Positioning Canada's financial sector for consumers

Comments on a consultation document
for the review of the Federal financial sector framework

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Executive Summary

The Department of Finance's recent consultation document regarding the future of Canada's financial sector[1] leaves the reader slightly perplexed regarding what it is trying to achieve.

The Document seeks to determine where the financial sector currently stands. In that regard, however, it misses some dimensions and remains imprecise in other areas. In particular, it lacks the granularity required to assess consumer heterogeneity and the breadth needed to analyze negative externalities foisted on consumers.

Its attempt at "balancing" the three core policy objectives it proposes (which we support) appears to be based on a zero-sum approach under which improvements regarding efficiency and utility would come at the expense of stability. While this view has long been held in some circles, we suggest that it is at best obsolete, and not conducive to fostering a financial sector policy for the twenty-first century.

Yet this analysis seemed to undergird the part (now withdrawn) of Bill C-29 which purported to improve the protection afforded to consumers interacting with banks. In fact, these provisions would have reduced consumer protection, while providing banks with the uniform national regime that they prefer. We contend that this proposal was constitutionally unsound and that, in addition to reducing consumer protection, it would have increased legal uncertainty and risk. We review the concept of "consumer protection", provide an overview of current provincial consumer protection legislation, assess some of the gaps in the current Federal financial consumer protection framework and illustrate to what extent Canada's largest banks' terms and conditions do not comply with basic consumer protection principles.

Of course, other jurisdictions are also reviewing the regulatory framework supporting their financial sector. We provide some indication of recent trends in the United States and European Union regarding specifically consumer protection. We note that, in both cases, efforts have been made to provide consumers with a strong level of protection and to harmonize the activities of regulators acting at different levels.

In Canada as elsewhere, the financial sector is both swiftly evolving and confirming its status as a building block of the economy and society. What happens to this sector impacts everyone, and the slightest shift in the wind may hit more vulnerable consumers especially hard. It is therefore essential that the regulatory framework sustain the sector, foster its evolution and protect those who depend on it.

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[1] Department of Finance Canada. *Supporting a Strong and Growing Economy: Positioning Canada's Financial sector for the Future – A Consultation Document for the Review of the Federal Financial Sector Framework*. Ottawa, August 2016. 33 p. Consulted at https://www.fin.gc.ca/activty/consult/ssge-sefc-eng.pdf. Hereinafter the "Document".

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> **Position**, *v.* 1. *trans.* To put or set in a particular or appropriate position; to place. [...] An abbreviation for "to place in position", 'to place a ball in a proper position to make its next point in order'; **b.** To determine the position of; to locate. [2]

1.0 A reckoning

1.1 Whither "positioning"?

Locating, stowing, targeting: positioning encompasses both static behavior and dynamic, purposeful aiming. The Department of Finance's recent consultation document regarding the future of Canada's financial sector[3] may then perhaps be forgiven for leaving the reader slightly perplexed regarding what it is trying to achieve.

First, the Document seeks to determine where the financial sector currently stands. In that regard, however, it misses some dimensions and remains imprecise in other areas. It is only half-successful at locating the sector.

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2 The Oxford English Dictionary. Vol. VII. Oxford, Oxford University Press, 1933, 1970.

3 Department of Finance Canada. *Supporting a Strong and Growing Economy: Positioning Canada's Financial sector for the Future – A Consultation Document for the Review of the Federal Financial Sector Framework*. Ottawa, August 2016. 33 p. Consulted at https://www.fin.gc.ca/activty/consult/ssge-sefc-eng.pdf. Hereinafter the "Document".

This shortcoming makes it harder for the Document to help set "the ball in place" for the next move. In addition, the Document approaches the process of establishing what this next move should be in a way that we suggest is not conducive to fulfilling adequately the three core policy objectives which the Document itself identifies as the conceptual framework for the review it is initiating[4].

In Canada as elsewhere, the financial sector is both swiftly evolving and confirming its status as a building block of the economy and society. What happens to this sector impacts everyone, and the slightest shift in the wind may hit more vulnerable consumers especially hard. It is therefore essential that the regulatory framework sustain the sector, foster its evolution and protect those who depend on it.

The implication is that this framework may need to evolve significantly over the next decade. In Canada, financial sector regulation has dealt primarily with stability; as a result, we benefit from an industry which claims to be the most stable in the world, but which is also oligopolistic, loath to change its ways and disinclined to listen to users (or regulators), convinced as it is that it knows best. There is a growing need for a profound culture shift if policy objectives such as efficiency and utility are to be fully given the importance they deserve in order to transform both the regulatory framework and the market.

While we acknowledge that the Document is but a preliminary phase in the Department's analytical process, we are therefore somewhat concerned that this first step may be too timid, and apparently too steeped in the ways of the past. Given that the Minister of Finance has also introduced, then retracted, recently legislative changes regarding consumer protection – hence partial implementation of the utility objective – which in our respectful view were somewhat pusillanimous and something of a misstep, we worry that the signal the Department may seem to be sending is that the next decade will be mostly "business as usual", with some superficial changes. We are rather of the view that it is time to firmly reposition the financial sector in order to make it much more effective and attentive to user needs than it currently is. This will take political will as well as clear and consistent signals, so that everyone understands which position we are collectively aiming for.

1.2 PIAC and Option consommateurs

The Public Interest Advocacy Centre ("PIAC") is a non-profit organisation based in Ottawa that provides legal and research services on behalf of consumer interests and, in particular, vulnerable consumers' interests, concerning the provision of important public services. PIAC has been interested in payment and other financial services issues for many years. It has been involved in recent years in various aspects of the payments system, such as the review of the *Canadian Code of Practice for Consumer Debit Card*

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4 These objectives are (1) stability (safety, soundness and resiliency of the sector), (2) efficiency (competitivity, innovation and growth) and (3) utility (relevance to needs and protection of consumer interests): Document, p. 7.

Services. Individuals associated with PIAC are currently members of FinPay and of the Canadian Payments Association's Stakeholder Advisory Council.

Option consommateurs is a Montréal-based non-profit consumer organisation founded in 1983 that provides direct services to consumers through activities such as budget counselling, in addition to research and advocacy work. It has been keenly interested in issues related to financial services since 1990 and has participated actively in numerous consultations, including the process which led to the 2001 legislative review of the financial sector and the implementation of consumer protection provisions[5] in the *Bank Act* at the time the Financial Consumer Agency of Canada was created.

1.3 Our comments

Our comments are intended as a high-level presentation of our reactions to some of the issues raised in the Document. As we understand the process engaged by the Department, more detailed comments will be sought in the future, under one guise or another. In that context, we have opted here to eschew detailed arguments or expositions regarding a number of issues. We have, however, commented at greater length on issues directly related to consumer protection, given the context in which these observations are drafted.

Of course, the fact that we have not commented at this point on any issue raised in the Document should not be construed as meaning either agreement or disagreement with any position on such issue.

We hereby consent to the disclosure of our comments by the Department, online or otherwise, provided of course that the source is identified.

2.0 Some short answers

The Document raises five questions related to the evolution of the Canadian financial sector. We will focus mostly on the first two questions and, to a lesser extent, on the third. In this section of our comments, we will briefly outline our answers; a more detailed rationale will be provided in section 3.

1- What are your views on the trends and challenges identified in this paper? Are there other trends or challenges that you expect to significantly influence the financial sector going forward?

The analysis proposed by the Department focuses mostly on the macro-economic trends that are perceived as important by providers and which mostly impact the stability and, to a much lesser extent, the efficiency core policy objectives. It therefore overlooks elements that cause negative externalities to users, including consumers, it presents a very narrow view of consumer interests and it does not discuss sufficiently challenges associated with competition from new market entrants, technology and demographic changes that actually raise questions about the relevance of financial service providers as we have known them over the past half-century. Underestimation of these issues' importance makes it less likely that

[5] In particular, Option consommateurs played a crucial role in the adoption of legislative provisions regarding access to basic banking.

the efficiency and utility core policy objectives will be attained, which also raises questions about the stability of a financial sector divided between regulated incumbents and unregulated, but increasingly significant, new competitors.

2- **How well does the financial sector framework currently balance trade-offs between the three core policy objectives of stability, efficiency and utility?**

By framing the question in terms of trade-offs, the Document falls at the outset into the trap of a zero-sum game analysis, as if any improvement to efficiency or utility had to be at the expense of stability. This perspective is inherently conservative and advantages incumbents. The current regulatory framework is highly inefficient regarding the fulfillment of the efficiency and utility policy objectives and current developments, including the analysis proposed in the Document does not appear likely to improve markedly the protection of consumer interests and, therefore, will not further the attainment of the utility policy objective; in fact, recent legislative proposals would have in all likelihood reduced currently available consumer protection for Canadian banking customers. The proposed perspective could therefore well help incumbents further entrench their market domination, thus also hindering the fulfillment of the efficiency objective. As a result, the Document leaves the impression that the stability objective implicitly remains the foundational element of any new policy or regulatory framework, at the expense of efficiency and stability.

3- **Are there lessons that could be learned from other jurisdictions to inform how to address emerging trends and challenges?**

In other jurisdictions, strong legislative and regulatory action has been taken to further the fulfillment of the efficiency and utility policy objectives. There are clear and strong rules to protect users, regulatory action furthers competition and regulators enjoy significant powers. In comparison, consumer protection measures in federal legislation are weak and full of gaps, while an organization such as the Financial Consumer Agency of Canada has limited powers.

3.0 Surveying the landscape

3.1 Trends and challenges

As the Document attests, the Canadian financial sector is evolving at an ever-increasing pace. Whether the regulatory framework is able to keep up depends significantly on the Department's understanding of market changes. However, this first step of the proposed review process, dedicated to surveying the current landscape and key trends, leaves us perplexed regarding the Department's ability to develop in-depth understanding of what is happening.

The description of the landscape proposed by the Document is so stratospheric that it misses critical trends. It appears to assume that looking at national averages suffices to understand what is happening in a country as diversified as Canada; like many similar papers, it falls into the trap of assuming (at least implicitly) that all consumers are broadly

similar, and are middle-class, literate, urban denizens[6]. What is perhaps even more surprising is that the Document also misses some macro trends that are highly relevant to the understanding of the evolving relationship between consumers and the financial sector.

As a result of this excessively high-level approach, the analysis is missing the granularity that is required to understand essential trends and, in particular, is therefore unable to identify negative externalities increasingly imposed by the industry on consumers and other users of financial services.

3.1.1 A short-sighted analysis

We generally agree with the findings in the Document that the Canadian financial industry is increasingly concentrated. Although the Document does not consider that issue, it is arguable that domestic financial institutions have come to the conclusion that the market segments in Canada they are most interested in are now saturated, so that their local growth will be stunted in the future[7]. That may partly explain another finding of the Document, to wit the growing exposure of our institutions to other national markets and to the globalized market.

We incline to the view that risks associated with such concentration and globalization are insufficiently considered in the Document. We would also suggest that our large institutions' growing profitability is compelling evidence that efficiency gains are not passed on Canadian customers and, in particular, on consumers; while the Document seemingly acknowledges this may be a debatable issue (p. 25), it provides no indication that it will be pursued in any way. We suggest that it should, and that a prime policy concern should be to implement measures that will make efficiency gains more easily measurable, that will further their distribution to customers[8] and that will increase competition in the national market.

3.1.2 Consumer financial activity: facts to fill the gaps

Household final consumption expenditure now (2015) accounts for 56% of Canada's gross domestic product at market prices and that proportion has been slowly growing over the past five years[9]. Consumer spending is more important to the Canadian economy

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6 The Document does acknowledge (p. 26) that "[c]ertain Canadians […] may be faced with particular challenges", but the wording itself implies that these are isolated and fairly discrete cases. We will revisit this issue *infra*.

7 It would be interesting to assess, in this context, whether Canadian financial institutions find it more profitable to try and contest these markets within Canada, or rather to indulge in oligopolistic conscious parallelism and largely maintain their market share. A rigorous, independent analysis of their behavior would therefore be very helpful in order to determine where the Canadian banking market currently stands in terms of efficiency, which would of course then inform policy priorities.

8 An interesting topic for discussion in this regard might be the capping of interchange fees associated with various payment instruments, as has been achieved in Australia, in the European Union and in the United States.

9 Statistics Canada. *Gross domestic product, expenditure-based*. Ottawa, Statistics Canada, August 31 2016. Consulted at http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/econ04-eng.htm.

than government and business spending put together. And consumer spending is increasingly targeted at services, rather than at the purchase of goods[10].

It is trite to mention that this growth in household expenditure is largely supported by increasing debt[11], the greater part of which (by far) is provided by banks. Unsurprisingly, the Bank of Canada identifies household indebtedness as "key vulnerability 1" in its most recent review of the Canadian economy[12]; even if the Bank expects a potential deterioration of the mortgage market to have limited impact on lenders, total personal loans (non-mortgage) still amount to nearly 20% of banks' assets as of August 2016, which is non-trivial[13].

With cash now amounting to barely a third of retail payments and cheques being replaced by direct deposit[14] or other types of electronic payments, consumers are also increasingly dependent on financial institutions (and the accounts or credit cards they provide) for their ability to remain economically integrated. A consumer who cannot maintain an account with a financial institution is slowly but surely marginalized.

But banks are also highly dependent on consumers. In 2015, "Personal Financial Services" and "Cards and Payment Solutions" amounted together to 76.9% of Royal Bank's total Canadian banking revenue[15]. At the Toronto-Dominion Bank, "Canadian retail" activities amounted to nearly three quarters (74%) of total net income[16].

In short, both the Canadian economy as a whole and banks' financial health are highly dependent on consumer economic activity, and consumers are in turn highly dependent on banks. Not only is this intricate set of interdependencies not adequately assessed in the Document, but the analysis that is proposed of consumer activity is woefully inadequate.

Regarding consumer protection, the analysis proposed in the Document appears to be based on three assumptions: consumers are for the most part reasonably well-equipped to

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10 *Ibid*. In 2015, household spending related to services accounted for 56% of household final consumption expenditure, and that ratio has also been trending up.

11 See Document, Figure 8, p. 22.

12 Bank of Canada. *Financial System Review*. Ottawa, Bank of Canada, June 2016. 45 p. See in particular pp. 9-12, 19-21. Consulted at http://www.bankofcanada.ca/wp-content/uploads/2016/06/fsr-june2016.pdf.

13 Statistics Canada. *Table 176-0025 – Chartered bank assets and liabilities and monetary aggregates, monthly average, seasonally adjusted, Bank of Canada*. Consulted on October 17, 2016 at http://www5.statcan.gc.ca/cansim/a26?lang=eng&id=1760025.

14 Tompkins, Michael; Galociova, Viktoria. *Canadian Payment Methods and Trends: 2015 – Canadian Payments Association Discussion Paper No 7 –November 2016*. Ottawa, Canadian Payments Association, November 2016. 24 p. Consulted at https://www.payments.ca/sites/default/files/cpmt_report_english.pdf.

15 Royal Bank of Canada. *Helping clients thrive and communities prosper – Royal Bank of Canada Annual Report 2015*. Montréal, Royal Bank of Canada, December 2015. 212 p. P. 25, Table 18. Consulted at http://www.rbc.com/investorrelations/pdf/ar_2015_e.pdf. The "Cards and Payment Solutions" item may include revenue that is not directly dependent on consumer activity (see *idem*, p. 27), but that would not alter materially the conclusion that consumer-related revenue is critical to the Bank.

16 Toronto-Dominion Bank. *Building the Even Better Bank – 2015 Annual Report*. Toronto, Toronto-Dominion Bank, 2016. 209 p. Table 13, p. 24. Consulted at http://www.td.com/document/PDF/ar2015/ar2015-Complete-Report.pdf.

deal with their financial service providers, except in "particular" cases; they have adequate access to banking services; and the current consumer protection framework works reasonably well. We would respectfully dispute all three assumptions, the first two in this section and the latter in subsection 3.2.2.3.

3.1.3 The "average consumer" myth

The "consumer" category is highly heterogeneous. Consumers differ greatly due to age, ethnic origin, place of residence, education, health status and revenue, to list only a few factors. The resources of a computer engineer living in the Rosedale neighbourhood do not have much in common with those of an elderly and newly arrived Syrian refugee temporarily housed in Jane/Finch, and their situation is quite different from that of a Tuktoyaktuk fisherman.

It is altogether too easy to forget that roughly half of Canadians are functionally illiterate[17], and therefore cannot understand most written communications proposed by banks. In 2011, a fifth (20.6%) of the total population was foreign-born and 3.5% of all Canadians had arrived in 2006 or more recently[18]; it is likely that these percentages have increased over the past five years, implying that a meaningful proportion of the Canadian population is perhaps not entirely familiar with our institutions yet. And while some aging or disabled Canadians are quite comfortable with technology and actually enjoy the fact that they can easily obtain basic services without having to leave home and visit a branch, others are not as comfortable with online services, cannot use them or simply cannot afford them[19], and some appreciate the human contact they get at a branch.

As a matter of fact, a significant number of Canadians are not cognitively well-equipped to deal with financial service providers. They are as vulnerable in that area as in others. There is an immense asymmetry of informational and financial resources between provider and consumer, and it opens the door to business practices that unduly advantage the strong at the expense of the vulnerable.

Management consulting firm EY recently published some of the results of a global survey regarding consumer banking and while the study does not provide many detailed results regarding Canada, it suggests using a two-dimensional matrix combining financial

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17 Forty-nine percent (49%) of the Canadian population stands at the level of proficiency 2 in literacy or lower, on a scale of 5 and, globally, Canadians score at the OECD average; fifty-five percent of Canadians stand at level 2 in numeracy or lower, putting Canada below the OECD average. Statistics Canada; Employment and Social Development Canada; Council of Ministers of Education, Canada. *Skills in Canada: First Results from the Programme for the International Assessment of Adult Competencies (PIAAC).* Ottawa, Minister of Industry, 2013. Catalogue no. 89-555-X. 102 p. Pp. 13, 16, 18, 20. Consulted at http://www.statcan.gc.ca/pub/89-555-x/89-555-x2013001-eng.pdf.

18 Statistics Canada. *Immigration and Ethnocultural Diversity in Canada – National Household Survey.* Ottawa, Minister of Industry, 2013. Catalogue no. 99-010-X2011001. 23 p. P. 6. Consulted at http://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-010-x/99-010-x2011001-eng.pdf.

19 See in particular Bishop, Jonathan; Lau, Alysia. *No consumer left behind, part II: Is there a communications affordability problem in Canada?* Ottawa, Public Interest Advocacy Centre, July 2016. 175 p. Consulted at http://www.piac.ca/wp-content/uploads/2016/09/PIAC_No-Consumer-Left-Behind-Part-II-Website-Version.pdf.

savviness and digital savviness: do consumers understand financial products, and are they comfortable with digital interfaces? More than a third (36%) of respondents described themselves as "not savvy" in either area[20]; in Canada, that proportion reaches 41%[21].

Consumer heterogeneity does not only mean that many Canadians are more vulnerable than they mythic average consumer is deemed to be; it also implies that there are also different needs to be served, and the traditional financial sector is not always successful in addressing them. Consumer micro-credit is a market which traditional institutions seem to have largely dumped on so-called "fringe bankers", including payday loan providers[22]. Islamic finance is a growing trend both in Canada and worldwide[23], but remains largely unaddressed by incumbent providers – and by the Document. Project financing needs are increasingly met through crowdfunding, a practice shunned by incumbents, developing largely outside the formal regulatory framework and again ignored by the Document. The Canadian international remittance market also develops without significant involvement from incumbents[24] yet this issue, which is of great importance to numerous Canadians, is absent from the Document[25].

Because incumbents do not answer adequately these needs (and others), Canadians depend on much costlier services as well as on unregulated providers, with the latter factor increasing financial and legal risk. In addition and because of their size, these providers usually cannot provide economies of scale or scope. These market failures, risks and negative externalities are unaccounted for in the Document, with the risk that no policy will be developed to address the issues they raise.

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20 EY. *The relevance challenge: What retail banks must do to remain in the game*. EY, October 21 2016. 16 p. P. 6. Consulted at http://www.ey.com/Publication/vwLUAssets/ey-the-relevance-challenge/$FILE/ey-the-relevance-challenge-2016.pdf. This document provides highlights of the global survey of 32 countries, with 55 000 respondents.

21 EY. *30% of Canadian consumers report decreased dependence on banks* News release. Toronto, EY, October 21 2016. Consulted at http://www.ey.com/ca/en/newsroom/news-releases/2016-30-percent-of-canadian-consumers-report-decreased-dependence-on-their-bank. The survey included slightly over 2 000 respondents from Canada.

22 Even residential mortgage credit is increasingly provided by lenders which are not prudentially regulated: Document, p. 15.

23 See for instance Thomson Reuters. *Canada Islamic Finance Outlook 2016*. Toronto, Thomson Reuters, 2016. 73 p. Consulted at http://www.tfsa.ca/storage/reports/Canada_Islamic_Finance_2016.pdf.

24 For a basic look at this market, see for instance Kelly, Deirdre. *Massive money-transfer industry disrupted by startups*. The Globe and Mail, May 30 2106. Consulted at http://www.theglobeandmail.com/report-on-business/massive-money-transfer-industry-disrupted-by-startups/article30193454/.

25 Yet we note that it was identified as a significant issue in the Minister of Finance's 2015 *Economic Action Plan* and inspired engagements from all major federal political parties in the latter part of 2015: see for instance Logan, Nick. *Want lower fees to send money abroad? Here's what the federal parties say they'll do about it*. Global News, October 7, 2015. Consulted at http://globalnews.ca/news/2263644/want-lower-fees-to-send-money-abroad-heres-what-the-federal-parties-say-theyll-do-about-it/.

3.1.4 Access to services

According to the Canadian Bankers Association, the nine largest banks in the country (which account for the vast majority of branches accessible to consumers) operated 6 303 branches as of October 2015[26]. This may seem impressive – except for the fact that, roughly twenty years ago, Canadian banks and Canada Trust (which was since acquired by Toronto-Dominion Bank) together operated 8 483 branches[27]: in twenty years, their network has shrunk by 25%, while population has increased significantly. Assuming that trends documented in the late nineties have held, suburban areas remain reasonably well-covered today by the branch network, while aging city cores and rural areas are neglected. Millions of Canadians likely have a hard time finding and visiting a bank branch[28]. And other financial institutions, such as Desjardins in Québec, have not picked up the slack, as they have been just as busy pruning their own network.

While the Document seems to imply that this trend is of little importance, as "[m]ost routine transactions are now conducted electronically, and branches are increasingly used to provide advice and value-added services" [29], branches remain vitally important for a subset of consumers[30]. The EY survey's Canadian results indicate that 60% of our consumers believe that it is "highly important" for a bank to have a physical presence[31]. As a result of this basic misunderstanding of market needs, the Document does not

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26 Canadian Bankers Association. *Bank Branch Statistics – 9 banks total*. Toronto, Canadian Bankers Association, posted on July 22 2016 (according to http://www.cba.ca/bank-branches-in-canada). Consulted at http://www.cba.ca/Assets/CBA/Files/Article%20Category/PDF/stat_bankbranches_en.pdf.

27 St Amant, Jacques. *Les portes closes – l'état alarmant des réseaux des institutions financières canadiennes*. Montréal, Option consommateurs, 1998. 160 p. P. 10, Tableau 1. This survey, based on detailed data provided by the Canadian Payments Association, examined the status of deposit-taking financial institutions' branch networks at the national level in 1996, and the evolution of those networks between 1966 and 1996 in four specific areas (Montréal, Calgary, part of Eastern Ontario and Eastern Nova Scotia). To our knowledge, no comparable nationwide study has been performed since – regrettably, as such data would be invaluable. The Canadian Bankers Association's website does not provide historical data regarding the evolution of branch networks. Data compared here include exclusively bank (and Canada Trust) branches in Canada.

28 While we are primarily concerned with consumer issues, we are mindful that branch closures may also be harmful to small business, as documented in a recent report in the United Kingdom whose findings we suspect would largely apply to Canada: National Federation of Self-Employed & Small Businesses Limited. *Locked out – the impact of bank branch closures on small businesses*. Blackpool, October 17 2016. 46 p. Consulted at http://www.fsb.org.uk/docs/default-source/fsb-org-uk/fsb-bank-branch-closures-(final).pdf?sfvrsn=0.

29 Document, p. 26, first paragraph.

30 According to EY's aforementioned study, 44% of respondents worldwide "would not trust a bank without branches"; the specific data for Canada is not available but, in the United States, 53% of respondents felt that a bank having a physical presence was "of high importance" to them: *op. cit*, p. 8. To quote EY (*ibid.*), "[…] digital is not replacing the human experience: they are complementary to each other." This is not to say that branches cannot evolve; but they remain necessary to a high proportion of consumers, and must be accessible.

31 *Loc cit*.

discuss potential alternatives, including the possibility that Canada Post involve itself again in offering banking-like services, on its own or as an agent for other institutions[32].

In essence, the Document seems to assume policies should be targeted at a mythical "average consumer" who lives in a suburb, pays hers bills online and can drive her car to the nearest bank branch twenty kilometres away should she require advice on investing her savings. This is not the way millions of Canadians live and, for them, convenient access to a branch is a necessity.

From the provider's narrow standpoint, closing a branch may in some cases look like a rational solution: assets can be directed where they would be more profitable and the bank's bottom line is improved. From a broader perspective, however, a closure induces significant negative externalities in a neighborhood or a rural community, as customers can no longer obtain necessary services or must travel significant distances to receive a service that is less attuned to their specific needs.

The Document does not discuss this issue, and current mechanisms to assess competing interests in such a case in Canada are essentially ineffective. The requirement to provide a notice of branch closure under section 459.2 of the *Bank Act* has had very limited impact, and Canada has nothing remotely comparable to the provisions of the United States' *Community Reinvestment Act*[33], which ensure decisions taken by banks regarding their network's evolution are considered in assessments that are of strategic importance to those banks. In Canada, communities have been left to themselves.

This may contribute to explain the proportion of adult Canadians who do not hold an account with a deposit-taking financial institution. The Document postulates (p. 26) that "[r]oughly 99 per cent of Canadians above the age of 15 have an account at a financial institution", without however quoting any source for this assertion.

We suspect the Department has trusted the World Bank' Global Findex Database 2014[34] for this finding (see its *Indicator table*, p. 83); if so and from a methodological standpoint, we note however that this data is taken from a survey that excluded the Northwest Territories, Nunavut and Yukon (that is, according to the survey, 0.3% of the Canadian population) and, more importantly, that targeted 1 004 respondents contacted through "Landline and cellular telephone", with a margin of error of 3.9%[35]. Yet we know that while 99.2% of Canadian households subscribed either to landline, to cellular phone or to both in 2014, that proportion decreases to 97.8% (2014) in households

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32 On this topic, see for instance Anderson, John. *Why Canada Needs Postal Banking*. Ottawa, Canadian Centre for Policy Alternatives, October 2013. 81 p. Consulted at https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2013/10/Why_Canada_Needs_PostalBanking.pdf.

33 12 U.S.C. §§2901 ss.

34 Demirguc-Kunt, Asli; Klapper, Leora; Singer, Dorothe; Van Oudheusen, Peter. *The Global Findex Database 2014 – Measuring Financial Inclusion around the World*. Policy Research Working Paper 7255. Washington, World Bank Group; Development Research Group; Finance and Private Sector Development Team, April 2015. 88 p. Consulted at http://documents.worldbank.org/curated/en/187761468179367706/pdf/WPS7255.pdf.

35 *Ibid.*, Table A2, p. 76.

classified in the lowest revenue quintile[36]. In other words, a phone survey is bound by design to exclude a certain number of respondents, and especially lower-income respondents, who are more at risk of not having an account with a deposit-taking financial institution[37].

Therefore and considering the survey and sample design, as well as the acknowledged margin of error, we respectfully contend that it is inaccurate and misleading to claim that 99% of Canadians over fifteen have a deposit account. Although it also has some methodological limitations, we are much more inclined to trust the survey done for the Financial Consumer Agency of Canada in 2006, which found that 96% of adult Canadians held a savings or chequing account with a financial institution[38]. We are skeptical that the proportion of Canadians with an account could have increased by 3% in the last decade, given known economic and demographic trends. And while a 3% difference may seem of little importance, it amounts to somewhere between nine hundred thousand and a million Canadians whose plight should not be ignored.

In other words, a very significant proportion of Canadians (and quite possibly a majority) are actually challenged in different ways when interacting with banks and other financial service providers: they are faced with cognitive and informational asymmetries, with geographic hurdles and with other obstacles, to such an extent that quite a few are completely excluded from banking services. "Particular challenges" are not the exception but, rather, the rule.

3.1.5 Literacy at the rescue?

We note that the Document postulates (p. 21) that some of those challenges can be addressed by improving financial literacy. Unfortunately, reality is significantly more complicated. Consumer organizations know firsthand that financial education about comparatively simple issues, such as budgeting, and that immediately addresses a practical need, is indeed effective. In other contexts, however, studies have indicated that financial literacy efforts have in fact limited impact – and especially limited long-term impact – on consumers' ability to understand more complex financial services and make

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36 Canadian Radio-television and Telecommunications Commission. *Communications Monitoring Report 2016*. Gatineau, Canadian Radio-television and Telecommunications Commission, October 2016. 365 p. and appendixes Tables 2.0.7 and 2.0.7 and accompanying text, pp. 56-60. .Consulted at http://www.crtc.gc.ca/eng/publications/reports/PolicyMonitoring/2016/cmr.pdf.

37 We note in passing that the International Monetary Fund, for its part, does not claim to be able to quantify the number of Canadians with an account held at a bank or other deposit-taking financial institution: International Monetary Fund. *IMF data – Access to macroeconomic & financial data – Financial Access Survey*. Consulted October 24 2016 at http://data.imf.org/?sk=E5DCAB7E-A5CA-4892-A6EA-598B5463A34C&ss=1460043522778.

38 Les études de marché Créatec+. *Executive Summary – General Survey on Consumers' Awareness, Attitudes and Behaviour – Prepared for the Financial Consumer Agency of Canada*. Montréal, Les études de marché Créatec+, December 15 2006. 25 p. Pp. 4, 24. Consulted at http://www.fcac-acfc.gc.ca/Eng/resources/researchSurveys/Documents/FCAC_GenSurvExec_2006-eng.pdf.

better choices[39]. At best, such efforts may have some positive temporary impact (albeit quite small) when precisely targeted[40].

And literacy cannot compensate for limited competition in the market: most institutions offer similar products or rates and propose terms and conditions which, even assuming consumers could understand them, all tend to be similarly biased toward provider interests. Nor can it compensate for institutions that have left a community. In a market that is increasingly complex, financial literacy can only address an essential, but comparatively limited part of the need for consumer protection.

The stark reality is that the relationship between a bank and most of its customers is profoundly unequal. Bankers know more – which does not imply that they know best; and they have more material resources and alternatives, while customers depend on them. A bank can afford to lose a thousand low- or mid-income customers; none of them can probably afford to be without a bank. A bank can afford not to offer services it deems less profitable; its decision's impact mostly takes the part of negative externalities suffered by others. On their own, literacy efforts cannot rebalance such a market. Most of those issues are not even raised in the Document – then again, most of them also seem to be invisible on Bay Street.

3.1.6 Competition and new entrants

The Document acknowledges at a high level that there are new entrants in the Canadian financial market, but remains very timid in its assessment of this trend, both at the quantitative and the qualitative levels.

We suspect that the erosion of banks' relevance documented by EY in the aforementioned paper holds true in Canada[41]: consumers' expectations are changing and incumbents have a hard time proving that they can provide always-available, intuitively usable, personalized products; they are encumbered by legacy infrastructure and a culture that was adequate when products changed once a decade and the notion of "app" did not even exist[42]. Younger consumers are probably more likely to prefer the services offered

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39 See for instance Fernandes, Daniel; Lynch, John; Netemeyer, Richard. *Financial Literacy, Financial Education and Downstream Financial Behaviors*. (2014) Management Science 60 (8): 1861-1883. The text is also available at http://pubsonline.informs.org/doi/pdf/10.1287/mnsc.2013.1849. A presentation at a conference in Toronto by one of the authors is also available: Lynch, John. *Financial Literacy & Financial Education: Just-in-time or Just too late?* Financial Literacy and Well-Being Forum, University of Toronto, November 24 2015. 30 p. Consulted at http://inside.rotman.utoronto.ca/behaviouraleconomicsinaction/files/2015/11/JohnLynch-BEARFinLit.pdf.

40 See for instance Kaiser, Tim; Menkhoff, Lukas. *Does financial education impact financial behavior, and if so, when?* Discussion Papers 1562. Berlin, Deutsches Institut für Wirtschaftsforschung, 2016. 63 p. Consulted at http://www.diw.de/documents/publikationen/73/diw_01.c.529454.de/dp1562.pdf.

41 See EY. *30% of Canadian consumers report decreased dependence on their bank*. Press release, October 21 2016. 3 p. Consulted at http://www.ey.com/ca/en/newsroom/news-releases/2016-30-percent-of-canadian-consumers-report-decreased-dependence-on-their-bank. The press release's title is self-explanatory.

42 EY, *The Relevance Challenge*, *op. cit.*, p. 2.

by new entrants – assuming these providers can establish themselves in the Canadian market. We also note that, according to EY's study, consumers in developed countries still trust their banker by and large to keep their money safe, but they are much more reluctant to trust the banker to provide them with unbiased advice[43].

We will let these competitors, and the Competition Bureau's current consultation on fintechs, document more fully the growing anecdotal evidence that incumbents are obstructing market entry by new providers[44]. But we suggest this is an issue unaddressed in the Document that should be of significant concern. We also note that in market segments such as payment mechanisms, Canada lags behind other jurisdictions, including the United States. Innovation seemingly has a hard time crossing the border, for reasons that warrant further and vigorous investigation – especially as our bankers are wont to insist on Canadian consumers' openness to innovation when that argument suits them, and therefore cannot claim that the market's tardiness results primarily from consumers' reluctance to adapt to useful and affordable innovation.

3.1.7 Tectonic shifts

Another issue that is insufficiently addressed in the Document is the likelihood that Canada will increasingly evolve towards a situation where some providers are regulated, prudentially and otherwise, while others are not. Incumbents will perceive that the playing field is not level and are likely to insist that new entrants should be regulated just as they are. These new competitors will object that their activities raise much smaller risks and that they would be smothered by the application of a regulatory framework adapted to much bigger organisations. Consumers will remain blissfully ignorant of the differences between providers – until something goes wrong and they find out they were not protected after all, which may cause significant reputational risk to all new entrants, as well as financial prejudice to affected consumers.

This raises a fundamental and extremely complex question. The current regulatory framework is based on an institutional approach: a bank is regulated insofar as it is a bank created under the *Bank Act*, with the implication that a different type of entity is not subject to the same rules, even if it offers identical services. Conversely, requirements to be met in order to become (and remain) a bank under the *Act* are quite onerous. New entrants will therefore not become banks (or other "regulated" entities) for the most part, and would remain largely unregulated. The market would be split, competition would be unfair and consumers would be inadequately protected. The alternative is to evolve toward functional regulation, so that any entity that provides a given service is regulated in the same way, assuming it raises the same risk profile.

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43 EY, *op. cit.*, pp. 5.

44 We did hear a Bay Street lawyer, who was participating on a panel at the Canadian Payments Association's conference in June 2016, say explicitly and publicly that no bank would open an account to a Bitcoin provider. Even taking due account of financial and legal risk potentially involved in dealing with this class of prospective customers, this type of blanket policy is not conducive to market entry and increased competition and is perhaps symptomatic of a culture that is more apt at obstructing than at fostering change.

We fully acknowledge the challenges associated with such a humongous change, at the constitutional, policy and business practice levels. But we suggest that the evolution of the market will, sooner or later, make this discussion unavoidable. For slightly different reasons, it has already started regarding the securities industry and the payments ecosystem; perhaps it is time to put that issue in a much broader context in order to invent a regulatory framework that would be truly relevant for twenty-first century financial services provided to Canadians[45].

This broader conversation could also tackle another issue that is insufficiently discussed in the Document. Our largest financial institutions are now for the most part "multi-pillar": banks control subsidiaries that offer trust, insurance or investment services and that sometimes represent a significant part of their global activity; meanwhile a life insurer controls a bank. While there are risk mitigation mechanisms aimed at each specific provider, it is unclear whether the regulatory framework is currently able to monitor adequately financial group risk. We also note in this regard that the introduction of provisions such as those added to the *Bank Act* sixteen years ago regarding bank holding companies seems to have been ineffective, since unless we are quite mistaken no financial institution has chosen to avail itself of this regime; it might be useful to look into the causes of that failure, and whether it leaves significant risk unaddressed[46].

In summary, the Document proposes a macro-economic perspective on the industry that is probably not very different from the one discussed in Bay Street boardrooms. It is focused on incumbents' concerns – or at best on incumbent-related issues.

Micro-economic and sociological analysis is largely absent from this analysis. As a result, negative externalities and service gaps are not addressed: they are not even visible through the perspective taken by the Document. There is an urgent need for other viewpoints and more granularity if authorities are to see beyond their traditional concern with stability issues and develop policies that may also further the fulfillment of the efficiency and utility objectives.

3.2 Furthering efficiency and utility too

3.2.1 The zero-sum approach

Question 2 in the Document seeks views regarding the way the current regulatory framework balances "trade-offs between the three core policy objectives". We fundamentally disagree with this "zero-sum" approach, which implies that any gain in the fulfillment of the efficiency and utility objectives would be at the expense of stability.

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45 This discussion would also need to address online cross-border financial services offered to Canadians, which raise complex jurisdictional and enforcement issues.

46 For instance and if a bank's investment and securities subsidiary were to become insolvent due to unexpected crystallisation of market risk, to what extent would the stability and reputation of the bank itself be at risk? To what extent are banks legally allowed to pledge capital on behalf of a subsidiary and in such a scenario, to what extent might a bank overextend itself to save its brand's reputation by trying to salvage a sinking subsidiary? In particular, we are not aware of any information on the public record that would document the extent of those risks in Canada.

This conversation should not be about "trade-offs", but about ways to further simultaneously all three objectives.

We acknowledge that there has existed in the past a view that, for instance, more consumer protection equals lower provider profits, hence less stability. In the same way, more competition may induce lower profits. We respectfully believe that analysis is myopic to the point of being fallacious and we expected it to have been discarded long ago.

First, it goes without saying that the stability of the financial sector should not be predicated upon predatory, unconscionable or monopolistic practices. Rules that prohibit predation and unconscionable behavior are not only legitimate, but necessary in order to ensure a fair and well-functioning market. And it is an axiom of current economic dominant thought that competition is better than monopoly.

Moreover, predation and unconscionable behavior breed distrust, which undermines stability. A market where consumers know that they are safe is likely to be stronger and more stable than a market where they realize they will be gouged at the first opportunity, and should therefore stay away or flee at the first sign of instability.

In a regulatory culture where stability concerns have been – and apparently remain – paramount, the "trade-off" approach can only mean less consumer protection and more obstacles to competition. It translates in less regulatory constraints and less competitive pressure on incumbents: objectively, it serves them well – at the expense of all other market participants, and of the economy as a whole.

A market that is more efficient and more competitive generates new services and new revenue streams, and is less dependent on a small number of large providers: it is actually likely to be more stable. A market where consumers feel secure attracts more activity and generates less legal and reputational risk.

Stability of the financial sector should not be perceived only in terms of the survival of individual, systemically important providers, but in terms of viability of the ecosystem, taken as a whole. In that perspective, authorities need to develop a concept of stability that includes legal, social[47] and reputational risk and that takes into account the needs and interests of other stakeholders; such a concept currently appears to be sorely lacking.

In addition and even if looked only from the financial standpoint, stability does not require stellar return on equity. The Canadian financial sector currently seems like it is not only stable and (very) profitable: it actually looks bloated, and perhaps complacent. Complacency is not a recipe for long-term stability, especially in the face of quickly evolving technologies and markets (unless it is associated with obstruction to market entry); neither is it the best way to achieve efficiency and share efficiency gains.

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47 As an aside regarding social risk, we note that the Document does not even reference the 2016 *G20 High-Level Principles for Digital Financial Inclusion*: http://www.gpfi.org/sites/default/files/documents/G20%20High%20Level%20Principles%20for%20Digital%20Financial%20Inclusion%20-%20Full%20version-.pdf. More generally and even as financial inclusion is becoming a buzzword around the world, the very real issues underlying that concern are barely mentioned in the Document.

What Canada needs therefore is a "win-win" approach: a regulatory framework that will seek to simultaneously improve stability of the ecosystem, efficiency and utility. This approach is noticeably absent from the Document, as is a concern for broader ecosystem stability. From our more specific perspective, however, what is especially disappointing is the Document's alarming weakness with regard to the utility core policy objective, and especially consumer protection concerns: in that area, the Document and recent legislative proposals actually point quite clearly to the existence of analytical gaps and actually threatened to reduce already scanty Federal protection for consumers of financial services.

3.2.2 Consumer protection: stormy weather ahead

3.2.2.1 promises, promises…

Canadian federal authorities have long been concerned primarily with the stability of the financial sector, with other matters – and especially consumer protection – seemingly being mere afterthoughts. Things started to change slowly in the 1980s and 1990s, and a further set of "consumer protection" provisions were added with the 2001 legislative review, which also created the Financial Consumer Agency of Canada[48].

Still, there remained significant gaps in the protection afforded to bank customers; the Minister of Finance therefore announced in 2013 that a "consumer code" would be elaborated. This was followed by further announcements on this topic in every single Budget, including the 2016 Budget. The Parliamentary Secretary to the Minister of Finance also held consultations in April 2014, and there were occasional discussions between Department staff and consumer organizations regarding the development of such a code. There seemed to be room for cautious optimism that consumer issues would be effectively addressed; this expectation was briefly dashed by the most recent legislative initiative from Government in this area[49].

Some sort of "consumer code" did appear to be introduced by Division 5 of Part 4 of the draft *Second Act to implement certain provisions of the budget tabled in Parliament on March 22, 2016 and other measures*, tabled in the House of Commons on October 25, 2016 ("Bill C-29"). We assume these legislative amendments were perceived by the Department as the primary tool to implement the "consumer protection" aspect of the utility core policy objective or, at least, as an instrument to initiate a process that should lead to better consumer protection. If so, we can only, regretfully, conclude that the

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48 S.C. 2001, c. 9. Of course, work leading to that legislation had started long before, in particular with the creation of the *Task Force* on the Future of the Canadian Financial Services Sector in 1996.

49 Hope springs eternal, however… We therefore gladly take note of reports according to which the Minister of Finance indicated that "government will then ask the Financial Consumer Agency of Canada to assure that the proposed federal protections for consumers are at least as strong as those available provincially": Curry, Bill. *Morneau pulls Bank Act changes from budget bill after objections from Quebec, Senate*. Globe and Mail, December 12, 2016, Consulted at http://www.theglobeandmail.com/news/politics/morneau-pulls-bank-act-changes-from-budget-bill-after-objections-from-quebec-senate/article33303437/.

chosen approach was not only weak and ineffective, but that it would arguably have worsened the Canadian consumers' plight[50].

First, the approach adopted by Bill C-29 predictably exacerbated constitutional debates and would likely have generated lengthy and onerous litigation, an issue we will discuss in subsection 3.2.2.2. In addition, it would not have significantly improved consumer protection, which we will discuss in subsection 3.2.2.3. Yet there are problems in the market, many of which are unaddressed, as we will briefly canvass in subsection 3.2.2.4. By pushing aside existing – if insufficient – protection afforded by provincial legislation, Bill C-29 would therefore have left consumers worse off, and the industry in the throes of regulatory uncertainty.

3.2.2.2 Constitutional issues

3.2.2.2.1 *the proposed reform*

It is trite that constitutional concerns were part of the reason why Parliament was invited to tinker with the *Bank Act*'s consumer protection provisions. In that context, it is not surprising that Bill C-29 proposed retaining (albeit with a slight modification) the existing third paragraph of the *Act*'s preamble, which would have read thus:

> And whereas it is desirable and is in the national interest to provide for clear, comprehensive, exclusive, national standards applicable to banking products and services offered by banks; [51]

The Bill also proposed the addition to the *Act* of the following provision[52]:

Purpose

627.03 (1) The purpose of this Part is to, among other things, set out a comprehensive and exclusive regime in relation to an institution's dealings with its customers and the public in relation to banking products and services in order to

(a) provide those customers and the public with uniform protection on a national level;

(b) allow the institution to carry on the business of banking, consistently and efficiently on a national level; and

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50 Considering that Division 5 of Part 4 of Bill C-29 has been removed from the Bill, the following discussion may now seem irrelevant. We suggest, however, that these provisions can still serve as a template of sorts to discuss the various policy issues raised by a (legitimate) desire to improve consumer protection in the banking area .

51 C-29, subs. 117 (2).

52 Sections 627.01 to 627.96 would have been added to the *Bank Act* through C-29, s. 131.

> **(c)** ensure the uniform supervision of institutions and enforcement of provisions relating to the protection of their customers and of the public.

Paramountcy

> **(2)** This Part is intended to be, except as otherwise specified under it, paramount to any provision of a law or regulation of a province that relates to the protection of consumers or to business practices with respect to consumers.

These principles being confirmed or established, Bill C-29 purported to add to the *Bank Act* a part XII.2, entitled *Dealing with Customers and Public*[53].

Our understanding is that the preamble and section 627.03 were intended to exclude entirely provincial legislation from the regulation of banks' activities with Canadian consumers. With all due respect, and on the basis of cases decided both by the Judicial Committee of the Privy Council and the Supreme Court of Canada, we express the view that this attempt would have been ineffective and would only have generated uncertainty and further litigation.

There can be no doubt that contracts between banks and consumers attract the application of the double aspect doctrine: contracts fall under provincial jurisdiction under subsection 92 (13) of the *Constitution Act, 1867*, while matters pertaining to banks fall under federal jurisdiction under subsection 91 (15). Therefore, the protection of consumers contracting with banks is *prima facie* an area that can be regulated both by federal and provincial legislation. In the presence of two regulators who may have different priorities, however, a conflict between the rules they have enacted may emerge, in which case the solution is clear under our constitutional system: precedence is given to the federal rule. The more complicated issue is to determine whether there actually is a conflict between the two rules.

There are two generic doctrines of constitutional law which can be relied upon to avoid or solve that question, and preclude or limit the application of provincial consumer protection legislation to banks: interjurisdictional immunity and paramountcy. We will tackle each in turn.

3.2.2.2.2 *interjurisdictional immunity*

Interjurisdictional immunity prevents the application of provincial legislation where the latter would "impair" the core of a federal power to such an extent that said power can be said to be "seriously or significantly trammel[ed]" [54]. The Supreme Court of Canada has clearly indicated over the last decade that interjurisdictional immunity should

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53 We note, however, that Division 5 of Part 4 of C-29, which encompassed these proposed legislative changes, was entitled "Financial Consumer Protection Framework".

54 *Québec (Attorney General)* v. *Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536 (hereinafter *COPA*), § 45.

be relied upon only exceptionally, and primarily in specific cases where its application has been acknowledged by courts in the past[55].

For over twenty years now, the Supreme Court has clearly and unwaveringly preferred to rely on "co-operative federalism" [56], instead of interjurisdictional immunity, in order in particular to avoid situations where federal inaction in an area where it would have exclusive jurisdiction according to the doctrine would create a regulatory void[57]. This orientation has been especially manifest in cases concerning banking.

In particular, the *Marcotte* case[58] has shown unambiguously that, in Canada, banks do not enjoy interjurisdictional immunity in such a way that consumer protection afforded by provincial legislation would never apply to them. At stake was the impact of provincial legislation requiring the disclosure of certain charges ancillary to credit; the Supreme Court was crystal-clear that such a requirement in no way can be said to seriously trammel the core of a federal power (§ 66). A claim of interjurisdictional immunity from such requirements must therefore fail.

The Court therefore did not even need to readdress in *Marcotte* the definition of the "core" of a federal power, which provinces cannot invade. However, it had provided such a definition in *COPA*, where it stated:

> [35] The test is whether the subject comes within the essential jurisdiction — the "basic, minimum and unassailable content" — of the legislative power in question: *Bell Canada*, at p. 839; *Canadian Western Bank*, at para. 50. The core of a federal power is the authority that is absolutely necessary to enable Parliament "to achieve the purpose for which exclusive legislative jurisdiction was conferred": *Canadian Western Bank*, at para. 77.

The inexpugnable core of a federal power is thus narrower than the power itself and there should therefore be no "confusion between the scope of the federal power and its basic,

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55 See *inter alia Canadian Western Bank* v. *Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, §§ 36, 66-67.

56 *Canadian Western Bank*, *op. cit.*, § 24 and cases quoted therein; *Saskatchewan (A.G.)* v. *Lemare Lake Logging*, [2015] 3 S.C.R. 419, 2015 SCC 53, (hereinafter "*Lemare*"), § 22; *Alberta (A.G.)* v. *Moloney*, [2015] 3 S.C.R. 327, 2015 SCC 51 (hereinafter "*Moloney*"), § 15. The notion of "co-operation between the Dominion and the Provinces" is actually not new, since it was already the basis of the Judicial Committee of the Privy Council's decision in *A.G. of Canada* v. *A.G. of Ontario and others*, [1937] AC 326 (*Labour Conventions Reference)*, which is the case where the "watertight compartments" metaphor, usually claimed to justify interjurisdictional immunity, was first used. In that case, the Council actually found for the provinces. As to federal-provincial cooperation, see p. 354.

57 *Canadian Western Bank*, *op. cit.*, § 44; the Court significantly expanded on this concern in *Tsilhqot'in Nation* v. *British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 256, §§ 147-149, and referred to it again in *Lemare*, *op. cit.*, §§ 20-23, 27 and 66.

58 We will rely primarily on the one case in a trilogy that addressed most specifically the constitutional issues we are concerned herewith: *Bank of Montreal* v. *Marcotte*, 2014 SCC 55, [2014] 2 S.C.R. 725 (hereinafter *Marcotte*).

minimum and unassailable content"[59]: as a result and while banking is certainly a broad area of jurisdiction, clearly encompassing relationships with customers, the protection of banks' customers is not necessarily part of the core of the federal power, and therefore not necessarily covered by interjurisdictional immunity.

The argument that banks benefit from interjurisdictional immunity regarding consumer protection would imply that the protection of bank consumers must be acknowledged as part of the "core" of federal jurisdiction over banks. This conclusion would impose a significant policy burden on Parliament – and begs the question of why that responsibility was so ineffectually addressed over most of the past century and a half. Assuming for the sake of discussion that courts agreed with this claim for interjurisdictional immunity (even though its corollary would be that *Marcotte* was wrongly decided), Parliament may want to consider carefully what it wishes for and to weigh the burden it is seeking to carry, as it implies that no one but Parliament could legislate about a slew of issues regarding which banks currently rely upon provincial legislation on a regular basis[60].

Of course, one could propose an exceedingly narrow reading of the decision in *Marcotte*: provincial disclosure requirements regarding certain forms of credit charges might indeed apply to banks, but, under such a narrow reading, all other consumer protection issues would still be deemed undecided and could potentially be viewed as part of Parliament's "essential jurisdiction" over banking, pending other decisions[61]. Perhaps to curb such narrow readings[62], the Court added the following comment in *Marcotte*:

> [68] The Banks argue for exactly the type of amorphous, sweeping immunity that was rejected in *Canadian Western Bank*. Banks cannot avoid the application of all provincial statutes that in any way touch on their

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59 *Canadian Western Bank* v. *Alberta*, § 85; see also § 51.

60 For instance, a bank that grants a mortgage loan to a consumer in Québec in order to buy a house relies on provisions of Québec' *Civil Code* to establish and, eventually, enforce the mortgage; however, these provisions include elements that protect borrowers (who are consumers), such as a requirement to provide prior notice before the bank can exercise its rights. Should the protection of banks' customers be deemed to be an exclusive federal jurisdiction, not only would these provisions of the *Civil Code* become inoperative regarding banks, so that Parliament would need to legislate regarding such issues, but an argument could be made that these provisions cannot be dissociated from the global regime, and therefore that banks cannot rely on mortgages in Québec – with the implication that Parliament would have to establish a complete mortgage regime. Similar issues might arise in other provinces.

61 We may note that we are for our own part at a loss to identify any rationale for proposing such a distinction between the disclosure requirements analyzed in *Marcotte* and other disclosure requirements – or other measures – seeking to rectify asymmetries between banks and consumers (an issue we will revisit *infra*), but we acknowledge that other parties may attempt to be more creative.

62 And to further the certainty and predictability of the law, as well as preventing the useless multiplication of cases brought to court. A very narrow reading of *Marcotte* would only lead to further litigation, to no one's real advantage.

> operations, including lending and currency conversion. Provincial regulation of mortgages, securities and contracts can all be said to relate to lending in some general sense, and will at times have a significant impact on banks' operations. However, as this Court concluded in *Canadian Western Bank*, this is not enough to trigger interjurisdictional immunity. The provisions of the *CPA* do not prevent banks from lending money or converting currency, but only require that conversion fees be disclosed to consumers.

In other words, provinces could not prevent banks from performing the core activities of banks (such as accepting deposits or lending), but they can certainly impose even requirements that have "a significant impact" on their operations, in the Court's own words[63].

This finding should actually have been greeted favorably by both the banks and Parliament. In fact, banks do rely on a daily basis on provincial legislation that impacts their activity, such as the rules supporting mortgages, liens, garnishment or property. Some aspects of those rules do protect consumers or other vulnerable citizens, yet banks certainly do not argue that they are immune from these provisions when they find them globally advantageous to their activities. If they were, Parliament would be required to set up an exhaustive legislative framework to enable banks – and presumably other federal undertakings – to acquire or manage property and enter into contracts, a perspective that should be obviously unappealing[64]. Yet when similar rules seek to compensate for informational and other asymmetries that significantly advantage the banks, these institutions would have us believe that their core activities are suddenly endangered by requirements to be more transparent or not to act unconscionably, and that only Parliament is wise enough to balance their interests and consumers'. We respectfully remain unconvinced.

The weaknesses inherent in such an argument probably help to explain why there are very few (if any) consumer protection issues concerning banks and decided by appellate courts where it was concluded that interjurisdictional immunity prevented provincial law application; as a result, there are very few "situations already covered by precedent" where the doctrine would provide banks with immunity from provincial consumer

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63 See also *Canadian Western Bank*, *op. cit.*, §§ 51-53. *Irwin Toy Ltd.* v. *Québec (Attorney General)*, [1989] 1 SCR 927 is another interesting precedent. At stake was the application of provincial legislation prohibiting certain forms of advertising targeting children to toy companies and television broadcasters; the Court concluded that provincial "legislation of general application enacted in relation to consumer protection" applied to federal undertakings such as broadcasters even if it impacted a vital part of their activity (in this case their advertising revenue) because it merely had an incidental effect on that core activity (pp. 953, 955-959). In the same way, provincial legislation that regulates disclosure, advertising, loss allocation or unilateral contractual modifications may impact banks and even have an incidental (though arguably minimal) effect on their income, without triggering interjurisdictional immunity or otherwise being invalid or inoperative.

64 See also *Canadian Western Bank*, *op. cit.*, § 65.

protection legislation[65]. In fact, the most recent indication we have from appellate courts – *Marcotte* – is that banks are not immune to provincial consumer protection legislation. We therefore contend that the better reading of *Marcotte* is that the doctrine of interjurisdictional immunity simply cannot justify a blanket exclusion of provincial legislation in the banking area.

3.2.2.2.3 *paramountcy*

To quote the Supreme Court of Canada,

> The guiding mantra of the paramountcy analysis is that "where there is an inconsistency between validly enacted but overlapping provincial and federal legislation, the provincial legislation is inoperative to the extent of the inconsistency": *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, at para. 11; […][66]
>
> Two kinds of conflict are at play: (1) an *operational conflict*, where compliance with both the federal and provincial law is impossible; and (2) *frustration of purpose*, where the provincial law thwarts the purpose of the federal law (*Quebec (Attorney General) v. Canadian Owners and Pilots Association*, [2010] 2 S.C.R. 536 (*COPA*), at para. 64; [67]

The first branch of the test is the easiest to analyze: basically, when one enactment says "yes" and the other says "no", one should comply with the federal enactment. For a conflict to exist, it must be impossible to comply with both enactments at the same time. Therefore and when, for instance, the provincial enactment is simply more onerous than the federal one, it is possible to comply with both by complying with the provincial enactment: in such cases, there is no conflict, and the provincial enactment remains fully operative[68]. In the area of consumer protection, the fact that a provincial enactment fulfills more effectively this "protection" purpose would therefore not bar its application.

We are respectfully of the view that there are few situations where federal and provincial legislation regulating relationships between banks and consumers come in such insoluble operational conflict, and courts are already well-equipped to decide any such case, the implication being that the text of proposed section 627.03 was legally unnecessary when considered under this branch of the paramountcy doctrine. As a result,

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65 In fact, the Supreme Court went so far in *Marcotte* as to indicate that "La protection du consommateur est un domaine de compétence provinciale et elle est régie au Québec par la *L.p.c.* dont l'application relève de l'Office de la protection du consommateur."(§ 74). We note that the English version of the reasons (penned by Rothstein and Wagner JJ., the latter from Québec) is significantly less clear and we acknowledge that this *obiter dictum* may be overbroad; it does suggest, however, that the Court leans toward a broad view of provincial jurisdiction in this area.

66 *Lemare*, § 15.

67 *Lemare*, § 17.

68 See *inter alia Moloney*, § 19 and caselaw quoted therein.

a new federal regime could well serve as a national "floor" in terms of consumer protection, while consumers could enjoy better protection in provinces that grant them additional safeguards.

The only possible justification for adding section 627.03 to the *Bank Act* would therefore have been that Parliament believed that provincial legislation would have frustrated the purpose underlying the Part XII.2 it mooted adding to the *Bank Act*. The first logical step of this analysis is therefore to try and establish that purpose.

Part XII.2 would have been established by Division 5 of Part 4 of Bill C-29, which was entitled "Financial Consumer Protection Framework". Part XII.2 itself was set to be titled "Dealing with Customers and Public" and it required banks to observe five principles in order to further accessibility, transparency, fairness and efficiency (section 627.02). These elements would seem to indicate at first glance that the reform's intent was to ensure the protection of customers' interests and, in particular, of consumers, and they could reasonably be used by courts to help establish Parliament's intent[69].

Section 627.03 purported to establish explicitly the purpose of Part XII.2[70]. It should be noted at the outset that this provision was explicitly non-exhaustive, as it stipulated that the Part's purpose was, "among other things", what it then defined as being said purpose by using a two-step mechanism that requires closer analysis.

To summarize, the stated goals were to provide customers with uniform protection on a national level, allow banks to carry on business consistently and efficiently on a national basis and ensure uniform supervision. In order to attain them, a "comprehensive and exclusive regime" was set out by Part XII.2: this regime was therefore a means to the ends listed in subsections 627.03 (1) (a), (b) and (c).

The first of these ends is customer protection, which was intended to be made "uniform". There are two avenues, however, leading to such a goal: one can establish a floor, or a cap. Parliament may in effect say: "Nowhere will customers be protected less than what is established in this Part" or "Nowhere will they be better protected". We contend that the first reading is more consonant with the title given to Division 5 and the principles set out in section 627.02, as it maximizes customer protection. This is especially true as, contrary to what the first paragraph of section 627.03 proclaims, the proposed regime is anything but comprehensive, an issue we will revisit *infra*. This

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69 *United Buildings Corp.* v. *City of Vancouver*, [1915] A.C. 345, 351; *Law Society of Upper Canada* v. *Skapinker*, [1984] 1 S.C.R. 357,376-377, 379.

70 This section echoes to some extent the *Bank Act*'s preamble and both can obviously also be relied upon to construe Parliament's intention (see for instance *Finlay* v. *Canada (Minister of Finance)*, [1993] 1 S.C.R. 1080, 1123; *R.* v. *C.D.K.*, [2005] 3 S.C.R. 668, §§ 35, 37), insofar of course as those parts of the legislation are found to be constitutionally binding. As noted *infra*, the Supreme Court expressed doubts in *Marcotte* that the preamble's purview could preclude the application of provincial consumer protection legislation to the extent claimed by the banks. As a result, it could well be that the impact of these parts, had they been added to the *Bank Act* is that, once the constitutional dust had settled, they would have regulated consumer protection without prevailing upon provincial legislation.

reading would not have prevented the application of provincial consumer protection provisions that actually confer better protection to users.

We acknowledge, however, that this reading is likely not the one intended by the drafters, as they also emphasized an "exclusive" regime that would be consistent on a national level. The implication is that Part XII.2 privileged consistency over more effective customer protection: in effect, every Canadian would be protected, but weakly – or at least not as strongly as she could be in some provinces, since under this construction of section 627.03 the application of provincial consumer protection legislation to banks would be prevented. Par XII.2 would have acted as a cap, to consumers' detriment.

This second reading, which emphasizes the consistent carrying on of the business of banking over consumer protection, is reinforced by paragraph 2 of section 627.03, which declared that Part XII.2 is paramount to provincial legislation that relates to the protection of consumers[71]. In effect, Part XII.2's real purpose would therefore not be consumer protection, contrary to the title of C-29's Division 5 of Part 4, but the establishment of a regime allowing institutions to carry on "consistently" the business of banking, be it at the expense of consumers. It is an open question how courts would have reacted to such discrepancies within the proposed changes; as noted *supra*, subtitles, preambles and purposive provisions may impact statutory construction, but only insofar as they are consistent with constitutional law.

In effect, under the "frustration of purpose" branch of the paramountcy doctrine, banks or the Attorney General would therefore have been claiming that the application of provincial consumer protection regimes to banks would prevent them from carrying on their business consistently and effectively, to such an extent that those provincial regimes could legitimately be pre-empted. Only a uniform, weak and exclusive customer protection regime, acting as a cap, would ensure the attainment of Parliament's twin purposes of consumer protection and banking efficiency: The argument would therefore be that banks cannot carry on their business consistently and efficiently while complying with provincial consumer protection legislation[72]. But is that consistent with what the Supreme Court teaches us about paramountcy in the context of co-operative federalism?

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71 We note, however, that proposed subsection 627.77 (3) acknowledged that this paramountcy claim would not apply to provisions regarding the disclosure of information related to some insurance charges.

72 Setting constitutional law aside for a moment, a reality check may be in order. In view of the fact that national banks in the United States must contend to some extent with the laws of 50 States, in addition to Federal law, and that EU banks doing business outside their home country must contend with national requirements as well as with the EU framework, we respectfully find this an unconvincing argument from a banking industry which loudly proclaims itself as the best in the world. We also note for instance that the RBC Group provides consumer banking services in the United States, the Caribbean and elsewhere; the Scotia Group provides consumer banking services (with more branches and offices outside Canada than within the country) in a number of countries in Latin America, the Caribbean and elsewhere; the BMO Group provides consumer banking services in the United States. None of the numerous consumer protection legal regimes which their foreign activities must comply with appear to prevent Canadian banks from carrying on their business "consistently and efficiently" – as well as profitably, which begs the question of why they could not adapt to Alberta or Québec law as well as they adapt to Mexican, Bahamian or Illinois law.

As with interjurisdictional immunity and the first branch of the paramountcy doctrine, the Supreme Court has repeatedly cautioned against overbreadth:

> [23[…] As this Court said in *Marcotte*, "care must be taken not to give too broad a scope to paramountcy on the basis of frustration of federal purpose": para. 72; see also *Canadian Western Bank*, at para. 74. This means that the purpose of federal legislation should not be artificially broadened beyond its intended scope. To improperly broaden the intended purpose of a federal enactment is inconsistent with the principle of cooperative federalism. […][73]

We contend that *Marcotte* makes it quite clear that the constitutionally intended scope of federal banking legislation does not preclude the application of provincial consumer protection legislation; therefore, a strong argument could be made that Parliament was trying to broaden that scope "artificially" and "improperly", and that the claim that section 627.03 would have excluded the application of provincial legislation was constitutionally unsound.

The "exclusive regime" argument must also be analyzed in conjunction with the Supreme Court's views[74] regarding "field occupancy":

> [20] Significantly, against the background of the two paramountcy paradigms of operational conflict and frustration of purpose, this Court cautioned in *Canadian Western Bank* that "[t]he fact that Parliament has legislated in respect of a matter does not lead to the presumption that in so doing it intended to rule out any possible provincial action in respect of that subject": para. 74. The fundamental rule of constitutional interpretation is, instead, that "[w]hen a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes": *Canadian Western Bank*, at para. 75, citing *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, at p. 356; see also *Ryan Estate*, at para. 69.
>
> [27] And, as previously noted, paramountcy must be applied with restraint. In the absence of "very clear" statutory language to the contrary, courts should not presume that Parliament intended to "occupy the field" and render inoperative provincial legislation in relation to the subject:

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73 *Lemare, op. cit*.

74 *Lemare, op. cit*.

> *Canadian Western Bank*, at para. 74, citing *Rothmans, Benson& Hedges Inc.*, at para. 21.

The wording of section 627.03 apparently aimed at "very clearly" occupying the field of consumer protection with regard to banks, thus pushing aside all provincial legislation. One of the problems this raises is that there are in fact very significant gaps in the proposed federal regime, as will be discussed *infra*.

Whether the provision was explicit enough to rule out the application of provincial legislation in areas which Parliament arguably did not even see as concerning consumer protection, since it chose not to regulate them at all in Part XII.2, remains an open question. In those cases, Parliament's choice to leave significant gaps could properly lead to an interpretation according to which it did not intend to interfere with provincial legislation in areas it left fallow. In other words, it is unclear what the extent of the "occupied field" would have been and if the Minister's contention was that it included any issue that could relate to consumer protection, then consumers would have fallen prey to exactly the issue raised by the Supreme Court in *Canadian Western Bank* (§ 44) and other cases: there are a vast number of situations where they would have been the victims of regulatory gaps and voids which Parliament had not only chosen not to fill, but had tried moreover to prevent provinces from filling.

Of course, one cannot forget that the "exclusive regime" argument advanced by section 627.03 might have seemed to be bolstered by the third paragraph of the preamble to the *Bank Act*, which also underlines that it is "in the national interest to provide for clear, comprehensive, exclusive national standards applicable" to the banks' activities. We would be remiss, however, in not underlining how the Supreme Court dealt with that reasoning in *Marcotte*, discussing the argument with regard to two provisions (sections 12 and 272) of Québec's *Consumer Protection Act*:

> [78] First, the Banks say that a purpose of the federal scheme is to provide for "clear, comprehensive, exclusive, national standards applicable to banking products and banking services offered by banks", citing the preamble to the *Bank Act*. […] However, even if we assume that a purpose of the *Bank Act* is to provide for exclusive national standards, such a purpose would still not be frustrated by ss. 12 and 272.
>
> [79] Sections 12 and 272 do not provide for "standards applicable to banking products and banking services offered by banks", but rather articulate a contractual norm in Quebec. Merchants must bring costs to the attention of consumers and, failing to do so, cannot claim them. This requirement does not amount to setting a standard applicable to banking products. Rather, it is analogous to the substantive rules of contract found in the *CCQ*, the operation of which the Banks do not dispute. If the Banks' argument amounts to claiming that the federal scheme was intended to be a complete code to which no other rules at

> all can be applied, that argument must also fail as the federal scheme is dependent on fundamental provincial rules such as the basic rules of contract. Just as the basic rules of contract cannot be said to frustrate the federal purpose of comprehensive and exclusive standards, if indeed such purpose exists, so too do general rules regarding disclosure and accompanying remedies support rather than frustrate the federal scheme.

The wording of section 627.03 clearly attempted to circumvent the interpretation given in *Marcotte* to the notion of "standards applicable to banking products" by claiming paramountcy to any provincial law or regulation relating to the protection of consumers. Going beyond what the preamble states, section 627.03 expressly sought to exclude the application to banks of provincial consumer protection rules.

The problem, of course, is that most "consumer protection" rules are also substantive rules of contract, and in most cases, are simply more specific articulations of basic rules in that legal area, on which the federal scheme is necessarily dependent. Therefore and as stated by the Supreme Court in par. 79 *supra*, the "complete code" argument "must also fail". In essence, Parliament is trying to modify the division of powers by excluding the application of provincially-enacted legislation pertaining to specific aspects of contract law; looking at *Marcotte*, it seems unlikely that such an attempt could be successful.

The fundamental question is simple: how can it possibly be claimed that allowing customers to benefit from the articulation of basic fairness requirements thwarts the purpose of enabling sound banking in Canada? The answer, of course, is that such an argument is untenable, unless one holds that efficient banking must be unfair. Could banks then claim at least that regional discrepancies affect their activity to such an extent that they cannot carry on their business "consistently and efficiently"? Even within Canada, they adapt to provincial regimes governing issues such as property, mortgages, issuance of securities or taxation, which undoubtedly apply to them[75], as we do live in a Federal State – not to mention the fact that Canadian banks are required to comply with consumer protection regimes in the other countries where they choose to do business willingly (and profitably). Beyond the intricacies of constitutional law arguments, there is simply no room for the banks to stand in order to claim that provincial consumer protection legislation thwarts the Federal "banking" purpose. We have no doubt whatsoever that they find compliance with such legislation annoying – and that in itself should bother greatly Federal (and other) regulators; but their slight inconvenience must yield to the interests of the greater number – and to the Constitution.

This is all the more so as the onus of proving that there are grounds for applying the interjurisdictional immunity or paramountcy doctrines falls squarely on the shoulders on the party (be it the banks or the Attorney General of Canada) that invokes the doctrine, and the Supreme Court has – recently and repeatedly – reminded parties that this onus is quite onerous:

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75 This is settled constitutional law since at least *Bank of Toronto* v. *Lambe*, (1887) 12 A.C. 575, 585-586.

> [26] To prove that provincial legislation frustrates the purpose of a federal enactment, the party relying on the doctrine "must first establish the purpose of the relevant federal statute, and then prove that the provincial legislation is incompatible with this purpose": *COPA*, at para. 66; *Marcotte*, at para. 73; see also *Canadian Western Bank*, at para. 75; *British Columbia (Attorney General) v. Lafarge Canada Inc.*, [2007] 2 S.C.R. 86, at para. 77. Clear proof of purpose is required: *COPA*, at para. 68. The burden a party faces in successfully invoking paramountcy is accordingly a high one; provincial legislation restricting the scope of permissive federal legislation is insufficient on its own: *COPA*, at para. 66; see also *Ryan Estate*, at para. 69. [76]
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> [27] Be it under the first or the second branch, the burden of proof rests on the party alleging the conflict. Discharging that burden is not an easy task, and the standard is always high. In keeping with co-operative federalism, the doctrine of paramountcy is applied with restraint. It is presumed that Parliament intends its laws to co-exist with provincial laws. Absent a genuine inconsistency, courts will favour an interpretation of the federal legislation that allows the concurrent operation of both laws: *Western Bank*, at paras. 74-75, citing *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307 ("*Law Society of B.C.*"), at p. 356; see also *Rothmans*, at para. 21; *O'Grady v. Sparling*, [1960] S.C.R. 804, at pp. 811 and 820. Conflict must be defined narrowly, so that each level of government may act as freely as possible within its respective sphere of authority: *Husky Oil*, at para. 162, per Iacobucci J. (dissenting, but not on this particular point), referring to *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, [1985] 1 S.C.R. 785, at pp. 807-8, per Wilson J. [77]

The Court therefore concluded in *Lemare* that a provincial requirement that delayed (by at least five months) the appointment of a national receiver under the *Bankruptcy and Insolvency Act* did not frustrate the purpose of the Federal enactment[78]. One can hardly imagine how effective provincial consumer protection legislation could be found to frustrate the avowed federal purpose of protecting those very same consumers.

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76 *Lemare*, *op. cit*.

77 *Moloney*, *op. cit*.

78 *Lemare*, *op. cit*, § 73. In *Moloney*, provincial legislation that sought to make enforceable a debt discharged under the *Bankruptcy and Insolvency Act* was found to be inoperative to that extent, as it frustrated the purpose of the Federal enactment as construed by the Court.

In order to claim that Part XII.2 effectively displaced provincial legislative provisions and made them ineffective with regard to banks on the basis of furthering consumer protection, the argument would essentially have been that more beneficial provincial provisions must be struck down because they provide consumers with additional protection: in essence, they protect consumers too well. This line of reasoning is obviously so paradoxical as to be untenable. The only rationale left to support Part XII.2 would therefore have been that it bolsters bank efficiency, be it at the expense of consumer protection. In other words, the *Bank Act* would have acknowledged that what is convenient to bankers is more important to Parliament than consumer protection. We are heartened that Parliament has rejected for the time being what appeared to be a highly debatable, if remarkably candid, policy choice.

It may be that Parliament is constitutionally allowed to make that policy choice. But it should be made transparently, rather than under the cover of protecting Canadian consumers. And the implication of the conclusion that Part XII.2's real purpose (its "pith and substance") is not to protect consumers, but to protect banks, means of course that provincial consumer protection provisions might well remain enforceable, with courts being required to determine how to reconcile consumer protection validly extended by the provinces with Federal concerns over banking efficiency, with the onus being put on the Federal Government and the banks to show that being fair to their Canadian customers prevents them from being efficient.

In other words, Bill- C-29 would likely have increased legal risk for banks, by creating constitutional uncertainty, and for consumers, by reducing the application of protective measures, thus nudging them toward competitors and therefore increasing market risk for banks. We are skeptical that any operational hassles potentially eliminated from the banks' national operations could compensate for those negative consequences suffered by both banks and their customers. We were also at a loss to understand the rationale supporting this policy in an era purportedly ruled by cooperative federalism.

Bill C-29 did not significantly improve the level of protection afforded to bank customers, and whatever additional protection it might have provided (which we will probe in subsection 3.2.2.3.3) was more than offset by losses associated with the Federal claim to paramountcy associated with its proposed regime. This was in no way, shape or form a "first step" toward the goal of improving consumer protection, thus furthering the "utility" core policy objective: it was a misstep, and a highly disturbing one at that.

This takes us back to the "trade-off" issue. Utility was being sacrificed to efficiency, as myopically perceived by banks that would avoid legal risk by liability exclusion clauses rather than by improving their business practices. This perspective is probably not efficient, in the long term, for the banks themselves, and it is certainly not efficient for the economy as a whole, as it shields practices that are legally unfair and economically unsound from effective review.

3.2.2.2.4 *related policy issues*

Three other aspects of the Federal claim for an exclusive regime must also be noted: it would have disproportionately affected residents of the province of Québec, it would

have significantly complicated the exercise of consumers' judicial recourses against banks and it would in fact have put banks at a competitive disadvantage.

First, it is settled law that federal legislation is not paramount to common law:

> Federal paramountcy applies where there is an inconsistency between a valid federal legislative enactment and a valid provincial legislative enactment. The doctrine does not apply to an inconsistency between the common law and a valid legislative enactment. [79]

Assuming for a moment that the exclusive character of a Federal regime would be justified by the paramountcy doctrine, the implementation of rules such as those proposed in Part XII.2 would therefore not have kept most Canadians from raising before judicial courts issues associated with the acceptance of an offer and the creation of a contract, vagueness, misrepresentation, incorporation of external clauses in contractual documents, frustration, unconscionability or the breach of the generic duty of good faith, for instance (not to mention equitable remedies) as, in all such cases, common law usually affords an individual (including a consumer) a remedy, which cannot be set aside on the basis of paramountcy. As we will review in subsection 3.2.2.3.2, provincial legislation may add usefully to consumer protection, but there is at least a core body of common law that protects minimally banks' customers.

Québec, however, is historically governed by a civil law system. This system provides rules covering all the issues mentioned in the above paragraph, but they are established by provincial legislation. Had the "bank's customer protection" field been considered to be fully occupied by Part XII.2, none of the rules addressing the aforementioned issues – and others – in Québec's *Civil Code*, in its *Consumer Protection Act* or in other legislation would have been operative against banks. Consumers in the rest of Canada would have remained protected to some extent by common law, but Québec consumers would have been deprived of any protection not provided in Part XII.2.

This results unavoidably from a Federal claim to occupy exclusively the field and from the fundamental duality of legal regimes in Canada. We respectfully submit that it raises very significant policy issues pertaining not only to consumer protection, but to federalism itself.

From the consumers' standpoint, there would also have been a strong negative impact regarding judicial recourse. Under section 272 of Québec's *Consumer Protection Act*, when a provider fails to comply with a provision of the *Act*, the consumer may request from a court, *inter alia*, the reduction of her obligations, annulment of the contract or damages, including punitive damages. The *Act* also prohibits contractual provisions that mandate arbitration or restrict a consumer's right to introduce legal actions such as class actions. Legislation in other provinces includes comparable provisions[80].

The regime contemplated by Part XII.2, however, contained no such provision. Assuming again that the federal regime was successful in tossing aside provincial

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79 *Marine Services International Ltd.* v. *Ryan Estate*, 2013 SCC 44, [2013] 3 S.C.R. 53, § 66.

80 See for instance Ontario's *Consumer Protection Act*, 2002, sections 7, 8 and 18.

legislation, banks could therefore easily have added to their terms and conditions stipulations preventing consumers from introducing class actions, for instance. And since Part XII.2 contained no provision similar to Québec's s. 272, it may have been open to question whether a consumer could have sued a bank before judicial courts for breach of an obligation established by Part XII.2[81].

As a result, customers of provincially constituted deposit-taking financial institutions would most likely have been better protected against the vagaries of their provider than the customers of banks. Insofar as it is rational to minimize legal risk and all other things being equal, consumers would therefore have been better off banking with non-banks. To that extent, the regime proposed by Part XII.2 would have acted as a rational disincentive to transact with banks and it would therefore have put those institutions at a competitive disadvantage in the Canadian market. Thus the proposed regime would have failed not only at protecting consumers, but at allowing the institutions to carry on their business efficiently.

3.2.2.3 But is there a problem?

But, one might ask, what do we talk about when we talk of "consumer protection", and are banks actually erring in any way? The Supreme Court of Canada itself has underlined the growing importance of consumer protection in modern society and outlined its objectives[82]. And, as we shall see *infra*, banks' current terms and conditions are less than exemplary, which has factored in their behavior being sanctioned by courts. In a nutshell, banks are much more effective at protecting themselves than at protecting consumers.

3.2.2.3.1 *the notion of "consumer protection"*

Consumers interact with merchants in multiple ways. They are exposed to advertising and other similar practices, they agree to contracts and they can suffer damages caused by goods or services provided by a merchant, whether they contracted with that merchant or not. With regard to banking, contracts and what revolves around them are likely the most important form of interaction, and the one we will focus on.

Rules governing contract law are generally predicated on some fundamental assumptions: contracting parties will rationally act in their own interest, they are free to contract and they have equivalent bargaining power. Of course, these assumptions do not quite hold in the context of contracts between banks and consumers: there are very significant asymmetries between parties in terms of knowledge and resources, while some banking services are practically essential, thus constraining the consumer's

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81 We acknowledge that, in *Morin* v. *Blais*, [1977] 1 S.C.R. 570 and in *The Queen (Canada)*v. *Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, the Supreme Court concluded that the civil consequences of a breach of statute should be subsumed in the law of negligence or, in Québec, may be assimilated to a fault if the statute embodies prudent behavior. The question remains, however: would non-compliance with a provision of Part XII.2 have been construed as negligence or fault? Consumers would have been required to make (and win) that argument before they could even start to discuss the merits of their case.

82 See in particular *Richard* v. *Time Inc.*, 2012 SCC 8, [2012] 1 S.C.R. 265, §§ 34-39 – including the Court's comments regarding federal-provincial complementarity in this area at § 38.

freedom. These differences require measures to rebalance the relationship and make it less unequal.

Some very basic legal principles, which flow from the aforementioned assumptions, apply to contracts, both at common law and in civil law regimes. First, parties should be able to provide informed and free consent. They should both be bound for the duration of the contract to the terms they have mutually agreed to. They should both act fairly, and in good faith. They should be required to compensate the other party if they do not comply with their obligations under the contract, especially if non-compliance is a result of their negligence (broadly understood).

When these simple principles are violated, something wrong is happening. Rules that foster or allow – in contract or legislation – behavior that is not consonant with these principles do not simply provide a "different" framework: they are fundamentally unsound. This is especially true in the specific area of consumer contracts, because of the asymmetry between the parties.

Economic analysis adds its own touch, especially with regard to cost allocation. The most efficient way to manage the costs resulting from undesirable or harmful behavior will usually be to allocate them to the least cost avoider: which party could have avoided the problem at the lowest cost? Assuming for example that a bank puts on the market a payment mechanism that occasionally malfunctions, who, between the bank that controls the mechanism and has expert knowledge, and a million disparate consumers with no expert knowledge, could remedy the problem the most effectively? Such concerns can also help to determine whether the rules governing the relationship between parties are robust from a global efficiency standpoint.

As a result, a sound framework, grounded in legal and economic considerations, should ensure full and true disclosure, in terms that are understandable, before an agreement is struck. It should prohibit, or at least restrict, the ability of a party to modify or terminate the contract unilaterally (unless the other party suffers no material prejudice from termination); it should prohibit, or at least restrict significantly, the ability of a party to contract out of any liability, especially when that party is the least cost avoider.

It is therefore unsurprising that these basic rules are enshrined in the *United Nations Guidelines for Consumer Protection*[83]. Grounded on the recognition of "imbalances" between providers and consumers, the Guidelines recommend that businesses deal fairly and honestly with consumers, especially with those who are vulnerable or disadvantaged (Section IV, par. 11 a); national policies should encourage "good business practices" and, in particular, the implementation of "[c]lear, concise and easy to understand contract terms that are not unfair" (Section V, par. 14) and they should also "make clear" the responsibility of the provider that services be reliable (Section V, par. 23). In addition,

> 26. Consumers should be protected from such contractual abuses as one-sided standard contracts, exclusion of

[83] The Guidelines were first adopted by the General Assembly of the United Nations in 1985, expanded in 1999 and revised and adopted by the General Assembly in December 2015. A consolidated, updated version can be found at http://unctad.org/en/PublicationsLibrary/ditccplpmisc2016d1_en.pdf.

essential rights in contracts and unconscionable conditions of credit by sellers.

Specific principles also apply to financial services, including the requirement for oversight bodies with the necessary authority and resources, fair treatment, avoidance of conflicts of interest, responsible lending and the offer of "products that are suitable to the consumers' needs and means" (par. 66).

These fundamental notions also underlie the G20's *High-level principles on financial consumer protection* of October 2011[84] and *Effective approaches to support the implementation of the remaining G20/OECD high-level principles on financial consumer protection* of September 2014[85], which we assume duly guide the Department's policy-making process in this area.

3.2.2.3.2 *what provinces do…*

In Canada, these principles are also frequently embodied in provincial consumer protection law. For instance, Ontario's *Consumer Protection Act, 2002*[86] stipulates *inter alia* that:

- rights provided by the *Act* apply despite any argument to the contrary (s. 7);
- compulsory arbitration clauses or clauses prohibiting participation to class proceedings are invalid (ss. 7, 8);
- unfair practices include taking advantage of a consumer's disability, ignorance or illiteracy, making representations where there is no reasonable probability of repayment by the consumer, or making representations where the contract is excessively one-sided or where the terms are so adverse to the consumer as to be inequitable (s. 15);
- consumers may rescind a contract where the provider has engaged in an unfair practice, and are "entitled to any remedy that is available in law, including damages" (s. 18).

Alberta's *Fair Trading Act*[87] provides *inter alia* that:

- rights provided by the *Act* apply despite any argument to the contrary (s. 2);
- it is an unfair practice to take advantage of the consumer as a result of his inability to understand the character, nature, language or effect of the transaction (subs. 6 (2) b));
- it is an unfair practice to include in a consumer transaction terms or conditions that are harsh, oppressive or excessively one-sided (subs. 6 (3) c));

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84 Available at https://www.oecd.org/g20/topics/financial-sector-reform/48892010.pdf.

85 Available at https://www.oecd.org/daf/fin/financial-education/G20-OECD-Financial-Consumer-Protection-Principles-Implementation-2014.pdf.

86 S.O. 2002, chapter 30, Schedule A. The summary provided forthwith is by no means intended to present an exhaustive list of relevant rules under the *Act* or under other Ontario legislation.

87 R.S.A.. 2000, chapter F-2. The summary provided forthwith is by no means intended to present an exhaustive list of relevant rules under the *Act* or under other Alberta legislation.

- it is an unfair practice to make a representation that a consumer transaction involves or does not involve rights, remedies or obligations that is different from the fact (subs. 6 (3) d));
- a consumer may cancel a contract tainted by unfair practices (s. 7) and a court may award punitive damages, in addition to other remedies (s. 7.2. 7.3, 13).

British Columbia's *Business Practices and Consumer Protection Act*[88] provides *inter alia* that:

- it is a deceptive practice to engage in a representation that a consumer transaction involves rights, remedies or obligations that differ from the facts (subs. 4 (3) b) iv));
- it is an unconscionable practice to take advantage of a consumer because of ignorance, illiteracy or age, to enter into a transaction where the consumer has no reasonable probability of full repayment or to establish terms and conditions that are so harsh and adverse to the consumer as to be inequitable (s. 8);
- where an unconscionable act or practice is alleged, the burden of proof is on the supplier to prove that its behavior was not unconscionable (s. 9);
- where an unconscionable practice happened, the transaction is not binding on the consumer and a court may reopen it, relieve the consumer from some obligations and set aside any agreement (s. 10).

Québec's *Civil Code* (the "QCC") and *Consumer Protection Act* (the "CPA")[89] provide *inter alia* that:

- illegible, incomprehensible and external clauses related to a contract are invalid unless they were explained to the consumer (ss. 1435, 1436 QCC);
- abusive clauses are void (s. 1437) while unconscionable clauses are reviewable by courts (ss. 1623, 2332 QCC; 8 CPA);
- clauses that exclude liability in case of gross negligence or for bodily injury are generally null (s. 1474 QCC), while clauses by which a merchant seeks to exclude its liability are void (s. 10 CPA);
- compulsory arbitration clauses or clauses prohibiting participation to class proceedings are invalid (s. 11.1 CPA);
- clauses allowing a merchant to decide unilaterally that a situation has happened or allowing for merchant's unilateral modification of a contract are restricted (ss. 11, 11.2 CPA);
- penalty clauses are restricted (s. 13 CPA);
- where a merchant has not complied with CPA, the consumer may have the agreement reviewed or cancelled and is legally entitled to damages, including punitive damages in some cases (ss. 271-271 CPA);

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88 S.B.C. 2004, chapter 4. The summary provided forthwith is by no means intended to present an exhaustive list of relevant rules under the *Act* or under other British Columbia legislation.

89 Respectively S.Q. 1991, c. 64 and R.S.Q., c. P-40.1. The summary provided forthwith is by no means intended to present an exhaustive list of relevant rules under Québec legislation.

- rights provided by CPA apply despite any argument to the contrary (ss. 261-262 CPA).

Other provinces have also provided consumers with similar rights. We hopefully can be excused for not presenting an exhaustive analysis of that significant body of rules in these comments. We contend, however, that this compendium suffices to illustrate the gist of provincial consumer protection legislation in Canada.

3.2.2.3.3 *... and the federal regime*

This may be contrasted with the current Federal regime aimed at protecting consumers who deal with banks. To put it bluntly, it is not a pretty sight.

From a consumer standpoint, the current mishmash of rules is deeply unsatisfactory. The Financial Consumer Agency (FCAC)'s website lists over fifty provisions of the *Bank Act*, twenty-eight regulations under the *Act*, six voluntary codes of conduct and over half a dozen "public commitments" claiming to protect consumers[90], to which one should add various rules adopted by the Canadian Payments Association ("CPA") and other instruments. Very few consumers (or legal advisers, for that matter – not to mention tellers and branch managers) are familiar with all those rules or could understand what they all mean and how they interact.

In too many cases, whatever rule may exist is not strong enough, is not logically consistent with other rules dealing with similar operations or is not legally enforceable by a consumer[91]. Often enough, there is simply no rule, beyond general legal principles (to be found in provincial legislation – unless of course it is tossed aside), to protect the consumer, and she may in any case fully expect that there will be provisions in her banking agreement purporting to preclude the application of any such principles that might protect her, as we will see *infra*. What we do have is weak, inconsistent and somewhat arcane.

Then one must look at what the current regime does not provide. There are no rules against unconscionability, prohibiting liability exclusion clauses in terms and conditions or prohibiting clauses purporting to suppress a consumer's right to begin a class action, to provide only those examples that illustrate to what extent the Federal regime is dramatically narrower than current provincial legislation. There is nothing requiring banks from showing care when deciding to extend (or overextend) credit. In other words, the current regime does nothing to prevent banks from infringing upon some of the most

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90 See http://www.fcac-acfc.gc.ca/eng/forIndustry/regulatedEntities/Pages/Overview-Aperudes.aspx.

91 For instance and given that the Supreme Court has reiterated that CPA rules cannot be enforced by consumers against banks in *B.M.P. Global Distribution Inc.* v. *Bank of Nova Scotia*, 2009 SCC 15, [2009] 1 S.C.R. 504, it is quite unclear to what extent, for instance, the *Canadian Code of practice for consumer debit card services* (http://www.fcac-acfc.gc.ca/Eng/Documents/DebitCardCode-eng.pdf), which was not endorsed directly by any bank (raising an interesting legal issue regarding the Canadian Bankers Association authority to legally bind its members) and is often not referenced in banks' terms and conditions, could possibly be legally binding against a bank.

basic rules governing the fairness of contracts – and Bill C-29 would have done nothing significant to improve the consumer's plight.

In our view, the first, logical step to improving the current regime would have been to assess its strengths, its weaknesses and the gaping holes that currently exist. Yet we are not aware that any such assessment was made. In fact, the solution proposed by the Minister seemed to imply that the current regime is adequate and only requires some fine-tuning.

But, for instance, do the current provisions regarding account opening work? There is emerging anecdotal evidence that banks, over the last year, have occasionally declined opening an account when they were clearly required to open it. Is the prepaid card regime effective? We don't know. And do we really want to keep in place a system whereby a bank can effectively shop around for the external complaints body that best suits its preferences?

As to the resolution of complaints, the current regime, which was maintained by Bill C-29, allows a bank to shop around for the external complaints body of its choice. Since its inception twenty years ago, the Ombusdman for Banking Services and Investments has developed a reasonably high level of expertise in this area, it has learned how to deal effectively with consumers and it is perceived by them as independent. With all due respect, the same cannot be said of the new bodies allowed to be chosen by banks to hear consumer complaints, and our understanding is that FCAC, the Financial Consumer Agency of Canada, is not able to assess properly such a body's technical qualifications in this very specialized area when it reviews a candidate's approval.

Speaking of FCAC, it was given very limited powers when it was created in 2001, which have not been significantly increased over the past fifteen years. Let us only say that it pales in comparison with bodies such as the United States' Consumer Financial Protection Bureau. It is actually a question whether the current FCAC regime complies with the direction given in the aforementioned United Nations guidelines regarding the establishment oversight bodies with the necessary authority and resources or with the aforementioned OECD guidelines.

Numerous other issues are not addressed under the current regime. One may note, *inter alia*, switching and portability of accounts, fees related to the issuance of paper statements[92], avoidance of conflicts of interests – especially when providing advice on the purchase of financial products – and responsible lending.

For the most part, all Bill C-29 did was to move around the existing rules between the Act and the Regulations, or provide slightly rephrased formulations thereof. It did add five new principles (at section 627.02), although their formulation was quite weak[93] (and

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92 Such fees are now prohibited by federal legislation in the telecommunications and broadcasting industries: *Telecommunications Act*, R.S.C., c. T-3.4, s. 27.2; *Broadcasting Act*, R.S.C., c. B-9.01, s. 34.1. Of course, there is currently no similar prohibition applying to banks, even though their practices may be as detrimental to more vulnerable consumers.

93 Compare for instance with the Irish code protecting consumers in their dealing with banks, which among other things requires the institutions to act with skill, care and diligence in the best interests of consumers and to put in place all necessary resources in order to comply with

their potential legal impact was nebulous), as well as some elements regarding issues such as accurate advertisement (but that is already covered in the *Competition Act*), clear information or the cancellation of agreements. It purported to "unify" the rules by bringing most of them in legislation where they are now part of regulation; but in doing so it would have made the regime more rigid and less able to adapt to an evolving market, at a time where market evolution is so swift that it would probably be more effective to make it more flexible, yet no less legally enforceable. The proposal also had the effect of scattering provisions which are logically related to one another in different parts[94]. The Bill also purported to add provisions that were clearly unhelpful to consumers, such as the one whereby a document mailed by a bank to a consumer would be deemed to have arrived five days later, with the consumer being prohibited from proving otherwise (section 627.4), even if she never received that document or could demonstrate that it had been destroyed in transit. It is also quite unclear to what extent the "improved" framework would have provided effective protection with regard to emerging practices, such as online loans offered jointly with non-banks[95], to give only that example.

In short, Bill C-29 brought very little improvement to the current regime, which is unsatisfactory.

3.2.2.3.4 *meanwhile, the banks*

So we have fairly weak Federal rules protecting consumers who interact with banks, and Bill C-29 attempted to thwart the application of provincial rules.

But surely stringent consumer protection rules are not necessary, as Canadian banks would never trample the basic rules of contractual fairness in agreements with their customers – or would they? A summary review of some of those agreements, in their current form, may actually be enlightening in that regard[96].

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the Code, for instance. The Irish Code also prohibits banks from restraining their liability in their terms and conditions. Central Bank of Ireland. *Consumer Protection Code 2012*. Consulted through https://www.centralbank.ie/consumer/cpc/Pages/home1.aspx. For the principles, see chapter 2.

94 A good example was provided by the *Prepaid Payment Products Regulations*, SOR/2013-209: instead of having all rules related to prepaid instruments in one regulation, which is comparatively simple to find, understand and amend as required, they would have been scattered between at least three legislative provisions, under different headings, in Part XII.2. The consumer's ability to understand her rights and obligations is not enhanced by such a change, nor is regulatory flexibility.

95 See for instance CIBC. *CIBC partners with fintech innovator Borrowell to deliver "one-click" online loans*. CIBC, Toronto, October 27, 2016. Press release. Consulted at http://cibc.mediaroom.com/2016-10-27-CIBC-partners-with-fintech-innovator-Borrowell-to-deliver-one-click-online-loans.

96 For the purposes of this quick review, we have examined summarily Bank of Montreal's *Agreements, Bank Plans and Fees for Everyday Banking – Effective date December 1, 2016* (42 p.) at https://www.bmo.com/pdf/Agreements_Bank_Plans_and_Fees_for_Everyday_Banking.pdf ("BMO"); CIBC's *Personal Account Agreement* at https://www.cibc.com/ca/apply/disclosures/pers-acct-agreement.html ("CIBC"); Royal Bank's *RBC Royal Bank Disclosures and Agreements related to Personal Deposit Accounts – effective November 1, 2016* (88 p.) at https://www.rbcroyalbank.com/onlinebanking/servicech/pdf/PDA_Account_Disclosure_Booklet

Terms and conditions from Canada's five largest banks currently include provisions that

- allow the Bank to unilaterally terminate the relationship without notice[97]: BMO, p. 3; CIBC, s. 16, RBC[98], s. 22; Scotia[99], p. 71; TD, s. G 14;
- allow the Bank to unilaterally change the terms: (with changes coming immediately in force: BMO, pp. 4, 8), CIBC, s. 28; Scotia, p. 71; TD, p. 1[100];
- exclude Bank liability: BMO, pp. 4, 28; CIBC, ss. 9, 19; RBC, s. 23, even in cases where the Bank was negligent (CIBC, s. 20; Scotia, p. 74; TD, s. G 6) [101];
- provide short delays to verify and dispute transactions[102]: BMO, p. 6; CIBC, ss. 3-4; RBC, s. 14; Scotia, p. 72; TD, s. B 11-12;
- provide that other – often unidentified – documents also apply to the relationship: BMO, p. 8; CIBC, s. 1; RBC, ss. 1, 5; TD, section A, B 2, G 1;
- allow the Bank to charge undisclosed fees and costs[103]: BMO, p. 8; RBC, s. 3; Scotia, p. 70; TD, s. G 8.

.pdf ("RBC"); Scotia's *Day-to-Day Companion Booklet – July 2016* (74 p.) at http://www.scotiabank.com/ca/common/pdf/day_to_day/day-to-day_banking_companion_booklet.pdf ("Scotia"), and Toronto-Dominion Bank's *Financial Services Terms* (10 p.) at https://www.tdcanadatrust.com/document/PDF/accounts/tdct-accounts-fst.pdf ("TD). We acknowledge that the lengthier documents include not only terms and conditions *per se*, but also other information, and that other agreements also govern parts of the relationships between banks and their customers. This is therefore not meant as an exhaustive compilation and analysis, but merely as an illustration of some of the issues raised by the current terms and conditions of Canada's largest banks and the impact Bill C-29 might have had on consumer protection. All quoted documents could be found, on December 11, 2016, on the respective banks' websites, where they were consulted.

97 This is despite the fact that the Supreme Court of Canada found that unilateral termination without notice by a bank could amount to an abuse of rights under Québec law, as the Bank had not acted in good faith: *Houle* v. *Canadian National Bank*, [1990] 3 S.C.R. 122. Given the Supreme Court's rulings in *Bhasin* v. *Hrynew*, 2014 SC C71, [2014] 3 S.C.R. 494, and *Bank of Nova Scotia* v. *Angelica-Whitewear Ltd.*, [1987] 1 S.C.R. 59, we query whether courts in other provinces might well come to the same conclusion under common law.

98 RBC's *Deposit Account Agreement per se* starts at p. 67 of the booklet referred in note 95.

99 Scotia's *Personal Deposit Account Client Agreement per se* starts at p. 60 of the booklet referred in note 95.

100 We note that Toronto-Dominion Bank's provisions allowing it to modify unilaterally the agreement under certain conditions are the only ones that appear to comply with Québec legislation – which goes to show that banks can so comply.

101 It used to be the rule that "the Queen can do no wrong" and enjoyed sovereign immunity against lawsuits; this is of course no longer the case and Her Majesty in right of Canada can be sued in most cases, under the *Crown Liability and Proceedings Act*, R.S.C., c. C-50; apparently, banks are still striving to carve out for themselves a type of legal immunity that even the Sovereign has renounced.

102 Such delays are arguably invalid in Québec under sections 2883, 2884 and 2925 QCC.

103 This, of course, was the issue raised in *Marcotte*. We are interested here only in fees and charges that are not covered by disclosure requirements as set in the *Bank Act*'s sections 445, 446 and 450; we query whether some of the terms mentioned here are actually compliant with s. 440.

Additionally and when banks mention maximum cheque hold periods, they often make no mention of their regulatory obligation to make the first $100 immediately available in most circumstances[104] (see for instance BMO, p. 5; RBC, s. 8).

We respectfully contend that most, and probably all of those provisions (with the aforementioned exception regarding TD) are invalid under Québec law and, most likely, under other provinces' legislations, which we believe on the basis of *Marcotte* and other cases apply to these terms: consumers are therefore currently protected against terms imposed by banks in order to modify or escape their contractual obligations or their liability, even in cases where the bank has not acted in good faith. Such terms (and many others), currently found in banks' terms and conditions, are simply unfair and cannot be reconciled with basic principles of contract law or economics, nor with the aforementioned United Nations Guidelines or OECD principles. They bolster asymmetries between banks and customers and disrupt the market to the banks' very significant advantage, they make it less efficient and they allow banks to take operational and other risks without caring for legal consequences, by purporting to avoid legal risk and let it rest on consumers' shoulders. This is not a recipe for stability, efficiency or utility.

Bill C-29, however, afforded no significant protection to consumers regarding any of those issues; nor does the current federal regime, for that matter[105].

3.2.2.3.5 *what needs to be done*

We certainly acknowledge that consumers dealing with banks should be better protected in Canada and we agree that much more should be done to further the successful implementation of that part of the utility core policy objective. We concur that Parliament can, and should, play a significant role in that regard. For such an intervention to be truly effective, however, a significant amount of work needs to be done.

First, we need to assess thoroughly the current regulatory regime and banking practices. Do existing rules induce the expected consequences? Are there undesirable behaviors in the market that need to be curbed? If so, what are the gaps that current rules do not address? We have already mentioned quite a few of those gaps over the last ten pages, but that listing is far from exhaustive. Put simply, the process leading to a new regulatory regime should be fact-based – and it should not start with the assumption the current regime is satisfactory: it is not.

This process should also be principles-based, and these principles should be sound. For instance, it is unrealistic to design a regulatory framework around a notion of exhaustive disclosure when we know that consumers actually do not read lengthy documentation[106]. Principles undergirding a new regulatory framework should be

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104 As required by the *Access to Funds Regulations*, SOR/2012-24, s. 4.

105 With the arguable exception of unilateral modifications to terms by the bank, with the federal regime being much more tolerant than Québec legislation governing that issue.

106 And this decision is for the most part rational: they know they are at best unlikely to fully understand all the ramifications of what they read, and that the terms are not negotiable; it would therefore be a waste of resources to wade through opaque boilerplate – or even "plain-language" documentation.

inspired from the United Nations Guidelines and G-20 principles referenced above, as well as from legal, economics and policy scientific literature that addresses these issues[107].

Once the picture of an adequate framework starts to emerge, Federal authorities will then need to establish, as a matter of policy, what parts of that new regime would best be established through Federal intervention, and how. We incline to believe that Federal legislation intended to work as a "floor" would accommodate the requirements of constitutional law and, if the floor is set high enough that provinces see no need to act significantly to improve on it, would ensure that consumers benefit from a high level of protection while it would also afford the level of national consistency that banks seek. As a matter of policy, Federal authorities should aim for the highest common denominator, rather than the lowest.

The rationale behind this policy choice is obvious. Huge asymmetries between banks and consumers prevent the market from working adequately and lead to unfair situations. A strong regulatory framework compensates for these asymmetries and prods the banks into improving their practices, thus making for a more efficient, innovative, competitive sector, which is better able to meet customers' needs, protect consumers' interests and face increasing competition from other, non-bank, providers.

Protecting consumers should no longer be seen as a burden by banks or regulators: it is in fact an incentive for providers to listen more attentively, adapt and do better. It strengthens them. After all, it is not the huge, hardened dinosaurs which survived, but their more nimble brethren which became the birds as well as the small, adaptive mammals. Complacency towards the banks' sometimes exacerbated, myopic sensitivities and fears should not be our national policy.

Pursuing vigorously the efficiency and utility objectives is essential to the development of a regulatory framework which will effectively support the evolving Canadian society and economy. This requires in particular the development by regulators of a renewed outlook regarding the notion of consumer protection. It should not be seen as a burdensome add-on, but as a means to foster improvement of industry practices, as well as financial and social inclusion, to everyone's long-term benefit – including the industry itself.

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107 To provide only one example, analysis regarding loss allocation could be supported by papers such as Coase, R. *The Problem of Social Cost*, Journal of Law and Economics **3**: 1–44; Cooter, R.; Rubin, E. *ATheory of Loss Allocation for Consumer Payments*. (1987-88) 66 Tex. L. Rev. 63); Hillebrand, G. *Before the grand rethinking: five things to do today with payments law and ten principles to guide new payments products and new payments law*, (2008) 83:2 Chi-Kent L. Rev. 769; Rusch, L. *Reimagining payment systems: allocation of risk for unauthorized payment inception*, (2008) 83:2 Chi-Kent L. Rev. 561; Sommer, J. *Commentary: where is the economic analysis of payment law?* (2008) 83:2 Chi-Kent L. Rev. 751; Levitin, A. *Private Disordering: Payment Card Fraud Liability Rules*, (2011) 5 Brooklyn J. Corp. Fin. & Comm. L. 1.

3.3 Lessons from abroad

3.3.1 A global challenge

Canada is obviously not the only jurisdiction that is coming to grips with the need to renew its regulatory framework dedicated to financial services and, in particular, its rules governing consumer protection:

> Broadly, the results of the survey on financial consumer protection in deposit and loan services reveal that most countries have some form of consumer protection legislation in place, but these do not often address concerns specific to the financial services industry. We also find that enforcement mechanisms are weak, partially due to lack of resources, institutional capacity, and limited enforcement powers of regulators. [108]

In many jurisdictions, rules specific to the financial sector are interspersed with rules governing all – or most – service providers. Quite often, rules applying to similar providers are not consistent, as is also the case in Canada. We are not alone.

Therefore, we can find some inspiration in models developed abroad, being it obviously understood that any solution must be adapted to the specificities of Canada's market and legal regime. In the following subsections, we will summarize at a very high levels some salient points of the regimes in place in the United States and European Union, concentrating exclusively on consumer protection issues.

3.3.2 The United States: a melting pot

As of November 2016, there were 5 141 banks in the United States[109], most of which serve a local or regional market. Other deposit-taking financial institutions are also present in the United States market, including 5 966 credit unions as of September 2016[110]. This is obviously a highly fragmented (albeit quickly consolidating) market, which is dominated however by a small number of banks with a national footprint.

Banks can be established through Federal or State legislation. In all cases, they are subject to some extent to State law. Where there is a conflict between State and Federal law regarding the activities of a federally-established bank, however, Federal law pre-empts State law. However, this generic statement must be qualified, as Federal banking

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108 Ardic, Oya Pinar; Ibrahim, Joyce; Mylenko, Nataliya. *Consumer Protection Laws and Regulations in Deposit and Loan Services – A Cross-Country Analysis with a New Data Set*. Policy Research Working Paper 5536. Washington, The World Bank – Financial and Private Sector Development; Consultative Group to Assist the Poor, January 2011. 44 p. Consulted at https://www.cgap.org/sites/default/files/CGAP-Consumer-Protection-Laws-and-Regulations-in-Deposit-and-Loan-Services-Jan-2011.pdf.

109 Ycharts.com. *US Number of Commercial Banks*. Consulted at https://ycharts.com/indicators/us_number_of_commercial_banks.

110 Credit Union National Association. *U.S. Credit Union Profile – Third Quarter 2016*. P. 2. Consulted through https://www.cuna.org/research-and-strategy/credit-union-data-and-statistics/.

legislation now limits situations where pre-emption can be applied and provide increased means for State regulators to apply Federal legislation[111].

There is a very substantial body of Federal legislation specifically pertaining to banks or federally-regulated banking activity: seventeen (17) "consumer financial laws" have been identified as coming (wholly or in part) under the aegis of the Consumer Financial Protection Bureau[112], and this listing is not exhaustive (it does not mention, for instance, the *Bank Secrecy Act* or the *Expedited Funds Availability Act*). That set of legislations covers a significantly broader range of issues, often in more detail and in ways that are more advantageous for the consumer, than the existing Canadian Federal framework. In addition, United States consumers can also count on State legislation where it is not specifically pre-empted, as well as common law rules.

The significant legislative reform adopted in this area in 2010 also established the Consumer Financial Protection Bureau, which has been extremely active in terms of reaching out to stakeholders and consumers, doing research, grappling with emerging issues, regulating and enforcing the regulatory framework it manages. Although it started its operations in 2011, it already boasts that it has brought "$11.7 billion in relief to consumers from" its enforcement actions[113].

While we would probably agree that the United States federal framework protecting banks' individual customers could be be streamlined and simplified somewhat, we note with interest efforts over the past few years to improve its articulation with State law and

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111 For a very high-level summary, see Skadden Arps, Slate, Meagher & Flom llp. *Bank Preemption After the Dodd-Frank Act*. New York, Skadden, September 13 2010. 5 p. Consulted at https://www.skadden.com/sites/default/files/publications/Bank_Preemption_After_the_Dodd_Frank_Act_0.pdf.

112 Consumer Federation of America. *The New Consumer Financial Protection Bureau*. Washington, 2010 (?). 3 p. P. 2. Consulted at http://www.consumerfed.org/pdfs/Fact-Sheet-CFPB-OverviewOct-2010.pdf.

113 Consumer Financial Protection Bureau. Website front page, December 2016. Consulted at http://www.consumerfinance.gov/. For example, it fined Wells, Fargo Bank N.A. $100 million last summer for opening accounts to consumers who had not required them: *Consumer Financial Protection Bureau Fines Wells Fargo $100 million for Widespread Illegal Practice of Secretly Opening Unauthorized Accounts*. Press release, September 8, 2016. Consulted at http://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-fines-wells-fargo-100-million-widespread-illegal-practice-secretly-opening-unauthorized-accounts/. In the event a similar practice was detected in Canada, it is unclear whether FCAC could have imposed a penalty on a bank, either under the current regime or the one envisioned in Bill C-29, and any penalty would have been significantly lighter, as penalties under subs. 19 (2) of the *Financial Consumer Agency of Canada Act*, R.S.C., c. F-11.1 are capped at $500 000. Yet Wells Fargo's assets are approximately $1.9 trillion, while for instance Royal Bank of Canada's assets currently range around $1.2 trillion: there is not such disparity between institutions in terms of size that it could justify the exceedingly low cap for penalties, which do not even amount to a slap on the wrist. With a net income of $2.5 billion in 2016, a half-million dollar penalty for Royal Bank equals to the loss of roughly two hours of net income over a full year (365 days x 24 hours). In fairness, it should also be mentioned however that a significant part of the Consumer Financial Protection Bureau's enforcement activities have been directed at non-banks.

State regulators, and we commend the creation of activities of the Consumer Financial Protection Bureau.

3.3.3 The European Union: a layered cake

The European Union ("EU") currently encompasses twenty-eight (28) States. While it strives to establish an internal single market, including the integration of financial services, it must also accommodate national regulatory frameworks.

EU institutions have implemented a number of legal instruments addressing financial consumer protection, including the Payment Accounts Directive[114], the Distance Marketing Directive[115] and the Consumer Credit Directive[116]. Some these Directives expressly specify that national authorities remain free to introduce additional requirements, or that national legislation continues to apply in areas which the Directive does not specifically address. When possible, EU authorities therefore apply the subsidiarity principle, established in 1992 by the Maastricht Treaty[117].

In addition, however, banks and other financial service providers are also required to comply with more generic consumer protection EU legislation. An excellent example is provided by the *Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts*[118], which makes unfair terms in contracts unenforceable. Under the Directive, are deemed to be unfair *inter alia* provisions that:

- exclude or limit the liability of a provider;
- allow the provider to nilaterally alter the terms of contract without a reason previously stipulated in the contract;
- exclude or hinder the consumer's right to take legal action[119].

The parallel with aforementioned provisions in Canadian provincial legislation will be obvious, as will the absence of comparable requirements in current Federal legislation.

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114 *Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features*. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0092&rid=1.

115 *Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC*. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002L0065&rid=1.

116 *Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC*. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0048&qid=1482423218338&from=EN.

117 And which the Supreme Court of Canada has also applied to our constitutional framework: see in particular *Canadian Western Bank*, *op. cit.*, § 45.

118 Available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31993L0013&rid=1.

119 The Annex to the Directive lists 17 types of clauses in total which, under subs. 3 (3) of the Directive, are deemed to be unfair, it being understood that this listing is not exhaustive.

Moreover, banks and other financial service providers are expected to comply with national legislation in all EU countries where they elect to do business. In most cases, national regimes include both generic consumer protection measures as well as specific rules tailored to the protection of financial consumers. The financial consumer protection regime could therefore probably be described as fairly thorough.

This is not to say that it is not subject to improvement[120]. EU authorities have launched in 2015 a broad consultation aimed at improving retail financial services[121]. While that consultation is largely concerned with issues associated with further opening the single market, it also raises a number of issues that are relevant to this discussion, including competition, efficiency, consumer switching, innovation and redress. Perhaps as interesting as the document itself is the process surrounding it, which is based on significant stakeholder involvement.

While such involvement is necessary, it also raises a delicate issue which is fully acknowledged in the EU, and perhaps not yet quite as clearly in Canada: to borrow from a recent article, the "public lacks voice on banking laws" [122]. While other factors are also involved, this is largely due to the confluence of two elements: the complexity of issues, and lack of resources on the part of public (including consumer) representatives[123]. The same challenges plague consumer representatives in Canada, which are nearing the point where they will simply be unable to participate significantly in processes such as the one now initiated by the Department. This is a problem that needs to be addressed urgently if authorities wish to keep consumer representatives involved in their consultative processes.

Returning to the EU framework, it could perhaps best be described as "multi-layered". Providers must comply with EU regulation specific to the financial sector, to EU regulation broadly addressing consumer protection issues and with national requirements that may be both sector-specific or more generic. While EU authorities have often sought to ensure that their interventions would not have the effect of unduly displacing national regulation, they have not shied away from trying to establish in some areas a very high level of consumer protection applicable across the entire EU territory.

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120 The Bureau européen des unions de consommateurs has identified what it calls "major loopholes and shortcomings" in that framework, and especially issues with enforcement: see Bureau européen des unions de consommateurs. *EU Regulatory Framework for Financial Services – BEUC response to the Commission's Call for Evidence*. Brussels, February 2016. 17 p. P.1. Available at http://www.beuc.eu/publications/beuc-x-2016-010_call_for_evidence_fs_regulatory_framework_beuc_response.pdf.

121 European Commission. *Green Paper on retail financial services – Better products, more choice, and greater opportunities for consumers and businesses*. Brussels, December 10, 2015. 29 p. Consulted at http://ec.europa.eu/finance/consultations/2015/retail-financial-services/docs/green-paper_en.pdf.

122 Teffer, Peter. *EU public lacks voice on banking laws*. EU Observer, December 8 2016. Consulted at https://euobserver.com/economic/136192.

123 *Ibid.*; see also Lindo, Duncan; Fares, Aline. *Representation of the public interest in banking*. Brussels, Finance Watch, December 2016. 49 p. Accessed through http://www.finance-watch.org/our-work/events/1284-public-interest-banking. The report was presented at a conference held on the topic of public interest representation in banking in early December 2016.

4.0 Setting the course

There is still significant work to be done in order to chart more accurately where the Canadian financial sector stands, and where it may be expected to head over the next decade or so. This is especially true when it comes to consumer-related issues. Over most of the twentieth century, Federal authorities regulating the financial sector have not focused much attention on those issues and we fully acknowledge the challenge they now face, especially in the context of a quickly evolving market. We respectfully submit, however, that they have become inescapable: the growth and health of our financial sector depend significantly on consumer activity, which itself requires that a relationship of trust be fostered between consumers and providers. Having banks argue for "national" regulation at the expense of consumer protection does not sustain that relationship.

We note with interest that the Minister of Finance has invited FCAC to probe financial consumer protection issues further. We hope that it will approach this mandate with great openness and will be happy to work with the Agency in that regard, within the confines of our resources.

More broadly, we invite the Department to further develop its understanding of the complex, heterogeneous and evolving landscape that it is trying to chart. No sound policy for positioning our financial sector for the future can be developed otherwise.