

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Cash Store v. Nova Scotia (Registrar of Credit), 2007 NSSC 81

Date: 20070315

Docket: SH 265165A

Registry: Halifax

Between:

3074700 Nova Scotia Limited o/a The Cash Store

Appellant

- and -

The Registrar of Credit,
appointed under the *Consumer Protection Act*, R.S.N.S., 1989, c.92

Respondent

DECISION

Judge: The Honourable Justice John D. Murphy

Heard: October 2, 2006, at Halifax, Nova Scotia

Written Decision: March 15, 2007

Counsel: David P. S. Farrar, Q.C.; Andrew Fraser, for the
Appellant
Agnes E. MacNeil, for the Respondent

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By the Court:

INTRODUCTION

[1] The Appellant operates as The Cash Store at branch offices throughout Nova Scotia, making short-term payday loans, which are essentially advances against borrowers' upcoming paycheques, usually repayable within one month. Lenders such as the Appellant require a permit under the *Consumer Protection Act*, R.S.N.S., 1989, c.92 (the "Act"), and their activities are subject to the provisions of the Act and Regulations made under its authority (**O.I.C. 2000-464, N.S. Reg. 160/2000** as amended by **O.I.C. 2004-138, N.S. Reg. 55/2004**; the "Regulations").

[2] Following receipt of a customer complaint, an investigation by Service Nova Scotia during November 2005 determined that procedures followed when loans were made at three Cash Store branches did not comply with the Act and Regulations. The irregularities included inadequate disclosure of fees and charging excessive interest.

[3] The Registrar appointed under the Act convened a hearing, as contemplated by the legislation, to allow The Cash Store to address the findings of the investigation prior to his making a decision concerning the status of its permit. After the hearing, the Registrar issued a written decision, dated March 28, 2006, which suspended the permit for 14 days and imposed five pre-conditions to reinstatement. Pursuant to s.32 of the Act, The Cash Store appealed the Registrar's decision, and its implementation has been in abeyance pending this Court's ruling.

[4] During the Appeal Hearing, The Cash Store did not take the position that the decision to suspend was wrong or could not be supported by evidence which was before the Registrar. Rather, the Appellant claimed the decision should be overturned because the Registrar failed to provide adequate reasons to properly explain what violations occurred, and to identify the evidence which grounded violations. The Cash Store also contends that if the decision to suspend is not reversed, the Court should set aside the total prohibition of all business activities

during the suspension and the conditions for reinstatement of the permit, because the Registrar did not have power to impose them, and they were unreasonable.

REGISTRAR'S HEARING AND DECISION

[5] The hearing before the Registrar was attended by five senior representatives of the Appellant and its counsel, by the inspector who investigated the complaint, and by two officials involved in administering the Act. The appeal book in this court contains documents which were before the Registrar, including filings and correspondence related to The Cash Store's registration under the Act, the November 2005 investigation and resulting reports, and correspondence between the Appellant's representatives and officials in the Registrar's office concerning irregularities, compliance, and hearing arrangements.

[6] The Registrar's hearing was not recorded, and the absence of a written or electronic record of that proceeding places this Court at a disadvantage, particularly when the appeal grounds suggest the Registrar did not properly relate the evidence to the alleged violations or give adequate reasons for his decision. Such issues can usually be better addressed if the Court has a record of the hearing, which often includes dialogue among the parties and the adjudicator disclosing what information was available and how issues were addressed.

[7] The Registrar imposed the permit suspension and conditions of reinstatement in the following terms:

...the lender's permit granted to 3074700 Nova Scotia Limited under the Consumer Protection Act is suspended for a period of 14 days, commencing May 1, 2006.

Once the 14 day suspension period has been completed the lender's permit may be re-instated under the following terms and conditions:

1. The Cash Store is to have conducted no business regulated by the Consumer Protection Act during its suspension period.
2. The Cash Store is to review all contracts to determine those where the administration charge and/or debit card fee were not disclosed in writing and/or factored into the cost of borrowing and provide this office with a list of all of the borrowers affected.

3. The Cash Store is to refund to all borrowers included on the list provided as a term of item 2 above all money paid in excess of that which was disclosed on the applicable loan agreement in accordance with Section 18(1) of the Act, which includes the administration charge, the debit card fee and any overpayment of interest if the loan was paid in full before the due date.
4. The Cash Store is to provide this office with a detailed accounting and proof of the refunds made in accordance with item 3 above.
5. The Cash Store is to sign both copies of the Assurance of Voluntary Compliance document attached to this decision and return them to this office by April 18, 2006.

ISSUES

[8] The list of issues enumerated in the Notice of Appeal has been substantially streamlined in the facta and oral arguments, and the matters in dispute may be summarized as follows:

- (1) Should the Registrar's decision to suspend the Appellant's license be set aside because he did not provide reasons which adequately described the manner in which The Cash Store violated the applicable legislation and which identified evidence to support those violations?
- (2) Did the Registrar err by imposing conditions for reinstatement of the Appellant's permit, when he did not have authority to do so?
- (3) If the Registrar had power to impose conditions, were those prescribed unreasonable such that they amounted to reviewable error?

ANALYSIS

[9] As the first step when addressing each issue, the Court must determine the standard of review applicable to that issue.

ISSUE #1 - The Decision to Suspend

[10] The Appellant submits that in the reasons given for his decision the Registrar failed to consider information which was before him, and did not recite with adequate precision the evidence upon which he was relying to reach his

conclusions, thereby compromising The Cash Store's ability to exercise a right of appeal.

(A) Standard of Review

[11] When conducting a judicial review or statutory appeal, the Court must begin by determining the standard of review in accordance with the pragmatic and functional approach outlined by the Supreme Court of Canada and the Nova Scotia Court of Appeal and followed in this Court. (**Pushpanathan v. Canada (Minister of Employment & Immigration)**, [1998] 1 S.C.R. 982; **Dr. Q. v. College Physicians and Surgeons (British Columbia)** 2003, S.C.C. 19; **The Law Society of New Brunswick v. Ryan** 2003 S.C.C. 20; **Creagar v. Nova Scotia (Provincial Dental Board)**, 2005 Carswell N.S. 48 (C.A.), **Re GE Capital Canada Retailer Financial Services Co.** (2000), 182 N.S.R. (2d) 165 (N.S.S.C.), and **Atlantic Collection Agency Ltd. (Appellant) v. Service Nova Scotia Municipal Relations Business Licensing and Registration Department (Respondent)**, 2006 Carswell N.S. 207 (N.S.S.C.).

[12] Those authorities direct that courts consider four categories of factors when determining the appropriate standard of review for a statutory appeal:

- (i) The presence or absence of a privative clause or statutory right of appeal;
- (ii) The expertise of the decision maker whose decision is under review;
- (iii) The purpose of the legislation and the provision in particular; and
- (iv) The nature of the question – is it a question of law, fact, or mixed law and fact?

[13] The reviewing Court must analyze the cumulative effect of the four contextual factors to determine whether the standard of review is one of:

- (a) Correctness;
- (b) Reasonableness; or
- (c) Patent unreasonableness.

[14] The pragmatic and functional approach was also explained by the Supreme Court of Canada in **C.U.P.E. v. Ontario (Minister of Labour)**, [2003] S.C.J. No. 28, at para. 149:

...The examination of these four factors, and the “weighing up” of contextual elements to identify the appropriate standard of review, is not a mechanical exercise. Given the immense range of discretionary decision makers and administrative bodies, the test is necessarily flexible, and proceeds by principled analysis rather than [sic] categories, seeking the polar star of legislative intent.

[15] In **Creagar**, *supra*, the Court of Appeal noted at paragraph 15 that:

[The functional and pragmatic approach to determining standard of review...] applies even to pure issues of law, for which the standard of review need not be correctness. The existence of the statutory right of appeal and whether the issue is one of law, are merely factors weighed with the others in the process to select the standard of review: **Ryan** at paras. 21, 41, 42; **Dr. Q.** At paras. 17, 21-26, 28-30, 33-34.

[16] Determining the standard of review applicable to a statutory appeal differs from deciding what standard to apply in an appeal to a Court of Appeal from a decision of a trial judge. In the latter context, the reviewing Court applies a standard based on an inquiry into whether the matters at issue are questions of fact, law or mixed fact and law. In this Appeal, in contrast, that is only one of four inquiries to be made before selecting the standard of review.

[17] In **Granite Environmental Inc. v. Nova Scotia (Labour Relations Board)** (2005), N.S.C.A. 141, the Court of Appeal summarized at paragraph 43 the Supreme Court of Canada’s comments in **Ryan v. Law Society (New Brunswick)**, *supra*, which provide guidance concerning the application of those different standards by a reviewing judge:

[43] For purposes of the analysis, I summarize **Ryan** as follows:

(a) Under correctness, the reviewing judge follows her own reasoning path. If the judge’s conclusion differs materially from the conclusion of the tribunal, then the tribunal is incorrect.

(b) Under reasonableness and patent unreasonableness, the reviewing judge does not follow her own reasoning path. She does not ask whether

her view is correct, reasonable or preferred. She follows the tribunal's reasoning path. She does not ask whether the tribunal's decision is correct or preferred. She asks whether there is any line of reasoning to support the tribunal's conclusion. If the answer is "yes", then the decision is upheld, even if there are other reasonably supportable conclusions which the reviewing judge prefers.

(c) This difference between correctness and the two reasonableness standards is especially important when reviewing a tribunal's decision under a statute, such as the *Trade Union Act* here, which authorizes the tribunal to balance competing interests and interpret and apply legislative policies. Then there often may be more than one conclusion with reasonable support. Under the two reasonableness standards any one of these is upheld. Under the correctness standard, a court upholds only its preferred conclusion.

[18] The four categories of factors which determine standard of review will be addressed in the context of this Appeal to assess whether the Registrar's decision should be considered against a standard of correctness, as maintained by The Cash Store, or reasonableness, as the Respondent contends.

(i) Absence of Privative Clause and Presence of Statutory Right of Appeal

[19] The absence of a privative clause, and the provision in Section 32 of the Act that the Court on appeal may confirm, vary or set aside the decision, order or direction of the Registrar, suggests a review standard with less deference to the Registrar's decision.

(ii) Decision Maker's Expertise

[20] The Nova Scotia Court of Appeal held in **Johnson v. Nova Scotia** (2005), N.S.C.A. 99:

The second contextual factor concerns the relative expertise of the Board as compared to that of the reviewing court. Greater deference is required only where the decision-making body is, in some way, more expert than the courts and the question under consideration is one that falls within the scope of the greater expertise...

[21] In **GE Capital**, *supra*, the Registrar under the Act had refused registration on the grounds that the Applicant's retailers were required to register separately as lenders. GE Capital appealed that decision, arguing, in part, that the Registrar had based his conclusions on irrelevant considerations and that he failed to properly apply and/or interpret the legislation. In **Atlantic Collection**, *supra*, when the Registrar under the *Collection Agencies Act* suspended its license, Atlantic Collection appealed, alleging among other things, that the Registrar had failed to provide a fair hearing. In both cases, when this Court was called upon by way of a statutory right of appeal to examine the decision of a Registrar, it determined that the appropriate standard of review was "correctness", after assessing the Registrar's relative expertise while it conducted a pragmatic and functional analysis.

[22] The same person serves as Registrar under the *Consumer Protection Act* and the *Collection Agencies Act*, and the decision under consideration in this Appeal was made by the same officer whose findings were reviewed in the **GE Capital and Atlantic Collection** cases. That person also administers the *Consumer Services Act*, the *Mortgage Brokers and Lenders Registration Act*, the *Real Estate Brokers Licensing Act* and the *Consumer Reporting Act*.

[23] In this case, the Respondent contends that the Registrar's decisions deserve deference because performance of his duties requires knowledge regarding calculating cost of credit, which is not a straightforward exercise, and he deals with matters of such complexity that the Act authorizes his retaining expert advice. The Respondent maintains that the Registrar's statutory powers, including those he receives under the *Public Inquiries Act*, indicate he is a person with specialized knowledge and expertise in economic regulation with broad powers to give directions, make orders, and impose conditions on permits.

[24] With respect, I disagree with the Respondent's view, and am more persuaded by the Appellant's submission that this Court's finding in **Atlantic Collection**, *supra*, is a more accurate characterization of the Registrar's expertise. Commenting upon the same official's role under the *Collection Agencies Act*, Justice Pickup observed beginning at paragraph 53:

The Registrar is appointed by the Governor in Council. The respondent notes that the Registrar, in addition to his duties under the *Collection Agencies Act*, is the

Director of Consumer Services appointed under the Consumer Services Act. The Registrar administers several Acts including the Collection Agencies Act, the Consumer Protection Act, the Real Estate Brokers Licensing Act, etc. The respondent suggests that the Registrar's responsibilities across different statutes would lead to some degree of specialization concerning consumer protection, policies and practices, and therefore some deference should be given to these decisions.

With respect, after review of the relevant provisions of the Collection Agencies Act, I cannot accept there is any degree of specialized knowledge attributable to the Registrar.

...

The respondent suggests that the Registrar's responsibilities under different statutes suggest that "some degree of specialization in consumer protection policies and practices would be developed and applied to decisions." I am not satisfied that this constitutes superior expertise to that of the court on the specific question of the violation of the Collection Agencies Act. The expertise would seem more likely to be found where a decision-maker's duties are more narrowly defined. It seems that having broad responsibilities for the supervision of several statutes would militate against a finding that an administrative decision-maker has greater expertise than the court.

The registrar is not a specialized decision-maker but is an official of the Respondent with a broader mandate, for whom supervision of the Act is one duty among many.

...

Here, unlike a specialized tribunal such as the Utility and Review Board, the registrar does not deal with a significant number of complaints under the Collection Agencies Act. A review of the legislation suggests that the administration of the Collection Agencies Act is but one of the many functions the Registrar carries out. As Director of Consumer Services, the Registrar has a responsibility for consumer protection under several statutes, yet there is no particular qualification for this appointment and no indication that the Registrar's expertise is any greater than that of the reviewing court. I am not satisfied that the responsibility for administering the Collection Agencies Act, in itself, confers any particular expertise on the Registrar.

[25] The qualifications required and duties performed by the Registrar under the Act are not materially different from the same person's role under the *Collection Agencies Act*. In my view Justice Pickup's observations and conclusions are apt in this case, and examination of the Registrar's expertise suggests little deference.

(iii) The Purpose of the Legislation and Provision

[26] The Act is a public interest statute intended to protect consumers by requiring fair disclosure of the cost of credit. The Registrar's functions, set out in Section 4, include powers relating to investigation, research, communication and policy development. No lender may carry on business in Nova Scotia without a permit issued by the Registrar, who also has authority to suspend or cancel permits. I agree with the Respondent's submission that the Registrar has broad powers involving a substantial exercise of his discretion, all in the public interest. As Chief Justice McLaughlin noted in *Dr. Q.*, *supra*, at paragraph 31, greater deference is demanded with respect to an administrative body charged with protecting the public interest in consumer-related matters. Consideration of this factor shows that the Registrar clearly deserves some deference when exercising his duty under the Act. In my view, he is entitled to a similar level of deference which this Court afforded to his role under the *Collection Agencies Act*.

(iv) The Nature of the Question

[27] The question which arises during consideration of the first issue is whether the Registrar's decision to suspend the Appellant's license should be set aside because he did not provide reasons to adequately describe the manner in which he found the Appellant violated the legislation, and because he did not identify the evidence upon which he relied. The Cash Store's concern does not focus on whether the decision to suspend was wrong or not supported by evidence, but is based upon a complaint that its ability to exercise a right to appeal is compromised. The issues the Appellant raises concerning the sufficiency and precision of the Registrar's decision and his analysis of the evidence involve legal questions, and are not matters of fact.

[28] Although the standard need not be correctness when reviewing issues of law (see paragraph 15, *supra*), the closer an issue becomes to being one of pure law,

the less deference a court should allow the decision-maker. (**Atlantic Collection**, paragraph 63) Despite acknowledging that there is no requirement that he be a lawyer, and that courts have more expertise interpreting legislation, the Registrar maintains that more deference should be shown to a decision-maker who is required, in the public interest, to make polycentric decisions going to the heart of his ability to regulate.

[29] The nature of the question must be considered in the context of the Registrar's role under an Act which contains no privative clause and provides an unlimited right of appeal. The Act and Regulations require the Registrar to hold a hearing and issue a written decision before cancelling or suspending a license, and to me that implies, as suggested by the Appellant, that the legislature expected the Court to closely scrutinize and afford minimal deference to the Registrar's decision, particularly where license suspension or cancellation could have severe consequences.

(v) Cumulative Assessment of Factors Affecting Standard of Review

[30] As the Court of Appeal stated in **Granite Environmental**, *supra*, at paragraph 29:

The ultimate question is whether the legislature intended that the issue under review be left to the tribunal: **Pushpanathan** at paragraph 26. The analysis of the four factors distills the answer for that question.

[31] The sufficiency of reasons and the extent to which they adequately addressed the evidence supporting the decision to suspend the Appellant's license are not issues which related to the core expertise of a specialized decision-maker who must receive a high level of deference. Based upon the foregoing consideration of the four categories of factors, I have concluded the first issue raised by the appeal – the adequacy of the reasons provided for the decision to suspend the Appellant's permit – should be decided on a standard of correctness.

(B) Review of Decision to Suspend - Did the Registrar Err by Suspending the Appellant's Permit Without Providing Adequate Reasons or Identifying Evidence to Support His Findings?

[32] The Appellant submits that the reasons given in the Registrar's decision do not set out precisely the principal evidence upon which his conclusions were based and do not adequately explain how he reached his findings. Applying a "correctness" standard of review, if the Registrar's findings were unsupported by evidence or if he provided insufficient reasons, the Court can set aside the suspension of the Appellant's permit.

[33] For the following reasons, I have concluded that the Registrar's decision was supported by evidence which he sufficiently identified, and that he provided adequate reasons. Applying the "correctness" standard, this Court should not interfere with the decision to suspend.

[34] Section 13 of the Act authorizes the Registrar to suspend or cancel a permit in the following circumstances:

- (a) for the breach of a term or condition upon which the permit was granted;
- (b) where he has reason to believe that the person has violated or failed to comply with any provision of this Act or the regulations or an order or direction given under this Act or the regulations; or
- (c) where the Registrar considers it to be in the public interest to do so.

[35] Section 6 of the Regulations directs that before suspending a permit for more than 12 days the Registrar shall conduct a hearing and provide a written copy of the decision to those concerned within 30 days.

[36] In this case the Registrar delivered a written decision within the prescribed time limit. The format included an introductory sentence stating:

I am satisfied that the permit holder has repeatedly violated a number of provisions of the legislation, did not carry out changes to their operations and documents as previously agreed and did not employ business practices that are in the best interests of the borrowers.

This was followed by the direction concerning the license suspension and listing of the reinstatement conditions (quoted in paragraph 7 of these reasons).

[37] In addition to stating the result, prescribing the suspension and setting out license reinstatement conditions, the Registrar's decision referenced the complaint and the two investigative reports which led to the hearing, identified those who attended the hearing, and concluded by setting out 11 findings in numbered paragraphs, preceded by the following introduction:

After due consideration of the content of Mr. Gibb's reports, the information that the parties provided on behalf of The Cash Store and to that which they conceded in respect to the matters raised in the reports, the questions posed to them during the hearing and their subsequent submission of information after the hearing, I find the following:

The findings comprise almost half of the four-page decision, which for ease of reference is attached as Schedule 'A' to these reasons.

[38] Although Regulation 6(4) requires the Registrar to give "a written copy of the decision", it does not indicate the extent to which reasons must be provided in support of the decision. The Appellant suggests that the adequacy of the reasons should be judged according to directions prescribed by Courts, including the following:

It is not enough to assert, or more accurately, to recite, the fact that evidence and arguments led by the parties have been considered.... The failure of the Board to perform its function under Section 8 included most seriously a failure to set out "the findings of fact upon which it based its decision" so that the parties and a reviewing tribunal are unable to determine whether or not, in discharging its functions, the Board has remained within or has transgressed the boundaries of its jurisdiction established by its parent statute. (**Northwestern Utilities, Re**, [1979] 1 S.C.R. 684 at paras. 44-45, in the context of a public utilities board)

[39] In **VIA Rail Canada Inc. v. Canada (National Transportation Agency)**, [2001] 2 F.C. 25 (C.A.), the Federal Court of Appeal considered the National Transportation Agency's written decision ruling that VIA Rail's tariff constituted an undue obstacle to the mobility of persons with disabilities, and held that the reasons provided were inadequate to give the railway an effective exercise of its right of appeal. The Court addressed the components of adequate reasons at paragraphs 21-22:

The duty to give reasons is only fulfilled if the reasons provided are adequate. What constitutes adequate reasons is a matter to be determined in light of the particular circumstances of each case....

...The decision-maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision-maker must be set out and must reflect consideration of the main relevant factors.

[40] The Cash Store also referred to **R. v. Sheppard**, [2002] 1 S.C.R. 869, where the Court concluded that a decision-maker errs in law if deficiencies in reasons prevent meaningful appellate review of the correctness of the decision.

[41] The Appellant complains that the Registrar did not precisely set out the evidence upon which his findings, which include significant factual determinations, were based. The adequacy of the reasons provided by the Registrar must be assessed, as the Federal Court of Appeal ruled in **VIA Rail**, in the circumstances of the particular case. In this instance, the Registrar identified the material and submissions which he considered prior to making his findings, including information provided by the Appellant, dialogue with Appellant's representatives during the hearing, information submitted after the hearing, and of particular importance, the investigative reports. Those reports, which were included in the Appeal Book filed in this court and which the Appellant acknowledged were available for consideration at the Registrar's hearing, clearly set out the information and documentation which led to the investigator's conclusions, which were the basis of the Registrar's decision to suspend. They provided analysis of documentation obtained from the Appellant and comment upon The Cash Store's procedures. Those reports include a summary of the investigator's activities, copies of relevant documentation and analysis of the transactions involved. After examining the reports, which the Registrar identified as the first item considered in reaching his findings which grounded the suspension, I have concluded that they were thorough, clearly referenced the evidence considered, and supported the investigator's findings. In my view, the reasons given in the Registrar's decision, when viewed in the context of the material and information, particularly as described in the investigative reports which he referenced, provide sufficient explanation to show how the Registrar arrived at his findings. It is unnecessary in the circumstances of this case for the Registrar to provide more detailed particulars of specific evidence supporting individual findings. This information would be apparent to the Appellant, who

must be presumed to be familiar with its own systems and procedures which the investigator considered. The Appellant's ability to appeal has not been compromised by inadequate reference to evidence; the Registrar has sufficiently identified the material and representations which he considered, all of which was either generated by or available to the Appellant.

[42] The Appellant suggested the Registrar erred in making some findings, particularly those respecting changes it had made to its operations, concessions concerning conduct of business in violation of the Act, and cost of borrowing calculations. After reviewing the investigator's reports and the other documents which were available for the Registrar's consideration, I find that any inaccuracy in his statement of findings was not material and is not a basis to interfere with his decision.

[43] The Registrar should not be required to produce reasons which meet an unreasonably high standard. The legislation allows only 30 days for delivery of the Registrar's written decision and the circumstances clearly indicate he must fulfill other duties during that time. When addressing standard of review, The Cash Store emphasized the Registrar's broad responsibilities and attempted to minimize his specialized knowledge and expertise relative to a court. It is inconsistent for the Appellant to demand that the Registrar provide reasons which meet standards expected from courts or very highly-specialized tribunals.

[44] The contents of the Appeal Book show that the Registrar had ample evidence, which was disclosed to The Cash Store, to support his decision to suspend The Cash Store's permit. The reasons provided are sufficient to meet the Registrar's responsibility to explain why the losing party did not succeed, they allow this Court to meaningfully apply the applicable standard of review, and they meet the requirements prescribed by the Court of Appeal in **N.S.T.U. v. Nova Scotia Community College** (2006), N.S.C.A. 22, paras. 42-48.

[45] The Cash Store has not established that the Registrar erred in suspending its permit based on findings not supported by evidence, or that he failed to give sufficient reasons for his decision.

ISSUE #2 - Imposition of Conditions

[46] The Cash Store's position is that when the Registrar finds there has been a violation of the Act, Regulations, or license terms, his authority is limited to suspending or revoking the offender's license, and that he had no power to impose conditions relating to the suspension or reinstatement of its license. The Respondent maintains that the Registrar has the authority to impose conditions, either expressly under the applicable legislation, or by implication because the Act is intended to ensure complete disclosure of credit cost and protect consumers.

(A) Standard of Review

[47] The parties agree that the issue of whether the Registrar can impose conditions upon license suspension or in connection with reinstatement is a question of law. Resolution of the issue depends entirely upon interpretation of the Act and Regulations, a legal matter about which the Registrar has no greater expertise than the reviewing court, and where no higher deference can be owed the Registrar than he was afforded when considering the first issue on appeal. I will apply a standard of correctness when determining whether the Registrar had authority to impose the conditions he placed upon the Appellant in this case.

(B) Legislation

[48] The following provisions in the Act and Regulations are relevant to determination whether the Registrar has authority to impose conditions relating to suspension and reinstatement of the Appellant's permit.

Consumer Protection Act

Functions of Registrar

4 It is the function of the Registrar and he has power to

(a) investigate complaints regarding credit granting and persons engaged in business as lenders;

...

(e) perform the duties and exercise the powers imposed or conferred upon him by this Act or the regulations;

(f) perform such other functions as are prescribed by the regulations or by the Governor in Council.

Permit

11 (1) No person shall carry on business as a lender unless that person holds a valid permit under this Act.

Duty to issue a permit

12 (1) Upon receipt of an application in the prescribed form from an applicant who satisfies the requirements of the regulations the Registrar shall issue a permit.

(2) Unless previously terminated or cancelled, every permit issued pursuant to subsection (1) expires three years from the date of its issue.

(3) The Registrar shall not refuse to issue a permit to a lender or cancel the permit of a lender without giving the lender an opportunity to be heard.

Suspension or cancellation

13 The Registrar may suspend or cancel the permit of any person

(a) for the breach of a term or condition upon which the permit was granted;

(b) where he has reason to believe that the person has violated or failed to comply with any provision of this Act or the regulations or an order or direction given under this Act or the regulations; or

(c) where the Registrar considers it to be in the public interest to do so.

33 The Governor in Council may make regulations

...

(c) prescribing the terms and conditions of a permit or any type or class of permit;

(f) respecting the suspension or cancellation of a permit;

Consumer Protection Act Regulations

4 The terms and conditions of a permit shall include

- (a) use by the applicant of only those forms approved by the Registrar;
- (b) compliance by the applicant with other relevant legislation, including but not limited to the Consumer Reporting Act; and
- (c) maintenance of a permanent place of business in Nova Scotia.

Suspension or cancellation of permit

6 (1) Before the Registrar

...

- (c) suspends the permit of a lender or agent for a period of more than 12 days,

the Registrar shall fix a time and place for hearing, and not less than 15 days before the date so fixed for the hearing, the Registrar shall give the applicant, lender or agent written notice of the hearing.

...

- (4) The Registrar shall give a written copy of the decision to the applicant, lender or agent within 30 days of the conclusion of the hearing.

(C) Authority to Impose Conditions

[49] All procedural requirements contained in the Act and Regulations were followed by the Registrar up to the time when he rendered his decision. The Appellant had received a permit (Act s.12) (which did not restate the terms and conditions included pursuant to Regulation 4, nor did it prescribe others), the Registrar investigated complaints (Act s.4), he complied with the requirements for scheduling and giving notice of hearing prior to suspending the Appellant's license (Regulation 6(1)), and he delivered a written decision within 30 days of the hearing (Regulation 7(4)). The findings upon which the Registrar based his decision to suspend were set out in his decision and constitute the types of breaches and violations which may give rise to suspension or cancellation of a permit (Act s.13).

[50] The plain language in Sections 12 and 13 of the Act authorizes the Registrar to grant and suspend permits, but the legislation does not state that he has power to impose conditions upon a suspension of a permit or prescribe additional terms for its reinstatement beyond those which must be included pursuant to Regulation 4.

[51] The Cash Store maintains that the Registrar cannot impose terms and conditions respecting permit suspension or reinstatement unless he is authorized to do so pursuant to Regulations made by the Governor in Council under s.33 of the Act. The Respondent's position is that the Court should imply the Registrar has that authority in order to fulfil the purpose and scheme of the legislation.

[52] The Registrar emphasizes that the Act is public interest legislation, and claims that failure to construe it as enabling him to impose conditions upon a suspension would interfere with regulation of the industry and prevent fulfilment of the statute's consumer protection objectives. He maintains that a doctrine of jurisdiction by necessary implication enables the Court to imply authority in the Act to authorize the Registrar to craft conditions so that he can meet any eventuality and do what is necessary to fulfill a broad mandate to accomplish the objectives of the legislative scheme. The Respondent urges the Court to read the Act liberally and find that the Registrar has implicit power to impose any conditions he deems necessary in the public interest to protect consumers, and to correct any wrongs committed by lenders who do not act in accordance with the legislation.

[53] While the objectives the Respondent seeks to attain may be those intended by the legislature, I am not convinced that the Court should extend the plain meaning of the Act and Regulations to give the Registrar power to impose stringent additional requirements upon lenders as preconditions of license reinstatement following suspension. The Court should not deem the Registrar to have powers which the Governor in Council did not afford him when it declined to exercise the specific authority it received under s.33 of the Act to make Regulations respecting suspension of permits. In my view, the Registrar did not receive the implied authority he claims. Even if the Act were construed to authorize giving such power to the Registrar, it would not vest in him unless the Governor in Council exercised its regulatory authority under s.33. In this instance, the Regulations (Sections 6, 7 and 8) relating to Suspension or Cancellation of Permit address primarily procedural issues, and do not authorize the Registrar to impose conditions upon license suspension or reinstatement.

[54] The Act and Regulations provide an adequate framework to accomplish the objectives of the legislation, including a regime for issuing permits, monitoring lenders and imposing sanctions by way of permit suspension and cancellation. By limiting the Registrar's powers to those prescribed by the legislation, the Court

does not frustrate the objective of the Act and Regulations. Consumer protection, although a paramount consideration, must be balanced with respect for the limitations which legislative authorities impose on the powers delegated.

[55] I do not accept the Respondent's submission that because the legislative scheme allows the Registrar to impose conditions when a permit is first granted, the legislature must have intended that he could impose conditions to modify a lender's behaviour following suspension. Participants who have invested in the industry should not, without notice, be subject to imposition of additional conditions of operation solely at the discretion of the Registrar. Placing sanctions upon lenders who do not comply with requirements in their permits is an essential element of the legislative scheme. It is inappropriate, however, without statutory authorization, for the Registrar to subject reinstatement to conditions which may not be foreseeable, and with respect to which permit holders do not have an opportunity to make representation.

[56] Had the legislature intended to give the Registrar ability to impose conditions upon cancellation or suspension of a license, it could have expressly so provided. In the *Mortgage Brokers and Lenders Registration Act*, R.S.N.S. 1989 c.291, s.10(1), states that:

The Registrar may suspend for a stated term or until a condition has been met or may cancel any permit if in the opinion of the Registrar it is in the public interest to do so.

The legislature specifically provided the Registrar authority to impose reinstatement conditions in the *Mortgage Brokers and Lenders Registration Act*, and the absence of such a provision in the Act may be taken as an indication that the legislature did not intend him to have such powers in this case.

[57] A similar restriction on the Registrar's powers was noted by this Court in **Atlantic Collection Agencies**, *supra*, at paragraph 77. In that case the Court considered s.15(1) of the *Collection Agencies Act* (a provision with wording almost identical to s.13 of the Act) which provided:

The Registrar may suspend or cancel a license where he is satisfied that the licensee...

The Court held:

There are no options under the legislation except cancellation or suspension of a license.

[58] In **Nova Scotia (Registrar of Motor Vehicles) v. Selig** (1996), 155 N.S.R. (2d) 38 (C.A.), the Court of Appeal determined whether the Registrar of Motor Vehicles could impose requirements for reinstatement when suspending a driver's license. The *Motor Vehicle Act* provided for the imposition of requirements for reinstatement when a license was revoked, but said nothing about doing so upon suspension. The Court found that the Act made a clear distinction between the revocation and suspension of a license and held that the provisions that applied to revoked licenses did not apply to licenses that had merely been suspended. The Court held that the Registrar could not impose requirements for reinstatement when suspending a license "[s]ince there is no clear statutory authority for doing so." (paragraph 30)

[59] The Registrar suggests that **Selig** should be distinguished from this case because the decision maker in **Selig** exceeded his jurisdiction by extending the suspension beyond the maximum time allowed by the statute. In my view the decision should not be construed as narrowly as the Respondent suggests. The Court stated at paragraphs 29 and 30:

29 Obviously, then, the provisions of the Act relating to restoration or reinstatement of a driver's license which has been revoked do not apply where the license has only been suspended.

30 Since there is no clear statutory authority for doing so, the Registrar cannot impose requirements for reinstatement of the Respondent's driver's license, which had been suspended under s.279 of the Act.

[60] The effect of the conditions in the present case, if they could not be reasonably fulfilled by the Appellant within the initial two-week suspension period, would be to extend the suspension beyond the time prescribed.

[61] The Respondent expressed particular concern that if the Registrar is unable to impose a condition that lenders repay monies they were not allowed to receive, the Act and Regulations would not protect the public interest. The Respondent suggested that the Registrar ought to be able to direct lenders to return to borrowers any money obtained contrary to the terms of the legislation or a permit.

In my view, the Registrar does not have authority to achieve that objective by imposing a refund requirement as a term and condition of permit reinstatement. The applicable legislation does not authorize imposing such a condition, but contains an alternate mechanism to achieve the result which the Registrar maintains is necessary. The following Regulations authorize the Registrar to require a surety bond as a condition of a lender obtaining a permit, to demand the bond's forfeiture upon violation of the Act or Regulations or failure to comply with a condition or a restriction in a permit, and to assign the forfeited bond:

Bond

5 (1) The Registrar may require a lender or agent to deliver a surety bond in an amount of \$25,000.00 as a condition of a permit.

(2) A surety bond required by subsection (1) shall be a penal bond acquired through a registered surety company approved by the Registrar.

(3) Where a bond delivered pursuant to this Section is forfeited pursuant to Section 21, the amount due and owing as a debt to Her Majesty by the person bound thereby shall be determined as if Her Majesty suffered such loss or damage as would entitle Her Majesty to the maximum amount of the liability prescribed by the bond.

Bond forfeiture provisions

21 A bond delivered pursuant to these regulations shall be forfeited upon the demand of the Registrar where...

(d) a decision has been rendered by the Registrar stating in effect that after consideration and investigation of a complaint, the Registrar is satisfied that the person in respect of whose conduct the bond is conditioned or any representative, agent, officer, servant or employee of that person

(i) has violated the Act or these regulations, or has failed to comply with any of the terms, conditions or restrictions to which the person's permit is subject, or is in breach of any contract to which the Act and these regulations apply, or...

and the conviction, judgment, order or decision has become final by reason of lapse of time or having been confirmed by the highest court to which any appeal may be taken.

22 The Registrar may assign any bond forfeited under the Act or these regulations, or may pay over any money recovered under it or recovered from the sale of any collateral security, to

(a) any person, or to the Public Trustee in trust for the person, who may become entitled to it in respect of a credit transaction with the person named in the bond;

(b) any representative, agent, officer, servant or employee of the person entitled pursuant to clause (a),

(c) judgment creditors of the person bonded; or

(d) any trustee, custodian, interim receiver or liquidator of the judgment creditors referred to in clause (c),

and any assignment or payment made pursuant to this Section shall be in accordance with and upon conditions set forth by Order of the Governor in Council.

[62] These Regulations indicate that the Governor in Council considered the need to protect persons doing business with lenders in Nova Scotia, and implemented a bonding mechanism which could do so. The legislative structure does not give the Registrar the option, if he chooses not to require the delivery or forfeiture of a bond, to impose a refund condition as a prerequisite to reinstatement of a suspended license.

[63] The Registrar's authority under s.13 of the Act is limited to suspending or cancelling a permit. Section 33 authorizes the Governor in Council to make regulations respecting suspension or cancellation of a permit; however, the only relevant Regulations in force, those contained in s.6, do not authorize the Registrar to impose conditions for reinstatement of a lender's permit. He acted without authority when he did so with respect to The Cash Store. The Court should not imply authority which could properly have been attributed to the Registrar by a

regulation. If the existing Act and Regulations do not achieve the purpose intended, the remedy must be legislative amendment, not extension of authority by judicial implication.

ISSUE #3 - Reasonableness of Conditions

[64] As I have concluded that the Registrar did not have the power to impose the five conditions which he prescribed, it is not necessary to address this issue in detail. Because significant points were raised during the comprehensive submissions made by counsel, I will make brief comment concerning some of the conditions.

[65] Having concluded that the Registrar could not impose the conditions, it would be moot to determine the standard upon which they would be reviewable; indeed, depending upon the nature of the prohibition or activity prescribed, the standard could differ for individual conditions.

[66] The first condition for reinstatement of the Appellant's permit following the 14-day suspension was: "The Cash Store is to have conducted no business regulated by the *Consumer Protection Act* during its suspension." This restriction

is stated in very broad terms, and could not apply to activities which the Regulations expressly allow to continue during suspension. Regulation #8 provides as follows:

Despite the cancellation or suspension of a lender's or agent's permit, the lender or agent may collect the lender's or agent's accounts receivable and for that purpose may extend the time of payment, take and give up security and otherwise deal with borrowers and credit transactions, the contracts for which were entered into before the cancellation or suspension of the lender's or agent's permit, provided no new credit is extended to a borrower.

[67] Conditions 2, 3 and 4 require the Cash Store to review all past loan contracts to identify excess charges, provide full refunds to borrowers, and account to the Registrar's office. Even if the Registrar had authority to require such prerequisites to permit restoration, the conditions would be reviewable to determine reasonableness. Examining and rectifying all contracts could be unduly onerous, if the lender had conducted a large volume of business over a long time.

[68] A condition that all unauthorized amounts collected be refunded to borrowers would be consistent with the general purpose of the Act and Regulations, but for the reasons outlined when considering Issue #2, it should not be imposed by the Registrar. The refund requirement is akin to awarding a civil

remedy to borrowers, which the legislation does not authorize. While consumer protection may be enhanced by returning improperly-collected amounts, the Governor in Council authorized refunding monies to borrowers only by the bond assignment mechanism referred to in para.62, which the Registrar chose not to use, and did not empower him to treat over-collection as a debt to be paid. The legislature has provided remedies to the Registrar to address lender wrongdoing, including the use of bonds, permit suspensions and permit cancellations. If those are inadequate, any shortcoming must be addressed by amendment to the Act or Regulations.

[69] The final condition imposed by the Registrar required the Appellant to sign an “assurance of voluntary compliance” within 21 days of the decision, prior to expiry of the 30-day appeal period prescribed by s.32 of the Act.

[70] The assurance required The Cash Store to acknowledge that the allegations made by the Registrar were true, and to agree that some of its activities contravened the Act and Regulations. Requiring the Appellant to execute this documentation demands an admission of guilt in order to obtain license reinstatement following 14-day suspension, prior to expiry of the appeal period. I

agree with the Appellant's submission that meeting this condition could force the Appellant to take contradictory positions – signing the assurance of voluntary compliance would require The Cash Store to admit allegations it might contest at appeal. Even if the Regulations authorized the Registrar to obtain the assurance, a condition that it be executed before expiry of the statutory appeal period would not likely meet a reasonableness test.

CONCLUSION

[71] The Registrar did not commit an error by suspending the Appellant's permit for 14 days. The evidence supported his findings that The Cash Store violated provisions of the Act and Regulations, did not carry out stipulated changes to operations and documents, and did not employ business practices in the best interests of the borrowers. The Registrar provided adequate reasons for the decision to suspend.

[72] The Registrar did not have the authority to impose the five terms and conditions which he required the Appellant to fulfil prior to permit reinstatement following the suspension, and those conditions are accordingly set aside.

[73] The lender's permit granted to 3074700 Nova Scotia Limited under the *Consumer Protection Act* will be suspended for a period of 14 days commencing April 16, 2007. The Cash Store is receiving approximately 30 days notice of the suspension commencement date, similar to that provided in the Registrar's decision.

[74] At the conclusion of the hearing, the parties requested an opportunity to address the issue of costs after receiving this decision. Submissions may be made to me in writing within 30 days.

J.

‘Schedule A’

Decision Pertaining to the Hearing regarding 3074700 Nova Scotia Limited o/a The Cash Store

In the matter of a complaint filed by William McFadden in relation to 3074700 Nova Scotia Limited o/a The Cash Store, a permit holder under the Consumer Protection Act, a hearing was held on Tuesday, February 28, 2006 to further investigate the findings in the two inspection reports prepared by Brad Gibb dated November 17, 2005 and December 1, 2006 in respect to the company’s business conduct and the resulting violations of the Act and to the provide the permit holder, 3074700 Nova Scotia Limited o/a The Cash Store (“The Cash Store”), an opportunity to address those results.

In attendance at the hearing were John (Jack) MacIsaac, President of The Cash Store, David Farrar (solicitor for the permit holder and Rentcash Inc.), Gordon Reykdal, CEO/Chairman of the Board, Rentcash Inc., Dave Morrison, Director Risk Management, Rentcash Inc., Dave McNeil, Director of Operations - Eastern Canada, Rentcash Inc. and Renal Doucet, Regional Manager - Nova Scotia, Rentcash Inc., all on behalf of 3074700 Nova Scotia Limited o/a The Cash Store and Jo-Ann Hamilton, Deputy Registrar of Credit, Ian MacLellan, Licensing Officer, Brad Gibb, Inspector and me, Richard Shaffner, Registrar of Credit.

Findings:

After due consideration of the content of Mr. Gibb’s reports, the information that the parties provided on behalf of The Cash Store and to that which they conceded in respect to the matters raised in the reports, the questions posed to them during the hearing and their subsequent submission of information after the hearing, I find the following:

1. The Cash Store did not implement changes to their procedures, disclosure documents and software systems as agreed upon with this office on January 27, 2004 in respect to same and the parties representing the company have acknowledged that this is true.
2. The Cash Store charged borrowers a fee (referred to by the parties who appeared at the hearing as a “default fee”) which is deemed to be an “administration charge” based on the hand written explanatory notes provided to the borrower by The Cash Store staff which disclosed the charge as an “administration charge” and the training manual for The Cash Store staff which also refers to the fee as an “administration charge”. Further basis for this determination is that no evidence was provided to substantiate that the “default fees” were deducted from the amount owing by the borrowers when the debt was paid on or before the due date which would distinguish the fee as being a charge applicable only if the borrower was in default. In fact, documentation was subsequently provided which demonstrated over 1400 instances where the charge had been levied although the borrower had paid the loan in full on or before the due date.

3. The Cash Store have incorporated an administration charge which is paid by the borrower in respect to lending transactions but have not disclosed the charge to the consumer in writing and is in violation of Section 17 of the Act as a result.
4. The Cash Store charged an administration charge which was not factored into the cost of borrowing in dollars and cents and as an annual rate in violation of Section 17 of the Act. Therefore, proper disclosure of the cost of borrowing was not provided and was, in fact, understated, and amounts other than those disclosed were charged to the borrower which is in contravention of Section 18(1) of the Act.
4. The Cash Store have charged a debit card fee of \$10.00 which is paid by the borrower in respect to lending transactions but have not disclosed the charge to the borrower in writing and is in violation of Section 17 of the Act as a result.
6. The Cash Store charged a debit card fee which was not factored into the cost of borrowing in dollars and cents and as an annual rate in violation of Section 17 of the Act. Therefore, proper disclosure of the cost of borrowing was not provided and was, in fact, understated, and amounts other than those disclosed were charged to the borrower which is in contravention of Section 18(1) of the Act.
7. The Cash Store had required that borrowers provide a “security” cheque in addition to a cheque to pay for the principal amount of the loan, interest and additional charges which could enable the company to collect from the borrower an amount in excess of that owing which is deemed to be improper business practice and not in the best interest of the borrowers.
8. The Cash Store provided the borrowers with receipts for payment which did not reflect the full charges made and amounts paid by the borrowers which is deemed to be improper business practice and not in the best interest of the borrowers.
9. The Cash Store staff, in the course of conducting business, misrepresented to borrowers who the lender was by stating that certain charges are made by the lender and certain charges are attributable to The Cash Store, who they state is not the lender. This is supported by the information provided in the staff training manual as well as in the hand written explanatory notes made on borrowers disclosure documents by The Cash Store staff after the loans have been extended.
10. The Cash Store appears to be in violation of Section 347 of the Criminal Code of Canada in that had all of the applicable charges been disclosed and included in the calculation of the cost of borrowing (or “interest” as defined in that Act), the percentage rate would be in excess of the criminal rate of 60% per annum.
11. Representatives of the Cash Store have conceded to having conducted business in violation of the Act and have indicated that they are prepared to accept responsibility for having done so.

Section 2(c) of the Consumer Protection Act states

“‘cost of borrowing’ means

(ii) when used in relation to a form of credit, other than variable credit, the amount by which the total sum that the borrower is required to pay if the payments required are made as they become due exceeds

(A) in the case of credit given by the advancement of money, the aggregate of the sum actually received in cash by the borrower and by an person on his behalf, the sum remaining unpaid under a previous extension of credit, in an amount determined under Section 19, that the borrower and lender agree is to be consolidated with the credit then being extended, official fees and premiums for insurance paid or payable by the lender at the request of the borrower”

Section 13 of the consumer Protection Act states

“The Registrar may suspend or cancel the permit of any person

(a) for the breach of a term or condition upon which the permit was granted;

(b) where he has reasons to believe that the person has violated or failed to comply with any provision or this Act or regulation or an order or direction given under this Act or the regulations; or

(c) where the Registrar considers it to be in the public interest to do so.

Section 18(1) of the Consumer Protection Act states

“A borrower is not liable to pay a lender as the cost of borrowing any sum or at a rate that exceeds the sum or rate disclosed in a statement given pursuant to Section 17 by more than the tolerances, if any, permitted by the regulations.”

Section 12 of the regulations made pursuant to the Consumer Protection Act states

The annual percentage rate of interest calculated and disclosed by a lender to a borrower shall be accurate to within one-eighth of one percent.”

Decision:

I am satisfied that the permit holder has repeatedly violated a number of provisions of the legislation, did not carry out changes to their operations and documents as previously agreed and did not employ business practices that are in the best interest of the borrowers.

This being the case, the lender’s permit granted to 3074700 Nova Scotia Limited under the Consumer Protection Act is suspended for a period of 14 days, commencing May 1, 2006.

Once the 14 day suspension period has been completed the lender’s permit may be re-instated under the following terms and conditions:

1. The Cash Store is to have conducted no business regulated by the Consumer Protection Act during its suspension period.

2. The Cash Store is to review all contracts to determine those where the administration charge and/or debit card fee were not disclosed in writing and/or factored into the cost of borrowing and provide this office with a list of all of the borrowers affected.
3. The Cash Store is to refund to all borrowers included on the list provided as a term of item 2 above all money paid in excess of that which was disclosed on the applicable loan agreement in accordance with Section 18(1) of the Act, which includes the administration charge, the debit card fee and any overpayment of interest if the loan was paid in full before the due date.
4. The Cash Store is to provide this office with a detailed accounting and proof of the refunds made in accordance with item 3 above.
5. The Cash Store is to sign both copies of the Assurance of Voluntary Compliance document attached to this decision and return them to this office by April 18, 2006.

Dated this 28th day of March, 2006

[Signed]
Richard Shaffner, Registrar