Remarks

The Board expects that payday lending will continue in Manitoba once the Board's maximums, as established by Order 39/08, are put into effect. The Board anticipates that the maximums set by the Board will not result in the industry closing, but that the maximums will restrain the cost to consumers and allow consumers to escape the highest charges now being levied in the industry.

Licensing of the industry by government will make legal what has been found, by Manitoba courts until now, to be illegal, the lending of money for a cost of credit in excess of 60% per annum. The legality of payday lending, within the constraints of the maximums set by Order 39/08, will allow the industry to, at minimum, explore the acquisition of lower cost of funds, which may or may not assist payday borrowers. At minimum, it will assist continuing payday lenders in the achievement of adequate rates of return.

Mr. Slee of 310-Loan testified at the hearing that led to Order 39/08 that his firm was earning a net return, after expenses, of 36% per annum. 310-Loan, to the Board's knowledge, based on the evidence of the proceeding, only makes payday loans and does not provide cheque cashing, wire transfers, title loans, mortgage referrals, income tax refunds or other services.

The Board concludes that the Legislature of Manitoba provided the Board a mandate for the purpose of providing consumer protection to those persons unfortunate enough to require loans with annual percentage rates 10 or more times the criminal rate of interest.

The Board also concludes that it has met its mandate, while continuing to recommend that banks and credit unions expand their credit offerings to allow for short-term and unsecured loans to those now being obliged to pay cost of credit 100 times that paid by those that are better off. It is not the single or very occasional user of a payday lender that the Board particularly seeks to protect with the maximums of Order 39/08, but the frequent borrower that the payday lending industry depends upon.

7.0 IT IS THEREFORE ORDERED

1. The Canadian Payday Loan Association's application for review and vary of Board Order 39/08 is denied, with the exception of the matter of retrospective adjustments of the cost of credit upon early repayment of a loan.

2. With respect to the matter of retrospective adjustment of the cost of credit, the Board hereby varies Order 39/08 and deletes the following determination:

   "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".

3. The Board hereby varies and deletes the first directive of Order 39/08 at Section 7.0, page 260, containing the following:

   "Legal language to reflect the following statements of maximum charges for or related to a payday loan is to be developed and approved by the Board prior to being set out by regulation pursuant to The Consumer Protection Act."

4. The Board hereby varies the following directive in Order 39/08 at pages 260 and 261:

   "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."

To be amended as follows:

"In determining adherence to this maximum, all mandatory 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."

5. In all other respects, Order 39/08 hereby is upheld.

THE PUBLIC UTILITIES BOARD

"GRAHAM LANE, CA"
Chairman

"GERRY GAUDREAU, CMA"
Secretary

Certified a true copy of Order No. 89/08
issued by The Public Utilities Board

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Secretary