

# Fasken Insurance Law and Regulation Update

31 May, 2019

Toronto, Ontario

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## Overview

Fasken held a briefing on insurance law and regulatory matters on the morning of 31 May, 2019 at its downtown Toronto offices. Robert McDowell opened the proceedings by introducing the guest speakers from the Financial Services Regulatory Authority of Ontario (FSRA): the President and CEO Mark White and Huston Loke, EVP, Market Conduct.

## Presentations

### **Mark White, President and CEO, FSRA—“FSRA Progress Report”**

Mr. White noted that FSRA is a brand-new regulator, and one quite different from its predecessor the Financial Services Commission of Ontario (FSCO) because of the view that there was a need to start over and develop an innovative new regulator. Specifically, the Expert Panel on the future of financial services regulation in Ontario, appointed by the Ministry of Finance to examine what regulatory approach should be implemented, argued for “revolutionary change” as opposed to an incremental approach, through the creation of a new regulator that was flexible, and not bound to old ways. Specifically, Mark White noted that the panel’s 31 March, 2016 final report titled *“Review of the Mandates of the Financial Services Commission of Ontario, Financial Services Tribunal, and the Deposit Insurance Corporation of Ontario”* stated that

*With financial services and pensions sectors changing at a rapid pace...Ontario needs a regulatory authority that is flexible, innovative, and in possession of expertise appropriate to match the consistently evolving financial environment. We call not for amendments, revisions or improvements to the existing regulatory framework and apparatus, but for the replacement of the current regulatory structure and approach with a more nimble and accountable one...*

Mr. White said that the regulatory scope of FSRA would be broad, covering everything that was not “federal or securities,” specifically calling out the following sectors:

- Property and Casualty Insurance;
- Life and Health Insurance;
- Credit Unions and Caisses Populaires;
- Loan and Trust Companies;
- Mortgage Brokers;
- Health Service Providers;
- Pensions.

Mr. White said that the broad legislative mandate of FSRA was to

- Regulate and generally supervise the regulated sectors;

- Contribute to public confidence in the regulated sectors;
- Monitor and evaluate developments and trends in the regulated sectors;
- Co-operate and collaborate with other regulators where appropriate;
- Promote public education and knowledge about the regulated sectors;
- Promote transparency and disclosure of information by the regulated sectors;  
and
- Deter deceptive or fraudulent conduct, practices and activities by the regulated sectors.

With respect to financial services, Mr. White further elaborated that the specific mandate of FSRA was to promote high standards of business conduct, to protect the rights and interests of consumers, and to foster strong, sustainable, competitive and innovative financial services sectors. There is a strong convergence between FSRA's priorities and the government's priorities, he indicated, but some items require further investigation such as whether FSRA will regulate financial planners, as well as working closely with the government on auto rate reform. Mr. White said that the regulator was part of an ecosystem that included industry players and other stakeholders, and it was critical that all parts of the ecosystem worked closely and collaboratively together.

Mr. White noted that the preparatory work, including developing FSRA's strategic plan, creating its first-year budget, and the fee structure consultations, were now complete and the intention was to formally launch FSRA as Ontario's new financial services regulator, with its doors open for business, on Monday, 10 June, 2019.

FSRA has had good relations with FSCO and there will be good regulatory continuance; as well, the Ministry of Finance has been very supportive. But there will also be challenges; and, in the short run, one of the top challenges will be filling many continuing staff vacancies.

Upon launch, Mr. White wants FSRA to have four areas of focus—enablement, empowerment, cultural transformation, and regulatory transformation. Funds would be allocated to these priorities.

Mr. White also did not seem to feel that FSRA or CCIR should play a major role in promoting fintech activities, making the interesting comment that “the last thing you really need if you believe in innovation, is another layer of bureaucracy.”

Finally, Mr. White shared the current organizational structure of FSRA, which can be found below in Appendix One.

**Huston Loke, EVP, Market Conduct, FSRA—“Market Conduct Update”**

Mr. Loke began his presentation by noting that the vision of FSRA was safety, fairness, and choice. Its mission, he said, was “public service through dynamic, principles-based and outcomes-focused regulation,” and he made a point throughout his presentation to emphasize the importance of evidence-based, thoughtful regulation. He also outlined the following key enablers to achieving this vision and mission:

- Principles-based;
- Rule-making;
- Clear guidance;
- Risk-based, evidence-driven and outcomes-focused;
- Collaborative, consultative and transparent culture;
- Dynamic;
- Operational independence from, and continuous collaboration with, government.

Mr. Loke said that FSRA’s overall market conduct regulation priorities are around burden reduction, and regulatory effectiveness. FSRA wants to reduce the volume of regulatory guidance, particularly items that are outdated or redundant, noting that FSRA was inheriting 1,100 pieces of guidance from FSCO and DICO—he said this was a pivotal opportunity for developing a new way of regulating. Regulatory transformation was necessary, he said—he said he regularly asks his staff to not just focus on their daily operational responsibilities, but to also think big picture, and for them to ask themselves why they were engaging in certain activities. With over 90,000 licencees in Ontario, it was necessary to tackle issues strategically. Mr. Loke said that it was also important to make services accessible, fair, and innovative. He noted that any costs imposed by the regulator on industry are ultimately borne by the consumer.

Mr. Loke then delved into some specific examples, starting with the importance of adopting effective market conduct standards. This, he said, would eliminate oversight gaps in the industry, ensure a level playing field for all industry participants, and would help increase fairness to consumers. As next steps, FSRA would engage with industry and other regulators to better understand their positions and to seek areas of consensus. If stakeholders have a code of conduct, FSRA will consider adopting it for supervision of the sector. Finally, he said FSRA would be transparent on why certain approaches would be used and why others would not.

With respect to FSCO’s 2018 Guidance on Treating Consumers Fairly, which FSRA has inherited, Mr. Loke acknowledged that industry said that having both a CCIR/CISRO Guidance, and a FSCO Guidance, has led to overlapping and potentially inconsistent documents which causes confusion. He committed to trying to achieve one document and guidance. He said FSRA would consult with industry and other regulators to harmonize to the extent possible, and to provide clarity on how the Guidance is to be interpreted and applied in day-to-day business throughout the insurance product life cycle. Noting that the TCF Guidance was based on Insurance Core Principles (ICP 19) of the International Association of Insurance Supervisors (IAIS), he said that FSRA would align with accepted industry best practices, and that going forward TCF principles should be an integral part of sound market conduct. He also noted that the Guidance could not be “one size fits all,” and that the size, distribution strategy, and complexity of operations of different companies meant that they would each need their own approach to implementing the Guidance. But it was important to also always keep consumer interests in mind throughout the product life cycle within a company’s operations, from product design through to the final fulfilment of obligations.

Mr. Loke spoke about fair outcomes for customers, noting that if commissions or compensation structures lead to conflicts of interest, that needed to be addressed. He said best practices should be a priority for both the industry and regulators, noting that this was the approach taken by the IMF and it would be used “one level down” by FSRA.

Prior to asking a question, CAFII Co-Executive Director Brendan Wycks made a statement in which he said that he felt that FSRA had a different philosophy than some other, more enforcement-oriented regulators, and he asked whether this might lead to conflicts or friction at the CCIR. Mr. Loke said “there may be differences in priorities around the CCIR table,” but he did not seem concerned that this would be a major stumbling block.

Mr. Loke was also asked about whether he planned to consult with the Board members of companies operating in the regulated sectors, particularly around TCF, and while he said that he had no problem with so doing, he felt that his major points of contact would be Chief Compliance Officers and legal counsel.

(See Appendix Two for *FSRA Examples of the Scope of Treating Consumers Fairly Reviews*.)

Mr. Loke concluded his talk by returning to key principles around the commitment to an open, transparent and collaborative approach that engages stakeholders, and ensures broad input is taken into account. To the extent possible, he said, it was better for organizations and industry sectors to self-regulate. Harmonization and collaboration were critical priorities for FSRA, and it would be acting on its commitment to thorough consultation, he stressed.

### **Jennifer Stoddard, Strategic Advisor, Fasken—“The Coming Data Protection Tsunami”**

Jennifer Stoddard noted that many jurisdictions, especially the European Union but also California, and India, were making significant enhancements to their data protection laws. There were increasing public policy concerns with the balance between corporate access to private data, and consumers’ ability to protect personal data, and governments were beginning to respond. The law was shifting increasingly towards giving consumers and individuals more rights, an area that Canada was behind on now but which we were likely to catch up on in the coming years.

Among the general trends are greater data and privacy rights and protections for consumers and individuals, dramatically increased regulatory sanctions, and data localization. Canada has partly responded to emerging trends through the enactment of a new Digital Charter adopted in May, 2019, but much more is on the horizon. Ms. Stoddard spent much of the remainder of her presentation on how to prepare for the coming storm, with a focus on developing a strategy and a plan of action around data protection, developing data protection processes, creating procedures for dealing with data breaches, and enhancing employee awareness and training on these issues.

**Kathleen Butterfield, Partner, Fasken—“Consumer Protection Developments”**

Ms. Butterfield noted that there was much activity around consumer protection recently, referencing the Australian Royal Commission Report and its recommendations, and the Financial Consumer Agency of Canada (FCAC)’s recent review of domestic banks’ sales practices. There may be parallels in Canada, she said, to some of the findings of the Australian Royal Commission. The FCAC, for example, concluded that Canadian bank culture is focused on selling.

Regulatory compliance risk, and the potential for litigation, are increasing in Canada, she said, noting that passage of federal Bill C-86, which enhances consumer protections, was in response to the Marcotte Decision<sup>1</sup> and the findings of the FCAC Sales Practices Review. Banks need to spend more time on risk mitigation, developing enhancements to sales practices, monitoring and oversight of sales personnel, and ensuring there is express consent for all sales.

**Koker Christensen, Partner, Fasken—“OSFI’s Reinsurance Discussion Paper”**

Koker Christensen provided an overview of a paper released by the federal Office of the Superintendent of Financial Institutions (OSFI), Canada’s prudential financial services regulator. OSFI recently released its first comprehensive review of the reinsurance framework in 10 years, in which it proposed a series of important reforms. The paper reviewed the current elements of the existing reinsurance framework, including Guideline B-3 *“Sound Reinsurance Principles and Practices,”* which is a principles-based guidance. The phases of the reinsurance review process were also touched upon, which include a Minimum Capital Test (MCT) by 2019; amendments to guidelines for unregistered related party reinsurance approval; and revisions to the MCT Guideline and Life Insurance Capital Adequacy Test (LICAT) for 2022 or later years.

A key concern for OSFI was the “leveraged business model” where a company issued high-limit policies in Canada and subsequently reinsures a significant portion of these risks, typically with an unregistered reinsurer. OSFI’s concern is that little collateral is required to be held in Canada, leading to credit risk and potential solvency issues. The industry, which typically has been able to absorb large losses, is concerned that OSFI will err too far on the side of caution, creating business issues for companies and making companies less internationally competitive.

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<sup>1</sup> The Marcotte Decision was an important Supreme Court case which ruled against banks in a provincial consumer protection class action. Donald Neave and Rebecca von Ruti write in a 22 September, 2019 article in DLA Piper: *“On September 19, 2014, the Supreme Court of Canada (the “Court”) ruled in Bank of Montreal v. Marcotte<sup>1</sup> (“Marcotte”) that Quebec’s consumer protection legislation is applicable to federally regulated banks such that it provides the basis for consumer class actions in Quebec against those banks. In so doing, the Court rejected the banks’ constitutional arguments and held the banks were not immune from Quebec’s Consumer Protection Act (“CPA”) with respect to the disclosure of credit card conversion charges levied on purchases made in foreign currencies. In the result, the Court ordered that the “Group A Bank”<sup>2</sup> defendants breached the CPA by failing to disclose the charges. They were ordered to reimburse consumer cardholders for conversion charges during the non-disclosing periods. The Court also restored the trial court’s award of punitive damages – \$25.00 per class member – for failing to disclose the conversion charges.”*

**Sylvie Bourdeau, Partner, Fasken—“Bill 141 and the Regulation Respecting Alternative Distribution Methods”**

Sylvie Bourdeau<sup>2</sup> noted that most of the provisions of Quebec’s new *Insurers Act* and *Act Respecting the Distribution of Financial Products and Services* would come into force on 13 June, 2019.

She reviewed in some detail the changes that Bill 141 would produce for brokerage firms.

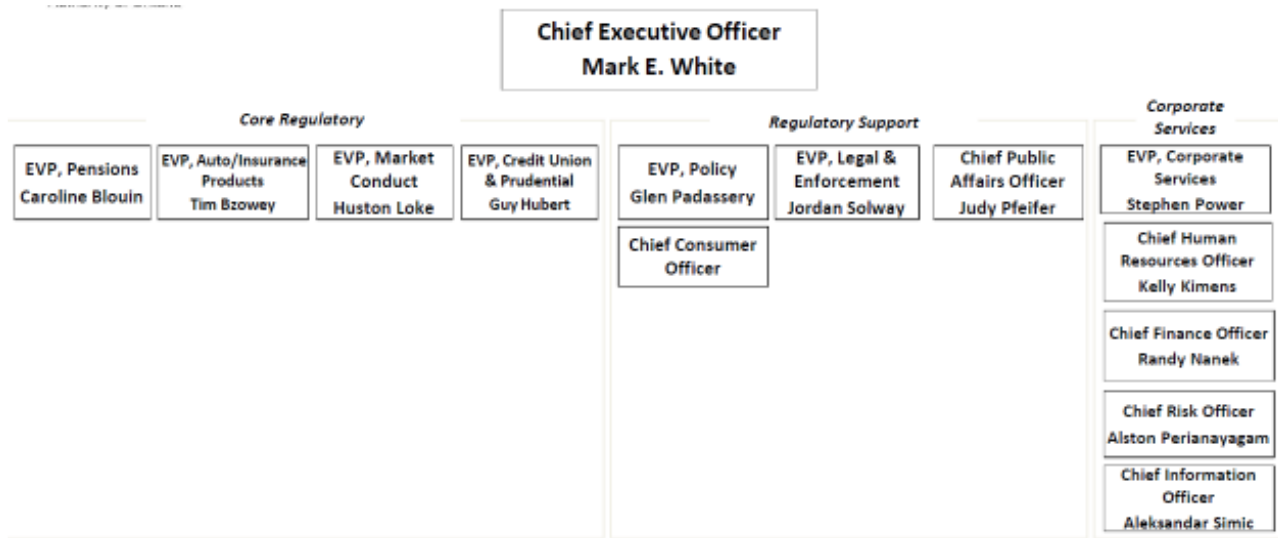
She also reviewed the *Regulation Respecting Alternative Distribution Methods*, the final, updated version of which was published on May 10, 2019. Of particular note, she said, were the new obligations that insurers offering insurance through a digital space must make a representative available to the customer if the customer so desires. Ms. Bourdeau noted that while there are new obligations outlined in the Regulation, these only apply to transactional sites where a consumer can actually complete an insurance purchase. For distribution without a representative, the previous requirement for a Distribution Guide to be provided to the consumer has been replaced by a requirement to display a summary and a fact sheet on the company’s digital space. The summary is expected to be much less detailed and extensive than were the requirements of the former Distribution Guide. Insurers that have a Distribution Guide already in place can use it up to June 13, 2020, so there is a one-year transition period. The AMF has also been very clear that it wants to work closely with the industry on implementation, and that it wishes industry to be transparent and to communicate with it, Ms. Bourdeau concluded.

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<sup>2</sup> Sylvie Bourdeau is CAFII’s legal counsel of record on issues related to Bill 141 and the Regulation Respecting Alternative Distribution Methods.



# Appendix One – FSRA Organizational Structure



## Appendix Two – FSRA Examples of the Scope of Treating Consumers Fairly Reviews

Corporate Governance	<ul style="list-style-type: none"> <li>• <b>Assess</b> organizational structure to ensure that reporting relationships between management and senior officers allow for effective oversight. <b>Confirm</b> that there is a reflection of TCF within the insurer's culture and values.</li> </ul>
Agent Training and Outsourcing Arrangements	<ul style="list-style-type: none"> <li>• <b>Evaluate</b> policies and procedures, advisor suitability factors as well as nature, timing and extent of training conducted.</li> </ul>
Incentives and Remuneration	<ul style="list-style-type: none"> <li>• <b>Review</b> policies and procedures, agent compensation structure, and incentives. <b>Confirm</b> that the insurer assesses risks periodically to ensure appropriate products are sold to consumers</li> </ul>
Product Marketing and Advertising	<ul style="list-style-type: none"> <li>• <b>Confirm</b> the insurer provides sufficient product information to allow a customer to make an appropriate decision.</li> </ul>
Information Provided to Customers	<ul style="list-style-type: none"> <li>• <b>Confirm</b> the insurer has a formal process for informing customers before, at the moment, and after sales, that takes into account TCF.</li> </ul>
Claims Handling	<ul style="list-style-type: none"> <li>• <b>Confirm</b> the insurer has a claims handling policy which incorporates TCF elements, as well as standard processing times that appropriately reflect TCF.</li> </ul>
Complaint Handling and Dispute Settlement	<ul style="list-style-type: none"> <li>• <b>Confirm</b> the insurer informs its customers of the existence of its complaints processing service and of its response timelines</li> </ul>