New Federal Consumer Protection Regime for Bank Customers

Financial Institutions Bulletin

Authors

Stephen D.A. Clark
Toronto

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On October 25, 2016, the Federal Government introduced Bill C-29, Budget Implementation Act, 2016, No. 2. The three main purposes of Bill C-29 are to:

- add strong language to the preamble of the *Bank Act* and add new purpose and paramountcy clauses, all of which are targeted at enhancing the argument that only the federal government and not the provinces may regulate banking products and services;
- consolidate the consumer protection provisions of the *Bank Act* into one new section, further enhance those provisions and set out principles on which the new consumer provisions are based; and
- enhance the provisions of the *Bank Act* in the areas of corporate governance, business practices, public reporting, disclosure of information and access to basic banking services.

While the Federal Government has been increasing its oversight of banks in the consumer protection and payment fields over the last several years by enacting new consumer protection measures under the *Bank Act* and entering into voluntary codes with the financial services industry, Bill C-29 is more targeted as it addresses two significant policy goals which have been on the agenda of the Federal Government for the last few years.

First, Bill C-29 proposes to create a comprehensive federal consumer code which will apply to all federally regulated financial institutions – banks, federal credit unions and foreign bank branches and while this objective may have still been several years in the making, its importance was accelerated as a result of the decision of the Supreme Court of Canada in a series of three cases known as *Marcotte*. Fasken Martineau first commented on these landmark cases in 2009. The second policy objective addresses the outcome of *Marcotte* by enacting provisions that strengthen the argument that federal jurisdiction is paramount over provincial jurisdiction with respect to products and services of banks.

The Exclusivity of Federal Jurisdiction over Canada's Banks

By way of background, Canada's Constitution provides that the regulation of banking is exclusively a federal matter, but the provinces also have a recognized jurisdiction over general consumer protection. For decades, the conventional wisdom has been that where a consumer protection disclosure provision exists under the *Bank Act*, and the regulations under it, any similar provincial consumer protection disclosure requirement does not apply to a bank.

In September 2014, the Supreme Court of Canada released its decision in *Bank of Montreal v. Marcotte*, dealing with the question of which level of government has constitutional authority over consumer protection issues involving banks. In this decision, the Supreme Court of Canada adjusted the balance of federalism by holding, for the first time, that the provincial consumer protection legislation can apply to bank's consumer contracts even if those provincial provisions overlap with the federal legislative scheme applicable to the same contracts.

Marcotte is significant from a constitutional perspective for two reasons. First, the Supreme Court of Canada concluded that that the Quebec provincial consumer protection statutory provisions were not a "code" for consumer protection, but rather, the provisions are imbedded in what is required for every contract in Quebec. By imbedding such statutory provisions in contract, the result was to put such provisions squarely into the provincial realm as, constitutionally, contract law is a provincial matter, not a federal matter. The second major conclusion was to narrow the circumstances under which the paramountcy doctrine can be applied so that the federal law trumps provincial law. Prior to *Marcotte*, to the extent that the *Bank Act* had provisions that dealt with a particular area, the federal law would be considered to have "occupied the field", meaning it would be paramount to a similar provincial law. The result of *Marcotte* is to significantly narrow the circumstances under which paramountcy can be successfully asserted. It is no longer sufficient for the federal law to occupy an area. In order for paramountcy to successfully apply, it is now necessary for the federal and provincial provisions to be in direct conflict such that from an operational point of view, the two cannot exist side by side as the result would be to frustrate or negate the federal provision. This is what is referred to as an "operational conflict" which then gives rise to the successful assertion of federal paramountcy.

There is no question that as soon as the *Marcotte* case was released, it was considered the most significant court ruling affecting banks in decades. The financial services industry was stunned by the decision. For Canada's banks, it meant having to consider the thousands and thousands of provincial and territorial consumer protection provisions and decide, for each and every one of them, what those provisions meant as against the federal ones. This task was made even more difficult because while many of the provinces have similar consumer protection legislation, none of them are identical which means there are 13 different statutes to be considered and compared to each other in addition to the federal law. From a legal perspective, many of the provisions are in conflict with each other and many of them are impossible to comply with. By way of example, if the *Bank Act* requires a bank to calculate interest in a certain way and a province requires that it be calculated a different way, the two are irreconcilable. There are many irreconcilable provisions. On a policy level, it meant that if the provincial law did apply, banks could no longer deliver the same financial services and products to customers on a national basis. There would be a patchwork of rules on a province by province basis and still it would be impossible to comply with all.

A court will often look at the purpose clause of a statute to help determine the intention of Parliament. While the *Bank Act* already has a "purpose" clause (which was strengthened in 2012 following the push back by the Supreme Court of Canada against the Federal Government's attempt to establish a national securities regulator), it is against this background that Bill C-29 has been introduced and which adds purpose and paramountcy clauses to the *Bank Act* to enhance the argument that only the Federal Government may regulate banking products and services.

Bill C-29 amends the Preamble by adding the following: "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."

In its introduction to the new comprehensive consumer code, Bill C-29 adds the following Purpose clause: "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 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 (c) ensure the uniform supervision of institutions and enforcement of provisions relating to the protection of customers and of the public."

Immediately following that Purpose clause, Bill C-29 adds the following Paramountcy clause: "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."

Again, the purpose of these three powerful statements are intended to make it clear that banking products and services are subject only to federal law and not to any provincial regulation. This then, constitutes the Federal Government's response to *Marcotte*.

Undoubtedly, many of the new provisions proposed in Bill C-29 resemble provincial consumer protection provisions and the purpose of now including such provisions in the *Bank Act* is to counter the result in *Marcotte* – a comprehensive set of provisions which show that the Federal Government has, from a constitutional law point of view, occupied the field backed by a set of strong statements as to purpose and paramountcy.

Consumer Protection Framework – A New Consumer Code

The new consumer code will be consolidated and set out in a new Part XII.2 of the *Bank Act*, titled "Dealings with Customers and Public". Part XII.2 is expressed to be based on five new principles:

1. basic banking services should be accessible;
2. disclosures should enable an institution's customers and the public to make informed financial decisions;
3. an institution's customers and the public should be treated fairly;
4. complaints processes should be impartial, transparent and responsive; and
5. an institution should act responsibly, considering its customers and the public as well as the efficiency of its business operations.

These five new principles are then organized in the new Consumer Code around the following areas, each of which has its own Division as part of the Code:

- Access to Basic Banking Services: retail deposit accounts; access to funds and cashing government cheques or other instruments;
- Business Practices: advertising; tied selling; what is meant by express consent; imposition of charges or penalties on products or services; negative option products; cooling-off periods for products or services; prepayment rights; minimum credit balances require express consent; default charges; mortgage renewals; credit limit increases; credit card cheques; use of product not consent; credit card statements; allocation of payments; credit limit holds; debt collection practices; and prepaid payment products;
- Disclosure: requirements for disclosure for products or services; agreement by

telephone; information boxes; deemed receipt of mailed documents; amendments to agreements; advertising; tied selling; and disclosure of complaints procedures;
- Deposit Accounts and Financial Instruments and Notes: disclosures to customers and public for various products offered by a bank including retail deposit accounts; deposit insurance disclosure; credit products; prepayment products; registered products; mortgage insurance; and optional products or services;
- Complaints: required procedures; annual reporting; and external complaints bodies;
- Accountability: public accountability statements required of certain banks; notice of branch closure; and extension of prescribed provisions to certain affiliates; and
- Regulations: enhanced regulation making power that will support the new Consumer Code.

Bill C-29 also includes proposed amendments to the *Bank Act* concerning the public accountability requirements for banks with equity of one billion dollars or more requiring those banks to provide an annual description describing: (i) information with respect to the contribution of the bank to the Canadian economy and society based on a set of principles that will be prescribed (in addition to the similar requirements already in the Public Accountability Statement Regulations); (ii) the measures taken by the bank to be consistent with the principles in the new Consumer Code in its dealings with its customers and the public, (iii) the measures taken by the bank to provide products and services to persons facing accessibility, linguistic or literacy challenges; and (iv) a description of the consultations undertaken by the bank with its customers and the public relating to existing products and services and the development of new products and services, the identification of trends and emerging issues that may have an impact on their customers or the public, and matters in respect of which the bank has received complaints. Banks will have to make this information available on their websites and provide it to any person who requests it.

Finally, Bill C-29 broadens board oversight of compliance with the consumer provisions by requiring that the Board of Directors of a bank must designate a committee of the Board of Directors to: (i) require management of the bank to establish procedures for complying with the consumer provisions; (ii) review those procedures to determine their appropriateness in ensuring the bank is complying with the consumer provisions; and (iii) require management of the bank to report at least annually to the committee on its application of the procedures and on any other activities that the bank carries out in relation to the protection of its customers.