

Canada's Financial Consumer Protection Framework: Consultation Paper

Submission by the Canadian Bankers Association

February 28, 2014

Introduction

The Canadian Bankers Association (the “CBA”) works on behalf of 60 domestic banks, foreign bank subsidiaries and foreign bank branches operating in Canada and their 275,000 employees. The CBA advocates for effective public policies that contribute to a sound, successful banking system that benefits Canadians and Canada's economy. It also promotes financial literacy to help Canadians make informed financial decisions and works with banks and law enforcement to help protect customers against financial crime and promote fraud awareness. www.cba.ca.

On December 3, 2013, the Government of Canada requested the views of Canadians on *Canada's Financial Consumer Protection Framework: Consultation Paper* (the “Consultation Paper”) to assist the government as it considers how to strengthen Canada's financial consumer protection framework. The CBA is pleased to contribute the banking industry's input to the government's deliberations. We have chosen to focus our comments on specific issues raised by the Consultation Paper rather than addressing each question in isolation. Some of the issues are more effectively addressed as part of a dialogue so we would appreciate the opportunity going forward to continue the dialogue on the important issues raised by the Consultation Paper.

The banking industry supports the federal government taking this opportunity to reaffirm and eliminate any ambiguity about its longstanding policy intent to have exclusive federal jurisdiction over banks and banking, including in the context of consumer protection.

We agree that the federal government should consolidate all the consumer provisions into a single Financial Consumer Code (the “Code”) that will provide the exclusive and comprehensive consumer protection regime that applies to products and services offered by banks with one federal regulator overseeing the banks' compliance with those requirements.

While we believe that the financial consumer protection framework should apply to banks, to all financial institutions established under the federal *Trust and Loan Companies Act* and to payment service providers in Canada, we suggest that, as a first step, the federal government should incorporate the Code into the *Bank Act*. Subsequently, the government can extend similar requirements – as applicable – to financial institutions established under the federal *Trust and Loan Companies Act* and create new legislation applicable to payment service providers.

At the same time, while the federal government has exclusive jurisdiction over banks and banking, we acknowledge that the provinces have regulatory oversight for many non-banking products and services. This provincial oversight of many aspects of insurance, investment advice, securities trading and some aspects of the capital markets are unlikely to be affected by this review of the federal framework that applies to banks and banking activities.

The *G20 High Level Principles on Consumer Protection*¹ (the “G20 Principles”) and the work of the Financial Stability Board speak to ‘financial institutions’ broadly, not just federally regulated banking activities. When considering how the G20 Principles can be translated into a Canadian context, it is important that the consumer is at the centre, and that the relative complexity of the product or service being sold underpins the obligations that will apply to banks.

The Consultation Paper proposes to establish a set of overarching consumer protection principles. We support a framework of consumer protection principles that can adapt to change. Principles need to be meaningful, measurable and clear for consumers, banks and regulators. Principles that are too abstract or ambiguous can create confusion and inefficiencies, and ultimately may not achieve the goal of consumer protection. There is also a role for more detailed elements supporting the principles to provide specific requirements applying to a particular product or service.

We believe in fair treatment of the consumer. We believe that fair treatment of the consumer is best achieved through: disclosure by banks that is clear, simple and not misleading; accessible banking; a robust complaint resolution process; fraud prevention and protection; regulation of certain business practices; a strong sophisticated regulator; and enhanced financial literacy.

We are concerned about any proposed fundamental shift in policy direction, moving from the current approach where the expectations on banks are clear and implementable to regulating “fair treatment of the consumer”. The experience of other jurisdictions leads us to conclude that regulating “fairness”, while noble in principle, can lead to a series of unintended negative consequences for both consumers and banks – because regulating “fairness” is subject to ambiguity and ongoing interpretation.

We endorse the government’s intent to ensure that the Code allows, and in fact encourages, further innovation in the financial services sector so banks can continue to serve the needs of consumers by developing and enhancing financial products and services and how they are delivered to consumers.

We expand on our views on these issues and other issues included in the Consultation Paper below.

Exclusive Federal Jurisdiction over Banks and Banking

Regulating bank products and services with a view to protecting consumers falls within the exclusive jurisdiction of Parliament. As the Attorney General of Canada recently stated in the *Marcotte* case, “Consumer protection in the banking sector is one of the many facets of banking legislation.”² It is well understood today that not only is the national regulation of banks good for the

¹ www.oecd.org/daf/fin/financial-markets/48892010.pdf

² Factum of the Attorney General of Canada [EN translation], *Marcotte v. Bank et al.*, paragraph 38, http://www.scc-csc.gc.ca/factums-memoires/35009/FM130_Intervener_Attorney-General-of-Canada.pdf

economy as a whole, as was shown by Canada's resilience during the recent global financial crisis, but it also leads to clearer and more consistent rules for consumers of banking products and services.

Despite the fact that the Constitution gives the federal government exclusive jurisdiction over "banks" and "banking", some proponents continue to believe that provinces have a complementary role to play in this area. That would not be good for consumers. It would be confusing to have overlapping and conflicting federal and provincial disclosure requirements, and consumers would not know whether to complain to the federal regulator or their provincial regulator if they had a concern about their bank. There is a stability and enhancement of the federal government's safety and soundness mandate that comes with having a single regulator for consumer matters (the Financial Consumer Agency of Canada, the "FCAC") that is complementary to the prudential regulator (Office of the Superintendent of Financial Institutions, the "OSFI") both working closely with the Department of Finance. This stability would be undermined by having financial matters related to consumers fractured and disseminated to the provincial regulators.

The recent approach of provinces seeking to regulate certain banking activities risks eroding the exclusive federal power over consumer protection in the area of banking. The Code offers the opportunity to eliminate any ambiguities with respect to the exclusive and comprehensive nature of the federal framework.

We set out in the Appendix to this submission the industry's more detailed views on the constitutional issues surrounding the Code.

Starting Point for Reviewing Existing Consumer Protection Framework

The G20 Principles recognize that strong financial consumer protection already exists in several jurisdictions. They also recognize that effective approaches to consumer protection must take into account specific jurisdictional circumstances. Therefore, any initiative to make changes to Canada's financial consumer protection framework must start by looking at the current framework and how it has served Canadian consumers. We must also look at the specific environment in Canada in which banks operate to see if the factors that resulted in the renewed policy and regulatory focus on financial consumer protection that led to the G20 Principles are present in the banking industry in Canada.

The Existing Canadian Framework Works Well for Consumers

In Canada, the government has embraced an approach to consumer protection that focuses on providing a competitive financial marketplace and empowering consumers through an enhanced disclosure regime. By ensuring that consumers receive disclosure about financial products and

services that is clear, simple and not misleading, and by providing consumers with the knowledge and skills to decide which financial products and services are right for them through extensive consumer education and financial literacy initiatives, the government's approach to consumer protection has empowered and enabled consumers to make their own decisions about meeting their needs and wants in the financial marketplace. The existing strength of Canada's consumer protection framework, coupled with a strong prudential risk management oversight within Canada's banking industry, has resulted in a Canadian financial system that is widely recognized as one of the world's soundest.³

The success of the Canadian approach can be measured in a number of ways – the absence of abuses in the Canadian banking industry, high customer satisfaction scores and low consumer complaint volumes. By all these measures, Canada's banks perform well.⁴

The G20 Principles recognize that “the principles may need to be adapted to specific national and sectoral contexts”. Therefore any changes to the current consumer protection framework need to be considered in the Canadian context, not in the context of the United States, the United Kingdom or other jurisdictions where the regulatory framework, consumers' values and practices, and banks' policies and practices have been different from those of consumers and banks in Canada.

Canada simply has not had examples of demonstrably unfair treatment that we have seen in some other jurisdictions. Canada's banks have not engaged in the practices that led to loss of consumer confidence and trust in banks that was experienced in other countries and that contributed to the global financial crisis in 2008. Moreover, many of the problems experienced by consumers in other countries were with financial institutions that were regulated, so having more regulation is not necessarily the answer to the problem.

For regulation to be successful, it must be *effective*. The effectiveness of Canada's financial consumer protection framework has been demonstrated through the financial crisis and broader economic downturn and has been widely recognized around the world. Therefore, incremental enhancements that support the concept of effective regulation and build on the current solid foundation are entirely appropriate as the Canadian financial marketplace evolves and the products and services that banks make available to consumers change and evolve. Overall, there must be recognition that Canada's existing approach to consumer protection is already effective.

³ World Economic Forum, Global Competitiveness Report 2013–2014, <http://www.weforum.org/reports/global-competitiveness-report-2013-2014>

⁴ The 2013 World Retail Banking Report found that Canadian customers exhibited the highest Customer Experience Index scores; and Canadian customers had the highest proportion of positive customer experiences of the 35 countries surveyed.

In 2012 the 393 complaints escalated to banks' external complaint bodies represent only 0.00001% of the more than four billion transactions that are processed through the largest banks each year, and 0.0005% of the number of credit card and mortgage accounts.

Low delinquency rates for both credit cards (0.9% in arrears over 90 days) and mortgages (0.31% in arrears over 90 days).

Principles-based Framework – A Suggested Approach

Consumer protection is not about protecting consumers from bad decisions but about enabling consumers to make informed decisions in a marketplace free of deception and abuse.⁵

In Canada, given our unique culture, cautious approach and well-regulated and -managed banks, we suggest that the Code should be founded on the following concepts articulated in the Preamble to the *Bank Act*:

- Acknowledge that the Code represents a comprehensive, exclusive national standard applicable to banking products and services offered by banks;
- Recognize that a strong and effective banking sector is essential to economic growth and prosperity and that the legislative framework enables banks to compete effectively and be resilient;
- Take into account the rights and interests of depositors and other consumers of banking products and services.

There must be a balance of all of these considerations when enhancing the financial consumer protection framework for Canada. The rights of consumers must be sufficient to protect consumers (recognizing that consumers have responsibilities as well as rights) while allowing banks to continue to contribute to economic growth and prosperity, compete effectively, and contribute to stability and public confidence in the financial system and the strength and security of the national economy.

To reflect this balance, the rights and interests of consumers would be best supported by principles in the Code related to:

- disclosures that are clear and simple and not misleading,
- accessible banking,
- robust complaint resolution processes,
- fraud prevention and protection (i.e. unauthorized activity on a consumer's account), and
- regulation of certain business practices similar to the requirements that exist today.

In the Canadian financial marketplace, innovation is a constant. Therefore the Canadian financial consumer protection framework should be anchored in principles that can be applied to new products and services, and the changing delivery of those products and services, without the need for new regulatory initiatives each time a new type of product or service is developed, or a new delivery channel is available to offer consumers those products and services.

We support a principles-based approach for the financial consumer protection framework and think it is the best way to move forward in the constantly evolving marketplace. It is important, however, that the principles be meaningful, measurable and clear for consumers, banks and regulators, so they do not create significant discrepancies amongst the various stakeholders' interpretations. The

⁵ Financial Stability Board, *Consumer Finance Protection with particular focus on credit*, 2011, http://www.financialstabilityboard.org/publications/r_111026a.pdf

policy intent must be clearly stated in the principles. In some cases, these principles may need to be supported by elements that provide more detailed requirements for a particular product or service. The elements could, with some modification, be generally reflective of the requirements found today in the various regulations and voluntary codes.

Banks and Consumers⁶

The Consultation Paper asks whether financial stewardship of customers' interests is a principle that should be included in the Code. Banks in Canada have the satisfaction and fair treatment of consumers among their top priorities. With the intense competition in the banking marketplace, and the ease with which consumers can switch financial institutions, it is in the banks' strong interest to treat their customers fairly to keep them happy. And they do.

The CBA 2013 annual polling showed Canadians' high and increasing levels of favourability toward banks in Canada and their own bank in particular:

When asked about their impressions of organizations and businesses, the favourable impressions from survey respondents were as follows:

- *Canadian banks – 81%*
- *The company you do most of your banking with – 90%*
- *Credit unions – 60%*

The 81% favourability for Canadian banks has been increasing steadily, up from 59% in 2001.

All data is from the CBA's most recent public opinion polling conducted by Abacus Data between November 30 and December 12, 2013. 1007 adult Canadians were polled and the margin of error is +/-3.2%

The favourable results from this poll, together with the extremely low levels of complaints that are escalated to external complaints bodies demonstrates that the existing consumer protection framework works well for consumers in Canada.

Maintaining high customer satisfaction ratings is not just about being “nice” to customers. It inherently involves designing products and services that anticipate and meet consumers' expectations, needs and wants; providing consumers with sufficient information to enable them to understand the offerings and to be able to decide which products and services are appropriate for them; properly servicing the products and services throughout their life span; and dealing expeditiously with any problems or complaints that arise. The longevity of consumers' relationship with their bank is illustrative of how well Canadian consumers believe their bank is meeting their needs. It is also illustrative of the focus of Canadian banks on designing products and services with a view to long-term retention and satisfaction of their customers. Banks in Canada are not

⁶ individual retail customers, natural persons. See Scope section below

motivated by short-term gain at the expense of customer loyalty and long-term retention of customers. Banks compete vigorously on the basis of how they deal with their customers, the range of products and services they offer, and on the level and quality of their service, as evidenced by the following:

- Banks design products and services that anticipate and meet consumers' expectations, needs and wants. They spend significant resources when developing products and services, and customer feedback is a critical component in the development process. While each bank's research methodology is different, generally banks access behavioural data, conduct pilots and do testing, obtain customer feedback, and implement redesigns to ensure that products and services are rooted in their customers' needs, expectations and wants, and that consumers will understand and be satisfied with their product or service.
- Banks make significant efforts to provide assistance to consumers to ensure that they understand the products and services that they offer. Banks provide consumers with sufficient information to enable them to understand the offerings and to allow the consumer to decide which products and services are appropriate for them. Individual bank websites, call centres and branches have information and employees available to help explain products and services to consumers. In Canada's competitive banking sector, it is in the banks' best interests, both reputationally and financially, to inform consumers about the suite of products and services from which they can select the most appropriate product or service for their needs.
- Banks in Canada are leaders in supporting financial literacy activities and initiatives in communities across Canada. There are many community organizations delivering financial literacy programs across Canada and many of these programs are supported by banks and involve bankers.
- For its part, the CBA has provided financial literacy to high schools for over 13 years through its *Your Money Students* seminar program, teaching over 220,000 young people the basics on budgeting, saving, investing, using credit wisely and avoiding fraud. The CBA is also currently developing a similar program for seniors to assist those who are entering retirement to help them manage their finances and avoid financial abuse and fraud.
- Banks provide both volunteers and financial support to not-for-profit credit counselling agencies whose primary roles in the community are financial education and counselling – with a very small (less than two per cent) recidivism rate for consumers who have completed the credit counselling debt management programs.
- Both the CBA and individual banks support Financial Literacy Month with individual initiatives and participate in Credit Education Week activities.

Disclosure and Choice Serve Consumers Well

The Consultation Paper mentions that “Some jurisdictions have developed principles that set out an expectation of how financial institutions should treat consumers ... supplemented by rules about what “fair treatment” entails ...”⁷. A consumer protection regime should have a balance of responsibilities between consumers and the banks so that requirements are fair to both. As the G20 Principles note:

It is essential to protect consumers’ rights while also recognising the fact that these rights do come with consumer responsibilities.

A bank should provide all the relevant information for the consumer, but in the end it needs to be the consumer’s own informed decision about which product or service is most appropriate for him or her. A bank cannot and should not be required to seek excessive personal information or to take responsibility for the consumer’s decision.

Banks believe in and embrace fair treatment of the consumer. We believe that the principles we have proposed are the best means by which to ensure fairness. Making ‘fair treatment’ itself a regulatory requirement is not appropriate, for the following reasons.

First, a fairness regime would inevitably weaken banking policy, currently in the hands of the Department of Finance, by shifting that responsibility and interpretation to legal proceedings (e.g. class actions). This shift to the courts could ultimately erode the federal government’s ability to fulfill its safety and soundness mandate by blurring the lines between the regulator, the policy-maker and the courts. The interpretation of a general standard of responsibility, such as what is fair treatment, would be outsourced to courts that can make findings that are inconsistent with the findings made by the FCAC. This is contrary to the policy objective of Parliament to have the FCAC as the exclusive overseer of the consumer provisions that apply to the federally-regulated financial industry.

Second, an obligation to observe a general standard of responsibility, such as to treat consumers fairly, is not helpful – it gives no indication as to what is expected and provides no clarity to consumers, banks or regulators. Thus it has to be supplemented with further guidance. In the United States, for example, its requirement to treat consumers fairly⁸ required further elaboration – several hundred pages of elaboration⁹, in fact – to specify what constitutes unfair treatment. In contrast, Canada’s approach has been to specifically restrict certain business practices (e.g. *Credit Business Practices Regulations*) that provide clear indications as to the government’s approach to enhancing consumer protection.

⁷ Consultation Paper, section 4.2 Responsibility of Financial Institutions to Consumers, page 5, paragraph 2

⁸ Fair Credit Reporting Act, <http://www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/fair-credit-reporting-act>

⁹ Consumer Financial Protection Bureau, *CFPB Supervision and Examination Manual, Version 2*, http://files.consumerfinance.gov/f/201210_cfpb_supervision-and-examination-manual-v2.pdf

Third, experience in other jurisdictions shows that a fair treatment regime can have inappropriate and unintended consequences. We understand from financial institutions in the United Kingdom that a ruling by the regulator about what fair treatment requires winds up having retroactive effect. That is not appropriate, but it is an inevitable consequence of a fair treatment regime. If you decide that a particular action is unfair today, then it must always have been unfair. This has the potential to lead to confusion for consumers where, for example, the retroactive application means that consumers cannot obtain products or services that they previously could access or where there are changes the terms and conditions associated with them. This retroactive consequence of a fair treatment regime places a significant risk on banks for law suits about their past practices. Increased litigation is reflective of uncertainty, drives up costs for consumers, may limit availability of resources for other endeavours (e.g., innovation) and can reduce consumers' access to products and services.

In Ireland, where financial institutions are required to observe general standards of responsibility and to conduct suitability assessments, there have been a number of unintended negative consequences for consumers. Financial institutions are developing fewer products, less innovation is occurring, and consumers complain that they receive too much information in disclosures, which makes it difficult for them to understand the product or service they are buying and the terms that apply to those products or services. In the same vein, consumers also complain about having to share more and more personal information with banks when applying for banking products and services.

Fourth, regulating, overseeing and auditing a fairness regime is expensive, complex and difficult.

Finally, a legal requirement to observe a general standard of responsibility, such as to act in the best interests of a consumer, would limit consumers' convenience and ability to access products and services over the phone or online, or to purchase products or services jointly with another person, given the information that a bank would need to collect for the purpose of administering a fair treatment regime.

The G20 Principles state that "regulation should reflect and be proportionate to the characteristics, type and variety of financial products." Not all of the G20 Principles will apply to all sectors. It would be inappropriate to apply a "best interests" standard that has historically only applied to providing complex advisory services, e.g. discretionary management of investments, to the sale of bank products and services. Bank products and services are – in comparison to such advisory services – relatively low risk and relatively easy for consumers to understand. Enhanced financial literacy initiatives and clear and transparent disclosures should be sufficient to provide consumers with the ability to decide what product or service is right for them.

The Consultation Paper does not identify any benefits of a fairness regime for Canada that would justify the unintended consequences – for consumers, government and banks – that would inevitably be involved in such a regime.

We would welcome the opportunity to engage in further dialogue to expand on our views and explore this issue further with the government.

Addressing the Needs of Seniors and Vulnerable Consumers

Assisting Consumers to Avoid Financial Abuse

The current approach that banks use to address financial abuse is through disclosure that helps such consumers avoid putting themselves in a position where they are susceptible to financial abuse, e.g., helping consumers understand the implications of appointing an attorney under Power of Attorney or giving full access to assets through a joint account. Many banks have also focused efforts on assisting front-line bank staff to better identify and enable them to escalate suspected financial abuse that comes to their attention.

Banks take different approaches to addressing the needs of seniors and vulnerable consumers. The following are examples of efforts taken by some of the banks individually or collectively through the CBA to date:

- Brochures and online information that target the information needs of Canadians, including seniors and other Canadians who may be vulnerable.
- Trained staff to answer questions via option selection on in-bound calls.
- Enhanced training for front-line staff to assist them to identify financial abuse.
- Worked with the Public Guardian and Trustee office representatives in British Columbia and several other provinces to share their knowledge about financial abuse and to prepare common information that all banks could use to help with training front-line staff to identify and escalate potential situations of financial abuse of their older and vulnerable consumers.
- Identification of common scenarios – including joint accounts, Powers of Attorney, delegated use of bank payment and credit cards, and changes to beneficiary designation – where family members and other trusted individuals may perpetrate abuse. The information also sets out other frequent scams perpetrated by strangers to defraud seniors of their savings. If these situations come to the attention of bank front-line staff, bankers can attempt to provide the consumer with cautions and additional information to help them avoid abuse. This information was circulated to all banks to augment each bank's individual training resources.
- Online and printed materials about Powers of Attorney (mandates in Quebec) explaining what they are, how they may be used to perpetrate financial abuse and what factors should be considered before giving a Power of Attorney.

- Presentations to elder law groups, seniors' advocates and seniors groups to enhance financial literacy and raise awareness about the risk of financial abuse.
- Trust and estate planning services to allow families to plan for the future so that the consumer's wishes can be carried out in a manner that lessens the likelihood of financial abuse.
- Industry fraud tips to warn seniors about scams and fraud targeting seniors.
- Discounted banking services, simplified savings and retirement income products, and advisory services tailored to the needs of consumers, including seniors.
- CBA online information to help consumers understand financial abuse and how to avoid it, Powers of Attorney (bank requirements and using POAs to open a bank account) and appropriate use of joint accounts to avoid financial abuse. The information is also available in a format that seniors' advocates and elder law practitioners can download and distribute to their clients and stakeholders. Efforts are underway to promote this information to elder law practitioners and seniors' groups.
- CBA's new national financial literacy program for seniors. Modelled on the CBA's highly successful *Your Money Students* program, this new seminar program will be offered in French and English, free of charge, to seniors' groups across the country. *Your Money Seniors* will be presented by bankers in the community volunteering their time and expertise and is being developed in partnership with the Financial Consumer Agency of Canada. Seminars are expected to begin in mid-2014.

Since the government's review of the *Personal Information Protection and Electronic Documents Act* (PIPEDA) began in 2005, the banking industry has actively sought an amendment to PIPEDA to allow banks to disclose personal information related to potential financial abuse to lawful authorities, next of kin or other authorized representatives. Currently PIPEDA allows banks to report suspected abuse to relevant authorities, such as police or the Public Guardian and Trustee office, where a bank has reasonable grounds to believe a law is being contravened. If no law is being contravened, however, even if abuse is suspected, banks are constrained by PIPEDA as to what actions they can take.

Assisting "Vulnerable" Canadians

Addressing the unique challenges faced by vulnerable Canadians in the financial marketplace is a complex issue. To start, there is great difficulty in defining what is meant by "vulnerable". Efforts around the globe to define "vulnerable" invariably admit to the inadequacy of any proposed definitions. Vulnerability can be subjective; it can be transitory; it can be obscure and difficult to identify.

The Law Commission of Ontario has published two papers that refer to the concept of vulnerable – one related to seniors and the other focusing on persons with disabilities. In *A Framework for the Law as it Affects Older Adults*¹⁰, on page 2 it notes the following:

Older adults have often been considered “vulnerable” as a group, and this vulnerability has been used to justify significant levels of interference with older adults’ autonomy. It is inaccurate to assume that all older adults are frail, dependent and therefore in need of protection, and equally problematic to assume that the only or the most appropriate response to vulnerability is to restrict the autonomy of the older adults in question, a common form of paternalism affecting older adults.

However, it is also a mistake to assume that all older adults are privileged, affluent and capable. In some cases, older adults are disadvantaged because of life experiences; for others, aging itself may result in risk and hardship. For those older adults who experience or who are at greater risk of disadvantage and negative outcomes than others, a higher level of attention or protection from law or policy-makers may be essential.

Risk must also be understood in a broader social context. An older adult’s family and other relationships, living arrangements, income sources and levels, access to supports and the law itself may either increase or decrease levels of risk and inequality, depending on their quality and extent. Therefore, while laws, programs and policies must recognize the capacities and individuality of older adults, this recognition must be balanced by the provision of additional supports for those older adults who are particularly disadvantaged or at risk in order to ensure that the law promotes dignity, autonomy, participation and security for all older adults.

In the Ontario Law Commission’s second paper, *A Framework for the Law as It Affects Persons with Disabilities*¹¹, while its references to “vulnerable” are not as focused and there appears to be an assumption that persons with disabilities are vulnerable, it links older adults and persons with disabilities:

There are similarities in the ways in which older persons and persons with disabilities are situated in society, particularly as both groups are largely excluded from the labour market, and therefore experience structural dependency; as a result, members of both communities may not be viewed as “adults”.

¹⁰ Ontario Law Commission, *A Framework for the Law as it Affects Older Adults: Advancing Substantive Equality for Older Persons through Law, Policy and Practice*, April 2012, p. 2 and 55 <http://www.lco-cdo.org/older-adults-final-report.pdf>

¹¹ Law Commission of Ontario, *A Framework for the Law as It Affects Persons with Disabilities*, September 2012, page 2, <http://www.lco-cdo.org/persons-disabilities-final-report.pdf>

In addition to the difficulties with clearly and cleanly defining “vulnerable consumers”, some individuals will not want to be identified as vulnerable and there is a very real risk that banks could face human rights concerns and be accused of discrimination because they identified a person as vulnerable.

We do not believe that imposing regulatory measures on banks would be an effective approach to addressing the needs of seniors and vulnerable Canadians.

Enhancing Access

Banks recognize that some consumers need different means of accessing banking services to allow them to do their banking. To that end, most bank branches are wheelchair accessible. Many ABMs are designed with larger screens and other features to accommodate needs of clients with a disability; as ABMs are replaced, banks expand the services available to assist vulnerable consumers. Many ABMs have favourite transactions and quick cash options that reduce the complexity of using a bank machine. Many banks provide information in braille and audio formats and high-contrast black and large-font type on white background. The largest banks offer Registered Disability Savings Plans to assist families to make provision for disabled family members who qualify for the Canada Disability Tax Credit.

Supervisory Powers for Financial Consumer Agency of Canada

As part of the exercise of clearly confirming exclusive federal jurisdiction over banks and banking, the federal government should emphasize that the federal government’s policy is that the Financial Consumer Agency of Canada (FCAC) is the sole supervisor and arbiter of compliance with the consumer provisions for banks, and it has sole authority to levy fines or penalties for non-compliance. Going forward, the government would need to confirm that the FCAC would have a similar role overseeing the Code. This, along with the internal dispute resolution and the independent external complaints body to provide redress, provides a complete system for remedying any issues consumers may have with their banks. There is no need – nor is it appropriate – for the FCAC to have a redress function or a mandate to order compensation to consumers.

As noted previously, the goal with the Code is to have principles and supporting elements that clearly state the policy intent and that are meaningful, measurable and clear so there is no ambiguity or differing interpretations as to how they should be implemented in practice. We recognize, however, that inevitably situations will arise when additional guidance from the regulator may be necessary to clarify the policy intent and to ensure consistent interpretation, free from doubt for banks.

If a bank has a question about interpretation, the FCAC must be prepared to commit to a consistent viewpoint that it makes known to all regulated institutions. It is our experience that, while FCAC

encourages regulated institutions to seek assistance from the Compliance and Enforcement Branch (the “CEB”) if they have questions about compliance, in many instances where banks have approached officials to confirm their legal counsel’s interpretation of the requirements with respect to new product offerings, officials feel that it is inappropriate to opine. Thus a bank must go to market relying on its own internal legal advice, which may later be contradicted by FCAC when it investigates a complaint. If FCAC’s interpretation is different than the bank’s view, it necessitates wholesale systems changes that could have been avoided with definitive and reliable guidance at the outset. Consideration should be given to the benefits of adding a Policy Branch that is separate from the CEB – as is the case at OSFI – and giving it a mandate to interpret principles and supporting elements, and provide guidance to regulated institutions (and the CEB).

When FCAC is called upon to issue guidance, it must function on a general basis, not be limited to a particular case in point. The FCAC’s current consultation process for guidance should be formalized, requiring it to consult with stakeholders and take into account how the requirements would work in practice in advance of the issuance of any guidance. Regular collaboration with banks, and more advice and support from the regulator with the intent of clarifying the applicable principles and elements and reasonable measures needed to comply with them would assist the FCAC to establish reasonable expectations of banks and help them to comply.

In a principles-based regime, it will be imperative that the FCAC’s staff understand banks’ commercial functions so its interpretations of the requirements take commercial realities into account. Staff must have a mix of backgrounds and a collective depth and diversity of experience that allows them to meaningfully anticipate the impact of their interpretations on consumers, banks and the financial services system as a whole, and to take into account the harm to the consumer.

The FCAC’s interpretations should be shared broadly and in a timely way with all regulated institutions. It would be helpful if the FCAC quickly raised any supervisory concerns directly to the regulated institution affected and more broadly where there are industry-wide concerns. Operating on a “no surprises” basis would also be very helpful. This is a key principle at OSFI that is very effective.

Innovation

One of the government’s clear goals with reviewing the current consumer protection framework is to be able to accommodate, through the introduction of overarching principles, any new products and services or new delivery channels that are introduced into the financial marketplace without the need for new regulation each time. The banks support this goal, and urge the government to build into the framework the flexibility necessary to accommodate advances in technology and to allow banks to take full advantage of technology to make it easier and more convenient for consumers to access products and services and the related disclosures.

Technology is one of the tools that assists in delivering greater access to financial services in rural and remote communities. Alternative delivery channels, like smart phones and other mobile devices, offer different ways to provide disclosures. The Code will need to ensure that such information and disclosure reach the consumer, but perhaps through different positioning or timing (i.e., subsequent to time of application). For example, allowances may need to be made for subsequent communication (via email, mail or online) of disclosures or other changes will need to be made to the disclosure requirements to accommodate for space limitations (e.g., font and text requirements on information boxes). Subsequent disclosure could be coupled with rights in favour of the consumer as appropriate to the product or service involved.

Scope

We recommend that for clarity the new framework for **consumer** protection be specifically designed for consumers only – that is, individual retail customers who are natural persons and seeking products and services for non-business purposes. Businesses of whatever size, and products and services intended only for business purposes, should be dealt with separately in the *Bank Act*. Currently there is no consistency as to which consumer provisions in the *Bank Act* apply just to retail consumers and which apply more broadly to all customers of the bank. The *Cost of Borrowing Regulations* clearly exempt business loans, but other regulations such as the *Disclosure of Charges Regulations*, *Disclosure of Interest Regulations* and *Access to Funds Regulations* apply to consumers and certain businesses as well. Just to be clear, we support certain requirements for disclosure to businesses, and believe that it would be clearer for both banks and their commercial and retail customers if the provisions relating to commercial relationships were separate from those for consumers (natural persons).

Appendix

Exclusive Federal Jurisdiction over Banks and Banking

As the government goes through the exercise of developing the Code, we believe that the constitutional issues are significant and should always be front and centre in any policy discussion. We set out below a list of constitutional issues that will have a significant impact on the Code.

Exclusive

As a starting point, the federal government should take the opportunity to eliminate any ambiguities about the exclusive nature of the federal framework. In other words, it must be made clear that the Code is the *only* applicable consumer protection regime for banking products and services.¹² This can be accomplished through an express statement in the proposed Code.¹³ The express statement in the Code should also be supported by the existing Preamble to the *Bank Act*, which speaks of “clear, comprehensive, exclusive, national standards applicable to banking products and banking services.”¹⁴ This means that the proposed Code should be anchored in the *Bank Act* and not as a stand-alone piece of legislation. This approach is consistent with the existing federal policy to regulate each type of FRFI separately and with the fact that the exclusive power is over “banks” and “banking”, and not general consumer protection.

Comprehensive

The term “comprehensive” (or “complete code”) has led to much confusion; it is often used to describe very different concepts and ideas when it comes to constitutional matters. For the purposes of the Code, the federal government should steer clear of the idea that federal legislation is only comprehensive if and only if all elements found in provincial legislation are included. This is simply the wrong approach for many reasons. First, attempting to “mirror” provincial legislation (i.e. gap-filling approach) necessarily implies that the provinces have a complementary policy role to play in the regulation of banking products and services, which they do not. This will only lead to more uncertainty for federal policy makers and, ultimately, for consumers. There would be no practical end to regulations in order to cover the vast amount of provincial standards in the area of consumer protection.

Second, courts may be forced to make negative inferences (as to jurisdiction) in areas where provincial standards exist without a “corresponding” federal standard. In other words, the

¹² To be clear, the CBA is not advocating for ousting provincial common law or the Civil Code in the case of Quebec. The CBA believes that there can only be one substantive regulatory framework with one policy maker holding the pen (i.e. disclosure, business practices, etc.) with respect to banking products and services. Other provincial consumer protection legislation dealing generally with similar matters should not trench in this area.

¹³ See, for example, *Quebec (Attorney General) v. Canada (Human Resources and Social Development)*, [2011] 3 S.C.R. 635, ¶¶17, 26-28.

¹⁴ Courts very often rely on the Preamble to determine legislative intent, particularly in constitutional law cases: see, for example, *Reference re Securities Act*, [2011] 3 S.C.R. 837, ¶¶93, 95.

comprehensive nature of federal banking legislation will be measured by how similar it looks to provincial consumer legislation.

Based on the above, the term “comprehensive” should not be taken too literally. In our view, “comprehensive” simply means that a clear policy decision has been made by the federal government to substantively regulate an area, in a particular way, to the exclusion of provincial policy makers. From this perspective, any perceived shortcomings or perceived “gaps” in federal legislation are no longer relevant. The civil remedy example, discussed below, is illustrative in this regard.

Civil Remedy

The issue of a civil remedy in the area of banking stems almost entirely from recent class actions in Quebec against multiple banks. Up to that point, there was virtually no talk of a civil remedy in banking legislation. Proponents of the provincial consumer protection regime believe that there is an “absence” of a civil remedy in the federal legislation implying that provinces can step in to fill that absence. This argument assumes that the absence of a civil remedy was inadvertent rather than a clear policy choice by the federal government to adopt a different regulatory approach – one without a civil remedy for obligations arising out of breaches of consumer provisions. The argument also assumes that the existing policy is not functioning very well and requires add-ons.

This could not be further from the reality. As the Attorney General of Canada argued in the *Marcotte* case, “unlike Quebec, which has chosen to go the route of civil remedies, Parliament chose to establish a system of administrative and penal sanctions to address contraventions of federal statutes intended to protect consumers in the banking sector.”¹⁵

Leaving that point aside, it is our view that a civil remedy in the proposed Code is neither necessary to accomplish the federal objective of protecting consumers of banking products and services nor to create a “comprehensive” regime. The existing regime comprising the Financial Consumer Agency of Canada and the internal and external dispute resolution mechanisms works very well for consumers. The current debate in the context of the Quebec class actions (currently on appeal before the Supreme Court of Canada) should not dictate a defensive policy shift. The most effective, low-cost solution is always better for consumers.

Furthermore, simply including a civil remedy in the Code will not necessarily create a more “comprehensive” regime. As stated earlier, by mirroring provincial legislation, there is no guarantee that down the road proponents won’t find other perceived “gaps” in the Code, in which case, more regulations will be necessary to keep up. In our view, the permanent solution is for the federal government to expressly set out its policy choice and clear any ambiguities to ensure the Code is comprehensive in its own right.

Again, we would be pleased to elaborate further on the industry’s views on this important topic.

¹⁵ Factum of the Attorney General of Canada [EN translation], *Marcotte v. Bank et al.*, paragraph 7, http://www.scc-csc.gc.ca/factums-memoires/35009/FM130_Intervener_Attorney-General-of-Canada.pdf