

10-1-2011

Conceptions of Borrowers and Lenders in the Canadian Payday Loan Regulatory Process: The Evidence from Manitoba and Nova Scotia

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Recommended Citation

Freya Kodar, "Conceptions of Borrowers and Lenders in the Canadian Payday Loan Regulatory Process: The Evidence from Manitoba and Nova Scotia" (2011) 34:2 Dal LJ 443.

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Commentators characterize thinking about payday loans as falling into two general perspectives. In one theory, payday loans respond to market demand and are a sensible choice for a consumer with limited assets, credit, or other support when an unexpected financial need arises. The opposing theory holds that the loans are usurious and exploit vulnerable low-income borrowers. In 2007, amendments were passed exempting payday loans from the application of the criminal interest rate provisions of the Criminal Code if they were made by companies licensed by a province with a regulatory scheme. The author examines how federal and provincial lawmakers and administrative decision-makers understood payday loans and those who use them, and how the conceptualizations of borrowers and the industry are reflected in the regulatory regimes that emerged. To do this the author considers the federal legislative debates about the Criminal Code amendments and the subsequent cost-setting decisions in Manitoba and Nova Scotia, the first two provinces to regulate payday lending. Despite Manitoba's focus on more vulnerable borrowers, she concludes that, assessed as a whole, the regulatory regimes better correspond to the "market demand" school of thought about payday loans.

D'après les commentateurs, les opinions concernant les prêts sur salaire peuvent être réparties en deux grandes perspectives: d'un côté, les prêts sur salaire répondent à une demande du marché et sont un choix sensé pour les consommateurs qui ont peu d'actifs, un mauvais dossier de crédit ou n'ont pas d'autres recours en cas de besoin financier imprévu. De l'autre côté, ces prêts sont usuraires et exploitent les emprunteurs vulnérables à faible revenu. En 2007, des modifications ont été apportées à la loi pour exempter les prêts sur salaire de l'application des dispositions sur les taux d'intérêt criminels du Code criminel s'ils sont offerts par des entreprises détentrices d'un permis provincial émis en vertu d'un régime réglementaire. L'auteure étudie la connaissance que les législateurs fédéral et provinciaux et les décideurs administratifs avaient des prêts sur salaire et de ceux qui y ont recours, et la façon dont les conceptualisations des emprunteurs et de l'industrie sont reflétées dans les régimes de réglementation qui ont suivi. Pour ce faire, l'auteure examine les débats législatifs fédéraux sur les modifications au Code criminel et les décisions ultérieures quant à la détermination des coûts prises au Manitoba et en Nouvelle-Écosse, les deux premières provinces à réglementer les prêts sur salaire. En dépit des précautions prises par le Manitoba relativement aux emprunteurs les plus vulnérables, l'auteure conclut que lorsqu'ils sont évalués dans leur ensemble, les régimes de réglementation penchent du côté de l'école de pensée qui entend répondre à la demande du marché pour ce qui est des prêts sur salaire.

* Faculty of Law, University of Victoria. I would like to thank Rose Camara, Lyndsey Delamont, Angela Murray, and Chris Tait for their diligent research assistance; participants at the Managing Business Risk Roundtable, National Centre for Business Law, University of British Columbia, Vancouver, January 2009 who provided feedback on a very preliminary presentation of these ideas; and Judy Fudge, Karen Pearlston, and Mary Anne Waldron for their comments. I also thank the National Centre for Business Law for a grant which helped fund the research assistance for this project.

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Introduction

A significant area of recent regulatory activity in the Canadian consumer protection field has been with respect to payday loans. Until recently these loans were “regulated” by the 60% cap on interest in section 347 of the *Criminal Code*—the criminal interest rate provisions.¹ Although payday loan borrowers have regularly paid interest and fees that together amount to well over 60% per annum, payday loan providers have rarely been prosecuted. In 2007, amendments were passed exempting short-term (less than 62 days) loans of \$1500 or less from the application of section 347 if they are made by companies licensed by a province with a regulatory scheme “that protect[s] recipients of payday loans and...limits...the total cost of borrowing.”² In making these amendments the federal government effectively transferred regulatory authority over payday lenders to provinces that enact legislation. To date, most provinces have passed legislation, although it is not in force in all the jurisdictions. Generally the regulatory scheme has been incorporated within existing consumer protection statutes.

Ruth Berry and Karen Duncan characterize thinking about payday loans as falling into two general “schools of thought” or perspectives.³ Roughly speaking, payday loans either respond to market demand, and are a sensible choice for a consumer with limited assets, credit, or other support when an unexpected financial need arises.⁴ Or the loans are exploitative and usurious, and vulnerable low-income consumers will “fall prey to them.”⁵ This paper looks at how lawmakers and administrative decision-makers understood payday loans and those who used them, and how they articulated the purpose of the new regulatory regime. To do this I examine the debates about the *Criminal Code* amendments at the federal level, and decisions about the substance of key elements of the new regime by two provincial administrative bodies: the Manitoba Public Utilities Board

1. RSC 1985, c C-46.

2. *Ibid* at s 347.1 (3), as amended by *An Act to amend the Criminal Code (criminal interest rate)*, SC 2007, c 9.

3. Ruth E Berry & Karen A Duncan, “The Importance of Payday Loans in Canadian Consumer Insolvency” (October 2007) Report Prepared for the Insolvency Research Initiative, Office of the Superintendent of Bankruptcy Canada, online: <[http://www.ic.gc.ca/eic/site/bsf-osb.nsf/vwapj/Payday_EN.pdf/\\$file/Payday_EN.pdf](http://www.ic.gc.ca/eic/site/bsf-osb.nsf/vwapj/Payday_EN.pdf/$file/Payday_EN.pdf)> at 3. See also *Maximum Charges for Payday Loans* (4 April 2008) Order No. 39/08, online: MPUB <<http://www.pub.gov.mb.ca/pdf/misc/39-08.pdf>> at 121-22 [*Maximum Charges*]; Paul Bowles, Keely Dempsey & Trevor Shaw, “Fringe Financial Institutions, the Unbanked and the Precariously Banked: Survey Results from Prince George, B.C.” (September 2010) Report Prepared for the Aboriginal Business Development Centre at 5-6 (copy on file with the author).

4. Berry & Duncan, *supra* note 3 at 5-8.

5. *Ibid* at 7.

(MPUB) and the Nova Scotia Utility and Review Board (NSUARB). Manitoba and Nova Scotia were the first two provinces to regulate payday lending. These boards were responsible, at least initially, for setting the limits on the cost of borrowing and charges and interest on default, as well as making recommendations about regulatory amendments. I am interested in thinking about how the conceptualization of borrowers and the industry in the regulatory debates is reflected in the regulatory regimes that emerged.

I have chosen to look at the federal legislative debates and the utility boards' decisions because they all draw on, refer to, and interpret oral and written submissions from consumers and industry. Moreover, analysis of legislative debates provides both an interpretative tool for understanding the legislation,⁶ and "offer(s) a glimpse of the public justifications employed by...[Parliamentarians] when discussing policy decisions."⁷ Similar arguments can be made about examining the two rate-setting bodies' decisions.

In addition, the administrative decisions provide insights into the ways in which the legislation, which mandated the respective boards to consider the interests of payday borrowers and lenders in making an order that is "just and reasonable in the circumstances"⁸ was subsequently applied. There is another pragmatic reason for focusing on the decisions generated by these two regulatory bodies rather than the individual submissions to them. The NSUARB provides access to the documents submitted, but hearing transcripts are not publicly available online. Conversely, the MPUB provides online access to transcripts, but not to the documents. Therefore, the decisions are the only comparable texts.

The first section of the paper provides an overview of payday loans in Canada. The second section looks at the regulatory history leading up to the *Criminal Code* amendments. It focuses on the ways in which consumers and lenders and those who represented them responded to the regulatory scheme in place before the amendments, how they characterized payday loan borrowers and the industry, and how they articulated the vulnerabilities and risks created by the previous regulatory regime.

6. Ruth Sullivan, *Statutory Interpretation*, 2d ed (Toronto: Irwin Law, 2007) at 279-90; Stéphane Beaulac, "Recent Developments at the Supreme Court of Canada on the Use of Parliamentary Debates" (2000) 63 Sask L Rev 581.

7. Andrew Woolford & Jasmine Thomas, "Exception and Deputization under Today's NDP: Neo-liberalism, the Third Way, and Crime Control in Manitoba" (2011) 26 CJLS 113 at 119.

8. *Consumer Protection Act*, RSNS, 1989, c 92, s 18T(5), as amended by *An Act to Amend Chapter 92 of the Revised Statutes, 1989, the Consumer Protection Act*, SNS 2006, c 25 [NSCPA]; *Consumer Protection Act*, CCSM c C200, s 164(5) as amended by *The Consumer Protection Amendment Act (Payday Loans)*, SM 2006, c 31 [MCPA 2006].

The remainder of the paper examines the characterization of borrowers and lenders, and the purpose(s) of the legislative regime in two contexts: the federal legislative debates about the *Criminal Code* amendments and subsequent cost-setting decisions in Manitoba and Nova Scotia. As it turned out, these boards set the lowest and highest caps to date on the cost of borrowing and other charges. The NSUARB also recently reviewed its decision and reduced the maximum cost it set in 2008.⁹ This makes Nova Scotia the first province to conduct a review of a fully implemented payday loan regulatory regime.

In the last section I consider the understandings of the payday loan industry and borrower reflected in the regulatory regimes that emerged. Despite Manitoba's focus on more vulnerable borrowers, I conclude that assessed as a whole, the regulatory regimes better correspond to the "market demand" school of thought about payday loans. The industry is seen as responding to consumer demand and filling a gap in the consumer credit market. The borrower is understood to be an average consumer freely choosing the loan and fully aware of its costs. Regulation is designed to increase competition and ensure adequate disclosure about loan costs and terms so that consumers can make informed choices. This will in turn result in an efficient payday loan market.

In some ways this conclusion is not surprising given that the federal government acted to permit lenders to charge what would otherwise be criminal interest rates on loans in a province with a regulatory scheme and a federal Cabinet "designation," and both Manitoba and Nova Scotia chose to regulate and seek a designation. What *is* surprising is the extent to which this understanding dominates the regimes, particularly in Nova Scotia, because the divergent perspectives on the industry and borrowers—what I refer to in the paper as the "market demand" and the "exploitative" schools of thought—were present in the debates, the administrative decisions, and the submissions considered in these processes. At all stages of the regulatory process there was evidence supporting the conception of the payday loan borrower as particularly vulnerable, with few choices and at risk of exploitation. Moreover, both federal and provincial decision-makers could have responded to both kinds of borrower/consumer, yet implemented only a limited number of the measures recommended to protect more vulnerable borrowers.

9. 2011 NSUARB 22 at para 114 [*NSUARB 2011*].

I. *Payday loans*

1. *Overview*

Payday loans are relatively small loans given in exchange for a post-dated cheque or a pre-authorized withdrawal from a bank account in the amount of the loan plus interest and any other fees. They are part of a range of financial services available in the “alternative financial sector” (AFS).¹⁰ In addition to payday loans, the AFS provides services such as cheque-cashing, rent-to-own purchases, and pawnbroking. Services are usually targeted towards those with lower incomes or poor credit histories.¹¹ Payday loan companies first appeared in the 1990s, and have rapidly expanded to include approximately 1,600 outlets nationwide.¹² In 2008 approximately 4,330,000 payday loans were issued.¹³ Payday loans generally range from \$100 to \$1,000, with the average loan being \$280 for a 10 day period.¹⁴ The interest and fees charged vary, but as an annual percentage rate (APR) are well above the 60% limit set by section 347.¹⁵ For purposes of comparison, the Financial Consumer Agency of Canada (FCAC) gives examples of credit card interest rates ranging from 12% to 19%.¹⁶ Interest rates for unsecured personal lines of credit are generally lower.¹⁷

Borrowers take out payday loans for a variety of reasons. They might (1) be unable to get cheaper forms of credit such as a line of credit, credit card, or overdraft protection¹⁸; (2) live in a community not served

10. Iain Ramsay, “The Alternative Consumer Credit Market and Financial Sector: Regulatory Issues and Approaches” (2001) 35 Can Bus LJ 325 at 333-34.

11. *Ibid* at 334.

12. Canadian Payday Loan Association, “Our Mandate,” online: <<http://www.cpla-acps.ca/english/aboutmandate.php>> [CPLA, “Mandate”]. See also Andrew Kitching & Sheena Starkey, Parliamentary Information and Research Service, *Payday Loan Companies in Canada: Determining the Public Interest* (Ottawa: Library of Parliament, 2006) at 4.

13. *Maximum Charges*, *supra* note 3 at 38.

14. Wendy Pyper, “Payday Loans” (2007) 8:4 Perspectives on Labour and Income 5 at 6; Canada Payday Loan Association, “What is a payday loan and who uses it?” online: <<http://www.cpla-acps.ca/english/mediabackgrounders1.php>> [CPLA, “What is a payday loan?”].

15. See, e.g., Ramsay, *supra* note 10 at 344; Association of Community Organizations for Reform Now (ACORN) Canada, *Protecting Canadians’ Interest: Reining in the Payday Lending Industry* (Vancouver, BC: ACORN, 2004) at 32-33 (Appendix 2) [ACORN, *Protecting Canadians’ Interest*]; *Affordable Payday Loans v Firth et al*, [2005] OJ no 1232 (Ct J (Gen Div Sm Cl Ct)) [*Affordable v Firth*]. The current costs in provinces regulating the industry range from \$17 per \$100 in Manitoba to \$25 per \$100 in Nova Scotia: *Payday Loans Regulation*, Man Reg 99/2007, s 13.1(1); *NSUARB 2011*, *supra* note 9 at 2.

16. “Choosing the Right Credit Card for You”, online: <<http://www.fcac-acfc.gc.ca/eng/resources/publications/PaymentOptions/RightCC/RightCC-3-eng.asp>>.

17. “Shopping Around for a Line of Credit”, online: <<http://www.fcac-acfc.gc.ca/eng/resources/publications/banking/TSLineCredit-eng.asp>>. See also *Maximum Charges*, *supra* note 3 at 6.

18. Pyper, *supra* note 14 at 5.

by mainstream banks¹⁹; and/or (3) like the borrowing process, location, and hours of payday loan outlets.²⁰ Borrowers do not operate completely outside the mainstream financial sector though, as they must have a bank or credit union account.²¹

Statistics Canada recently started tracking payday loan use. Its 2005 Survey of Financial Security asked about their use in the previous three years. Less than 3% of families surveyed had taken out payday loans. Those that were more likely to have used one included young families; low income families with few assets; renters; those who did not have credit cards, or who were unable to pay down credit card balance(s); those who were behind in bill payments, including rent/mortgage payments; those who had already tried to sell or pawn an asset; and those who did not have anyone they could ask for help in a time of unexpected financial difficulty.²² More than 25% of those who had used a payday loan indicated they would not be able to handle an unexpected expense of \$500, while almost 50% said they would not be able to do so for one of \$5,000.²³

In another survey, only 48% of payday loan borrowers surveyed understood that the interest they were paying was more than the interest on a credit card purchase.²⁴ The MPUB estimated that the average payday borrower takes out four to six loans a year.²⁵ In short, those who use payday loans tend to be more vulnerable consumers in terms of their ability to access credit in the mainstream financial system or to cover basic living costs without incurring or increasing their debt.

2. *Regulatory history*

The payday loan industry is not subject to the legislative schemes governing mainstream deposit-taking institutions such as banks and credit unions. As the industry grew, consumers and organizations such as the Public Interest Advocacy Centre (PIAC) and the Association of Community Organizations

19. ACORN, *Protecting Canadians' Interest*, *supra* note 15 at 15; ACORN Canada, *A Conflict of Interest: How Canada's Largest Bankers Support Predatory Lending* (Toronto: ACORN Canada, 2007) at 3.

20. Pyper, *supra* note 14 at 5. See also Kitching & Starky, *supra* note 12 at 2-3; Ipsos-Reid Corporation, *Public Experience with Financial Services and Awareness of the FCAC* (Ottawa: Financial Consumer Agency of Canada, 2005) at 11-12.

21. *Maximum Charges*, *supra* note 3 at 46-47. See also Bowles, Dempsey & Shaw, *supra* note 3 at 44-45.

22. Pyper, *supra* note 14 at 6-12.

23. *Ibid* at 10, 12.

24. Ipsos-Reid Corporation, *supra* note 20 at 18.

25. *Maximum Charges*, *supra* note 3 at 38.

for Reform Now (ACORN), as well as government representatives,²⁶ became concerned about the vulnerability of many borrowers, the high cost of loans, and a lack of transparency about loan terms and costs.²⁷ They were also critical of the way practices such as “rollovers” and multiple concurrent loan-holding pulled consumers into a cycle of increasing debt.²⁸ They called for comprehensive regulation of the industry and its practices.²⁹

Although it is a criminal offence to charge or “receive interest at a criminal rate”³⁰ there have been few prosecutions of payday lenders.³¹ Instead the fact that lenders were charging criminal interest rates became central to class action lawsuits brought by consumers against lenders for unjust enrichment.³² The payday loan industry has vigorously defended these actions.³³

The borrower at the centre of the consumer discourse was a vulnerable one, with low-income and insecure employment, few (if any) savings

26. The Consumer Measures Committee, a committee with federal, provincial and territorial representation, is mandated to work together on issues related to consumer protection and consumer affairs. Its Working Group on the Alternative Consumer Credit Market began looking at improving practices within the Alternative Consumer Credit Market, including payday loans, as early as 2000.

27. See, e.g., Sue Lott & Michael Grant, *Fringe Lending and “Alternative” Banking: The Consumer Experience* (Ottawa: Public Interest Advocacy Centre, 2002); Consumer Measures Committee Working Group on the Alternative Consumer Credit Market, *Consultation Paper on Framework Options For Addressing Concerns with the Alternative Consumer Credit Market* (Consumer Measures Committee, 2002); ACORN, *Protecting Canadians’ Interest*, *supra* note 15.

28. If the borrower does not have sufficient funds to repay the loan, some lenders may allow him or her to, for an additional fee, “rollover” the loan.

29. For overviews of the regulatory reforms proposed see, e.g., ACORN, *Protecting Canadians’ Interests*, *supra* note 15 at 26-28; John Lawford, *Pragmatic Solutions to Payday Lending: Regulating Fringe Lending and “Alternative” Banking* (Ottawa: Public Interest Advocacy Centre, 2003) at 48-52.

30. *Criminal Code*, *supra* note 1 at s 347(1).

31. *Maximum Charges*, *supra* note 3 at 113-14. See also Consumer Measures Committee Working Group, *supra* note 27 at 4.

32. See, e.g., *MacKinnon v National Money Mart Co*, 2006 BCCA 148; *Bodnar v Cash Store Inc*, 2010 BCSC 145. Lenders seeking to enforce the terms of a payday loan also ran the risk a court would sever the interest and fees from the loan principal. See, e.g., *Affordable v Firth*, *supra* note 15. For a discussion of recent payday loan litigation see generally Mary Anne Waldron, “A Brief History of Interest Caps in Canadian Consumer Lending: Have We Learned Enough From the Past?” (2011) 50 CBLJ 300 at 309-15.

33. As National Money Mart stated of its defence of *Smith v National Money Mart*: “We believe in the merits of our business practices and in the quality of our products and services. That is why, for the past five and a half years, we have vigorously defended every allegation...and why we intend to continue to do so throughout this trial”: National Money Mart Company, News Release, “Money Mart Comments on Class Action Trial” (27 April 2009) online: CNW <<http://www.newswire.ca/en/releases/archive/April2009/27/c5410.html>>. The parties ultimately agreed to a \$100 million settlement, subject to court approval. Money Mart’s parent company “admit[ted] no wrong doing,” indicating that the “settlement will allow us to avoid the continuing substantial litigation expense”; Dollar Financial Corp, News Release, “Dollar Financial Corp Announces Expected Settlement in Ontario Class Action Litigation” (9 June 2009) online: DFC <<http://phx.corporate-ir.net/phoenix.zhtml?c=177357&p=irol-newsArticle&ID=1297774&highlight=>>>.

or assets, living paycheque to paycheque, on the edges of the financial mainstream without access to credit, at risk of exploitation by lenders who were actively evading the law. Frequent payday loan users were even more vulnerable and at risk of being drawn into a cycle of debt.

The industry responded by pursuing self-regulation and government regulation. In 2004, it formed what is now the Canadian Payday Loan Association (CPLA), a self-regulatory body that currently represents a significant proportion of the industry.³⁴ Its early activities suggest the CPLA sought to address criticisms of the industry. It commissioned Ernst & Young to assess industry costs,³⁵ and it created a *Code of Best Business Practices* (the Code).³⁶

Ernst & Young's study determined the industry-wide average cost (operating and loan capital and bad debt) of a payday loan to be \$20.66 per \$100. The weighted average, which factors in market share, was \$15.69 per \$100. The difference in cost for a large lender and a smaller one was significant: \$16.93 per \$100 versus \$22.88.³⁷ The report also concluded payday lenders are dependent "on maintaining a substantial repeat customer base."³⁸

While the commissioning of the Ernst & Young report responded to concerns about loan costs, the Code addressed some of the criticisms about lending practices and transparency. For example, although it sets no limits on the cost of borrowing, it does prohibit rollovers, and interest, fees, and other costs are to be disclosed in plain language.³⁹

The CPLA also sought legislative reforms. Indeed, in describing itself it states it "is not your typical industry association. We're calling for regulation, not fighting it."⁴⁰ The industry argued section 347 should not apply to the small, short-term loans they provided and, more particularly, that it was inappropriate to assess the usurious nature of the loan by annualizing its cost. They suggested payday loans were designed for occasional use, not for regular shortfalls in income.

34. CPLA, "Mandate", *supra* note 12.

35. Ernst & Young, *The Cost of Providing Payday Loans in Canada: A Report Prepared for the Canadian Association of Community Financial Service Providers* (Tax Policy Services Group, 2004), online: Canada Payday Loan Association <<http://www.cpla-acps.ca/english/reports/EYPaydayLoanReport.pdf>>.

36. Canadian Payday Loan Association, online: <<http://www.cpla-acps.ca/english/consumercode.php>> [CPLA, *Code*].

37. Ernst & Young, *supra* note 35 at 29.

38. *Ibid* at 46. The costs to provide the first loan were 2.68 times higher than for providing repeat or rollover loans, with first-time loans accounting for 85% of operating costs (at 34).

39. CPLA, *Code*, *supra* note 36.

40. Canadian Payday Loan Association, "Welcome to the CPLA," online: <<http://www.cpla-acps.ca/english/home.php>>.

The industry presented a very different discourse about borrowers, challenging their characterization as vulnerable. Instead they argued borrowers were educated, average Canadians with household incomes close to the median who took out payday loans for convenience and flexibility and understood their costs.⁴¹ Payday lenders were providing (1) more choice in the lending marketplace; and (2) a service by lending to those deemed too high risk by mainstream financial institutions. This risk in turn justified higher interest rates and fees.

Thus by 2006, when the *Criminal Code* amendments were introduced, all sides in the debates were calling for legislative reform and industry regulation. The next section looks at the legislative debates about the amendments. In particular it looks at the claims made about the industry and borrowers, and about how the legislation would protect consumers.

3. *Federal response: Bill C-26*

Bill C-26, *An Act to amend the Criminal Code (criminal interest rate)*⁴² added section 347.1 to the *Criminal Code*. The section exempts lenders from prosecution under section 347 for payday loans that meet the following criteria: (1) they are for \$1500 or less; (2) for up to 62 days; (3) the lender is licensed by a province; and (4) the province has been designated by Cabinet under section 347.1(3).⁴³ This section provides (1) that Cabinet shall, at the request of the province, designate it for the purposes of sections 347.1 and (2), if the province has legislation in place that “protect[s] recipients of payday loans and that provide[s] for limits on the total cost of borrowing under the agreements.”⁴⁴

a. *Bill C-26 in the House of Commons*

Members of Parliament (MPs) did not hear directly from lenders or borrowers, or those representing them. Instead, speakers referred to reports and recommendations of a number of organizations including the CPLA, PIAC, and the Consumers’ Association of Canada (CAC). At the committee stage, the Standing Committee on Industry, Science and Technology (House Standing Committee) called senior staff with the Departments of Industry and Justice as witnesses.

The governing Conservative Party, and the opposition Liberal and New Democratic (NDP) Parties supported the Bill, while the Bloc

41. CPLA, “What is a payday loan?”, *supra* note 14.

42. SC 2007, c 9.

43. *Criminal Code*, *supra* note 1 at s. 347.1(2).

44. *Ibid* at s 347.1(3).

Québécois (Bloc) did not.⁴⁵ Debate reflected the competing schools of thought about payday loans. Some of the Bill's supporters pointed to the need for regulation to protect vulnerable consumers from unscrupulous lending practices and costs. Others supported it because it would provide certainty, security, and legitimacy to payday lenders.

Regardless of their perspective, a recurring theme from supporters was that the industry's existence and rapid growth justified its regulation. In introducing the legislation, the Minister of Justice stated that "the bill is about providing greater protection to Canadians. It is about enabling the regulation of an industry which, for better or for worse, has come to occupy a very real place in Canadian cities and towns."⁴⁶ Or as Tony Martin, a New Democrat put it, "if these payday loan operations are going to exist, and it looks like they will for a while, let us at the very least make sure they are regulated."⁴⁷

MPs subscribing to the market demand school saw the industry as simply responding to consumer demand and a market gap. They pointed out that the CPLA "ha[d] been very forthcoming in lobbying for a bill to protect consumers"⁴⁸ to "give their industry both legitimacy and long term viability."⁴⁹ Lenders, they argued, faced the risks of loan default by high risk customers and potentially bankrupting class action suits.⁵⁰ The amendments opened the door for provincial regulation, would assist consumers "to function in fair and efficient markets,"⁵¹ and protect lenders who were responding to consumer demand.

Those who supported the amendments, but were more critical of the industry did not agree that its growth should simply be understood as "evidence [it] is fulfilling an otherwise unmet need for short term credit and/or convenience."⁵² Nor did they understand borrowers to be unconstrained in choosing a loan product. Instead they were vulnerable consumers: "individuals who are basically forced to use these services

45. *House of Commons Debates*, 39th Parl, 1st Sess, No 104 (6 February 2007) at 6496 (Results of Third Reading Vote).

46. *House of Commons Debates*, 39th Parl, 1st Sess, No 068 (24 October 2006) at 4814 (Hon Vic Toews).

47. *House of Commons Debates*, 39th Parl, 1st Sess, No 104 (6 February 2007) at 6431.

48. *House of Commons Debates*, 39th Parl, 1st Sess, No 068 (24 October 2006) at 4200 (Brian Murphy).

49. *House of Commons Debates*, 39th Parl, 1st Sess, No 077 (6 November 2006) at 4772 (Blaine Calkins).

50. *House of Commons Debates*, 39th Parl, 1st Sess, No 103 (5 February 2007) at 6382 (Ken Boshcoff).

51. *House of Commons Debates*, 39th Parl, 1st Sess, No 077 (6 November 2006) at 4763 (Colin Carrie).

52. *House of Commons Debates*, 39th Parl, 1st Sess, No 103 (5 February 2007) at 6422 (Paul Szabo).

are the ones who can least afford to pay these high fees. Maybe they need the dollars to provide food, buy groceries... Maybe they need the dollars for a medical bill or maybe they even need the dollars to pay the minimum payment on a high interest bearing credit card.”⁵³ As one MP noted, “Anybody who is prepared to pay effectively a 60% interest rate on a cash advance clearly has no credit and no options.”⁵⁴ In opposing the bill, the Bloc argued the amendments were an “underhanded means to help people who have difficulty getting a loan to get money from payday lenders. ...[L]enders have put pressure on the government to legalize their existence.”⁵⁵ There was also discussion about the fact that mainstream financial institutions had vacated the marketplace for small, short-term loans. Opposition MPs suggested Parliament encourage them to re-enter the market voluntarily or through legislative means.⁵⁶

There was surprisingly little discussion of two key issues. The first was that the amendments would effectively permit lenders to charge criminal interest rates. The second was the criteria, if any, that would be used to decide if a province seeking designation under section 347.1(3) had legislation in place that “protected” borrowers. It was not until the committee stage that it was clearly stated that the amendments would permit payday lenders to charge what would otherwise be criminal interest rates: “[c]ertainly we’re talking about provinces regulating these payday lenders and allowing them to charge more than 60%... The exemption is necessary so that they can allow them to charge more than 60%.”⁵⁷ Although the discussion about interest rates was initiated by a Liberal MP, it was largely Bloc MPs who objected to the idea that lenders would be able to charge rates above 60%.⁵⁸

The Bloc raised the issue again during third reading, with one MP noting the CAC objected to the legislation because it would not protect consumers from high interest rates, and the CAC “believe[d] that the industry [was] calling for this amendment for its own benefit.”⁵⁹ A few MPs, largely from the NDP, skirted the point by focusing on provincial

53. *Ibid* at 6383 (Hon Wayne Easter).

54. *Ibid* at 6422 (Paul Szabo).

55. *Ibid* at 6417 (Robert Vincent).

56. See, e.g., *ibid* at 6384 (Pat Martin), 6386 (Paul Crête); *House of Commons Debates*, 39th Parl, 1st Sess, No 104 (6 February 2007) at 6428-30 (Tony Martin), 6436 (Brian Murphy).

57. House of Commons, Standing Committee on Industry, Science and Technology (INDU), *Evidence*, 39th Parl, 1st Sess, No 38 (12 December 2006) at 4 (William Bartlett, Senior Counsel, Criminal Law Policy Section, Department of Justice).

58. *Ibid* at 4 (Paul Crête).

59. *House of Commons Debates*, 39th Parl, 1st Sess, No 104 (6 February 2007) at 6431-32 (Nicole Demers).

regulatory powers. For example, in response to criticism the NDP was supporting criminal interest rates, Judy Wasylycia-Leis stated “[t]he situation is quite the opposite. We reject the idea that we should simply talk about a 60% interest rate...We are simply saying that we would like the federal government and the provinces...to agree that they will put aside the criminal rate of interest...when a province has a better system to manage this area.”⁶⁰

However, public servants indicated that “[t]here’s really no intent here for the federal government to pass on the adequacy of the provincial legislation.”⁶¹ There were to be few, if any, criteria attached to the requirement that the provincial regulatory scheme “protect recipients of payday loans” beyond limits on the costs of borrowing. Yet all parties supporting the legislation appeared confident in the provinces’ ability to create regulatory schemes that would protect consumers, curtail industry practices that had attracted criticism, and set a reasonable ceiling on payday loan costs.

b. *Bill C-26 in the Senate*

While Senate debate echoed many of the questions and concerns raised in the House of Commons, senators were more clearly focused on the fact that the amendments could permit licensed lenders to charge interest of more than 60% APR. There was also considerable discussion of what “protect” meant in the context of the proposed section 347.1(3) requirement that a province seeking a designation have legislation in place that “protects” payday loan borrowers. Senators were concerned that there were virtually no criteria to provide guidance to cabinet in deciding whether to designate a province.⁶² Senators also delved more deeply into why mainstream lending institutions were not providing the kinds of loans sought by payday loan borrowers.

Much of the discussion took place at the committee stage. In addition to the civil servants who had appeared before the House Standing Committee, the Standing Committee on Banking, Trade and Commerce (Senate Standing Committee) called representatives from mainstream financial institutions, the payday loan industry, the FCAC, the Competition Bureau of Canada (the Competition Bureau), the Ombudsman for Banking

60. *House of Commons Debates*, 39th Parl, 1st Sess, No 103 (5 February 2007) at 6414.

61. House of Commons, Standing Committee on Industry, Science and Technology (INDU), *Evidence*, 39th Parl, 1st Sess, No 38 (12 December 2006) at 5 (William Bartlett, Senior Counsel, Criminal Law Policy Section, Department of Justice).

62. See, e.g., Senate, Standing Committee on Banking, Trade and Commerce, *Evidence*, 39th Parl, 1st Sess, No 16 (28 February 2007) at 22-27.

Services and Investments, and the CAC as witnesses. It also heard from former Senator Madeleine Plamondon who had sponsored an earlier, unsuccessful bill to regulate payday loans.⁶³

Some senators and witnesses opposed permitting costs above 60% APR. They argued the amendments offered little protection to vulnerable consumers and gave government little influence over the rate(s) provinces set.⁶⁴ Others indicated they were “not prepared to force an industry into losing money [and that] [t]his industry came about...to meet the needs of the little people and people who are willing to pay.”⁶⁵ When asked what a “fair, reasonable and appropriate cap”⁶⁶ for a \$100 loan would be, the CPLA suggested \$20, although it indicated it would not necessarily see a cap of up to \$30 as excessive.⁶⁷ The CPLA stressed the need for a cap high enough to encourage competition while “protect[ing] consumers from companies that will gouge them with high fees.”⁶⁸

Competition was a central theme of the presentation from Rentcash Inc., a national payday lending company. It argued the Bill would reduce competition and create monopolies. It proposed amendments to ensure that “transparency, competition and consumer choice [would be] preconditions of provincial designation,”⁶⁹ and monopolies avoided. Although Rentcash did not favour rate caps, its witnesses acknowledged the public pressure on governments to set them. When pressed, its vice-president suggested an appropriate cost ceiling would be one that matched its current fee structure, \$21.60 per \$100.⁷⁰

Senators consulted staff with the Competition Bureau about whether the legislation would encourage monopolies in one or all the provinces.⁷¹ The Competition Bureau indicated that although it generally preferred to leave product pricing to the market, this approach did not appear to be working. Despite the number of payday lenders, loan costs continued to be

63. Bill S-19, *An Act to amend the Criminal Code*, 1st Sess, 38th Parl, 2004.

64. See, e.g., *Debates of the Senate*, 39th Parl, 1st Sess, vol 143, No 76 (28 February 2007) at 1854 (Hon Sen Céline Hervieux-Payette, Leader of the Opposition), and the evidence of Madelaine Plamondon and representatives from the CAC. Senate, Standing Committee on Banking, Trade and Commerce, *Evidence*, 39th Parl, 1st Sess, No 16 (1 March 2007) at 41-53; Senate, Standing Committee on Banking, Trade and Commerce, *Evidence*, 39th Parl, 1st Sess, No 17 (21 March 2007) at 30-36.

65. Senate, Standing Committee on Banking, Trade and Commerce, *Evidence*, 39th Parl, 1st Sess, No 16 (1 March 2007) at 45 (Hon Sen W David Angus).

66. *Ibid* at 69.

67. *Ibid* at 70 (Stan Keyes). A cost of \$21 for a \$100 loan over 14 days is 521% APR. At \$30 it is 782%.

68. *Ibid* at 66.

69. *Ibid* at 73 (Michael Thompson, Vice-President, Rentcash Inc).

70. *Ibid* at 75, 82-83.

71. Senate, Standing Committee on Banking, Trade and Commerce, *Evidence*, 39th Parl, 1st Sess, No 16 (28 February 2007) at 32 (Hon Sen Jeremiah Grafstein).

high, causing public concern and suggesting a problem within the payday loan market. Given the current market situation, the Competition Bureau did not object to the Bill and noted the *Competition Act* would continue to apply to the industry.⁷²

Other senators on the Senate Standing Committee appeared to share a similar view—that although the free market was the best means for allocating resources, when it was not working, the state needed to get involved. This is captured nicely in the following remark by the Chair: “I believe in the competitive model, but that presumes a question of free choice in a free marketplace. However, when choice is limited, the wicked arm of the government has to reach out and try to protect consumers as best we can.”⁷³

The Senate Standing Committee also discussed why the services payday lenders provided were not available from mainstream financial institutions. In this context it consulted with Alterna Savings, a credit union in Ontario, about its work in assessing whether it could provide some of the products currently offered by payday lenders.⁷⁴

In the end, despite concerns about its inability to ensure provinces enacted legislation with sufficient levels of consumer protection, and the possibility of a patchwork of provincial regulatory schemes, the Senate Standing Committee recommended the Bill be passed without amendments because it did not want to unduly delay legislation that would protect vulnerable consumers.⁷⁵ It urged provinces to ensure their legislation included measures to limit rollovers, resolve complaints, ensure full disclosure of loan terms, follow reasonable debt collection processes, and provide a rescission right no later than the end of the day after the loan had been taken out. The Senate Standing Committee also expressed concern about the “lack of involvement by chartered banks in short-term, low-value-lending,” urging them to enter the marketplace for such loans.⁷⁶ The Senate went on to approve the Bill.

72. Senate, Standing Committee on Banking, Trade and Commerce, *Evidence*, 39th Parl, 1st Sess, No 17 (21 March 2007) at 9 (Colette Downie, Acting Deputy Commissioner, Competition Bureau of Canada), 13 (David McAllister, Senior Advisor, Competition Bureau of Canada).

73. *Ibid* at 29 (Hon Sen Jerahmiel Grafstein).

74. Senate, Standing Committee on Banking, Trade and Commerce, *Evidence*, 39th Parl, 1st Sess, No 16 (1 March 2007) at 55 (Norman Ayoub, Senior Vice-President, Chief Operating Officer, Alterna Savings).

75. Senate, Standing Senate Committee on Banking, Trade and Commerce, *Observations to the Fifteenth Report of the Standing Senate Committee on Banking, Trade and Commerce (Bill C-26)*, 39th Parl, 1st Sess, No 20 (19 April 2007) 9 at 9.

76. *Ibid* at 10.

c. *Provincial reaction*

To date, all the provinces except Québec and Newfoundland have enacted legislation regulating payday loans, although not all have proclaimed it in force. Generally speaking, the legislation and regulations contain provisions relating to disclosure, licensing, borrower cancellation rights, rollovers, extensions, renewals and replacements, and the holding of concurrent loans. They permit the respective licensing agencies to investigate complaints, ensure compliance, and levy fines. The legislative schemes also place limits on the interest and other fees that can be charged.⁷⁷

One area where there is significant variation is in the process for setting the limits on the costs of borrowing. In the majority of provinces, Cabinet sets it.⁷⁸ In some of these jurisdictions, governments have conducted consultation processes before finalizing the legislation and setting the maximum costs.⁷⁹ Three other provinces, Nova Scotia, New Brunswick and, initially, Manitoba, delegate the task to their respective public utilities boards.⁸⁰ Two of the boards, the MPUB and the NSUARB, have held public hearings and issued decisions setting the maximum costs of borrowing and recommending further legislative amendments.⁸¹ In addition to being the first jurisdictions to establish limits on borrowing costs, they set the lowest and the highest caps to date: with Manitoba's limit of \$17 per \$100, and Nova Scotia's of \$31 per \$100. Such a difference seems surprising, particularly since they were imposed by administrative bodies experienced in setting rate caps and balancing consumer and business interests in the process.

The next section takes a closer look at the narratives about the industry, borrowers, and the purpose(s) of the regulatory schemes in the hearings and decisions. The divergence in the maximum costs of borrowing ordered appears to stem from the fact that the MPUB and subsequent provincial

77. For a comparison of provincial regulatory regimes see Stephanie Ben-Ishai, "Regulating Payday Lenders in Canada: Drawing on American Lessons" (2008) 23 BFLR 323 at 335-42, 360-66, 370-76 (Current to 8 April 2008); *NSUARB 2011*, *supra* note 9 at para 45.

78. See, e.g., *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s 112.02, as amended by *Business Practices and Consumer Protection (Payday Loans) Amendment Act*, SBC 2007, c 35; *Payday Loans Act, 2008*, SO 2008, c 9, ss 32(2), 77(23).

79. In British Columbia, for example, the Ministry of Public Safety and solicitor general issued a consultation paper and requested responses to questions about a number of issues including disclosure and total borrowing costs. Ministry of Public Safety and solicitor general, *Consultation Paper: Regulation of payday lenders under the Business Practices and Consumer Protection Act* (Victoria: Ministry of Public Safety and Solicitor General, 2007).

80. *MCPA 2006*, *supra* note 8 at s 164; *N SCPA*, *supra* note 8 at s 18T; *Cost of Credit Disclosure Act*, SNB 2002, c C-28.3 Part V.1, Div F, s 37.47; as amended by *An Act Respecting Payday Loans*, SNB 2008, c 3. New Brunswick's legislation is not yet in force.

81. *Maximum Charges*, *supra* note 3; 2008 NSUARB 87 [*NSUARB 2008*].

government decisions respond to the more vulnerable borrower at risk of industry exploitation presented by consumer groups and other critics. In contrast, the NSUARB decision centres around an average borrower making a sensible choice in a moment of unexpected financial need, and an understanding of the payday loan industry as filling a gap in the consumer credit market. The analysis focuses on the submissions and decisions with respect to (1) the appropriate methodology for setting borrowing costs; (2) the maximum costs of borrowing; and (3) additional recommendations to government about the regulatory schemes.

II. *Provincial regulatory responses: Manitoba and Nova Scotia*

1. *Manitoba Public Utilities Board hearing: November 2007–February 2008*

At the time of the MPUB hearing, the provincial *Consumer Protection Act (MCPA)* required it to set the maximum cost of credit for a payday loan as well as the maximum costs for (1) a loan renewal or extension; (2) a replacement loan; or (3) on default.⁸² The MPUB was given a broad mandate to consider a number of factors in making an order that was “just and reasonable in the circumstances”⁸³ including: lender expenses and revenue, their financial risks, the circumstances of borrowers and other credit options available to them, and any factors or information it considered to be relevant and in the public interest.⁸⁴

Its decision-making process included four months of public hearings. It heard from eight interveners, seven of whom were from the payday lending industry: the CPLA, four payday lending companies, a lender to payday lenders, and a payday loan insurer. The eighth was a coalition of consumer organizations (the Coalition) comprised of the CAC (Manitoba), the Manitoba Society of Seniors, and Winnipeg Harvest, a food bank. The MPUB also heard from a number of presenters who asked, or were asked, to attend. They included payday loan users, researchers, and representatives from social service agencies and the industry.⁸⁵ The hearing process was characterized by the Coalition as unique and without “Canadian regulatory precedent.”⁸⁶

The MPUB’s decision includes summaries of the presentations and the interveners’ submissions and recommendations, along with its own

82. *MCPA 2006*, *supra* note 8 at s 164(2).

83. *Ibid* at s 164(5).

84. *Ibid* at s 164(4).

85. For more information about the process and the parties see *Maximum Charges*, *supra* note 3 at 4, 70-75.

86. Quoted in *ibid* at 119.

findings, recommendations and order. The competing schools of thought about payday loans and borrowers thread through the submissions and the MPUB decision. As the MPUB was actually setting the maximum costs of borrowing, there was more attention to competition, choice and rate-setting than there had been during the Parliamentary debates.

a. *Submissions*

i. *Approach to regulation*

The Coalition argued the provincial payday loan market was not adequately protecting consumers. It noted that although a number of lenders competed for business in the “unregulated” market, costs were still very high particularly in comparison to other forms of unsecured credit. Borrowers frequently held concurrent or continuous repeat loans, and lenders’ disclosure of costs and loan terms was inadequate.⁸⁷ Moreover, the market was not sufficiently competitive, was concentrated in urban areas, and dominated by two companies.⁸⁸ The Coalition suggested the MPUB ground its decision in an “efficiency model” which balanced consumer protection with a fair rate of return for efficient lenders.⁸⁹ It was confident there were “opportunities for efficiencies within the current players in the marketplace.”⁹⁰

Generally speaking, industry representatives submitted that regulation was needed to legitimate the industry and protect it from the risks of class action suits and the difficulties in recovering debts that had existed under the previous *Criminal Code* provisions.⁹¹ They submitted MPUB should focus on encouraging competition and discouraging market concentration. Some representatives took the position that the industry was already operating competitively,⁹² while others argued the market was not fully competitive because some lenders were unwilling to enter the market because of the current risks. This meant fewer lenders were responding to consumer demand for payday loans. These lenders could raise prices “without losing significant market share” and there was little incentive to reduce loan prices.⁹³ Once regulations were in place, the market would expand to full competitive capacity.⁹⁴

87. *Ibid* at 125-26, 143-44.

88. *Ibid* at 127, 133-34.

89. *Ibid* at 140 quoting the Coalition submissions.

90. *Ibid*.

91. *Ibid* at 117.

92. See, e.g., *ibid* at 198.

93. *Ibid* at 161 quoting 310-Loan.

94. See, e.g., *ibid* at 159, 190, 194.

All of the industry interveners argued it was important that the regulatory scheme, including the rate caps, not interfere significantly with the market and rejected the Coalition's "efficiency model." Some cautioned against state paternalism in setting a rate cap designed to influence consumers' choices about how to spend their money.⁹⁵ The CPLA argued that as new lenders entered the regulated market, lenders would be under greater pressure to become more efficient.⁹⁶

The industry argued its growth was simply a market response to consumer demand and that it expanded the panoply of lending options available to the well-informed consumer.⁹⁷ This consumer was the one presented by the industry throughout the regulatory debates: a middle-class, educated, average working Canadian who understood their options. If they took out a payday loan, they had made a choice that should not be examined closely since people should be allowed to make poor choices.⁹⁸

The Coalition and a number of the presenters took issue with this explanation for the industry's growth and its assertion that it was founded on consumer choice. The Coalition suggested that "instead of payday lending maximizing consumer welfare, ...payday lenders may be reinforcing underlying economic inequality. And that's a particularly key concept when we look to the demographic of repeat borrowers."⁹⁹ They placed use of payday loans within a larger social and economic context of increasing income inequality, stagnating wages and assets, and rising debt to income ratios.¹⁰⁰ This was compounded by reduced access to mainstream financial services. The low- to middle-income earners the industry targeted were particularly affected by these economic changes and the industry was exploiting them.¹⁰¹

The Coalition noted that borrowers were more vulnerable than the average Canadian and they "tend[ed] to be younger, less educated, in larger families and have lower family income."¹⁰² Repeat borrowers were even more vulnerable.¹⁰³ This understanding of the payday borrower

95. See, e.g., Assistive Financial and Sorenson's Loans in *ibid* at 157, 174.

96. *Ibid* at 194.

97. See, e.g., *ibid* at 186, 189.

98. See, e.g., *ibid* at 174 quoting Sorenson's Loans.

99. *Ibid* at 124.

100. 310-LOAN also cited these developments in explaining the growth in demand for payday loans. *Ibid* at 160.

101. *Ibid* at 82-97, 122-24.

102. *Ibid* at 124 quoting the Coalition.

103. *Ibid* at 124-25.

as particularly vulnerable was also central to many of the presenters' submissions.¹⁰⁴

ii. *Maximum costs of borrowing*

The maximum costs of borrowing recommended ranged from the \$15 per \$100 borrowed proposed by the Coalition for all loans including extensions and renewals,¹⁰⁵ to Rentcash's proposed \$37.50 per \$100. The CPLA made the lowest industry proposal of \$23 per \$100.¹⁰⁶ In the event of default, the Coalition proposed a maximum charge of 1% or 2% per week.¹⁰⁷ In contrast, Rentcash recommended 59% interest on default and for extensions or renewals, along with inflation indexation for the cap.¹⁰⁸ The CPLA recommended a maximum fee of \$40 plus 60% interest in the event of default.¹⁰⁹

The Coalition argued that current rates should not be determinative because the industry was not operating efficiently.¹¹⁰ It disagreed with industry submissions that the spread in costs simply reflected the range of risks associated with the loans. Instead it suggested that such a range would not exist in a competitive market and was not reflective of the spreads found in the mainstream financial services industry.¹¹¹ In keeping with its recommendation that the MPUB take an efficiency approach to regulation, the Coalition stressed that the industry's costs should not be the only consideration. It acknowledged its recommended rate would likely result in some companies closing or leaving the province, but argued "the fact that less efficient companies may not be able to continue... does not necessarily mean... the rate is not just and reasonable."¹¹² It suggested a lower cap would put pressure on lenders to become more efficient.¹¹³

Industry interveners rejected the Coalition's submissions, arguing its proposals would result in many payday loan companies ceasing operations. They presented a variety of arguments and rate proposals. Generally, they encouraged the MPUB to set rates that would encourage a viable and competitive market.¹¹⁴ Most industry interveners appeared to propose costs that were similar to the ones they already charged. Their

104. See, e.g., *ibid* at 78-80.

105. *Ibid* at 154.

106. For a summary of the various proposals see *ibid* at 116-17.

107. *Ibid* at 152.

108. *Ibid* at 198-200.

109. *Ibid* at 174, 193.

110. *Ibid* at 133 quoting the Coalition.

111. *Ibid* at 136.

112. *Ibid* at 145.

113. *Ibid* at 117.

114. See, e.g., *ibid* at 163.

submissions stressed the fact that the government, in choosing to regulate the industry, had signalled that “payday lending should be treated as a legitimate enterprise,”¹¹⁵ and had accepted that lenders had to charge what would otherwise be criminal interest rates. They argued that the range of loan costs in the industry, and in their recommendations, reflected the risks associated with the loans. They suggested the provincial government’s intent was to only prohibit higher, more extreme rates charged by other payday loan companies,¹¹⁶ although it is not clear what constituted an “extreme rate.”

iii. *Additional recommendations*

The MPUB was also empowered to make recommendations about all “matters in respect of payday loans and lenders,”¹¹⁷ and its decision outlines some additional recommendations that were put forward. The Coalition suggested limiting the percentage of a borrower’s income that could be subject to a payday loan and extending repayment periods.¹¹⁸ It also made a number of recommendations about the content and form of the information to be disclosed to borrowers before they take out a loan. Key recommendations included the provision of written and verbal information about loan costs and terms, as well as an opportunity to review the information independently before taking out a loan. The decision indicates the Coalition also made suggestions about internet lending but does not provide details.¹¹⁹ The industry interveners appear to have focused their submissions on the costs of borrowing. The MPUB decision does not delineate specific recommendations, although it notes suggestions for regular data collection from one industry intervener.¹²⁰

b. *Board Decision—Order No. 39/08*

The MPUB set the maximum cost of borrowing on a sliding scale. The industry could charge up to 17% of the loan’s value on the first \$500, plus 15% on loan amounts from \$501 to \$1,000, and 6% on amounts between \$1,000 and \$1,500. The maximum cost of borrowing for borrowers receiving income assistance or employment insurance was set at 6%, as was the cost for loans that were more than 30% of the borrower’s next pay (net). All mandatory charges and interest were to be included in calculating the total cost of borrowing. The MPUB also fixed the maximum charge

115. *Ibid* at 176 quoting the CPLA.

116. See, e.g., *ibid* at 177, 199, 210.

117. *MCPA 2006*, *supra* note 8 at s 164(12).

118. *Maximum Charges*, *supra* note 3 at 154.

119. *Ibid* at 147.

120. *Ibid* at 169. For a summary of suggestions from social agencies see *ibid* at 80-81.

for an extension, replacement, or renewal loan at a one-time charge of 5%. Default charges were set at \$20 plus 2.5% non-compounded interest per month.¹²¹

The MPUB also made a number of recommendations to government aimed at increasing consumer protection. These included encouraging the government to (1) look at ways to facilitate short-term, small loan provision by mainstream financial institutions such as credit unions and banks¹²²; (2) license payday lenders not currently covered by the regulatory scheme—internet and telephone lenders¹²³; and (3) pursue harmonization through nation-wide caps on the costs of credit.¹²⁴

In reaching its decision, the MPUB situated its deliberations within a number of conclusions about the statutory regime. It found that in passing the legislation, government had signalled (1) that the industry had a role in the province's financial service sector and (2) that it accepted consumers would pay borrowing costs above 60%. At the same time, the government had chosen to act paternalistically and regulate a market that was not providing sufficient protection to consumers. Thus the main purpose of the legislation was consumer protection.¹²⁵ Accordingly, the MPUB concluded "the maximum charges to be set for payday loans should be such as to reduce the cost of credit for consumers while promoting increased efficiency within the industry."¹²⁶

The maximum borrowing costs it ordered were below the industry recommendations, but higher than the Coalition's recommendation, at least for the first \$500.¹²⁷ The MPUB considered a lower cap, but determined setting it at or below 60% APR (\$0.16 per \$100) would not be sufficient for efficient lenders to operate. It acknowledged that some lenders would be unable to continue operations or would need to restructure,¹²⁸ but found there was "no public interest reason supporting inefficient payday lending."¹²⁹ The MPUB did not understand its mandate as requiring it to

121. *Ibid* at 260-61.

122. *Ibid* at 234-35, 253.

123. *Ibid* at 253-54.

124. *Ibid* at 254. Although the Board acknowledged that the regulatory changes were an improvement, it expressed concern that provincial regulation was likely to lead to a "hodge-podge of lender practices, laws and risks across Canada, a situation not in the best interest of either consumers or the industry." Moreover, lenders would not benefit from efficiencies that could come with national standards. *Ibid* at 222-23.

125. *Ibid* at 227.

126. *Ibid* at 217.

127. A cost of \$17 per \$100 (17%) had been recommended by a Coalition expert. *Ibid* at 152-54.

128. *Ibid* at 233, 244-45.

129. *Ibid* at 228.

set maximums that would allow the continued viability of all industry business models.¹³⁰

In contrast to the parliamentarians debating the *Criminal Code* amendments, some of whom had characterized the industry as in need of legislative protection, the MPUB was largely critical of lenders and their practices. Indeed, its findings begin with the observation that the industry had initially “flouted” the *Criminal Code* before seeking regulation to “legitimize” and protect it.¹³¹

The MPUB accepted that many borrowers had near average incomes, steady employment, the ability to access cheaper forms of credit, and deliberately chose to take out a payday loan.¹³² However, the borrowers at the centre of its deliberations were more vulnerable. They had below average incomes and were living paycheque to paycheque without savings or credit to help them cope with unexpected expenses such as car repairs, illness, or unemployment. The MPUB was particularly concerned about the evidence that many borrowers used payday loans on a monthly basis. It was this more vulnerable subset of payday loan borrowers that it saw as at risk of exploitation and bankruptcy.¹³³ The MPUB was upfront about the fact it hoped to discourage rollover and replacement loans by making them less lucrative.¹³⁴

This attention to more vulnerable borrowers also helps explain the MPUB’s decision to implement a sliding scale approach to the costs of lending. The Coalition and one of its witnesses had presented this option but noted it created more complexity.¹³⁵ This complexity was one of the reasons industry interveners had objected to it. They also argued that lenders would respond by increasing costs for smaller loans and providing multiple smaller loans rather than one larger loan.¹³⁶

c. *Subsequent Developments*

The CPLA applied to have the MPUB review its decision. Cash Store Financial Services Inc. (Cash Store), which had appeared at the hearing as Rentcash, applied to the Manitoba Court of Appeal for leave to appeal the decision. In its review decision, the MPUB deleted one element of *Order 39/08* that it agreed was already provided for in the legislation and denied

130. *Ibid* at 231.

131. *Ibid* at 218.

132. *Ibid* at 240.

133. *Ibid* at 236-38, 240.

134. *Ibid* at 231.

135. *Ibid* at 154.

136. *Ibid* at 192, 216.

the rest of the CPLA's application.¹³⁷ It also considered the grounds of Cash Store's appeal to the MCA, varied its order to make it clear that the maximum costs applied to all mandatory charges and interest, and decided it was not appropriate to suspend its order pending the decision.¹³⁸

The MPUB reiterated its view that the legislation's purpose was consumer protection and more particularly that "[i]t is not the single or very occasional user of a payday lender that the Board... seeks to protect with the maximums... but the frequent borrower that the payday lending industry depends upon."¹³⁹ In short, it was the borrower most at risk of being pulled into a cycle of payday loan debt that was at the centre of its deliberations. At the same time, the Board noted its expectation that payday lending would continue once the maximums were in place, and suggested that the legalization of payday lending at rates above 60% would reduce lender costs.¹⁴⁰ In January 2009, the Manitoba Court of Appeal granted Cash Store leave to appeal and stayed the MPUB's order until the appeal was heard.¹⁴¹

Rather than wait for the appeal decision, the provincial government passed legislation rescinding the MPUB's original order, and amending the *MCPA* so that the maximum costs of borrowing would be set by regulation.¹⁴² The legislation also included additional consumer protection measures, some of which had been recommended in the MPUB *Order*. These included bringing internet loans within the regulatory scheme, and limiting the percentage of a borrower's next pay cheque that lenders could advance.¹⁴³ The Finance Minister explained that government felt it could not wait for the appeal decision since "the industry remains effectively unregulated in many of their practices, and payday borrowers remain at risk."¹⁴⁴ In an echo of the MPUB's interpretation of its mandate, he stated that "[t]he need to regulate this industry to safeguard consumers has always been our government's driving motivation in creating and implementing the legislation."¹⁴⁵

137. *Reconsideration of Board Order 39/08: Maximum Charges for Payday Loans* (27 June 2008), Order No. 89/08, online: MPUB <<http://www.pub.gov.mb.ca/pdf/misc/89-08.pdf>> at 14-15.

138. *Ibid* at 30-31, 35-36.

139. *Ibid* at 34.

140. *Ibid* at 33-35.

141. *Re The Cash Store Financial Services Inc*, 2009 MBCA 1.

142. *Consumer Protection Amendment Act (Payday Loans)*, SM 2009, c 12 at ss 11, 13(1), 14(1), 15, 18 [*MCPAA*].

143. *Ibid* at ss 2, 6, 9(2).

144. Manitoba, Legislative Assembly, *Debates and Proceedings*, 39th Leg, 3rd Sess, No 41 (13 May 2009) at 2032 (Hon Greg Selinger).

145. *Ibid*.

The Minister also indicated that given MPUB's extensive hearing process, the government would be "treating [the MPUB order] as consultation, advice, and recommendations."¹⁴⁶ The amendments also require the MPUB to conduct a review within three years of the first regulation setting the maximum costs of credit coming into force. This review must include a public consultation and consider the maximum costs for loans, extension, renewal or replacement loans, and on default. The MPUB must report its recommendations about these costs and any other recommendations to government.¹⁴⁷

In April 2010, the government set the maximum borrowing cost for all payday loans at the rate the MPUB had ordered for payday loans up to \$500, namely 17% of the principal.¹⁴⁸ The government also set the same rate, 5%, the MPUB had ordered for extension, replacement or renewal loans,¹⁴⁹ as well as the same rate and charges for default.¹⁵⁰ It did not adopt a sliding cost scale, nor did it set reduced maximums for those receiving income assistance or employment insurance. It went further than the MPUB had in restricting loans to 30% of the borrower's net pay rather than reducing the costs of loans above 30%,¹⁵¹ and limiting the cost that could be charged for payday loans taken out within seven days of repaying another loan to 5%.¹⁵²

d. *Summary*

Although the MPUB, and later the provincial government, set maximum borrowing costs that would, absent the federal and provincial regulatory framework, amount to criminal interest rates, they were attentive to the vulnerable borrower at the heart of critiques of the industry and its practices. The MPUB decision included clear, enforceable measures to assist more financially vulnerable and repeat borrowers. It set the maximum borrowing costs on a sliding scale. It also set lower borrowing costs for those receiving employment insurance or income assistance, renewing, extending, or replacing existing payday loans, or borrowing more than 30% of their next pay cheque. Although the government declined to implement a sliding scale or reduced loan costs for those not employed, it took its cue from the MPUB in setting what is to date the lowest cap on borrowing costs in the country. It also followed the MPUB in setting

146. *Ibid.*

147. *MCPAA*, *supra* note 142 at s 10.

148. *Payday Loans Regulation, amendment*, Man Reg 50/2010, s 11.

149. *Ibid.*

150. *Ibid* at s 17.

151. *Ibid.*

152. *Ibid* at s 11.

significantly lower costs for renewal, extension, or replacement loans. In addition, the government's decision to regulate online lending (one of the MPUB recommendations), limit the percentage of a borrower's net pay that can be borrowed, and reduce the costs for back-to-back loans are all measures that assist more vulnerable and repeat borrowers.

The next section looks at the rate setting process in Nova Scotia. The contrast between Manitoba's maximum costs and those set in Nova Scotia appear to be reflective of the NSUARB's somewhat different understanding of the borrower, the industry, and the regulatory regime's purpose.

2. *Nova Scotia Utility and Review Board hearing: January, March, & July 2008*

Nova Scotia's *Consumer Protection Act (NSCPA)* gives the NSUARB a mandate virtually identical to the MPUB's original one.¹⁵³ In particular, it has the same broad mandate to make an order that is "just and reasonable in the circumstances,"¹⁵⁴ and permission to consider the same factors.¹⁵⁵ The NSUARB's decision-making process was not as extensive as the MPUB's process with only five days of public hearings. It granted intervener status to seven parties. Five were from the industry: the CPLA and three lending companies; and Assistive Financial Corp., "a privately held company that provides loan capital to borrowers through The Cash Store outlets."¹⁵⁶ The remaining two were the provincial agency Service Nova Scotia and Municipal Relations (SNSMR), which administers the legislation, and a Consumer Advocate appointed by the province. The NSUARB also held an evening session for those who were not interveners to make submissions. Credit Counselling Services of Atlantic Canada (CCSAC) and the Nova Scotia NDP Caucus both made presentations.¹⁵⁷

Like the MPUB, the NSUARB had to determine the maximum costs of borrowing and make recommendations about regulatory reform. Its decision includes a discussion of payday loans and borrower demographics and a summary of the submissions with respect to its "Final Issues List" and questions, along with its findings on each. Analyzing individual submissions is somewhat hampered by the fact that, in contrast to the MPUB decision, the NSUARB does not summarize the presentations and recommendations separately. Although the decisions refer to individual submissions, it is not always clear which party submitted the evidence

153. *NSCPA*, *supra* note 8 at s 18T.

154. *Ibid* at s 18T(5).

155. *Ibid* at s 18T(4).

156. *NSUARB 2008*, *supra* note 81 at para 30.

157. *Ibid* at paras 27-41.

the NSUARB ultimately relied on.¹⁵⁸ It is clear though that, as with the submissions to the MPUB, the competing schools of thought about the industry and borrowers were articulated in the submissions considered and inform the NSUARB's decision.

a. *Submissions*

i. *Approach to regulation*

Industry interveners disagreed about the methodology the NSUARB should use to determine the maximum costs of borrowing. The CPLA submitted it should take a "cost-plus" approach which incorporated operating, capital, and bad debt costs plus a reasonable rate of return.¹⁵⁹ While counsel collectively representing The Cash Store and Assistive Financial Corp. (together referred to as "Rentcash") argued that a cost approach, which is often used by utilities boards to set prices in monopoly situations, was not appropriate because the provincial payday loan industry was not a monopoly.¹⁶⁰ Instead Rentcash advocated a "less intrusive" market approach, which focused on eliminating the barriers keeping lenders from entering the payday loan market.¹⁶¹ Once these barriers (risk of class actions, regulatory uncertainty) were eliminated and the market properly competitive, lenders would not be able to charge excessive fees for payday loans. The provincial SNSMR also supported a market approach. In its view "attempting to establish a precisely calculated maximum cost... would be extremely difficult, time consuming and costly."¹⁶²

The Consumer Advocate argued the NSUARB did not have enough evidence about industry costs and rates of return to apply any methodology, but agreed with the CPLA that a "cost-plus" approach was more appropriate for setting a "just and reasonable" rate than a market approach because it ensured that lenders did not earn excessive returns.¹⁶³

ii. *Maximum costs of borrowing*

As for the maximum costs of borrowing, data indicated lenders in Nova Scotia were generally charging between \$20 and \$35 per \$100, with one lender charging \$15.¹⁶⁴ Industry submissions generally reflected the costs they were already charging. Rentcash submitted first that the costs should

158. In some instances I have looked at individual submissions to clarify a party's position on a particular point.

159. *Ibid* at paras 90, 98.

160. *Ibid* at paras 91-96, 113.

161. *Ibid* at para 91 quoting *Clinton Rebuttal Report*.

162. *Ibid* at para 114 quoting *SNSMR Closing Submission*.

163. *Ibid* at paras 97-100.

164. *Ibid* at paras 130, 142, 144, 145.

be left to the market, but if the NSUARB did set a maximum, it should be slightly more than \$35 per \$100 to include the upper range of current rates and accommodate increased regulatory costs.¹⁶⁵ Dr. Kevin Clinton, a Rentcash witness, suggested the initial rate should be based on those already being charged in the “current, unregulated market.”¹⁶⁶ It could be revised in subsequent reviews to reflect prices in a competitive regulated market.

310-LOAN suggested a slightly lower \$27 per \$100, and argued the existing range simply reflected the variety of business models, credit risks, and operating costs in the industry.¹⁶⁷ The CPLA made the lowest industry proposal: between \$20.60 and \$23.60 per \$100, plus “an amount to account for inflation and regulatory costs.”¹⁶⁸

Neither the Consumer Advocate, nor the SNSMR suggested a particular rate. The Consumer Advocate argued the rate should allow only the “lowest cost” and most efficient lenders to continue operating.¹⁶⁹ The SNSMR’s position again mirrored that of Rentcash. It suggested the rate should “[accommodate] existing payday lenders, except for any that are exceptionally higher than the norm.”¹⁷⁰ And finally, a consultant retained by the NSUARB suggested a cost somewhere between \$23-\$27 per \$100 would both promote competition and discourage extreme rates. All the interveners appear to have assumed and accepted that on default, the maximum interest rate that could be charged on the amount outstanding would be 60% APR.¹⁷¹

iii. *Additional recommendations*

The NSUARB also asked for submissions about recommendations to make to government.¹⁷² While 310-LOAN argued it should not make any recommendations before the lending market adjusted to the regulatory scheme,¹⁷³ a Rentcash witness recommended borrowers be able to determine the total cost of borrowing without having to first give personal information.¹⁷⁴ Rentcash counsel submitted loan agreements should have

165. *Ibid* at para 148.

166. *Ibid* at para 91 quoting *Clinton Rebuttal Report*.

167. *Ibid* at 148.

168. *Ibid*.

169. *Ibid* at para 151.

170. *Ibid* at para 74.

171. *Ibid* at para 163.

172. Pursuant to s 18T(10), *N SCPA*, *supra* note 8.

173. *NSUARB 2008*, *supra* note 81 at para 230.

174. *Ibid* at para 223.

to include contact information for both the lender and the Registrar of Credit for borrower questions and complaints.¹⁷⁵

Consumer advocates made more substantive recommendations focused on borrower vulnerability. CCSAC representatives made a number of suggestions including giving borrowers options to extend a loan repayment period to 60 days or to repay a loan in instalments; encouraging those who default to get credit counselling; and restricting loan principal to 25% of the next paycheque (net).¹⁷⁶ The Consumer Advocate supported many of these recommendations and suggested there be a “cooling off” period before a borrower could take out another loan.¹⁷⁷ And finally, the provincial NDP Caucus recommended that costs for repeat loans be lower than those for first-time loans to reflect their reduced costs for lenders; there be a limit on the number of payday loans a borrower could take out annually; and standardized and limited personal information requirements.¹⁷⁸

b. *Board Decision—2008 NSUARB 87*

The NSUARB set the maximum cost of borrowing at \$31 per \$100. Default charges were set at \$40 plus a maximum interest rate of 60% APR on the arrears.¹⁷⁹ The NSUARB decided that at future reviews it would require data from lenders on the number of payday loans, their average amount and the number of defaults, and it scheduled a review of its order in two years.¹⁸⁰

It also made three recommendations about amendments to the draft Regulations presented at the hearing. It recommended they require that: (1) lenders file annual data on the number of loans, their size, and the number of defaults with the registrar; (2) borrowers be able to know the total cost of borrowing without first submitting any personal information other than their name; and (3) the loan agreement include information about how to contact the lender and the Registrar of Credit in the event of questions or complaints.¹⁸¹

The NSUARB reflected on the regulatory regime and its own mandate, finding that in enacting legislation, both the federal and provincial governments had accepted borrowers would pay more than 60% APR for payday loans.¹⁸² Although it determined the intent of the

175. *Ibid* at para 226.

176. *Ibid* at para 227.

177. *Ibid* at para 228.

178. *Ibid* at para 229.

179. *Ibid* at paras 155, 159, 161.

180. *Ibid* at paras 199, 213.

181. *Ibid* at paras 222, 225-26, 232.

182. *Ibid* at para 251.

provincial legislation was to protect borrowers,¹⁸³ it disagreed with the MPUB's interpretation of its similarly worded mandate as tasking it with setting maximum borrowing costs that would only permit *efficient* lenders to continue operating. Instead, it held "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)."¹⁸⁴ Further, it decided it should apply a market approach to setting the maximum costs, as "competition [is]...the most effective control on the cost of borrowing."¹⁸⁵ The NSUARB agreed with submissions that the provincial payday loan market was competitive,¹⁸⁶ and that competition would only increase once regulation was in place.¹⁸⁷ This in turn, it held, would provide appropriate consumer protection.¹⁸⁸ As the NSUARB held that the Nova Scotia market was already competitive, it determined that the maximum costs should reflect those charged by the "mainstream" of lenders. This would protect borrowers from excessive charges and ensure they continued to have access to a range of loan products.¹⁸⁹

The borrowers at the centre of the NSUARB's decision were average payday loan borrowers, rather than the more vulnerable borrowers at the centre of the MPUB's decision. These borrowers were the ones the industry presented throughout the regulatory debates. They earned above average incomes, had "at least some post-secondary education,"¹⁹⁰ and "are willing to pay, and content to pay, charges which, if calculated on an annualized basis may be in the hundreds or even thousands of per cent."¹⁹¹ They were choosing to do so for a variety of reasons including convenience in terms of time and paperwork; privacy; and, in some cases, because traditional lenders' fixed costs made such a small loan more expensive in the mainstream financial sector.¹⁹²

183. *Ibid* at para 216.

184. *Ibid* at para 259.

185. *Ibid* at para 128.

186. *Ibid* at paras 104, 129.

187. *Ibid* at paras 104, 150.

188. *Ibid* at para 220.

189. *Ibid* at para 152-54.

190. *Ibid* at para 53.

191. *Ibid*.

192. *Ibid*. The decision cites data entered into evidence by the CPLA indicating the average payday loan in Nova Scotia was \$202.74, with nearly 2/3 of borrowers getting loans of less than \$300. 84% of borrowers indicated they paid the loans back on time, "and were highly satisfied with their understanding of the terms of their payday loan." It also indicated that 76% of borrowers had full-time employment and 51% had household incomes of less than \$50,000 (compared to 56% in the general population). Almost 60% of borrowers had some level of post-secondary education. *Ibid* at paras 43, 47-48.

In its recommendations to government about legislative amendments,¹⁹³ the NSUARB rejected the recommendations made by those representing consumers. Instead it generally agreed with 310-LOAN's submission that it allow the payday loan market to adjust to the new regulated environment before making additional recommendations.¹⁹⁴ In the NSUARB's view, competition coupled with the enhanced disclosure requirements in the legislation would provide adequate consumer protection for the average payday loan borrower at the centre of its deliberations.¹⁹⁵ Its decision to schedule an early review was designed to ensure the market was functioning competitively.¹⁹⁶

3. *Nova Scotia Utility and Review Board hearing—November 2010*

The NSUARB conducted its review of the *2008 Order* in November 2010. It granted four parties intervener status: the CPLA, The Cash Store (formerly known as Rentcash), the SNSMR, and a Consumer Advocate appointed by the board. During an evening session, it also heard from the CCSAC, the Anglican Church of Canada, and the Nova Scotia Government Employees' Union.¹⁹⁷

a. *Submissions*

i. *Approach to regulation*

None of the parties suggested the NSUARB abandon the market approach for setting the maximum costs, although it noted that "certain aspects of the evidence and submissions made on behalf of the Consumer Advocate could be seen as amounting to an implicit adoption of at least certain aspects of the cost approach."¹⁹⁸

ii. *Maximum costs of borrowing*

The NSUARB "received sharply differing views" about whether it should maintain the maximum cost of borrowing at \$31 per \$100.¹⁹⁹ Evidence before the NSUARB indicated the cost of borrowing in the province ranged from \$16 to \$31 per \$100, with the average cost having declined from \$24.34 in 2008 to \$23.21 in 2010.²⁰⁰ Although the decision does not set out their positions, all the industry interveners argued the maximum cost

193. All these recommendations were subsequently accepted by government and incorporated into the regulatory scheme. See *Payday Lenders Regulations*, NS Reg 248/2009, ss 5(a), 5(d), 9(3).

194. *NSUARB 2008*, *supra* note 81 at para 230.

195. *Ibid* at paras 136, 150, 177, 184, 212, 259, 276.

196. *Ibid* at para 214.

197. *NSUARB 2011*, *supra* note 9 at paras 24-37.

198. *Ibid* at para 50. The CPLA had originally advocated a cost approach.

199. *Ibid*.

200. *Ibid* at para 42. As witnesses for the Consumer Advocate noted, this was not a weighted average.

should not be changed.²⁰¹ The Cash Store, which had increased both its market presence (from 12 outlets to 23), and the cost of borrowing (from \$27 to \$31 per \$100) since 2008, focused its submissions on the need for a variety of loan products in a competitive market so that consumers would have sufficient choice.²⁰² This variety in turn explained the range of borrowing costs in the provincial market. The Consumer Advocate on the other hand, argued the cost of borrowing should be reduced to \$21 per \$100,²⁰³ which corresponded to that recently set in Ontario.

Concerns were also raised about the practice of some lenders to sell optional life, employment, or illness insurance. The Cash Store, for example, offered it at a cost of 2.5 to 3% of the loan.²⁰⁴ The Anglican Church argued such insurance should be banned and a witness called by the Consumer Advocate suggested the risk of an average 25-35 year old borrower “dying, or being injured, or losing his or her job in the brief two-week life of the loan, can be taken to be very small.”²⁰⁵

In terms of the fee and interest rates on default, the CPLA and The Cash Store submitted they should remain unchanged at \$40 and 60% respectively.²⁰⁶ The Consumer Advocate noted that Nova Scotia’s fee and interest rate were higher than in some other provinces,²⁰⁷ but does not appear to have suggested they be reduced.

iii. *Additional recommendations*

Disclosure

All the interveners appeared satisfied that existing disclosure requirements were adequate, with the Consumer Advocate suggesting only that amendments ensure all lender advertising include loan costs.²⁰⁸

Repeat loans

The *NSCPA* prohibits rollovers,²⁰⁹ “the extension or renewal of a loan that imposes additional fees or charges on the borrower, other than interest, or the advancement of a new payday loan to pay out an existing payday

201. See 2011 *NSUARB* 22 (Final Submission by CPLA at 2, 7; Final Submission by The Cash Store Inc. at p 13), Matter ID M02633, online: <http://www.nsuarb.ca/index.php?option=com_content&task=view&id=73&Itemid=82>.

202. *NSUARB 2011*, *supra* note 9 at para 97.

203. *Ibid* at paras 53, 55.

204. *Ibid* at para 178.

205. *Ibid* at para 181.

206. *Ibid* at paras 117, 121.

207. *Ibid* at paras 117-18.

208. *Ibid* at para 131.

209. *Supra* note 8 at s 18N(h).

loan....”²¹⁰ Lenders *are* permitted to offer loan extensions or renewals so long as they only charge interest. Evidence at the hearing however, indicated that larger lenders were not offering extensions or renewals. Instead, they would issue back-to-back loans; providing a new loan as soon as an earlier one was paid.

The legislation also does not prohibit concurrent loans from different lenders, and it was not a general practice for lenders to inquire about whether consumers had loans with other payday lenders.²¹¹ Submissions from the public, including the CCSAC, raised concerns that “repeat loans”²¹² and concurrent loans from multiple lenders trapped borrowers in a cycle of debt.²¹³

The Consumer Advocate recommended lenders be required to do “a more searching inquiry into the ability of [potential borrowers] to repay their loans, including whether [they] have a current loan with another payday lender”²¹⁴ and be prohibited from issuing a loan if this were the case.²¹⁵ Lenders should also be prohibited from issuing a new loan on the same day an earlier loan is repaid, and until the cheque for the previous loan has cleared.²¹⁶ He suggested Nova Scotia follow British Columbia in limiting the amount a lender can require be repaid in a single pay period when the borrower has taken out more than two loans in a 62-day period.²¹⁷ And finally, he suggested the NSUARB recommend the Regulations be amended to require the collection of data on repeat loans.²¹⁸

Online lending

At the time of the hearing, Nova Scotia was the only province not regulating online lenders. Industry interveners supported including them within the legislative scheme in order to regulate all payday lending business models and protect consumers. Inclusion of online lending, they argued, would also give lenders more choice in designing their business and increase the variety of loans available to consumers.²¹⁹ The CPLA suggested that Service Nova Scotia conduct a consultation process to determine the appropriate regulations,²²⁰ while the Consumer Advocate identified a number of issues

210. *Ibid* at s 18A(c).

211. *NSUARB 2011, supra* note 9 at paras 139, 140.

212. A loan taken out within 24 hours of repaying an earlier one. *Ibid* at para 142.

213. *Ibid* at paras 141-42.

214. *Ibid* at para 143 quoting the Consumer Advocate.

215. *Ibid* at para 143.

216. *Ibid*.

217. *Ibid*. See *Payday Loans Regulation*, BC Reg 57/2009, s 23.

218. *NSUARB 2011, supra* note 9 at para 144.

219. *Ibid* at paras 148, 150-52.

220. *Ibid* at para 155.

the NSUARB needed to consider before making recommendations, and suggested that Service Nova Scotia “review the implications of allowing payday lenders to provide [online] loans.”²²¹

b. *Board Decision—2011 NSUARB 22*

The NSUARB reduced the maximum cost of borrowing to \$25 per \$100²²² and included the cost of any loan insurance in the cost.²²³ It did not change the maximum default charges and interest rates.²²⁴ The NSUARB also recommended the Regulations be amended to require the disclosure of payday loan costs in all advertising.²²⁵ Otherwise it found existing disclosure requirements to be adequate.²²⁶ With respect to “repeat loans,” it ruled there was not enough evidence to justify prohibiting them or imposing a waiting period between loans. It did recommend the Regulations be amended to require lenders to submit data on repeat loans.²²⁷ It also indicated it would be recommending that online lending be regulated, and gave the parties thirty days to provide written submissions before it issued a supplementary decision with more detailed recommendations.²²⁸

Discussion

The NSUARB decided to continue using a market approach to determine maximum costs.²²⁹ In arriving at the \$25 figure, the NSUARB looked at industry costs and profits, noting that a variety of studies showed the average cost of payday loans ranged from \$21 to \$27 per \$100.²³⁰ It also commented on the fact that despite the high costs of payday loans, profit margins appeared to range from a loss to approximately 17 per cent.²³¹ The NSUARB compared this with Statistics Canada profit data showing the average profit margin for all Canadian industries was 8.8 per cent, with the margin for financial and insurance industries averaging 26.4%.²³² Although it expressed concern with the incompleteness of the data, the NSUARB

221. *Ibid* at para 154.

222. *Ibid* at para 114.

223. *Ibid* at para 185.

224. *Ibid* at paras 119, 124.

225. *Ibid* at para 133.

226. *Ibid* at para 134.

227. *Ibid* at paras 216-17.

228. *Ibid* at paras 164-66. Its supplementary decision, 2011 NSUARB 58, recommends online lending be subject to essentially the same fee and disclosure requirements as payday lending out of “bricks and mortar” outlets. See para 65 for a summary of the recommendations. In October 2011 Service Nova Scotia stated that the province would consider legislation to regulate online payday loan lenders pursuant to the May recommendation of the NSUARB.

229. NSUARB 2011, *supra* note 9 at para 51.

230. *Ibid* at paras 68, 106.

231. *Ibid* at para 57.

232. *Ibid*.

found the payday loan industry was not “a particularly profitable one,”²³³ and certainly less profitable than the mainstream financial sector.²³⁴

This finding was consistent with the 2009 report of the Maximum Total Cost of Borrowing Advisory Board for the Ontario Payday Lending Industry (the Ontario Report), which recommended a maximum cost of borrowing of \$21 per \$100.²³⁵ The NSUARB found that the Ontario Report recommended \$21, not because industry profits were too high, or the payday loan market uncompetitive, but because the Advisory Board had sought to eliminate loans to high risk borrowers,²³⁶ and to “reduce ‘product differentiation’.”²³⁷ The NSUARB recognized that industry critics as well as a Consumer Advocate witness supported reducing costs and limiting the range of payday loan products.²³⁸ However, it found most payday loan borrowers were satisfied with their loans, and that this satisfaction was due in part to the variety of products and services available to them: “product differentiation is...an important factor in the surprising (to many observers, at least) satisfaction that borrowers have with payday loans, whether the rate is lower...or higher.”²³⁹ Its support for competition and consumer choice is also apparent in its recommendation to include online lending in the regulatory scheme. The NSUARB indicated that, in its view, regulation would not only address its concern about a regulatory gap, it would encourage competition and provide more choice for consumers.²⁴⁰

The NSUARB considered the range of loan costs in Nova Scotia (between \$16 and \$31) and delved into The Cash Store’s recent increase to the \$31 maximum when it began giving borrowers a free MasterCard with their loan.²⁴¹ These kinds of cards are generally sold as an additional product for approximately \$18 to \$20, and cost lenders \$5.²⁴² Although not explicitly critical of this practice, the NSUARB did note the Consumer Advocate’s criticism of its “use...to justify [the cost increase],”²⁴³ and indicated testimony by The Cash Store’s president “seemed to suggest that if his Company ceased providing [it] as an included service, its rate could be reduced to its former level of \$27 or below.”²⁴⁴

233. *Ibid* at para 56.

234. *Ibid* at para 58.

235. *Ibid* at paras 61, 64.

236. *Ibid* at paras 70-72.

237. *Ibid* at paras 77-78, 81.

238. *Ibid* at para 81.

239. *Ibid* at para 95.

240. *Ibid* at paras 161, 164-66.

241. *Ibid* at paras 85, 97.

242. *Ibid* at paras 98-100.

243. *Ibid* at para 103.

244. *Ibid* at para 102.

The NSUARB found as “reasonable inferences” that the federal and provincial legislative regimes sought to ensure the availability of (1) payday loans throughout the province, and (2) a wide range of product choices to satisfy borrower demand.²⁴⁵ Thus, the maximum cost of lending could not be so low that it reduced or eliminated lending in rural areas where lenders would have higher unit costs,²⁴⁶ or eliminated services “which some borrowers seem to like and are willing to pay for.”²⁴⁷ That said, the NSUARB was not convinced the maximum cost of borrowing should remain at \$31 per \$100 and reduced it to \$25.²⁴⁸

Without further explanation for the \$25 figure, it is difficult to know how the NSUARB arrived at it. It is within the \$21 to \$27 range of lender costs and at the upper end of the range being charged before The Cash Store increased its charges. Thus it can be understood to be directed at The Cash Store’s practice of providing MasterCard’s without damaging the lender’s presence in rural Nova Scotia. The reduction to \$25 also seems unlikely to reduce product differentiation, choice, and competition in the payday loan market, three goals that underpin the NSUARB’s approach to payday lending regulation. It was clearly not its intent to reduce the cost or availability of payday loans to higher risk and more vulnerable repeat consumers. Moreover, even with this reduction, Nova Scotia continues to have the highest maximum cost of borrowing amongst provinces regulating payday loans.

Although it adopted a market approach, it also understood the legislative regime to impose a duty “to intervene in the market approach where it considers it appropriate to do so.”²⁴⁹ It did so in deciding to include optional insurance costs within the costs of borrowing. The NSUARB’s analysis of the practice is also the only part of its decisions to date in which it has been openly critical of lender practices.²⁵⁰ The NSUARB agreed with the submissions about the slim chances of the insured event occurring during the loan period.²⁵¹ It also found that the cost of insurance was disproportionate to the loan amount.²⁵² Although the NSUARB had initially thought it would prohibit the practice, it ultimately decided instead to allow it provided the charges were included in the total cost

245. *Ibid* at paras 108,111-12.

246. *Ibid* at paras 108-109.

247. *Ibid* at para 112.

248. *Ibid* at paras 113-14.

249. *Ibid* at para 105.

250. *Ibid* at paras 175-76.

251. *Ibid* at para 181.

252. *Ibid* at paras 182-83.

of borrowing.²⁵³ Although interventionist, in declining to ban the sale of payday loan insurance the NSUARB remained true to its philosophy of encouraging choice, competition, and product differentiation within the payday lending market.

On the issue of repeat and concurrent loans, the decision indicates these practices received strong criticisms from the Consumer Advocate and participants who worked with payday borrowers.²⁵⁴ Despite these submissions, and the fact that the practices have been criticized by consumer groups throughout the regulatory process, the NSUARB ruled it would not intervene in current lender practices to offer back-to-back loans or the ability of borrowers to hold concurrent loans from different lenders as it did not have adequate evidence about how any restrictions or prohibitions would be implemented, and whether they would actually succeed.²⁵⁵

The NSUARB also pointed to survey data prepared for the CPLA indicating borrowers did not support government limits on the number of loans they could take out or the prospect of lenders sharing information about borrowers. Those surveyed indicated a payday loan should be available whenever it was needed.²⁵⁶ The NSUARB did decide that more information was needed about the extent of repeat loans and recommended amendments to the Regulations requiring annual filing of data on “the number of repeat loans, the number of customers who have taken out repeat loans, and the number of repeat loans taken out by individual customers.”²⁵⁷

One could understand the NSUARB as simply being cautious here about intervening in the market, preferring to gather more data before recommending changes. However, given the strong critiques it heard on behalf of consumers and the fact that other provinces have stronger regulatory protections aimed at these practices, the decision can also be understood as according with the NSUARB’s focus on regulatory protection for the average payday loan borrower, and on encouraging market competition and choice. This is particularly so given that the NSUARB’s recommended data collection amendments will not, if implemented, provide information about the extent of the holding of concurrent loans from multiple lenders.

253. *Ibid* at paras 175-76, 184-85.

254. See, e.g., *ibid* at paras 141-44.

255. *Ibid* at para 146.

256. *Ibid* at para 145.

257. *Ibid* at para 147.

The borrower at the centre of the NSUARB decision was similar to the one at the centre of its 2008 decision and is consistent with the market demand school on payday loans. The one represented by the “vast majority” of borrowers: well educated with income levels “not much out of line with the income distribution of working class and middle [class] Canada,”²⁵⁸ who was making an informed choice when taking out a payday loan.

Conclusion

Throughout the federal and provincial regulatory processes discussed in this paper, decision-makers heard, considered, and articulated two divergent perspectives on the industry and borrowers—the “market demand” and the “exploitative” schools of thought. When assessed together, the regulatory regimes better reflect the market demand perspective. At the federal level, the *Criminal Code* amendments legitimize the industry and ensure its viability by permitting licensed lenders in a designated province to charge what would otherwise be criminal interest rates. Despite some supporters’ (and opponents’) concerns about the need to protect more vulnerable borrowers at risk of being drawn into a cycle of payday loan debt, the amendments provide little criteria for Cabinet to use in deciding whether a provincial legislative scheme “protects” borrowers for the purposes of designation, other than lender licensing and a cap on borrowing costs.²⁵⁹

At the provincial level, the Manitoba and Nova Scotia governments chose to regulate the industry and seek a cabinet designation. Although the provincial legislative schemes limit or prohibit rollovers—one of the most frequently criticized lender practices—they are largely focused on licensing and disclosure. This emphasis on disclosure accords with a market demand understanding of the industry since it aims to ensure borrowers can make an informed choice in a competitive market. And while these provinces currently have the lowest and highest borrowing costs, both are still well above the criminal interest rate in recognition of the fact that the industry could not operate if it was restricted to charging rates below 60% APR.²⁶⁰

And yet a closer examination of the cost-setting decisions in Manitoba and Nova Scotia suggests that perspectives on borrowers, the industry, and the purpose of the regulatory scheme do matter. Even within a larger regulatory framework that reflects a market demand approach to payday lending, the focus of the decision-maker affects the outcomes. Hence the marked contrast between the decisions in the two provinces in terms

258. *Ibid* at paras 93-94 quoting the evidence of Dr Clinton.

259. *Criminal Code*, *supra* note 1 at s 347.1(2)–(3).

260. See, e.g., *Maximum Charges*, *supra* note 3 at 233.

of the interpretation of similarly-worded mandates, the approaches to regulation, the costs set, and the responses to recommendations aimed at more vulnerable borrowers, particularly repeat borrowers.

Finally, this exploration of these regulatory processes also suggests that despite the divergent schools of thought on payday loans, the regulatory schemes that emerged could have responded to both perspectives by more fully responding to the evidence presented, and concerns raised, about vulnerable, repeat borrowers at risk of exploitation. For example, in Nova Scotia, limits on the percentage of a borrower's net pay that can be borrowed and lower costs for repeat loans could have been implemented or recommended in concert with the other measures. In both provinces, additional initiatives such as data collection on repeat and concurrent loans, and the creation of a payday loan database could have been recommended or more fully explored. At the federal and provincial levels, efforts could have been made to encourage mainstream lenders to find ways to offer payday loan-like products, as was recommended by the Senate Standing Committee and the MPUB.²⁶¹ The federal government could have investigated the CAC's recommendation that a new small loans act be introduced.²⁶² As more provincial regulatory schemes become fully operational and undergo periodic reviews, it will be interesting to see the ways in which they reflect and adapt to respond to both schools of thought and types of borrower.

261. *Ibid* at 220-21, 229, 242-43. For a recent discussion of ways in which mainstream financial institutions could provide services currently offered in the AFS, and some of the challenges to doing this, see Bowles, Dempsey & Shaw, *supra* note 3 at 3, 45-47.

262. Senate, Standing Committee on Banking, Trade and Commerce, *Evidence*, 39th Parl, 1st Sess, No 17 (21 March 2007) at 30-31 (Mel Fruitman, Vice-President, Consumers' Association of Canada).

