

# Stronger financial consumer protection and credit contract requirements ahead

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## AUTHORS



Brigitte Goulard



Peter A. Aziz



Eli Monas

Bill C-86, *Budget Implementation Act, 2018, No. 2* (Bill C-86) received Royal Assent on December 13.

Once in force, Bill C-86 will consolidate existing consumer provisions and regulations, and strengthen consumer protection provisions that apply to banks and authorized foreign banks under the *Bank Act* (BA). Proposed amendments to the financial consumer protection framework are expected to come into force on a day or days to be fixed by order of the Governor in Council.

Additionally, on November 15, 2017, *An Act mainly to modernize rules relating to consumer credit and to regulate debt settlement service contracts, high-cost credit contracts and loyalty programs* (Bill 134) received assent. This Act amends the *Québec Consumer Protection Act* (RLRQ c P-40.1), mainly in respect of credit. Provisions of Bill 134 will come into force in stages<sup>1</sup> with most provisions related to credit contracts coming into force on August 1, 2019.

In this article, we provide a high-level overview of the more pertinent changes emanating from Bill C-86 and Bill 134.

## Federal Financial Consumer Framework

The consumer framework is intended to address many of the issues raised as part of the Financial Consumer Agency of Canada's (FCAC) "Domestic Bank Retail Sales Practices Review" and "Report on Best Practices in Financial Consumer Protection." While a full understanding of the proposed regime must await the government's release of draft regulations, the following sections set forth a very high-level overview of the new framework's most impactful proposals.

### 1. Enhanced board accountability to consumer protection

Under the proposed regime, board oversight of compliance with consumer provisions would be broadened by requiring banks to designate a committee responsible for ensuring the bank's compliance with the new provisions. The Committee would:

- require bank management to establish procedures for complying with the consumer provisions;
- review those procedures to determine whether they are appropriate to ensure the bank is complying with the provisions; and
- require management to report at least annually to the Committee on the implementation of the procedures and on any other activities that the bank carries out in relation to the protection of its customers.

## 2. Promotion of responsible business conduct

The new framework provides for a wide range of new requirements intended to encourage responsible business conduct and fair treatment of consumers.

One of the most significant changes will be the banks' obligation to establish and implement policies and procedures ensuring the products or services offered or sold are appropriate, having regard to the person's circumstances, including their financial needs. Although the bank's responsibility is limited to the establishment of policies and procedures, the new requirement is significant when read in combination with the provisions requiring banks to ensure that:

- a. remuneration, payment or benefit offered to officers and employees does not interfere with their ability to comply with these policies and procedures, and
- b. banks' officers and employees are trained in the bank's policies and procedures for complying with the consumer provisions.

Several other provisions also promote responsible business conduct, including:

- a prohibition from communicating or providing false or misleading information to a customer, the public or the FCAC Commissioner;
- a general prohibition, added to the tied selling restriction, against imposing undue pressure on a person for any reason or taking advantage of a person;
- an extension of certain consumer protection provisions to business customers;
- the introduction of a cooling off period, during which a consumer can cancel an agreement for certain products or services without any cancellation charge;
- a requirement to send an electronic alert if a person's deposit account balance, or the amount of credit available on the person's line of credit or credit card falls below a set amount;
- a prohibition against imposing any charges for optional products or services under promotional, preferential, introductory or special offers on the day the promotion ends without obtaining the person's express consent;
- redress provisions requiring banks to credit or refund any charge or penalty imposed where such charge or penalty was not provided for in an agreement or where the excess amount of the charge or penalty is greater than the amount provided for in an agreement. Banks will also be required to credit or refund any charge or penalty if the bank provides the product or service without first having obtained the customer's express consent; and
- a new whistleblowing regime in respect of any "wrongdoing."

## 3. A more robust complaints reporting regime

The proposed complaint-reporting framework will significantly expand the banks' responsibilities. Three of the more important aspects of this new regime are:

- a new provision which broadly defines a "complaint" as any dissatisfaction whether justified or not, with respect to a product or service or the manner in which the product or service is offered, sold or provided;
- a requirement for the banks to make a comprehensive record of each complaint including information as to how the institution attempted to resolve the complaint and any paid compensation; and
- the obligation to submit quarterly reports of each complaint to the FCAC Commissioner.

## 4. Strengthening the powers and duties of the FCAC's Commissioner

Bill C-86 also proposes several amendments to the *Financial Consumer Agency of Canada Act* (FCAC Act), including:

- an increase in the penalties for a violation of the BA to \$1 million for natural persons and \$10 million in the case of financial institutions or payment card networks (the maximum penalties are currently \$50,000 and \$500,000, respectively); and
- a provision requiring the Commissioner to make public the nature of a violation, the name of the person who committed it and the amount of the penalty imposed.

Bill C-86's reinforced financial consumer protection framework and FCAC's modernized supervision framework launched in October, will transform the banks' approach to financial consumer protection.

For a more detailed review of the proposed legislative amendments, see "[Bill C-86 Set to Strengthen Financial Consumer Protection](#)."

## Québec consumer protection considerations

Financial institutions have been reviewing their agreements and procedures in order to comply with the new credit provisions from Bill 134. Below we discuss some of the more impactful changes that clients should consider when reviewing their agreements and procedures.

### 1. Assessment of a consumer's capacity to repay credit

A merchant entering into a credit contract must now assess the consumer's capacity to repay credit. The same applies for a credit limit increase in open credit contracts including for credit cards and lines of credit. Financial institutions, among others, are required to perform this assessment.

### 2. Entering into high-cost credit contracts

Contracts where the credit rate exceeds the Bank of Canada rate by 22% are deemed to be high-cost credit contracts. As the Bank of Canada rate changes from time to time, financial institutions should consider the credit rate charged in their various products.

Before entering into a high-cost credit contract or before granting a credit limit increase (for certain credit contracts, including credit cards and lines of credit), financial institutions must assess the consumer's capacity to repay the credit, and determine the consumer's debt ratio, which is essentially the ratio of the consumer's monthly housing, lease and debt payments (calculated under the regulations) to the consumer's monthly income. The financial institution must provide a written copy of this information to the consumer.

High-cost credit contracts also trigger additional disclosure requirements prior to entering into the contract, and the consumer has particular cancellation rights.

Also, a consumer with a debt ratio over 45% who enters into a high-cost credit contract is deemed to have contracted an excessive, harsh or unconscionable obligation. Specific recourses are available to consumers in this situation.

### 3. Credit card disclosure requirements

Financial institutions must provide consumers with better information regarding credit cards, such as an estimation of the time required to reimburse the balance of an account when only a minimum payment is made, as well as information regarding the credit rate, the grace period and the nature of the charges.

The minimum monthly payment of any new credit card contract cannot be less than 5% of the outstanding balance and the minimum monthly payment for contracts already in progress will gradually increase from 2% to 5%.

It also now easier for a consumer to terminate pre-authorized payments.

## 4. Practices related to credit

The premium for insurance of persons (in certain cases), the premium for home or automobile insurance, the fee for an additional copy of an account statement or for customizing a credit card (among others) are not credit charge components and therefore cannot be billed as credit charges.

Financial institutions are not required to send a statement of account if there have been no cash advances or payments during the period and if the balance is at zero. However, in the case of credit contracts with a variable credit rate, a statement of account must now be sent to the consumer once a year.

A joint credit cardholder can be released from his joint obligation to repay the credit by notifying the financial institution and co-debtor of his intention not to use the credit extended, leaving the co-debtor responsible for the credit extended to him.

The legislation now distinguishes clearly between increasing credit limits and making transactions that exceed the credit limits. Consumers must request and consent to credit limit increases: any unilateral credit limit increase cannot be invoked against the consumer and the consumer is not required to pay the amounts charged to the account that exceed the credit limit granted before that unilateral increase. Banks may permit consumers to make transactions that exceed their credit limits with appropriate notice provided they do not charge a fee for it.

## Final thought

The interaction between the new federal consumer framework and the Québec consumer protection requirements may pose some practical challenges for compliance and will certainly transform the financial institutions' approach to financial consumer protection. We also expect to see an increase in consumer protection class actions in Québec once these provisions come into force.

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<sup>1</sup> August 1, 2018: provisions related to advertising, business practices, loyalty programs, credit contracts with itinerant merchants and restrictions on credit brokers; January 1, 2019: provisions related to compensation fund coverage for customers of travel agents; February 1, 2019: provisions related to debt settlement services.