

Intelligence MEMOS



From: James M. Mabbutt
To: Finance Minister Morneau
Date: December 21, 2016
Re: **CONSUMER PROTECTION, BANKS AND FEDERAL AUTHORITY**

Your proposed budget implementation legislation (Bill C-29) set up a comprehensive consumer protection regime for bank customers. That regime represents yet another skirmish in the ongoing federal-provincial war for control over banks. I would like to propose a win-win solution.

Largely because of specific federal authority over banks and banking in the constitution, the courts have accepted a fair degree of federal control over banks in fields such as special lending regimes, rules for unclaimed deposits and the control of reserve requirements. However, in recent years, banking activity has expanded into many new fields such as insurance and credit cards. The Supreme Court has resisted the banks' claims for immunity from provincial legislation in these areas and has allowed overlapping and concurrent legislation from both orders of government.

Your proposals sought to eliminate uncertainty by establishing a national consumer protection regime for banks at the federal level. Many provisions were already in the *Bank Act*. The Bill however took a very firm tone stating that federal authority over bank consumer protection was **exclusive** and that the provisions were **paramount** to provincial legislation. With respect, these statements may be of doubtful constitutional force – one cannot bootstrap constitutional authority simply by saying it exists – and had the effect of angering Quebec, which has a very advanced consumer protection regime.

You have now, I think wisely, given instructions to the government leader in the Senate to withdraw the consumer protection provisions of Bill C-29. You coupled this with a statement that new legislation will be proposed following consultation with the Financial Consumer Agency of Canada.

There is much merit in having a uniform consumer protection code for banks at the national level since provincial regimes are a hodge podge. In Quebec, consumer protection legislation is comprehensive. It provides detailed and strict regulation of credit charges (i.e., interest) by all lenders. It provides for punitive damages for aggrieved consumers and has a powerful Office of Consumer Protection. By contrast, much of the legislation in other provinces and territories is weaker, whether by negligence or design, and there is often not the political will to initiate strong enforcement. Leaving protection of bank consumers to the provinces entirely would result in a patchwork regime of limited benefit to consumers. This being said, however, there is no need to assert that this type of federal legislation trumps provincial law. Such an approach may be seen as a constitutional irritant. Concurrent federal and provincial consumer protection legislation applying to banks would not hinder bank operations and could be of considerable benefit to consumers. I hope you will agree to this approach.

James M. Mabbutt was General Counsel, Constitutional and Administrative Law Section, Federal Department of Justice.