

# Collateral Matters

A Banking Law Newsletter

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## Ditch the Wallet: Navigating Mobile Payment Regulation

By Alyssa Gebert

While slow to take off, Canada's mobile payment market is poised for growth.<sup>1</sup> Mobile payments are generally defined as transactions where payment data and instruction are made via mobile device, instead of a more traditional method of payment, such as cash or credit card.<sup>2</sup> In Canada, no single entity has broad regulatory power over the mobile payment ecosystem. Mobile payments in Canada are governed by a patchwork of legislation. Regulations are geared toward addressing a variety of concerns, from setting payments standards to oversight, consumer protection and security.

The advent of mobile payment systems has enabled new entrants using financial technology ("FinTech") to compete in a field conventionally dominated by banks and credit cards. This relatively new financial service has created challenges for regulators. A recurrent complaint of incumbents in the space is that the current regulatory framework makes it difficult for banks to innovate, while FinTech startups are not constrained by the same rules. This article addresses the patchwork of legislation currently in place, and discusses the regulatory path forward.

### Payment Standards

#### *Canadian Payments Act*

The *Canadian Payments Act*<sup>3</sup> established the Canadian Payment Association, whose mandate is to create and operate national systems for the clearing and settlement

of payments. The Canadian Payment Association was not designed to oversee payment systems established by others or regulate the operations of participants in the mobile ecosystem.

#### *Canadian NFC Mobile Payments Reference Model (the "Mobile Reference Model")*

The Canadian Bankers Association has published a set of voluntary guidelines for mobile near-field communication ("NFC"), also known as tap-to-pay. These guidelines, which were developed and adopted by major Canadian banks and credit union groups, set out recommendations relating to functionality, security features and the logistics of processing NFC mobile payments. While the Mobile Reference Model addresses some security, risk and privacy issues, including who may access data stored on mobile wallets, the Mobile Reference Model remains voluntary and only binds those banks and credit unions that participated in its development.

#### *Code of Conduct for the Credit and Debit Card Industry in Canada (the "Code")*

Broadly, the Code's purpose is to ensure that merchants are fully aware of the costs associated with accepting credit and debit card payments, provide merchants with pricing flexibility and allow merchants the ability to freely choose which payment options they will accept. While the Code was updated in 2015, clarifying that both debit and credit transactions may be performed using a single

<sup>1</sup> Financial Consumer Agency of Canada, International Review: Mobile Payments and Consumer Protection (2015); online: <http://www.fcac-acfc.gc.ca/Eng/resources/researchSurveys/Documents/InternationalReviewMobilePaymentsAndConsumerProtection.pdf>.

<sup>2</sup> Financial Consumer Agency of Canada, Mobile Payments and Consumer Protection in Canada (2013), online: [http://www.fcac-acfc.gc.ca/Eng/resources/researchSurveys/Documents/FCAC\\_Mobile\\_Payments\\_Consumer\\_Protection\\_accessible\\_EN.pdf](http://www.fcac-acfc.gc.ca/Eng/resources/researchSurveys/Documents/FCAC_Mobile_Payments_Consumer_Protection_accessible_EN.pdf).

<sup>3</sup> *Canadian Payments Act*, R.S.C., 1985, c. C-21.

mobile device, the Code is only applicable to credit and debit card networks and their participants (e.g. card issuers and acquirers).

## Oversight

### *Bank Act*

The *Bank Act* provides for payment rules and standards, as well as prudential oversight for federally-regulated financial institutions. Likewise, federally-regulated financial institutions are subject to oversight by the Office of the Superintendent of Financial Institutions (“**OSFI**”). As the *Bank Act* and OSFI regulation target the service provider, rather than the services themselves, many FinTech companies operating in the mobile payment space are not subject to these regulations.

### *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*

The federal *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*<sup>5</sup> (“**AML**”) provides for an anti-money laundering system. Canada’s AML laws regulate “money services businesses” and impose requirements, such as registration, record keeping and the reporting of large cash transactions, suspicious transactions and terrorist property, on these entities. The definition of money services business is broad, and is generally understood to encompass a business that transfers funds from one person (the customer) to a third party recipient. This definition is comprehensive enough to cover a variety of FinTech mobile payment providers.

## Consumer Protection

With the growth of mobile payment systems comes an increase in technologies that collect, use and disclose consumer’s personal information. The federal *Personal Information Protection and Electronic Documents Act*<sup>6</sup> (“**PIPEDA**”) applies to all organizations that collect, use or disclose personal information in the course of commercial activities. PIPEDA imposes certain obligations upon organizations regarding the collection, use, disclosure, retention and security of personal information. Likewise, those in the payment space would have to comply with provincial consumer protection legislation<sup>7</sup>, which provides for certain prohibited unfair practices related to making false, misleading or deceptive representations.

## Path Forward

Recent plans announced by the Ontario Securities Commission (the “**OSC**”) may provide a corollary path forward for the regulation of FinTech mobile payments. In September of this year, the OSC indicated that it would create an innovation hub for FinTech companies (the “**OSC Launchpad**”).<sup>8</sup> The OSC Launchpad’s goal is two pronged: first, to help FinTech companies navigate the Ontario securities regulatory framework; second, the OSC will work to tailor regulations for FinTech companies, while ensuring investors remain protected.

Given the patchwork of regulations that currently exist regarding mobile payments, and that many FinTech mobile payment providers do not fit neatly into the existing legal framework, regulatory experimentation may be needed. Under section 37 of the *Canadian Payments Act*, the Minister of Finance has the power to “designate a payment system,” that is “national or substantially national in scope, or plays a major role in supporting transactions in Canadian financial markets or the Canadian economy.”<sup>9</sup>

Designating mobile payments as a payment system for oversight under the *Canadian Payments Act* will bring all mobile payment service providers, regardless of entity type, under the oversight of the Minister of Finance and the *Canadian Payments Act*. Revising the current regulatory framework will ensure that FinTech startups are subject to some of the same regulations as institutional entities in the mobile payment ecosystem. This, combined with an innovation hub similar to the OSC Launchpad to support FinTech startups operating in the space, may be a first step toward creating a consistent regulatory framework for mobile payment service providers, while promoting innovation in the payment system ecosystem.

<sup>4</sup> *Bank Act*, S.C. 1991, c. 46.

<sup>5</sup> *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17.

<sup>6</sup> *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5.

<sup>7</sup> *Consumer Protection Act*, 2002, S.O. 2002, c. 30, Sched. A.

<sup>8</sup> Ontario Securities Commission, News Release, “Regulator Unveils OSC Launchpad” (October 24, 2016) online: [http://www.osc.gov.on.ca/en/NewsEvents\\_nr\\_20161024\\_regulator-unveils-osc-launchpad.htm](http://www.osc.gov.on.ca/en/NewsEvents_nr_20161024_regulator-unveils-osc-launchpad.htm).

<sup>9</sup> *Canadian Payments Act*, section 37.

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