

June 9, 2015

FIA & CUIA Review  
Policy & Legislation Division  
Ministry of Finance  
PO Box 9470 Stn Prov Govt  
Victoria BC V8W 9V8

Dear Sirs

My interest involves the issue described on page 36 of the recently released initial public consultation paper under the heading "Regulatory Framework for Trust Companies". As noted, the pillars that historically separated Canada's financial sector into four distinct parts have crumbled. The early days of chinese walls are long forgotten and fair treatment of consumers has been left to the industry to find various ways and means to exploit with little or no oversight from government. Additionally, at the consumer level the courts offer no viable alternative. An individual clearly lacks the resources necessary to pursue a legal remedy that often involves a large national corporation.

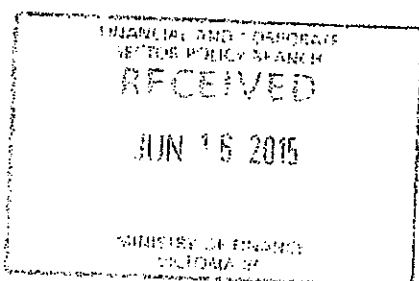
My submission titled "A Proposal to Amend Section 93(1) of the Financial Institutions Act of British Columbia" is attached. This submission is intended to present useful information and comment on the subject of potential conflicts of interest, as well as proposing an amendment to section 93(1) to correct a serious, but unrelated, flaw in the legislation.

I have been concerned with the question of fiduciary duty within the financial services sector for a very long time. My first exchange with the RBC Financial Group on the handling of uninvested cash balances in registered accounts was in 2004. I would be pleased to provide any follow up information you might consider useful regarding what exists now, or how the Declaration of Trust document has been changed over time to become less protective of the client. I do wish to meet with Ministry staff to discuss my submission.

but otherwise can be reached by e-mail, which you have on file, or by telephone at

Yours truly

  
William Kritsch



# A PROPOSAL TO AMEND SECTION 93(1) OF THE FINANCIAL INSTITUTIONS ACT OF BRITISH COLUMBIA

## PREFACE

In September 2007, I addressed a complaint to the Financial Institutions Commission of British Columbia (FICOM) regarding the handling of uninvested cash balances in registered accounts (RRSPs&RRIFs) where the trustee and agent jointly responsible for the administration of these accounts are both owned by the same bank. In its response, FICOM said that it had no authority in this matter and suggested I approach the Office of the Superintendent of Financial Institutions (OSFI) in Ottawa. I did not agree and redirected my concern to the then Minister of Finance the Hon. Carole Taylor. In the exchange that followed the Ministry took the position that, although the authority held by OSFI is chiefly limited to matters involving solvency and the prime responsibility for the market conduct of trust companies whether federally or provincially incorporated rests with the province, the *Declaration of Trust* document that raised my concern is not covered by current legislation. According to this interpretation FICOM can, under Section 93(1) of the Financial Institutions Act of British Columbia (the Act), disallow a contract if it considers it to be unfair. However, if the document in question is named a *Declaration of Trust* or carries any description other than "contract," FICOM has no authority. In a letter dated January 29, 2008, the Ministry wrote; "When the government next considers revisions to the regulatory framework for market conduct of trust companies and other financial institutions, we will consider whether the regulatory powers should be enhanced in light of the concerns you have raised." We are now at that point.

## REVISITING THE CONCERN

As stated earlier, my initial contact with FICOM concerned the handling of uninvested cash balances in registered accounts (RRSPs&RRIFs) where the trustee and agent jointly responsible for the administration of these accounts are both owned by the same bank. Similar questions might be raised elsewhere in the industry, but my concern as a client is with The Royal Trust Company and its conduct in the administration of these accounts within the context of being part of the RBC Financial Group.

When an RBC self-directed RRSP/RRIF is opened, The Royal Trust Company is named as Trustee and RBC Dominion Securities Inc. (RBCDS) is named as Agent. Both are wholly owned subsidiaries of The Royal Bank of Canada. The Trustee is paid an annual fee by the account holder for administering the trust requirements attached to a registered account, while the Agent receives a commission on the buying and selling of the various securities that make up the account. The account is administered according to a set of provisions contained in a document named a *Declaration of Trust*. One such provision deals with the handling of uninvested cash balances and reads as follows:

Uninvested cash, in whatever currency held within the Fund, will be placed on deposit with the Trustee or an affiliate of the Trustee and held in the same currency as received from the Agent, provided that such currency is a currency that has been agreed from time to time by the Trustee and

Agent and repaid in the same currency. The interest on such cash balances payable to the Fund will be determined by the Agent from time to time in their sole discretion with no obligation to pay a minimum amount or rate. The Trustee will pay interest to the Agent, in the same currency as the uninvested cash was received, as referred to above, for distribution to the Fund and the Agent shall credit the Fund with appropriate interest. The Trustee shall have no liability for such payment of interest once it is paid to the Agent for distribution.

We do not know the investment strategy followed by Royal Trust, but a fair approach would be to place individual cash balances on deposit with the Royal Bank on the same basis as the bank offers daily interest accounts to the general public. Today, this would produce an annualized return of eight-tenths of one percent calculated daily, and paid monthly with no minimum deposit requirement and no minimum credit. In contrast, RBCDS sets an interest payment policy of one-tenth of one percent calculated monthly on the average daily cash balance with a minimum credit of \$1.00. Following the RBCDS model an account would have to hold a monthly average daily cash balance of \$12,000 in order to receive a \$1.00 interest payment. This same \$1.00 could be earned in four days on a \$12,000 cash balance invested in a daily interest account. Whatever investment choice is followed by Royal Trust the options available are not limited to a return of one-tenth of one percent, and there can be no question that the overwhelming amount of interest paid to the agent stays within the RBC family and adds to the profits posted by the Royal Bank. This diversion of interest income away from client accounts is made possible by the way Royal Trust has chosen to conduct itself as a trustee. A possible conflict of interest is also a concern.

With regard to the initial public consultation paper recently circulated by the Ministry, I believe additional regulatory oversight is needed to address potential conflicts of interest and that this can best be accomplished via specific trust company regulations incorporated into the current legislation. For example, interest income earned through the investment of client funds must be paid directly into the client's account. The channeling of such payments through a corporate affiliate, or any other third party, would be specifically disallowed. Such new regulations must be very specific so there is no opportunity for an alternate interpretation of their intent. I believe an effective set of specific regulations can be developed, as exemplified above, and would produce a more successful result than a generalized code of conduct continually requiring interpretation, or by attempting to gain influence over some new "primary entity" with possibly no history of regulation or no established authority base on which to build. In addition to the potential conflicts of interest issue, section 93(1) presents a separate concern that is also very much a part of this review.

### **SECTION 93(1)**

This portion of the Act reads as follows: "If, in the opinion of the commission, a form of contract in use between a financial institution and its customers or a form of application or advertisement relating to such a contract is unfair, misleading or deceptive, the commission by order may prohibit the use of that form by a financial institution."

In September 2009, I wrote to the Ministry to point out that the documentation put forward contains the same elements that would be found in a contract i.e. offer, consent and consideration (in

the form of an annual administration fee) and could reasonably be considered sufficient to justify the application of this section and allow FICOM to hear the complaint, conduct an investigation and provide an opinion. A reply was received saying only that a review of the Act was not expected prior to 2014. The suggestion concerning documentation was never responded to, reflecting the narrow titular interpretation first given in 2007/08 to the word "contract". The difficulty here is that I know of no example of this word used by a trust company to name the documentation covering the sale and administration of its financial products in the retail market. The same may be true for other financial institutions named in the Act.

With all orders published on the FICOM website since 2004, it can readily be established that no orders have been issued pursuant to Section 93(1) in the ten years since the Act was last reviewed. Whether any investigations were conducted involving this section that did not result in the issuance of an order during the same time period is not as easily determined. In answer to this question FICOM reported that "investigations are not normally tracked by section" and it is unable to identify any investigations carried out under this authority. Considering the previously noted absence of the use of the word "contract" by industry, it is most probable that there have been no investigations involving this section since the legislation was last reviewed in 2004. The likelihood is that complaints involving this section would, like my own, be redirected to OSFI or some other agency having no applicable authority, while the responsibility for overseeing the market conduct of financial institutions, that rests exclusively with the government and is assigned to FICOM, is simply disclaimed.

The sad reality is that, with the language used in the legislation incompatible with the language used in the marketplace, and then compounded with a very narrow interpretation of the word "contract", Section 93(1) offers more protection to trust companies and others in the avoidance of regulatory oversight than it provides protection to the public via the application of regulatory control. For the government to support a position whereby the public is effectively unable to access the regulatory powers given to the commission, and allow that position to degrade a section of legislation supposedly intended for the public's protection, is completely untenable and a correction is required.

#### **PROPOSED AMENDMENT**

In order for the government to fully honour its responsibility to oversee the market conduct of trust companies and others named in this legislation, the ability of the public to access the powers held by the regulator must be made solely dependent upon what a document in use between a financial institution and its customers contains, without regard or limitation as to that document's name or title. An amended Section 93(1) would then read: "If, in the opinion of the commission, a form of document in use between a financial institution and its customers, or a form of application or advertisement relating to such a document is unfair, misleading or deceptive, the commission by order may prohibit the use of that form by a financial institution." This proposed revision will strengthen the overall integrity of the legislation and better protect the interests of the citizens of this province.

  
William Kritsch June 9, 2015