

Federal consumer code for banks — proposed Bank Act amendments

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On October 25, 2016, the Canadian federal government introduced Bill C-29, *Budget Implementation Act, 2016*, No. 2 (the Bill). If enacted, the Bill would impact more than 50 domestic and authorized foreign banks operating in Canada.

The amendments to the *Bank Act* proposed by the Bill have three broad purposes: (i) to assert federal paramountcy over consumer protection regarding banking products and services, as a response to a trilogy of Supreme Court cases decided in 2014 (referred to collectively as *Marcotte*), (ii) to implement enhancements in the areas of corporate governance, access to basic banking services, disclosure of information, business practices, and public reporting, and (iii) to consolidate the currently dispersed consumer protection provisions in one part of the *Bank Act*.

Constitutional implications

The Bill contains an express paramountcy clause asserting that the federal consumer provisions in the *Bank Act* are intended to operate exclusively of any applicable provincial consumer protection provisions. Although the effectiveness of such an express paramountcy clause has yet to be tested in Canadian courts, the amendments proposed by the Bill lay a strong foundation for the argument that such provisions operate as the exclusive applicable standards, irrespective of any provincial laws relating to the same subject matter, even if such provincial laws do not give rise to express contradiction with the federal laws.

In particular, the Bill proposes the following amendments that are relevant to this point:

- **Paramountcy:** The best indication that the proposed framework is meant to be paramount to any provincial laws is found in the clear language in the Bill: “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.”
- **Purpose:** The Bill also includes a clause that sets out the purpose of the new consumer regime. The purpose is stated to (a) provide customers and the public with uniform protection on a national level, (b) allow institutions (i.e., banks or authorized foreign banks) 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 their customers and of the public.

- **Preamble:** The third paragraph of the preamble to the *Bank Act* is revised slightly and restated to read as follows: “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”.

Dealings with customers and public

Bill C-29 amends the *Bank Act* by adding a new Part XII.2 entitled “Dealings with Customers and Public” (the consumer code) and, as the name suggests, this new part consolidates the existing consumer protection provisions and also introduces new provisions.

Five principles

The consumer code is stated to be based on the following five principles (**emphasis added**):

- **basic banking** services should be **accessible**
- **disclosures** should enable an institution’s customers and the public to make **informed financial decisions**
- an institution’s customers and the public should be **treated fairly**
- complaints processes should be **impartial, transparent, and responsive**
- an institution should act **responsibly**, considering its customers and the public as well as the efficiency of its business operations

Key consumer protection areas covered by the consumer code

The proposed consumer code covers the following areas amongst others:

- **Access to basic banking services:** requirements relating to retail deposit accounts, access to funds, cashing government cheques, or other instruments.
- **Business practices:** requirements relating to advertisements, tied selling, negative option billing, credit business practices, and prepaid products.
- **Disclosure:** requirements relating to disclosure of information generally and in respect of certain products and services such as deposit accounts, deposit insurance, deposit-type instruments, principal-protected notes, credit agreements, prepaid products, registered products, and mortgage insurance.
- **Complaints:** requirements relating to complaints procedures, annual reporting on institutions’ websites, and provision of information relating to complaints.
- **Accountability:** requirements relating to annual filing of accountability statements by banks with equity of \$1 billion or more, and notice of branch disclosure.

Several requirements will be included in regulations that are yet to be proposed. The

proposed consumer code, together with the regulations when they become available, requires further review to fully assess the impact on banks' businesses and operations.

If you would like to discuss any of the proposed requirements or would like to obtain a detailed comparison of the proposed requirements with the existing requirements under the *Bank Act*, please contact any of the authors.