Consumer Protection Issues and “Non-Banks”: A Comparative Analysis

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Forthcoming in the Texas International Law Journal, Volume 54 (2019)

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I. INTRODUCTION

The same millennials who spend all their money on avocado toast might not be looking to traditional banks to obtain mortgages or invest their limited funds because they don't have the requisite credit scores or resources to save money. This generation has also seen too many movies about Wall Street disasters and may have decided they don't want to give Leonardo DiCaprio money to "buy wolves." Also, they've been working any number of jobs that don't offer pensions or benefits; they often live paycheck to paycheck; and the prospect of borrowing money from a mainstream bank or depositing money at a mainstream bank when they need to eat lunch today or pay rent right now seems impossible. Non-bank financial institutions fill a big gap for millennials and others without a long and consistent credit history and confidence in capital markets. However, as will be shown in this article, non-bank financial institutions conduct business in Canada with far less oversight relative to their bank counterparts as a result of sweeping and loosely-worded regulation. An ineffective regulatory system leaves open the door to egregious violations slipping through the cracks without prompting formal inquiries into misconduct.

The 2017 Canadian federal budget together with the Home Capital crisis reignited discussion surrounding financial institutions and the regulations that govern them that were last front and centre following the 2008 financial crisis. Canada and the United States share numerous commonalities between banking systems, but responded differently to the 2008 financial crisis. Nearly a decade later, both countries have had vastly altered results as a by-product of these regulatory happenings impacting both bank and non-bank financial institutions, but more importantly, the consumers who rely on these institutions. This article argues that more work on the Canadian regulatory framework for Canadian non-bank financial institutions is necessary, from at least a consumer protection perspective. For the purpose of this article non-bank financial institutions are broadly defined to include all prudentially regulated non-bank deposit-institutions and the primary focus is on provincial credit unions and trust and loan companies but also includes other financial service providers, such as financial technology companies. Each of these institutions is subject to other forms of provincial and federal regulation, but the focus for this article is on the federal financial regulatory framework for financial institutions. The article suggests that the post-2008 American regulatory approach, that now threatens to be rolled back by the current administration, offers a good model to ensure that Canadian non-bank financial institutions are more heavily scrutinized, and thus, ultimately Canadian consumers are better protected.

Through a discussion of the variance in responses between Canada and the US through the 2008 financial crisis, the purpose of regulation for financial institutions will be explored first. An examination of the role of the various regulators in Canada will be undertaken through a brief study of the key Canadian regulator, the Office of the Superintendent of Financial Institutions ("OFSI"). Structure, entities OFSI regulates, and intervention strategies will be discussed to ultimately differentiate between how bank and non-bank financial institutions are treated, using the Home Capital Saga as a primary example. Where creating fake accounts and profiles was treated harshly in the United States for Wells Fargo, Canada assumed a far softer approach to Home Capital for eerily similar conduct. Having established differential regulatory approaches to these two types of financial institutions in two different jurisdictions, the impact of these approaches on consumer protection will be explored from Canadian and American perspectives. Canadian consumer protection is not a primary focus for OSFI, and as such, the Consumer Deposit Insurance Company ("CDIC") will be discussed to evaluate the efficacy of consumer protection legislation with respect to deposits. Similarly, the Canadian regulator for consumer protection, the Financial Consumer Agency of Canada ("FCAC") will then be compared to its relatively, more successful counterpart, the Consumer Financial Consumer Bureau ("CFPB") to distill key differences that FCAC can implement.

II. 2008 FINANCIAL CRISIS RESPONSE

A) Historical Underpinnings

Canada and the United States possess many similarities in economic structure, industry reliance, and banking prominence between themselves and with many developed countries globally. Despite these commonalities, Canada was the only country among the G-8 to escape the financial crisis without a government bail-out.[1] According to the World Economic Forum, Canadian banks were named the safest in the world.[2] Canada's ability to withstand economic ruin is rooted in tolerance for industry connection, state involvement, and differing routes of financial system development. While deep financial and economic integration between Canada and the US may suggest Canada being swept away by US tides, Canada's response did not parallel the US stimulus injection into banks.[3] Going beyond effective regulation and conservative banking practices, Canada's history with financial sector development offers some insight into Canada's resilience.

In its history, Canada did not experience a single bank failure, however, there were 43 non-bank financial institution failures from 1970 until present, with the most recent failure in 1996.[4] The rationale for the stark difference in the number of institutional failures between banks

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[1] Christopher C. Nicholls, "The Regulation of Financial Institutions: A Reflective But Selective Retrospective" (2011) 50 Can Bus LJ 129 at 129.

[2] *Nicholls*, *ibid* at 129; Donald J. S. Brean, Lawrence Kryzanowski & Gordon S. Roberts, "Canada and the United States: Different Roots, Different Routes to Financial Sector Regulation" (2011) 53:2 Business History 249 at 251.

[3] *Nicholls*, *ibid*.

[4] *Brean, Kryzanowski & Roberts*, *supra* note 2 at 251; Government of Canada, Canada Deposit Insurance Corporation, *History of Member Institutions Failing* (2017), online: <www.cdic.ca/en/about-cdic/resolution/Pages/

and non-banks may be attributed to regulating interest rates. In 1967, Canada removed interest rate controls whereas this continued into the late 1980s in the United States.[5] When inflation prompted an increase in interest rates, Canada was unaffected as banks possessed the ability to adjust their interest rates accordingly. However, the US banking system suffered disintermediation because a parallel banking system was developed to funnel unregulated market funds into bank securities or bank-sponsored products (this is commonly known as "shadow-banking").[6] Loans were repackaged to avoid the bank's balance sheet with the regulators being unable to catch this kind of behaviour. Canada did not develop a large shadow banking sector and also had relatively lower exposures to collateralised mortgage obligations, structured investment vehicles, and credit default obligations.[7] Fewer numbers of large banks enabled stability, which allowed higher equity returns with lower risk funding practices while holding greater equity in Canada.[8]

B) Structure

The most significant differences between Canada and the United States during the financial crisis were their institutional structure of financial systems and the modes of financial sector regulation.[9] Up until the mid-1950s, Canada was completely free from government intervention, thus impacting the financial structure of the economy.[10] Five major banks predominantly dictated regulatory trends as a result of financial and political clout.[11] In comparison, the United States was subject to far more regulation early on its history. The

history.aspx> [*History of Member Institutions Failing*].

5 *Brean, Kryzanowski & Roberts*, *ibid* at 265.

6 *Ibid*.

7 *Ibid* at 266.

8 *Ibid* at 264.

9 *Ibid* at 260.

10 *Ibid* at 261.

11 The five major banks are the Bank of Montreal (BMO), the Bank of Nova Scotia (Scotiabank), Canadian Imperial Bank of Commerce (CBIC), the Royal Bank of Canada (RBC), and the Toronto-Dominion Bank (TD Bank).

American "dual banking system" separated national and state banks, thus facilitating a clear demarcation ripe for intensified regulation.[12] This market fragmentation served to be the catalyst for compounding pressure for regulatory demands.[13] From 1990 to 2009, the number of commercial banks dropped from 12,000 to 7,000.[14] The atomistic nature of the US financial system underlies its weakness and vulnerability. Inherently, American regulation is rules-based and prescription-oriented.

Canadian conservatism extended to capital rules because banks were required to "*hold higher levels of Tier 1 (equity) and total risk-weighted capital.*"[15] Canadian banks voluntarily chose to hold capital in excess of required minimum. A maximum leverage of 20:1 assets to capital was mandated, but banks often opted to stay well below this.[16] In contrast to the rules based, American system of regulation, Canadian regulation is "principle-based" where financial institutions must meet both "*intent and what is explicitly prescribed in legislation*".[17] For example, the Canadian regulator, which will be discussed in further detail below, does not set out a fixed formula for how to behave when facing loan losses, but can step in when it feels that it is necessary to make adjustments.[18]

The implication of this "principle-based", Canadian approach suggests a more favourable environment for banks specifically as there is freedom for innovative responses to issues it faces. However, this approach may prove to be detrimental to non-banks as a function of the imbalanced, relative financial resources.[19] When facing instances of loan losses, banks possess

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12 *Brean, Kryzanowski & Roberts*, *supra* note 2 at 261.
13 *Ibid*.
14 *Ibid* at 260.
15 *Ibid* at 264
16 *Ibid*.
17 *Ibid*
18 *Ibid*.
19 *Ibid* at 265.

the capital to navigate around this hurdles, while some non-bank institutions do not. The lack of guidance from the Canadian regulator may serve to further exacerbate the financial hardships non-banks may face as this direction is what these institutions require. Current "principle-based" regulation serves to further benefit the large banks, while non-banks are left in the shadows.

The stability of Canadian banking rests on the implicit guarantee of large banks, thus contributing to higher rates of equity return, and a less competitive yet integrated industry.[20] Despite being more stable, it is misleading to say that Canada was immune from disruption in the financial markets. Canadian banks were forced to accept significant write-downs, but in comparison to the United States, it was relatively less impactful because of the Canadian financial structure.[21] The impact of the financial downturn unsurprisingly impacted non-bank financial institutions far more grievously relative to its bank counterpart.[22] The Government of Canada has also advanced several other policy reforms since the financial crisis, including establishing a federal credit union framework to improve the ability of new entrants and smaller banks to compete with larger players.[23] Small and medium-sized financial institutions have explained the difficulties they face in competing nationally as a function of "*higher regulatory burden and tighter prudential requirements relative to large banks*".[24] Despite identifying this concern, limited steps have been assumed to fully address the gap in legislation. The financial crisis was a prime example that highlighted the shortcomings of the status quo. Canadian banks

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[20] *Ibid* at 263; *Nicholls*, *supra* note 1 at 130.
[21] *Nicholls*, *ibid* at 148.
[22] John Pozios & Matthew Underwood, "Musical Chairs: Who's Left Standing When the ABCP Music Stops?" (2009) 9 Asper Review of International Business and Trade Law 65 at 84.
[23] Government of Canada, Department of Finance, *Supporting a Strong and Growing Economy: Positioning Canada's Financial Sector for the Future – A Consultative Document for the Review of the Federal Financial Sector Framework* (26 August 2016), online: <www.fin.gc.ca/activty/consult/ssge-sefc-eng.pdf>.
[24] Government of Canada, Department of Finance, *Potential Policy Measures to Support a Strong and Growing Economy: Positioning Canada's Financial Sector for the Future – Review of the Federal Financial Sector Framework* (11 August 2017), online: <www.fin.gc.ca/activty/consult/pssge-psefc-eng.pdf> [*Consultation Document 2*].

entered the crisis particularly well-positioned to withstand tanking balance sheets, but the same could not be said for non-bank financial institutions.

III. WHO REGULATES NON-BANK FINANCIAL INSTITUTIONS?

Banking falls under the purview of the Office of the Superintendent of Financial Institutions ("OSFI"), which will be discussed in further detail, but non-banking financial institutions can easily fall through the "regulatory cracks" even though they are within the OSFI's regulatory mandate.[25] In addition to 87 banks, the OSFI regulates 44 trust companies, 18 loan companies, 68 life insurance companies, 13 fraternal benefit societies, and 155 property and casualty insurance companies.[26] Closer attention needs to be paid to how these bodies are regulated in practise by the OSFI and reforms are necessary to address gaps. A case study on Home Capital better situates the issue of non-bank financial institution regulation.

Home Capital is a publicly traded company which acts through its principal subsidiary, Home Trust Company, to offer mortgage lending, deposits and credit cards.[27] Targeting the population who have been turned away from traditional banks for reasons such as poor credit history or self-employment, Home Trust offers uninsured mortgages which accounts for roughly 90 per cent of its business.[28] Home Trust is a federally regulated trust company, and as such, is a non-bank financial institution that falls under the purview of the OSFI. As one of Canada's largest alternative mortgage lenders, Home Capital assumes only a small piece (approximately $20 billion in mortgages) of the overall mortgage market, approximately $1.1 trillion.[29]

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[25] *Pozios & Underwood*, *supra* note 22 at 75.

[26] For a detailed list of these companies, see Government of Canada, Office of the Superintendent of Financial Institutions Canada, *Who We Regulate* (23 October 2014), online: <www.osfi-bsif.gc.ca/Eng/wt-ow/Pages/wwr-er.aspx> [*Who OSFI Regulates*].

[27] Armina Ligaya, "What exactly is Home Capital and why is it so important to the mortgage industry?", *Financial Post* (27 April 2017), online: <www.business.financialpost.com/news/fp-street/what-exactly-is-home-capital-and-why-is-it-so-important-to-the-mortgage-industry/wcm/8f536a80-78bb-4e36-8cff-91f1801145a7>.

[28] *Ibid*

[29] *Ibid*.

When Home Capital announced the need for a $2 billion loan facility to aid in offsetting the $600 million drop in high interest savings account deposits, the stock value dropped as much as 64.9 per cent to $6.[30] Home Trust relies on deposits to help fund the company's mortgage lending. The drop in deposits directly impacts lending abilities, thus damaging investor confidence in the company's viability. Deposits started to dwindle back in 2015 when the Ontario Securities Commission ("OSC") accused the company and its officials of misleading shareholders as a result of broker frauds, which culminated in cutting ties with 45 brokers.[31] These brokers were found to be submitting altered and fictitious mortgage applications highlighting the emphasis on short-term thinking and a blindness to risk.[32] Despite this event occurring two years ago, its remnants have created an air of uncertainty for Home Capital. "*This is a very peculiar situation where Home Capital has no issues around credit, and no issues with a capital shortfall. Yet they are being decimated in terms of their viability as an ongoing entity.*"[33] The OSFI announced that it was monitoring the situation and that it may move quickly to protect the alternative mortgage market confidence, however, the actions taken by OSFI remain unclear and ultimately a private action appears to have restored market confidence in the short term.[34]

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30 *Ibid*. For more information on how Home Capital ultimately received a $1 billion loan, see Janet McFarland et al, "Mayday at Home Capital", *Globe and Mail* (19 May 2017), online: <www.theglobeandmail.com/report-on-business/home-capital-saga-real-estate/article34972594/>.

31 *Ligaya*, *supra* note 27; Barbara Schecter, "The Home Capital saga: A timeline of key events and allegations", *Financial Post* (5 May 2017), online: <www.business.financialpost.com/news/fp-street/the-home-capital-saga-a-timeline-of-key-events-and-allegations/wcm/fc4fc934-c114-45be-bbfe-b6d440f701a0>.

32 Lal Bakaran, "Home Capital saga highlights the need for strong internal auditing", *Globe and Mail* (10 May 2017), online: <www.theglobeandmail.com/report-on-business/rob-commentary/home-capital-saga-highlights-the-need-for-strong-internal-auditing/article34948959/>.

33 *Ibid*.

34 *Ibid*; Katia Dmitrieva, Kristine Owram & Doug Alexander, "Warren Buffett's backing boosts Home Capital despite investor opposition", *Financial Post* (29 June 2017), online: <www.business.financialpost.com/news/fp-street/warren-buffetts-backing-boosts-home-capital-despite-investor-opposition>.

As will be discussed in the latter half of this paper, when Wells Fargo had acted in a similar fashion to Home Capital in creating fake accounts to mislead customers, the US regulator imposed a heavy-handed, punitive fine.[35] The issue of Home Capital being a publicly traded non-bank may explain the lack of action on the part of both the OSC and the OSFI. When posed with situations where immoral behaviour goes unchecked through the aforementioned "principle-based" model of regulation, further misfeasance becomes encouraged. Lenient responses from the regulator rooted in the status quo thus permit more immoral behaviour. The Bank Words related regulation which seeks to provide greater consumer clarity as to the definition of a "bank", as will be discussed in far greater detail below, has only been recently adopted, but it has no effect on an entity named "Home Capital" as it does not fall within its scope.[36] Ultimately, the lack of specific focus in the existing regulatory structure on non-bank financial institutions and confusion surrounding the role of the various regulators threaten to have dire implications for consumer protection.

IV. THE NEED FOR EFFECTIVE REGULATION

Ability to withstand macroeconomic ruin is one indicator of the efficacy of regulation. The current regulatory system may have served to be beneficial nearly a decade ago, but with the transformation of financial institutions, and improved access to financial institutions for a wider range of consumers, there is the need for growth. A combination of Canada's "principle" based system and the US "rules/prescription" based system may offer some guidance into the next step

[35] Gretchen Morgenson, "Wells Fargo Forced Unwanted Auto Insurance on Borrowers", *New York Times* (27 July 2017), online: <www.nytimes.com/2017/07/27/business/wells-fargo-unwanted-auto-insurance.html>.

[36] Government of Canada, Office of the Superintendent of Financial Institutions Canada, *Advisory 2017-01 – Restrictions on the use of the words "bank", "banker" and "banking"* (June 2017), online: <www.osfi-bsif.gc.ca/Eng/fi-if/app/rla-prl/Pages/adv-2017-01.aspx> [*Advisory*]; *Consultation Document 2*, *supra* note 25 at 18.

for an effective regulator. A mixed principle-and-rules approach has the advantage of enabling regulator to possess a wider scope for action in face of innovation designed to avoid regulation.[37] This is currently in place in the United Kingdom and Australia.[38] This hybrid system does not necessarily equate to success considering that the UK banks still failed during the financial crisis, but it does offer a logical development of regulation which encompasses the innovative practices of financial institutions and better accounts for consumer protection concerns.[39] The United Kingdom's interest in departing from the European Union ("Brexit") directly impacts the flexibility of banks in the mixed principle-and-rules methodology as the governing framework for the rules is likely to drastically change.[40]

Innovative development for financial institutions may rest in a steady progression away from transparency. An opaque and insulated regulator is beneficial as it can regulate unfettered by partisan politics and majoritarian preferences.[41] The OSFI operates in a "black box", keeping policy and enforcement related information confidential, ultimately serving to its advantage to prevent bank collusion or rent-seek.[42] This opacity goes against the generally held views about the benefits of transparency in regulating bodies.[43] Canada's regulatory structure is a factor to why Canada weathered the financial crisis so well – banks were discouraged from taking excessive risks as a general principle.[44] If not sufficiently independent, regulated institutions

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[37] *Brean, Kryzanowski & Roberts*, *supra* note 2 at 264.
[38] *Ibid*; Fiona Haines, "Regulatory Failures and Regulatory Solutions: A Characteristic Analysis of the Aftermath of Disaster" (2009) 34:1 Law & Social Inquiry 31 at 45; Deborah Healey & Rob Nicolls, "Should Stability Reign? The Consumer Downside of Foregone Competition in Retail Banking Markets" (2016) 32 BFLR 69.
[39] *Brean, Kryzanowski & Roberts*, *supra* note 2 at 264.
[40] Justine N. Stefanelli, "Taking Back Control? Parliamentary Sovereignty and UK Membership in the EU" (2016) 10 J Parliamentary & Pol L 521.
[41] Anita Anand & Andrew Green, "Regulating Financial Institutions: The Value of Opacity" (2012) 57:3 McGill LJ 399 at 399.
[42] *Ibid*.
[43] *Ibid*.
[44] *Ibid* at 401.

might seek rules to favour their profitability. Brean, Kryzanowski & Roberts (2011) suggest that insulation, that is to say separation from elected officials, and opacity, i.e. a lack of transparency, may be the best alternative.[45] The implications of an insulated and opaque regulatory body result in developing and implementing regulations, no prescribed processes, no mandated public consultation, and no necessary stakeholder input or cost-benefit analysis.[46] While understanding that the OSFI operates in a "black box", its response and intervention process must be examined in more detail to truly identify the adverse ramifications for non-banks.

V. THE OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS (OSFI)

A) Background

An independent federal agency which supervises financial institutions and pension plans to determine their financial condition, the Office of the Superintendent of Financial Institutions ("OSFI") is vital for federally regulated financial institutions (FRFIs) oversight. The OSFI supervises these deposit-taking institutions and conducts risk-based assessments of safety and soundness.[47] If material deficiencies are discovered, this agency possesses the legislative power under the *OSFI Act*[48] to require management or the board of directors to take necessary corrective measures.[49] Advanced regulatory frameworks must promote adoption of policies and

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[45] *Ibid* at 404.
[46] *Ibid*.
[47] Government of Canada, Office of the Superintendent of Financial Institutions Canada, *Guide to Intervention for Federally Regulated Deposit-Taking Institutions* (June 2015), online: <www.osfi-bsif.gc.ca/Eng/Docs/Guide_Int.pdf> at 1 [*Guide to Intervention*].
[48] *Office of the Superintendent of Financial Institutions Act*, RSC 1985, c 18 (3rd Supp), Part I [*OSFI Act*].
[49] *Anand & Green*, *supra* note 41 at 403.

procedures to manage risk while evaluating system-wide or sectoral issues that may negatively impact institutions.[50]

B) Structure

Structurally, the Minister of Finance "presides" over and is "responsible" for the OSFI,[51] but practically, the Superintendent of Financial Institutions possesses the decision-making authority for this body. The Superintendent, however, is appointed by the Governor General, exposing this agency to the possibility of political influence. The OSFI must still implement legislation created by the Cabinet, but the *OSFI Act* has left room for this agency to create its own policy considering factors such as risk management, interpretation of different requirements, and guidelines/rulings on certain matters.[52] It is not the OSFI's role to regulate capital markets nor to advise investors on how to invest; instead, it is "*purely seek to ensure the safety and soundness of financial institutions that make promises to pay depositors and policyholders.*"[53]

The OSFI currently regulates 87 banks, of which 32 are domestic, 23 are foreign, 28 are foreign bank branches with full service, and 4 are foreign bank branches solely for the purpose of lending funds.[54] As mentioned above, the OSFI also regulates 44 trust companies, 18 loan companies, 68 life insurance companies, 13 fraternal benefit societies, and 155 property and casualty insurance companies.[55] "Financial institution" in the *OSFI Act* covers banks within the meaning of section two of the *Bank Act*:[56] a company to which the *Trust and Loan Companies*

[50] *Ibid*
[51] *Ibid* at 419; *OSFI Act*, *supra* note 48, ss 3, 4(1).
[52] *Anand & Green*, *ibid* at 420.
[53] *Pozios & Underwood*, *supra* note 22 at 85.
[54] *Who OSFI Regulates*, *supra* note 26.
[55] For a detailed list of these companies, please see *Who OSFI Regulates, ibid.*
[56] *Bank of Canada Act*, RSC 1985, c B-2 [*Bank Act*].

Act applies;[57] an association to which the *Cooperative Credit Associations Act* applies;[58] an entity to which the *Insurance Companies Act* applies,[59] and an entity under Green Shield Canada.[60]

Financial regulation through the OSFI provides a control mechanism for both macroprudential and microprudential concerns. Macroprudential considerations include issues that regulation addresses on the financial system as a whole.[61] Microprudential regulation addresses individual institutions more specifically.[62] In conjunction with the Bank of Canada, which prioritizes credit, currency, and controlling national monetary policy, both institutions form the backbone for financial regulation in Canada.[63] This twin peak regulatory structure strikes a balance between reducing potential for collusion and preserving easy monitoring by regulators.[64] While formed to specifically address the oversight of regulations, the primary action that the OSFI undertakes is strictly bound to federally regulated deposit-taking institutions. That is to say, non-banking financial institutions, which are largely smaller in size than the big five banks, are treated with the same regulation, and thus decrease the OSFI's effectiveness for oversight. In both its macro- and microprudential consideration, regulation is painted with the same brush for both bank and non-bank institutions, as exemplified through its intervention process.

C) OSFI Intervention

The potential collapse of federally regulated deposit-taking institutions triggers the OSFI intervention process, a means by which financial viability of a member institution is rated and

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57 *Trust and Loan Companies Act*, SC 1991, c 45.
58 *Companies' Creditors Arrangement Agreement Act*, RSC 1985, c C-36.
59 *Insurance Companies Act*, SC 1991, c 47.
60 *Green Shield Canada Act*, SC 2007, c 6.
61 *Anand & Green*, *supra* note 41 at 407.
62 *Ibid*.
63 *Ibid*.
64 Koker Christensen, Sunny Sodhi & Robert McDowell, "Current Requirements to Establish a Bank Or Federal Trust and Loan Company" (2014) 29:2 BFLR 369 at 408.

addressed accordingly. Statutes provide a wide range of discretionary intervention powers which consider the unique circumstances of financial institutions, including nature, scope, complexity and risk profile.[65]

i. No Significant Issues

If there are no significant problems with an organization, then the OSFI's responsibilities include assessing the financial condition and the operational performance of a financial institution. This includes conducting a thorough review of information from filings and financial reporting requirements such as board and committee minutes.[66] Meetings and regular risk-based supervisory reviews of institutions are included at this stage to ensure proactive supervision. Through a supervisory letter and composite risk ratings, the OSFI advises institutions of any corrective measures to undertake.[67]

ii. Stage 1

If a member institution is identified at stage one, the overall net risk and capital compromise the institution's stability. Risk management activity must begin to address deficiencies which are not presently serious, but possess the capacity to deteriorate into a more serious problem if left unaddressed.[68] The OSFI will formally notify and meet with management, the board, and an external auditor. The institution will be monitored on an escalating basis by increasing the frequency of reporting requirements and expanding the level of detail for submitted information.[69] Business related compliance restrictions on financial institutions are

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[65] *Guide to Intervention*, supra note 47 at 1.
[66] *Ibid* at 3.
[67] *Ibid* at 4.
[68] *Ibid* at 5.
[69] *Ibid*.

imposed to further ensure institutional stability.[70] At this stage in the process, the practical implications of similar procedures for both bank and non-bank institutions is not yet visible.

iii. Stage 2

At this stage, institutions pose material safety and soundness concerns and are vulnerable to adverse business and economic conditions that require corrective action. Enhanced monitoring of remedial measures occur by increasing the frequency of reporting requirements. An external auditor is introduced to enlarge the scope of review to perform other procedures and prepare a report at the institution's expense.[71] A contingency plan is developed to enable the OSFI to be ready to take rapid control of the institution's assets in the event of rapid deterioration.[72] This specific stage is still relevant to non-bank financial institutions considering the non-partisan and unbiased external auditor report.

A recent example of the OSFI intervention occurred for Maple Bank GMBH (Maple Bank). On February 15th, 2016, the OSFI intervened to protect depositors and creditors of the Canadian branch of Maple Bank by taking permanent control of the assets and requesting the Attorney General to apply for a winding-up order.[73] Assets were taken to preserve the value of the branch. On February 11th, 2016, an insolvency administrator was appointed by the German Insolvency Court to administer the wind-up of Maple Bank GmbH.[74] Despite possessing its headquarters in Germany, its foreign Toronto branch is monitored by OSFI. Maple Bank GmbH

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[70] *Ibid* at 6.

[71] *Ibid* at 7; Government of Canada, Office of the Superintendent of Financial Institutions Canada, *Supervisory Guide Applicable to Federally Regulated Insurance Companies* (2015), online: <www.osfi-bsif.gc.ca/Eng/Docs/Insurance_guide.pdf> at 3 [*Supervisory Guide*].

[72] *Guide to Intervention*, *ibid* at 8.

[73] Government of Canada, Office of the Superintendent of Financial Institutions Canada, *News Release - Superintendent of Financial Institutions continues intervention actions re Canadian branch of Maple Bank* (15 February 2016), online: <www.osfi-bsif.gc.ca/Eng/Docs/nr20160215.pdf>.

[74] *Guide to Intervention*, *supra* note 47 at 9; *Supervisory Guide*, *supra* note 71 at 4.

Toronto participated in stage two of the intervention process where OSFI assumed temporary control of its assets.

iv. Stage 3

The third stage indicates the need for regulatory modifications to treat non-bank financial institutions differently. The current intervention framework identifies the financial institution as immersed in serious debt, thus threatening the future viability and solvency of the institution unless corrective measures are undertaken promptly.[75] The OSFI appoints direct external specialists to assess certain areas of quality loan security, asset values, and reserve sufficiency to ultimately enhance the scope of business regulations. The OSFI staff become present at the institution to monitor the situation on an ongoing basis while encouraging restructuring or seeking a prospective buyer.[76] While a large bank may still operate despite heavy regulation, non-bank financial institutions much more limited in capital assets, may find this stage impractical. The connotation of intensified regulation suggests a profound deviation from the manner in which institutions were regulated before the financial concern, but one should still remember that the "principle-based" emphasis of the OSFI softens the intended effect of intense regulation.[77]

v. Stage 4

The last stage of the intervention process results in the OSFI having determined that the institution is undergoing severe financial difficulties. The institution has failed to meet regulatory capital requirements and the statutory conditions for taking control have been met.[78] As a result of failure to develop and implement an acceptable business plan, the institution is considered

[75] *Guide to Intervention*, *ibid*; *Supervisory Guide*, *ibid*.
[76] *Guide to Intervention*, *ibid*; *Supervisory Guide*, *ibid*.
[77] *Brean, Kryzanowski & Roberts*, *supra* note 2 at 264.
[78] *Assessment of Financial Institutions Regulations*, 2017, SOR/2016-297, s 3(1); *Guide to Intervention*, *supra* note 47 at 10; *Supervisory Guide*, *supra* note 71 at 5.

non-viable on an imminent basis. The OSFI may assume temporary control of assets and request the Attorney General of Canada to apply for a winding up order for the institution.[79] Non-bank institutions at this stage likely fall far below the capital requirements for this stage to be of any use. The third stage of this intervention process is the end for non-banking entities due to capital requirements. This demonstrates the all-encompassing, yet ineffective means of regulating differing types of financial institutions.

New OSFI guidelines utilize prescriptive language that softens the impact on large federally regulated financial institutions and their board of directors, but is still just as burdensome on smaller institutions.[80] Small companies believe they are held to the same standard of large banks and insurance companies despite the OSFI's insistence that the new guidelines are not a "one size fits all".[81] The OSFI recognizes that FRFIs differ in terms of scope and complexity with different corporate governance practices, but the expectation of management to be more proactive persists. Capital requirement hindrances are also neglected under this intervention process. The OSFI intervention process is specific to the economic climate and the pressures associated with maintaining a healthy economy; however, ramifications for consumers are not addressed by OSFI when federally regulated deposit-taking institutions fail. Careful tailoring of the past guideline has been implemented after consultation and feedback from the industry, but clearly, there is still plenty of regulatory change required to address the specific needs of non-banking financial institutions. With the introduction of new language to elaborate on admissible uses of the word "banks", non-bank financial institutions may be directly impacted.

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[79] *Guide to Intervention*, *ibid*; *Supervisory Guide*, *ibid*.
[80] Luis Millan, "OSFI Softens Final Risk Guidelines" (2013) 29:6 Bottom Line 7.
[81] *Ibid*.

D) OSFI'S Definition of Bank

A recent OSFI Advisory[82] points to the introduction of a recent regulation to further clarify the definition of the word "bank". Of particular use to the current discussion, this regulation establishes how the term "bank" is relative to "non-bank entity".[83] A bank is strictly limited to those entities set out in Schedule I or II of the *Bank Act*.[84] Section 983 outlines two restrictions on the use of words attributed to banks, i.e. Bank Words.[85] The first restriction prevents a non-bank entity from acquiring, adopting or retaining a name that includes the Bank Words to *indicate or describe* any part or whole of a business in Canada.[86] Bank Words reasonably suggest to the public the nature of the entity's business. The OSFI indicates that any trade name or phrase that suggests to the public that banking is a part of the business's activities when it is in fact not a core part of the entity's nature violates this section.[87] Several examples are provided, such as a non-bank entity's name being "Cooperative Nanking" or "Banking Centre", would be in violation of the restriction. However, there are several exceptions to the new regulation.[88] Situations where a non-bank entity may use the word "bank" include instances where the use of Bank Words are not in relation to any part of the financial activity of the business, i.e. Food Bank.[89]

The introduction of this regulation will undoubtedly impact many non-bank entities whose names may mislead consumers to believe an incorrect bank status for said entity. The regulation also signals an appreciation for the proliferation of non-bank Canadian financial

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[82] *Advisory*, *supra* note 36.
[83] *Use of the Word "Bank" by Non-financial Businesses (Excluded Entities) Regulations*, 2017, SOR/2001-408.
[84] *Bank Act*, *supra* note 56.
[85] *Ibid*, s 983.
[86] *Advisory*, *supra* note 36.
[87] *Ibid*.
[88] *Bank Act*, *supra* note 56, ss 983(4)(c), (d), (e), (5), (5.1), (6), and (12).
[89] *Advisory*, *supra* note 36.

institutions and the need for responsive regulation, however, more work is necessary as discussed to this point. It is far too early to predict the on-the-ground implications of this new language on non-bank entities specifically in terms of consumer protection as this may just carve out non-banks from the focus of OSFI's oversight. Consumers may still be less protected as a result of this differential treatment of non-banks. However, as will be discussed in the next section, the Canadian Deposit Insurance Company ("CDIC") addresses some consumer protection issues in the event of financial institution failure and fills in some of the regulatory gaps for non-bank financial institutions.

VI. CANADIAN DEPOSIT INSURANCE COMPANY (CDIC)

A) History

In 1913, depositor protection was in the form of senior management and shareholder liability for losses associated with a failed bank.[90] This system of double liability was removed in 1950 and many changes have occurred since.[91] After collapses of two major financial institutions, the Atlantic Acceptance Company and the Prudential Finance Company in 1965 and 1966, respectively, the Minister of Finance announced the intention to proceed with a federal plan of deposit insurance in 1966.[92] The purpose of the *CDIC Act*[93] was to ensure the safety and soundness of depositors who are usually not in a position to evaluate the financial soundness of institutions holding their deposits. The 1967 *CDIC Act* articulated that the CDIC set aside a

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[90] *Guide to Intervention*, *supra* note 47.

[91] Government of Canada, Canada Deposit Insurance Corporation, *An Overview of CDIC's History and Evolution* (2015), online: <www.cdic.ca/en/about-cdic/Documents/our-history.pdf> at 3 [*CDIC Overview*].

[92] *Ibid* at 5.

[93] *Canada Deposit Insurance Corporation Act*, RSC 1985, c C-3 [*CDIC Act*].

reserve fund, of which banks must be contributing members.[94] Since its creation in 1967, the CDIC has handled 43 failures of member institutions.[95]

The CDIC addresses consumer protection concerns in the event of the OSFI intervention resulting in serious, detrimental economic impact. The CDIC is a federal crown corporation that protects savings in the event a member institution collapses.[96] The CDIC normally works through the OSFI to address any concerns it may have about individual institutions. Through monitoring, the CDIC takes necessary action depending on the condition of member institutions.[97] Seven deposit categories are protected up to a maximum of $100,000.[98] These categories include savings accounts, chequing accounts, term deposits (GICs and debentures), money orders, travellers' cheques and bank drafts, and accounts that hold funds to pay taxes on mortgage properties.[99] To be eligible, the deposit must be payable in Canada in Canadian currency and must be repayable no more than five years after the date of deposit.[100]

B) Resolution Tools

Resolution tools depend on the circumstances of a particular situation and consider variables, such as the size and complexity of banks, franchise value, and availability of any private sector buyer.[101] In the event that a member institution collapses, the following tools are

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[94] *CDIC Overview*, *supra* note 91 at 5.

[95] *History of Member Institutions Failing*, *supra* note 4; Government of Canada, Canada Deposit Insurance Corporation, *Resolution Tools* (2017), online: <www.cdic.ca/en/about-cdic/resolution/Pages/tools.aspx> [*Resolution Tools*], Government of Canada, Canada Deposit Insurance Corporation, *Protecting Your Deposits* (November 2013), online: <www.cdic.ca/en/financial-community/Pages/protecting-your-deposits.aspx> at 2 [*Protecting Your Deposits*]. For a list of member institutions, see Government of Canada, Canada Deposit Insurance Corporation, *List of Member Institutions* (2017), online: <www.cdic.ca/en/about-di/what-we-cover/Pages/list-members.aspx>.

[96] Robb Engen, "How CDIC Would Protect Your Deposits if Home Capital Goes Bankrupt", *Boomer&Echo* (8 May 2017), online: <www.boomerandecho.com/cdic-protect-deposits-home-capital-goes-bankrupt/>; *Protecting Your Deposits*, *supra* note 92 at 2.

[97] *Guide to Intervention*, *supra* note 47 at 1.

[98] *Ibid*.

[99] *Protecting Your Deposits*, *supra* note 95 at 2.

[100] *Ibid*.

[101] *Resolution Tools*, *supra* note 95; Engen, *supra* note 96.

triggered in the interest of protecting assets, in turn having a direct impact on consumer protection.

i) Reimbursement of Insured Deposits[102]

The reimbursement process is automated wherein depositors do not need to file a claim to gain access to their funds provided that they fall within one of the seven outlined deposit categories.[103] All contracts are terminated with this resolution tool and the institutions critical financial services are no longer available, including access to accounts. Depositors with funds not protected by the CDIC would be able to file a claim with the liquidation firm when appointed by the courts.[104] This tool is likely to be triggered only in the case of a small to medium-size bank.[105]

ii) Forced Sale[106]

In the event a buyer exists, the CDIC assumes control of the failing bank for a short period of time to complete its sale, merger or restructuring. Assuming control ensures that core banking operations continue and insured deposits are protected.[107] With governmental approval, this tool is utilized when shareholder consent of the transaction is not expected or the time to obtain consent would take too long. Forced sale can occur in two forms.[108] First, all shares may be transferred to the CDIC and it becomes the sole shareholder to facilitate the sale.[109] Second,

[102] *Resolution Tools*, *ibid*; Engen, *ibid*.
[103] *Resolution Tools*, *ibid*; Engen, *ibid*.
[104] *Resolution Tools*, *ibid*; Engen, *ibid*.
[105] *Resolution Tools*, *ibid*; Engen, *ibid*.
[106] *Resolution Tools*, *ibid*; Engen, *ibid*.
[107] *Resolution Tools*, *ibid*; Engen, *ibid*.
[108] *Resolution Tools*, *ibid*; Engen, *ibid*.
[109] *Resolution Tools*, *ibid*; Engen, *ibid*.

the CDIC is appointed receiver to sell all or some of the failing bank’s assets and liabilities to buyer.[110]

iii) Bridge Bank[111]

The bridge bank resolution tool is implemented at times where there is no buyer or private-sector solution for the failing institution. The CDIC steps in and uses this tool as a means to “bridge” the gap between institutional failure and the process of finding a buyer. All or part of a bank’s business is transferred to another bank, which is temporarily owned by the CDIC.[112] This option is similar to a forced sale in that the transfer would ensure that critical banking operations continue. As the owner, the CDIC would likely appoint a new board of directors and CEO to handle restructuring and stabilization of the new bridge bank[113]. Once stable, the bridge bank would be sold to the private sector buyer.[114]

iv) Financial Assistance[115]

In the event of imminent financial collapse, the CDIC may provide the member institution with loans, guarantees, deposits, or loss-sharing agreements.[116] This process is generally completed on a stand-alone basis to assist in a private transaction. More flexible of the array of resolution tools, financial assistance may be employed concurrent to any of the other resolution tools.[117]

v) Bail-In Framework[118]

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[110] *Resolution Tools*, *ibid*; Engen, *ibid*.
[111] *Resolution Tools*, *ibid*; Engen, *ibid*.
[112] *Resolution Tools*, *ibid*; Engen, *ibid*.
[113] *Resolution Tools*, *ibid*; Engen, *ibid*.
[114] *Resolution Tools*, *ibid*; Engen, *ibid*.
[115] *Resolution Tools*, *ibid*; Engen, *ibid*.
[116] *Resolution Tools*, *ibid*; Engen, *ibid*.
[117] *Resolution Tools*, *ibid*; Engen, *ibid*.
[118] *Resolution Tools*, *ibid*; Engen, *ibid*.

This process was introduced in 2016 and enables the CDIC to ensure that failing institutions remain open for Canadians to help protect the economy.[119] Authorities may convert long-term debt to common shares for large Canadian banks while the institution remains operational. In the event of a failure, this ensures that losses are covered by the bank's shareholders and certain investors instead of taxpayers or depositors. Of importance is that deposits are protected despite the federal budget's "bail-in proposal". "*The bail-in scenario described in the budget has nothing to do with depositors' accounts.*"[120] If the banks have severe difficulties, the bail-in regime would convert debt into equity to recapitalize the bank. Failing financial institution have to tap into their own reserves/assets which it has been forced to put aside to keep its operations going.[121] This is vastly different than a bail-out framework which uses the taxpayers' money to save the failing financial institution.

The CDIC is an agency specifically designed to consider depositors' investments into member institutions, and thus has the integral role to react with this financial aspect in mind. Consumer protection more generally is not encompassed as a specific consideration in this agency's mandated role.[122] Financial consumers are the most vulnerable stakeholder to illegal and distasteful practices that financial institutions may employ in daily practice. Consequently, Canada has established the Financial Consumer Agency of Canada (FCAC) to act as a regulatory body for consumer complaints specifically. The following section will explore the FCAC while noting its history, role, and function. Subsequently, the FCAC's American counter-part, the

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[119] *Resolution Tools*, *ibid*; Engen, *ibid*.

[120] Ellen Roseman, "Most Canadians' deposits not at risk if bank fails — but check CDIC protection: Roseman", *The Toronto Star* (7 April 2013), online: <www.thestar.com/business/personal_finance/2013/04/07/most_canadians_deposits_not_at_risk_if_bank_fails_but_check_cdic_protection_roseman.html>.

[121] *Ibid*.

[122] *Ibid*.

Consumer Financial Protection Bureau (CFPB) will be discussed to discuss its relative success despite its much shorter life-span.

VII. FINANCIAL CONSUMER AGENCY OF CANADA

A) History

The FCAC came into existence in 2001 through its enabling statute, the *Financial Consumer Agency of Canada Act*.[123] The purpose of this agency was to supervise financial institutions with respect to consumer protection, pertinent specifically to federal financial services legislation.[124] In 1996, the federal government established a Task Force on the Future of Canadian Financial Services Sector to explore reform for this integral component of the economy.[125] The resulting report (MacKay Report) identified that "*the current framework for consumer protection is not as effective as it should be in reducing the information and power imbalance between institutions and consumers.*"[126] The creation of the FCAC ensured that federal financial institutions would be monitored and compliance would be enforced by reviewing consumer protection provisions of respective institutions' statutes.[127] This agency, by definition, would then be eligible to monitor both bank and non-bank institutions. Through paramountcy, the FCAC obtained jurisdiction over provincial statutes; however, provincial civil remedies are still available for breach of contract. The FCAC is led by a Commissioner who reports annually to Parliament through the Minister of Finance.[128]

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[123] *Financial Consumer Agency of Canada Act*, SC 2001, c 9 [*FCAC Act*]; *Nicholls*, *supra* note 1.

[124] *Guide to Intervention*, *supra* note 47.

[125] Government of Canada, Financial Consumer Agency of Canada, *FCAC History*, (9 January 2017), online: <www.canada.ca/en/financial-consumer-agency/corporate/history.html> [*FCAC History*].

[126] *Ibid*.

[127] Bradley Crawford, "Bank of Montreal v. Marcotte: "Exclusive" Federal Financial Consumer Protection Law and the Role of the Law of Contract" (2015) 30:2 BFLR 345 at 348.

[128] Government of Canada, Financial Consumer Agency of Canada, *Supervision Framework* (April 2017), online: www.canada.ca/en/financial-consumer-agency/services/industry/supervision-framework.html [*Supervision Framework*] at 1.

Several objectives drive the supervision of financial institutions. Ensuring that entities are in compliance with legislative obligations, voluntary codes of conduct, and public commitments remains to be the primary purpose of oversight; however, the FCAC also assumes a more proactive role. By promoting policies and procedures designed to implement market conduct obligations and evaluating trends, the ultimate impact on financial consumers is a major reference point for the FCAC.[129] On July 11th, 2010, amendments to the *FCAC Act* came into effect that broadened its mandates. Now, the FCAC has increased research efforts, field testing, and stakeholder engagement to provide information on financial trends and emerging issues to the government.[130] This expanded its role to providing information to consumers regarding financial products and services.

The *National Strategy for Financial Literacy – Count Me In, Canada* attests to initiatives undertaken to empower consumers with the knowledge and confidence they need to make responsible financial decisions.[131] Further, the FCAC held its first Consumer Groups Summit, which brought together 14 consumer groups to discuss financial consumer protection issues.[132] Collaborating with governmental agencies, regulators, and stakeholders to foster an understanding of financial services, the FCAC seemingly acts in ways to safeguard consumer interest. The Act was amended again in 2013 to create a new leadership position within the

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[129] *Crawford, supra* note 127.

[130] *FCAC History*, supra note 125.

[131] Government of Canada, Financial Consumer Agency of Canada, *Building for the Future Annual Report 2015-2016*, online: <www.canada.ca/content/dam/fcac-acfc/documents/corporate/planning/annual-reports/FCAC-annual-report-2015-16.pdf> at 7 [*Annual Report*].

[132] Government of Canada, Financial Consumer Agency of Canada, *Excelling as a regulator, an educator, a partner: FCAC releases 2015-2016 Annual Report* (11 October 2016), online: <www.canada.ca/en/financial-consumer-agency/news/2016/10/excelling-regulator-educator-partner-fcac-releases-2015-2016-annual-report.html?=undefined&>.

Agency.[133] In 2014, the Governor-in-Council appointed the first Financial Literacy Leader to lead strategic decisions on raising awareness about concerns surrounding financial literacy.[134]

C) Oversight Role

i) Complaint Process

While supervision remains to be a primary role for FCAC, consumer protection overarches their legislative prerogative. Another facet of regulation assumes the form of a complaint system wherein consumers can file reports about infractions that financial institutions may be committing.[135] Shifting to a framework that prioritizes consumers, the FCAC claims that is now "*the turnstile through which the dissatisfied customer of a bank…must pass*" to report misbehaviour.[136] In 2015-2016, 708 compliance issues were investigated.[137]

The consumer complaint mechanism is intended to offer an opportunity to review the individual fact scenario and systematically improve the business as a whole. Compliance issues with financial institutions are intended to be exposed with consumer complaints.[138] Pursuant to section 455 of the *Bank Act*, a bank must establish procedures to redress complaints made by customers with respect to fees, disclosure of information, and calculation for the cost of borrowing.[139] Complaint procedures must be readily available to customers and must include information on the process for the customer to access the FCAC.[140] Bill C-8 transferred the responsibility for dealing with consumer complaints from the OSFI to the FCAC.[141]

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133 *FCAC Act*, *supra* note 123.

134 *FCAC History*, *supra* note 125.

135 Anthony Duggan, Jacob S Ziegel & Jassmin Girgis, "Financial-Consumer Complaint Agencies" (2013) 54 Can Bus LJ 68; *FCAC Act*, *supra* note 123, s.121.

136 *Crawford*, *supra* note 127 at 349.

137 *Annual Report*, *supra* note 131 at 11.

138 Jacqueline J Williams, "Canadian Financial Services Ombudsmen: The Role of Reputational Persuasion" (2005) 20:3 BFLR 41 at 44.

139 *Bank Act*, *supra* note 56, s 455.

140 *Williams*, *supra* note 138 at 44; *Bank Act*, *supra* note 56, s 456.

141 *Williams*, *ibid* at 45.

While legislation prescribes complaint systems to be easily accessible to consumers, the current Canadian framework does not allow for this. An outdated, convoluted website increases difficulty for consumers to find information about the complaint system to file documentation.[142] Further, the FCAC suggests first escalating the complaint within internal branches prior to filing a complaint, thus ultimately reducing the overall number of complaints to situations of genuine concern.[143] However, while complaints that ultimately get filed with the FCAC may be of actual non-compliance, the current framework dissuades consumers from elevating it to the agency because the seemingly bureaucratic process.[144] The system for customer complaints appear perfunctory in comparison to other systems such as the United States, which will be explored in further detail.

Redress for complaints must be incorporated into the corporate cultures of financial institutions through the "drip-down effect".[145] Top level organizational commitment to the complaint process is required for this system to be effective and beneficial for both customers and the financial institution.[146] Management must set customer service standards and implement them through concrete measures and powers to employees. A customer complaint escalation process must be effective for a financial institution to remain successful and competitive. As mentioned, the FCAC website directs bank customers to first speak to the bank itself.[147] If still dissatisfied, then the next stage would be to speak to an individual more senior in the bank or an internal ombudsman. The internal ombudsman is an impartial body located within the bank

[142] Government of Canada, Financial Consumer Agency of Canada, *FCAC Website* (July 2017), online: <www.canada.ca/en/financial-consumer-agency.html>.
[143] *Williams*, *supra* note 138 at 45.
[144] *Ibid*.
[145] *Ibid*.
[146] *Ibid*.
[147] Jennifer Wells, "Can our Financial Watchdog Actually Protect Us?", *The Toronto Star* (17 March 2017), online: <www.thestar.com/business/2017/03/17/can-our-financial-watchdog-actually-protect-us.html>.

whose responsibility is to report to the FCAC and investigate consumer complaints regarding process and bank misbehaviour.[148] The issue lies in directing consumers to this impartial agent – the ombudsman – as a means for resolution and raises concerns of the differences in role between FCAC and an ombudsman.

ii) Regulating as an Agency vs an Ombudsman

The compliance role of the FCAC is contrasted with the appeal and redress role of an ombudsman. Regulators enforces requirements and utilizes their own guidelines.[149] Information is gathered through the complaint process. Regulators do not have the power to provide redress to customers of the institutions they regulate.[150] An ombudsman serves as a mediator between parties to bring about a mutually agreeable resolution. Based on the fairness of the circumstances, non-binding recommendations are provided; however, institutions generally abide by the recommendation due to their influence.[151] The main purpose of an ombudsman is to provide a form of redress to the customer.[152]

The FCAC oversees the implementation and effective roll-out of consumer protection legislation and has specifically taken over consumer-issue monitoring responsibilities of the OSFI for all financial institutions. Instead of merely monitoring consumer protection provisions to ensure compliance, the FCAC has the ability to compel banks to provide information to verify

[148] *Williams*, *supra* note 138 at 42.
[149] *Ibid*.
[150] *Ibid* at 47.
[151] *Ibid*.
[152] *Ibid*

compliance.[153] While the limits to this are hazy, it raises the question of FCAC being more than a mere compliance-affiliated regulatory body. It is clear that while the FCAC has been granted a wide array of powers, it is not in the position to redress the issues.[154] Consequently, while it has powers of an ombudsman to demand confidential information, it cannot act on this intelligence, thus addressing the issue of efficacy.

D) Shift to Supervisory Framework

The present compliance framework will shift to a structure that is supervisory in nature as of November 1st, 2017.[155] The Supervision framework illustrates the FCAC's vision for more robust and effective oversight. Despite core activities remaining consistent, numerous enhancements exist.[156] Changes in this new framework are not immediate, but instead, need to be phased in over time, such as market conduct breach prevention, regulated entities must proactively identify, address, and monitor risks, regular FCAC updates on risks and responses, and continuing improving of supervisory and enforcement processes to remain efficient.[157]

Two tiers of classification will be brought in based on the level of market conduct risk inherent in entities under the new framework. Under the first tier, the nature of product/services offered by the entity require compliance with market conduct obligations, this includes FRFIs offering retail products and services.[158] Each tier one entity is assigned a FCAC Senior Officer as their liaison with the Agency.[159] Intensity of supervision correlates to the size of the entity and

153 *Ibid* at 48.
154 *Ibid* at 50.
155 *Supervision Framework*, *supra* note 128 at 3.
156 *Ibid*.
157 *Ibid*.
158 *Ibid* at 4.
159 *Ibid*.

the complexity of its business model.[160] The second tier encompasses banks and trust companies that do not offer retail products or insurance companies that restrict their business to the sale of insurance.[161] These entities engage in business activities that result in minimal risk of breaching a federal market conduct obligation[162] and require significantly less intensive supervision and monitoring.

Within the supervisory framework, three prongs drive the mandate: promoting responsible conduct, monitoring market conduct, and enforcing market conduct obligations.

i) Promoting Responsible Conduct

Promoting responsible conduct primarily assumes the form of providing Notices of Violations and Notices of Decision (for breaches of legislation/regulation) upon violation of FCAC guidelines.[163] FCAC rulings are binding for a particular situation and serve as a precedent for all future matters with similar material facts, thus serving to promote responsible behaviour.[164] Further, promoting responsible conduct is achieved through engagement with regulated entities. The FCAC meets with senior officials of regulated entities to share priorities, build trust and promote responsible market conduct.[165] Annual Industry Sessions to present opportunities for open discussions and information-sharing are an example of industry specific promotion. Similarly, engagement with stakeholders through public consultations, round tables, speaking engagements and stakeholder surveys are ways to engage with consumer groups to seek perspectives on the regulatory environment, emerging issues, and trends.[166] Promoting responsible conduct applies directly to non-bank financial entities as outlined prerogatives may

[160] *Ibid*.
[161] *Ibid*.
[162] *Ibid*.
[163] *Ibid* at 6.
[164] *Ibid*.
[165] *Ibid* at 7.
[166] *Ibid*.

be imposed on these institutions without their express consent. This framework ensures non-bank financial entities are governed, thus a shift away from the old system wherein there was less oversight.

ii) Monitoring

Market conduct profiles are created for tier one entities wherein the FCAC gathers information about an institution's business model and maintains a risk profile.[167] An FCAC Senior Officer devises an annual supervision plan for each regulated entity while focusing on how the entity manages risk, planned growth and change, and compliance culture.[168] Particularly different from the old regime of having broad, principle-based suggestive regulations, the new monitoring framework specifically targets non-bank entities and works with them to address financial issues strategically. Profiles are shared individually or in aggregate with FCAC senior management and used to determine priorities for subsequent years.[169] Third-party intelligence and industry reviews are also components of the monitoring aspect of the new supervisory framework.[170] Ultimately, third-party intelligence amounts to consumers and merchants participating in consultations or by filing complaints to the FCAC Consumer Services Centre while industry reviews assess emerging issues on a specific topic to identify trends for policy discussions.[171]

iii) Enforcement

[167] *Ibid* at 8.
[168] *Ibid*.
[169] *Ibid*
[170] *Ibid*.
[171] *Ibid* at 10.

Enforcement comprises the third prong of the new supervisory framework and primarily relies on the use of investigations.[172] Preliminary investigations determine basic information like whether a potential breach falls within its supervisory authority, if there is a potential breach, and if it is isolated or systemic. Investigations result in a Notice of Breach or a Compliance Report (which results in a Notice of Violation) which sets out the facts, an assessment and recommendations for enforcement action.[173] Actions plans detail corrective measures to be required to address a breach if a Notice of Violation is issued. This notice may include an administrative monetary penalty (AMP).[174] Regulated entities can pay the AMP or make representations to the Commissioner within 30 days, or do nothing.[175] The AMP can be a max of $50,000 for natural person or $500,000 for all other persons, per violation.[176]

Ultimately, while the FCAC appears to satisfy all of the criteria of an effective regulator, and the November 2017 amendments may have a positive impact on consumer protection concerns raised by both bank and non-bank entities, its true efficaciousness is revealed when compared to its American counterpart: the Consumer Financial Protection Bureau ("CFPB"). Despite the FCAC being in force and regulating from 2001, the CFPB has arguably had more meaningful impact on consumers and financial institutions in comparison to the FCAC while only operating for less than half as long as its Canadian counterpart. To truly determine the effectiveness of the Canadian regulator, the CFPB must be examined to set a standard for comparison.

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[172] *Ibid* at 11.
[173] *Ibid*.
[174] *Ibid* at 11.
[175] *FCAC Act*, *supra* note 123, s 22(3).
[176] *Ibid*, 19(2).

VIII. CONSUMER FINANCIAL PROTECTION BUREAU

A) History

The *Dodd-Frank Wall Street Reform and Consumer Protection Act*[177] was passed in 2010 as a response to the financial crisis. Lobbying had brought the government to the realization that a lack of regulation for banks was the major contributing factor for economic despair. As such, one of the provisions of this act enabled CFPB to provide oversight to banks.[178] This legislation was specifically aimed to regulate the unregulated, protect consumers, and reverse incentives that encouraged the action of subprime lenders and investors, credit rating agencies, and market-based intermediaries.[179] The Act targets systemic risk through macroprudential regulation, that is, regulation of individual firms based on their impact and significance within the financial system more generally.[180] The focus of this legislation was the entire system by a specific aim to eliminate shadow banking by requiring hedge funds to be registered with and regulated by the Securities Exchange Commission.[181] For the purpose of this discussion, the impact of CFPB will be discussed exclusively, while it is acknowledged that the Act as a whole, in all of its various facets, was as impactful as a response to the economic crisis.

[177] *Dodd–Frank Wall Street Reform and Consumer Protection Act*, Pub L 111–203, HR 4173 [*Wall Street Reform and Consumer Protection Act*].
[178] Anne M Khademian, "The Financial Crisis: A Retrospective" (2011) 71:6 Public Administration Review 841 at 841.
[179] *Ibid*.
[180] *Ibid* at 843.
[181] *Ibid*.

B) Role

The CFPB has a plethora of roles in terms of supervision and oversight. In addition to traditional regulatory roles, the bureau may monitor risks to consumers to prevent unfair, deceptive, or abusive acts associated with consumer financial series or products.[182] Primarily, however, its role is to supervise covered persons for compliance with federal consumer financial law and take appropriate enforcement action to address violations.[183] These two primary roles need to be unpacked to fully comprehend the CFPB's influence.

The CFPB has defined persons in a way that captures virtually any entity (natural or unnatural) that "*engages in offering of providing a consumer financial products or services*".[184] The CFPB has rulemaking power under 18 enumerated consumer financial protection laws with varying levels of supervisory and enforcement power.[185] However, to implement a specific rule, the bureau must consult with federal banking regulators or other appropriate federal agencies prior to proposing a rule to confirm its consistency with those agencies and their objectives.[186] The bureau may also participate in the judicial process by commencing a civil action against those who violate federal consumer financial laws or filing amicus briefs in court proceedings.[187] More common, their role is to analyze consumer complaints and conduct private investigations

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[182] *Ibid* at 845.
[183] Laureen E Galeoto, Karen Y Bitar & Gil Rudolph, "The Consumer Financial Protection Bureau: The New Sheriff in Town" (2012) 129:8 Banking LJ 702 at 702.
[184] *Wall Street Reform and Consumer Protection*, supra note 177, § 1002(6).
[185] "Administrative Law - Agency Design - Dodd-Frank Act Creates the Consumer Financial Protection Bureau - Dodd-Frank Act, Pub L no 111-203, 124 Stat 1376 (2010) (to be Codified in Scattered Sections of the U.S. Code)" (2011) Harv L Rev 124:8 2123 at 2125 [*Anonymous*].
[186] *Ibid* at 2126; Michael B Mierzewski et al., "The Dodd-Frank Act Establishes the Bureau of Consumer Financial Protection as the Primary Regulator of Consumer Financial Products and Services" (2010) 127:8 Banking LJ 722 at 728.
[187] *Mierzewski et al.*, *ibid*.

into alleged violations. Monetary penalties for violations can reach up to one million dollars per day for every day a party knowingly violated a federal consumer protection law.[188]

Similar to the FCAC, assessment of existing regulations and consumer education are both priorities for the CFPB as well. From inception, the bureau had five years to examine regulations and order a transfer to the authority of the CFPB under an enumerated consumer law.[189] An ongoing project, consumer education provides opportunities for consumers to have access to financial counselling, information on understanding credit histories and scores, mainstream banking services, and strategies for debt reduction. Consumer education also manifests in raising awareness about the relief that the CFPB can provide to institutions that violate laws.[190] The CFPB can reform contracts, refund moneys or return real property, impose restitution fees, disgorgement or compensation for unjust enrichments, order payment of damages, declare a violation, and impose limits on the "person's" activities, thus having an impact on non-bank, as well as bank, financial entities.[191]

The CFPB is unique in that it is a self-funding regulator.[192] This means that there is no requirement to go to Congress each year for funding, as funds can be requested from the Federal Reserve directly without question.[193] The CFPB structure is different than that of a traditional independent agency in two ways. First, while independent agencies are insulated from the executive branch, they must still report to Congress. The CFPB is insulated from both the executive and legislative branches, thus making it drastically different from the FCAC, which may be biased politically.[194] Second, independent agencies feature a board with multiple

[188] *Ibid*.
[189] *Ibid* at 729.
[190] *Ibid*.
[191] *Ibid* at 734.
[192] *Khademian*, *supra* note 178.
[193] *Anonymous*, *supra* note 185 at 2123; *ibid*.
[194] *Anonymous*, *ibid*.

members, but the CFPB possesses a single director, again keeping it further removed from the influence of the political biases.[195]

The CFPB regulates large banks, large credit unions and their affiliates, and non-bank entities that offer financial products.[196] Any "service provider" of the large banks or non-bank institutions that provide a "material service" fall under the regulatory purview of the CFPB.[197] Within one year of inception, the CFPB stirred the financial services industry with its regulation. A prime example is its settlement with Capital One bank, which required the bank to refund customers who bought financial services related products, totalling $140 million, and then pay a restitution fine valued at $25 million.[198] A more recent example is the fiasco with Wells Fargo.[199] Eight-hundred thousand people who took out car loans from Wells Fargo were unnecessarily charged auto-insurance.[200] Officials within CFPB found improper insurance practices had taken place and estimated that the bank owed $73 million to wronged customers.[201] These largely successful regulatory enforcements depended in large part on an effective and easy mechanism for individuals to submit complaints.

D) Complaint Database

Vividly different from the Canadian system to submit a complaint, the American version does not recommend speaking with the institution and its internal hierarchy first when submitting

[195] *Ibid*.
[196] See *Mierzewski et al.*, *supra* note 186 at 724 for acts that fall under the purview of CFPB; see *Mierzewski et al*, *supra* note 186 at 726 for a list of covered persons; see *Mierzewski et al*, *supra* note 186 at 727 for those excluded from the purview of CFPB.
[197] *Galetoto, Bitar & Rudolph*, *supra* note 183.
[198] Laureen E Galeoto, Karen Y Bitar & Gil Rudolph, "Consumer Financial Protection Bureau's First Major Enforcement Action, and What the $210 Million Settlement Means" (2012) 129:8 Banking LJ 713; *Galeo, Bitar & Rudolph*, *supra* note 183 at 706.
[199] *Ibid*.
[200] *Morgenson*, *supra* note 35.
[201] *Ibid*.

a complaint. The first stage is to submit the complaint to an online form, which is extremely clear and accessible to the general public.[202] The complaint must address the type of problem being experienced, details of the occurrence, the company that the complaint is directed to, and the individuals involved.[203] Specific details, such as dates and amounts, are required along with any documents to support the exchange. All information should be completed upon submission as there is no means to submit a second complaint about the same problem.

Unlike the FCAC, American consumers can follow the status of their complaint through an online portal that tracks progress.[204] The complaint is forwarded to the company, who reviews the complaint and communicates as needed and reports back about steps undertaken to rectify the issue.[205] Likely the most unique and pro-consumer stage in the complaint process is that the complaint is published on the Consumer Consent Database, and with consent, descriptions of the exchange are published after removing all personal information.[206] Complaints are publicly available after the company responds or after 15 days.[207] 97% of complaints sent to companies receive timely responses.[208]

The CFPB has undertaken several initiatives to increase accessibility issues related to the language of the complaint process, an action that FCAC has failed to undertake. As of April 2017, changes to the online form included plain language improvements and reorganization of how products, sub-products, issues, and sub-issues were grouped.[209] Indeed, all facts within the

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[202] Government of United States, Consumer Financial Protection Bureau, *Consumer Complaint Database* (2017), online: <www.consumerfinance.gov/data-research/consumer-complaints/> [*Complaint Database*].

[203] Government of United States, Consumer Financial Protection Bureau, *Submit a Complaint* (2017), online: <www.consumerfinance.gov/complaint/getting-started/>.

[204] Government of United States, Consumer Financial Protection Bureau, *Learn how the Complaint Process Works* (2017), online: <www.consumerfinance.gov/complaint/process/>.

[205] *Ibid*.

[206] *Ibid*.

[207] *Complaint Database*, *supra* note 202.

[208] *Ibid*.

[209] *Ibid*.

allegations are not verified in the initial stages, but the complaint is merely to establish that there was indeed a commercial relationship between the consumer and the company.[210] The structure of the CFPB website is also pro-consumer, with text such as "*We're on your side*" to provide support and stand up for the consumer.[211] The recent changes to the CFPB system indicate a preference to be focused on the consumer.

E) Shortcomings

Comparatively, it appears that the American CFPB is several steps ahead of its Canadian counterpart in terms of regulation and pro-consumer behaviour, but there are several shortcomings to the American regulator as well. A common criticism is that this body reduces profit-making ability, thus impacts the competitiveness of US firms relative to their foreign counterparts.[212] While the individual institution is undoubtedly safer due to capital constraints, these constraints make for a more illiquid market overall. Banks must hold a higher percentage of their assets in cash, which consequently decreased the total amount they are able to hold in market securities.[213] The impact of this is that banks will not be able to play the market maker so prospective buyers will have more difficulty finding counteracting sellers.[214] In turn, prospective sellers will find it more difficult to find counteracting buyers.[215] This may affect Americans in the form of higher unemployment, lower wages, and slower increases in wealth and living standards.

The most common criticism of the CFPB is rooted in what some may consider its strength: independence. The only way for the Director of the bureau to be removed is by the

[210] *Ibid*.
[211] *Ibid*.
[212] "Dodd-Frank Wall Street Reform and Consumer Protection Act", *Investopedia* (2015), online: <www.investopedia.com/terms/d/dodd-frank-financial-regulatory-reform-bill.asp>.
[213] *Ibid*.
[214] *Ibid*.
[215] *Ibid*.

President, and specifically for cause.[216] "*The Director enjoys significantly more unilateral power than any single member of any other independent agency… other than the President, the Director of the CFPB is the single most powerful official in the entire United States Government, at least when measured in terms of unilateral power*."[217] The Justice Department asserted that the Director should be removable at the President's will, which is consistent with an earlier 2-1 ruling by a panel of the United States Court of Appeals, but is inconsistent with the Dodd-Frank financial reform law.[218]

Unsurprisingly, opposition stems from President Trump's office, a heavy proponent of deregulation. The Trump administration filed a brief with Federal Appeals Court that the CFPB is unconstitutional because it places power in hands of a single director who can't be fired by the President except for cause, and as such, the Director should be made accountable to the President.[219] The Trump administration argues that because the single agency head is unchecked, there is a greater risk that the agency will engage in extreme departures from the President's executive policy.[220] President Trump has pledged to repeal the *Dodd-Frank Act*, and has passed the *Financial CHOICE Act*[221] on June 8th; however, it is not expected that this act will pass through the Senate in its entirety.[222]

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[216] Gillian B White, "What Will Happen to the Consumer Financial Protection Bureau?", *The Atlantic Times* (11 October 2016), online: <www.theatlantic.com/business/archive/2016/10/court-rules-consumer-financial-protection-bureaus-structure-is-unconstitutional/503660/>.

[217] *Ibid*.

[218] *Ibid*.

[219] Daniel Fischer, "Trump Administration Switches Sides, Argues CFPB Structure is Unconstituional", *Forbes* (17 March 2017), online: <www.forbes.com/sites/danielfisher/2017/03/17/trump-administration-switches-sides-argues-cfpb-structure-is-unconstitutional/#446d94de3105>; Donna Borak, "House Republican: President Trump Fires CFPB Director Richard Cordray", *CNN* (5 April 2017), online: <www.money.cnn.com/2017/04/05/news/economy/cfbp-director-cordray-republicans/index.html>.

[220] *Fischer*, *ibid*; *Borak*, *ibid*.

[221] H.R.5983 - *Financial CHOICE Act of 2016*.

[222] *Fischer*, *supra* note 219; *Borak*, *supra* note 219. At the time of writing the *Financial CHOICE Act* has not yet reached the Senate: H.R. 10 — 115th Congress: Financial CHOICE Act of 2017." www.GovTrack.us. 2017. January 15, 2018 <https://www.govtrack.us/congress/bills/115/hr10.

Ultimately, the CFPB has several advantages over the Canadian counterpart in terms of structure, policy, and process. In terms of non-bank regulation, the rules-based system allows for fines to specifically target non-bank financial institutions, whereas the principle-based, Canadian system lacks this. The attribution of heavy fines to discourage misconduct of non-bank entities serves to be the crux of the advantage that the American system possesses. To truly understand the implications of these differences on the general population, the impact on consumers of both these regulators needs to be explored comparatively.

IX. CANADA VS THE UNITED STATES

When banks were "upselling" customer products in the United States, the fines were far more punitive. As mentioned, the CFPB announced that Wells Fargo was fined US 185-million after investigation revealed they had opened more than two million fake checking, credit card, and other accounts for unknown customers to meet quotas while the OSFI and OSC merely provided a slap on the wrist to Home Capital for similar actions.[223] Actions on part of the US are intended to serve as a message for the industry. The CFBB was set up in light of the 2008 economic crisis and in its five year existence, it has recovered more than $11.8 billion dollars and handled 1.1 million complaints.[224] Their website makes it easy to submit complaints and includes a searchable public database with complaints and encourages whistleblowers. Undoubtedly, Wells Fargo is a bank, but had a non-bank entity partaken in similar conduct, the American system ensures that a similar fine would have been imposed.

In Canada, the FCAC is more obscure – it is not well known amongst the general population. In the recent TD Bank scandal, where agents were encouraged to upsell products to

[223] Alan Freeman, "Canada's Financial Watchdog is a Joke", *iPolitics* (17 March 2017), online: <www.ipolitics.ca/2017/03/17/canadas-bank-regulator-is-a-joke/>.
[224] *Ibid*.

meet internal quotas, FCAC did not mimic CFPB's behaviour.[225] Admittedly, the issue with TD Bank was not as egregious as Wells Fargo, the FCAC was aware of what the Big Five banks were doing and had only conducted a special investigation after a delay.[226] In comparison, the CFPB pursued Wells Fargo promptly upon being notified of its misbehaviour.[227] If found guilty, the fine could only go up to $500,000, not $500-million like in the US.[228] If the situation is especially serious, the FCAC may opt to name the institution publicly; however, in 16 years of existence, it has only named institutions twice and has only issued 27 fines in its history.[229]

Improper sales practices of top banks show that Canada's watchdog lack the bite to tackle consumer abuses as aggressively as their US and European peers. The FCAC has a budget of C$18 Million (13.5 million USD) for the 2016/17 financial year and employs 89 staff.[230] The OSFI has annual budget of $144 million and employs 700.[231] However, the US CFPB had budget of $606 million last year and 1,623 employees, by far making it even more well-resourced even if the FCAC and OSFI were to be merged.[232] The FCAC fines capped at $500,000 per violation and since its 2001 inception, the Canadian agency has only issued and collected C$1.7 million in fines.[233] The CFPB has handed out fines worth $5 billion since 2011 inception.[234] Further, the FCAC has not carried out "mystery shopper" exercise since 2005 as they claim that there are "*better ways to make sure the banks actually comply with the legislation*";[235] however, it was

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[225] Armina Ligaya, "Consumer banking watchdog to review consent practices after report of aggressive sales tactics at TD", *Financial Post* (15 March 2017), online: <www.business.financialpost.com/news/>.
[226] *Ibid*.
[227] *Wells*, *supra* note 147.
[228] *Freeman*, *supra* note 223.
[229] *Ibid*.
[230] Matt Scuffham, "Canada's Bank Oversight in Crosshairs After Mis-Selling Reports", *Thomson Reuters* (30 March 2017), online: <www.ca.reuters.com/article/businessNews/idCAKBN1711JG-OCABS>.
[231] *Ibid*.
[232] *Ibid*.
[233] *Ibid*.
[234] *Ibid*.
[235] *Ibid*.

mystery shopping that helped US regulators identify allegations of discrimination that led to a $10.6 million settlement.[236]

X. CONCLUSION

The United States, while historically lagging in regulation capable of protecting consumers in a financial crisis, has recovered in a consumer-conscious fashion with empowered regulators. These developments are facing threats by the current American administration, but still stand as an excellent model for Canada. The Canadian system, effective in its regulation to prevent widespread financial ruin, places less emphasis on consumer protection and the increasing number of non-bank financial institutions. The difference in oversight focus for banking and non-bank financial entities is a prime example as to how consumers are placed in a vulnerable position, as seen in the case of Home Capital. While regulators like OSFI offer some form of protection, bodies specifically created for consumers, such as the CDIC and FCAC, do exist with consumer rights at the forefront. The roles of the CDIC and the FCAC have both been re-defined by the budget and new legislation providing an opportunity to draw on the American experience and for Canadian regulators to lead the way in terms of innovation on consumer protection issues that have evolved to take into account the banking matrix. The introduction of new "Bank Words" may trigger a symbolic shift towards effective and more practical oversight for non-bank financial institutions, but that transformation has yet to be spurred. It is still far too premature to truly realize the implication of using the "Bank Words" to distinguish entities. The American counterpart of the FCAC, the CFPB is several strides ahead of Canada in protecting the general population as seen with its emphasis on punitive retribution. Perhaps this is an additional step that must be taken in parallel to realize an effective regulator for a neglected set of institutions: non-bank entities.

[236] *Ibid*.

The Canadian regulator must be in a mindset to encourage complaints and oversight with accessible, plain language systems, available processes to communicate, and additional funding to encourage autonomous, effective regulating. Canada proved to be successful both while entering and emerging from the last financial crisis, and as such, a systemic overhaul was not likely considered necessary, as it was for the United States. This, however, should not preclude Canada from acting with the best interest of financial services consumers in mind for future endeavours by encouraging systemic change. Innovative and transformative regulatory practices must be encouraged to flourish alongside innovative and transformative developments in increasing access to banking services for all Canadians.