

# Bill 14: *The Consumer Protection Amendment Act (Payday Loans)*

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## I. INTRODUCTION

Over the past 20 years, stores offering “fast cash” have cropped up all across Canada. Pictures of overjoyed, upwardly-mobile young adults holding fans of banknotes greet the customers, assuring them that despite their poor credit histories, they, too, will come away with cash in their pockets and smiles on their faces. If only this were the whole story.

Until recently, the payday loan industry was largely unregulated in Canada. This billion-dollar industry, often accused of predatory lending practices,<sup>1</sup> was left alone to charge exceptionally high interest rates with little government interference. Payday lenders routinely charged interest rates exceeding 10 times the legal limit. While it is true that some lenders have been found liable in class action lawsuits and some lenders have been refused the courts’ assistance in enforcing these illegal contracts, not a single payday lender has ever been criminally prosecuted for usury.<sup>2</sup>

Bill 14, *The Consumer Protection Amendment Act (Payday Loans)*,<sup>3</sup> is the latest effort by the Government of Manitoba to regulate the payday loan industry and, purportedly, protect consumers. Bill 14 was introduced in the House on 8 April 2009 and received Royal Assent on 11 June 2009. This paper provides an overview of the events giving rise to the Bill, outlines its key provisions, and describes its passage through the House. The paper concludes with an assessment of the Bill.

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<sup>1</sup> For example, Association of Community Organizations for Reform Now (ACORN), *Protecting Canadians’ Interest: Reining in the Payday Lending Industry* (Vancouver: ACORN Canada, 2004) at 5 [ACORN Report].

<sup>2</sup> Parliamentary Information and Research Service, *Payday Loan Companies in Canada: Determining the Public Interest* (PRB 05-81E) (Ottawa: Library of Parliament, 2006) at 8–11, online: Parliament of Canada <<http://www.parl.gc.ca/information/library/PRBpubs/prb0581-e.html>> [Parliamentary Report].

<sup>3</sup> Bill 14, *The Consumer Protection Amendment Act (Payday Loans)*, 3rd Sess, 39th Leg, Manitoba, 2009 (assented to 11 June 2009), SM 2009, c 12, amending RSM 1987, c C200 [Act or Bill 14 or Bill].

## II. BACKGROUND

The payday loan industry, which originated in the United States in the mid-1980s, found its way to Canada in the early 1990s.<sup>4</sup> This industry has flourished in Canada; well over 1400 outlets are now scattered across the country.<sup>5</sup> Based on the number of outlets currently operating in the United States (30 000)<sup>6</sup> and the comparative size of the Canadian market, it is expected that the number of outlets in Canada will more than double by the time the industry reaches maturity.<sup>7</sup>

In Manitoba, there are currently more than 15 payday lenders operating over 75 payday outlets across the province.<sup>8</sup> As well, a growing number of telephone and online lenders are making their payday loans available to Manitobans.<sup>9</sup> The payday loan industry in Manitoba is dominated by two firms: National Money Mart and Cash Store Financial, formerly Rentcash Inc..<sup>10</sup> Cash Money Cheque Cashing Inc. also has a number of outlets in Manitoba.<sup>11</sup> Advance America, the largest payday lender in the United States, is quickly becoming a major player in Manitoba.<sup>12</sup>

The emergence of a widespread payday loan industry in Canada is surprising, not because the demand for short term loans was ever in question, but because, until recently, the vast majority of these highly visible and profitable outfits committed a criminal offence each and every time they provided a loan.<sup>13</sup> Section 347 of the *Criminal Code* made it a crime to lend money at a criminal rate of interest, defined as “an effective annual rate of interest calculated in accordance with general actuarial practices and principles that exceeds sixty percent on the credit advanced under an agreement or arrangement.”<sup>14</sup> Before recent qualifications to this section, the vast majority of payday lenders routinely

<sup>4</sup> Manitoba Public Utilities Board Order 39/08, *Maximum Charges for Payday Loans* (4 April 2008), Manitoba Public Utilities Board Order 39/08 at 14, online: PUB <<http://www.pub.gov.mb.ca/pdf/misc/39-08.pdf>> [*Order 39/08*].

<sup>5</sup> *Re Cash Store Financial Services Inc.*, 2009 MBCA 1, (2009) 236 Man R (2d) 29 at para 3 [*Cash Store*].

<sup>6</sup> *Order 39/08*, *supra* note 4 at 38.

<sup>7</sup> *Cash Store*, *supra* note 5 at para 3.

<sup>8</sup> *Order 39/08*, *supra* note 4 at 39.

<sup>9</sup> *Ibid* at 39–40.

<sup>10</sup> *Ibid* at 39.

<sup>11</sup> Parliamentary Report, *supra* note 2 at 6.

<sup>12</sup> *Order 39/08*, *supra* note 4 at 39.

<sup>13</sup> ACORN Report, *supra* note 1 at 1.

<sup>14</sup> *Criminal Code*, RSC 1985, c C-46, s 347(2).

committed a criminal offence by charging interest rates ranging from hundreds to thousands of percent of the loan value.<sup>15</sup>

In response to allegations that they were charging criminal interest rates, payday lenders argued that because they operate with relatively small loan volumes and deal exclusively in short-term loans, the interest cap set out in the *Criminal Code* was too low to enable them to recoup their costs of doing business.<sup>16</sup> Accordingly, they structured their fees so as to turn a profit while flying under the radar of section 347. Specifically, they set their interest rates below 60% per annum but charged additional fees that actually account for the majority of borrowers' costs.<sup>17</sup>

By separating fees and interest, payday lenders merely disguised their criminal rates of interest. The broad definition of "interest" in the *Criminal Code* easily encompasses payday lenders' fees, regardless of how they chose to identify them:

"interest" means *the aggregate of all charges and expenses, whether in the form of a fee, fine, penalty, commission or other similar charge or expense or in any other form*, paid or payable for the advancing of credit under an agreement or arrangement, by or on behalf of the person to whom the credit is or is to be advanced, irrespective of the person to whom any such charges and expenses are or are to be paid or payable, but does not include any repayment of credit advanced or any insurance charge, official fee, overdraft charge, required deposit balance or, in the case of a mortgage transaction, any amount required to be paid on account of property taxes.<sup>18</sup>

Not surprisingly, payday lenders argued that the majority of their fees did not qualify as interest as it is defined in the *Criminal Code*.<sup>19</sup> While payday lenders denied allegations that their fees, properly construed, amounted to criminal rates of interest, courts across Canada concluded differently.<sup>20</sup> As one Manitoba court put it, "[i]nterest as defined in the Criminal Code is all inclusive and covers charges, penalties and fees (however they may be described or disguised) payable under an agreement for credit."<sup>21</sup> Accordingly, many payday lenders that sought judgment against defaulting borrowers were denied the

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<sup>15</sup> *Order 39/08*, *supra* note 4 at 6.

<sup>16</sup> See *ibid*, *supra* note 4.

<sup>17</sup> *Ibid* at 15–17, 32–33.

<sup>18</sup> *Criminal Code*, *supra* note 14 [emphasis added].

<sup>19</sup> See e.g. *Kilroy v A OK Payday Loans*, 2007 BCCA 231, [2007] 8 WWR 480 [*Kilroy*].

<sup>20</sup> *Ibid*; also *Tracy (Representative ad litem of) v Instalozans Financial Solution Centres (B.C.) Ltd.*, 2009 BCCA 110, [2009] 4 WWR 236 [*Tracy*]. For a good overview of the relevant Manitoba jurisprudence, see *Order 39/08*, *supra* note 4 at 20–30.

<sup>21</sup> *MoneyMax Canada Ltd v Mario Barcolta* (8 September 2005), Winnipeg SC05-06-07205 (Man QB) considered in *Order 39/08*, *supra* note 4 at 20.

assistance of the courts because the courts would not enforce criminal contracts.<sup>22</sup> In one such case, the Manitoba Court of Queen's Bench held:

[T]he public policy need for a strong and clear message that courts will not assist lenders in the business of loaning short-term money at criminal interest rates to unsophisticated customers far outweighs the public policy concern of unjustly enriching a person by not granting judgment for repayment of the principal.<sup>23</sup>

Payday lenders also became the defendants in a number of class action lawsuits.<sup>24</sup> For instance, the British Columbia Court of Appeal upheld a ruling that payday lenders were liable to a class of borrowers for unjust enrichment on the basis that, after all additional fees were considered, they were charging criminal rates of interest in violation of section 347 of the *Criminal Code*.<sup>25</sup>

In light of the foregoing, many of the payday loan industry's critics demanded that governments prosecute payday lenders under section 347.<sup>26</sup> Conversely, the payday loan industry and its proponents claimed that the rapid growth of the industry revealed that it fulfills an otherwise unmet need, namely convenient access to short-term loans.<sup>27</sup> Over time, it became evident that if government did not weigh in on the issue, the future of the payday loan industry in Canada would be determined by the class action lawsuits. Successful lawsuits would ultimately bankrupt the industry, settling the matter once and for all.<sup>28</sup>

In 2000, the Consumer Measures Committee Working Group on the Alternative Consumer Credit Market was established to facilitate federal-provincial consultations regarding how governments should tackle this issue.<sup>29</sup> Six years later, the Government of Canada introduced Bill C-26, *An Act to amend the Criminal Code (criminal interest rate)*.<sup>30</sup> This Bill received Royal

<sup>22</sup> *Order 39/08*, *supra* note 4 at 20–30.

<sup>23</sup> *C.A.P.S. International Inc. v Robert Kotello* (25 April 2002), Winnipeg CI01-01-24230 (Man QB) discussed in *Order 39/08*, *supra* note 4 at 24.

<sup>24</sup> *Order 39/08*, *supra* note 4 at 17.

<sup>25</sup> *Tracy*, *supra* note 20.

<sup>26</sup> Parliamentary Report, *supra* note 2 at 13.

<sup>27</sup> *Ibid* at 1.

<sup>28</sup> Parliamentary Information and Research Service, *Bill C-26: An Act to amend the Criminal Code (criminal interest rate)* (Legislative Summary LS-541E) (Ottawa: Library of Parliament, 2006, revised 2007) at 2, online: Parliamentary Information and Research Service <<http://www2.parl.gc.ca/Content/LOP/LegislativeSummaries/39/1/c26-e.pdf>> [Legislative Summary of Bill C-26].

<sup>29</sup> *Cash Store*, *supra* note 5 at para 7.

<sup>30</sup> Bill C-26, *An Act to amend the Criminal Code (criminal interest rate)*, 1st Sess, 39th Parl, 2007 (assented to 3 May 2007), SC 2007, c 9, amending RSC 1985, c C-46 [Bill C-26]. Although Bill C-26 has been passed into law, I will continue to refer to it as Bill C-26 for ease of reference.

Assent on 3 May 2007. Bill C-26 amended section 347 to exempt payday lenders from criminal sanctions provided the following conditions are satisfied:

- a) the amount of money advanced under the agreement is \$1,500 or less and the term of the agreement is 62 days or less;
- b) the person is licensed or otherwise specifically authorized under the laws of a province to enter into the agreement; and
- c) the province is designated under subsection (3).<sup>31</sup>

A province is to receive designation under subsection (3) “if the province has legislative measures that protect recipients of payday loans and that provide for limits on the total cost of borrowing under the agreements.”<sup>32</sup>

Bill C-26 revealed the preference of the Parliament of Canada for delegating regulatory oversight of the payday loan industry to the provinces as opposed to prosecuting payday lenders, outlawing the industry, or simply leaving the fate of the industry up to the courts.<sup>33</sup> A Legislative Summary of Bill C-26 provided the following justification:

The expanding presence of payday loan companies suggests that some Canadians are willing to pay rates of interest in excess of those permitted under the *Criminal Code* for their payday loans. Bill C-26 is designed to exempt payday loans from criminal sanctions in order to facilitate provincial regulation of the industry.<sup>34</sup>

Overall, Bill C-26 was a victory for the payday loan industry in Canada. It conferred legitimacy on the industry while allowing payday lenders to continue charging exceptionally high interest rates. It should safeguard payday lenders from future class action lawsuits. Payday lenders may also find courts more willing to grant judgment against borrowers in default.<sup>35</sup>

Still, the extent to which payday lenders will benefit from Bill C-26 ultimately depends on how each province responds. In provinces that opt to regulate the industry and apply for federal designation, payday lenders will be affected by the rate-caps and other restrictions imposed by provincial legislation. In provinces that do not regulate the industry, payday lenders remain susceptible, in theory, to criminal prosecution.

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<sup>31</sup> *Ibid.*, s 2. It should be noted that, at the time of writing, many provinces in Canada, including Manitoba, have yet to be designated under subsection (3); therefore, payday lenders in these provinces violate the *Criminal Code* when they charge interest rates exceeding 60%.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Order 39/08*, *supra* note 4 at 8.

<sup>34</sup> Legislative Summary of Bill C-26, *supra* note 28 at 1.

<sup>35</sup> *Order 39/08*, *supra* note 4 at 10.

Manitoba first responded to Bill C-26 with Bill 25, *The Consumer Protection Amendment Act (Payday Loans)*.<sup>36</sup> Bill 25 received Royal Assent on 7 December 2006. This Bill added Part XVIII to *The Consumer Protection Act*, thereby empowering the province to regulate the payday loan industry.

Bill 25 established a system for licensing payday lenders in Manitoba, and it introduced a requirement that all payday lenders be licensed. This requirement has yet to come into force.<sup>37</sup> Bill 25 also introduced a number of restrictions and obligations on payday lenders in order to protect borrowers, including limits on what payday lenders may charge borrowers, which have again yet to come into force.<sup>38</sup> Bill 25 includes a prohibition against taking security for loans and a prohibition against issuing concurring loans, which also has yet to come into force.<sup>39</sup>

Bill 25 also imposed a number of new positive obligations on payday lenders, including a requirement to provide clear documents and information to borrowers, and a requirement to post signs identifying all costs in a clear and understandable manner. The first of these is in force; the latter is not.<sup>40</sup> Bill 25 also introduced new rights for borrowers, including a right to cancel a loan within 48 hours and a right to a refund if overcharged.<sup>41</sup> Finally, it introduced a record-keeping requirement for payday lenders and it empowered officials to perform inspections.<sup>42</sup>

Bill 25 tasked the Public Utilities Board (“PUB”) with setting limits on costs of payday loans. Specifically, it ordered the PUB to do the following: (a) set the maximum cost of credit or establish a rate, formula, or tariff for determining this limit; (b) set the maximum amount that may be charged for a renewal, extension, or replacement loan or establish a rate, formula, or tariff for determining this limit; and (c) set the maximum penalty for default or a rate, formula, or tariff for determining this limit.<sup>43</sup> The PUB was required to give notice and hold a public hearing before making its Order.<sup>44</sup> The Order was to be

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<sup>36</sup> Bill 25, *The Consumer Protection Amendment Act (Payday Loans)*, 5th Sess, 38th Leg, Manitoba, 2006 (assented to 7 December 2006), SM 2006, c 31, amending RSM 1987, c C200 [Bill 25]. Although Bill 25 has now been passed into law, I will continue to refer to the Act as Bill 25 to distinguish it from subsequent amendments.

<sup>37</sup> *Ibid.*, s 3.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

reviewed by the PUB at least once every three years.<sup>45</sup> Lastly, the PUB was permitted to make recommendations to the minister with regard to payday loans and lenders.<sup>46</sup>

Between November 2007 and February 2008, the PUB held public hearings in Thompson, Brandon, and Winnipeg.<sup>47</sup> The PUB heard from witnesses, presenters, and interveners, comprised of industry representatives, social agencies, researchers, consumer protection advocates, and others.<sup>48</sup> The PUB released its Order on 4 April 2008. The Order specified the maximum allowable charges for payday loans and provided a number of recommendations for government.<sup>49</sup>

The PUB's Order established a maximum cost of credit as follows: 17% of the loan received up to \$500, plus 15% of the loan received from \$501 to \$1000, plus 6% of the loan received from \$1000 to \$1500.<sup>50</sup> The Order set a lower rate, 6% of the entire loan, for payday loans to persons receiving social assistance or employment insurance as well as for payday loans that exceed 30% of the expected net next pay of the borrower.<sup>51</sup> The Order went on to limit the amount that a payday lender may charge a borrower for a renewal, replacement, or extension of a loan to 5% of the balance renewed, replaced, or extended.<sup>52</sup> The Order also limited the fine for default to \$20 plus 2.5% per month.<sup>53</sup> The Order also set limits on charges for debit/credit cards when borrowers are not given the option of cash.<sup>54</sup>

The Order also made a number of recommendations to government. Among other things, the government was urged to (a) regulate telephone/internet payday lending; (b) regulate pawning and rent-to-own charges; (c) regulate other services provided by payday lenders (e.g., wire transfers, title loans, money orders, etc.); (d) encourage mainstream financial institutions to serve the credit needs of those currently reliant on payday lenders; and, (e) promote financial literacy through education, information and counselling.<sup>55</sup>

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<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> *Order 39/08, supra* note 4 at 4.

<sup>48</sup> *Cash Store, supra* note 5 at para 14.

<sup>49</sup> *Order 39/08, supra* note 4.

<sup>50</sup> *Ibid* at 260.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid* at 261.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid* at 8–9, 251–259.

After the PUB released its Order, the Canadian Payday Loan Association (“CPLA”) filed an application with the PUB for a review and variation.<sup>56</sup> The CPLA was partially successful. The PUB made a few minor changes to the Order; however, on the whole, the PUB confirmed the findings, determinations, and recommendations of its previous Order.<sup>57</sup>

Another intervenor to the initial hearing, Cash Store Financial Services Inc. (“Cash Store”) was not content to file an application for review. Instead, Cash Store sought leave to appeal the Order at the Manitoba Court of Appeal.<sup>58</sup> Cash Store also sought a stay of the Order, if leave were granted, for the duration of the proceedings.<sup>59</sup> The primary ground of appeal, which was successfully advanced by Cash Store, was put as follows:

The PUB erred in law and exceeded its jurisdiction by failing to properly consider the scheme, objects and intentions of the relevant sections of the *CPA* and of the *PUB Act* and by issuing the Order, which is contrary to them.<sup>60</sup>

Whereas the PUB emphasized the perils of payday loans and the need to protect consumers, the Court of Appeal ruled that “a balancing is required between the interests of consumers and the interests of the industry”.<sup>61</sup> For the Court of Appeal, Bill C-26 evinced Parliament’s determination that there is a “legitimate need for the existence and operation of a payday loan industry”.<sup>62</sup> Accordingly, the Court of Appeal went on to state that “the public interest encompasses both the interests of consumers of payday loans who need to be protected and the interests of payday lenders so as to ensure continuance of a properly regulated and viable industry.”<sup>63</sup> The Court of Appeal then looked at the wording of a particular provision which Bill 25 added to *The Consumer Protection Act*, specifically subsection 165(5) which, at the time of the hearing, required the PUB to make a just and reasonable order having regard to the factors considered by it.<sup>64</sup> Subsection 164(4), at that time, identified factors the PUB was allowed to consider in making an order, which included the operating

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<sup>56</sup> *Reconsideration of Board Order 39/08: Maximum Charges for Payday Loans* (27 June 2008), Manitoba Public Utilities Board Order 89/08 at 14, online: PUB <<http://www.pub.gov.mb.ca/pdf/misc/89-08.pdf>> [*Order 89/08*].

<sup>57</sup> *Ibid.*

<sup>58</sup> See *Cash Store*, *supra* note 5.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid* at para 24.

<sup>61</sup> *Ibid* at para 45.

<sup>62</sup> *Ibid* at para 43.

<sup>63</sup> *Ibid* at para 44.

<sup>64</sup> *The Consumer Protection Act*, RSM 1987, c C200, s 165(5), as amended by *The Consumer Protection Amendment Act (Payday Loans)*, SM 2006, c 31, s 3.

expenses, revenue requirements, and risks taken by payday lenders.<sup>65</sup> Having considered the applicant's argument that the PUB failed to give sufficient attention to the interests of the industry and the consumers who rely on it for payday loans, the Court of Appeal concluded as follows:

[T]he applicant has established as arguable that, whether as a result of the philosophical views of the PUB as to payday loans and the payday loans industry as expressed in the Order, or otherwise, and by reason of the maximum rates which it set, the PUB has exceeded its jurisdiction in the fulfillment of its mandate under s. 164 of the *CPA*.<sup>66</sup>

The Court of Appeal granted leave to appeal on two additional grounds advanced by the applicant.<sup>67</sup> It further held that the PUB's Order should be stayed pending the appeal.<sup>68</sup>

### III. SUMMARY OF BILL 14

The Government of Manitoba responded to the decision of the Manitoba Court of Appeal with Bill 14.<sup>69</sup> Upon coming into force, Part 3 rescinded the PUB's Order<sup>70</sup> and, in so doing, shut down the pending appeal. Bill 14 also amended *The Consumer Protection Act* and certain provisions of Bill 25 that had not yet been proclaimed in force. These empower the Lieutenant Governor in Council to make regulations setting limits on what payday lenders may charge for the cost of credit, for renewals, replacements or extensions of loans, and for default on loans.<sup>71</sup> At the time of writing, the regulations are not yet in effect. In the meantime, and until Manitoba receives federal designation, payday lenders in Manitoba remain subject to the 60% cap set out in section 347 of the *Criminal Code*.

Although Bill 14 stripped the PUB of its rate-capping powers and gave these powers to cabinet, it assigned the PUB a new role to play in the regulation of the payday loan industry. Bill 14 requires the PUB to conduct a review of the regulations within three years and make recommendations to the Minister of

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<sup>65</sup> *Ibid*, s 164(4).

<sup>66</sup> *Cash Store*, *supra* note 5 at para 49.

<sup>67</sup> *Ibid* at paras 50–67, 81–92.

<sup>68</sup> *Ibid* at paras 94–111.

<sup>69</sup> Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 39th Leg, 3rd Sess, vol LXI No 41 (13 May 2009) at 2032 (Hon Greg Selinger) [*Debates* (13 May 2009)]. See also Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 39th Leg, 3rd Sess, vol LXI No 50 (1 June 2009) at 2489 (Cliff Graydon) [*Debates* (1 June 2009)].

<sup>70</sup> Bill 14, *supra* note 3, s 18.

<sup>71</sup> *Ibid*, ss 9–17.

Family Services and Consumer Affairs.<sup>72</sup> Bill 14 also stipulates that the Minister can seek the advice and recommendations of the PUB regarding the regulation of the industry.<sup>73</sup> Thus, it appears that the PUB will continue to do the majority of the work, with Cabinet taking the credit so as to prevent judicial interference.

In addition to setting out a new process for setting rate-caps on payday loans, Bill 14 introduced new consumer protection provisions. These provisions put additional restrictions on payday lenders. First, Bill 14 forbids payday lenders from retaining the residual funds on cash cards.<sup>74</sup> This provision acknowledges that borrowers who are issued cash cards are often unable to access a portion of their loan because automated teller machines do not dispense bills in denominations smaller than \$20.<sup>75</sup> Bill 14 also prohibits payday lenders from granting a loan which exceeds a proportion of the borrower's next net pay as prescribed by regulation. However, this provision has not yet come into effect.<sup>76</sup> In addition, payday lenders are prohibited from deducting any portion of the cost of credit from the principal amount of the loan.<sup>77</sup> Tied selling is also prohibited, meaning that payday lenders are prohibited from making a payday loan contingent on the purchase of an additional product or service, unless its cost is included in the borrower's cost of credit for the loan.<sup>78</sup> Finally, Bill 14 empowers the Lieutenant Governor in Council to make regulations respecting internet payday loans.<sup>79</sup>

Bill 14 also introduced new tools for government to enforce the regulatory scheme.<sup>80</sup> The Bill empowers the director of the Consumers' Bureau to order a lender to pay certain costs of an inspection or investigation resulting either from failure to comply with the regulatory scheme or failure to cooperate with inspectors.<sup>81</sup> As well, the director is empowered to issue compliance orders.<sup>82</sup>

Finally, Bill 14 established the Manitoba Payday Borrowers' Financial Literacy Fund, although the provisions dealing with this fund have yet to come into effect.<sup>83</sup> This initiative will help fund programs designed to improve the

<sup>72</sup> *Ibid.*, s 10.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*, s 5.

<sup>75</sup> *Debates* (13 May 2009), *supra* note 69 at 2032–2033.

<sup>76</sup> Bill 14, *supra* note 3, s 6.

<sup>77</sup> *Ibid.*, s 7.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*, s 9(1)(j).

<sup>80</sup> *Debates* (13 May 2009), *supra* note 69 at 2033.

<sup>81</sup> Bill 14, *supra* note 3, s 8.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

financial literacy of payday loan borrowers and prospective borrowers.<sup>84</sup> It will be financed by payday lenders, who will have to pay a financial literacy support levy as a condition of their licence.<sup>85</sup>

#### IV. PASSAGE OF BILL 14 THROUGH THE LEGISLATIVE ASSEMBLY

This section is intended to provide readers with an overview of the debate surrounding Bill 14. It presents a range of perspectives on Bill 14 voiced by MLAs and members of the public and highlights a number of the contentious issues.

##### A. First and Second Readings

On 8 April 2009, the Honourable Greg Selinger, Minister of Finance, moved that Bill 14 be read a first time. The motion was seconded by the Honourable Gord Mackintosh, Minister of Family Services and Consumer Affairs. The motion was adopted.<sup>86</sup>

On 13 May 2009, Minister Selinger moved that Bill 14 be read a second time and referred to a House Committee. The motion was seconded by Hon. Rosann Wowchuk, then Minister of Agriculture.<sup>87</sup> Minister Selinger identified the Bill as “a critical component in the government's commitment to protecting consumers through the regulation of the payday loan industry.”<sup>88</sup>

Given the Court of Appeal's interpretation of the preceding amendments, Minister Selinger prudently put the government's true intentions on the record:

I wish to make it very clear that the *raison d'être* of The Consumer Protection Act is, and always has been, the protection of consumers. The effect of the provisions in the current legislation, and those contained in Bill 14, is to regulate the payday loan industry. However, the legislation's core objective is to protect consumers from excessive loan rates and dubious business practices.<sup>89</sup>

Minister Selinger noted that the ruling of the Manitoba Court of Appeal, wherein Cash Store was granted leave to appeal and a stay of the Order, concerned the government because it delayed the implementation of the existing payday loan legislation, thereby leaving the industry unregulated and borrowers

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<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, vol LXI No 22 (8 April 2009) at 565 (Greg Selinger) [*Debates* (8 April 2009)].

<sup>87</sup> *Debates* (13 May 2009), *supra* note 69 at 2031.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid* at 2033.

unprotected.<sup>90</sup> Minister Selinger stated that, although the government was confident that the appeal would have been dismissed, thereby leaving the Order intact, the government had to consider the effect of the ensuing delay on Manitobans.<sup>91</sup>

Having admitted that Bill 14 was largely designed to put a stop to the judicial proceedings and get on with regulating the payday loan industry, Minister Selinger noted that his government would treat the PUB's Order as "consultation, advice, and recommendations" when setting the rate-caps via regulation.<sup>92</sup> He also highlighted the future role of the PUB in reviewing the regulations and providing advice and recommendations to government.<sup>93</sup> Lastly, Minister Selinger noted that, once Bill 14 had been passed, the Government of Manitoba would apply to the Government of Canada to receive a designation order under the *Criminal Code* to exempt compliant payday lenders in the province from criminal liability for usury.<sup>94</sup>

A handful of other MLAs also put their thoughts on the record with regard to Bill 14. Liberal MLA Kevin Lamoureux observed that over the last few years there has been an exodus of banking institutions from the north end of Winnipeg and, in their absence, payday outlets have cropped up everywhere.<sup>95</sup> After speculating that the number of payday lenders in the north end outnumbers those in the south by a ratio of about 5 to 1, Mr. Lamoureux stated:

I suspect if you were to start to draw some correlations, you might find the individuals that are quite often in most need are the ones that are put into a position which they're having to use the services of these payday operations...<sup>96</sup>

Mr. Lamoureux opined that payday loan operations are not "a bad thing per se"; however, he expressed concern that individuals are taking out loans without fully appreciating the costs.<sup>97</sup> Given that the Bill would promote financial literacy and protect borrowers from exploitation, Mr. Lamoureux supported referring Bill 14 to Committee.<sup>98</sup>

On 27 May 2009, Progressive Conservative MLA David Fauschou called the attention of the House to the fact that cabinet would be assuming a great

<sup>90</sup> *Ibid* at 2032.

<sup>91</sup> *Ibid*.

<sup>92</sup> *Ibid*.

<sup>93</sup> *Ibid*.

<sup>94</sup> *Ibid* at 2033.

<sup>95</sup> *Ibid* at 2034.

<sup>96</sup> *Ibid* at 2034–2035.

<sup>97</sup> *Ibid* at 2035.

<sup>98</sup> *Ibid* at 2035–2036.

deal of responsibility under Bill 14.<sup>99</sup> While recognizing that the PUB would continue to do much of the “legwork”, Mr. Faurshou encouraged the government to stay current and on top of changes to market conditions over time.<sup>100</sup> He also echoed the sentiments of the Court of Appeal, calling on the government to “recognize the balance between those that are lending the money and those that are in receipt of, of loans monies.”<sup>101</sup>

On 1 June 2009, after Progressive Conservative MLA Cliff Graydon stressed the significance of Bill 14 for enabling government to fulfill its duty to protect consumers,<sup>102</sup> debate came to a close and the second reading motion was adopted.<sup>103</sup>

## **B. Standing Committee on Legislative Affairs**

After passing second reading, Bill 14 was referred to the Standing Committee on Legislative Affairs. The proceedings were held on 3 June 2009. Six members of the public made oral submissions and two deposited written submissions. Of the six presenters, two represented the interests of the payday loan industry and four represented the interests of consumers. Both written submissions were made on behalf of the industry.

### *1. Submissions on Behalf of Industry*

Mr. Antoine Hacault, solicitor for Cash Store, stressed the need for a legislative provision requiring rate-caps to be just and reasonable to both consumers and the industry.<sup>104</sup> He argued that without this provision government could set rates that are unjust and unreasonable to consumers or industry, depending on which political party was in power at any given time.<sup>105</sup> Mr. Hacault also argued that the burden of a financial literacy fund should not fall entirely on the shoulders of payday loan operators. Instead, he proposed that this type of initiative be funded by the whole financial services industry.<sup>106</sup> Lastly, Mr. Hacault argued that payday lenders participating in the consultation process should have their costs

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<sup>99</sup> Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 39th Leg, 3rd Sess, vol LXI No 48 (27 May 2009) at 2384 (David Faurshou) [*Debates* (27 May 2009)].

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

<sup>102</sup> *Debates* (1 June 2009), *supra* note 69 at 2488–2489.

<sup>103</sup> *Ibid* at 2489.

<sup>104</sup> Manitoba, Legislative Assembly, *Standing Committee on Legislative Affairs*, 39th Leg, 3rd Sess, vol LXI No 4 (3 June 2009) at 91–92 (Antoine Hacault) [*Committee*].

<sup>105</sup> *Ibid* at 92.

<sup>106</sup> *Ibid* at 92–93.

reimbursed. He cautioned that refusal to do so would merely punish payday loan borrowers as lenders' costs would ultimately be forwarded to consumers.<sup>107</sup>

Mr. Robert Thompson informed the committee that he and his wife had recently opened a Money Tree outlet in Winnipeg.<sup>108</sup> He claimed that they "represent the quintessential mom-and-pop operation".<sup>109</sup> Mr. Thompson cautioned that if cabinet adopts the rate-caps set by the PUB, Manitoba-based payday lenders would be put out of business, leaving American multinational corporations like National Money Mart and Advance America to monopolize the market.<sup>110</sup> Mr. Thompson then compared the rate-caps set by the PUB with those set in other Canadian jurisdictions, which range from \$21 per \$100 loan in Ontario to \$31 per \$100 loan in Nova Scotia, and claimed that the higher rates in these jurisdictions discredits the lower limit set by the PUB.<sup>111</sup>

Mr. Gerry Charlebois, President of C11 Holdings Ltd., criticized the PUB for setting rate-caps which, he claimed, were "explicitly designed to put small companies such as ours out of business."<sup>112</sup> He argued that the economic and human costs to people who would otherwise have no access to credit far outweigh the cost of their loans. In his words:

There are cost and penalties applied if insurance premiums, car payments and or mortgage payments cannot be met. There are costs if medication cannot be purchased when it is required. There are costs for missing work because of vehicle break downs and no money to have it repaired. Employers are penalized by being short of staff and employees miss out on wages. There are human costs when there is no food on the table because one partner walked out on the other partner leaving behind no financial resources to provide the immediate needs of their partner or family. All of these situations happens far too often and services such as ours are the only hope for so many people. It is often the pay advance companies who can bridge the gap to get people over these temporary difficulties in their lives.<sup>113</sup>

Mr. Stan Keyes, on behalf of the Canadian Payday Loan Association ("CPLA"), noted that the CPLA supported the proposed legislation.<sup>114</sup> However, the CPLA rejected the notion that the payday loan industry should be solely responsible for funding financial literacy programs. According to the CPLA, payday lenders should not be singled out; rather, all businesses providing

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<sup>107</sup> *Ibid* at 92.

<sup>108</sup> *Ibid* at 96 (Robert Thompson).

<sup>109</sup> *Ibid* at 96.

<sup>110</sup> *Ibid*.

<sup>111</sup> *Ibid* at 111 (Gerry Charlebois).

<sup>112</sup> *Ibid* at 110.

<sup>113</sup> *Ibid* at 111.

<sup>114</sup> *Ibid* at 112 (Stan Keyes).

financial services should be required to contribute.<sup>115</sup> Mr. Keyes reminded the committee that Manitoba charges higher licensing fees than any other province, and that additional levies could effectively bankrupt the industry.<sup>116</sup> Lastly, Mr. Keyes advised the government against giving the PUB the authority to conduct reviews. He argued that the PUB's hearing process is ill-suited for such reviews and is too costly a process for payday loan stakeholders to participate in. Rather, an advisory board would be preferable.<sup>117</sup>

## *2. Submissions on Behalf of Consumers*

Ms. Gloria Desorcy from the Manitoba Branch of the Consumers' Association of Canada ("CAC") noted CAC's longstanding concern regarding the high cost of payday loans and the fact that many payday loan borrowers are individuals who can least afford to pay them.<sup>118</sup> After indicating CAC's support for the new consumer protection provisions contained in the Bill, she went on to identify some concerns with the Bill. Ms. Desorcy first expressed concern about the transferring of rate-setting powers from a "transparent multistakeholder public process" to a political one.<sup>119</sup> She noted that "CAC Manitoba is prepared to accept the expedience of having the Lieutenant-Governor-in-Council set the maximum charge this time around because it will enable all the other protections in the 2007 legislation and in Bill 14 to be instituted with less delay."<sup>120</sup> She then noted that the true test of the Bill will be the rate set by cabinet; CAC would not support a higher rate-cap than the one set by the PUB.<sup>121</sup> In any event, Ms. Desorcy was adamant that rate-capping powers should be returned to the PUB by the end of the year.<sup>122</sup>

Mr. Byron Williams from the Public Interest Law Centre provided arguments in support of regulating the payday loan industry in Canada.<sup>123</sup> Mr. Williams noted that in Canada two payday loan firms dominate the marketplace. One of these firms charges rates among the lowest in Canada while the other charges rates among the highest.<sup>124</sup> As Mr. Williams concluded, this is not

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<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid* at 93 (Gloria Desorcy).

<sup>119</sup> *Ibid* at 94.

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid* at 97–100 (Byron Williams).

<sup>124</sup> *Ibid.*

consistent with a well-functioning market.<sup>125</sup> Mr. Williams then proceeded to talk about the detrimental effects of the industry on a particularly vulnerable group: repeat customers. Mr. Williams explained that the payday loan industry is one which depends on this type of customer: a type of customer that is likely to end up experiencing a credit crisis.<sup>126</sup> Mr. Williams went on to describe the demographics of payday loan customers. He noted that they tend to be employed, have low-to-modest incomes, lack a university education, and lack a credit rating or have poor credit ratings.<sup>127</sup> He then emphasized that they find themselves at payday lenders rather than banks because of their vulnerability:

...[T]hey're more likely to be refused their credit card, more likely to spend in excess of income, more likely to have less than \$200 in a bank account, and more likely to have no one else to turn to in the event of financial difficulty. These are [their] consumers.<sup>128</sup>

Mr. Williams provided evidence showing that payday lenders would not be unduly burdened by the rate-caps set by the PUB which the government promised to consider when crafting the regulations.<sup>129</sup> When asked whether he thought it would have been better to just let the PUB set the rates as opposed to government, Mr. Williams responded as follows:

[M]y clients prefer a transparent process with—it, it's cumbersome, it's got flaws but it's worked well for Manitobans. That being said, in the short term, there's 55 to 80,000 people who could see some immediate rate relief through this, this bill, and I think my clients would support that in the short term, but in the longer term, they'd like to see a return to...a more fulsome regulatory process.<sup>130</sup>

In the short-term, Mr. Williams endorsed rate regulation to protect consumers who need these kinds of loans. However, recognizing that payday loans are not ideal sources of credit for low-income Manitobans, Mr. Williams hinted that long-term solutions may reside in mainstream financial institutions offering these kinds of financial services in the future.<sup>131</sup>

Mr. John Silver, the executive director of Community Financial Counselling Services, Inc. made a presentation to the committee based on his agency's experiences with clients who borrow from payday lenders.<sup>132</sup> Many of their clients, he noted, have more than one outstanding payday loan. Some, he

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid* at 98–99.

<sup>129</sup> *Ibid* at 99.

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid* at 99–100.

<sup>132</sup> *Ibid* at 100–103 (John Silver).

claimed, have up to eight outstanding loans.<sup>133</sup> Accordingly, Mr. Silver urged the government to put regulations in place to curb repeat borrowing.<sup>134</sup> After detailing the exploitative practices of unscrupulous payday lenders, Mr. Silver praised the proposed legislation while cautioning that care be taken to protect those most vulnerable:

I just want to say something about most of those vul-vulnerable consumers. This legislation and its accompanying regulations will go a great distance to meeting the objective to protect consumers from excessive loan rates and dubious business practices. However, par-particular care must be taken to protect the most vulnerable of consumers and those most opened-open to exploitation with regard to payday lending: individuals, families on social assistance, employment insurance and other forms of compensation, seniors struggling to manage on shrinking pension dollars. Those coping with disabilities all survive on incomes below or close to the poverty line.<sup>135</sup>

Ms. Laurie Johnson, program manager at New Directions for Children, Youth, Adults and Families, stressed the need for legislation to protect those most vulnerable from the perils of payday loans.<sup>136</sup> She emphasized that many of those who are vulnerable have invisible disabilities, such as FASD, learning difficulties, illiteracy, and chronic stress.<sup>137</sup> Ms. Johnson recommended that the PUB's rate-cap be adopted in the regulations, praised the legislative provisions addressing clarity and simplicity of language and the Financial Literacy Fund, and opined that "it's just not acceptable for irresponsible and mercenary business practices to be part of the social safety net for Canadians... ." <sup>138</sup>

Following the public presentations, the committee proceeded to the clause-by-clause consideration of the Bill.<sup>139</sup> No amendments were proposed or considered. All of the clauses were passed, and it was agreed that Bill 14 would be reported.<sup>140</sup>

### C. Report Stage

On 10 June 2009, Mr. Faurischou proposed two amendments to the Bill.<sup>141</sup> First, Mr. Faurischou moved, seconded by Mr. Graydon, that the Bill be amended by adding additional clauses stipulating that the purpose of the rate-caps is to

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<sup>133</sup> *Ibid* at 101.

<sup>134</sup> *Ibid*.

<sup>135</sup> *Ibid* at 102.

<sup>136</sup> *Ibid* at 103–104 (Laurie Johnson).

<sup>137</sup> *Ibid* at 104.

<sup>138</sup> *Ibid*.

<sup>139</sup> *Ibid* at 107–108.

<sup>140</sup> *Ibid*.

<sup>141</sup> Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 39th Leg, 3rd Sess, vol LXI No 56 (10 June 2009) at 2826–2828 (David Faurischou) [*Debates* (20 June 2009)].

protect “borrowers and the financial health of payday lenders” and that these limits must be set at “just and reasonable levels”.<sup>142</sup> Mr. Fauschou explained that this amendment may enable borrowers and lenders to appeal the rates set out in regulation to courts of law.<sup>143</sup> He stressed the importance of this avenue of redress, stating:

And I think it's very, very important that the laws passed by the Manitoba Legislature Assembly do not put themselves above the judicial system and that the judicial system always has opportunity to hear from Manitobans as to the pros and cons of any of our legislation through an appeal...to the court system.<sup>144</sup>

The House rejected this amendment.

Mr. Fauschou then moved, seconded by Mr. Stuart Briese, that Bill 14 be amended by removing the provision giving the PUB discretion to award participants costs and replacing it with one ordering the PUB to consider participants' reasonable costs and require government to provide reimbursement.<sup>145</sup> Due to the fact that licensing fees in Manitoba exceed those of any other province, Mr. Fauschou opined that there would be ample monies available to reimburse participants for their costs.<sup>146</sup> This amendment was also rejected.

#### D. Concurrence and Third Reading

On 11 June 2009, the Honourable Dave Chomiak, then Government House Leader, moved, seconded by the Honourable Diane McGifford, Minister of Advanced Education, that Bill 14 be concurred in, read for a third time, and passed.<sup>147</sup> At this time, the Leader of the Manitoba Liberal Party, Dr. Jon Gerrard, rose to speak against the Bill.<sup>148</sup> Dr. Gerrard opined that the legislation was unnecessary, that had the government just let the courts do their job, protective provisions would already be in place.<sup>149</sup> Dr. Gerrard also stressed the need to balance the interests of consumers and lenders in setting rate-caps.<sup>150</sup> He also opined that the “PUB is an infinitely better process than having the Minister

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<sup>142</sup> *Ibid* at 2826–2827.

<sup>143</sup> *Ibid* at 2827.

<sup>144</sup> *Ibid*.

<sup>145</sup> *Ibid*.

<sup>146</sup> *Ibid*.

<sup>147</sup> Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 39th Leg, 3rd Sess, vol LXI No 57B (11 June 2009) at 2978 (Dave Chomiak) [*Debates* (11 June 2009)].

<sup>148</sup> *Ibid* at 2978–2979 (Hon Jon Gerrard).

<sup>149</sup> *Ibid* at 2978.

<sup>150</sup> *Ibid*.

of Finance decide the interest rates.<sup>151</sup> The question, concurrence and third reading, was then put to the House and the motion was adopted.<sup>152</sup>

### **E. Royal Assent and Coming into Force**

Bill 14 received Royal Assent on 11 June 2009. The Act came into force on this day, subject to exceptions.<sup>153</sup> The sections dealing with the cash cards and prohibitions on discounting and tied selling came into force on 1 September 2009.<sup>154</sup> Section 6, which prohibits lenders from issuing a loan which exceeds a proportion of the borrower's next net pay, as well as the portion of section 8 which creates the Financial Literacy Fund, will come into force on a day fixed by proclamation.<sup>155</sup>

### **V. ASSESSMENT OF BILL 14**

Bill 14 has very different implications for payday lenders and borrowers; thus, it is not surprising that payday lenders and consumer advocates have different opinions with respect to the merits of the Bill. To be sure, the outcome of any assessment of Bill 14 would depend on whether the interests of the person making the assessment are aligned more with those of industry or the consumer.

That said, it would be hard to deny that payday lenders have been treated unfairly in the process. After spending countless hours and dollars participating in the PUB's hearings (and, in the case of Cash Store, applying for leave to appeal) Bill 14 rescinded the Order and established a whole new process for fixing rates. The government was admittedly responding to concerns about judicial interference, still one might be excused for asking why, if the government was so concerned with such interference, it did not introduce legislation the first time around (i.e., with Bill 25) giving itself the final say with respect to rates? Perhaps it was not foreseeable at the time the government introduced Bill 25 that a court would find as viable an argument that an order made pursuant to consumer protection legislation must balance the interests of consumers with the interests of those from whom consumers need protection. To be fair, this argument does seem counter-intuitive: the legislation is consumer protection legislation, not consumer and lender protection legislation. Still, this answer is unlikely to satisfy those payday lenders who invest so much time and

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<sup>151</sup> *Ibid* at 2979.

<sup>152</sup> *Ibid*.

<sup>153</sup> Bill 14, *supra* note 3, s 19.

<sup>154</sup> *Ibid*, s 19(2).

<sup>155</sup> *Ibid*, s 19(3).

money in a process, only to have the outcome of that process eliminated by new legislation.

Consumer advocates at the committee meeting expressed disappointment with the Court of Appeal's decision and were generally supportive of the government's decision to introduce legislation to shut down the appeal.<sup>156</sup> However, they were somewhat perturbed about the new process introduced by Bill 14 for setting rate-caps. Consumer advocates voiced opposition to the long-term replacement of a transparent, multi-stakeholder, public process with a political one that would take place behind closed doors. Two consumer advocates at the committee meeting noted that, while they supported a temporary change to bypass the appeal, they ultimately supported an eventual return of decision-making power to the PUB.<sup>157</sup> Bill 14 does not contemplate such a return.

Aside from making changes to the rate-capping process, Bill 14 introduced a number of new consumer protection provisions and new enforcement tools for government. As expected, consumer advocates applauded these new measures.<sup>158</sup> Many of these provisions, such as mandatory reimbursement of residual amounts left on cash cards, do nothing more than protect borrowers from outright exploitation. Thus, it is not surprising that these were the least controversial provisions of the Bill. Indeed, industry representatives at the committee took no issue with them whatsoever.

An aspect of Bill 14 that attracted much more lively debate was the Payday Borrowers' Financial Literacy Fund. At the committee meeting, representatives from the payday loan industry were adamant that payday lenders not be made to shoulder the entire burden of this fund.<sup>159</sup> Indeed, it is difficult to appreciate why the payday loan industry should be singled out for funding such an initiative. As will be discussed in the next section, many of their borrowers are vulnerable persons with low financial literacy.<sup>160</sup> However, this is also true for other industries engaged in sub-prime lending. Why should pawnbrokers, for instance, not be made to bear some of the costs of financial literacy programs? The government offered no justification for singling out payday lenders in the House debates.

Prior to recent amendments, payday lenders routinely charged interest rates that violated the *Criminal Code*. Thus, while some aspects of Bill 14 may be

<sup>156</sup> *Committee, supra* note 104 at 93–96 (Gloria Desorcy).

<sup>157</sup> *Ibid* at 93–96 (Gloria Desorcy), 97–100 (Byron Williams).

<sup>158</sup> *Ibid*.

<sup>159</sup> *Ibid* at 91–93 (Antoine Hacault), 111–112 (Stan Keyes).

<sup>160</sup> Association of Community Organizations for Reform Now (ACORN), *Survey of Payday Loan Users in Toronto and Vancouver* (Toronto: ACORN Canada, 2005) at 9.

unfair to payday lenders, one might be excused for thinking that they got off easy. Assuming that the government adopts the rates set by the PUB in the regulations, payday lenders will still be allowed to charge annual interest rates in the range of hundreds to even thousands of the percentages of their loans. While industry representatives have argued that these caps would shut down the payday loan industry in Manitoba, it is telling that the two largest lenders in Canada originally responded to the PUB's Order by publically vowing to continue their operations in the province.<sup>161</sup> Unless the Payday Borrowers' Financial Literacy Fund levy is set at such an exorbitant rate that payday lenders are forced to reconsider this position, it appears that Bill 14 poses no real threat to the viability of the industry in Manitoba.

## VI. ANOTHER PERSPECTIVE

This analysis has, so far, proceeded on the basis of an assumption that new provincial consumer protection provisions—such as caps on interest rates and a financial literacy fund—are ultimately in consumers' best interest. This assumption may seem incontrovertible; however, there is an argument that provincial initiatives aimed at receiving a federal designation order exempting payday lenders from prosecutions for usury may ultimately harm the marginalized consumers who currently rely on their services.<sup>162</sup> Admittedly, so long as the Manitoba government is committed to enacting legislation and seeking a designation pursuant to Bill C-26, consumer advocates would certainly be right to pursue the best possible consumer protection legislative provisions. However, consumer advocates would be wrong to altogether neglect the initial challenge of persuading their elected representatives to reject the federal-provincial scheme for exempting payday lenders from section 347. By regulating the payday loan industry and applying for federal designation, the Government of Manitoba is conferring legitimacy on the industry.<sup>163</sup> Essentially, the government is condoning interest rates that are considered criminal and offensive in any other context.

Payday lenders have vehemently argued that they provide a valuable service that fulfills an unmet need for short-term loans to people with poor credit histories.<sup>164</sup> The author concedes that there is certainly demand for these services. The author also concedes that there is merit to the argument that the risky nature of payday loans necessitates the charging of high interest rates. It is not the author's intention to demonize payday lenders; rather, it is to challenge

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<sup>161</sup> *Committee, supra* note 104 at 97–100 (Byron Williams).

<sup>162</sup> *Order 39/08, supra* note 4 at 99–103 (Professor Bruce Duggan).

<sup>163</sup> *Ibid* at 100.

<sup>164</sup> Parliamentary Report, *supra* note 2 at 1.

consumer advocates and the provincial government to question whether seeking an exemption for payday lenders from the usury provisions of the *Criminal Code* is truly in the best interests of Manitobans. While Parliament enacted a federal-provincial scheme, it gave provinces a choice as to whether to participate so as to permit their payday lenders to charge what would otherwise be criminal interest rates. This is a significant decision that has seemingly been ignored by both elected representatives and consumer advocates in Manitoba. Instead, the debate has focused exclusively on the substance of the very legislation which would qualify the province for a federal designation order.

As noted above, assuming that the government adopts the rates set by the PUB in the regulations, payday lenders would be permitted to charge annual interest rates in the range of hundreds to even thousands of the percentages of their loans. Undoubtedly, it will be argued that Manitobans are willing to pay these interest rates for payday loans, and government should not interfere with their freedom to contract. The weakness of this argument becomes apparent when one considers the demographics of payday loan borrowers and recent trends with respect to the distribution of financial institutions. While there is some disagreement between consumer advocates and payday lenders as to the precise make-up of payday loan users,<sup>165</sup> there is no question that a large proportion of borrowers are vulnerable, marginalized people with no savings and nowhere else to turn. This was confirmed in Statistics Canada's Survey of Financial Security, 2005.<sup>166</sup> This survey found that Canadian low-income families and families with little savings were significantly more likely than other Canadian families to have taken out payday loans.<sup>167</sup> The study also found a significant relationship between the use of payday loans and net worth: families with lower net worth were significantly more likely to take out payday loans.<sup>168</sup> Families that used payday loans were also more likely to be renters than homeowners<sup>169</sup> and were significantly less likely to have credit cards;<sup>170</sup> they were also more likely to have fallen behind on bills, loan payments, and mortgage payments.<sup>171</sup> Furthermore, spending exceeded income for more families that used payday loans than other families.<sup>172</sup> The study also showed that families which

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<sup>165</sup> See generally Stephanie Ben-Ishai, "Regulating Payday Lenders in Canada: Drawing on American Lessons" (2008) 23 BFLR 323 at 327 [Ben-Ishai]. Accord *Committee, supra* note 104; and *Order 39/08, supra* note 4.

<sup>166</sup> Wendy Pyper, "Payday Loans" (2007) 8:4 *Perspectives on Labour and Income* 5.

<sup>167</sup> *Ibid* at 7–8.

<sup>168</sup> *Ibid* at 8.

<sup>169</sup> *Ibid*.

<sup>170</sup> *Ibid* at 8–10.

<sup>171</sup> *Ibid* at 10.

<sup>172</sup> *Ibid*.

used payday loans were more likely to have sold their belongings to make ends meet and were significantly more likely to have previously declared bankruptcy.<sup>173</sup> Perhaps most troubling was the finding that nearly half of families that used payday loans reported that they had nobody else to turn to for financial assistance.<sup>174</sup> The Survey ultimately paints a picture of a group of desperate families using payday loans to make ends meet. Many of these families seem to have no other choice but to accept loans with exorbitant interest rates. In summary, those who can least afford the high interest rates accompanying payday loans are the ones with no other options but to endure them. One author has likened this trend to a regressive form of taxation:

Where the alternative financial sector is being used to purchase the necessities of life this detriment may be conceptualised as similar to a regressive form of taxation. It is ironic that publicly quoted companies engaged in sub-prime lending in the US are very profitable investments so that those who invest in the stock market (generally more affluent individuals) profit from the high prices charged to lower income consumers.<sup>175</sup>

The results of the Survey of Financial Security confirm what many would expect from personal observation. As anyone who has ever been to north end Winnipeg or East Hastings, Vancouver, will confirm, payday lenders know that there is high demand for their services in Canada's poorest communities.<sup>176</sup> As Mr. Lamoureux noted in the House debates, and as studies have shown, banks are moving out of poorer neighbourhoods leaving "the payday loan industry to move in and become the financial institution of last resort for low income Canadians."<sup>177</sup> As this becomes more common, a two-tiered system of credit is established: a relatively low-cost source of credit for affluent communities and a high-cost source of credit for poor neighbourhoods.<sup>178</sup>

The finding that payday loans are, by and large, the credit source of the poor, is even more troubling when one considers the correlation between poverty and membership in one or more marginalized groups—groups protected under the *Canadian Charter of Rights and Freedoms*<sup>179</sup> and human rights codes across the country, such as recent immigrants, persons with disabilities, and members of

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<sup>173</sup> *Ibid.*

<sup>174</sup> *Ibid* at 10–11.

<sup>175</sup> Industry Canada, *Access to Credit in the Alternative Consumer Credit Market* by Iain Ramsay (Ottawa: Industry Canada, 2000) at 40.

<sup>176</sup> *Debates* (13 May 2009), *supra* note 69 at 2034–2035.

<sup>177</sup> ACORN Report, *supra* note 1 at 15.

<sup>178</sup> Lynn Drysdale & Kathleen E Keest, "The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and its Challenge to Current Thinking about the Role of Usury Laws in Today's Society" (2000) 51 SCL Rev 589.

<sup>179</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

visible minority groups, among others.<sup>180</sup> What this means is that, by participating in the federal-provincial scheme exempting payday lenders from the usury provisions of the *Criminal Code*, and by condoning a two-tiered system of credit, governments are complicit in what is arguably discrimination.

Given the interests that are at stake, it is disconcerting that the question of whether Manitoba should regulate the industry and apply for a designation order never arose in the debates of either Bill 25 or Bill 14. While opting to abstain from applying for a designation order may not be a viable option, it is hard to accept that it was not worthy of any consideration—particularly in light of the fact that at least one other province has made this choice. Québec effectively barred payday lenders years ago by setting interest rate-caps too low for payday lenders to do business in the province.<sup>181</sup> There is no evidence to suggest that residents of Québec are suffering as a result.<sup>182</sup>

It has been suggested that Parliament sought to legitimize the payday loan industry largely out of fear that, if the industry were shut down in Canada, those who currently rely on payday loans would be forced to turn to loan sharks, theft, or go without.<sup>183</sup> Perhaps these same fears prevented the Legislative Assembly of Manitoba from even considering other potentially viable options for ensuring that everyone has access to credit when they need it most. The House did not consider the possibility that its efforts might be better spent encouraging credit unions to provide services to those who currently rely on payday lenders.<sup>184</sup> Nor did it seriously consider the possibility that the province should be working with the federal government to prevent bank closures in poor neighbourhoods.<sup>185</sup> The House had other options; whether or not these were viable should have been determined through debate before passing legislation pursuant to the federal-provincial payday loans scheme.

In the final analysis, while Bill 14 contains provisions to protect consumers from egregious instances of exploitation by payday lenders, the Bill ultimately condones a two-tiered system of credit: one for the affluent and one for the poor. While purporting to be consumer protection legislation, Bill 14 ultimately pardons payday lenders in Manitoba from the standard usury laws, cementing the industry as the financier of Manitoba's most vulnerable families.

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<sup>180</sup> Ramsay, *supra* note 175 at 1.

<sup>181</sup> *Order 39/08*, *supra* note 4 at 233.

<sup>182</sup> *Ibid* at 231.

<sup>183</sup> *Ibid* at 60.

<sup>184</sup> This solution was frequently raised at the PUB hearing. See *Order 39/08*, *supra* note 4.

<sup>185</sup> This solution was also frequently raised at the PUB hearing. See *ibid*.