Innovative oversight: strengthening the Canadian payments system

Comments addressed to the Department of Finance

PUBLIC INTEREST ADVOCACY CENTRE
LE CENTRE POUR LA DÉFENSE DE L'INTÉRÊT PUBLIC

June 2015

The Public Interest Advocacy Centre
One Nicholas Street Suite 1204
Ottawa, ON
K1N 7B7

Tel: (613) 562-4002 Fax: (613) 562-0007

Email: piac@piac.ca Website: www.piac.ca

Canadian Cataloguing and Publication Data

St Amant, Jacques

Innovative oversight: strengthening the
Canadian payments system

ISBN 978-1-927707-01-2

Come senators, congressmen
Please heed the call
Don't stand in the doorway
Don't block up the hall
For he that gets hurt
Will be he who has stalled
There's a battle outside
And it is ragin'.
It'll soon shake your windows
And rattle your walls
For the times they are a-changin'.

Bob Dylan, *The times they are a-changin'*

"There must be some way out of here," said the joker to the thief
"There's too much confusion, I can't get no relief"

Bob Dylan, *All along the watchtower*

Executive Summary

As the payments environment is being reshaped here as in the rest of the world, Canadians – and especially consumers – need a new regulatory scheme that will protect them while sustaining trust and innovation. Regrettably, the oversight framework currently outlined by the Department of Finance will not achieve those aims.

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.

The risk analysis proposed by the Department of Finance is imprecise and incomplete. In particular, it neglects issues such as legal, efficiency and social risk. The conceptual oversight framework and the notions advanced, such as that of “retail payment systems”, are ambiguous and ill-adapted to the task at hand. The public policy objectives put forward do not provide effective guidance to decision-makers and stakeholders. In addition, the vision that is proposed appears founded on a perception that regulation is a necessary evil that must be restrained as much as possible so as not to interfere with competition and innovation.

We believe the Canadian payments ecosystem needs a comprehensive regulatory framework in order to enhance trust, accessibility, competition and innovation. Such a framework will provide more certainty and will facilitate market entry. The need for regulation is not premised strictly on efficiency, but also on values such as accessibility and fairness. Canada currently suffers from regulatory failure in the payments area.

Canada needs a strong, principles-based framework – which is not synonymous with “light-touch” regulation. Principles-based regulation is highly demanding both on regulators and regulatees. This new framework should be based on a functional approach and include all payment functions, providers and instruments. We also need enforceable rules to protect end-users. It is possible to innovate in the regulatory area, while ensuring that stakeholders are both well protected and actively involved in the process, and Parliament has the constitutional authority to establish a modern, effective framework for the regulation of payments.

Implementing this new framework will require the establishment of a new regulatory entity. There is currently no entity within the federal regulatory sphere which could take those responsibilities. Canada can take inspiration, both as to the nature of its regulator as to substantive rules, on foreign regimes, such as those established in Australia and the United Kingdom.

It is necessary at this point to go back to the drawing table, make a comprehensive review of market practices and risks and clarify intentions and concepts, in order to design the strong and efficient framework for the payments ecosystem that Canada sorely needs.

Table of contents

Innovative oversight:

strengthening the Canadian payments system

1.0 Where we stand

1.1 Canada in the slow lane

The Philippines have launched a government-supported initiative to create a platform that could carry all electronic payments[1]. Bangladeshi low-income workers can now "receive wages, send remittances and pay bills" for a small fee using a run-of-the-mill mobile phone[2]. Denmark is envisioning legislatively enabling some categories of retailers to decline cash payments altogether[3]. The State of New York has developed digital currency regulations (that go well beyond money laundering issues)[4]. A Mexican

1 *Philippines Pushing for Cashless Society, But It's A Long Way Off*. Fintech Ranking, April 27, 2015. Available at http://fintechranking.com/2015/04/27/philippines-pushing-for-cashless-society-but-its-a-long-way-off/.

2 Alam, Shafiqul. *Bangladesh unbanked poor hail 'revolutionary' service*. The China Post, June 22, 2015. Available at http://www.chinapost.com.tw/print/438921.htm.

3 See for instance *Denmark legislates cashless society*. Pymnts.com, May 11, 2015, available at http://www.pymnts.com/news/2015/denmark-legislates-cashless-society/#.VYXQfLdFC70; Russell, Helen. *No wallet, no worries: Denmark considering cash-free shops*. The Guardian, May 14 2015. Available at http://www.theguardian.com/world/2015/may/14/no-wallet-no-worries-denmark-considering-cash-free-shops. Whether this project will survive Denmark's recent electoral upset (see *e.g.* Gani, Aisha. *Danish election: PM concedes defeat and resigns*. The Guardian, June 19, 2015, available at http://www.theguardian.com/world/live/2015/jun/18/denmark-general-election-2015-results-live) remains to be determined. France already caps the amount payable in cash to a merchant to 3 000 euros, and will reduce that amount to 1 000 euros effective September 1st, 2015: *Code monétaire et financier*, section L-112-6 and *Décret no 2015-741 du 24 juin 2015 pris pour l'application de l'article L. 112-6 du code monétaire et financier relatif à l'interdiction du paiement en espèces de certaines créances*.

4 *New York releases digital currency regulations*. The Paypers, June 4 27, 2015. *New York regulates digital currencies – exempts developers from licensing*. Techworld, June 4 2015, available at http://www.techworld.com/news/e-commerce/new-york-regulates-digital-currencies-exempts-developers-from-licensing-3614396/. See also New York State Department of Financial Services. *Proposed New York Codes, Rules and Regulations – Title 23. Department of Financial Services – Chapter I. Regulations of the Superintendent of Financial Services – Part 200. Virtual currencies* Available at http://www.dfs.ny.gov/legal/regulations/adoptions/dfsp200t.pdf. Meanwhile, a Canadian Senate Committee advocates a regulatory "light touch" in this area, "almost a *hands off approach*", and recommends that consumer protection-related concerns be addressed by providing through appropriate (but unidentified) "federal entities" "concise

regional airline now accepts payments through Bitcoin[5]. An Australian bank is looking at enabling both Bitcoin and the storage of reward credits for its customers[6], while Citibank is experimenting with its own blockchain-based cryptocurrency[7]. Meanwhile, Visa is working with designers to combine wearables with payments[8]. The European Union is capping credit card interchange fees at 0.3%[9]. After conducting a thorough public consultation and analysis on the topic of innovation in the payments system, the Reserve Bank of Australia and its chairman very publicly spur the payments industry to collaborate and innovate[10]. We learn that up to 90% of credit card readers used at the

---

information" about the risks inherent to such services, even though it abundantly acknowledges the existence of numerous reasons for regulating: Senate; Standing Senate Committee on Banking, Trade and Commerce. *Digital currency: you can't flip this coin! – Report of the Standing Senate Committee on Banking, Trade and Commerce*. Ottawa, June 2015. 64 p. See in particular pp. 8, 9, 15-16, 22-23, 25, 32, 33, 46, 47, 55, 56. Available at http://www.parl.gc.ca/Content/SEN/Committee/412/banc/rep/rep12jun15-e.pdf.

5 Transportes Aéreos Regionales. *1er Aerolinea en Latinoamérica en aceptar pagos con bitcoin*. Consulted at https://tarmexico.com/promo/bitcoin. See also *TAR Aerlineas Accepts Payment Via Bitcoin Through Openpay and BitPay*. Wireless News, June 5, 2015.

6 Smith, Paul. *Commonwealth Bank to embrace Bitcoin and air miles as fintech goes mainstream*. Financial Review, June 1st, 2015. Available at http://www.afr.com/technology/commonwealth-bank-to-embrace-bitcoin-and-air-miles-as-fintech-goes-mainstream-20150601-ghcre6.

7 Biggs, John. *Citibank Is Working On Its Own Digital Currency, Citicoin*. Techcrunch, July 7, 2015, available at http://techcrunch.com/2015/07/07/citibank-is-working-on-its-own-digital-currency-citicoin/#.tom1ec:UHWq.

8 *Visa to showcase cashless trend on the catwalk*. Finextra News, July 9, 2015. Available at http://www.finextra.com/news/fullstory.aspx?newsitemid=27580.

9 *Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions*. OJ L 123, p. 1. Interchange fee caps will come in force on December 9, 2015. An impartial observer might be tempted to note that the proposed cap is but a fifth of the cap "voluntarily" accepted by Canadian credit card issuers: Department of Finance. *Minister of Finance issues statement on voluntary Visa and MasterCard proposals*. Press release. Ottawa, November 4, 2014. Available at http://www.fin.gc.ca/n14/14-157-eng.asp. This observer may thus wonder how it is that Canadian financial institutions apparently need to charge merchants (and, indirectly, consumers) five times more to make ends meet than their European counterparts – especially as Whereas 20 of the aforementioned Regulation states that the caps that it sets are based on economic literature and "do not call into question the operation of international card schemes and payment service providers".

10 See *inter alia* Reserve Bank of Australia. *Strategic Review of Innovation in the Payments System: Conclusions*. Sydney, Reserve Bank of Australia, June 2012. 29 p. Available at http://www.rba.gov.au/payments-system/reforms/strategic-review-innovation/conclusions/pdf/conclusions-062012.pdf.; Stevens, Glenn. *Remarks prior to the Annual General Meeting of the Australian Payments Clearing Association*. Sydney, Reserve Bank of Australia, October 23, 2014. Available at http://www.rba.gov.au/speeches/2014/sp-gov-231014.html. Mr. Stevens is the Governor of the Reserve Bank of Australia. We incline to find his October 23 remarks quite insightful and can only hope that they would inspire Canadian authorities.

point of sale in the United States apparently rely on the same (publicly available) password, to wit the default set by the manufacturer[11].

Meanwhile, in Canada, the largest bank by market capitalization is proud to announce that its customers will now be able to access their RBC Wallet through their smartphone by using "the same PIN that locks the phone", thus providing "increased security" and eliminating "having to remember multiple passwords" [12], while being apparently unaware of the irony that security experts and bankers have for three decades roundly vilified consumers for using the same password for multiple purposes[13]. Yet RBC is seemingly at the forefront of the Canadian banking industry in this area; unsurprisingly, Canada lags far behind countries such as China, Korea and the United States with regard to consumer mobile payments[14].

Card networks are allowed in Canada to maintain interchange fees at levels that are three times higher than in Australia. Technological innovation in the payments ecosystem is lagging behind most G7 countries, not to mention a number of emergent economies that are jumping directly into mobile payments. Prepaid credit cards are massively used to scam consumers, with providers mostly shrugging off the issue[15]. In Canada, Square is barely known and Apple Pay's market entry is hindered by what seemingly amounts to an incumbents' oligopsony[16].

---

11 Pagliery, Jose. *This code can hack nearly every credit card reader machine in the country*. CNN, April 29 2015. Available at http://money.cnn.com/2015/04/29/technology/credit-card-machine-hack/index.html?iid=TL_Popular. We suspect results in Canada would be similar.

12 Royal Bank of Canada. *Increasing Security of Mobile Payments for Canadians with RBC Wallet*. Press release, June 2, 2015. Available at http://www.rbc.com/newsroom/news/2015/20150602-rbc-wallet.html.

13 Amusingly, RBC is also a co-signee of a recent document that reiterates that customers are advised "to select a four digit PIN that is *unique to that payment card*" (p. 26, our italics) and expresses concern over the evolution towards mobile wallet solutions, where consumers "will likely use the same verification method" for numerous applications (p. 33) – and, presumably, the device itself: BMO Bank of Montreal; CIBC; National Bank of Canada; RBC Royal Bank; TD Bank Group. *Payments Security White Paper*. Toronto, July 13, 2015. 50 p. Hereinafter "BMO". Available at http://www.cba.ca/contents/files/submissions/misc-2015-paymentssecurity-whitepaper-en.pdf. Apparently, what is a feature in a press release is a bug in a position paper.

14 See for instance *Proxama struggles to spread mobile payment in Canada*. Pymnts.com, June 22, 2015. Available at http://www.pymnts.com/news/2015/proxama-struggles-to-spread-mobile-payment-in-canada/#.VYgW1LdFC71.

15 Harris, Sophia. *Prepaid credit card scams on rise, Canadians losing millions*. CBC News, July 8, 2015. Available at http://www.cbc.ca/news/business/prepaid-credit-card-scams-on-rise-canadians-losing-millions-1.3141804.

16 Shecter, Barbara. *As Canadians clamour for Apple Pay, could the tech giant have finally met its match?* Financial Post, April 24, 2015. Available at http://business.financialpost.com/news/fp-street/as-canadians-clamour-for-apple-pay-could-the-tech-giant-have-finally-met-its-match. Seemingly, the largest banks are banding together to slow the invasion of their turf by a rival which they underline is not regulated as they are, thus hinting that they would be happy to use the regulatory framework as a barrier to entry: see Berman, David. *Canada's banks form consortium to deal with Apple Pay: reports*. The Globe and Mail, April 17, 2015. Available at http://www.theglobeandmail.com/report-on-business/canadas-banks-form-consortium-to-deal-with-apple-pay-reports/article24004338/.

In 2011, the Task Force for the Payments System Review (the "Task Force") came up with four scenarios as it attempted to understand how the Canadian payments industry might evolve over the following decade. The most pessimistic scenario was nicknamed "Groundhog Day": it assumed that the market would remain highly fragmented and that user adoption of new payment mechanisms would be slow, thus almost ensuring that the industry would evolve at a glacial pace and that tomorrow would feel very much like today[17]. To quote the scenario's summary,

> Like the movie *Groundhog Day*, this scenario replays the recent past. Canada's payments system moves forward as it has in the past. Not much changes in the infrastructure of the payments system. The ecosystem is not strongly aligned: government, financial institutions (FIs), businesses and telcos are all charting their own courses and protecting their own interests, with few or no universal standards.
>
> The regulatory environment responds slowly and as a rule offers only basic protection, except when specific crises force a more significant response. At the same time, consumers and businesses are slow to adopt new technology; mobile payments move slowly, concerns about authentication, privacy and security remain high, and no clear product winners drive consumers to adopt a new technology strongly. Meanwhile much of the rest of the world moves ahead, adopting new technologies and creating a more robust regulatory framework[18].

This sounds eerily like the situation Canada currently faces, four years later. It is fair to speculate that "Groundhog Day" was the scenario the Task Force most devoutly hoped Canada could avoid during the 2010-2020 decade; plainly, we are off to a slow start.

For another example of a similar logic, see BMO, *op. cit.* An oligopsony, of course, is a market where providers are faced with a small number of customers, who can therefore control the market; in this case, a small number of authorized payment card issuers are in a position to dominate the market, and even more so if there is limited competition between them regarding crucial product or service requirements. To illustrate the notion, Walmart, who dwarfs many of its merchandise providers and has huge market share in many areas, making providers dependent on its purchase power to distribute their products, is often suspected of oligopsonistic behavior (in addition to being an oligopolistic retailer in many markets, of course).

17 Task Force for the Payments System Review; Viewpoint Learning. *Scenarios for the future of the Canadian Payments System*. Task Force for the Payments System Review, July 2011. 68 p. See in particular pp. 13, 16, 19-28. Available at http://paymentsystemreview.ca/wp-content/themes/psr-esp-hub/documents/r01_eng.pdf. For an illuminating outline of the current level of fragmentation and its consequences for end-users in the Canadian mobile payments ecosystem, see BMO, *op. cit.*, pp. 6-7.

18 *Ibid*., p. 13. In the interest of full disclosure, it should be mentioned that the author of these comments participated in the preparation of the scenarios, and especially of *Groundhog Day*.

We fear that the framework that is now proposed by the Canadian government to oversee so-called "national retail payment systems"[19] will not enable our country to move forward significantly, or much faster. That framework is conceptually weak, imprecise and impractical. It will not help to set up an environment that is conducive to fairness, trust, innovation, competition and efficiency. We will therefore suggest that significant changes should be made to some of the proposed framework's foundations and to the Government's approach to the regulation of retail payments – and of payments, more globally.

1.2 The Public Interest Advocacy Centre

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

1.3 Our comments

Our comments are intended as a high-level presentation of our concerns surrounding the present and future of Canada's retail payment ecosystem. 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 are mindful that the Paper is concerned with "retail" payments. However, it is practically impossible to isolate entirely retail payment systems from "prominent" or "systemic" systems, as we will note *infra*, and in particular in subsection 3.2.2. The implication is that the conceptual oversight framework proposed in the Paper is basically flawed. We believe that a broader perspective is required, and that the oversight of the Canadian payments ecosystem should be analyzed as a whole, before distinctions are made that may not be the most conducive to designing an effective regulatory framework. Our comments therefore go somewhat beyond the Paper's specific ambit, to embrace the entire ecosystem and the need for an integrated regulator.

Our comments are generally structured around the themes put forward in the Paper. We have, however, not followed the same order and have added some concerns of our own. Section 2 of our comments briefly addresses the specific questions raised in the Paper, and refers to more detailed exposition in section 3, where we examine more thoroughly issues related to risk management, to the Paper's flaws and to considerations around the design of a new regulatory framework. We propose specific recommendations in section 4.

---

19 Department of Finance Canada. *Balancing Oversight and Innovation in the Ways We Pay: a Consultation Paper*. Ottawa, April 2015. Hereinafter the "Paper". Available at http://fin.gc.ca/activty/consult/onps-ssnp-eng.asp.

Our primary concern goes to consumers, and especially vulnerable consumers, but we seek to understand the ecosystem as a whole. However and while we are cognizant of the indirect impact they may have on consumer interests, we will generally not address specific issues involving large value payments, business-to-business transactions or the clearing and settlement of transactions involving securities and other similar financial instruments.

While most current discussions around the payments environment, including the larger part of our comments herein, turn around electronic payments, older payment mechanisms will also be mentioned, and should not be forgotten: cash and cheques are still a significant part of the environment, and the way they are treated impacts millions of consumers.

The 2007-2008 financial crisis and its aftermath provided regulators and scholars with a (dearly bought) opportunity to review and assess oversight theories or schemes that had become fashionable after 1990, such as "principles-based regulation". While we are mindful that the payments ecosystem raises a set of risks that is in its particulars different from the practices which led to the crisis, we believe the critique of these theories and schemes is nonetheless highly relevant to the design of a Canadian payments regulator's toolbox and we will draw from that literature and seek to adapt its findings to the needs of the current exercise.

As we note below (in particular in section 3.2.2), there are significant terminological problems with the Paper. Nowhere does it define basic concepts such as "oversight" or "payment systems". One might thus be tempted to refer to glossaries widely used in the payments environment, such as the one published by the Bank for International Settlements, only to find out that the definitions this glossary proposes are to some extent inconsistent with the Paper's ambit[20]. For instance, the definitions of "oversight" emphasizes the mitigation of systemic risk (see p. 37), which by definition is not supposed to be a major concern regarding retail systems, while retail systems are given a definition that seems to restrict the notion to "networks" and excludes arrangements involving end-users[21], while the Paper is purportedly highly concerned with end-users. We will therefore give such terms a much broader signification – and suggest that the Department define such concepts more precisely.

---

20 Bank for International Settlements – Committee on Payment and Settlement Systems. *A glossary of terms used in payments and settlement systems*. Basel, Bank for International Settlements, March 2013. Available at http://www.bis.org/cpmi/glossary_030301.pdf. We refer in particular to this source, as it is referenced by the Bank of Canada in its recent consultation paper on prominent payment systems: Bank of Canada. *Proposed Criteria and Risk-Management Standards for Prominent Payment Systems – A consultation paper by the Bank of Canada*. Ottawa, Bank of Canada, June 12, 2015. 23 p. P. 2, footnote 2. We acknowledge that the Bank itself is not consistent in its terminological sources: see *e.g.* p. 9, footnote 12 of the same paper. Available at http://www.bankofcanada.ca/wp-content/uploads/2015/06/proposed-criteria-risk-management-standards.pdf. We are also mindful of s. 36 of the *Canadian Payments Act*, R.S.C., c. C-21.

21 Bank for International Settlements, *ibid*., definitions of "retail funds transfer system" and "funds transfer system".

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

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

2.0 Some short answers

In this section of our comments, we will briefly answer the eight questions specifically outlined in the Paper. We note the absence of any question related to the public policy objectives proposed by Government, which in our view urgently need to be addressed as they are inadequate to the task at hand[22]. A more detailed rationale for our answers will be provided in section 3.

2.1 Risk-related issues

Are the identified risks posed by "national retail payment systems" comprehensive? Should other risks be included?

The notion of "national retail payment systems" is unclear (see subsection 3.2.2.2) and the conceptual oversight framework proposed by Government is inadequate (see subsection 3.2.2), which vitiates any attempt at providing a definitive answer to this question. While the Paper purports to consider end-user interests, the analytical framework remains mostly concerned with risks to the system or systems, rather than to end-users (see subsection 3.2.2.1).

The categories of risks mentioned in the Paper are so broad as to be apparently all-encompassing, but the interpretation that is proposed of the meaning of each category is much narrower (see subsections 3.2.4, 3.1). Issues such as pricing (*e.g.* interchange fees) do not seem to be addressed *per se*. Protection of end-user interests emphasizes "transparency/disclosure" and "clearly defined rights and responsibilities", without contemplating issues such as fairness and unconscionability of contractual terms. End-users', and especially consumers', concerns about accessibility are not considered, nor are issues related to legal, reputational, efficiency and social risk (see subsection 3.1). We also note that issues associated with the fact that very significant providers in the Canadian market process transactions and establish their rules outside the country is not addressed.

The risk analysis that is proposed is therefore superficial and incomplete, and in particular does not address adequately end-user concerns.

Are there other measures that should be considered to address these risks?

The measures outlined in the table entitled *Key Risks in Retail Payment Systems* mostly take the form of standards (5 occurrences in 14 bullets), guidelines (3

22 We will discuss the public policy objectives in subsection 3.2.3.

occurrences), policies and "rules" (without further specification), as well as undefined requirements to provide information. These proposals are blatantly inadequate.

In markets where there are fundamental informational asymmetries associated with complex technological, legal and business structure-related issues, such as the payment services ecosystem, it is impossible to rebalance the relationship between provider and end-user (and especially consumer) simply by providing information. Information-based strategies such as those proposed in the Paper also minimize or ignore the obstacles which a significant proportion of the population must face to simply have meaningful access to whatever information is provided, let alone use it to make decisions (see subsections 3.1.8, 3.3.1.2).

While standards and guidelines may be adequate to solve technical issues where stakeholders have well-aligned concerns, so that it is actually in each one's immediate and obvious interest to comply, they fail badly when interests are not so aligned. An obvious case is the determination of "Clearly defined consumer rights and responsibilities", as the Paper puts it – without specifying through what type of measure such rights and responsibilities should be clarified. In such a case, consumer (and other users') interests are often *not* aligned with what providers will perceive as their immediate interest. As a result, terms and conditions in standard form agreements already purport to define the consumer's rights and obligations very clearly – but in a way that is so detrimental to the weaker party that it is often unconscionable (see in particular section 3.1.4).

More broadly and in order to ensure a level playing field, eliminate free riders and provide effectively for a "fair, reasonable and proportionate allocation of costs, benefits, rights and responsibilities among all participants" [23], there needs to be a coherent and comprehensive framework of legally binding legal instruments that will establish a regulatory "floor" above which providers may choose to compete. This framework should be principles-based while relying where necessary on more prescriptive rules, and should be supported by appropriate oversight and enforcement mechanisms (see subsections 3.3.3 to 3.3.6).

How should the government balance the need to mitigate risks with the objectives to promote innovation and competition in the payments sector?

This question stems from the deeply flawed assumption that rules aimed at mitigating risk on the one side must necessarily be balanced against innovation and competition on the other side, as if they were essentially opposed. They are not.

As framed, the question implies that risk mitigation is a necessary evil, whereas innovation and competition are inherently good. Innovation may be misguided and competition may be inefficient, while a regulatory framework is necessary in order to foster and enable healthy innovation and competition, as it provides the required certainty

[23] This phrasing is borrowed from the Task Force for the Payments System Review's proposed National Payments Policy, subsection (a) (ii) : Policy Paper A, *Users and their Discontent*, especially p. 25, and available at http://paymentsystemreview.ca/wp-content/themes/psr-esp-hub/documents/ppA_eng.pdf.

to assess the viability of business initiatives. Regulation must also pursue socio-political goals that are broader than efficiency (see subsection 3.2.1).

The better question would be "What would a regulatory framework that promotes global welfare, sustainable economic growth and justice look like?" We believe such a framework would be fact-based, would facilitate stakeholder involvement at each step and would include rules that are fair, reasonable and proportionate in the assignment of costs, benefits, rights and responsibilities, in addition to being enforceable.

2.2 Scope-related issues

To ensure that customers making payments within a single financial institution benefit from the same protections provided to payments between institutions, should the application of CPA rules that protect customers be extended to "on-us" payments?

Such an extension of the Canadian Payments Association's ("CPA") rules would be ineffectual from the customers' standpoint and would not address adequately issues associated with the absence of a level playing field. It would also raise complex questions regarding CPA's mandate and role in the payments ecosystem (see subsection 3.2.6).

Preauthorized debits ("PADs") provide a good example. When payor and payee use different financial institutions and an unauthorized payment against a deposit account is processed, CPA rule H1 purports to provide direct recourse to the payor against it financial institution; should they use the same institution, however, the operation does not need to go through the clearing process, hence rule H1 is technically non-applicable. Even if the rule was made applicable to such transactions, financial institutions currently offer regularly recurring payments on credit cards, which are equivalent in practice to PADs; extending the rule to "on-us" operations would not alter the consumer's absence of recourse under rule H1 where payments are drawn on credit card accounts, and therefore would not ensure a level playing field between providers – nor would it simplify significantly the task of consumers trying to understand which rules apply in which circumstances.

The much more problematic issue, however, is that third parties (such as customers) cannot legally rely on CPA rules, which bind only CPA members (see subsection 3.2.6). Extending the rules to "on-us" transactions would therefore change nothing whatsoever for customers from a legal standpoint: neither individual judicial recourse nor class actions could be based on a CPA rule, and it is unclear to what extent ombudsman schemes currently apply the rules (assuming that they are even aware of them).

It is also unclear whether CPA, even in the context of its new governance regime, would be a proper forum not only from a legal, but from a policy, perspective, for enacting rules which would bind third parties (as they are not admissible for membership and can have limited input into the rule-making process), and which might apply to operations that do not rely on CPA systems at all.

Insofar as an adequate regulatory framework, based on a functional approach, is implemented, extension of CPA rules would not be the most appropriate remedy to the problems experienced by end-users.

Should oversight be based on a functional approach, where risks are assessed by payment activity and treated similarly regardless of the provider?

We strongly support the view that oversight should be based on a functional approach. We believe Parliament has the required jurisdiction under the Canadian Constitution to establish such a regime (see section 3.3.2) and that an extensive regulatory framework, based on a functional approach, is the only way to provide for consistency and certainty, to the benefit of all stakeholders and the Canadian economy.

What payment functions or instruments should be brought within the scope of oversight?

All payment functions and instruments should be brought within the scope of oversight, as well as all providers.

Obviously, payment instruments such as coinage, bank notes or bills of exchange are already regulated and seem to raise few issues[24]. However and for the regulator to be able to develop a comprehensive view of the ecosystem and establish a fully coherent framework, its remit will have to be as broad as the area to be regulated.

We agree with CPA that functions which should be included within the perimeter of oversight include payment initiation, authorization, transmission of funds, exchange of value, holding of funds, clearing and settlement[25], but would add as well other functions identified by the Committee on Payments and Market Infrastructures and related to pre-transaction activities (such as acquisition and provision of hardware and software) and post-transaction activities (including dispute resolution) [26]. Care should be taken to address appropriately cross-functional concerns, such as consumer protection and competition.

The scope of oversight should be sufficiently broad that the designated agency (see below and section 3.3.6) would be able to consider a broad range of issues, including market conduct, market structure, pricing, consumer protection, innovation and stakeholder collaboration. In other words, it should be able to oversee the payments ecosystem as a whole, taking into account all its dimensions. Canada needs a comprehensive regulatory framework for payments, and a regulator which can monitor

---

[24] Nonetheless, practices such as cheque imaging or refusal of cash payments by some merchants may well warrant further investigation. In the light of Denmark considering to allow some classes of merchants to decline payment in cash, as noted in section 1.1, one may well imagine that similar proposals might be made in Canada, and would warrant granting the regulator the ability to fully assess such a decision's socio-economic consequences. Similarly, a payments regulator could have inquired in a timely fashion into the potential consequences of the federal Government's now watered-down plan to eliminate federal payments by cheques.

[25] Canadian Payments Association. *Oversight of National Retail Payment Systems – Canadian Payments Association Submission in Response to Finance Canada*. Ottawa, June 11 2015. P. 5.

[26] Committee on Payments and Market Infrastructures. *Non-banks in retail payments*. Basel, Bank for International Settlements, September 2014. 44 p. P. 7. Available at http://www.bis.org/cpmi/publ/d118.pdf.

the market as well as establish and enforce directions to participants through appropriate normative instruments, while maintaining an ongoing dialogue with all stakeholders.

Finally and consistent with a functional approach, all providers (and not merely "systems") involved in these functions should be brought under the oversight scheme's umbrella *qua* performance of those functions, in order to ensure that the playing field is truly level. Rules may, however, be adapted to the specificities of various categories of services, so that risk is contained appropriately – that is, sufficiently, but not excessively.

What should be the key priority in developing oversight for retail payment systems?

There are two possible interpretations of this question: what should be the key priority at this stage, and what should be the key priority for the agency responsible for the regulatory framework (hereinafter the "Agency") which should be implemented?

As to the first interpretation, it is urgent that the government obtain a thorough understanding of the issues and facts pertaining to the current status of the Canadian payments ecosystem. It would also be very useful for stakeholders if it were to clarify its vision regarding certain key issues, such as the notion of "retail payment system" (see section 3.2.2) and whether it intends to manage risk to systems *stricto sensu*, or risk to all stakeholders impacted by retail payment systems.

As to the second interpretation, the Agency will need to establish at the outset its authority over the industry through processes such as the formulation of a clear and exhaustive policy statement[27].

Through what form of arrangement(s) should oversight be implemented (*e.g.*, legislation, code of conduct)?

The new regulatory framework will need to be enacted through legislation, which should establish a principled framework of objectives and an organisation responsible for implementing that framework. This Agency should be granted a broad range of powers to monitor, guide and regulate the industry, as well as ensure compliance. Normative instruments put in place in order to establish rights and obligations should be legally binding and third parties should be able to rely on them in court, but it should be possible to enact such instruments through mechanisms which are more flexible than traditional regulation (see section 3.3.5). The Agency should therefore be granted an extensive toolkit. Consumer experience in the past shows that codes of conduct are generally inefficient and should be avoided, except perhaps where stakeholders' interests are so well-aligned that industry participants will effectively find it in their immediate financial interest to comply.

---

27 See for instance Payment Systems Regulator. *A new regulatory framework for payment systems in the UK –PSR PS15-1*. London, Payments Systems Regulator, March 25, 2015. 84 p. Available at https://www.psr.org.uk/sites/default/files/media/PDF/psr-publications-consultations-psr-ps-15.1.pdf. Establishing a proper framework is necessary, but not sufficient, however, as the regulator's attitude and actions may quickly undermine its credibility: see for instance Combes, Alistair. *The new UK payments regulator: a carbon copy of its Payments Council?* Finextra blog, June 8, 2015, at http://www.finextra.com/blogs/fullblog.aspx?blogid=11081.

3.0 The rationale

Policy should be fact-based. It should also be supported by values and policies. In this section, we shall strive to articulate the facts, values and policies we believe should govern the implementation of a framework for “retail” payments in Canada.

In order to do so, we will start by a stratospheric view of the reasons why we need such a framework, with an emphasis on, and articulated around, various types of risks. We will then discuss specific concerns with the Paper’s content, before providing suggestions as to the design of the regulatory framework we need.

3.1 Managing risks

3.1.1 A daunting new world

That the payments environment currently evolves at a head-spinning rate worldwide is trite. That the range of payment methods and providers gets broader is glaringly obvious. That the market does not work well, and is not successfully self-regulating in a way that would further total welfare, is painfully obvious (to some stakeholders at least). In order to define public policy, however, one needs to dig deeper and understand thoroughly why this is happening, and what it entails for our society.

Technology increasingly enables information to travel far and fast, but it still struggles with authentication and it depends on networks that can fail spectacularly.

Technology reduces costs (especially transaction costs), thus enabling more competition – assuming new entrants can slip through bottlenecks currently controlled mostly by incumbents.

Business models evolve, with payment processing becoming a significant source of income in itself for some providers, new intermediaries appearing in some markets (such as Apple) and disintermediation developing in other markets (or, sometimes, the same ones).

Business models involving ever more complex chains of interconnected participants generate legal and financial risk and uncertainty.

Technology, pricing and complexity breed incomprehensibility and exclusion.

And so this brave new world is rich with opportunities, yet rife with danger. Opportunities should be nurtured, but danger must be suppressed (or at least minimized and controlled).

What are some of the risks the ongoing transformation of our payments environment creates or increases for Canadian consumers?

- They could lose funds entrusted to a dishonest or soon-to-be insolvent provider;
- they could lose funds entrusted to a technologically unsafe provider;
- they could lose control over their personal information;

- they could be charged unconscionable prices related to payments, or face other unfair contractual requirements or obstacles;
- they could be faced by technology they are unable to understand or use;
- they could be denied market access to technologies that would be useful and efficient, because of insufficient competition or innovation;
- they could have no effective legal recourse or means of redress, individually or collectively, when faced with any of those situations.

It is unrealistic (not to say illusory) to believe that the average consumer can understand the complexity of the transactions that person enters into daily, or that the consumer will read and understand pages of legal gibberish in order to assess the risk associated with a given type of transaction. There is arguably not a single individual in this country who fully understands all the network rules[28], all the technology (and especially the software), all the terms and agreements and everything in the legislative and regulatory framework underpinning our retail payment ecosystem. Hence the consumer assumes – legitimately, but wrongly, as it is – that there are rules to protect him.

It is naïve to assume that all – or at least most – providers will diligently comply with voluntary requirements, unless there is a clear and immediate risk that non-compliance will have material consequences. Numerous examples show beyond doubt that non-compulsory requirements applying to the Canadian financial sector in the payment sector are mostly observed in the breach.

In this section, we will outline some of the threats looming over Canadian consumers who simply wish to pay (or get paid)[29]. Insofar as possible, we will associate these threats with various types of risks – which is not to say that we are attempting here to propose an exhaustive analysis of the various risks pertaining to the payments ecosystem. We deliberately do not follow the risk categorization proposed in the Paper, which we find too vague to be useful. We will not fully examine so-called "efficiency" risks, not because we believe that there is meaningful competition in the Canadian payments ecosystem (there isn't), but because others – such as the representatives of business users and new entrants – are currently much better placed than we are to provide a more thorough analysis of those issues; some aspects of efficiency risk, however, are highly relevant to consumers and we will mention them briefly.

At the outset, it is necessary however to emphasize that in order to drive public policy adequately, any risk assessment must fully consider the risks borne by all stakeholders, and not just those threatening providers and "networks", or "systems", as the Paper purports to label them. This may require a slightly new perspective from the Department of Finance. Risk associated with a system is a significantly broader category than risk

28 Some of which are not even in the public domain.

29 This section is partly an update of PIAC's comments to the Task Force for the Payments System Review published in September 2010 under the title *All along the watchtower: seeking the future of Canada's payment system*, available at http://www.piac.ca/wp-content/uploads/2014/11/watchtower_final.pdf.

caused to the system: a payment network, for instance, may appear to work reasonably well on an ongoing basis, yet be fraught with legal risk to end-users, impose on them extortionate prices or be insufficiently innovative – yet it will open on the morning, and be highly profitable, and thus to some might look as not risky at all.

3.1.2 Credit and liquidity risk

Credit and liquidity risks are obviously different. For our purposes, however, they can be considered together. Credit risk is associated with a debtor's inability or refusal to fulfill its obligations: the creditor will therefore not receive the value it expected. Liquidity risk is the risk that funds will not be available in a sufficiently liquid form when required for business purposes. In both cases, someone is short – quite often the end-user.

Within the payments context, credit risk mainly arises under two guises. The first is obvious: credit cards are a significant part of the payments landscape and conspicuously generate credit risk for their issuers. However and insofar as various factors[30] induce consumers to pay using mechanisms that allow access to credit, today's payments market may actually be instrumental in increasing credit risk in the Canadian economy and the current level of consumer indebtedness[31]. That issue, however, goes beyond the ambit of payment regulation *per se* (except insofar as public policy may suggest that rules should nudge consumers toward non-credit payment instruments, or at least be neutral[32]).

The second form of credit and liquidity risk may be slightly less obvious, but is more relevant to our purposes: deposits in deposit-taking financial institutions ("DTFIs") are customer loans to the institution[33]. The risk that a DTFI will not be able to reimburse is therefore a credit risk for the institution's customers, which is mitigated however by deposit insurance and regulatory supervision. However, new payment schemes may raise credit risk that is mitigated neither by deposit insurance nor regulatory supervision of any kind. Prepaid cards and other schemes whereby consumers entrust money to a provider, to be accessed later through the provider's scheme, are very weakly regulated, if at all, for credit risk[34]. In some jurisdictions, the credit risk associated with providers such as PayPal has even driven regulators to prohibit its operations on their territory or to require PayPal to take appropriate measures in order to mitigate credit risk[35].

---

30 Such as loyalty programs or increased legal protection in cases of fraudulent transaction associated with payment by credit card.

31 There is increasingly abundant scientific literature examining consumers' tendency to overspend when money is dematerialized or credit is electronically available, but these issues go well beyond the scope of these comments.

32 That is currently not the case: for instance, legislation at the federal level and in all provinces establishes a liability cap when fraudulent transactions are done with a credit card and some networks provide chargeback protection, whereas there is no comparable framework regarding debit transactions using other networks.

33 *Foley* v. *Hill*, (1848) 2 H.L. Cas. 28, 9 E.R. 1002 (H.L.), which has been followed in Canada, including under Québec law.

34 For an illustration, see note 71.

35 In a PayPal transaction, the payor transfers the funds to PayPal, which then makes them available to the payee. Until the provider abides by payee's instructions to transfer the funds, PayPal holds the funds and, should it go bankrupt, it would be unable either to pay the payee or refund the payor. Authorities have therefore required PayPal at least to obtain a

Non-regulated providers, and especially the smaller ones, also face the possibility that they will at some point have insufficient liquidity to deal with a sudden afflux of customer withdrawals. A liquidity crisis can quickly turn into a run and become a solvency issue, thereby raising credit risk for scheme users, as well as reputational risk to the industry.

As new providers emerge in the Canadian market, credit and liquidity risk are likely to rise unchecked. Canadian authorities may therefore wish to consider the framework which has been implemented by European authorities in order to regulate risks associated with payment institutions.

3.1.3 Operational risk

Operational risk is concerned with the effectiveness of technologies and processes and human performance, or the failure thereof. Payment activities obviously raise significant operational risk, as payors and payees expect their transactions to be processed swiftly and safely. Even large, experienced processors are not immune to operational breakdown[36]; smaller providers may be quickly overwhelmed by systems failure.

---

money transmitter license : see *e.g.* the June 3 2002 Interpretation Letter by the State of New York Banking Department to PayPal at http://www.banking.state.ny.us/legal/lo020603.htm. It is our understanding that, in Canada, PayPal currently transfers funds in transit into an account where they are held in trust for its clients. Whether that mechanism would be found to be legally effective should PayPal go bankrupt or propose an arrangement under the *Companies' Creditors Arrangement Act*, R.S.C., c. C-36 or similar legislation mercifully remains untested. We are not aware of any regulatory requirement currently imposed on providers such as PayPal in Canada to take such measures, or to submit them to regulatory oversight.

36 The almost week-long systemwide breakdown experienced in June 2004 by Royal Bank provides the most obvious example in our recent history, although other Canadian financial institutions have also had their share of problems. In the United Kingdom, problems experienced by large financial institutions such as the Royal Bank of Scotland group in 2012 show how technical problems in one group of institutions can disrupt customers' activities, but also impact third parties. As to this (first) RBS incident, see for instance *RBS fined £56m over 'unacceptable' computer failure*, November 20 2014, at http://www.bbc.com/news/business-30125728. RBS Group again "lost" 600 000 payments after an IT system breakdown in June 2015 and, at the time of writing this response, it was reported that it had taken two days to sort the problem out and post accurately payments received by customers: Salmon, James; Eccles, Louise; Smith, Jennifer. *No money till the weekend! Millions of pounds 'go missing' after technical glitch makes 600,000 payments 'vanish' overnight*. The Daily Mail, June 17 2015. Available at http://www.dailymail.co.uk/news/article-3127782/Millions-pounds-missing-technical-glitch-means-600-000-RBS-customers-payments-disappeared-overnight.html; BBC. *RBS says accounts updated after glitch*, June 19 2015, available at http://www.bbc.com/news/business-33196424. One is also reminded of another recent incident involving the Bank of England's real-time gross settlement system, where a malfunction in a systemically important system had a direct impact on thousands of consumers, especially those involved in housing market transactions; see for instance Treanor, Jill. *Bank of England payment system collapsed 'due to design fault'*. The Guardian, March 25 2015, at http://www.theguardian.com/business/2015/mar/25/bank-of-england-payment-system-collapsed-due-to-design-fault.

Whether they be big or small, however, when systems break down or are unable to prevent fraud, users and providers start thinking about their rights and liabilities; in Canada, they are likely to have a hard time finding clear answers.

3.1.4 Legal risk

Legal risk is the risk associated with inadequate compliance to laws, regulations or ethical standards or, more broadly, with the encounter between a factual situation and a legal norm[37]. From the consumer's standpoint, it takes two major forms in the current payments environment: we suffer from an inadequate regulatory framework, and some market participants strive to transfer risk to other participants through contractual arrangements of sometimes dubious ethical and legal value.

Electronic payments are fraught with legal uncertainty in Canada because there are few clear rules in place, and what rules we have are often inconsistent. Whether a consumer pays a merchant using a preauthorized debit on her bank account, or a preauthorized debit on her credit union's credit card, or by PIN-based point-of-sale debit, or by PIN-less point-of-sale debit, or using Interac's Online service, or PayPal, or a prepaid card in Québec or a prepaid card in Manitoba, to name only a few possibilities, her rights and liabilities, and other stakeholders', will be quite different[38]. Such an environment is unlikely to foster confidence and investments, especially as many of those rules can be changed privately, with scant consultation if any, by providers or their networks. There is simply no clarity or consistency associated with the jumble of rules we are currently saddled with. It is therefore difficult both for consumers and providers to assess properly their legal risk. Consumers simply do not have access to, or can understand, the rules, and providers may wrongly believe that they have displaced risk on their customers, only to have courts tell them that they actually have not.

Perhaps because they are slightly more aware than their customers of the legal uncertainty surrounding retail payments in Canada, providers often attempt to minimize their legal risk by switching it to other parties, and especially to consumers, through contractual terms and conditions. Consumers' legal (and financial) risk may thereby become excessive (as well as incomprehensible). CIBC's *Convenience Banking Service*

---

37 The realization of legal risk can have significant strategic, financial or reputational consequences. It can result *inter alia* from uncertainty regarding the fluctuation of norms, their interpretation or the difficulty associated with legal qualification. There is scant literature on the notion of legal risk, but an interesting analysis is offered by Collard, Christophe; Roquilly, Christophe. *Proposals for a Definition and Map of Legal Risk*. Nice, EDHEC Business School, June 2011. 17 p. Available at http://faculty-research.edhec.com/_medias/fichier/edhec-position-paper-proposals-for-a-definition_1335169641716.pdf. The BIS glossary (see note 20) defines legal risk as either "the risk of loss because of the unexpected application of a law or regulation or because a contract cannot be enforced" or "the risk that a party will suffer a loss because laws or regulations do not support the rules […], the performance of […] arrangements, or the property rights and other interests held […]. Legal risk also arises if the application of laws and regulations is unclear".

38 The Task Force documented some of those challenges in its Policy Paper A, *op. cit*, especially pp. 9-11.

Agreement[39], which applies in particular to debit card transactions, provides an interesting example that should be sufficient for our purposes.

According to section 15 of the Agreement, the bank is liable to its customer only where it has been grossly negligent, has acted fraudulently or has willfully misconducted itself. The only other exception is when circumstances beyond the customer's control caused the loss, such as when there has been a technical malfunction or fraud. CIBC thus declines responsibility in other cases, including (explicitly, near the middle of section 15) where it has been "merely" negligent. The provision also stipulates that CIBC "will not under any circumstances" be liable for punitive damages. Therefore, the bank purports not be responsible for run-of-the-mill negligence.

Moreover and under subsection 3 a) of the Agreement, the consumer is responsible for all losses resulting from an unauthorized use of a debit card if she contributed to the unauthorized use or does not cooperate in the subsequent investigation; under subsection 3 b), contributing to unauthorized use includes any failure to comply with requirements imparted under section 2, including (at subsection 2 b) the requirement to memorize the consumer's personal identification number ("PIN") and never keep "any written record of it".

Therefore, if there are unauthorized debit transactions in a consumer's account and if it turns out that she kept at the very bottom of a seldom-opened drawer a well-disguised written record of her PIN, and if CIBC (in its absolute discretion) determines that she did not cooperate adequately in its investigation, the consumer would be fully liable for the losses under sections 2 and 3 and could not sue CIBC even if the Bank had been demonstrably negligent in processing the transaction, under section 15; and she could never recover punitive damages, even in the latter case if CIBC had been grossly negligent.

One must finally point to section 18 of the Agreement, which states that

> CIBC has adopted a number of "Voluntary Codes of Conduct and Public Commitments", including the Canadian Code of Practice for Consumer Debit Card Services, which are available on www.cibc.com.

Interestingly, this provision does *not* state that such codes are included by reference in the text of the agreement, leaving a court to wonder what weight to give to this provision and to those voluntary undertakings. Even more interestingly, comments under clause 5 in the Interpretive Guide at the end of the *Canadian Code of Practice for Consumer Debit Card Services* explicitly envision that a consumer may legitimately keep a written record of her PIN, as long as it is well-disguised and not kept where it could easily be stolen with the

[39] The agreement, consulted on May 26, 2015, is available at https://www.cibc.com/ca/apply/disclosures/conv-banking-serv-agreement.html.

debit card[40]. In other words, section 18 of the Agreement refers to a document with which subsection 2 c) of the same Agreement, quoted above, is patently inconsistent[41].

Assuming a consumer who is victim of a fraud reads her agreement and makes sense of its contents, her conclusion is likely to be that she has limited recourse (if any) against her banker. Should she contact the bank, she is likely to be referred to the Agreement's provisions.

This is a clear case[42] where a banker is attempting through contractual provisions to transfer most risks regarding unauthorized transactions to the consumer – although admittedly "clear" may not be the most apposite term, at least from the ordinary consumer's perspective. This raises two distinct, and quite significant, issues.

First, should a provider be allowed, as a matter of policy, to shift risk and liability in such a way? We believe the answer should squarely be "no". We share the position adopted by Australian authorities, which is that, in many cases, an economically efficient loss allocation rule "assigns liability on [...] the account institution to encourage it to improve the security of the" system over time[43]. We agree with the Australian Securities and Investments Commission that the least cost avoider principle suggests that payment system providers are best placed to reduce costs and risks by improving their products at a systemic level, instead of burdening consumers with compliance with unrealistic requirements. Liability should also be allocated taking fully into account the informational asymmetry[44] between providers and consumers regarding how systems are designed and work, and what the various parties can do to effectively minimize risk.

Providers may argue that such a policy would create a moral hazard and reward negligent customers; they would rather transfer liability on consumers through contract

---

40 The Code is available at http://www.fcac-acfc.gc.ca/Eng/Documents/DebitCardCode-eng.pdf. See especially comments 5 to 7 under section 5 of the Interpretive Guide.

41 Incidentally, this provides but one example of situations where providers, including reputable ones, do not comply with voluntary instruments.

42 But by no means the only one. In fairness to CIBC, a similar analysis of most of its competitors' agreements would lead to similar results and we picked CIBC in this case in part because we have addressed similar criticism to other banks in the past, and would not wish to look like we always target the same institutions. From a policy standpoint and in addition to the non-compliance issue, the implication is that there is no significant competition between providers regarding liability issues, and that search costs incurred by consumers to try and find the best terms would be wasted, leading to the conclusion that this is a case of market failure warranting regulatory intervention. For a short analysis of this specific issue, see for instance Cooter, Robert; Rubin, Edward. *A Theory of Loss Allocation for Consumer Payments*. [1987] 66 Tex. L.R. 63, 67-69.

43 Express reliance of Australian authorities on the least cost avoider principle, first elaborated by Nobel Prize laureate Ronald Coase, goes back at least to 1999 and has been reiterated in consultation papers such as: Australian Securities and Investments Commission. *Consultation Paper 78 - Reviewing the EFT Code*. ASIC, January 2007. 129 p. P. 62. The Paper can be found at http://www.fido.gov.au/asic/pdflib.nsf/LookupByFileName/eft_review_2007.pdf/$file/eft_review_2007.pdf.

44 The negative impact of informational asymmetry on markets has been theorized *inter alia* by Joseph Stiglitz through work for which he received the Nobel Memorial Prize in economy.

than implement more secure payment mechanisms. In fact, the consequences of the latter moral hazard, created by the providers, are far more significant for the Canadian economy. Providers are in a position to put in place globally safe *systems*; consumers can do nothing but to try and secure *individual transactions*. The onus on providers should therefore be obvious. They are the ones who should be held to account first.

Unfortunately, providers often seek to morph their self-inflicted operational risk into customers' legal risk, through unbalanced terms and conditions in contractual agreements which cannot be discussed, such as in the example above. Providers therefore lack incentives to make needed improvements that would have a positive impact on market conduct and market efficiency[45]. Strong security and other concerns should be designed into systems in such a way that consumers need not be treated as the defective link and burdened with undue liability. The regulatory framework should ensure that proper incentives are in place so that providers will face their fair share of the social costs associated with fraud, for instance.

The second issue is that, arguably, many of the provisions found in CIBC’s *Convenience Banking Service Agreement* are legally unenforceable, in some parts of Canada at least. For instance, section 10 of Québec’s *Consumer Protection Act* prohibits exclusionary clauses such as the Agreement’s section 15 and section 272 of the same Act provides for punitive damages – and, in view of the Supreme Court of Canada’s recent rulings[46], it should not be unduly difficult to demonstrate that such provisions validly apply to a bank. There can of course be no doubt that they would apply to non-bank providers. Other provisions of CIBC’s agreement also raise various problems, and would likely be void in some Canadian jurisdictions at least.

Provider strategies such as broad liability exclusion clauses embedded in standard form contracts are therefore risky for the provider itself: courts may well conclude that the provisions it has sought to impose on consumers are unfair and unconscionable, and therefore invalid. It is unclear to what extent providers are currently aware that their legal risk may be significantly higher than what they may suspect (but their shock following the *Marcotte* ruling may provide some clues…) From the perspective of financial and legal literacy, they are also deeply defective, as they appear to provide consumers,

---

45 Obviously, we assume that deploying a less than optimal technology and having the cost of this inefficiency borne by parties that are powerless over that decision (i.e. consumers) is not an efficient allocation of resources.

46 We are obviously thinking in particular of its decision in *Bank of Montreal* v. *Marcotte*, 2014 SCC 55, [2014] 2 S.C.R. 725, especially in paragraphs 65-68. As to punitive damages, the Court established the applicable framework in *Richard* v. *Time Inc.*, 2012 CSC 8, [2012] 1 S.C.R. 265, especially at paragraphs 175-180, where the Court also underlines the fact that the *Consumer Protection Act* is a statute of public order, from which providers may not derogate (par. 175). It may be worth recalling at this point that the financial institutions sued in *Marcotte* and the associated cases have been ordered to disburse hundreds of millions of dollars in reimbursement to consumers and penalties, for non-compliance with one specific provision of the *Consumer Protection Act* related to one specific set of fees. We would be inclined to respectfully suggest that providers, and especially banks, should reassess (and requantify) their legal risk, and their mitigation strategies.

through the agreements' wording, with information that is arguably legally unsound and attempt to discourage the lawful exercise of rights actually guaranteed by legislation.

To summarize, the Canadian legal environment regarding payments (and especially consumer electronic payments) is dismal. In many cases, there are no rules. What rules we have are usually incoherent, treating similar transactions and essentially similar providers differently on the basis of often abstruse (from the consumer standpoint) differences. Many of those rules are imposed by one party on a weaker one, through arcane legal agreements, and many are unfair, legally inoperative, or both. And most of the rules purporting to protect users are never enforced against providers, for want of a competent regulator or even basic knowledge of the rules' existence by users, their lawyers and the courts. It would be difficult to design a more uncertain, and therefore riskier, legal landscape. Canada's legal framework for payments, and especially electronic payments, is hopelessly antiquated. Jurisdictions such as the United States, Australia and the European Union are easily a decade ahead of us. By not providing them with a clear and apposite regulatory framework, we do a disservice not only to consumers, but also to providers and to the whole economy.

3.1.5 Reputational risk

Reputational risk is the risk that action (or omission) will alter negatively a party's image in its community or lower others' confidence in that party. Operational failure and non-compliance are two major sources of reputational risk: needless to say therefore, our current payments environment is ripe for breaking reputations.

A damaged reputation may lose a provider current or prospective customers and, in the financial area, lead very quickly to liquidity risk. This in itself would justify measures aimed at mitigating reputational risk.

However and especially in emerging industries, an event can impact not only the provider who made a mistake, but all its competitors, who get tarred by the same brush. Whether the perception that takes hold of the public is justified or not is beside the point: a domino effect can quickly develop and harm a whole industry[47]. Every provider is likely to be impacted by consumers' knowledge that there are "lemons" in the market that they cannot easily distinguish from good quality services or providers, leading them to refrain from using the products or else to be only willing to pay a lower price than otherwise warranted, to compensate for the risk of obtaining low quality[48].

---

47 An interesting example emerged recently in qualitative research (to be published this summer) conducted on behalf of *Service de protection et d'information du consommateur*, a Québec-based consumer group, and aimed at assessing the consequences of the replacement of cheques issued by the Government of Canada by direct deposit. A significant number of consumers who participated in focus groups and of respondents from community organisations working with vulnerable populations underlined that many Canadians were reluctant to switch to direct deposit of federal benefits because they have had bad experiences with preauthorized debits or direct deposits in the past, and therefore no longer want anyone to be able to "fool around with their account".

48 Llewellyn, David. *The Economic Rationale for Financial Regulation. Occasional Paper Series 1*. London, Financial Services Authority, April 1999. 58 p. Pp. 25-26.

From a policymaking standpoint, it is therefore important that reputational risk be minimized by providing a clear framework for all market participants and by being able to cull (or at least provide guidance to) less competent or less trustworthy participants before they can give the whole sector a black eye[49]. We do not believe competitors should simply be left to straighten out each other without supervision – especially when they do so by pre-emptively keeping others from entering the market through the control of bottlenecks, thereby inhibiting competition and innovation.

3.1.6 Systemic risk

Systemic risk entails that one failure will propagate through a system and precipitate other participants' failures in a cascade that could eventually bring down the whole system. While the potential for large value payments to contribute significantly to systemic risk has been generally acknowledged and controlled over the last quarter century or so[50], smaller payments have usually not been perceived as holding a significant systemic risk potential.

We suggest that the latter conclusion should be reviewed. The immediate cause for the 2007-2008 worldwide financial crisis was linked to delinquent consumer mortgage payments, which few had predicted could ever cause such turmoil[51]. Obviously, we are aware that the subprime mortgage crisis was magnified and made global by the unexpected impacts of securitization and somewhat carefree use of various derivative products, as well as other factors, but this only goes to show that it has become very hard indeed to predict whether a ripple in the consumer pond might turn into a tsunami everywhere else. The trigger for a crisis may well be found among retail payment service providers.

We therefore suggest that it would be less than prudent to overlook the systemic risk potential that even small-value payments may hold, especially when they are processed by unregulated providers, and that care should be taken to assess and if necessary to minimize that potential. Perhaps it is time to move on from neoclassical economics' focus of risk as an attribute of each individual provider to an approach that acknowledges the interconnectedness of all participants and a more "ecological" analysis[52] of payment networks, *lato sensu*.

---

49 See *inter alia* Ferran, Eilis. *The New Mandate for the Supervision of Financial Services Conduct*. [2012] 65 Current Legal Problems 411, 413.

50 In Canada, CPA's Large Value Transfer System was created in order to minimize systemic risk and CPA's more recent policy of not clearing payments exceeding twenty-five million dollars through ACSS was implemented with the same purpose.

51 See for instance Driesen, David M. *The Economic Dynamics of Law*. Cambridge, Cambridge University Press, 2012. 242 p. Pp. 36-49 and sources quoted therein. See also Black, Julia. *Paradoxes and Failures: 'New Governance' Techniques and the Financial Crisis*. [2012] 75 (6) Modern Law Rev. 1037, especially footnote 1 and corresponding text. Hereinafter "Paradoxes".

52 For an example of such an approach in the context of better understanding the 2007-2008 crisis, see Haldane, Andrew G. *Rethinking the Financial Network*. Speech, April 28, 2009. London, Bank of England, 41 p. Mr. Haldane, who is currently the Chief Economist of the Bank of England, was at the time Executive Director, Financial Stability, at the Bank. Available at http://www.bankofengland.co.uk/about/Pages/people/biographies/haldane.aspx.

3.1.7 Efficiency risk

The Paper subsumes under the "efficiency risks" label issues associated with competition, including innovation (or lack thereof). For convenience's sake and the purposes of this subsection, we will adopt its vocabulary.

Canadian competition law is riddled with substantive deficiencies[53]. Practitioners know very well that the *Competition Act*'s provisions are drafted in such a way that it is practically impossible to demonstrate that any but the most patently egregious behavior violates statutory requirements. In addition, the *Act* has low dissuasive power against large undertakings, with maximum fines of twenty-five million dollars ($25 M) for the most severely punished violation, i.e. price-fixing. By way of comparison, EU competition law imposes a maximum fine in such cases not exceeding ten per cent (10%) of the firm's annual turnover[54]: as a result, at least eleven undertakings have been fined more than three hundred million euros (300 M €) each since 2007, with the highest fine, in 2008, attaining 715 M €[55]. A large financial institution can sweep a twenty-five million dollars fine under the rug – and in a footnote to financial statements; a seven hundred million dollars fine is likely to get the attention of the Board of Directors of any but the very largest institutions (and make front page news from coast to coast, adding reputational damage).

In a nutshell, the current framework is not suited to mitigating significantly efficiency risk in Canada.

Other stakeholders are in a better position than we are to discuss barriers to entry encountered by prospective payment service providers. We would like, however, to address briefly innovation issues.

Over the last few years, a growing number of Canadian stakeholders registered their dissatisfaction with the lack of a convenient system enabling truly fast and low-cost retail payments in Canada, especially since a number of other countries have already implemented such systems. CPA therefore held an informal consultation in 2013 regarding timeliness of payments. The results were striking: while most (if not all) user/stakeholder communities described their needs and indicated their strong interest in a new service, CPA members replied that they did not see a quantified business case for such a service and basically showed no interest.

---

53 See for instance Wise, Michael. *Review of Competition Law and Policy in Canada*. (2003) 5:1 OECD Journal Competition Law and Policy 47. Available at http://www.oecd-ilibrary.org/docserver/download/2403211ec003.pdf?expires=1436796324&id=id&accname=ocid177146&checksum=46664AFA7C393B8B5634B9BA67831FAB. There has been no really significant change to the *Competition Act* since this thoughtful (and scathing) critique was published.

54 *Treaty on the Functioning of the European Union*, art. 101; *Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*, OJ L 1/1, 4.1.2003, article 23 (2). Article 81 of the Treaty, mentioned in the Regulation's title, has since been renumbered as 101.

55 European Commission (?). *Cartel Statistics*. Updated to June 24, 2015 (and March 31, 2014 regarding cartel fines per undertaking). Information taken from table 1.6. Available at http://ec.europa.eu/competition/cartels/statistics/statistics.pdf.

Admittedly, things have changed over the past eighteen months, with CPA embarking on its "New generation" initiative, and it must be commended both for the 2013 consultation and for being more responsive to evolving market needs than its members. The incumbents' first reaction, however, was perceived by a number of observers as typical of their reluctance to innovate significantly and be at the forefront of technological evolution.

Another example was recently (and presumably unwittingly) provided by Canada's largest bank themselves, when they published a "white paper" on payments security that systematically downplays security risks associated with current practices (theirs) and emphasizes the risks and uncertainties related to new mobile payment options – and providers (competitors)[56]. The paper makes very clear the banks' concerns over their potential loss of power over diverse functions (*e.g.* p. 24) and customer-related data (*e.g.* pp. 24-25, 29), as well as a somewhat paternalistic streak (*e.g.* "Issuers will continue to manage the relationship with the customer", p. 32). This is not to say the issues they raise are not important; their approach, however, is so obviously biased by very selective risk analysis, and protectionist in its global outlook, that it does not hold as much water as it would like readers to believe. Meanwhile, in the same week, six (6) British banking groups are launching Apple Pay in the United Kingdom[57].

Perhaps this should come as no surprise. Improving or rebuilding systems such as the payments infrastructure requires investments, and therefore generates costs. In most cases, these costs are first supported by providers, who then turn around and increase their prices, so costs are eventually absorbed by users. This raises a fundamental policy question regarding governance of the system as a whole: is the last word on investments to be left to providers, or users?

In the current system, large providers effectively hold (and exercise) a veto power. Whatever the clamors of users may be, they can choose not to invest in innovation. They may also decide to innovate with scant if any consultation when it serves their own purposes and impose related costs and requirements on users, as retailers have learned

---

[56] BMO, *op. cit.* For instance, the paper decries the authentification challenges associated with mobile payments and vaunts the superiority of EMV standards, but does not dwell on the fact that Canadian banks currently accept not only PIN-less transactions, but card-not-present transactions that raise as much, if not more risk than the services they criticize explicitly. The banks also raise concerns about untested data protection in the mobile space, but conveniently forget to mention that increased recourse to tokens in the mobile payment ecosystem might well reduce significantly the risk of payment card number thefts, which are too often kept by acquirers, merchants or other intermediaries. Amusingly, on the same day the banks issued their paper, we learned that thousands of Canadians may have had their card data stolen from a retailer: Tencer, Daniel. *Up to 60,000 Canadians Affected By Possible Walmart Credit Card Data Breach*. The Huffington Post Canada, July 13, 2015. Available at http://www.huffingtonpost.ca/2015/07/13/walmart-canada-data-breach-credit-cards_n_7787698.html.

[57] Williams, Rhiannon. *Apple Pay UK launch – how and where to use it*. London, The Telegraph, July 14, 2015. Available at http://www.telegraph.co.uk/technology/apple/11736823/Apple-Pay-UK-launch-how-and-where-to-use-it.html. For Canadian banks' approach to Apple Pay, see footnote 16, *supra*.

through the EMV chip implementation and PCI compliance affrays. The result is not satisfactory, to say the least.

On the other hand and should the last word be given to users, providers will reply by saying in effect that they are being expropriated: they will not wish to have investment decisions imposed on them by others, especially if those "others" include competitors from parallel payment streams. When such decisions have been mandated for the public good in the past, the power to do so was generally left to the State, rather than to self-regulatory bodies.

In the United Kingdom, the creation of the *Faster Payments* service was spurred rather explicitly by regulators[58]. In Australia, as noted above, authorities are keeping a tight rein on the industry in order to "foster" cooperation and innovation. In the United States, the Federal Reserve Bank has chosen to show strong leadership in order to get the industry to implement new technologies, including the facilitation of faster payments. In Canada, CPA is valiantly embarking on a mission to herd cats and obtain consensus on a renewed payment infrastructure.

There is no easy solution. Clearly, users no longer accept that they must remain at the mercy of suppliers and the *status quo* is not a valid policy option if Canada is to make any significant progress in the payments arena over the next decade. It is unlikely, however, that incumbent providers will gladly abandon the position of power they currently occupy. Yet both sides are condemned to find some common ground and define how, and to what extent, they are willing to share power over the fate of the Canadian payments system. Determining who will be responsible for facilitating that process will be among the most interesting discussions ensuing from the process started with the Paper.

3.1.8 Social risk

While social risk and vulnerabilities associated thereto seldom figure as chapter headings in consultations related to payment systems, they should in fact stand at the forefront of issues considered by policymakers[59]. Canadians' vulnerabilities inform the ways they can use payment mechanisms; in turn, the design and deployment of such mechanisms can increase social exclusion, to the detriment of the whole economy.

Social risk management was advocated as early as 2003 by the International Bank for Reconstruction and Development[60]. It stems from the realization that it is necessary not

---

[58] See in particular Payment Systems Task Force. *Payment Systems Task Force announces faster payment service*. Office of Fair Trading press release. London, May 25, 2005. The Task Force was set up as a response to an inquiry on competition in the financial system and was chaired by the Office of Fair Trading, which was at the time a major regulator of consumer protection and competition issues in the United Kingdom. Archived at http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/news-and-updates/press/2005/94-05.

[59] See in particular *G20 High-level principles on financial consumer protection*. Paris, Organisation for Economic Co-operation and Development, October 2011. 7 p. Available at http://www.oecd.org/daf/fin/financial-markets/48892010.pdf.

[60] Holzmann, Robert; Sherburne-Penz, Lynne; Tesliuc, Emil. *Social Risk Management: The World Bank's Approach to Social Protection in a Globalizing World*. Washington, The World

only to assist vulnerable populations, but to reduce vulnerability *per se*. Insofar as social exclusion can be broadly defined as the "restriction of access to the capabilities essential to functioning in adult life" [61], it hinders participation in social and economic life and generates costs which, in the aggregate, are significant. From the economic standpoint of the provider, factors causing social exclusion often act as negative externalities that it imposes on others; from the standpoint of the vulnerable person, they are powerful, and sometimes very practical, barriers to participating to economic and social life.

Exclusion is associated with being denied access to resources, be they material, cultural or emotional[62]. Its consequences can be cumulative, with a low level of literacy leading to unemployment and poverty, which can trigger depression and further reduce employability, for instance. Many cases of exclusion are much less dramatic, of course; but millions of Canadians are vulnerable to one or many forms of exclusion. This also entails a consequence which should be of great concern to policymakers: the ideal average Canadian consumer does not exist and policies and markets must deal with a formidable variety of capabilities and vulnerabilities.

Consumers are highly heterogeneous. There are too many factors which can lead to exclusion in Canadian society for us to attempt their description or analysis here. A preliminary assessment had been prepared for the benefit of the Task Force for the Payments System Review[63], which can inform a partial list of issues that should be kept in mind:

- income and wealth;
- education, knowledge and literacy;
- age;
- health and disabilities;
- population mobility and immigration;
- geography;
- connectivity

Bank, May 2003 20 p. Available at http://siteresources.worldbank.org/SOCIALPROTECTION/Publications/20847129/SRMWBApproachtoSP.pdf .

61 Bynner, James. *Risks and Outcomes of Social Exclusion: Insights from Longitudinal Data*. London, University of London. 29 p. P. 6. Available at http://www.oecd.org/edu/school/1855785.pdf.

62 Bynner, *ibid.*, p. 4.

63 St Amant, Jacques. *The problem with adoption: an overview of some critical factors concerning payment mechanisms and user adoption in Canada*. Montréal, Task Force for the Payments System Review, February 22 2011. 98 p. See in particular pp. 27-44. Sadly and while the Task Force's archived website still refers to the document (http://paymentsystemreview.ca/index.php/resources/resources-and-links/index.html, subsection "Payments and Usage"), the link to the document itself is now inoperative.

At least 8.8% of the population of Canada "lived in low income in 2011", according to Statistics Canada[64] – whose threshold for low income is seen by many working at the grassroots level as being much too low.

Forty-nine percent (49%) of Canadians score below three (on a scale of five) in an assessment of literacy proficiency levels[65], essentially marking them as functionally illiterate.

In 2012, 13.7% of Canadians over fifteen lived with disability, for a total of nearly 3.8 million individuals[66]; according to some estimates, half a million Canadians live "with a significant vision loss" [67], which is likely for instance to impact their interactions online.

Over twenty percent (20.6%) of people living in Canada in 2011 were foreign-born, nearly a fifth of whom arrived in this country within the last decade and 6.5% of whom did not know either English of French[68]. Millions of Canadians send funds to family or relations in their country of origin on a regular basis through remittance services, accounting for the fact that well over five billion dollars were transferred in that way in 2014[69]. Most of those services are unregulated, and some are somewhat opaque.

In 2013, all urban communities in Canada had access to residential broadband Internet connectivity, but only 84% of rural regions had access to broadband; even so, the level of residential penetration for Internet access (whatever the speed) was only 80%[70], indicating that a fifth of Canadian households do not have Internet access at home, mostly in rural areas. Access is of course even more difficult in geographically remote

64 Statistics Canada. *Income of Canadians, 2011*. Statistics Canada, The Daily, June 27, 2013. Consulted at http://www.statcan.gc.ca/daily-quotidien/130627/dq130627c-eng.htm.

65 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. 102 p. See *inter alia* pp. 16-17. Consulted at http://www.statcan.gc.ca/pub/89-555-x/89-555-x2013001-eng.pdf.

66 Statistics Canada. *Table 115-0014 – Total income for adults with and without disabilities, by age group and sex, Canada, provinces and territories)*. Ottawa, Statistics Canada, May 2015. Consulted at http://www5.statcan.gc.ca/cansim/a26?lang=eng&retrLang=eng&id=1150014&pattern=115-0014..115-0023&tabMode=dataTable&srchLan=-1&p1=-1&p2=31.

67 Canadian National Institute for the Blind. *Fast Facts about Vision Loss*. Consulted at http://www.cnib.ca/en/about/media/vision-loss/pages/default.aspx, May 27 2015.

68 Statistics Canada. *2011 National Household Survey: Immigration, place of birth, citizenship, ethnic origin, visible minorities, language and religion*. Ottawa, Statistics Canada, The Daily, May 8, 2013. Consulted at http://www.statcan.gc.ca/daily-quotidien/130508/dq130508b-eng.pdf.

69 Finance Canada. *Strong leadership – A balanced-budget, low-tax plan for jobs, growth and security*. Ottawa, Finance Canada, April 21 2015. P.297, quoting World Bank bilateral remittance data. Consulted at http://www.budget.gc.ca/2015/docs/plan/budget2015-eng.pdf.

70 Canadian Radio-Television and Telecommunications Commission. *Communications Monitoring Report*. Gatineau, CRTC, October 2014. 268 p. See in particular pages ii, 171. Consulted at http://crtc.gc.ca/eng/publications/reports/PolicyMonitoring/2014/cmr.pdf.

areas, and compounds the absence of financial institutions *in situ*[71]. Even when access is technologically possible, it may not be affordable for all Canadians[72].

Listing socio-demographic factors does not equate to analysis and situations are often complex. For instance, a number of older Canadians are still uncomfortable with new technologies, simply do not see why they should invest energy in mastering them when they expect not to use them for a long period or prefer to cash their cheque at the bank to provide them an opportunity for social contact, whereas others prize electronic payments for helping them to alleviate personal mobility issues. Those variables, however, should remind policy makers that millions of Canadians do not fit the model of the white-collar Toronto suburbanite with a university degree and a stable job near Bay Street.

Even more prevalent than socio-economic risk factors are behavioural risks, to which even those Toronto suburbanites are not immune. Simply put, humans do not always believe in the coldly rational way postulated by neoclassical economics or contract law. They tend to overestimate short-term gain and discount long-term risk, hence they often forego the cold-headed risk assessment that neoclassical theory assumes they will perform[73]. The way humans assess risk therefore becomes a risk in itself and one that can

---

71 The lack of financial institutions in the North was noted by the Task Force's Consumer Issues Advisory Group, and is documented: see *e.g.* Option consommateurs. *L'accès aux services financiers pour les populations du Nunavik, du Nunavut et des Territoires du Nord-Ouest*. Montréal, Option consommateurs, June 2007. 73 p. Available at http://option-consommateurs.org/documents/principal/fr/File/rapports/services_financiers/oc_serv_fi_grand_nord_200706.pdf. As a result, retailers such as the North West Company provide financial services to their customers and are actually expected by them to do so: see *e.g.* Martens, Kathleen. *Plan to direct-deposit government cheques rolled back*. APTN National News, June 30, 2015. Available at http://aptn.ca/news/2015/06/30/plan-direct-deposit-government-cheques-rolled-back/ (APTN is the Aboriginal Peoples Television Network). In order to fulfil consumer needs, the North West Company has recently introduced a direct deposit solution (including payroll and government benefits) through a Visa Prepaid card: *The North West Company introduces first scalable direct deposit solution for prepaid cards to stores across Northern Canada*. Press release, June 17, 2015. Toronto, The North West Company. Available through http://www.northwest.ca/media/media-releases.php. The card, which is branded "We Financial", a trademark owned by the North West Company, is issued by the Bank of Nova Scotia (see *We Financial Visa Prepaid*, available at https://ca.visaprepaidprocessing.com/WeFinancial/Pages/Home.aspx); it is a prepaid card which can be used to accept direct deposit and set up pre-authorized payments, as well as serve at point of sale, online or at a banking machine, but the remarkably interesting agreement which governs its use (*Cardholder Agreement We Financial Visa Prepaid Card*, available at https://ca.visaprepaidprocessing.com/WeFinancial/PRC965/CP965-T03-001/docs/terms.htm) is adamant that it shall not be deemed to be a bank account and specifies that the balance on the card is not an insured deposit.

72 PIAC is a member of, and acts as counsel for, the Affordable Access Coalition, which is requesting status as an intervener before the CRTC in the context of the latter's ongoing review of basic services; for more data on this issue, please refer to Affordable Access Coalition. *Phase 1 Intervention – Telecom Notice of Consultation CRTC 2015-134 – Review of basic telecommunications services*. Ottawa, July 14, 2015. 132 p. Available at http://www.piac.ca/wp-content/uploads/2015/07/Affordable-Access-Coalition-TNC-2015-134-14-July-2015-FINAL.pdf.

73 For an outline of some of these issues, albeit in a different context, see Schwarcz, Steven. *Rethinking the disclosure paradigm in a world of complexity*. [2004] 1 U.Ill. L. Rev 1,

be quite significant, especially where a person is presented with desirable practical benefits that are almost immediately available, while risks are eventual, abstract and complex to analyze, as in the consumer payments area.

When added to the deep informational asymmetries characteristic of apparently simple, but in fact complex products such as payment mechanisms, behavioural risks make it essentially impossible to rely on disclosure to protect consumers. Networks are too intricate, business relationships between providers are too opaque, risks are too varied to provide actionable information in a format which people will read and understand; even if they did, they could not alter standard form agreements, which are usually incomprehensible. Moreover, requirements to disclosure do not effectively address unconscionability issues and, since consumers have limited choice between contractual terms which are most often as opaque as they are unfair, and which are in many cases essentially similar from a provider to another, competition cannot eliminate the worst terms and conditions from the market. Disclosure is therefore not an effective consumer protection policy in this area – or, at the very least, it needs to be augmented by rules that prohibit various types of market conduct.

Many Canadians need different services, and sometimes very different interfaces, in order to use mechanisms such as electronic payments. If their needs are not taken into account, Canada will exclude an increasing proportion of its population from the economic mainstream. This may look to providers as a gain, insofar as they do not feel the need to adapt to vulnerable populations in the short term, but it generates huge negative externalities for the country as a whole, and profound challenges to the individuals who find themselves on the wayside.

3.1.9 All is well…

Providers incur solvency, operational and legal risk. They foist legal risk on users, who would also be saddled with the consequences of a significant occurrence of solvency or operational risk. Providers' reputations are at the mercy of their systems, or others', vagaries. The ability of consumers to use various payment mechanisms is constricted by a number of vulnerabilities, which providers do not always seek to alleviate when they design their systems, thus generating a risk of exclusion. And systems and providers have become so closely intertwined that it is next to impossible to predict whether any failure could effectively be contained, or whether it would contaminate other participants to the payments ecosystem.

All risks are not borne equal, and need not be managed identically. It is now generally accepted that two major factors should be considered when weighing risk and required containment measures: magnitude and probability of occurrence. The Paper, and especially the conceptual oversight framework, leaves the impression that its authors are mostly concerned with the magnitude of risk, rather than probability of occurrence. Risks that are catastrophic at a system level are seen as "severe"; risks that may occur on a

---

especially pp. 13-17 and sources quoted therein. For a more complete summary of issues related to behavioural economics, see in particular Kahneman. *Thinking, fast and slow*. Doubleday, 2011. 499 p. Daniel Kahneman received the Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel in 2002 for his work in this area.

monthly basis and trouble thousands of users, while not threatening the system as a whole, seem to be perceived as acceptable, if not routine. We cannot share that view. Both risks that are very likely to crystallize, or that would have catastrophic consequences, should count among a regulator's priorities.

The implication for the payments environment is that risks incurred by the largest operators, who are often the incumbents, should rank high among regulatory concerns. The failure of a major provider could impact millions of consumers and businesses and could be, if not necessarily apocalyptic, at least highly disruptive. As noted above, incumbents in particular are not immune to operational risk or to the genesis of legal risk. Any notion that current Canadian providers are "safe", and that only new providers should be required to "get their act together" somehow (preferably, in the incumbents' view, by emulating all the onerous requirements already imposed on them, whether they are relevant or not), would be not only factually inaccurate, but should be seen as a shrewd fallacy that would be both inconsistent with the fundamental notion of functional regulation and would lead to imposing perhaps inappropriate requirements on some providers, while doing nothing to remedy the incumbents' numerous shortcomings. In effect, it would amount to using the regulatory framework as a barrier to entry and would be anticompetitive.

The Canadian payments ecosystem needs a clean slate. We need to dispel any notion that, because the system currently works and does not make the headlines on a daily basis, it is, if not perfect, at least highly satisfactory. It is not. Our ecosystem works well for the incumbents and it is admittedly fairly safe – so safe (and self-serving) that it likely inhibits competition and innovation, and transfers a significant amount of risk on parties other than the incumbents, who in many cases are not the least cost avoider by any margin and lack market or legal power to fight back.

The various types of risks associated with payment operations need to be precisely identified and weighed. Participants must be required to mitigate the risks they generate in ways that are proportional to the magnitude and frequency of occurrence of those risks, and mitigation measures need not be identical for all types of participants. Where, for instance, a deposit-taking financial institution with hundreds of billions of dollars on deposit from consumers is required to participate in a deposit insurance scheme, a closed-loop prepaid card issuer with less than fifty million dollars in outstanding value at any time might perhaps post some sort of security bond to the regulator, or be required to segregate funds in a legally effective way, so as to ensure a comparable level of protection to customers who simply trust they will get their money back. In both cases, however, the risk should be weighed, and addressed.

All in all, this is not the description of a robust environment: our payments ecosystem is currently laced with risks, many of which are inadequately addressed. That there has been no crisis in various areas should not be taken as meaning they are risk-free, but rather that consumers have been lucky (or quiet); sooner or later, something will break, with the industry (or part thereof) expressing surprise and dismay at such an "unforeseeable" event.

We would finally add that risk-based analysis that targets separately specific payment functions is not necessarily conducive to the clear identification of problems in areas such as market entry and innovation. In short, all is not going well in the Canadian payments ecosystem. If the play is to end well, much will need to happen.

3.2 The Paper and its flaws

3.2.1 Regulation is not a sin

3.2.1.1 an inauspicious title

Problems with the Paper start with its title. At the outset, a position is taken that oversight and innovation must be "balanced", hence that they necessarily pull in opposite (or at the very least, different) directions. This is a fundamental policy mistake, which taints the whole approach taken in the Paper.

Oversight and regulation are not wrong *per se*. They do not necessarily hinder innovation and economic activity. In fact, they are essential to both.

Regulation should not been seen as being necessarily restrictive or nefarious to industry. In many cases, it enables or facilitates activities[74]. In fact, some notable economists actually view regulatory frameworks as "captured" by the regulated industry itself and "designed and operated primarily for its benefit" [75]. Others, such as Ronald Coase, also from the Chicago School of Economics and the 1991 laureate of the Nobel Memorial Prize in Economic Sciences, acknowledge that regulation is in some cases necessary.

Coase received the prize in large part for a paper he published in 1960[76]. He was concerned with (negative) externalities, and how to reduce them. In his view and where there are only two parties involved in a relationship, contract and property law are usually all that is required to ensure appropriate resolution of any disagreement. But as externalities impact more stakeholders, transaction costs associated with negotiating hundreds or thousands of agreements become excessive:

> In the standard case of a smoke nuisance, which may affect a vast number of people engaged in a wide variety of activities, the administrative costs might well be so high as to make any attempt to deal with the problem within the confines of a single firm impossible. An alternative solution is direct

74 Orbach, Barak. *What is Regulation?*.[2012] 30 Yale Journal on Regulation Online 1, 4. See also Driesen, *op. cit.*, pp. 27-29, 54.

75 Stigler, George. *The Theory of Economic Regulation*, [1971] 2 Bell J. Econ. & Mgm't Sci 3, 3. While we are certainly mindful of the risk of regulatory capture, we do not quite share Pr. Stigler's pessimism about regulatory schemes. It might be useful to point out that Pr. Stigler could hardly be considered as an unsubstantial leftist radical, as he received the 1982 Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel, in particular for his study of the causes and effects of public regulation, and was known as a leader of the so-called Chicago School of Economics.

76 Coase, Ronald. *The Problem of Social Cost*. (1960) 3 J. Law and Econ. 1-44.

> government regulation. Instead of instituting a legal system of rights which can be modified by transactions on the market, the government may impose regulations which state what people must or must not do and which have to be obeyed.
>
> […] It is clear that the government has powers which enable it to get some things done at a lower cost than could a private organization (or at any rate one without special governmental powers). But the governmental administrative machine is not itself costless. It can, in fact, on occasion be extremely costly. Furthermore, there is no reason to suppose that the restrictive and zoning regulations, made by a fallible administration subject to political pressures and operating without any competitive check, will necessarily always be those which increase the efficiency with which the economic system operates. Furthermore, such general regulations, which must apply to a wide variety of cases, will be enforced in some cases in which they are clearly inappropriate. From these considerations it follows that direct governmental regulation will not necessarily give better results than leaving the problem to be solved by the market or the firm. But equally there is no reason why, on occasion, such regulation should not lead to an improvement in economic efficiency. This would seem to be particularly likely when, as is normally the case with the smoke nuisance, a large number of people are involved and in which therefore the costs of handling the problem through the market of the firm may be high.[77]

We agree that governments are fallible – although they are subject to democratic check, which is surely at least as legitimate as competitive check. And we most certainly agree that there are situations where regulation improves economic efficiency, because it reduces transaction costs. With Coase, we incline to the view that regulation is warranted where its cost is lower than transaction costs associated with solving problems otherwise, such as when a large number of people experience negative externalities – that is, practically always in the current Canadian payments market.

In addition, the implementation of a fair, clear and cohesive regulatory framework would foster legal and financial certainty. Participants in the market would know what the rules of the road are, and could assess their risks and investments accordingly. Regulation can actually nurture an environment that is more conducive to innovation than

---

77 *Ibid.*, part V.

the normative chaos and unpredictability currently inhibiting our payments markets. No less an authority in neoclassical economics (and also both a leader of the Chicago School of Economics and laureate of the 1974 Nobel Memorial Prize in Economic Sciences) than Friedrich Hayek agreed that some regulation is necessary for markets to function:

> The functioning of a [sic] competition not only requires adequate organization of certain institutions like money, markets and channels of information – some of which can never be adequately provided by private enterprise – but it depends, above all, on the existence of an appropriate legal system […][78]

Postulating that one needs to "balance" regulatory oversight and innovation implies that regulation would mostly be bad, and innovation would mostly be good. While fostering innovation is usually good (which is not to say that all innovations are[79]), establishing the proper regulatory framework is not only good, but necessary. Therefore and simply as a matter of neoclassical economic theory and policy, the notion, implicit in the Paper's title, that regulating the payments industry is fraught with the risk of stifling innovation or inducing paralysis is unsustainable.

3.2.1.2 why and when regulate?

From the traditional neoclassical economic standpoint, the main reason public authorities would regulate is because there is some demonstrated market failure. The question thus becomes: are there market failures in the Canadian payments system? Our unequivocal answer is affirmative. There are significant issues with the level of competition in the market and with the information available to market participants, as well as with obstacles facing customers who wish to participate in the market.

The Canadian payments market is currently characterized by the domination of a small number of financial institutions which control access to a large part of Canadians' liquid assets (in the form of deposits) and play a dominant role in the evolution of networks such as CPA, Interac, Visa and MasterCard, thus generating a significant risk of oligopsonistic behavior by network participants, whose collaboration networks need in order to succeed[80].

---

78 Hayek, Friedrich. *The Road to Serfdom*. Fiftieth Anniversary Edition. Chicago, The University of Chicago Press, 1994. 274 p. P. 43. See also Chant, John. *Regulation of financial institutions – a functional analysis. Technical Report 45*. Ottawa, Bank of Canada, January 1987. 83 p. See in particular pp. 46-47 regarding the legal framework of financial services and its preventive character; see also p. 50 regarding regulation and transaction costs. See also subsection 2.8.3 on the "Role of the payments system".

79 Lumpkin, Stephen. *Regulatory Issues Related to Financial Innovation*. Financial Market Trends, vol. 2009/2. Paris, OECD, 2009. 31 p. Available at http://www.oecd.org/finance/financial-markets/44362117.pdf. While we suspect the text was written before the impacts of the 2007-2008 crisis had been fully assessed, and shows perhaps slightly more optimism in the market than might have been warranted, it is interesting, and we note in particular its strong recommendation that regulators rely on the precautionary principle when dealing with financial innovation (p. 19, step 7).

80 Influence over payment networks takes many forms other than membership or control of the board of directors. For instance, a large network participant can have disproportionate

In addition, the larger networks and their participants are few, and dominate the landscape. Market entry by new contenders is therefore quite challenging, especially in an area where an established reputation is a valuable asset and network effects play a strong role. New competitors may in fact be practically banished from the Canadian market if no financial institution will open them an account, so that they can operate normally. Incumbents are in a position to act as bottlenecks, and there is anecdotal evidence that they do[81].

Responsiveness to user needs is also likely to be constrained by insufficient competition: if innovators are unable to enter the market, there is limited incentive for the few active participants to innovate.

In other words, upstream payment markets may be both oligopsonistic and rife with barriers to entry, while downstream markets are oligopolistic and insufficiently responsive to customer demand. The low level of innovation in the Canadian ecosystem, compared for instance with the United States market, suggests that there is limited entry. Corporate customers would probably have much to say about responsiveness to their needs on the part of established Canadian providers. Merchants' simmering dissatisfaction with payment networks' pricing and security requirements do not need elaboration.

Users' ability to assess the financial stability and operational capabilities of providers is extremely limited. Financial information is insufficiently available, and in any case quite (and increasingly) difficult to interpret for non-experts[82]. Judging technical proficiency is also beyond the abilities of most users, and especially of most consumers. There is therefore significant informational asymmetry that makes market participants unable to assess financial and operational risk, and weigh whether they can trust a potential provider.

---

influence in rulemaking within the network or be in a position to effectively veto a project by threatening not to participate in it (thus compromising the advantages of network effect) or to withdraw from the network altogether. Arguably, some networks need their major members more than those members need the network, especially in a concentrated market like Canada. Unfortunately, the Competition Bureau took no heed of those elements in its 2008 decision on duality referred below in footnote 216. For recent comments over a Canadian bank's market power over a payment network, see Shecter, *op. cit*.

81 For instance, the author had the opportunity to discuss informally with witnesses before the Standing Committee on Industry, Science and Technology of the House of Commons in October 2011, when the Committee held hearings on e-commerce, and one individual in particular mentioned that he had personal knowledge of situations where Canadian financial institutions would simply not open accounts to potential competitors in the payments market. The same issues are currently raised in the United Kingdom: Wallace, Tim. *Big banks accused of running cartel in payments*. The Telegraph, June 29, 2015. Available at http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/11706119/Big-banks-accused-of-running-cartel-in-payments.html.

82 While all situations are not as challenging as the Enron case or disclosure related to exotic financial instruments, even expert analysts increasingly face difficulties assessing financial information, due both to the quantity and complexity of the data: see for instance Schwarcz, *op. cit*.

Legal risk is both increased and hidden through legal jargon which most consumers cannot understand – and could not vary, as it is embedded in standard form contracts that are cast in stone[83]. It is in fact a rational choice for a consumer not to attempt reading and understanding an agreement that cannot be negotiated and can hardly be deciphered, especially when she can reasonably assume that competitors' agreements are just as unfavorable[84]. Here again are significant informational asymmetries between providers and users[85].

Those asymmetries are compounded for a significant proportion of the population by a broad range of vulnerabilities. In addition, serving users in more remote or less densely populated areas may increase the costs borne by providers beyond what they believe is acceptable, while there is no mechanism to compensate underserved users for the negative externalities generated by those providers' business decisions.

---

83 For an overview of some issues related to this heatedly discussed area, see for instance Bakos, Yannis; Marotta-Wurgler, Florencia; Trossen, David. *Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts*. NYU Center for Law, Economics and Organization. Working Paper No. 09-40, October 2009. 47 p. Consulted through http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1443256 and also published at (2014) 43:1 Journal of Legal Studies 1-35.

84 There is scant competition in the market over the contents of payment service provider agreements. The only potential exception may relate to "zero-liability" claims which, when one peruses the small print, are in fact generally much less generous than they sometimes purport to be. The *very* small print (apparently 6 points) of the footnote at the bottom of the Visa Zero Liability Policy statement on the network's website remains a case in point (http://www.visa.ca/en/personal/securewithvisa/liability.jsp). Of course, sometimes the small print is not even provided. For instance, Interac's web page presenting its *Flash*® service (http://www.interac.ca/en/interac-flash/interac-flash-for-consumers) mentions its zero liability policy but includes a footnote specifying that "Some conditions apply" and pointing to another web page (http://www.interac.ca/index.php/en/security#zero-liability), which provides glowing statistics and states that "Our Zero liability policy means cardholders are protected from any fraud losses", without acknowledging the existence of any "applicable conditions" or providing any information whatsoever regarding what those "conditions" might be. Another page recommends that the user consult her "financial institution for details" (http://www.interac.ca/en/security/security). We suspect that, by this point, the average consumer will be at a loss to understand with any certainty what Interac's zero liability policy may actually mean for her in practical terms in her dealings with her financial institution. However and should she be both persistent and a Royal Bank customer, for instance, she might learn through her Bank's website that Interac's Zero liability policy means "you are not liable for fraudulent charges provided that you take reasonable precautions to protect your Client Card and your PIN, as set out in your RBC Client Card agreement" (http://www.rbcroyalbank.com/debitchip/_assets-custom/pdf/Final%20Flash%20Brochure%20-%20ENG.pdf). In other words, RBC tells us that, in its view, Interac's policy means what RBC says it means in its own agreement (link to said agreement not included on RBC's aforementioned web page).

85 For greater certainty, let us insist that we are not advocating here for solutions predicated on providing more information to users in order to remedy these asymmetries: rather, we are of the view that they are practically impossible to eliminate (barring requiring every consumer to hold university degrees in law, economics and information technology) and that the only workable solutions will directly address the behaviors which informational asymmetries make possible (and profitable) on the part of providers.

In other words, there are currently numerous types of market failures in the Canadian payments system, and there is no reason to believe that most will be remedied by the market on its own; they certainly have not been over the past decade. Providers have no financial interest in doing so, and users are not in a position to compel them to act otherwise through the conclusion of millions of agreements: transaction costs for all parties would be disproportional to their resources.

If it is an article of faith of neoclassical economy that well-functioning markets are efficient, it would seem reasonable to suspect that dysfunctional markets will be inefficient. The Canadian payments market is a case in point. A small number of providers massively externalize their risks and impose excessive prices, while refraining to provide services customers require and need. Let three examples suffice to support that last statement: consumer standard form agreements, interchange fees and processing of payment-related remittance information (or lack thereof). Those inefficiencies, and others, would by themselves abundantly justify regulatory intervention – and they already do in many jurisdictions.

3.2.1.3 beyond efficiency

While economic considerations currently loom large in the public discourse, they are by no means the only reasons why government should regulate. Greek philosophers already distinguished clearly between economics, related to management issues, and the much broader questions associated with government of the *polis*, the public sphere, twenty-three centuries ago[86]. Making good policy extends beyond assessing whether the economy is reasonably well managed. In fact, there are now authors opining that the "set of understandings about how markets [work] that were based in neo-classical economics" and which inspired the financial sector's regulatory sector after 1990 "[…] were largely erroneous, with disastrous consequences." [87]

Scholarship currently identifies numerous theories of regulation, which can be brought within a few broad categories. Theories in one of those categories emphasize efficiency, and tend to reflect economic concerns such as those noted above; although they have dominated the past quarter century, they are now disputed. Another category gives precedence to procedural concerns: regulation should ensure that proper procedure is followed to establish rules, be it for instance through "interest representation" or "collaborative governance" [88].

---

86 The distinction is already made clearly in the *Οἰκονομικά* (*Economics*), traditionally ascribed to Aristotle but likely written by one of his students, as well as in Aristotle's *Politics*. Aristotle lived from 384 to 322 BC.

87 Black, Julia. *Seeing, Knowing and Regulating Financial Markets: Moving the Cognitive Framework from the Economic to the Social*. LSE Law, Society and Economy Working Papers 24/2013. London, 2013. 47 p. P. 2 Available at http://www.lse.ac.uk/collections/law/wps/WPS2013-24_Black.pdf. Hereinafter "Seeing". The author argues for the development of "a far more enriched, and realistic, conception of markets than the relatively sparse economic model assumes" (p. 3) and provides a number of leads to follow, which unfortunately exceed the ambit of this paper.

88 This typology summarizes and simplifies the one developed by Adler, Matthew. *Beyond efficiency and procedure: a welfarist theory of regulation*. [2000] 28 Florida State U. L. Rev. 241-338. In particular, part II of Adler's paper provides a strong refutation of theories strictly

Yet other scholars articulate a view that "overall well-being is morally relevant to regulatory choice" and should be taken into account together with distributive, deontological and perfectionist criteria[89]. That is, issues such as ensuring equality (and giving priority to the well-being of those who are worse off), ensuring respect of basic rights and seeking "good" outcomes (*e.g.* caring about nonsentient species, reduced climate impact or cultural improvement) are not only valid reasons for regulating, but must actually be taken into consideration. Justice goes beyond efficiency, and so does the policymaker's remit.

Especially within the context of the various types of vulnerabilities mentioned earlier, concerns such as systemic discrimination resulting from business or technological choices, or the consequences of geographic remoteness on social and financial inclusion, should be addressed. Efficiency-focused processes, such as cost-benefit analyses, simply cannot take into account such factors, which by their nature are largely qualitative, rather than quantitative – yet such factors should be considered in any regulatory process. As one legal scholar puts it, "We do not want society to efficiently drive itself off a cliff" : assessing efficiency is not the same as setting goals, and the latter should be the primary concern for those who establish public policy[90]. Nor can cost-benefit analyses easily appraise *ex* ante processes which are highly dynamic, such as the impact of the introduction of new technologies[91], or help determine how to attain economic development through innovation[92].

Methods such as scenario analysis and stakeholder involvement may be much more effective in designing proper policy than neoclassical cost-benefit analysis. That is in part because it is often essential to determine who is (more or less) empowered as a result of a regulatory intervention, in order to fully understand how that intervention will be implemented and how it will affect stakeholders' ability to foster change in the future[93]. Competition law provides an interesting example, as the most efficient market may actually not be consonant with global social welfare, and especially with consumer

based on efficiency concerns, which is too complex to summarize herein (see especially pp. 244-249).

89 *Ibid.*, 288-317. See also, for instance, White, Barbara Ann. *Economic efficiency and the parameters of fairness: a marriage of marketplace morals and the ethics of care*. [2005]15:1 Cornell Jnl of Law and Public Policy 1-72 Zamir, Eyal; Medina, Barak. *Law, Morality, and Economics: Integrating Moral Constraints with Economic Analysis of Law*, [2008] 96:2 California Law Rev. 325-391.

90 Driesen, *op. cit.*, pp. x, 22.

91 *Ibid.*, p. 3. An added challenge for cost-benefit analysis is to properly assess *all* costs and benefits: too often, the costs of government intervention are put forward, without giving due consideration to the significant private transaction costs such intervention makes avoidable (*ibid.*, p. 33).

92 Innovation is inherently messy and may, in the short run, be highly ineffective. It is claimed – likely apocryphally – that Thomas A. Edison experimented with 10 000 prototypes before successfully testing a carbon filament and developing the light bulb as we came to know it. If Edison had had to answer to a twenty-first century MBA or accountant, we suspect he would have been told that his costs far exceeded quantifiable benefits and that he should move on long before he succeeded…

93 Driesen, *op. cit.*, pp. 65-66.

welfare, in the long run, and may entrench incumbents to such an extent that even the most innovative contenders are barred from entering the market, thus making it inefficient over time.

This is not to say that efficiency, or the design of processes ensuring proper stakeholder participation, should not be of concern to policymakers and regulators; there are, however, other dimensions which they should take into consideration.

The issue therefore is not "minimal" regulation in order to avoid any risk of economic damage: it is smart regulation, to borrow from the terminology in use at the Organisation for Economic Cooperation and Development. Not whether or to what (limited) extent to regulate, but why, how and by whom. This opens a much more interesting discussion.

A sound regulatory policy is a very effective tool for the State to wield. When underpinned by solid research and analysis and championed by a leader with clear long-term objectives, it can serve to support reform and sustain general welfare[94]. It may actually be necessary in order to accomplish needed reforms: there can also be State failure to do its part in fostering the changes that must happen in order to facilitate developments such as innovation and increased accessibility to essential services, or to foster trust in institutions such as the payments system, which may be eroded in a period of fast-paced change.

We agree that regulation can become obsolete and should be updated. We also agree that, in some cases, traditional "command-and-control" regulation may lack flexibility and actually backfire. However, Canada is currently in a different situation: simply put, this is a case of State failure to provide the regulatory framework that would enable and enhance the development of a payments ecosystem adapted to the needs and capabilities of the twenty-first century.

3.2.2 The "conceptual oversight framework"

Another fundamental problem associated with the Paper is the "Conceptual oversight framework" which has been developed by the Government, without appropriate and comprehensive input from stakeholders[95]. Such input might have helped to rectify the basic flaws underlying the framework, and which have especially obvious consequences when it comes to the retail market.

---

[94] For an overview of these issues, see *e.g.* Organisation for Economic Co-operation and Development. *Regulatory Policy and the Road to Sustainable Growth*. Draft Report. Paris, 2010. 104 p. Pp. 11-13, 15-16. Available at http://www.oecd.org/regreform/policyconference/46270065.pdf. See also Driesen, *op. cit.*, pp. 27, 29.

[95] That framework was partly outlined in the documentation accompanying the 2014 Budget (*The road to balance: Creating jobs and opportunities*. Ottawa, Department of Finance, February 11 2014, p. 131). Unfortunately, the consultation announced therein for "the Spring of 2014" did not happen until 2015, after Parliament had begun to legislate in accordance with that framework by modifying the *Payment Clearing and Settlement Act* in order to improve the oversight of so-called "prominent" payment systems.

3.2.2.1 a warped framework

In the Government's current view, the oversight of the Canadian payments system can be divided into three buckets: there are "systemically important" systems, "prominent" systems and "National Retail Payment" systems. While lip service is given to ensuring user protection and efficiency as appropriate, it becomes quickly obvious that "safety and soundness" concerns were paramount in designing this framework, and especially so as they relate to the payments system as a whole. A sentence in the second paragraph of subsection 3.2 of the Paper is telling in that regard:

> Moving towards the left along the continuum [96], the severity of risks would increase, with potential impacts on the economy.

In other words, if (say) Interac (a national retail payment system) was to shut down without notice, the risk and the impact on the economy would not be viewed as "severe". That may be true from a prudential standpoint, but it certainly would not be perceived as such by merchants and consumers. Yet within the framework implemented by Government, their concerns, however significant they may be, cannot be "severe", because that framework was designed by institutions whose experience and expertise relate primarily to systemic risks. The implication is that the framework is designed to deal with macro-economic problems, with micro-economic issues being given the short shrift. In that perspective and if Ms. Smith is short $3 000 for two weeks because a provider made a processing error in her file, the level of concern or the risk incurred should be deemed "low", as the provider will not fail or create contagion in the financial sector and there are not thousands of users inconvenienced. The fact that Ms. Smith might be evicted and see her life insurance cancelled as a result is, according to this framework, merely regrettable. And even if fifty thousand consumers were impacted in the same way, the impact would not be deemed as being "severe". In other words, the magnitude of risk is seen as the dominant factor, rather than its probability of occurrence (or actual frequency of occurrence).

It is as if the only type of impact on end-users that is really considered is the one which would flow from the system's failure. The stark reality is that risk caused by a system (in particular to end-users) extends largely beyond risk caused to the system. The cogs of the system may turn as their operator expects them to, but there may still be legal risk, localized operational risk, excessive pricing or insufficient innovation, which are all risks borne by users that, in the proposed framework, seem to be given short shrift. Obviously, risks to systems may have significant impact and should be carefully monitored; but an oversight regime that truly cares about end-users must flesh out a much more comprehensive understanding of end-user risks.

Fundamentally therefore, and very deeply, the structure of the framework is skewed against "user protection" issues, which are perceived as less important than safeguarding systems themselves.

---

96 That is to say, towards "prominent" and "systemically important" systems in the figure preceding said paragraph in the Paper [our footnote].

3.2.2.2 a blurred framework

In addition, the framework is designed around the oversight of "systems". The concept seems easy to understand and apply with regard to systemically important and prominent systems, which provide clearing and settlement services, and of which there are few in the Canadian economy. But how broad is the notion of a "National Retail Payment System"? [97] Is PayPal such a system? Is the Cadillac Fairview Corporation Limited, a prominent operator of commercial real estate, including shopping malls, that offers the Shop!Card gift card[98], such a system? What about Apple, Google or Facebook? Or Bitcoin? Or cornestore remittance services[99]? Or acquirers? Assuming that card networks are "systems", what entities and activities actually come within the oversight perimeter? The network "operator" only, or also the issuers, the third-party processors…? Do agreements between, say, an issuer and a consumer, or a merchant and an acquirer, come within the ambit of the "system" that is to be regulated?

The notion of "system" is therefore not very helpful, and is in fact quite ambiguous, when one seeks to oversee retail payments. A significant proportion of payment activities (including some which may raise the greatest risks for consumers) are not provided by "systems" (except in the very broadest meaning one could give to the word). And if only "systems" in a narrower sense, such as networks, are to be regulated, there will be no level playing field in the Canadian payments market. In fact, in designing the architecture of its framework, Government appears to have fallen for the institutional fallacy: it targets organisations, or at the very least types of structures and organisations, rather than functions.

To compound the difficulty, there are problems with the application of the governmental framework, as "prominent" systems provide "retail services" and "retail" systems also provide functions such as clearing and settlement which are closer in nature to what "prominent" systems do. Consider for instance preauthorized debits ("PADs") on a consumer's deposit account held with a financial institution. The only "system" which could be associated with such PADs in Canada is CPA's Automated Clearing Settlement System ("ACSS"), which is likely to be regulated not as a retail payment system, but as a prominent system (and thus, we suspect, with limited concern for user protection, but that is for another day – an another consultation). However, it is likely that transactions equivalent to PADs, but drawn on, say, a consumer's MasterCard credit card, would be

97 We note that the Paper's footnote 2 takes great care not to define, or even describe, what is meant by the notion of "payment system" in the retail market context.

98 The card can be issued in denominations of up to $500 and value can be redeemed in stores and other destinations "in Cadillac Fairview shopping centres across Canada": https://www.cfshopcard.ca/Public/How-Shop-Card-Works.aspx. In other words, one could conceivably purchase a gift card in Toronto's Eaton Centre and use it to purchase goods at Ottawa's Rideau Centre's Forever 21's store then, the following week, to grab a bite at Bento Sushi in Montréal's Galeries d'Anjou.

99 Which the documentation accompanying the 2015 Budget rightly identifies as worthy of attention, as they are involved in the annual transfer of over 5.8 billion dollars in 2014: *Strong leadership: A balanced-budget, low-tax plan for jobs, growth and* security. Ottawa, Minister of Finance, April 21 2015, p. 297. Consulted at http://www.budget.gc.ca/2015/docs/plan/budget2015-eng.pdf.

considered as provided by a national retail system, and regulated as such. Yet PADs and regularly recurring transactions on credit card accounts arguably are functionally equivalent retail payment mechanisms. So much for a level playing field – and for regulatory consistency and clarity.

Besides, both Visa and MasterCard provide their own clearing functions, and possibly settlement functions as well. Yet they could compete as a practical matter with ACSS without being subject to the same level of requirements. While one can appreciate that the value of daily transactions going through ACSS is significantly higher and raises specific issues, there might be for instance operational robustness considerations that Canada would wish to see addressed by card network clearing and settlement systems, yet the framework for doing so would likely be quite different from the one governing ACSS. From the user's perspective, however, it may just as crucial that (say) the Visa network be able to process a transaction and, in a given situation, substitution may simply be impossible.

In short, the premises supporting the oversight framework designed by Government are wrong. Systems are not the proper regulatory target, unless the term is defined so broadly that it loses its meaning and should be replaced, and the distinction between "retail" and "prominent" systems is to some extent artificial, as their activities or their impact on the market overlap. Attempting to build a functional regulatory framework on flawed premises is a perilous exercise.

3.2.3 The "public policy objectives"

In its section 3.1 and Annex 3, the Paper outlines the Government's public policy objectives regarding payments and the principles flowing from those objectives. These objectives and principles are well-intended, but are so all-encompassing that they may well be non-actionable.

The stated objectives are "safety and soundness" [100], "efficiency" and "consideration of user interests". The first objective is said to refer to risk management taken as a whole, and principles refer essentially to monitoring. Efficiency is described as including "how effectively the […] processes are carried out to meet end-users' needs" (Annex 3), while principles and targeted outcomes aimed at implementing this objective are limited to competition issues and cost reduction. "Consideration of user interests" may be the objective which is the best fleshed out, perhaps reflecting in part past work by the Task Force[101].

Perhaps the oddest aspect of those objectives, as they are phrased, is that they are merely topical: there is no action, and no goal, attached to them. It is merely implied that the objective would be, say, "to ensure" safety and soundness; but that is different from

---

[100] As an aside, may we respectfully submit that the French translation of the Paper is atrocious, and that the translation of "soundness" by *bien-fondé* in this specific context is especially nonsensical?

[101] Task Force for the Payments System Review. *Policy Paper A: Users and their Discontent*, *op. cit*.

"promoting", or "monitoring", safety and soundness, for instance. These so-called objectives are therefore exceedingly vague[102].

As we will develop further in sections 3.3.3 and 3.3.4, we agree that a regulatory framework for the payments industry should be principles-based, but it must also be specific enough to provide effective direction to regulators, industry and users. We incline to prefer the "Proposed National Payments Policy" which the Task Force adopted as a recommendation fulfilling part of its mandate[103]. While the Policy is admittedly imperfect, it is clearer, more specific and more exhaustive than the objectives and principles proposed in the Paper, and it provides a better guide for regulators and stakeholders with regard to what results should be achieved. It also embodies for the most part the eight (8) principles advocated by many Canadian consumer groups, including PIAC, since 2005 and which should in our view form the basis of a Canadian policy for payments. These principles are the following:

– **universality:** the broadest range of payment technologies should be regulated;
– **neutrality:** all technologies should be regulated by similar rules, insofar as possible;
– **security:** payment technologies and processes should be secure and sound;
– **accountability:** risk should be supported by the party which creates it;
– **transparency:** rules, responsibilities, risk, and prices should be clear for all parties;
– **liberty:** payors should be allowed to choose the payment method they prefer;
– **enforceability:** the framework should be effectively enforced;
– **legitimacy:** the framework should be fair, persuasive, authoritative, and it should compare favorably with best-in-class comparable instruments worldwide.

Regulatory principles are laudable; regulatory goals are necessary, and the Paper is less than crystal-clear about what Government would hope to achieve – unless the principles it outlines are in fact its goals. If so, they are inadequate, in part because they are much too narrow.

At a stratospheric level, what is happening in the Canadian payments ecosystem? Electronic mechanisms are gradually displacing cash and cheques, outsiders are trying to enter the market – albeit with limited success – and the old rules of the road are increasingly inadequate in an environment that is exponentially becoming more complex, with diverse consequences over various types of stakeholders. How should we wish this

---

102 We are of course mindful that these "objectives" read suspiciously like the list of factors CPA is required to consider as it implements its legislative objects, under subsection 5 (2) of the *Canadian Payments Act*, R.S.C., c. C-21 – but with the verbs removed. We respectfully submit that this list, which is in our opinion deeply lacking with regard to CPA's mandate and oversight, is certainly grossly inadequate in the context of the oversight of the payment system as a whole, or even "merely" of retail payment systems.

103 Task Force for the Payments System Review. *Policy Paper A: Users and their Discontent*, pp. 19-22, 24-25. We reproduce the text of the proposed Policy in Appendix A.

situation to evolve? What, therefore, are the relevant regulatory goals, and how could they be translated into policy?

In general, reducing economic friction and transaction costs is a good thing. Electronic payments tend to reduce both, so their development should be fostered.

As a rule, the inclination of our economic system is to value competition, in part because it nurtures innovation and adaptive efficiency. Competition is also expected to increase choice and accessibility. Policies should facilitate competition.

Equality and social inclusion are social priorities, yet not everyone is equally able to adapt to the changing payments landscape, which benefits many but may disadvantage others. Policies should seek to remedy asymmetries and support more vulnerable participants[104].

By definition, payments involve the exchange of value and require trust, which is difficult to maintain in a changing environment. Policies should sustain trust in the payments system.

Obsolete rules increase friction, add to complexity, hinder innovation and may lead to unfair situations, thereby eroding trust. They should be replaced.

Therefore, a new regulatory framework for payments should strive to further five interrelated goals:

1) reduce economic friction,
2) foster competition and innovation,
3) sustain trust,
4) protect vulnerable participants to the ecosystem and
5) ensure that appropriate rules facilitate the achievement of those goals.

These goals are clearer and more exhaustive than the proposed “public policy objectives”. They can, and they must, be articulated more precisely, as the Task Force has done with its own proposal for a National Payments Policy.

The Paper’s Annex 3 does succeed in providing slightly more specificity when it contemplates “targeted outcomes”. Even that column, however, remains deeply deficient when it comes to the protection of Canadians’ interests, as it apparently assumes that informed choices supported by disclosure and transparency will suffice; for reasons mentioned earlier, they will not.

It is not enough for Government to state that it is concerned with safety and soundness, efficiency and the fate of users. The obvious question is: how does it want to deal with those issues? What does it want to achieve? And the less obvious question, though just as important, is: are those concerns the right ones? Is Government missing

[104] Vulnerability takes multiple forms and depends on the specifics of a situation or relationship. The concept applies as much to a medium-size merchant negotiating with an acquirer as to a consumer living in Kugluktuk with limited access to financial services, to take only these examples.

anything important? Remarkably, the statement of Government' policy objectives succeeds in being simultaneously too vague and amorphous, and too narrow, as there are a number of issues we have mentioned *supra* which are not clearly addressed by the objectives.

3.2.4 The "risks to address"

We have provided a summary description of some of the risks we currently view as affecting retail payment activities in Canada in subsection 3.1 *supra*. That quick overview is enough to show that risk categories identified in subsection 4.1 of the Paper are incomplete and much too generic to be very useful in designing an oversight framework for the payments ecosystem. The Paper skips over issues such as legal and social risk, except insofar as it seems to suggest that better disclosure of terms by providers and the addition of some redress mechanisms would solve most problems. The Paper also explicitly states that there is "generally meaningful competition in the retail payment sector", a view that may be disputed both by providers who would like to enter the market and by consumers who are faced with products that are often quite similar, whatever brand they may flaunt[105].

Clearly thus, while apparently comprehensive, since practically any risk can be subsumed under one of the three proposed categories, the risk framework is inadequate for lack of precision, and it is clearly incomplete. Goodwill and information will not eliminate those risks: clear, enforceable requirements will be necessary. As to "balancing" risk mitigation and innovation, we have addressed the issue in subsection 3.2.1.1.

3.2.5 The perimeter of oversight

We wholeheartedly agree that a functional approach should be adopted in order to oversee and regulate the Canadian payments ecosystem. Targeting specific institutions only would ensure that the framework would remain inconsistent both between categories of entities and categories of operations, as well as filled with gaps, uncertainty and free riders.

Payment activities should therefore be regulated, instead of payment providers. In addition, a broad range of activities should be regulated. All payment functions, instruments and providers should be brought within the scope of oversight. For the regulator to be able to develop a comprehensive view of the ecosystem and establish a fully coherent framework, its remit will have to be as broad as the area to be regulated.

Obviously, payment instruments such as coinage, bank notes or bills of exchange are already regulated and seem at first glance to raise few issues. The reality is more

[105] Not to mention cases where "competition" actually reduces the services they can access or increases prices. For instance and with the entry of Visa in the debit market, some Canadian issuers now no longer permit their customers to use Interac online and require them to use Visa debit online. The entry of new ATM providers in the market has provided financial institutions with the opportunity to create charges that did not exist before, and network competition for issuers tends to push interchange fees higher. None of those trends appears to us as indicators of a well-functioning competitive market.

complex. For instance, merchants are starting to decline payment in cash[106], raising interesting questions about the notions of currency and legal tender as well as significant issues in terms of consumer choice and accessibility to goods and services. As Denmark considers letting some classes of merchants to decline payment in cash, one may well envision similar proposals coming up in Canada; their implementation should require a full prior assessment of such a decision's numerous socio-economic consequences[107]. In the same way, a payments regulator may well have weighed in early on in the process which led the Government of Canada to announce that it would eliminate payment by cheques completely, only to realize years later that such a decision remains impractical in the Canadian market. Therefore, even "old" payment mechanisms may raise issues which should come under the regulator's remit. Of course, new payment instruments should also been overseen, including non-conventional ones such as loyalty points or crypto-currencies, even if they are not denominated in a State-issued currency: they are used to make payments and, from the end-users' perspective, they raise issues that are similar to those associated with more standard payment mechanisms.

We agree with CPA that functions which should be included within the perimeter of oversight include payment initiation, authorization, transmission of funds, exchange of value, holding of funds, clearing and settlement[108], but other functions identified by the Committee on Payments and Market Infrastructures and related for instance to pre-transaction activities (such as acquisition and provision of hardware and software) and post-transaction activities (including dispute resolution) [109], should also be part of the regulator's remit, so that it be enabled to consider the whole landscape.

Beyond the classification of functions proposed by the Committee on Payments and Market Infrastructures, however, there are other dimensions to ponder when determining the perimeter of oversight. We should include the processes supporting these functions, as well as those who perform them. Therefore, activities such as product design should be within the remit of the regulatory framework, in order for instance to ensure that social risk is adequately considered at the outset[110]. In addition and while we intuitively perceive regulation as addressed to people, it becomes increasingly necessary that technologies and technological products should also be seen as objects that regulation

---

106 A bookstore in downtown Montréal specializing in travel literature has for years now had a notice on its front door informing customers that it takes only debit and credit cards, excluding cash.

107 For the record, we can be expected to disagree thoroughly.

108 Canadian Payments Association. *Oversight of National Retail Payment Systems – Canadian Payments Association Submission in Response to Finance Canada*, *op. cit.*, p. 5.

109 Committee on Payments and Market Infrastructures. *Non-banks in retail payments*, *op. cit.*, p. 7.

110 This is not as heretical (or leftist) as it may sound to some: British financial regulators have been examining product design for some time. For *e.g.* legal insight addressed at the insurance industry, see Norton Rose Fulbright. *Insurance product development in the new regulatory landscape*. London, Norton Rose Fulbright, January 2013. Available at http://www.nortonrosefulbright.com/knowledge/publications/74008/insurance-product-development-in-the-new-regulatory-landscape.

addresses, in order for instance to ensure that it complies with proper risk allocation principles (see section 3.3.4) [111].

The scope of oversight should also be sufficiently comprehensive that the Agency would be able to consider a broad range of issues, including market conduct, market structure, pricing, consumer protection, innovation and stakeholder collaboration. In other words, it should be able to oversee the payments ecosystem as a whole, including all its dimensions.

In addition and consistent with a functional approach, all providers involved in these functions should be brought under the oversight scheme's umbrella *qua* performance of those functions.

This obviously means that there would be overlap between the regulator's perimeter of oversight and other regulators'. There are known mechanisms to address such situations, including memoranda of agreement between regulators, and the regulator's ambit being limited to payment-related issues would minimize any such overlap. There are also precedents: again and taking from the British example, the Financial Conduct Authority is required to consider competition issues in the market, even though the United Kingdom has established specialized competition regulators[112].

In addition, having a broad mandate does not imply that the Agency would need to regulate minutely each and every type of payment or provider. It should have the flexibility to assess, on the basis of risk caused to systems and stakeholders, when practices merely require ongoing monitoring or demand more intensive intervention, which would also limit the risks associated with regulatory overlap.

3.2.6 The trap of "voluntary" mechanisms

Section 4.3 of the Paper purports to address oversight measures and their implementation. The divide in the drafters' minds between "important" issues such as solvency, which require legislation or other legally binding intervention, and mere "market conduct" issues, which could be addressed through voluntary codes, is again quite obvious, and certainly not conducive to adequate protection of end-users.

The Paper repeatedly puts forward codes of conduct and other voluntary instruments as appropriate mechanisms to address end-user concerns. This view is perhaps partly reflective of an impression that "principles" should be associated with "voluntary" or "soft". As we will see *infra* in subsection 3.3.3 when discussing principles-based regulation as a method, it is not the case. It is perhaps also reflective of an impression that voluntary instruments are efficient. They are not.

It is simply inaccurate to assert that the *Canadian Code of Practice for Consumer Debit Card Services* has been "[…] effective in addressing market conduct and consumer protection issues", as the Paper states. The Code is largely unknown and mostly observed in the breach. As noted earlier in section 3.1.4, financial institutions' standard form agreements frequently and egregiously do not comply with the Code, thus providing

111 As to the interaction of regulation and technology, see *e.g.* Black, *Seeing*, *op cit.*, 32-36.
112 See *e.g.* Ferran, *op cit.*, 431-447.

misleading information to consumers, the institutions' own staff and, eventually, the courts, which will rely on the agreement's text rather than on some unknown and legally unenforceable code. In addition, the Code is increasingly obsolete, as it does not address PIN-less transactions[113]. In fact, we would be hard put to identify another purported consumer protection tool in the Canadian payments ecosystem that has been as ineffective as the Code – although we would acknowledge that some CPA rules unwittingly give it a good running.

Indeed, preauthorized debits provide another example where a legally non-binding instrument (from the end-user's perspective at any rate) is ineffective. CPA's rule H1, discussed above, establishes that (assuming it applies) a consumer who notices an unauthorized PAD in her account can request an immediate correction from her financial institution, provided she acts within 90 days of the mistaken PAD. Experience indicates that the rule is not well-known by financial institutions' frontline staff – nor by consumers, for that matter. A nationwide Environics survey showed in 2006 that two thirds of Canadian households used PADs, but that twelve percent (12%) of users had experienced a problem with a PAD in the preceding two years and that only 38% of those contacted their financial institution, with 4% of them being referred by their banker to the merchant[114]. These results are not the sign of a well-functioning process; and while nine years have passed since that survey was published, our experience inclines us to the view that the situation has not improved significantly, at least in terms of awareness of the rule and compliance therewith. In addition and as we shall indicate *infra*, the rule is not enforceable by a consumer against her financial institution.

Let us take yet another example, related to online bill payment. A consumer chooses to pay her bill early in the morning on the due date, through her financial institution's website. Some time later, she is informed by the biller (which for our purposes uses another financial institution than the consumer's) that her payment was actually received and posted after the due date and that it is therefore charging her a penalty for late payment. Yet, according to subsections 5 e) and 3 (l) (i) of CPA's Rule H6 (and subject to some considerations we will leave aside for the sake of simplicity), the agreement between the biller and its financial institution is supposed to require the biller to deem the consumer to have paid her bill on the day she made the transaction at her own FI – in this case the due date. Therefore, either the biller does not comply with its banking agreement, or the agreement does not comply with the Rule. However, the Rule is unenforceable in court on behalf of the end-user and, in such a case, CPA merely recommends that the consumer take up the issue with the biller and, if still dissatisfied, with her own financial institution. This might be perceived by jaded observers as less than a fully proactive stance[115].

113 Nor does it cover prepaid cards, although they can provide services that are very similar to debit cards, as the earlier discussion of the We card has illustrated (see above, note 71).

114 Canadian Consumer Initiative/Environics Research Group. *Pre-Authorized Debits*. Survey, March 2006. 17 p. See in particular questions 55.1, 55.2 and 55.4 Available at http://www.consommateur.qc.ca/union-des-consommateurs/docu/budget/DPAsurvey.pdf.

115 This is incidentally not a hypothetical scenario. One might also wonder how often the power granted to the President under section 2 of CPA's *By-law No. 6 – compliance* has been used since it was enacted, and whether there is any other mechanism available to an end-user

We have mentioned CPA rules' unenforceability against third parties; this is not new from a legal perspective, but perhaps needs to be fleshed out again. In fact, it has long been held by courts, and supported by authors, that CPA rules (or clearing house rules generally) do not apply to third parties, who cannot rely legally on them[116]. CPA rules bind only CPA members.

This very limited legal effect of the rules was emphatically confirmed by the Supreme Court of Canada in *B.M.P. Global Distribution inc*. v. *Bank of Nova Scotia*[117]. Rules apply between members; they do not create entitlements for third parties, decisions of CPA's compliance panel would have no impact on customers' rights, and rules are not necessarily implicitly incorporated in the service agreement between banker and customer. In a nutshell and from the consumer's perspective, CPA rules judicially do not exist. They cannot be used to base an individual claim in court, or a class action. It is also very much unclear to what extent internal financial institution ombudsman schemes, or external schemes (especially those who are less specialized than the Ombudsman for Banking Services and Investments) rely on CPA rules when deciding disputes, or are even aware that they exist.

While unfortunate to some extent, this result is nonetheless somewhat logical from both a legal and a policy standpoint. Rules are adopted (under s. 19 of the *Canadian Payments* Act) by CPA's Board of directors, without any requirement for public consultation; it would therefore be rather odd that they apply to the public at large when it can have no input in the process (except for the Minister's disallowance power, of course). Section 29 of the *Act* establishes that members must act according to the rules, but is silent as to third parties' rights or duties. In a sense, rules act as a multilateral contract between the members, to which users are not parties. Both under the common law doctrine of "privity of contracts" and civil law's concept of *effet relatif des contrats*, such third parties cannot claim any legal entitlement from the contract, nor are they bound by it.

Grassroots experience and legal analysis thus lead to the same conclusion: from the end-user's perspective, voluntary codes, CPA rules and analogous instruments are next to useless, unless the provider is willing to indemnify the victimized end-user, in which case they are probably not necessary in the first place.

Upon reflection, this is probably a fairly commonsensical conclusion. Where mistaken, fraudulent or otherwise unauthorized transactions are alleged by a consumer, the parties' immediate interests are simply not aligned: the consumer wishes for a prompt and full reparation, while the provider would rather not refund the consumer without being sure that it will be able to recoup the cost somehow or, at least, without being convinced that an unauthorized transaction has indeed occurred, and it is usually in no

who wishes to see a CPA rule properly enforced. Problems with bill payments that are deemed late by the biller are quite frequent and many billers now post notices that bills should actually be paid online days before the due date, in obvious non-compliance with the spirit of Rule H6.

116 See for instance Crawford, Bradley *Effect of Clearing House Rules*. [1983] 61 (4) Can. Bar Rev. 921.

117 2009 CSC 15, [2009] 1 S.C.R. 504. See especially paragraphs 56-60.

particular hurry to investigate, say, a $400 claim. In such cases, voluntary codes (or CPA rules, which amount to the same thing from the end-user's perspective) cannot be of much help to the aggrieved end-user, as they are not legally enforceable and are in fact often set aside by the contents of banker-customer standard form agreements, which are enforceable before courts.

Occasional conflicts are unavoidable between provider and end-user. They should be solved, and they should be solved fairly. There must therefore be mechanisms that ensure those results. Sometimes the parties will be able to negotiate a solution that is both acceptable to them and fair – not only from their standpoint, but from that of a disinterested observer; that perception of fairness is necessary to maintain trust. But sometimes parties will not agree; there should then be a fair solution which can be imposed on them. That solution will usually be enshrined, more or less precisely, in a rule, and that rule must be binding and enforceable. Otherwise, there can be no fair solution when parties differ.

This is not to say that traditional top-down "command" regulation, based on detailed legislation or statutory instruments, is the only alternative. Experience, however, has taught us to be very skeptical about industries' ability and willingness to self-govern fairly when their interests (as they perceive them) are not very closely aligned with users'. Other, mandatory, instruments must also be available, such as legislation – to which the Paper gives short shrift.

As for legislation, which the Paper acknowledges has advantages such as enforceability and transparency, it is presented as rigid and poorly adaptable over time, with the *Bills of Exchange Act* provided as an example. That statute was first enacted in 1890 and was modeled on British legislation drafted in 1882. Indeed it is by all accounts obsolete[118], not only as to its substance, but also as to form. It is the epitome of caselaw-based technical, byzantinely intricate legislation in the best nineteenth century British tradition, informed by archaic principles of interpretation, which is mercifully being gradually abandoned by our federal Parliament. Somewhat more inspiring examples in terms of legislative technique could have been provided however, such as (say) the *Official Languages Act* or, to remain in the financial sector while looking overseas, the British *Financial Services Act 2012*[119]. There is smarter legislation, in terms of legal technique, than the *Bills of Exchange* Act, and it would have made a better example, and helped make a better case regarding the possible shape of a regulatory framework for payments. Again, however, the reader is left with the impression that the drafters sought to emphasize codes of conduct and other voluntary solutions at the expense of more effective (and mandatory) mechanisms.

We do agree with the last paragraph of section 4.3. In fact, it should be obvious that a broad range of tools will need to be combined in order to tackle the challenge of

118 See *e.g.*, for recommendations regarding its content, Geva, Benjamin. *The Modernization of the Bills of Exchange Act: A Proposal*. Osgoode Hall Law School Legal Studies Research Paper Series, vol. 10, no 7, 2014. Toronto, 2014. Available through http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2440714 and originally published at [2011] 50 Canadian Business Law Jnl 26.

119 Respectively R.S.C., c. O-3.01 and 2012, c. 21 (UK).

regulating adequately the Canadian payments ecosystem. But voluntary codes should lie at the very bottom of that toolkit, and smart legislation and regulation should appear on the top.

3.3 Designing a framework

3.3.1 A sketch

Let us acknowledge at the outset that regulating the Canadian payments industry effectively raises significant challenges. However, other jurisdictions have come to realize that proactive regulation in this area is increasingly necessary, and it is high time Canada does the same.

The regulatory framework should be principles-based. As noted above, it should cast a wide net. Where necessary to protect stakeholders' interests, rules should be legally binding and enforceable. There should be a regulatory body responsible for overseeing the ecosystem. Stakeholders should be closely involved in the regulatory process. But an unavoidable preliminary question must first be disposed of.

3.3.2 The constitutional aspect

3.3.2.1 the distribution of powers

Whenever the need to regulate some set of activities is examined in Canada, constitutional issues must be considered. We are of the view that, given the current state of our constitutional law, Parliament does have a broad jurisdiction in areas involving payments[120], that provinces can also regulate some aspects of payments and that, given a clear conflict between Federal and Provincial regulation, federal paramountcy would apply.

Federal legislation pertaining to payments could conceivably come under various heads:

- peace, order and good government, under the preamble to s. 91 of the *Constitution Act, 1867*;
- the regulation of trade and commerce, under subs. 91 (2);
- currency and coinage, under subs. 91 (14);
- banking and the issue of paper money, under subs. 91 (15);
- savings banks, under subs. 91 (16);
- bills of exchange and promissory notes, under subs. 91 (18);
- legal tender, under subs. 91 (20), and
- federal undertakings, through subs. 91 (29).

---

120 A view apparently shared by Parliament itself, considering in particular the enactment of the *Canadian Payments Act*, the *Payment Card Networks Act* and the *Payment Clearing and Settlement Act*.

As it has been interpreted by the courts *inter alia* through the doctrines of national dimensions and emergency, the power regarding peace, order and good government is likely not the most relevant to this discussion, and will not be considered further. We suggest that the powers under subsections 91 (15) and (16) can be considered herein together as the "banking power"[121]. We will also consider together the jurisdictions over currency, bills of exchange and legal tender. The issue of federal undertakings will then be addressed.

We will therefore turn now to three clusters of powers: trade and commerce, banking and "currency/bills of exchange/legal tender".

3.3.2.2 the regulation of trade and commerce

While, as drafted, the federal power over trade and commerce may at first appear to be all-encompassing, courts have quickly curtailed potential federal ambitions by clarifying that it could not be construed to be so broad as to render meaningless provincial jurisdiction over property, civil rights and contracts: the powers explicitly conferred to provinces in 1867 therefore act as a limitation to the federal power over trade and commerce[122].

The issues we are interested in here are likely not by their nature international or interprovincial in scope[123] and we will eschew the analysis of those branches of the trade and commerce power. Perhaps closer to our concerns, the Supreme Court has articulated a test in order to determine whether federal legislation can validly come under Parliament's jurisdiction over general trade and commerce[124]. Courts will ascertain whether

1) the impugned legislation is part of a general regulatory scheme;
2) this scheme is monitored by the continuing oversight of a regulatory body;
3) the legislation bears upon trade in general, rather than upon a specific industry;
4) the legislation is of such a nature that the Constitution would not allow the provinces, jointly or severally, to enact similar measures, and

---

121 Especially since there are no longer savings banks in Canada.

122 *Citizens Insurance Company* v. *Parsons*, (1881-82) 7 App. Cas. 96 (P.C.). *Parsons* also opened the door to a reading of subs. 91 (2) whereby Parliament would have jurisdiction over international trade, interprovincial trade and over "general trade and commerce affecting Canada as a whole".

123 Although, on the basis of case law regarding telecommunications, this may be arguable: *Téléphone Guèvremont Inc.* c. *Régie des télécommunications du Québec*, [1994] 1 R.C.S. 878, which found that a purely local phone company was a federal undertaking as provision of its services necessarily implied the ability to provide interprovincial communications. In the same sense, payment networks may be interprovincial (or international) and most (if not all) payment mechanisms are by their nature pan-canadian.

124 *G.M.* v. *City National Leasing*, [1989] 1 S.C.R. 641. The principles considered in *G.M.* were reiterated by the Supreme Court in the *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837.

5) the failure to include one or more provinces in the scheme would jeopardize its application for the rest of the country[125].

It is crucial to note that the Supreme Court did not require full, complete and absolute compliance with all five criteria for federal legislation to be valid under the general trade and commerce power: they serve as a check-list indicating potential validity[126]. Obviously, however, the closer a regulatory scheme comes to full compliance, the likelier it would be found to be constitutionally valid.

Could federal payments legislation then be justified under the general trade and commerce power? There would likely need to be a global scheme, monitored by a regulatory body[127]. The obvious parallel is with the *Competition Act* and the Competition Bureau, the former having been found to come validly under the trade and commerce power in *G.M.*. The argument would need to be made that payments pertain to trade and commerce in general[128]. Depending upon the breadth of this payments legislation, it may well be that the provinces could not be allowed to enact measures pertaining to the global regulatory scheme. Non-application of the scheme in a province could impact implementation in the rest of the country, especially with regard to payment networks, emphasizing the need for a national solution.

Success under tests 1) and 2) therefore requires that a fairly substantial framework be implemented. Success under tests 3 and 4) might appear reasonably likely depending on the legislation to be enacted, while success under test 5) would depend on the type of scheme enacted. The more significant the regulatory scheme to be put in place, the likelier it may be therefore that it could be construed as valid under the general trade and commerce power granted to Parliament.

3.3.2.3 the “banking” power

There is no question that the regulation of banking comes under federal jurisdiction and, when analysts think “federal regulation of financial services”, the so-called “banking power” tends to be foremost in their minds. Less obvious is the determination of what it is that fits within “banking” under subs. 91 (15) of the *Constitution Act*, 1867 and, therefore, whether it is appropriate to peg the payments hat on that particular constitutional hook.

A case in point is *Pioneer*[129]. The Court was reluctant to extend the application of the federal “banking” power beyond banks as explicitly identified by federal legislation, and thus beyond an institutional approach. Beetz J., in particular, expressly indicated that

[125] *G.M.*, *ibid.*, 661-662.

[126] *Ibid.*, 663.

[127] or, of course, by more than one, as long as they are part of the same global regulatory scheme.

[128] An implication being that it would be counterproductive to discuss (or purport to define) a “payments industry”: it is payments, which are pervasive in the economy, which should be regulated, and possibly their provision. Legislation should thus focus on the activity, rather than on the providers, which is of course also consistent with a functional approach.

[129] *Can. Pioneer Man. Ltd.*. v. *Labour Relations Board of Saskatchewan*, [1980] 1 S.C.R. 433. For a review and analysis of the case, see *inter alia* Binavince, Emilio; Fairly, H. Scott.

> On the whole, I do not think that it is possible, at least for the purpose of this case, to define banking in purely functional terms.[130]

In other words, doing what a bank does (insofar as that can be defined or described) would not be enough to bring one under the “banking” jurisdiction.

Beyond conceptual and policy obstacles, the Court also identified a technical argument: the *Interpretation Act* and the *Bank Act*, read together, establish that no entity can be deemed to be authorized to carry on the business of banking unless it is established as a bank under the *Bank Act*. As a result, the Supreme Court preferred an institutional approach to the understanding of that specific constitutional power: the regulation of “banking” applies to banks, as they are explicitly defined and listed under federal legislation. We are not aware that the Supreme Court has significantly varied its view on this issue since 1980.

Activities of other entities could therefore not come under subs. 91 (15). Beetz J., however, left a door ajar, by stating that the institutional approach

> [...] is particularly appropriate in a case where what has to be decided is whether a given institution falls within the concept of banking as a business, and not whether a legislative enactment is constitutionally depending on its relationship to banking within the meaning of s. 91.15 of the Constitution. [...] The concept of banking as a business and the meaning of the word “banking” in s. 91.15 are not necessarily co-extensive; the meaning of “banking” in the section might very well be wider than the concept of banking as a business.[131]

Borrowing from an Australian case, Beetz J. goes on to give examples: legislation requiring banks to have minimum capital, or prohibiting categories of persons from holding bank shares, would relate to “banking” and should therefore come under exclusive federal jurisdiction[132]. This broadened (but as such undefined) “banking” power would extend in some cases to cover activities pursued by entities other than banks, although all the examples given by Beetz J. involve a bank *stricto sensu* as share issuer or seller of assets, for instance[133]. However, we are not aware of any decision in Canada since *Pioneer* where the Supreme Court would have effectively so extended the

---

Banking and the Constitution: untested limits of federal jurisdiction. [1986] 65 Can. Bar. Rev. 328.

130 *Can. Pioneer Man. Ltd.*, *ibid.*, p. 461.

131 *Ibid.*, p. 466.

132 although we respectfully do not see how, in the first case, this extends the notion of “banking” much beyond the institutional test, even if it is not an operation within the banker-customer ambit.

133 And, of course, the institutional test implies that Parliament could designate any entity as a “bank” and bring it under subs. 91 (15), assuming that it is involved in activities that are minimally similar to those of a bank *stricto sensu*.

"banking" power. If anything, recent cases, such as *Canadian Western Bank*[134], seem to indicate that the Court is not even eager to extend the range of the exclusive federal power over banking to all services offered by or through a bank, let alone to services offered by non-banks. Nor is there any indication that activities related to payments, while admittedly central to banks, would come under the "banking power" when exercised by non-banks.

In general therefore, it appears that "banking" under subs. 91 (15) pertains to banks, as formally identified. In addition and where the bank's activities happen to be covered by provincial legislation, the Supreme Court will uphold such legislation where it does not unduly curtail the exercise of vital bank activities[135].

As Beetz J. noted in *Pioneer*[136], there might be significant policy consequences should the ambit of the exclusive federal jurisdiction over banking be co-extensive with banking activities in the broader sense: an implication might be that trust companies and credit unions, which are involved in such activities under provincial authority, have been acting unconstitutionally for decades, as provinces could not validly grant them to power to engage in "banking" *lato sensu*. Another implication would be that all entities involved in a "banking" activity might become federal undertakings. For easily understood reasons, the Supreme Court shied from the latter constructions. It is also likely that, from a policy standpoint, claiming to ground overarching national payments legislation on the banking power might not sit well with all provinces.

In other words, under the institutional test applied by the Supreme Court, the "banking" power does not extend to non-banks, whereas payments legislation should apply to a much broader set of providers; under the functional test, which we understand the Supreme Court has not applied within the last thirty years (and has explicitly set aside in *Pioneer*), payments would need to be considered as specific to banking[137] while payment providers, having one of their significant activities defined as coming under exclusive federal jurisdiction, might therefore be turned into federal undertakings[138]. The

---

134 *Canadian Western Bank* v. *Alberta*, [2007] 2 S.C.R. 3. The Supreme Court held that the selling or promotion of insurance by a bank through its branch network could validly be regulated by the province and that such provincial regulation did not thus impair or hamper essential banking activities.

135 The obvious cases in point being the *Marcotte* trilogy, and especially *Bank of Montreal* v. *Marcotte*, 2014 SCC 55, [2014] 2 S.C.R. 725. For a case where provisions of the *Bank Act* were held to render inapplicable incompatible provincial legislation, *Bank of Montreal* v. *Hall*, [1990] 1 S.C.R. 121.

136 P. 449.

137 even though Beetz J. explicitly stated in *Pioneer* that providing chequing accounts was not specific to the business of banking.

138 At this point, it may be useful to reflect on the plight of OC Transpo, the public transit commission based in Ottawa: since part of some of its bus routes, amounting to 0.5% of its network and at most 4% of its ridership, crossed into Québec, OC Transpo was deemed to be a federal undertaking: *Re Ottawa-Carleton Regional Transit Commission and Amalgamated Transit Union, local 279 et al.*, (1983) 44 O.R. (2d) 560 (Ont. C.A., by Cory J., as he then was). While spectacular, it is not an isolated case and even a whiff of extra-provincial or otherwise federally regulated activity may turn an entity into a federal undertaking for legal purposes. We will revisit this issue in subsection 3.2.3.5, *infra*.

banking power clearly does not appear to be an appropriate foundation for the regulation of payment activities in Canada.

One last issue pertaining to the banking power should be emphasized at this point. Banks (*stricto sensu*) are subject both to federal and provincial legislation enacted on the basis of other constitutional heads of power, a point made abundantly clear in *Marcotte*. Subsection 91 (15) is thus most certainly not the only basis on which banks' acitivity can be regulated.

3.3.2.4 currency, bills of exchange and legal tender

When the *Constitution Act, 1867* was drafted, the exchange of "money" essentially took the forms of currency (including bank notes, covered in subs. 91 (15)) and bills of exchange (which could be drawn on banks), only the former being (under some conditions) legal tender (an issue which in itself comes under subs. 91 (20)). It can therefore be argued that the regime put in place at the time contemplated that all matters pertaining to money would come under federal jurisdiction[139], subject to the limitation that aspects whose pith and substance was close enough to contracts might (also) come under provincial legislation through the double aspect doctrine.

There is no doubt that the federal jurisdiction over currency exists independently of the jurisdiction over banking. In the 1938 reference about (principally) three Alberta statutes, three of the six judges who opined on the issue concluded that the provincial social credit scheme implemented by those statutes came with the "currency" jurisdiction, and was therefore *ultra vires*; they were joined by three others in concluding that it also came under "banking"[140].

The *Alberta Social Credit Act* purported to create the "Alberta Credit", whose value in money was to be credited to a provincial government account on which Treasury Credit Certificates could be issued "for the purpose of increasing the purchasing power of the consumers of Alberta". It was expected that those certificates would circulate as a medium of exchange and payment[141]. In other words, they would be used as money[142]:

> Any medium which by practice fulfils the function of money and which everybody will accept in payment of a debt is money in the ordinary sense of the words even although it may not be legal tender;[143]

---

139 The implication being that provinces could not, jointly or severally, regulate money and related activities, thus satisfying the fourth of the tests proposed in *GM*.

140 *Reference re Alberta Statutes*, [1938] S.C.R. 100. On appeal to the Privy Council, their lordships contemplated only one of the three impugned statutes, which they found to be *ultra vires*, without having to consider the issues that are of interest here.

141 *Ibid.*, p. 110.

142 The legal notion of "money" remains ill-defined and may need to be modernized. This is especially true in a context where even banks are beginning to envision acting as "stores of value", including Bitcoin or loyalty points: see *e.g. Commonwealth Bank to embrace Bitcoin and air miles as fintech goes mainstream*, Australian Financial Review, Melbourne, June 1st 2015, at http://www.afr.com/technology/commonwealth-bank-to-embrace-bitcoin-and-air-miles-as-fintech-goes-mainstream-20150601-ghcre6.

143 *Reference re Alberta Statutes*, *op. cit.*, p. 116.

The scheme envisioned by the Alberta legislature thus infringed upon the exclusive federal jurisdiction over currency. Insofar as it would work through a credit system, it also infringed upon the jurisdiction over banking[144].

If Alberta could not create another medium to be used as money because it infringed upon subs. 91 (14), the implication would appear to be that the regulation of any such medium would come under that heading and would fall under exclusive federal jurisdiction.

Bills of exchange, in the shape of cheques, have long been used to move "scriptural" money. There is no doubt that such instruments come under federal jurisdiction through subs. 91 (18). By way of the "living tree" metaphor, it would appear arguable that any instrument serving to transfer scriptural money should also come under exclusive federal jurisdiction through subs. 91 (18) [145].

Whether new payment mechanisms are money *per se* or serve as means to transfer scriptural money, it would therefore appear arguable that they fall under Parliament's purview under either subs. 91 (14) or 91 (18).

Insofar as Parliament's intent would be to regulate money or money transfers, rather than the full range of activities that entities engaged in providing payment services may be involved in, bringing payments legislation under the currency/bills of exchange/legal tender headings may therefore provide a simpler, more apposite solution than would the "banking" jurisdiction. The scheme would be aimed at the activities, rather than at the entities. Just as, currently, anybody who draws, holds, changes or cashes a cheque must comply with the *Bills of Exchange Act*, anyone emitting, using or accepting a greater variety of modes of payment which in effect replace cash and cheques would be regulated by federal payments legislation.

3.3.2.5 federal undertakings

Once an entity is characterized as a "federal undertaking", regulation of a broad range of its activities comes under federal jurisdiction. However, this is arguably one of the

---

[144] The Court also concluded that the scheme infringed federal jurisdiction over trade and commerce.

[145] We acknowledge that, in *Marcotte* vs. *Fédération des caisses Desjardins du Québec*, 2014 SCC 57, [2014] 2 S.C.R. 805, paragraphs 18-21, the Supreme Court opted for a rather narrow construction of subsection 91 (18). We would respectfully argue, however, that this case can be distinguished and that, given the opportunity to consider the full range of issues at stake, the Court might eventually prefer an interpretation that would be more consistent with current market evolution. The issue should be framed not as whether some instrument is a bill of exchange in the traditional sense, but whether there is federal jurisdiction over instruments playing an economic role similar to that granted to bills of exchange at the end of the nineteenth century (to wit, transferring scriptural money), and thus whether the Constitution is truly a living tree. Following the logic governing that part of *Marcotte*, the right to marry would never have been extended to same-sex couples – and yet it was: *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698. Further and where subsection 91 (18) is considered together with the federal powers over currency and legal tender, it is difficult to escape the conclusion that the Fathers of the Confederation expected Parliament to be responsible for all matters pertaining to money and payments. We would therefore respectfully submit that the Supreme Court has not written the last word on this issue.

most vexing areas of Canadian constitutional law, if only because it appears to be in almost constant flux.

A "federal undertaking" is an undertaking whose activity comes essentially within federal jurisdiction. Airlines, telecommunications providers, radio stations or banks are classic examples. Parliament is endowed with a broad power to regulate the activities and management of federal undertakings. Provincial legislation may apply to federal undertakings[146], but it cannot "impair the core of a federal power" – that is, create a situation where the exercise of the federal power would be "seriously or significantly trammel[led]"[147].

What is relevant for our purposes is that once an undertaking is characterized as "federal", its activities and management in areas such as labor relations or human rights fall under federal legislation, instead of provincial legislation. Should federal payments legislation be enacted in such a way that, say, Symcor, Moneris or Desjardins would become federal undertakings, the impact on the legal framework applying to them would be quite significant – and is probably not desirable.

We would suggest such a result can be avoided. For instance, undertakings currently involved in issuing, processing, receiving or paying cheques are not for that sole reason considered as being federal undertakings, even though cheques certainly come under federal jurisdiction. Nonetheless, a fine line may need to be drawn, and observed, so as to ensure that any payments initiative does not turn out to have undesired consequences.

3.3.2.6 the paramountcy rule

It is also a long-established principle of our constitutional law that a given matter may have a "double aspect" – that is, it can come simultaneously under federal and provincial jurisdiction[148]. A loan agreement between a bank and a consumer, for instance, comes under federal jurisdiction over banks and over interest, but also under provincial jurisdiction over contracts.

Where federal and provincial legislation uncontrovertibly conflict over a specific issue, federal rules are paramount. However and where there is no such conflict and an otherwise valid provincial rule would apply to an undertaking, including a federal undertaking insofar as it does so without impairing the core of a federal power, the provincial rule will fully apply to that undertaking[149].

---

146 enabling for instance banks to create mortgages under provincial legislation to secure their loans. That federal jurisdiction over federal undertakings does not automatically exclude the application of provincial legislation to such undertakings was forcefully restated by the Supreme Court in *Bank of Montreal* v. *Marcotte*, *op. cit*., par. 62-69 in particular.

147 See *Bank of Montreal* v. *Marcotte*, *op. cit*., par. 64, quoting *Québec (Attorney General)* v. *Canadian Owners and Pilots* Association, 2010 SCC 39, [2010] 2 S.C.R. 536. for the latest iteration of the test. We fortunately do not need to go into the details of that issue for present purposes.

148 *Hodge* v. *The Queen*, (1883) 9 App. Cas. 117, 130. The Supreme Court revisited the issue in the *Reference re Securities Act*, *op. cit*.

149 *Multiple Access Ltd.* v. *McCutcheon*, [1982] 2 S.C.R. 161, confirmed in *Law Society of British Columbia* v. *Mangat*, [2001] 3 S.C.R. 113 and regularly reiterated over the past fourteen years.

3.3.2.7 the power to act

Is there federal jurisdiction over payments and over the activity as a whole? We respectfully submit that there is, on the basis of Parliament's powers over trade and commerce and regarding currency, legal tender and bills of exchange, as properly construed. Are there obstacles to be avoided? Clearly there are, including the fact that a regulatory scheme should not inadvertently turn numerous entities into "federal undertakings". Does that leave space for provincial jurisdiction? We respectfully submit it does, while acknowledging the risk of overlap[150], and we would thus express the view that federal-provincial-territorial cooperation may be a useful avenue to explore in this area in coming years.

3.3.3 Regulating differently

Traditional, so-called "command and control" regulatory mechanisms, using detailed legal rules backed by criminal sanctions and overseen by a government agency, have been out of fashion in the financial sector for a quarter century[151]. Market complexity, uncertainty and dynamism were said to make prescriptive regulation obsolete and ineffective, if only because it was so easy either to avoid the rules or to follow their letter while negating their spirit, thus "gaming" the system[152]. In addition, rules were perceived as being too rigid, both in terms of process to adopt or adapt them and in terms of application to complex and evolving markets.

A brass of new regulatory techniques were put forward as "better regulation" or "new governance" and became the flavour of the day, mostly from 1990 onwards. They include principles-based regulation, outcome-based regulation, risk-based regulation and management-based regulation; the distinctions between some of these techniques are subtle, and they are in fact intertwined. In the wake of the 2007-2008 financial crisis, however, most of these newfangled techniques are deemed to have failed – that is, they performed no better in terms of risk management or crisis avoidance than old-style prescriptive mechanisms.

It is therefore essential to understand better the pros and cons of these regulatory techniques, and indeed what they mean, for there is significant confusion in this area, as well as misplaced optimism and, occasionally, self-serving rhetoric.

---

[150] Such overlap occurs fairly frequently. A recent example is provided by the implementation of CRTC's recent *Wireless Code* (Telecom Regulatory Policy CRTC 2013-271, June 3, 2013, at http://crtc.gc.ca/eng/archive/2013/2013-271.htm), while provisions of provincial legislation such as Québec's *Consumer Protection Act*'s sections 214.1 to 214.11 or Nova Scotia's *Consumer Protection* Act's sections 25K to 25AO continue to apply to mobile telecom providers.

[151] Black, *Paradoxes*, *op.cit.*, p. 1041. The United Kingdom, a precursor in this area, "introduced Principles in financial services regulation in 1990": Band, Christa; Black, Julia; Hopper, Martyn. *Making a success of Principles-based regulation*. [2007] Law and Fin. Markets Rev. 191 (hereinafter "Success").

[152] Black, *Paradoxes*, *op.cit.,* pp. 1038-1040.

3.3.3.1 principles-based regulation

To quote a legal scholar who was an advocate of principles-based regulation before 2007 and has since developed a constructively critical view of the concept,

> In general terms, Principles-based regulation means moving away from reliance on detailed, prescriptive rules and relying more on high-level, broadly stated rules or Principles to set the standards by which regulated firms must conduct business.[153]

Principles-based regulation ("PBR") *is not* light-touch regulation[154] – or at least, not necessarily. As an example, the United Kingdom's Financial Services Authority, which was one of the staunchest proponents of principles-based regulation, applied its "Trust consumers fairly" principle through an integrated approach that included overseeing product design by firms and strongly recommending that they perform regular mystery shopping. PBR can actually be quite demanding on providers[155], and quite intrusive on the part of the regulator. "Principles-based" must not be confused with "voluntary" or "soft".

The advantage of principles is that they formulate broad standards rather than very specific rules, making them more flexible and more adaptable to market practices as well as harder to avoid through technical loopholes. They point to types of behavior and qualitative assessment, rather than detailed quantitative results[156]. The requirement to "treat consumers fairly", for instance, when assessing information provided to a customer, is likely to be more effective than requiring that the "disclosure of information X shall be provided on the first page of the document in a font no smaller than 10 points", without regard to whether the consumer will read or understand the prescribed text or not – but it is also much more demanding on the regulatee, and may be perceived as providing somewhat less certainty as to whether the regulatee is in compliance with regulatory requirements, or not.

Certainty of the rule – that is, whether regulator, regulatee, public and courts agree on what it means[157] – may be perceived as a challenge, especially in the common law world, where legal practitioners tend to be more familiar with more detailed rules. Canadian courts, however, have provided ample guidance regarding the intelligibility of law, and especially of criminal and penal law[158], which suggests that well-drafted principles

---

153 Band, *Success*, *op. cit*. For a more critical stance, Black, Julia. *The Rise, Fall and Fate of Principles Based Regulation*. Law, Society and Economy Working Papers 17/2010. London, London School of Economics and Political Science, 2010. 25 p. Available at http://www.lse.ac.uk/collections/law/wps/WPS2010-17_Black.pdf. Hereinafter "Rise". See also Black, Julia. *Paradoxes*, *op. cit*.

154 Which was utterly discredited by the 2007-2008 crisis. See *e.g.* Black, Julia *Rise*, *op. cit*, pp. 14-15. See also Black, *Paradoxes*, *op. cit.*, 1044.

155 Band, *Success*, *op. cit.*, 192-193. See also Black, *Rise*, *op. cit.,* pp. 18-19.

156 Band, Success, op*. cit.*, 192.

157 *Ibid.*, 194.

158 *Reference re ss. 193 and 195,1 (1) © of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *R.* v. *Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *Ontario* v. *Canadian Pacific*

should pass handily any constitutional challenge for vagueness. What must be achieved is a reasonable degree of predictability as to what the rule means[159]. But lower certainty is the price to pay for flexibility; it entails that management bear a higher degree of responsibility regarding compliance. PBR requires a "significant change in the skills, judgement and mindset of firms", compared to more traditional prescriptive regulation, and demands more from those responsible for compliance within the firm[160]. Generally, it requires more from the regulatee than the prescriptive approach and leads into management-based regulation, which we will discuss *infra*.

Beyond the statement of principles, PBR usually also requires new approaches by the regulator itself. In order to foster predictability, there should be ongoing dialogue between regulator and regulatee, and the greater interpretative risk incurred by the regulatee suggests that the regulator should provide more ongoing guidance. The regulator's focus also changes from a "ticking the boxes" approach to a more qualitative and substantive assessment of outcomes achieved by the regulatee, which entails that its staff must develop skill sets that are different from those currently expected from compliance inspectors. There is, however, unavoidable tension with the regulatee, as regulated entities

> "[…] want more specific guidance; regulators think firms should work it out for themselves. Firms do not want to do the regulators' job for them; regulators do not want to become unpaid consultants." [161]

Authors have opposed PBR to rules-based regulation on the basis of this ambiguity:

> In the principles-based systems there is clarity about the regulatory objectives but the process of reverse-engineer [sic] these objectives into meaningful compliance at the firm level is ambiguous, whereas in the rules based systems there is clarity about the compliance process but the process of forward-engineer [sic] this into regulatory objectives is also ambiguous. [162]

In other words, regulators who design rules-based systems cannot be sure that the rules they put in place will achieve the objectives they seek, but regulatees know what they are expected to do; firms that try to translate principles into behaviours cannot be sure that the regulator will find them in compliance, but the regulator has clearly determined its objectives. Opting for a system or another is therefore as much an allocation of the uncertainty burden as anything else.

Ltd., [1995] 2 S.C.R. 1031 *Canadian Foundation for Children, Youth and the Law* v. *Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76 *R.* v. *Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584; *R.* v. *Levkovic*, 2013 SCC 25, [2013] 2 S.C.R. 204.

159 Band, *Success*, *op. cit.*, 196-197.

160 *Ibid.*, 200.

161 Black, Julia, *Rise*, *op. cit*,. pp. 5-8; quotation from p. 8.

162 Frantz, Pascal; Insterfjord, Norvald. *Rules vs Principles Based Financial Regulation* November 25, 2014. Available through http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2561370.

From a methodological standpoint, the heart of the regulatory challenge is to achieve the “optimal precision” of the rules that are implemented, between rigidity and uncertainty[163]. Issues directly related to individual rights, such as liability and procedural fairness, often lend themselves better to more specific rules – although such rules can (and should) be informed by principles. Dealing with quickly changing market practices may best be left to principles, the implementation of which will evolve as new services and unforeseen challenges arise[164].

As to the latter issue, we would be remiss in not emphasizing the relevance of increasingly involving stakeholders in the evolution of the regulatory framework, thus privileging bottom-up rule-building rather than top-down imposition of requirements. Providers, users and other stakeholders alike have their fingers on the pulse of the market, so to speak – but monitor it from various vantage points. It is high time that they be given an effective opportunity to provide their input in the process.

A principles-based approach focuses on outcomes, rather than on detailed recipes and prohibitions. It provides guidance to regulators, tribunals and courts, as well as to stakeholders. It establishes a framework for the necessary rules (for there are some) to be properly developed and implemented. It must not, however, slide into pure self-regulation if it is to remain effective[165], and a competent and effective regulator must be established for such an approach to be successful. There are challenges to implementing a principles-based regulatory strategy, some of which an author outlines cogently:

> First, regulators need to have the necessary capacity in terms of numbers, access to information, expertise, and perspective to act as an effective counterweight to industry as the content of principles is developed. Second, regulation needs to grapple with the impact of complexity on financial markets and their regulation. Effective regulation should reflect an appropriately granulated understanding of different kinds of complexity and their effects, and reject the notion that innovation is by definition beneficial. [...]. Finally, this paper suggests that the lack of diversity and independence among regulators and industry may have contributed to conflicts of interest, overreliance on market discipline, and “groupthink” in the run-up to the GFC. The appropriate response may be a move away from an expertise-based, technocratic model

163 Ford, Cristie. *Principles-Based Securities Regulation in the Wake of the Global Financial Crisis*. (2010) 55 McGill L.J. 257. Pp. 266-267 and authors quoted therein.

164 As a result, compliance costs may actually appear to increase as firms face more uncertainty and absorb some of the negative externalities that other stakeholders used to face on their own. Arguably however, these costs would be more than compensated by a reduction in reputational and legal costs as problems are prevented, rather than left festering or solved *ex post facto* before the courts.

165 For an overview of these issues in the context of securities regulation, see Ford, *op. cit*. The gist of her comments is manifestly relevant for our purposes.

> toward a more broadly participatory one. The paper closes with a call for a continuing commitment to principles-based regulation, accompanied by the indispensable implementation piece — meaningful enforcement and oversight. [166]

We believe these observations apply equally to the regulation of the payments ecosystem. We underline that the regulator's independence and competence are crucial to the success of such a model[167].

That said, principles seldom stand alone: they serve as the foundation for more specific rules, which "put flesh around the bone" provided by a given principle. Even with a principles-based approach, there are situations where detailed rules are more effective because uniformity is required (*e.g.* disclosure requirements designed to facilitate comparability of offers) or where it is simply more cost-effective to set a clear threshold for a given behavior[168].

3.3.3.2 outcome-based regulation

Outcome-based regulation is aimed at emphasizing oversight of what is achieved, rather than of the processes carried out by regulatees. Once the goal has been set by the regulator, it is assumed that the firm is best placed to determine how it can be attained[169] and it is attainment of the goal, rather than the choice of the specific tool by the provider, that is the regulator's true objective.

As a practical matter, it is often difficult to distinguish precisely between "principles-based" and "outcome-based" regulation as, in both cases, the core rules tend to be stated in purposive language. Actually and after the 2007-2008 crisis, British regulators sought to "rebrand" their regulatory scheme as outcome- rather than principles-based, without

---

166 Ford, *op. cit.*, pp. 261-262. "GFC" is the author's acronym for the "global financial crisis". See also Ferran, *op. cit.*, 420-2, as well as Viñals, Jose; Fiechter, Jonathan; with Narain, Aditya; Elliott, Jennifer; Tower, Ian; Bologna, Pierluigi; Hsu, Michael. *The Making of Good Supervision: Learning to Say "No"*. IMF Staff Position Note SPN/10/18. Washington, International Monetary Fund, May 18, 2010. 22 p. Available through http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1670831.

167 One might refer to recent testimony from Ireland's former chief executive of the Financial Services Regulatory Authority, who acknowledged he was "deeply sorry" about the 2007-2008 crash and stated that there was "trust and reliance" placed on banks' boards of directors and management, a part of the regulatory model that "clearly failed". The former regulator characterized the oversight model put in place at the time as "principles-based" and admitted both that "the Authority placed itself, unfortunately, so it could be viewed as a service provider rather than a detached strong regulator" and that "few people would dispute a far more intrusive form of regulation was required" in the circumstances leading to the crash: *Regulator 'sorry' for bank crisis*. Belfast Telegraph, May 28, 2015. Available at http://www.belfasttelegraph.co.uk/news/republic-of-ireland/regulator-sorry-for-bank-crisis-31260348.html.

168 Band, *Success*, *op. cit.*, 201. Band *et al.* also note (p. 202) that, perhaps paradoxically, specific rules may be simpler to apply for smaller businesses, which lack the resources to understand and implement less precise principles.

169 *Ibid.*, 192.

changing much of the substance[170]. However and as noted above, PBR can morph into specific, process-oriented oversight, as was the case in the United Kingdom with fair treatment of consumers and regulatory control over product design processes.

Outcome-based regulation is also rather demanding both on regulates and regulators:

> The whole point of outcome, as I sought to explain earlier, is that we want the supervisors to supervise, ie, to give consideration to whether the actions which companies are taking are leading to consequences which work in the best interests of society, consumer and the markets. We want them to think ahead, anticipate, think what is going to happen next, think whether what is going to happen next is going to work for society. That is what we mean by outcomes-based regulation. It is always difficult to capture that in one word but the point is clear. They need to be forward-thinking, braver, intrusive and get involved. [171]

Firms are therefore expected to fuse strategy and compliance, with a view to the social impacts of their actions. Again, this is more demanding than simply ensuring that specific thresholds, as often set in traditional regulation, are met. And the onus is on senior management to show the regulator that expected outcomes are being achieved, while the regulator itself must also develop the abilities to follow the regulatee's journey towards success.

3.3.3.3 management-based regulation

Also touted before the 2007-2008 crisis, management-based regulation is in a sense a consequence of the implementation of PBR, which puts more emphasis on the regulatee's management to determine how to achieve the goals enshrined in the regulatory principles. It assumes that compliance will become a strategic issue, overseen by upper management, and that a firm's compliance staff will play a more proactive role within the firm[172]. The firm is therefore required to develop strong compliance systems and demonstrate their existence to the regulator[173].

---

170 Black, Julia. *Rise*, *op. cit.*, p. 8.

171 Hector Sants, then United Kingdom's Chief Executive of the Financial Services Authority, testifying before the House of Commons Treasury Select Committee, February 25, 2009, in the context of an inquiry, Response to Q2225, consulted at http://www.parliament.the-stationery-office.co.uk/pa/cm200809/cmselect/cmtreasy/144/09022506.htm), also quoted in part (with inaccurate reference) in Black, Julia. *Rise*, *op. cit.*, p. 8.

172 Black, Julia. *Rise, op. cit.*, pp. 3, 17.

173 See for instance Black, *Paradoxes*, *op. cit.*, pp. 1045-1046. The obvious risk from the regulator's perspective is that it will be presented with impressive processes that will turn, in practice, to be empty shells. As Black puts it (p. 1046), the success of such a system is "fundamentally reliant on the simultaneous presence of four elements: on firms having the appropriate culture to support the compliance systems which are in place, on having the right incentives to pursue public objectives as well as private profits, and on regulators possessing sufficient skills and industry experience to evaluate firms, and having sufficient courage and political support to challenge them." A tall order indeed.

The notion of management-based regulation is also impacted by "judgement based regulation", as the British Financial Services Authority also attempted to rebrand PBR, and by the latter's notion of "outcome-based" regulation exposed in Mr. Sants' quote *supra*[174]: there should be fewer detailed rules and providers will need to use their best judgement in order to act appropriately. As noted above, differences between the three techniques may be more semantic than real.

However, management-based regulation basically acknowledges a fundamental truth: the regulator cannot constantly oversee each firm. Effective compliance must therefore rely on the regulatee's proper behavior, based on its values and its compliance processes. Trust is of the essence.

And that is a significant concern for policymakers worldwide, as this trust was abused not only during the period leading to the 2007-2008 crisis[175], but also after that crisis had abated, as shown for instance by the Abacus and LIBOR scandals[176]. In fact, it is arguable that management may well have in some cases an incentive to break the rules and thus lower their costs or increase their revenue, if they find (or even suspect) that their competitors are doing the same without getting caught; there can easily be a race to the bottom, fuelled by short-term profitability: private behavior does not equate to, or always pursue, public good, and sometimes swerves towards herd behavior[177], without regard for the emplacement of cliffs.

If management is to be trusted, it must behave ethically. Some are now suggesting that professionals (lawyers, accountants, engineers…) acting within the firm or for it should be held to a high degree of ethical responsibility by their professional bodies, with a more efficient set of ethical expectations being put in place[178]. Oversight would thus come (in part) from within the firm, and managers who are also professionals would be expected to be accountable for what they know, and what they decide.

Clearly, then, management-based regulation puts an onerous burden on providers' management: it is expected to regain trust and make the right decisions, without the

---

[174] Black, *Paradoxes*, *op. cit.*, 1042.

[175] To pick only one example in the United Kingdom, where the Financial Services Authority "built a large part of its supervisory approach on the assumption that 'the vast majority of firms intend to treat their customer fairly'", £9 billion (more or less) turned out to be due in redress to customers who had been sold inappropriate products: Ferran, *op. cit.*, 418. The author goes on to note that "it is clear that supervisors over-estimated the extent to which it was safe to seek to capitalize on firms' self-interest in behaving well." We concur.

[176] For a reminder, see *e.g.* O'Brien, Justin. *Culture, codes of conduct and limits of enforcement*. [2014] 8:1 Law and Fin. Mkts Rev. 1. O'Brien quotes in particular Barclays' former CEO, who famously said in November 2011 that corporate culture is "how people behave when no-one is watching" (see http://news.bbc.co.uk/today/hi/today/newsid_9732000/9732862.stm), which, given Barclays' involvement in the LIBOR scandal, does not bode well for its compliance culture. Of course, Canadians and their financial firms do not behave in such wretched ways. Except in quite exceptional cases, such as Enron.

[177] See for instance Llewellyn, *op cit*, 27. The size of some firms, and especially the globalized financial institutions, also raises the issue of sheer capability of senior management to control their firm and ensure appropriate compliance.

[178] Sanders, Deen. *Reinventing regulation*. [2014] 8:2 Law & Fin. Markets Rev. 98.

(admittedly weak) guidance of specific regulation. It must exhibit sound judgement in an uncertain environment, and will be assessed on the basis of that ability. Management will be expected to take the "right" decisions, even when it may not seem rational to do so from a narrow economic or financial standpoint (such as quarterly profitability or emulation of cheating competitors)[179].

3.3.3.4 risk-based regulation

Risk-based regulation is a bit of a misnomer and may induce confusion, inasmuch as any regulatory regime is aimed at controlling risk. In many cases, what regulators have meant is that they would assign resources according to what they felt raised the highest risks, in the light of their specific mandate. As Black states, it then becomes largely a regulatory strategy that faces inwards and that is aimed at managing limited resources[180]. The results may not sit well with a public that expects to be universally protected, or their elected representatives.

Risk-based regulation was also often associated with management-based regulation, under the assumption that it was in the firm's interest "to manage its risks well" [181]: this assumption turned out not to be well-founded in fact in the course of events leading to the 2007-2008 crisis, as firms woefully underestimated risk in the face of complexity and the pursuit of short-term benefits (and, arguably, higher bonuses for management). It didn't help that firms presented regulators with representations of risk management and compliance systems that had little to do with reality[182], sometimes in good faith, and sometimes not.

Even where a broader meaning is given to risk-based regulation, its success from a regulatory standpoint depends on properly identifying the risks, using the right indicators and being able to challenge firms, and thus having the skills and mettle required to do so[183]. Risk identification, in particular, may become a point of contention between the regulator on the one hand and the public (and its elected representatives) on the other.

As drafted, the Paper provides ample illustration of the problems that risk-based regulation can raise. The reader is distinctly left with the impression that end-user interests are associated as a matter of course with lower risk, and could be addressed with a few voluntary codes and redress mechanisms, thus requiring minimal resources from the regulator. It is as if the perspective was that systems should of course be safeguarded, for their own sake and end-users', but that problems impacting end-users without threatening the system's daily and ongoing operation (such as massively using unconscionable or illegal standard contracts) were not issues worth the regulator's close consideration. We are therefore quite reluctant to support the view that a risk-based approach should be adopted.

---

179 Black, Julia. *Seeing*, *op. cit.*, 18.
180 Black, *Paradoxes*, *op. cit.*, 1053.
181 Black, *Paradoxes*, *ibid.*, 1047.
182 Black, *Paradoxes*, *ibid*, and sources quoted therein.
183 Black, Julia. *Paradoxes*, *ibid.*, 1055.

Of course, risk mitigation mechanisms should be proportionate to the risk. We would therefore argue that, insofar as a risk-based approach is considered, it should be used with the utmost care in determining which issues the regulator should address, and should serve mostly as a tool to adjust responses to the various types of risks and to their magnitude.

3.3.3.5 whither 'new' regulation?

Whether it is called principles-, outcome-, management- or risk-based regulation, the new regulatory model mooted in the nineties hinged more on trust and flexibility than on detailed rules: it was hoped that firms and regulators would use principles to attain successfully expected outcomes in complex and evolving markets. In the context of the 2007-2008 crisis, it plainly and clearly did not work.

In fact, too many regulatees demonstrated that "a principles-based approach does not work with people who have no principles" [184], as the FSA Chief Executive incisively noted in a speech in 2009, while too many regulators either did not understand the activities they were regulating or lacked the willingness to stand up to rash providers[185].

This is not to say that more flexible regulation is necessarily doomed. It does mean, however, that it is not a magical solution. It requires novel approaches, more strategic insight and more judgement, both from the regulator and from those it regulates. It relies more transparently on firms' willingness to discipline themselves, and thus requires them to integrate compliance at the highest level with its strategic objectives. Otherwise, it will fail – again.

3.3.4 Implementing principles

With other consumer organisations, we have recommended for years the implementation of a principles-based regulatory framework in the payments area. We are mindful, however, of both the advantages and drawbacks of such an approach.

What do we mean by "principles"? Basically, they are statements which orient the decision-making process. They should be more specific than the objectives proposed by the Task Force in its National Payments Policy, and certainly much more specific than the objectives outlined in the Paper, insofar as they serve to articulate these objectives and thus enable decision-making.

An example might help to clarify what is required. Objective (a) (ii) in the National Payments Policy states that the assignment of costs, benefits, rights and responsibilities

---

[184] Sants, Hector. *Delivering intensive supervision and credible deterrence*. Financial Services Authority. March 12, 2009. Available at http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2009/0312_hs.shtml.

[185] While visiting the London School of Economics in November 2008, the Queen asked (rather candidly) why no one had seen the crisis coming; the answer she received many months later from the British Academy forum of economists was that the main explanation was "a failure of the collective imagination of many bright people [...] to understand the risks to the system as a whole": see *e.g.* Black, *Paradoxes*, *op. cit.*, note 107 and Black, *Seeing, op. cit.*, p. 2. The British Academy's answer to the Queen can be accessed through http://www.britac.ac.uk/events/archive/forum-economy.cfm.

among all participants should be fair. In the context of consumer liability for fraudulent transactions, what might that mean, and what principles should the regulator rely on?

In a paper published in 1987, two United States legal scholars argued for a "theory of loss allocation for consumer payments"[186]. They deliberately opted for a neoclassical economic analysis based on transaction costs and a Coasian framework[187], but found that the recommendations to which they came were also likely to be assessed as fair in terms of distributional effects, and therefore acceptable to consumer advocates[188].

Cooter and Rubin postulate that three principles should be considered when designing proper rules for minimizing payment transaction costs:

- loss spreading,
- loss reduction and
- loss imposition.

In other words, who can best support the risk, who can best prevent it and how can adjudication costs be best reduced? We will touch on loss spreading and loss imposition, and concentrate on loss reduction.

As risk increases relative to their ability to support it, people become more risk averse. Therefore, a consumer faced with a potential $10 000 loss associated with a transaction will often demur while his banker, faced with exactly the same risk, will not. If the banker wants the transaction to happen, he should offer some form of reassurance to his customer, which he can afford better than the customer ever could, especially if the risk is quantifiable. The banker will be able to *spread* the risk among its customer base by adding a minimal, incremental amount to the price for his services and the consumer will be more likely to use (and pay) a service that is now, for him, essentially risk-free[189], at a cost to the banker that is low enough to make the operation profitable.

Reducing the risk of loss does not come without a cost. Risk mitigation will be more efficient if it is achieved by the party who will incur the lowest cost in doing so. In a nutshell, who can most effectively prevent a loss from happening? In order to encourage that party to minimize loss, it should be the one held liable if and when a loss happens. In other words, the legal rule should ensure that "the liable party internalizes the social value of the precaution" [190]. The challenge arises when many parties can help minimize loss: exonerating one party from liability may be seen as tolerating, or even encouraging, negligence on its part, hence the preference for fault-based liability regimes. In technically complex areas such as payments, however, the provider has such a significant ability to *reduce* risk by implementing adequate technology and such a cost advantage,

---

[186] Cooter, *op. cit.* Their analysis focuses on operational risk and does not consider credit risk issues.

[187] *Ibid.*, pp. 67-70: providers and users incur transaction costs when using payment instruments; minimizing those costs is one way to achieve efficiency; informational asymmetries and negotiation costs preclude the use of contract to achieve such efficiency; there is therefore market failure and a need for regulation.

[188] *Ibid.*, p. 66.

[189] *Ibid.*, pp. 70-73.

[190] *Ibid.*, p. 74 (footnote omitted).

while the customer has so many reasons not to be negligent beyond the immediate cost associated with liability for a lost payment[191], that it is in most cases more efficient to assign *a priori* liability to the provider.

Largely on the basis of a similar analysis, scholars have developed an argument whereby, in many cases, an "economically efficient loss allocation rule" assigns liability on "[...] the account institution to encourage it to improve the security of the" system over time[192]. Liability should also be allocated taking fully into account the informational asymmetry between providers and consumers, and ensuring that providers design safe systems rather than relying on millions of consumers to secure hundreds of millions of transactions.

This is not, however, what is currently happening in the Canadian market. Quite simply, providers tend to transfer liability on consumers through contract, rather than implement more secure payment mechanisms, as mentioned above.

The corollary is that provisions such as those found in standard form agreements mentioned *supra* do not reflect an economically efficient loss allocation rule. Rather, they reflect market dominance, insufficient competition and informational asymmetries which do not allow consumers to understand those contractual provisions, negotiate them or avoid them. If providers will not eliminate them, the regulatory framework should[193]. As we stated in section 3.1.4, providers are in a position to put in place globally safe *systems*; consumers can do nothing but to try and secure *individual transactions*.

Having appropriate substantive rules is necessary, but not sufficient. They must also be enforced as efficiently as possible. The burden associated with a loss should therefore be shifted to the party which should suffer it through a process that is simple and clear. The process through which loss is imposed must therefore also be a regulatory concern.

Thus, one can step from a generic policy objective to principles, and then to a finding: to go back to the previous example, contractual provisions that unduly transfer liability to consumers are neither economically efficient nor fair. They should be eliminated. The only outstanding issue is the choice of the best instrument to achieve the desirable result.

---

191 Including liquidity loss, reputational risk, administrative hassles and, in most cases, his or her own moral compass.

192 See footnote 43, *supra*, and text associated therewith.

193 It can do so for instance by prohibiting certain types of contractual clauses, or mandating balanced default clauses where standard form agreements are silent. The economic theory of default rules has attracted scholarly interest in the past (see for instance Ayres, Ian; Gertner, Robert. *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*. [1989-90] 89 Yale L.J. 87), but there has been a tendency to consider that default clauses should be set at "what the parties would have wanted" should they have considered the issue when contracting; when it comes to consumer protection, however, it is likely that, in many cases, the parties would not have agreed on the default clause because their interests are diametrically opposed, and it is up to the regulatory framework to determine how to set such legal rules (for instance, by giving precedence to the protection of the weaker party to the contract). Providing clear (and apposite) mandatory default rules may actually minimize the costs of contracting for all parties, which is a benefit for providers.

This of course is but an example, and does not assume that we entirely support, for instance, Cooter and Rubin's proposed principles or the application of a Coasian analysis. It shows, however, how a principles-based approach can work. In this instance and once every stakeholder is aware of the principles the regulator intends to apply, the determination of the principles might even be dissuasive enough to convince providers to modify their agreements, for fear of more intrusive measures[194].

3.3.5 Form and substance

Principles must usually be turned into more prescriptive statements in order to direct behavior. The form of such statements may vary widely.

Some will be embodied in technology, be it the choice of hardware or software design. In hi-tech areas such as electronic payments, the intricate relationship between implementation of principles and technological architecture will require increasing awareness from stakeholders, regulators and system designers.

More conventionally, other prescriptive statements will take some legal shape, as law remains one of the most commonly used, and best understood (to a certain extent at least) sets of instruments to guide social behavior. But law can come in many forms, each with their advantages and drawbacks.

Legislation is the most obvious type of legal norm. It is public, adopted by elected representatives and thus socially highly legitimate, and usually enforceable by courts. However, it can be difficult and lengthy to modify, and Canadian federal legislation has tended to be highly detailed and prescriptive[195]. We believe legislation would be required at the very least to establish a National Payments Policy and a regulator. The regulator's powers should allow it to enact more specific norms through various mechanisms.

Delegated legislation has traditionally been enacted through regulation. However, the process surrounding the adoption of such instruments has become quite onerous over time[196]. While there are excellent reasons for ensuring that care is taken to regulate properly and to ensure public involvement in the process, other methods may lead to similar results and be, in many cases, better adapted to the requirements that a regulatory body would face in the payments ecosystem.

For instance, the Canadian Radio-Television and Telecommunications Commission may impose any condition it deems appropriate to the offering and provision of telecommunications services, through a public, quasi-judicial process where all interested

---

194 Not that we would be holding our breath...

195 Yet legislation need not be so detailed as, for instance, the *Bills of Exchange Act*. A statute such as the *Civil Code* in Québec provides an example of a very different style of legislative drafting, as do many Directives and Regulations enacted by the European Union. Even within the federal environment, legislation such as the *Telecommunications Act*, R.S.C., c. T-3.4 (especially as it was first enacted in 1993 and before a number of more specific provisions were added), could provide some inspiration. In other words, one must distinguish between the legal nature of the norm (legislation, regulation, code…) and the technique through which it guides behavior, which may be more or less prescriptive and detailed.

196 See for instance the requirements of the *Statutory Instruments Act*, R.S.C., c. S-22.

parties can be fully heard[197]. These powers have enabled the Commission to implement the *Wireless Code* in 2013; the Code imposes on providers of retail mobile wireless voice and data services a number of requirements regarding issues such as penalties and the content and clarity of contracts[198]. Needless to say, the *Code* is not voluntary: providers must legally comply with what amounts to a set of conditions imposed by the Commission.

Other bodies, such as the Canadian Transportation Agency, can also regulate industries and ensure, for instance, that terms are just and reasonable, through acceptance of tariffs, direct orders or adjudication[199]. When adjudication reveals systemic problems, the Agency has been known to issue notices inviting providers to "voluntarily" improve terms and conditions, the implicit threat being that the proposed rules would otherwise be enforced through adjudication[200].

Québec's *Consumer Protection Act*[201] may also provide inspiration, as it allows for voluntary undertakings to be extended by Order in Council. Under this system, a merchant or group of merchants agrees voluntarily to some behaviour that is deemed acceptable by the relevant authority. Where it believes that doing so could be beneficial, Government can choose to extend the application of the undertaking to a whole sector of activity and make it legally binding on all merchants on that sector. Once an undertaking has been extended by Order, non-compliance exposes the merchant to both civil and penal liability. The most relevant provisions of the Act are the following:

> **314.** The president may accept a voluntary undertaking from a person with the object of governing the relations between a merchant, or group of merchants, and consumers, in particular in order to determine the information to be given to consumers, the quality of the goods or services with which they will be

---

197 *Telecommunications Act*, R.S.C., c. T-3.4, sections 24, 24.1 and 25, as well as *Canadian Radio-Television and Telecommunications Commission Rules of Practice and Procedure*, SOR/2010-277 as amended.

198 *Telecom Regulatory Policy CRTC 2013-271*, June 3d 2013, available at http://crtc.gc.ca/eng/archive/2013/2013-271.pdf. The process leading to the adoption of the Code is of interest. CRTC first determined, through a public hearing process, that it had become necessary to "establish a mandatory code of conduct" (*id.*, par. 5); as a matter of fact, providers agreed that such a code was becoming necessary. CRTC then held a second public hearing focused on the Code's contents. It should be underlined that in its decision (*id.*, par. 23-26), CRTC expressly found that market forces were not sufficient to ensure all the policy objectives governing the provision of telecommunications were met, especially in the area of more vulnerable end-user protection.

199 See for instance *Air Transportation Regulations*, SOR/88-58, especially sections 104-107.1.

200 See for instance Canadian Transportation Agency. *Notice to Industry: Initiative to level the playing field among air carriers and increase rights and remedies for passengers delayed because of overbooking and cancellation of flights.* July 3 2013. Available at https://www.otc-cta.gc.ca/eng/publication/notice-industry-remedies-overbooking-cancellation. The Agency has since, in numerous decisions, applied the orientations outlined in the Notice and required carriers to modify their tariffs accordingly.

201 R.S.Q., c. P-40.1, sections 314-315.1.

> provided, standard contracts, methods of settling disputes or rules of conduct.
>
> [...]
>
> **315.1** The Government may, by order and with or without modification, extend the application of a voluntary undertaking made under section 314 to all merchants in the same sector of activity, for all or part of the territory of Québec.

The process established by s. 315.1, enacted in 1992, has been used three times over the past two decades. Voluntary undertakings have been extended in the areas of unitary price labelling, marketing and sale of prearranged funeral services and advertising of used vehicles by merchants.

The latter case is interesting. The used vehicle resale industry was plagued by incomplete and misleading advertisement to such a high degree that it was tainting the image of even the most reputable dealers, who felt practically obliged to go with the flow in order to keep market share. Those dealers accepted an invitation to sit down with the *Office de protection du consommateur*[202] and consumer representatives, and hammer out a list of practices that should be banned. Once they agreed, government adopted an Order in 2006 to extend this voluntary undertaking to the entire sector. By all accounts, the sector has now significantly improved its practices.

This process therefore provides most of the advantages of both a voluntary process and legally binding regulation, and practically none of their disadvantages. Rules are determined by (usually knowledgeable) stakeholders, at the pace that suits them. Their adoption depends on stakeholders' willingness to find common ground. Then, if those rules are found to be sound, they *may* be extended to those who have not participated in the discussion, ensuring a level regulatory field in the sector and both legal certainty and enforceability.

There are two challenges facing a regulator in the payments area: the complexity and fluidity of the issues on the one hand, and the need for legal certainty and enforceability on the other. Purely voluntary codes purport to address the former, while classic regulation addresses the latter. Voluntary undertakings extended by decree, or some similar mechanism, address both.

Of course, these are only examples, but they illustrate that a regulator's well-designed toolkit can provide it with a broad range of mechanisms that can be flexible enough to adapt to the market, ensure stakeholder involvement in the rulemaking process and provide end-users with a sound legal basis for exercising rights when necessary.

---

[202] The governmental agency charged with the application of the Act; the president referred to in s. 314, *supra*, is the Office's.

3.3.6 Establishing a regulator

3.3.6.1 what makes a good regulator

For a regulatory framework to be effective, there needs to be someone in charge: there must be a regulator. There are issues to be addressed in terms of mandate and resources, as well as in terms of structure, in order to ensure that policy objectives are achieved.

In the wake of the 2007-2008 financial crisis, regulatory oversight's failings have been closely scrutinized, as alluded to above. Less attention was given to supervisors themselves, and what makes them successful. An IMF Note sought to fill that gap[203] and while it focuses on microprudential supervision, it explicitly indicates that the issues it discusses are just as relevant to market conduct supervision. It espouses the Basel II basic philosophy, which requires that sound regulation be supported by strong supervision and strong market discipline[204].

In the authors' opinion,

> To be effective, supervision needs to be intrusive, adaptive, skeptical, proactive, comprehensive and conclusive. [205]

The supervisor must know inside out the entities it supervises, it must be "in constant learning mode" to follow market evolution, it must prod and question while looking ahead, it must look at the whole perimeter, including the edges, and it must follow through on all issues that are identified as potentially problematic[206]. It must also have the resources, including technical skills, stable staff and budgetary autonomy, to do its work, while avoiding regulatory capture. Most importantly, it must have "a willingness to take action" and say no when necessary[207].

While rules provide more certainty than principles, they can also be evaded, especially when they are drafted with undue specificity. Principles may be less certain, but they are more flexible and more easily adapted to a changing environment. For principles to work, therefore, a regulator must be able to ensure that they are effectively enforced as the need arises: it must adapt the principles and make sense out of them in order to address adequately a specific situation. Hence the care that must be taken in designing an effective regulator, for the bar is set quite high, as Ford underlines:

> Moreover, because so much interpretive discretion rests in the regulator's hands, regulatory capacity, training, judgment, and philosophy are critically important to effective implementation. It is therefore crucial to think carefully about the structure through

[203] Viñals, *op. cit*.
[204] *Ibid.*, p. 8, footnote 3.
[205] *Ibid.*, p. 5.
[206] *Ibid.*, pp. 12-13.
[207] *Ibid.*, pp. 14-17.

> which principles will be translated into regulatory practice. [208]

Independence, expertise and effectiveness are three significant challenges that Ford mentions and that a regulator overseeing a principles-based regulatory framework will face. This means it will need significant resources to do its work properly, else the law of the jungle is likely to re-establish itself.

Independence represents a significant challenge, especially in a small market like Canada's, where regulatory capture[209] may happen through close – and sometimes incestuous – relationships between regulators and regulatee. The latter may be seen as having more expertise, creating a dependant relationship, and regulator's staff may wish to avoid picking on prospective employers who might eventually value their experience[210]. There must be a diversity of perspectives brought to the table for regulation to work, and the regulator must be able to bring to the discussion an understanding of the ecosystem that will not systematically be the industry's or the users'.

There are therefore numerous and delicate considerations to keep in mind when choosing a regulator, or designing a new one. Care must also be taken to consider the specific characteristics of the area to be regulated.

Regarding the structure of a Canadian payments regulator, three options are possible: regulatory responsibilities may be shared between two or more existing organisations, an existing organisation may be given a new mandate or a new organisation may be created altogether. An examination of the characteristics of this regulatory body may help to identify the formula best adapted to regulating the Canadian payments ecosystem.

Canada's new payments regulator must be able to develop a global view of the ecosystem and understand its complexity. It must be both technology-savvy and mindful of socio-economic factors. It must be able to regulate a broad array of providers. It must be able to consult and work with stakeholders. It must be independent, impartial and reasonably free from the vagaries of politics. It must be competent and nimble.

The bar is, admittedly, quite high.

The first requirement outlined would appear to eliminate the shared-jurisdiction option. It appears unlikely that separate organisations, however well they may coordinate their resources, would be able to develop the cohesiveness and focus required to regulate the ecosystem effectively. Shared jurisdiction basically means maintaining the *status quo*: the last decade shows how conservative, and barely reactive, such a framework has worked out to be, when we need a proactive and focused regulator.

Is there then an existing regulator which could realistically add the payments industry to its remit? We incline to the view that the answer is negative, as the following overview

---

208 Ford, *op.cit.*, p. 288.

209 For a discussion of the practical impacts of regulatory capture (eventual or real), see for instance Perri, Frank; Brody, Richard. *The sleeping watch dog: aka the Securities and Exchange Commission*. [2011] 19:3 Jnl of Fin Regulation and Compliance 208-221.

210 Ford, *op. cit.*, pp. 299-302 in particular.

indicates. The sole remaining option, therefore, will be to create a new regulator, either as an autonomous entity or as a semi-autonomous body within an existing organisation.

3.3.6.2 existing candidates

At first glance, at least seven (7) organisations currently in existence and created by federal legislation might be potential contenders as the new Canadian payments regulator – from a theoretical standpoint at least: we are certainly not claiming any of them has actually shown any interest in regulating retail payments (indeed some have disclaimed any such interest) and, as the next pages will make clear, we are of the view that none currently has the peculiar combination of expertise, credibility and independence required. They may be doing their current job quite well, but that does not automatically qualify them for the very challenging work that awaits the payments regulator Canada needs.

3.3.6.2.1 *the Department of Finance*

The Department of Finance's mandate is both extensive and amorphous[211]. The Minister is certainly responsible for setting Canada's policy in the payments area, but that does not make the Department the ideal regulator.

Over the last decade, the Minister has been seemingly reluctant to weigh in too heavily in some heated disputes, preferring to foster the adoption of voluntary undertakings. The Department has also seemed to find it challenging to maintain the required expertise over time. In addition, payments are but a drop in the torrent of issues the Minister must manage. Arguably, the payments industry would be better served by having a specialized regulator, which would also be somewhat insulated from the hurly-burly of short-term political concerns. As an author puts it (albeit in the broader context of financial services regulation),

> Financial supervisors should develop a strong internal sense of identity in order to insulate themselves from the destabilizing influence of short-term political preferences and from industry lobbying. [212]

We agree. The Minister should of course provide the broad orientations underpinning the regulatory framework and may occasionally be required to act as the policymaker of last resort, but the vast majority of issues should be settled without needing the Minister's intervention.

3.3.6.2.2 *the Financial Consumer Agency of Canada*

The Financial Consumer Agency of Canada ("FCAC") was established to supervise federally-regulated financial institutions, external complaints bodies and payment card network operators, monitor the implementation of voluntary codes of conduct, promote

---

211 The Department is formally established by section 14 of the *Financial Administration Act*, R.S.C., c. F-11, and section 15 grants the Minister the "control and direction of all matters relating to the financial affairs of Canada […]", but the Department's website currently references over 60 statutes for the application of which the Minister is responsible (http://www.fin.gc.ca/legislation/act-loi-eng.asp).

212 Ferran, *op. cit.*, p. 420.

consumer awareness, monitor trends and strengthen financial literacy[213]. The Minister of Finance presides over FCAC, which is managed by a Commissioner who has the status of a deputy head of a department[214].

It has been suggested by some stakeholders that FCAC could act as the Canadian payments regulator. We respectfully, but firmly, disagree.

FCAC's current regulatory perimeter is limited to federally-regulated financial institutions and card networks whose most important participants are the same institutions, and to the enforcement of a very narrow set of legislative provisions. It cannot devise new normative instruments. On the other hand, the payments ecosystem includes a wide range of participants, a majority of which (in numbers) are not federally-regulated financial institutions or card networks, and its regulation will require innovative rule creation addressing a broad spectrum of issues. FCAC would thus find itself with two completely different areas of jurisdiction, with two different toolkits. This is not conducive to cohesive action.

FCAC is not a fully independent agency from a legal standpoint, as opposed for instance to CRTC or the Competition Bureau. While we acknowledge that the Commissioner has in fact a high level of autonomy, it is the Minister who presides over the regulator.

In addition, FCAC appears to have emphasized the promotion of consumer awareness over the last decade, rather than proactive supervision, and is perceived by many stakeholders as a fairly weak regulator.

Given its narrow focus, lack of formal independence and current policy orientation, FCAC is not a strong candidate for the office of payments regulator. It would probably be simpler to create a new entity, rather than to try to morph FCAC into a completely different organisation.

3.3.6.2.3 *the prudential regulators*

The Office of the Superintendent of Financial Institutions ("OSFI") and the Canada Deposit Insurance Corporation ("CDIC") already oversee a significant chunk of the Canadian financial industry, and might thus seem to be reasonable candidates for the responsibility of becoming the payments regulator. However, both organisations share with FCAC some characteristics which weaken their appeal[215].

OSFI's mandate is to supervise federally-regulated (as well as some provincially-regulated) financial institutions in order to ensure their sound financial condition and to supervise certain pension plans so to as verify that they are sufficiently funded. The Minister of Finance presides over OSFI, while the Superintendent acts as the deputy head. CDIC is an independent corporation, with its own Board of Directors, and it was created to provide deposit insurance for the benefit of customers of federally-regulated

---

213 *Financial Consumer Agency of Canada Act*, R.S.C., c. F-11.1, especially sections 2 and 3.

214 *Ibid*., subsections 3 (1) and 4 (1).

215 OSFI is established under the *Office of the Superintendent of Financial Institutions Act*, R.S.C, c. O-2.7; CDCIC is established under the *Canada Deposit Insurance Corporation Act*, R.S.C., c. C-3.

financial institutions as well as to contribute to the stability of the Canadian financial system.

Therefore, both regulators focus on financial institutions and on “safety and soundness” issues. Neither has experience in dealing with a broader range of providers or issues. Neither has developed ongoing relationships with many stakeholder constituencies. OSFI is not formally independent from the Minister. In addition, there might be a possibility that CDIC’s and OSFI’s foremost responsibilities concerning safety and soundness could make them more reluctant to foster innovative risk-taking or increased competition in the payments market. Neither OSFI nor CDIC therefore appears well-suited to act as a payments regulator.

3.3.6.2.4 *the Competition Bureau*

The Competition Bureau is certainly more independent from government and has experience in a broad range of markets. It also maintains ongoing relationships with many stakeholder constituencies.

However, its focus is squarely on competition and it must respectfully be said that it has not manifestly demonstrated a profound understanding of the specificities of the Canadian payments market over the past twenty years[216].

With the utmost respect, its recent submission to the Department as a response to the Paper does not sway our views significantly[217]. In particular, we note that the Bureau recommends that merchants be allowed to apply surcharges when accepting various payment mechanisms, without discussing however how such a proposal could be

216 In *Director of Research and Investigation* v. *Bank of Montreal*, CT-1995/002, decided June 20 1996 (reasons available at http://www.ct-tc.gc.ca/CMFiles/0093a38PPG-3102004-67.pdf), which dealt with allegations of abuse of dominant position by Interac’s founding members, the Competition Tribunal lambasted the Bureau for being unclear in its positions (pp. 33-34) and “unconvincing” (p. 40), and for proposing provisions relating to consumer service pricing that appeared “to offer minimal, if any, benefit to consumers” (p. 52). In fact, it is arguable that the Consent order obtained at the time by the Bureau resulted in an increase of costs incurred by consumers who use automated banking machines over the past two decades, rather than in benefits. Then, in 2008, the Bureau decided to authorize financial institutions’ dual allegiance to card networks (see letter published by the Bureau: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02749.html), without adequate consultation with stakeholders and with scant analysis of the real power relationships between issuers and networks in Canada, which amount to an oligopsony. Of course, the Bureau also ignominiously lost its case against the Visa and MasterCard networks in 2013 (*Commissioner of Competition* v. *Visa Canada Corporation and MasterCard International Incorporated*, 2013 Comp. Trib. 10, available at http://www.ct-tc.gc.ca/CMFiles/CT-2010-010_Reasons%20for%20Order%20and%20Order%20Dismissing%20the%20Commissioner's%20Application_337_38_7-23-2013_7109.pdf.

217 Competition Bureau. *Submission by the Commissioner of Competition Before the Department of Finance Canada*. Ottawa, Competition Bureau, June 19, 2015. 9 p. Available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03958.html. Regarding surcharges and competitiveness, see par. 29; regarding market conduct issues and disclosure, see par. 47-50.

reconciled with section 54 of the *Competition Act*[218], which it enforces, or how harmful surcharges turned out to be in Australia before authorities had to cap them[219]. Surcharges would increase consumer confusion in the marketplace, are likely illegal under both federal and some provincial legislation and are unlikely to be imposed by merchants in any event, by one of their Canadian most persistent promoters' own admission[220]; we fail to see how they could possibly advance efficiency or consumer interests, yet the Bureau persistently insists on their implementation.

Intriguingly, the Bureau goes on to declare that without the ability of merchants to surcharge, refuse to accept certain cards or steer their customers, "neither Visa nor MasterCard, nor any mobile wallet providers using their respective networks, have any meaningful incentive to compete with respect to the level of card acceptance fees" (par. 29, *in fine*). In other words, only punitive incentives are, in the Bureau's opinion, likely to work. Innovation and other positive factors would be unlikely to spur competition; the networks' market power is apparently so great that they see no reason to compete on prices; in most jurisdictions, such a situation would be akin to what the *Competition Act* calls an abuse of dominant position and could be litigated[221]. This sounds, however, as if

---

218 *Competition Act*, R.S.C., c. C-34. Section 54 prohibits the supply of a product at a price that exceeds the lowest price clearly expressed in respect of that product. Rather obviously, surcharging entails that the price paid by the purchaser will exceed the lowest price advertised, otherwise there would be no surcharge. In provinces such as Québec, authorities that apply provisions similar to s. 54 have clearly indicated that surcharging is illegal under such provisions: see for instance Office de la protection du consommateur, *Paiement par carte de débit: frais interdits*. July 23, 2014. Available at http://www.opc.gouv.qc.ca/consommateur/sujet/prix-rabais/publicite/carte-debit/. This view regarding the ambit of subsection 224 c) of Québec's *Consumer Protection Act* was recently confirmed by the Superior Court: *Stratos Pizzeria (1992) inc.* c. *Galarneau*, 2015 QCCS 2353, May 8, 2015. Therefore and even if the Bureau's conclusion was (erroneously, in our view) that surcharging can be reconciled with s. 54, the practice would still be illegal under provincial legislation, at least in Québec.

219 See for instance Reserve Bank of Australia – Payments System Board. *Payments System Board Annual Report 2012*. Sydney, Reserve Bank of Australia, 2012. 58 p. Pp. 25-26Available at http://www.rba.gov.au/publications/annual-reports/psb/2012/pdf/2012-psb-ann-report.pdf .

220 Canadian Federation of Independent Business. *Background/media availability on credit card ruling*. Toronto, Canadian Federation of Independent Business, July 22, 2013. CFIB president Dan Kelly is quoted as declaring: "CFIB believes very few merchants would surcharge for credit card acceptance, but the power to do it would cause Visa and MasterCard to rethink future hike fees". Available at http://www.cfib-fcei.ca/english/article/5327-competition-tribunal-advisory.html. While we agree that most merchants would probably not surcharge (at least until they discover how lucrative a profit center it became in Australia), if only because of management and reputational issues, we respectfully fail to see how acknowledging that the power to surcharge, once obtained, would actually not be used, would impress card networks, who might also very well conclude that increasing interchange fees sufficiently would compensate for a small loss of market share.

221 We acknowledge that the *Competition Act*'s provisions are drafted in such a way that it is unduly difficult for Canadian authorities to find that what may clearly be a case of abuse from an economic standpoint.is also abusive under the *Act*, but that is another discussion.

the Bureau had given up on enforcing the *Act* – which may be understandable, given the legislative framework's manifest weaknesses.

Finally and as to market conduct, the Bureau is apparently content with recommending that "any representation made to the public to promote payments systems is not false or misleading in a material respect and that it provides sufficient information to enable informed choice" (par. 49). As mentioned above, the informational asymmetries are so deep, and there are so many other market failures in this area, that it is illusory to expect that providing accurate and abundant information would suffice to rebalance the market.

But perhaps the most damning indictment of the Bureau's ability to oversee payments, given the limitations of the current framework, came from an institution that is part of that framework. In its 2013 decision regarding Visa and MasterCard policies, the Competition Tribunal wrote:

> **[394]** We are unanimously of the view that even if the requirements under section 76 had been met, this is not a proper case to grant discretionary relief. Given the evidence adduced, it is clear that the proper solution to the legitimate concerns raised by the Commissioner of Competition is going to require a regulatory framework. We are typically reluctant to decline to exercise our discretion in favour of regulation as we agree that generally speaking even very imperfect competition is preferable to regulation.
>
> **[395]** However, this is an exceptional case and we are convinced that it makes more sense to begin with a regulatory approach rather than to back into it. A section 76 Order would be a blunt instrument and there will be technical hitches, unforeseen consequences, a need for ongoing adjustment and stakeholder consultation. The experience in other jurisdictions such as Australia and the United Kingdom shows that concerns will be raised by consumers regarding surcharging and possible gouging, and rather sooner than later, intervention will have to take place by way of regulation.
>
> **[396]** The "but for" world that the Commissioner postulates does not take sufficient account of the negative competition impacts or the effects on customers. It does not address the negative experiences of other countries. The order sought would apply to a broad swath of the Canadian economy which the Commissioner categorizes as "the merchant sector" and simply assumes to be uniformly competitive. To the extent that markets within "the merchant sector" depart from this assumption, the order sought by the Commissioner risks replacing one set of distorted incentives by another.
>
> **[397]** The powers of the Tribunal to effectively fashion a remedy are limited. Ongoing monitoring and enforcement are impossible. The "merchants" are not before the Tribunal,

> so the effectiveness of the remedy or the necessary safeguards cannot be assured. [222]

Simply put, the framework within which the Bureau operates is not conducive to addressing adequately the intricate issues raised by the evolution of the Canadian payments ecosystem. Should it be responsible for payment issues, either it would be ineffective, or it would have to wear two very different hats, with a specific payments-related framework providing it with a different mission and different powers. We would argue that some at least of the issues associated with competition law would be better addressed by a specialized payments regulator with well-delineated jurisdiction over matters such as abuse of dominant position.

Given the Bureau's specific jurisdiction and need for independence in carrying out its current mandate, the diversity of aspects to be considered by a payments regulator and the need for that regulator to remain in close contact with the industry, as well as the deficiencies in Canada's *Competition Act* (which would warrant another paper), we do not believe the Bureau could act as the payments regulator, nor that it can achieve alone proper regulation of competition and other concerns in this highly specialized, and apparently mystifying, area.

3.3.6.2.5 *the Canadian Payments Association*

CPA specializes in payments and it has become over the years, if only for want of another forum, a major facilitator of communications between stakeholders. Hopefully, the current governance renewal will also make it more independent from its major members' whims. Clearly, CPA has a number of attributes that could make it a contender for the task of regulating the payments industry – but there is an obstacle which cannot be ignored.

CPA is primarily a systems operator. In addition and as things currently stand, nearly sixty percent of transactions cleared through the ACSS by volume are Interac-related[223], making CPA somewhat financially dependent on Interac's commercial success[224]. As a

---

222 *The Commissioner of Competition* v. *Visa Canada Corporation and MasterCard International Inc.*, 2013 Comp. Trib. 10, CT-2010-10, par. 394-397.

223 Canadian Payments Association. *Flow of payment items through the Automated Clearing Settlement System (ACSS)*. We used data for 2014 and added volumes for ABM transactions and POS debit and credits. Available at http://cdnpay.ca/imis15/eng/Publications/Statistics/eng/res/acss_annual_archives2012-2014.aspx. Admittedly, a small part of ABM transaction volume must be ascribed to The Exchange, Canada's competing ABM network. However, since The Exchange states that its network has grown to "over 2,500 ATMs" (*About FICANEX Services*, available at http://www.the-exchange.ca/default.aspx?PageID=1047&LangID=en) while there are "over 60,000 bank machines in Canada" (Canadian Bankers Association. *The ABM market in Canada*. October 3 2014. Available at http://www.cba.ca/en/media-room/50-backgrounders-on-banking-issues/118-abm-market-in-canada), more than a third of which are owned by financial institutions, this factor should not have a material impact on Interac volume's importance to CPA – and especially ACSS-related – revenue.

224 CPA member dues are currently largely established on the basis of the volume of transactions processed by a member: *Canadian Payments Association By-Law No. 2 – Finance*, in particular sections 5 and 6 (available at http://laws-lois.justice.gc.ca/PDF/SOR-

result, CPA is competing, directly or indirectly, with other networks or providers. It is difficult to envision how it could remain a network operator while regulating its own competitors. We are of the view that Canada needs a strong, national operator of clearing and settlement systems, and there is no point in replacing CPA by something else. The logical conclusion is that CPA could hardly be the payments regulator that Canada also needs.

3.3.6.2.6 *the Bank of Canada*

The Bank of Canada's powers regarding payment systems are currently established primarily in the *Payment Clearing and Settlement Act*[225], and are aimed at controlling risk to the stability of Canada's financial system and promoting its efficiency. The Bank is also a participant in clearing and settlement systems. In addition and through its research activities, it monitors numerous aspects of the payments ecosystem. In short, it is knowledgeable and experienced. It certainly enjoys a high level of independence. There are therefore many reasons why, as in other jurisdictions, the Bank could become the national payments regulator.

However, the Bank is the first to admit that it has limited expertise with regard to retail payment systems, and it arguably has very limited expertise with respect to micro-economic and social issues such as consumer protection. It is not an experienced regulator. Moreover, its primary task, as indicated in the *Bank of Canada Act*'s preamble, is to regulate credit and currency and, within the scope of monetary action, promote the economic and financial welfare of Canada; regulating payments and their providers might conceivably appear to compromise the independence and impartiality required from the Bank to perform adequately its legislative mandate.

3.3.6.3 Examples from abroad

Once the half-dozen or so more likely candidates within the current Federal government structure have been eliminated from the running, it is difficult to escape the conclusion that Canada needs a new payments regulator. Other countries have also chosen to designate a specialized entity as the payment oversight leader, and the British and Australian frameworks may be of particular interest.

3.3.6.3.1 *the United Kingdom*

The United Kingdom payments ecosystem is now partly overseen by the Payment Systems Regulator, established by Part 5 of the *Financial Services (Banking Reform) Act 2013*[226]. The Regulator officially started to operate on April 1st, 2015. The Regulator is an autonomous entity, with its own Board of directors, but at the same time is a subsidiary of and embedded within the Financial Conduct Authority, which provides the Regulator with staff and other resources, thus reducing administrative costs. The

2003-175.pdf). As a result, it is preferable for CPA that its members privilege Interac debit transactions rather than, say, Visa debit transactions.

225 R.S.C., c. P-4.4. The *Bank of Canada Act*, R.S.C., c. B-2, does provide for the Bank's power to make loans to CPA members, which is incidental to clearing and settlement activities.

226 2013, c. 33.

legislation defines notions such as payment systems, participants in systems and payment service providers. The Regulator's remit is limited to systems which are designated by Treasury once it is satisfied that deficiencies or disruptions of a system "would be likely to have serious consequences for those who use, or are likely to use, the services provided by the system". The emphasis is therefore on the impact of systems on users[227].

The legislation requires that the Regulator pursue three objectives, which have to do with competition, innovation and service to users, and that it has regard to issues such as the stability of the financial system. Its objectives are fleshed out at length. The Regulator may require the operator of a system to establish or modify rules, and it can order an operator to grant access to its system to an entity that wishes to become a service provider. It also has concurrent functions with British competition authorities. It can impose penalties on systems which are not in compliance, as well as obtain injunctions from a court if there is a reasonable likelihood of a compliance failure. The Regulator is also required to establish effective consultative processes.

While other entities are likely to impact payment oversight, the Regulator is required to coordinate with most of them. It is therefore in a position to establish a leadership role in coming years.

3.3.6.3.2 *Australia and Singapore*

The Reserve Bank of Australia has two boards: the Reserve Bank Board, which oversees it traditional central bank functions, and the Payments System Board (the "Board"), which determines the Bank's payments system policy with a view to the greatest advantage of the people of Australia, risk control, efficiency, competition and overall stability of the financial system[228]. Under the *Payment Systems (Regulation) Act 1998*[229], the Board has authority over "payment systems" [230] in order to "designate" them and impose on them access regimes and standards, which may cover a very broad range of issues, including the setting of interchange fees. Systems that do not comply with a standard may be directed to do so, and failure to comply with a direction is an offence. The Board is generally required to act in the public interest, that is with a view to ensuring that payment systems are financially safe for use by participants, efficient and competitive. The *Payment Systems (Regulation) Act 1998* also establishes the Board as the regulator of "purchased payment facilities", i.e. stored value facilities such as prepaid cards or similar instruments.

Over the past two decades, the Board has demonstrated keen analytical capabilities as it monitors the payment system (taken as a whole), as well as willingness to challenge the industry, induce change and control inappropriate practices – such as excessively high interchange fees or surcharges.

---

227 *Ibid.*, sections 43-44.

228 *Reserve Bank Act 1959*, no. 4, 1959, as amended, sections 8A, 10B.

229 *Act No. 58 of 1998*, as amended. Other legislative provisions also provide for Board authority on various issues, which we will not consider in depth here.

230 The notion of "payment system" is broadly defined in section 7 as "a fund transfer system that facilitates the circulation of money, and includes any instruments and procedures that relate to the system".

Interestingly, Singapore has emulated the Australian framework to some extent, with a *Payment Systems (Oversight) Act*[231], clearly inspired from Australia's *Payment Systems (Regulation) Act 1998*, and which provides the Monetary Authority of Singapore with jurisdiction over payment systems and stored value facilities.

Noteworthy is that in both the British and the Australian case, leadership concerning the oversight of payments has been attributed to an entity which is ensconced within another. The Payment Systems Regulator is a subsidiary of the Financial Conduct Authority, with an autonomous Board of directors[232]. Australia's Board is nestled within the Reserve Bank. In the event that Canadian authorities were reluctant to create a wholly new body, these examples indicate that it might be possible to establish a regulator as an autonomous entity within the Bank of Canada, for instance. There will certainly be a need for further analysis in this area.

3.3.6.4 a legislative mandate

In order to be successful, the Agency will need a strong mandate, which should be established by legislation. The comments made by a British author regarding the Financial Conduct Authority's mandate seem quite relevant:

> A good statutory mandate would provide a useful and comprehensible guide to what society expects from supervision, expressed in language that is sufficiently clear to guide the FCA but without unduly cramping its supervisory style or imposing rigidly prescriptive, 'one size fits all' requirements that would be hopelessly inappropriate given the range of actors, situations and transactions for which the FCA will have conduct of business oversight responsibilities. [233]

Actually, FCA's legislative mandate is articulated through a combination of strategic and operational objectives, general functions and, with regard in particular to its operational objectives, a catalogue of issues the FCA must or may "have regard to" [234]. It is therefore quite elaborate and all-encompassing.

The Payment Systems Regulator's remit is established in similar fashion by sections 49 to 70 of the aforementioned *Financial Services (Banking Reform) Act of 2013*, which articulate objectives, regulatory principles the Regulator must have regard to, as well as functions, both general and more specific. The Act (at sections 103 ss.) also requires the Regulator to consult "relevant persons", including users.

We are also mindful of the G20 high-level principles on financial consumer protection, which specify that oversight bodies responsible for financial consumer protection

---

231 *Singapore Statutes Online, chap. 222A* (originally enacted as Act 1 of 2006).

232 See http://www.fca.org.uk/psr and https://www.psr.org.uk/about-psr/psr-governance.

233 Ferran, *op. cit.*, p. 422 (footnote omitted).

234 Relevant provisions were added to the *Financial Markets and Services Act 2000* by s. 6 of the *Financial Services Act (2012)*, *op. cit*.

> […] require clear and objectively defined responsibilities and appropriate governance; operational independence; accountability for their activities; adequate powers; resources and capabilities; defined and transparent enforcement framework and clear and consistent regulatory processes. [235]

When designing the regulator's mandate and structure, Parliament will wish to remain mindful of constitutional issues. Especially if it wishes to base its action on the trade and commerce power, Parliament may seek to provide the Agency with a broad mandate both as to scope and as to powers to intervene in the market.

Given the complexity and vitality of Canada's payments ecosystem, we are adamantly of the view that the regulator's success will depend in significant part on its ability to sustain stakeholder participation throughout its activities. Bringing the parties to the table and requiring them to settle issues in a way that is acceptable to everyone would allow a significant part of the thorniest challenges we face to be solved without undue formalism. As acknowledged by G-20 countries, this is especially true in the area of consumer protection[236]. This kind of process may take some time, but it is clearly in our view a case of "make haste slowly". However, Canada needs a facilitator for this kind of conversation, and that facilitator's ability to succeed will be enhanced by giving it the power to act if and when (as will happens) stakeholders cannot agree on a solution that fosters general welfare and the implementation of a sound national payments policy. Parliament should consider these issues carefully when designing the regulator's structure and mandate.

3.3.7 Substantive issues

Canada needs a payments regulator, because there will be principles and rules to design, implement and enforce. What these principles and rules could be is a topic for another day. We would be remiss, however, in not outlining some precedents which should be of interest.

In the United States, the *Electronic Fund Transfer Act* was enacted in 1978 – that is, nearly forty years ago. It provides in particular a basic framework regarding consumer liability issues where unauthorized transactions have happened. Other federal legislation applies to credit card transactions, fund availability and sundry other matters. Clearly, this framework, which is arguably due for some modernization, has clearly not hindered innovation, yet it is structured around legally enforceable federal legislation.

The European Union adopted its "Payment Services Directive" in 2007, which was supplemented in 2009 by a further Directive concerning the issuance of electronic money[237]. European authorities are now in the process of finalizing the adoption of a

---

[235] G20, *op. cit.*, principle 2, "Role of Oversight Bodies", on p. 5.

[236] G-20, *op. cit.*, pp. 4-5.

[237] *Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market* (OJ L 319, 5.12.2007, p. 1); *Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions*

comprehensive Directive which would apply to all payment services in the Union. According to the European Commission,

> The new measures will also ensure that all payment providers active in the EU are subject to supervision and appropriate rules. This should create the right incentives for the emergence of new players and the development of innovative mobile and internet payments in Europe. [238]

This new framework would also improve consumer protection; in addition and as noted earlier, it includes measures to deal with interchange fees, which have already been enacted.

Australia has recently implemented its revamped ePayments code, which modernizes protections afforded to consumers using various types of electronic payments[239]. Japan's *Payment Services Act* came into effect in 2010 and regulates the issuance of prepaid money instruments as well as fund transfer services provided by non-banks[240]. Brazil has modernized its legislative framework in 2013 by regulating payment schemes, requiring in particular that they

> meet end-user needs, in particular with respect to freedom of choice, safety, protection of their economic interests, non-discriminatory treatment, privacy and personal data protection, transparency and access to clear and complete information about the service

as well as soundness, reliability, financial inclusion and interoperability[241], and in so doing has in particular facilitated the emergence of competing mobile payment schemes[242].

---

amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC (OJ L 267, 10.10.2009, p. 7).

238 European Commission. *Commissioner Hill welcomes agreement on the Revised Payment Services Directive*. Press release, Brussels, May 5, 2015. Available at http://europa.eu/rapid/press-release_IP-15-4916_en.htm?locale=en.

239 The Code, which was implemented in 2013, can be found at http://download.asic.gov.au/media/1337282/ePayments-Code-as-amended-from-1-July-2012.pdf. In particular, it provides a much more coherent framework than what is currently observed in Canada.

240 For a summary, see Mori, Takeshi; Takahashi, Yasufumi. *Payment Services Act: The new Japanese regulatory framework for payment services*. [2010] 4:1 Journal of Payments Strategy & Systems 67.

241 *Law 12,865 of October 9, 2013*. For the excerpt quoted, see art. 7, and in particular par. IV. Partial translation by Banco Central do Brasil, which we assume is adequately accurate, available at http://www.bcb.gov.br/Pom/Spb/Ing/InstitucionalAspects/Law12865.pdf. The full legislative text, in Portuguese (which we do not purport to read), is available at http://www.normasbrasil.com.br/norma/lei-12865-2013_260487.html.

242 Almazán, Mireya; Frydrych, Jennifer. *Mobile financial services in Latin America & the Caribbean: State of play, commercial models, and regulatory approaches*. London, GSMA, May 2015. 32 p. P. 22. Available at http://www.gsma.com/mobilefordevelopment/wp-content/uploads/2015/05/2015_GSMA_Mobile-financial-services-in-Latin-America-the-

It is high time Canada follows suit. We need a framework that will foster trust, bolster innovation and ensure access to payment systems and mechanisms. We remain as far today from benefitting from such a framework as when former minister Flaherty created the Task Force for the Payments System Review, five years ago, if not farther.

Five years ago, our first comments to the Task Force were prefaced by, and took their title from, a Bob Dylan song[243]; we are tempted to close these comments with another title from the singer: "the times, they are a-changin". We need as a society to look beyond the immediate concerns of those few who are loudly predicting countrywide doom and gloom if they are even oh! slightly jostled from their pinnacle of power, and ensure that the Canadian payments ecosystem will evolve in the very near future in a way that will respond to the needs of all Canadians.

4.0 Our recommendations

Retail payments concern everyone in Canada. There is nary a payment activity that is not related to retail payments, and even "prominent" or "systemic" systems are intricately involved in ensuring that retail payment mechanisms function well. Canada is badly in need of an overarching reform of the oversight of its payments system, writ large. The following recommendations are offered both in the context of the Paper and in that spirit.

A- The process

1- We recommend that in the coming months, the Minister substantiate the facts required to base its review of the need for a new framework for payments and, in particular, retail payments in Canada through comprehensive, thorough and ongoing dialogue with the stakeholder community extending beyond the discussions of FinPay.

B- The fundamentals

2- We strongly recommend that Parliament put in place an oversight framework to foster the development of a safe, fair and innovative payments ecosystem in Canada, that would effectively serve the needs of all Canadians.

3- We recommend that the Minister review in depth its current conceptual oversight framework for the Canadian payments system and, in particular, clarify, and if need be replace, the notion of "national retail payment systems".

Caribbean.pdf. See also comments on other emerging regulatory schemes in Latin America, at pp. 22-23.

243 See footnote 29, *supra*.

4- We recommend that the Minister clarify, modify as needed and bring more precision to its public policy objectives as currently stated, in order to make them actionable objectives which can effectively guide the regulatory framework required to foster the development of the Canadian payments system.

5- We recommend that the Minister clarify the concepts and terminology used in designing and implementing an oversight framework for retail payments in Canada.

C- The risk assessment

6- We recommend that the Minister clarify explicitly at the outset the scope of the risk assessment to be performed and, in particular, that not only risk to systems is to be considered, but also risk to individual end-users that may result from a system's normal operation, including inappropriate legal risk and efficiency risk due to insufficient innovation on the part of system operators.

7- We recommend that the Minister refine significantly the categories currently proposed to classify risk, in order in particular to address more effectively legal, efficiency and social risk.

8- We recommend that risk be used as a factor to ensure proportionality of regulatory response, rather than as a factor that excludes categories of risk from oversight or minimizes the importance attached to those risks.

9- We urgently recommend that the Minister proceed to a thorough and holistic risk analysis, taking into account stakeholder concerns, in order to then use a fact-based approach to design the appropriate oversight regime.

D- Solutions

10- We strongly recommend that a framework be designed and implemented to oversee all retail payment-related activities, all types of payment instruments and all providers in Canada, following a functional approach.

11- We recommend that the Minister implement a principles-based approach, using more detailed rules as required in order to optimize the flexibility and effectivity of the oversight framework.

12- We recommend that a dedicated body be established whose mandate would be to monitor and regulate the Canadian payments ecosystem, in cooperation as required with other regulators.

13- We recommend that the regulator's mandate extend to all payment functions, instruments and providers.

14- We recommend that legal instruments established or implemented by the regulator be legally enforceable, and that novel approaches to regulation be examined and applied when establishing the regulator's mandate and powers.

15- We recommend that standards and other voluntary instruments, as well as disclosure-based approaches, be used only sparsely by the regulator, and only where they are demonstrably more beneficial or effective than other approaches.

16- We recommend that the oversight framework require the regulator to collaborate on an ongoing basis with stakeholder communities, and that stakeholder communities be enabled as required to participate in that process.

Appendix A

(Task force for the payments system review)

Proposed National Payments Policy

The payments system performs an essential role in the Canadian economy and society. In order to optimize the total economic and social welfare of all its participants, ensure its efficiency and guide its evolution and development, the Canadian payments system shall be governed by the following objectives:

Trust

(a) Generate and maintain a high level of trust among participants by being demonstrably:

- (i) Financially stable and safe with regard to the level of risk created or incurred by participants;
- (ii) Fair, reasonable and proportionate in the assignment of costs, benefits, rights and responsibilities among all participants, taking into account all relevant factors, including the level of risk involved and the ability of participants to prevent and bear risk and costs;
- (iii) Operationally robust and able to process payments in a timely and accurate manner;
- (iv) Secure and able to protect the integrity and privacy of information;
- (v) Supported by easily accessible and understandable rules governing its use, the prices charged to participants and the information provided thereto;
- (vi) Held in compliance with appropriate regulatory oversight by public agencies and authorized self-governance organisations;
- (vii) Supported by easily understandable, impartial and accessible systems of redress that are responsive and efficient and that include independent appeal processes; and
- (viii) Governed in a way that provides all categories of participants with a reasonable opportunity to provide input into its governance, development and use.

Accessibility

(b) Be easily accessible to all participants who use payment mechanisms and supportive of a reasonable expectation that they can choose among adequate payment mechanisms by ensuring:

- (i) The provision of effective and efficient services throughout Canada;

(ii) The delivery of adequate and affordable services that are available independently of participants' socio-economic and demographic circumstances or commercial significance; and

(iii) The provision of services that are easy to use and that accommodate participants of all skills and abilities.

Good value

(c) Provide good value by:

(i) Operating in a way that delivers the most efficient costs to participants, consistent with the objectives of the National Payments Policy;

(ii) Establishing an efficient and consistent regulatory framework that applies to all participants and is founded on functional neutrality;

(iii) Facilitating competition among a wide variety of providers and services, including through the elimination of unnecessary barriers; and

(iv) Promoting interoperability, both at the national and international levels.

These objectives apply as reasonably appropriate to the different participants in the Canadian payments system, with due regard for the diversity of their circumstances.

Mediagraphy

1- Legislation

1.1 Canadian federal legislation and regulation

Bank of Canada Act, R.S.C., c. B-2

Bills of Exchange Act, R.S.C., c. B-4

Canada Deposit Insurance Corporation Act, R.S.C., c. C-3

Canadian Payments Act, R.S.C., c. C-21

Competition Act, R.S.C., c. C-34.

Financial Administration Act, R.S.C., c. F-11

Financial Consumer Agency of Canada Act, R.S.C., c. F-11.1

Office of the Superintendent of Financial Institutions Act, R.S.C, c. O-2.7

Official Languages Act, R.S.C., c. O-3.01

Payment Clearing and Settlement Act, R.S.C., c. P-4.4

Statutory Instruments Act, R.S.C., c. S-22

Telecommunications Act, R.S.C., c. T-3.4

Air Transportation Regulations, SOR/88-58

Canadian Payments Association By-Law No. 2 – Finance

Canadian Radio-Television and Telecommunications Commission Rules of Practice and Procedure, SOR/2010-277

1.2 Canadian provincial legislation

Nova Scotia. *Consumer Protection Act*, RSNS 1989, c. 92

Québec. *Consumer Protection Act*. R.S.Q., c. P-40.1

1.3 European Union legislation

Treaty on the Functioning of the European Union

Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1/1, 4.1.2003

Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market (OJ L 319, 5.12.2007, p. 1

Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC (OJ L 267, 10.10.2009, p. 7)

Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions. OJ L 123, p. 1.

1.4 European national legislation and regulation

République française. *Code monétaire et financier*

République française. *Décret no 2015-741 du 24 juin 2015 pris pour l'application de l'article L. 112-6 du code monétaire et financier relatif à l'interdiction du paiement en espèces de certaines créances*

United *Kingdom. Financial Services Act 2012*, 2012, c. 21

United Kingdom. *Financial Services (Banking Reform) Act* 2013, 2013, c. 33

1.5 Other jurisdictions' legislation, regulation and codes

Australia. Australian Securities & Investments Commission. *ePayments* Code. 2012. Available at http://download.asic.gov.au/media/1337282/ePayments-Code-as-amended-from-1-July-2012.pdf

Australia. *Reserve Bank Act 1959*, no. 4, 1959

Australia. *Payment Systems (Regulation)* Act, Act *No. 58 of 1998*

Brazil. *Law 12,865 of October 9, 2013*, available at http://www.bcb.gov.br/Pom/Spb/Ing/InstitucionalAspects/Law12865.pdf and http://www.normasbrasil.com.br/norma/lei-12865-2013_260487.html

New York State Department of Financial Services. *Proposed New York Codes, Rules and Regulations – Title 23. Department of Financial Services – Chapter I. Regulations of the Superintendent of Financial Services – Part 200. Virtual currencies* Available at http://www.dfs.ny.gov/legal/regulations/adoptions/dfsp200t.pdf

Singapore. *Payment Systems (Oversight)* Act, Singapore *Statutes Online, chap. 222A* (originally enacted as Act 1 of 2006)

2- Caselaw

B.M.P Global Distribution inc. v. *Bank of Nova Scotia*, 2009 CSC 15, [2009] 1 S.C.R. 504

Bank of Montreal v. *Hall*, [1990] 1 S.C.R. 121

Bank of Montreal v. *Marcotte*, 2014 SCC 55, [2014] 2 S.C.R. 725

Canadian Foundation for Children, Youth and the Law v. *Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76

Can. Pioneer Man. Ltd.. v. *Labour Relations Board of Saskatchewan*, [1980] 1 S.C.R. 433

Canadian Western Bank v. *Alberta*, [2007] 2 S.C.R. 3

Citizens Insurance Company v. *Parsons*, (1881-82) 7 App. Cas. 96 (P.C.)

Commissioner of Competition v. *Visa Canada Corporation and MasterCard International Inc.*, 2013 Comp. Trib. 10, CT-2010-10

Director of Research and Investigation v. *Bank of Montreal*, CT-1995/002, decided June 20 1996

Foley v. *Hill*, (1848) 2 H.L. Cas. 28, 9 E.R. 1002 (H.L.)

G.M. v. *City National Leasing*, [1989] 1 S.C.R. 641

Hodge v. *The Queen*, (1883) 9 App. Cas. 117

Law Society of British Columbia v. *Mangat*, [2001] 3 S.C.R. 113

Marcotte vs. *Fédération des caisses Desjardins du Québec*, 2014 SCC 57, [2014] 2 S.C.R. 805

Multiple Access Ltd. v. *McCutcheon*, [1982] 2 S.C.R. 161

Ontario v. *Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031

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

R. v. *Levkovic*, 2013 SCC 25, [2013] 2 S.C.R. 204

R. v. *Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584

R. v. *Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606

Re Ottawa-Carleton Regional Transit Commission and Amalgamated Transit Union, local 279 et al., (1983) 44 O.R. (2d) 560

Reference re Alberta Statutes, [1938] S.C.R. 100

Reference re Same-Sex Marriage, 2004 SCC 79, [2004] 3 S.C.R. 698

Reference re ss. 193 and 195,1 (1) of the Criminal Code (Man.), [1990] 1 S.C.R. 1123

Reference re Securities Act, 2011 SCC 66, [2011] 3 S.C.R. 837

Richard v. *Time Inc.*, 2012 CSC 8, [2012] 1 S.C.R. 265

Stratos Pizzeria (1992) inc. c. *Galarneau*, 2015 QCCS 2353, May 8, 2015

Telecom Regulatory Policy CRTC 2013-271, June 3d 2013

Téléphone Guèvremont Inc. c. *Régie des télécommunications du Québec*, [1994] 1 R.C.S. 878

3- Scientific literature

Adler, Matthew. *Beyond efficiency and procedure: a welfarist theory of regulation*. [2000] 28 Florida State U. L. Rev. 241-338

Almazán, Mireya; Frydrych, Jennifer. *Mobile financial services in Latin America & the Caribbean: State of play, commercial models, and regulatory approaches*. London, GSMA, May 2015. 32 p. Available at http://www.gsma.com/mobilefordevelopment/wp-content/uploads/2015/05/2015_GSMA_Mobile-financial-services-in-Latin-America-the-Caribbean.pdf

Ayres, Ian; Gertner, Robert. *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*. [1989-90] 89 Yale L.J. 87

Bakos, Yannis; Marotta-Wurgler, Florencia; Trossen, David. *Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts*. NYU Center for Law, Economics and Organization. Working Paper No. 09-40, October 2009. 47 p. Consulted through http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1443256 and also published at (2014) 43:1 Journal of Legal Studies 1-35

Band, Christa; Black, Julia; Hopper, Martyn. *Making a success of Principles-based regulation*. [2007] Law and Fin. Markets Rev. 191

Binavince, Emilio; Fairly, H. Scott. *Banking and the Constitution: untested limits of federal jurisdiction*. [1986] 65 Can. Bar. Rev. 328

Black, Julia. *Paradoxes and Failures: 'New Governance' Techniques and the Financial Crisis*. [2012] 75 (6) Modern Law Rev. 1037

Black, Julia. *Seeing, Knowing and Regulating Financial Markets: Moving the Cognitive Framework from the Economic to the Social.* LSE Law, Society and Economy Working Papers 24/2013. London, 2013. 47 p. Available at http://www.lse.ac.uk/collections/law/wps/WPS2013-24_Black.pdf

Black, Julia. *The Rise, Fall and Fate of Principles Based Regulation*. Law, Society and Economy Working Papers 17/2010. London, London School of Economics and Political Science, 2010. 25 p. Available at http://www.lse.ac.uk/collections/law/wps/WPS2010-17_Black.pdf

Bynner, James. *Risks and Outcomes of Social Exclusion: Insights from Longitudinal Data*. London, University of London. 29 p. Available at http://www.oecd.org/edu/school/1855785.pdf

Chant, John. *Regulation of financial institutions – a functional analysis. Technical Report 45*. Ottawa, Bank of Canada, January 1987. 83 p

Coase, Ronald. *The Problem of Social Cost*. (1960) 3 J. Law and Econ. 1-44

Collard, Christophe; Roquilly, Christophe. *Proposals for a Definition and Map of Legal Risk*. Nice, EDHEC Business School, June 2011. 17 p. Available at http://faculty-research.edhec.com/_medias/fichier/edhec-position-paper-proposals-for-a-definition_1335169641716.pdf.

Cooter, Robert; Rubin, Edward. *A Theory of Loss Allocation for Consumer Payments*. [1987] 66 Tex. L.R. 63

Crawford, Bradley *Effect of Clearing House Rules*. [1983] 61 (4) Can. Bar Rev. 921

Driesen, David M. *The Economic Dynamics of Law*. Cambridge, Cambridge University Press, 2012. 242 p

Ferran, Eilis. *The New Mandate for the Supervision of Financial Services Conduct*. [2012] 65 Current Legal Problems 411

Ford, Cristie. *Principles-Based Securities Regulation in the Wake of the Global Financial Crisis*. (2010) 55 McGill L.J. 257

Frantz, Pascal; Insterfjord, Norvald. *Rules vs Principles Based Financial Regulation* November 25, 2014. Available through http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2561370

Geva, Benjamin. *The Modernization of the Bills of Exchange Act: A Proposal*. Osgoode Hall Law School Legal Studies Research Paper Series, vol. 10, no 7, 2014. Toronto, 2014. Available through http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2440714 and originally published at [2011] 50 Canadian Business Law Jnl 26

Hayek, Friedrich. *The Road to Serfdom*. Fiftieth Anniversary Edition. Chicago, The University of Chicago Press, 1994. 274 p.

Holzmann, Robert; Sherburne-Penz, Lynne; Tesliuc, Emil. *Social Risk Management: The World Bank's Approach to Social Protection in a Globalizing World*. Washington, The World Bank, May 2003 20 p. Available at http://siteresources.worldbank.org/SOCIALPROTECTION/Publications/20847129/SRMWBApproachtoSP.pdf .

Kahneman. *Thinking, fast and slow*. Doubleday, 2011. 499 p.

Llewellyn, David. *The Economic Rationale for Financial Regulation. Occasional Paper Series 1*. London, Financial Services Authority, April 1999. 58 p.

Lumpkin, Stephen. *Regulatory Issues Related to Financial Innovation*. Financial Market Trends, vol. 2009/2. Paris, OECD, 2009. 31 p. Available at http://www.oecd.org/finance/financial-markets/44362117.pdf

Mori, Takeshi; Takahashi, Yasufumi. *Payment Services Act: The new Japanese regulatory framework for payment services*. [2010] 4:1 Journal of Payments Strategy & Systems 67

O'Brien, Justin. *Culture, codes of conduct and limits of enforcement*. [2014] 8:1 Law and Fin. Mkts Rev. 1

Orbach, Barak. *What is Regulation?*.[2012] 30 Yale Journal on Regulation Online 1

Perri, Frank; Brody, Richard. *The sleeping watch dog: aka the Securities and Exchange Commission*. [2011] 19:3 Jnl of Fin Regulation and Compliance 208-221

Sanders, Deen. *Reinventing regulation*. [2014] 8:2 Law & Fin. Markets Rev. 98

Schwarcz, Steven. *Rethinking the disclosure paradigm in a world of complexity*. [2004] 1 U.Ill. L. Rev 1

St Amant, Jacques. *The problem with adoption: an overview of some critical factors concerning payment mechanisms and user adoption in Canada*. Montréal, Task Force for the Payments System Review, February 22 2011. 98 p. Inoperative link at http://paymentsystemreview.ca/index.php/resources/resources-and-links/index.html, subsection "Payments and Usage"

Stigler, George. *The Theory of Economic Regulation*, [1971] 2 Bell J. Econ. & Mgm't Sci 3, 3

Viñals, Jose; Fiechter, Jonathan; with Narain, Aditya; Elliott, Jennifer; Tower, Ian; Bologna, Pierluigi; Hsu, Michael. *The Making of Good Supervision: Learning to Say "No"*. IMF Staff Position Note SPN/10/18. Washington, International Monetary Fund, May 18, 2010. 22 p. Available through http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1670831

White, Barbara Ann. *Economic efficiency and the parameters of fairness: a marriage of marketplace morals and the ethics of care*. [2005]15:1 Cornell Jnl of Law and Public Policy 1-72

Wise, Michael. *Review of Competition Law and Policy in Canada*. (2003) 5:1 OECD Journal Competition Law and Policy 47. Available at http://www.oecd-ilibrary.org/docserver/download/2403211ec003.pdf?expires=1436796324&id=id&accname=ocid177146&checksum=46664AFA7C393B8B5634B9BA67831FAB

Zamir, Eyal; Medina, Barak. *Law, Morality, and Economics: Integrating Moral Constraints with Economic Analysis of Law*, [2008] 96:2 California Law Rev. 325-391

4- Newspapers, magazines, press releases and similar material

Commonwealth Bank to embrace Bitcoin and air miles as fintech goes mainstream, Australian Financial Review, Melbourne, June 1st 2015, at http://www.afr.com/technology/commonwealth-bank-to-embrace-bitcoin-and-air-miles-as-fintech-goes-mainstream-20150601-ghcre6

Denmark legislates cashless society. Pymnts.com, May 11, 2015, available at http://www.pymnts.com/news/2015/denmark-legislates-cashless-society/#.VYXQfLdFC70

New York regulates digital currencies – exempts developers from licensing. Techworld, June 4 2015, available at http://www.techworld.com/news/e-commerce/new-york-regulates-digital-currencies-exempts-developers-from-licensing-3614396/

New York releases digital currency regulations. The Paypers, June 4 27, 2015

Philippines Pushing for Cashless Society, But It's A Long Way Off. Fintech Ranking, April 27, 2015. Available at http://fintechranking.com/2015/04/27/philippines-pushing-for-cashless-society-but-its-a-long-way-off/

Proxama struggles to spread mobile payment in Canada. Pymnts.com, June 22, 2015. Available at http://www.pymnts.com/news/2015/proxama-struggles-to-spread-mobile-payment-in-canada/#.VYgW1LdFC71

RBS fined £56m over 'unacceptable' computer failure, November 20 2014, at http://www.bbc.com/news/business-30125728

RBS says accounts updated after glitch, BBC, June 19 2015, available at http://www.bbc.com/news/business-33196424

Regulator 'sorry' for bank crisis. Belfast Telegraph, May 28, 2015. Available at http://www.belfasttelegraph.co.uk/news/republic-of-ireland/regulator-sorry-for-bank-crisis-31260348.html

TAR Aerlineas Accepts Payment Via Bitcoin Through Openpay and BitPay. Wireless News, June 5, 2015

Visa to showcase cashless trend on the catwalk. Finextra News, July 9, 2015. Available at http://www.finextra.com/news/fullstory.aspx?newsitemid=27580

Alam, Shafiqul. *Bangladesh unbanked poor hail 'revolutionary' service*. The China Post, June 22, 2015. Available at http://www.chinapost.com.tw/print/438921.htm

Berman, David. Canada's banks form consortium to deal with Apple Pay: reports. The Globe and Mail, April 17, 2015. Available at http://www.theglobeandmail.com/report-on-business/canadas-banks-form-consortium-to-deal-with-apple-pay-reports/article24004338/

Biggs, John. *Citibank Is Working On Its Own Digital Currency, Citicoin*. Techcrunch, July 7, 2015, available at http://techcrunch.com/2015/07/07/citibank-is-working-on-its-own-digital-currency-citicoin/#.tom1ec:UHWq

Canadian Federation of Independent Business. *Background/media availability on credit card ruling*. Toronto, Canadian Federation of Independent Business, July 22, 2013. Available at http://www.cfib-fcei.ca/english/article/5327-competition-tribunal-advisory.html

Combes, Alistair. *The new UK payments regulator: a carbon copy of its Payments Council?* Finextra blog, June 8, 2015, at http://www.finextra.com/blogs/fullblog.aspx?blogid=11081

European Commission. *Commissioner Hill welcomes agreement on the Revised Payment Services Directive*. Press release, Brussels, May 5, 2015. Available at http://europa.eu/rapid/press-release_IP-15-4916_en.htm?locale=en

Gani, Aisha. *Danish election: PM concedes defeat and resigns*. The Guardian, June 19, 2015, available at http://www.theguardian.com/world/live/2015/jun/18/denmark-general-election-2015-results-live

Harris, Sophia. *Prepaid credit card scams on rise, Canadians losing millions*. CBC News, July 8, 2015. Available at http://www.cbc.ca/news/business/prepaid-credit-card-scams-on-rise-canadians-losing-millions-1.3141804

Martens, Kathleen. *Plan to direct-deposit government cheques rolled back*. APTN National News, June 30, 2015. Available at http://aptn.ca/news/2015/06/30/plan-direct-deposit-government-cheques-rolled-back/

Pagliery, Jose. *This code can hack nearly every credit card reader machine in the country*. CNN, April 29 2015. Available at http://money.cnn.com/2015/04/29/technology/credit-card-machine-hack/index.html?iid=TL_Popular

Office de la protection du consommateur, *Paiement par carte de débit: frais interdits*. July 23, 2014. Available at http://www.opc.gouv.qc.ca/consommateur/sujet/prix-rabais/publicite/carte-debit/

Payment Systems Task Force. *Payment Systems Task Force announces faster payment service*. Office of Fair Trading press release. London, May 25, 2005. Archived at http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/news-and-updates/press/2005/94-05

Royal Bank of Canada. *Increasing Security of Mobile Payments for Canadians with RBC Wallet*. Press release, June 2, 2015. Available at http://www.rbc.com/newsroom/news/2015/20150602-rbc-wallet.html

Russell, Helen. *No wallet, no worries: Denmark considering cash-free shops*. The Guardian, May 14 2015. Available at http://www.theguardian.com/world/2015/may/14/no-wallet-no-worries-denmark-considering-cash-free-shops

Salmon, James; Eccles, Louise; Smith, Jennifer. *No money till the weekend! Millions of pounds 'go missing' after technical glitch makes 600,000 payments 'vanish' overnight*. The Daily Mail, June 17 2015. Available at http://www.dailymail.co.uk/news/article-3127782/Millions-pounds-missing-technical-glitch-means-600-000-RBS-customers-payments-disappeared-overnight.html

Shecter, Barbara. *As Canadians clamour for Apple Pay, could the tech giant have finally met its match?* Financial Post, April 24, 2015. Available at http://business.financialpost.com/news/fp-street/as-canadians-clamour-for-apple-pay-could-the-tech-giant-have-finally-met-its-match

Smith, Paul. *Commonwealth Bank to embrace Bitcoin and air miles as fintech goes mainstream*. Financial Review, June 1st, 2015. Available at http://www.afr.com/technology/commonwealth-bank-to-embrace-bitcoin-and-air-miles-as-fintech-goes-mainstream-20150601-ghcre6

Tencer, Daniel. *Up to 60,000 Canadians Affected By Possible Walmart Credit Card Data Breach*. The Huffington Post Canada, July 13, 2015. Available at http://www.huffingtonpost.ca/2015/07/13/walmart-canada-data-breach-credit-cards_n_7787698.html

The North West Company. *The North West Company introduces first scalable direct deposit solution for prepaid cards to stores across Northern Canada*. Press release, June 17, 2015. Toronto, The North West Company. Available through http://www.northwest.ca/media/media-releases.php

Transportes Aéreos Regionales. *1er Aerolinea en Latinoamérica en aceptar pagos con bitcoin*. Consulted at https://tarmexico.com/promo/bitcoin

Treanor, Jill. *Bank of England payment system collapsed 'due to design fault'*. The Guardian, March 25 2015, at http://www.theguardian.com/business/2015/mar/25/bank-of-england-payment-system-collapsed-due-to-design-fault

Wallace, Tim. *Big banks accused of running cartel in payments*. The Telegraph, June 29, 2015. Available at http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/11706119/Big-banks-accused-of-running-cartel-in-payments.html

Williams, Rhiannon. *Apple Pay UK launch – how and where to use it*. London, The Telegraph, July 14, 2015. Available at http://www.telegraph.co.uk/technology/apple/11736823/Apple-Pay-UK-launch-how-and-where-to-use-it.html

5- Other sources

5.1 Public body papers, reports and statements

G20 High-level principles on financial consumer protection. Paris, Organisation for Economic Co-operation and Development, October 2011. 7 p. Available at http://www.oecd.org/daf/fin/financial-markets/48892010.pdf

Australian Securities and Investments Commission. *Consultation Paper 78 - Reviewing the EFT Code*. ASIC, January 2007. 129 p. Available at http://www.fido.gov.au/asic/pdflib.nsf/LookupByFileName/eft_review_2007.pdf/$file/eft_review_2007.pdf

Bank of Canada. *Proposed Criteria and Risk-Management Standards for Prominent Payment Systems – A consultation paper by the Bank of Canada*. Ottawa, Bank of Canada, June 12, 2015. 23 p. Available at http://www.bankofcanada.ca/wp-content/uploads/2015/06/proposed-criteria-risk-management-standards.pdf

Bank for International Settlements – Committee on Payment and Settlement Systems. *A glossary of terms used in payments and settlement systems*. Basel, Bank for International Settlements, March 2013. Available at http://www.bis.org/cpmi/glossary_030301.pdf

Bank for International Settlements – Committee on Payments and Market Infrastructures. *Non-banks in retail payments*. Basel, Bank for International Settlements, September 2014. 44 p. Available at http://www.bis.org/cpmi/publ/d118.pdf

Canada; Department of Finance. *Balancing Oversight and Innovation in the Ways We Pay: a Consultation Paper*. Ottawa, April 2015. Available at http://fin.gc.ca/activty/consult/onps-ssnp-eng.asp

Canada. Department of Finance. *List of Acts and Regulations*. Available at http://www.fin.gc.ca/legislation/act-loi-eng.asp

Canada; Department of Finance. *Minister of Finance issues statement on voluntary Visa and MasterCard proposals*. Press release. Ottawa, November 4, 2014. Available at http://www.fin.gc.ca/n14/14-157-eng.asp

Canada; Department of Finance. *Strong leadership – A balanced-budget, low-tax plan for jobs, growth and security*. Ottawa, Finance Canada, April 21 2015. Consulted at http://www.budget.gc.ca/2015/docs/plan/budget2015-eng.pdf

Canada; Department of Finance. *The road to balance: Creating jobs and opportunities*. Ottawa, Department of Finance, February 11 2014

Canada; Industry Canada. *Canadian Code of Practice for Consumer Debit Card* Services. Available at http://www.fcac-acfc.gc.ca/Eng/Documents/DebitCardCode-eng.pdf

Canadian Transportation Agency. *Notice to Industry: Initiative to level the playing field among air carriers and increase rights and remedies for passengers delayed because of overbooking and cancellation of flights.* July 3 2013. Available at https://www.otc-cta.gc.ca/eng/publication/notice-industry-remedies-overbooking-cancellation

Competition Bureau. *The Competition Bureau's Letter to Financial Institutions – Duality and Dual Governance of Credit Card Networks in* Canada. Gatineau, Competition Bureau, November 7, 2008. Available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02749.html

Competition Bureau. *Submission by the Commissioner of Competition Before the Department of Finance Canada*. Ottawa, Competition Bureau, June 19, 2015. 9 p. Available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03958.html

Financial Conduct Authority. *Payment Systems Regulator*. Available at http://www.fca.org.uk/psr

Organisation for Economic Co-operation and Development. *Regulatory Policy and the Road to Sustainable Growth*. Draft Report. Paris, 2010. 104 p. Available at http://www.oecd.org/regreform/policyconference/46270065.pdf

Payment Systems Regulator. *A new regulatory framework for payment systems in the UK – PSR PS15-1*. London, Payment Systems Regulator, March 25 2015. 84 p. Available at https://www.psr.org.uk/sites/default/files/media/PDF/psr-publications-consultations-psr-ps-15.1.pdf

Payment Systems Regulator. *PSR governance*. Available at https://www.psr.org.uk/about-psr/psr-governance

Reserve Bank of Australia – Payments System Board. *Payments System Board Annual Report 2012*. Sydney, Reserve Bank of Australia, 2012. 58 p. Available at http://www.rba.gov.au/publications/annual-reports/psb/2012/pdf/2012-psb-ann-report.pdf

Reserve Bank of Australia. *Strategic Review of Innovation in the Payments System: Conclusions*. Sydney, Reserve Bank of Australia, June 2012. 29 p. Available at http://www.rba.gov.au/payments-system/reforms/strategic-review-innovation/conclusions/pdf/conclusions-062012.pdf

Senate of Canada; Standing Senate Committee on Banking, Trade and Commerce. *Digital currency: you can't flip this coin! – Report of the Standing Senate Committee on Banking, Trade and Commerce*. Ottawa, June 2015. 64 p. Available at http://www.parl.gc.ca/Content/SEN/Committee/412/banc/rep/rep12jun15-e.pdf

Task Force for the Payments System Review. Policy Paper A, *Users and their Discontent*, Ottawa, Task Force for the Payments System Review, December 2011. Available at http://paymentsystemreview.ca/wp-content/themes/psr-esp-hub/documents/ppA_eng.pdf

Task Force for the Payments System Review; Viewpoint Learning. *Scenarios for the future of the Canadian Payments System*. Task Force for the Payments System Review, July 2011. 68 p. Available at http://paymentsystemreview.ca/wp-content/themes/psr-esp-hub/documents/r01_eng.pdf

5.2 Private entity papers and reports

Affordable Access Coalition. *Phase 1 Intervention – Telecom Notice of Consultation CRTC 2015-134 – Review of basic telecommunications services*. Ottawa, July 14, 2015. 132 p. Available at http://www.piac.ca/wp-content/uploads/2015/07/Affordable-Access-Coalition-TNC-2015-134-14-July-2015-FINAL.pdf

BMO Bank of Montreal; CIBC; National Bank of Canada; RBC Royal Bank; TD Bank Group. *Payments Security White Paper*. Toronto, July 13, 2015. 50 p. Available at http://www.cba.ca/contents/files/submissions/misc-2015-paymentssecurity-whitepaper-en.pdf

British Academy Forum of economists. Letter to the Queen. July 22, 2009. Available through http://www.britac.ac.uk/events/archive/forum-economy.cfm

Canadian Consumer Initiative/Environics Research Group. *Pre-Authorized Debits*. Survey, March 2006. 17 p. Available at http://www.consommateur.qc.ca/union-des-consommateurs/docu/budget/DPAsurvey.pdf

Canadian Payments Association. *Oversight of National Retail Payment Systems – Canadian Payments Association Submission in Response to Finance Canada*. Ottawa, June 11 2015

Norton Rose Fulbright. *Insurance product development in the new regulatory landscape*. London, Norton Rose Fulbright, January 2013. Available at http://www.nortonrosefulbright.com/knowledge/publications/74008/insurance-product-development-in-the-new-regulatory-landscape

Option consommateurs. *L'accès aux services financiers pour les populations du Nunavik, du Nunavut et des Territoires du Nord-Ouest*. Montréal, Option consommateurs, June 2007. 73 p. Available at http://option-consommateurs.org/documents/principal/fr/File/rapports/services_financiers/oc_serv_fi_grand_nord_200706.pdf

Public Interest Advocacy Centre. *All along the watchtower: seeking the future of Canada's payment system*. Ottawa, Public Interest Advocacy Centre, 2010. Available at http://www.piac.ca/wp-content/uploads/2014/11/watchtower_final.pdf

5.3 Speeches and hearings

Haldane, Andrew G. *Rethinking the Financial Network*. Speech, April 28, 2009. London, Bank of England, 41 p.. Available at http://www.bankofengland.co.uk/about/Pages/people/biographies/haldane.aspx

Sants, Hector. *Delivering intensive supervision and credible deterrence*. Financial Services Authority. March 12, 2009. Available at http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2009/0312_hs.shtml

Sants, Hector. Testimony before the House of Commons Treasury Select Committee, February 25, 2009. Response to Q2225, consulted at http://www.parliament.the-stationery-office.co.uk/pa/cm200809/cmselect/cmtreasy/144/09022506.htm)

Stevens, Glenn. *Remarks prior to the Annual General Meeting of the Australian Payments Clearing Association*. Sydney, Reserve Bank of Australia, October 23, 2014. Available at http://www.rba.gov.au/speeches/2014/sp-gov-231014.html

5.4 Contractual documents and consumer information

Bank of Nova Scotia. *We Financial Visa Prepaid*. Available at https://ca.visaprepaidprocessing.com/WeFinancial/Pages/Home.aspx)

Bank of Nova Scotia. *Cardholder Agreement We Financial Visa Prepaid Card*. Available at https://ca.visaprepaidprocessing.com/WeFinancial/PRC965/CP965-T03-001/docs/terms.htm

Cadillac Fairview. *How it works*. Available at https://www.cfshopcard.ca/Public/How-Shop-Card-Works.aspx

CIBC. *Convenience Banking Service Agreement*. Available at https://www.cibc.com/ca/apply/disclosures/conv-banking-serv-agreement.html

Visa Canada. *Visa Zero Liability Policy*. Available at http://www.visa.ca/en/personal/securewithvisa/liability.jsp

FICANEX Services LP. *About FICANEX Services*. Available at http://www.the-exchange.ca/default.aspx?PageID=1047&LangID=en

Interac. *Fraud prevention*. Available at http://www.interac.ca/en/security/security

Interac. *Interac Flash for consumers.* Available at http://www.interac.ca/en/interac-flash/interac-flash-for-consumers

Interac. *Interac security* features. Available at http://www.interac.ca/index.php/en/security#zero-liability

RBC Client Card agreement. Available at http://www.rbcroyalbank.com/debitchip/_assets-custom/pdf/Final%20Flash%20Brochure%20-%20ENG.pdf

5.5 Statistical data

Canadian Bankers Association. *The ABM market in Canada*. October 3 2014. Available at http://www.cba.ca/en/media-room/50-backgrounders-on-banking-issues/118-abm-market-in-canada

Canadian National Institute for the Blind. *Fast Facts about Vision Loss*. Consulted at http://www.cnib.ca/en/about/media/vision-loss/pages/default.aspx, May 27 2015

Canadian Payments Association. *Flow of payment items through the Automated Clearing Settlement System (ACSS)*. Available at http://cdnpay.ca/imis15/eng/Publications/Statistics/eng/res/acss_annual_archives2012-2014.aspx

Canadian Radio-Television and Telecommunications Commission. *Communications Monitoring Report*. Gatineau, CRTC, October 2014. 268 p. Consulted at http://crtc.gc.ca/eng/publications/reports/PolicyMonitoring/2014/cmr.pdf

European Commission (?). *Cartel Statistics*. Updated to June 24, 2015 (and March 31, 2014 regarding cartel fines per undertaking). Available at http://ec.europa.eu/competition/cartels/statistics/statistics.pdf

Statistics Canada. *2011 National Household Survey: Immigration, place of birth, citizenship, ethnic origin, visible minorities, language and religion*. Ottawa, Statistics Canada, The Daily, May 8, 2013. Consulted at http://www.statcan.gc.ca/daily-quotidien/130508/dq130508b-eng.pdf

Statistics Canada. *Income of Canadians, 2011*. Statistics Canada, The Daily, June 27, 2013. Consulted at http://www.statcan.gc.ca/daily-quotidien/130627/dq130627c-eng.htm

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. 102 p Consulted at http://www.statcan.gc.ca/pub/89-555-x/89-555-x2013001-eng.pdf

Statistics Canada. *Table 115-0014 – Total income for adults with and without disabilities, by age group and sex, Canada, provinces and territories)*. Ottawa, Statistics Canada, May 2015. Consulted at http://www5.statcan.gc.ca/cansim/a26?lang=eng&retrLang=eng&id=1150014&pattern=115-0014..115-0023&tabMode=dataTable&srchLan=-1&p1=-1&p2=31