



Saving and investing with FinTechs

Is innovation compatible with consumer protection?

RESEARCH REPORT - SHORT VERSION

Abridged version of French report produced by Option consommateurs and presented to the Office of Consumer Affairs of Innovation, Science and Economic Development Canada

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Option consommateurs

MISSION

Option consommateurs is a non-profit organization whose mission is to promote and defend the rights and interests of consumers and ensure that they are respected.

HISTORY

Option consommateurs has been in existence since 1983, when it arose from the Associations coopératives d'économie familiale movement, more specifically, the Montreal ACEF. In 1999, it joined forces with the Association des consommateurs du Québec (ACQ), which had already pursued a similar mission for over 50 years.

PRINCIPAL ACTIVITIES

Option consommateurs helps consumers experiencing difficulties, by offering them budget consultation and information sessions on budgeting, debt, consumer law and the protection of privacy.

Each year we produce research reports on important consumer issues. We also work with policy makers and the media to denounce unacceptable situations. Whenever necessary, we institute class action suits against merchants.

MEMBERSHIP

In its quest to bring about change, Option consommateurs is active on many fronts: conducting research, organizing class action suits, and applying pressure on companies and government authorities. You can help us do more for you by becoming a member of Option consommateurs at www.option-consommateurs.org

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The survey was conducted by BIP Research. The data in the survey was analyzed by the same firm and by the author, with the assistance of Bruno Marien, a lecturer in the Department of Political Science and Law at Université du Québec à Montréal (UQÀM). We should point out that Mr. Marien also provided methodological support throughout this research. We extend our thanks to him.

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Summary

There are numerous companies today that encourage consumers to save and invest online using a “robo-advisor.” Sometimes, they offer to round each purchase up to the nearest dollar, then deposit the money saved this way into an account to be invested later. Sometimes consumers are encouraged to deposit their assets in relatively risky securities, including exchange-traded funds (ETFs).

The home pages of the three companies we studied, Mylo, Wealthsimple and BMO SmartFolio, are replete with promotional jargon, but are markedly low on clear information. Consumers who casually skim through their pages before committing themselves may not realize what they are getting into. They are urged to act quickly, however. Mylo wants you to invest in 10 minutes and Wealthsimple in 5!

The consumer who wants to find out more learn is obliged to go through various legal documents. Besides the helpful information these contain, including protective measures one should take, there are also a large number of limited liability clauses. In addition, although most companies have obviously made an effort to ensure that their documents are clear, some of their practices may give rise to confusion.

According to our survey of 800 Canadian consumers in four provinces, Quebec, Ontario, Alberta and British Columbia, the current users of these platforms or those who have used them in the past three years are largely men between the ages of 35 and 54. However, the next generation—the millennials—are not far behind.

Our survey demonstrates that this group of Canadians is attracted by such platforms. People aged 25–35 say they feel they are in control when they deal with a FinTech company and are not worried about protecting their personal information. When questioned more closely, however, it soon transpires that they are relatively uninformed. It is therefore particularly important that there be effective legislation to protect them.

But is there? To find out, we studied Canadian federal legislation and the laws in force in four provinces: Quebec, Ontario, Alberta and British Columbia. This led us to conclude that improvements are needed. Fortunately, our study of best practices in Australia, the United States, France, the United Kingdom, Singapore, Switzerland, and the European Union has convinced us that there are many interesting avenues that could be explored to ensure better protection for consumers who choose to save or invest using FinTechs.

Introduction

In recent years, a number of increasingly audacious technologies have made their appearance in the financial domain. Conspicuous among these are cryptocurrency, peer-to-peer loans and robo-advisors¹. These new technologies come equipped with their share of promises. They supposedly make life easier for consumers by providing solutions to some of their most pressing problems. But they also give cause for concern. Their arrival is creating a disturbance in the market that borders on revolution – it's hardly surprising that they have been labelled “disruptive” technologies!

These new technologies are developing at a phenomenal rate. In 2017, EY² published a major study³ that reported China and India as having the highest adoption rates, at 69% and 52% respectively. In Canada, this rate was only 18%⁴. Two years later, the same firm published another study on the same subject. This one found that China and India still had the highest adoption rates - 87% for each of these two countries - and that Canada now had a 50% adoption rate, with faster than expected growth⁵.

Everywhere, it is young people who are most enamoured of these new technology-based products. According to the EY study published in 2017, the average FinTech adoption rate⁶ was 37% among 18–24 year-olds, 48% among 25–34 year-olds and 41% among 35–44 year-olds; it was only 30% or less among those aged 45 years and up⁷. Influenced by the 2008 financial crisis, young people have not yet developed a solid relationship with a financial institution and do not always see the benefit of doing so. Yet, they do not hesitate to turn to a private company offering FinTechs⁸. In the opinion of some, 18 to 24-year-olds may never develop a close relationship with a traditional financial company. This is even truer of the succeeding generation; and some new technology companies are already targeting children⁹.

FinTech companies promise easily accessible, low-cost, quality services. Their deployment is being encouraged worldwide, as long as they protect consumers. With this end in view, several countries, Canada included, have recently adopted “banking supervision approaches” such as innovation hubs, accelerators and regulatory sandboxes.¹⁰ Such measures are useful, especially since they make it possible to study how FinTechs work and how they are evolving, which is essential if measures are to be set in place to adequately protect consumers.

1. Our study

¹ According to the study by Dominique Payette: “Regulating Robo-advisers in Canada” in *2018 33:3 Banking and Finance Law Rev* 423-474, p. 427, these are the three “most common new technologies.”

² Also known as Ernst & Young, EY is a global leader in advisory, assurance, tax and transactional services. For more information, see <https://www.ey.com/ca/en/about-us/a-better-business-world>

³ EY, “The rapid emergence of FinTech,” in *EY Fintech Adoption Index 2017*, online at: [https://www.ey.com/Publication/vwLUAssets/ey-fintech-adoption-index-2017/\\$FILE/ey-fintech-adoption-index-2017.pdf](https://www.ey.com/Publication/vwLUAssets/ey-fintech-adoption-index-2017/$FILE/ey-fintech-adoption-index-2017.pdf)

⁴ *Id.* at 12.

⁵ EY, “Global FinTech Adoption Index 2019: As FinTech becomes the norm, you need to stand out from the crowd,” p.7, online at: https://assets.ey.com/content/dam/ey-sites/ey-com/en_gl/topics/banking-and-capital-markets/ey-global-fintech-adoption-index.pdf.

⁶ In the EY study referred to here, the term FinTech is used to refer to all financial transactions that take place over the Internet, including saving and investing, but also money transfer and payments (including those made using cryptocurrency), borrowing, financial planning and insurance.

⁷ EY, *supra*, note 5 at 16.

⁸ *Ibid.*

⁹ *Id.* 17.

¹⁰ Competition Bureau, “Technology-led innovation in the Canadian financial services sector,” p. 74, online at: <https://www.ic.gc.ca/eic/site/cb-bc.nsf/eng/04322.html>

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Our study focuses on FinTech savings and investment companies and their robo-advisors.¹¹ These companies are generating tremendous momentum, yet little is known about their practices. What kinds of representations do they make to consumers? What kinds of agreements do they have with them? What rules do they have in place to protect the information consumers disclose and the money they entrust to them? Are they responsible in the event of problems? What dispute resolution mechanisms do they have in place?

We are also interested in the consumers who are attracted by FinTechs. Who are they? What motivates them? What do they know about the Fintech companies? What is their perception of them? How do they behave when they use such services?

Finally, we inquired whether the current legislation in Canada is sufficient to protect consumers who choose to do business with a FinTech company for savings and investment purposes, and we explored the existing legislation in several other jurisdictions to identify practices that could serve as a source of inspiration.

1.1 Our methodology

We began by conducting a literature review in order to identify recent developments and consumer protection issues related to the subject of the study.

Second, we interviewed a number of specialists—representatives of regulatory bodies and experts in law and finance. We then studied the Canadian legal framework applied in four provinces: Quebec, Ontario, Alberta and British Columbia.¹² We also noted the best practices in the European Union, France, the United Kingdom,¹³ Australia, the United States, Switzerland and Singapore.

At the same time, we built up a representative sample of three companies that use these new technologies to offer Canadians savings products or services with or without investment. These were Mylo, Wealthsimple and BMO SmartFolio. We reviewed their websites, examined the representations made on them and analyzed the legal documents published on them. We also analyzed the legal documents of Tactex, Mylo's portfolio manager¹⁴.

Since FinTechs are still constantly evolving, we have chosen to focus on three popular, innovative Canadian companies: Mylo, Wealthsimple and BMO SmartFolio. These three companies represent the full range of consumer offerings. Mylo is an application that allows consumers to round up their expenses and transfer your spare change to an account, which they can use toward savings or investments. Wealthsimple is an application that allows consumers to both save and make investments. BMO's SmartFolio is a Nesbitt Burns product that allows consumers to save, but also to invest *through* a "robo-advisor"¹⁵. An examination of these three companies will make it possible to evaluate different

¹¹ We should mention that during our research, we noted some slight variation in the names of these tools, (roboadvisors, robo-advisers and robot advisors). For the purposes of our study, we will use the term robo-advisor throughout this report.

¹² A study of the laws of these four provinces will suffice to determine how Canadian consumers are protected from FinTech in terms of savings and investment.

¹³ At the time of drafting this report, the United Kingdom was still a member of the European Union. The situation may be different post-Brexit.

¹⁴ Given the large amount of personal information requested by the companies under study, we did not open an account. As a result, we were unable to study the questionnaires used to determine consumers' financial situation, nor were we able to read the messages sent to consumers at the time they make their commitment to the company and subsequently.

¹⁵ BMO SmartFolio is the only one of the companies surveyed that mentions using such a robot. On the company's home page, there is even a link to an explanation of what a robot advisor is in this context. See: BMO, "What's a Robo Advisor?" online at: <https://bmo.com/smartfolio/articles/robo-advisor/> accessed September 20, 2019).

structures and to identify common points and distinctive features. We are confident that these three companies are representative of the current offer in Canada.

Finally, to find out the opinions of consumers, we commissioned BIP Research¹⁶ to conduct a survey of 800 Canadians in four regions: Ontario, Quebec, the Prairies and British Columbia (200 respondents per region) to determine their attitudes, perceptions and knowledge of FinTech companies that provide savings and investment services¹⁷. The participants were able to answer questions in either official language.

2. Profile of savings and investment FinTechs

2.1 A new business model

In recent years, a multitude of companies offering FinTech savings and investment products have emerged. Some are “affiliated with brokerage firms owned by large banks,” others are new companies (start-ups) that often benefit “from the expertise of former owners of established brokerage firms or the support of large financial firms”¹⁸. They have a reputation of being inexpensive and easy to access.¹⁹

These companies offer their customers various products via a robo-advisor. In general, users can obtain these products online or through an application. To do so, they have to complete a questionnaire, then provide certain personal information as well as a multitude of other details that will assist the “robot” in proposing products likely to correspond to their needs.

FinTech savings and investment funds generally offer only a small number of portfolios, consisting mainly of exchange-traded funds (ETFs)²⁰ with varying levels of risk. They sometimes also offer other services, such as online financial planning tools.

2.2 The target clientele

According to a white paper by EquiSoft,²¹ a private company specializing in the design and distribution of advanced digital business solutions, savings and investment FinTechs target mainly millennials (or generation “Y”); people between 18 to 35 years of age²². These young people do not have enough money to be interesting to traditional financial advisors, do not have enough knowledge to manage their investments themselves and have relatively simple needs. In addition, they are interested in “technology

¹⁶ BIP Research is a Quebec-based survey and polling company based in Montreal. Online at: <https://www.bip-sondage.com/>.

¹⁷ This 5-minute survey was conducted in February 2019.

¹⁸ Stéphanie Grammond, “Conseillers robots: mode d’emploi,” in *La Presse*, February 23, 2016, online at: <https://www.lapresse.ca/debats/chroniques/stephanie-grammond/201602/23/01-4953625-conseillers-robots-mode-demploi.php>.

¹⁹ *Ibid.*

²⁰ For information on exchange-traded funds, see: Autorité des marchés financiers, “Fonds négociés en Bourse (FNB),” online at: <https://lautorite.qc.ca/grand-public/investissements/fonds-dinvestissement/fonds-negocies-en-bourse-fnb/>

²¹ Equisoft, “Invasion of the Robo-Advisor: Is the Threat Real?” in *White Paper*, February 2016, p. 10-11, online at <https://www.equisoft.com/wp-content/uploads/2017/08/White-paper-Robo-Advisor-EN.pdf>

²² This corresponds roughly to the age of millennials. In fact, there is general agreement that a millennial is someone born between 1980 and 2000.

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and being able to open an account on their phone”²³. Finally, given their age, time is on their side when it comes to saving.

Others may also be interested, including those who are dissatisfied with the services of their financial advisors, as well as early retirees and retired seniors; the latter, when they are no longer saving and trying to keep their capital, pay attention to their money. In the fall of 2017, the *Globe and Mail* told the story of a retired Toronto executive who, after realizing he was paying \$20,000 in fees per year, fired his financial advisor of 18 years to invest his entire \$500,000 portfolio with a robo-advisor that asked him for less than \$1,000 per year²⁴.

2.3 Major challenges

The main source of information for anyone tempted by the services of a FinTech savings and investment company is the company's website. It is therefore important that this site should provide them with all the information they need in order to know what is available to them and be able to determine if it is appropriate for them. They also need to be provided with information in a form that is easy to understand. This is all the more important considering the risks associated with ETF products, and is therefore a major challenge.

Robo-advisors collect information from their customers via questionnaires²⁵. The primary focus in these is to determine the consumer's age, income, financial goals and risk tolerance—important factors in providing the right product. The information gathered is then analyzed by means of an algorithm, and a product is suggested. It should be noted that the algorithm is supposedly able to detect any contradictions in the information given by the consumer.

In the Canadian business world, any apparent problems will be reported to a financial advisor. “Canadian legislation requires the presence of a natural person,” says Professor Ivan Tchotourian of the Faculty of Law at Université Laval. “The financial advisor checks the advice the robot gives, and intervenes when the questionnaire submitted is incomplete or when the client's situation changes. He has to be very alert; it’s his responsibility.”

This does not prevent many from wondering whether the process can detect hesitant consumers, those who require additional explanations or those who have not been completely truthful. Since the robot has zero emotional intelligence, will the advisor be able to detect [TRANSLATION]“The consumer's concerns and misunderstandings?”²⁶ Will he or she truly understand the information provided by the robo-advisor and make an informed decision?

²³ Équisoft, *supra*, note 21.

²⁴ Clare O'Hara, “Robo-advisors find popularity where few thought they would,” in *The Globe and Mail*, October 2017, online at: <https://www.theglobeandmail.com/globe-investor/funds-and-etfs/etfs/older-investors-turning-to-robo-advisors-to-reach-their-financial-goals/article36752258/>.

²⁵ It should be noted that in the United States, the quality of these questionnaires has been questioned. See Marc Lacoursière and Ivan Tchotourian, “Métamorphose technologique et institutions financières” in *Les Cahiers de droit*, Vol 60, no.3, September 2019, pp. 781-787 and p. 787 note 237. The Financial Industry Regulatory Authority, “Report on Digital Investment Advice,” March 2016, pp. 9-13, online at: <https://www.finra.org/sites/default/files/digital-investment-advice-report.pdf>

²⁶ Marc Lacoursière et Ivan Tchotourian, *supra*, note 25, p. 787, note 238.

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It is also questionable whether the procedure in place can really ensure that the information gathered is updated periodically. Anyone who deals with a FinTech company for several months or even years is likely to see their situation change, and this will entail a change in their needs.

Other considerations include the risk of discrimination and conflict of interest. Are robo-advisors free of prejudice? Could the private companies that manage them use their intelligence to their own advantage? Although no relationship between a flesh-and-blood broker and their clients is ever risk-free, when it is the brokers themselves who design the robots there is certainly some cause for concern.

Robo-advisors collect a lot of sensitive information and this raises privacy issues. There are questions about the quality of the mechanisms set in place to collect, store and destroy it. One wonders if the transfer of information between the FinTech company and its partners will be trouble-free. When it comes to data and fund protection, the more players there are, the higher the risk.

Robo-advisors need to have access to their clients' bank accounts—or the one their clients open with a third party. The funds in these accounts have to be protected. This raises security issues. Are the measures in place sufficient? Are the consumer's assets well protected? What is the role of the company and other related companies or the financial institutions? What are their responsibilities? FinTech companies are not as tightly regulated as financial institutions, and this is also cause for concern.

There are, of course, other technological risks, such as a possible algorithm error or technical failure that might occur over the course of the year²⁷. There is also fraud. In fact, robo-advisors are not immune from [TRANSLATION] “malicious manipulation, by means of hacking or sabotage, that could cause significant damage to any investor requesting the services of such a robot”²⁸.

Another concern is the belief that, within the limits imposed on them, robo-advisors cannot be wrong, which could create a [TRANSLATION] “false impression of safety and perfect execution.”²⁹ Such a false impression could contribute to blinding both the operator and the consumer and reducing the vigilance and caution of each.

Additionally, if FinTech companies offer their customers similar products, a large number of consumers are likely to end up making much the same choice. The massive use of robo-advisors could thus increase [TRANSLATION] “the level of risk of concentration on the financial markets.”³⁰ If there is a problem with a particular product, it could have serious consequences.

According to Professor Ivan Tchotourian, FinTech companies will offer more and more products over time. But this will give rise to other problems. [TRANSLATION] “This will be difficult for the advisor,” he says. “He will be unable to manage all the information related to these products. He will have to learn to work as part of a team.”

Finally, in the event of a contentious situation, who will be held responsible? The robot, the FinTech company or the financial advisor? And if it is the company, which company will it be? The one that owns the robot or the financial institution, the portfolio manager or the investment broker? Maybe even the

²⁷ Jean-Christophe Bernier, “Le rôle de la conformité à l'ère de la robotisation des services financiers: l'interaction entre les normes éthiques et l'automatisation de la fonction de conseil,” in *Gouvernance d'entreprise, conformité et criminalité*, Cowansville, Éditions Yvon Blais, 2018.

²⁸ *Id.* at 284.

²⁹ *Ibid.*

³⁰ Jean-Christophe Bernier, *supra*, note 27.

manufacturer of the robot? In such a context, it can be assumed that consumers will have difficulty asserting their rights³¹.

Will the solution be to give robots the status of a legal person? [TRANSLATION] “We've already thought about it,” says Marc Lacoursière, a professor in the Faculty of Law at Université Laval, “but that solution was eventually rejected. Artificial intelligence specialists today rely more on the industry’s commitment to high ethical standards.”

In this connection, we should mention the Montreal Declaration for a Responsible Development of Artificial Intelligence,³² which was made public by academics in December 2018 and in which over 500 people participated. This document proposes 10 principles that provide [TRANSLATION] “the directions of an ethical compass to guide the development of artificial intelligence towards ethically and socially desirable ends.”³³ These include the principles of inclusion and diversity, prudence, equity and responsibility. Anyone who has a role to play in the new FinTech world would do well to consider them.

3. Legal framework

One of the objectives of the research was to identify differences in the way that FinTech companies and traditional companies are supervised within in the same sector in four Canadian provinces: Quebec, Ontario, Alberta and British Columbia. Another was to identify best practices in several foreign jurisdictions: the European Union, France, the United Kingdom,³⁴ Australia, the United States, Switzerland and Singapore. This is our focus in this section.³⁵

3.1 Analysis of the Canadian legal framework

Regulations respecting investment services

Canadian legislators have generally adopted a consistent approach from one province to another toward regulating robo-advisors (and FinTechs to a greater extent). Considering that these technology companies use the Internet to easily and quickly offer services Canada-wide, this is to be welcomed: uniform regulations ensure that Canadian investors are offered at least a minimum level of protection when dealing with FinTech companies in Canada, without having to wonder which province is the competent jurisdiction.

The fact that Canadian legislators have adopted a so-called technology-neutral approach means that there are, in theory, no major differences between the regulations for financial advisors working under a traditional model and those for financial advisors using artificial intelligence.³⁶ As a result, investors should enjoy the same protections whichever of these business models they choose.

³¹ *Id.* p. 284.

³² Marc-Antoine Dilhac et al, Déclaration de Montréal pour le développement responsable de l'intelligence artificielle, December 4, 2018, online at: <https://www.declarationmontreal-iaresponsable.com/la-declaration>.

³³ *Ibid.*

³⁴ It should be recalled that, at the time of writing this report, the United Kingdom was still a member of the European Union. Things may change post-Brexit.

³⁵ As will be seen, we have grouped the laws studied according to whether they apply to investment services, consumer protection or privacy.

³⁶ On September 24, 2015, the Canadian Securities Administrators (CSA) issued an opinion stating that “The rules are the same if a PM operates under the traditional model of interacting with clients face-to-face and if a PM uses an online platform,” see: Canadian Securities Administrators, *CSA Staff Notice 31-342: Guidance for Portfolio Managers Regarding Online Advice*, 2015, p. 4, online at:

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Also, Canadian regulations require that the responsibility for the actions of the algorithm reside with a person,³⁷ which is a good thing for the consumer. However, it seems advisable to note that robo-advisors pose additional risks compared with traditional advisors (natural persons), and that steps need to be taken to provide additional guarantees to consumers who deal with robo-advisors, not in order to throw the market forces between the two business models out of balance, but to provide the same level of protection.

In fact, on an online platform, there is no one whose role is to ensure that clients understand the information provided and correct the situation if necessary; only inconsistencies that appear when the questionnaire is reviewed are likely to alert a natural person. In addition, since robo-advisors generally provide advice on a relatively small pool of products, there is a greater risk that the products offered may not be perfectly suited to the client's needs. In other words, even though, in theory, investors benefit from the same protections and guarantees with a traditional advisor as with a robo-advisor, the current model of the latter suggests that it cannot, in practice, offer the same quality of service, hence the need to offer investors additional statutory protections.

Regulations respecting consumer protection

All in all, research on this subject shows that investors are protected, first, by laws relating directly to financial products and services and, second, by other more general laws relating to consumer protection.³⁸ In Alberta and British Columbia, consumer protection laws may apply to some extent to robo-advisors. In Quebec and Ontario, however, securities are excluded from these laws, depriving consumers of much-needed protection when contracting for complex products and services available within the industry.

It would be preferable if consumers could benefit at all times from statutory protections. In the absence of specific provisions for robo-advisors in securities laws, it would be appropriate, through laws or directives, to make the provisions of consumer protection laws relating to distance contracts and clauses prohibiting arbitration and misrepresentations, applicable to contracts concluded on robo-advisor platforms.

One avenue to explore would be the adoption of a specific section of legislation or a separate law for the protection of consumers of financial products and services, such as the one passed in Alberta.³⁹

Regulations respecting protection of information

There is no significant difference in the protection of data provided to a robo-advisor and a traditional advisor, since when collecting data, both are required to abide by the same requirements (technologically neutral regulations).

https://www.osc.gov.on.ca/en/SecuritiesLaw_csa_20150924_31-342_portfolio-managers-online-advice.htm (accessed July 28, 2019).

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Financial Consumers Act*, RSA 2000, c F-13, online at: <https://www.canlii.org/en/ab/laws/stat/rsa-2000-c-f-13/133667/rsa-2000-c-f-13.html> (accessed July 29, 2019).

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In Alberta, British Columbia and Quebec, there are provincial laws in place respecting protection of personal information in the private sector⁴⁰ that apply to the companies we are interested in, provided that they do not otherwise fall under federal jurisdiction or the information is not sent outside the province.⁴¹ However, we can assume that very few companies using robo-advisors would limit themselves to operating in a single province, given the ease with which their service coverage can be extended Canada-wide. As a result, it seems likely that federal law will apply in most cases.

In Ontario, federal law will apply even if a FinTech company operates only in that province and the data is processed within its borders, since no private sector privacy legislation has been passed in that jurisdiction.⁴²

Canada would do well to find inspiration in what is being done abroad with regard to data protection, particularly in Europe.

3.4 Other jurisdictions

We also looked at several foreign jurisdictions: Europe, France, the United Kingdom, Australia, the United States, Switzerland and Singapore. These jurisdictions were studied in order to identify best practices aimed at reconciling technological development and consumer protection. This is our analysis.

Specific regulations respecting investment services

Each of the jurisdictions studied has adopted a “technology-neutral” approach to regulating new FinTech players. This seems to be the preferred approach, since regulating based on the structure of the company rather than the company’s actions has considerable limitations, especially since FinTech business models vary widely.

The use of a regulatory sandbox appears to be an interesting avenue for regulating the services offered by robo-advisors and ensuring consumer protection while the relevant authorities are familiarizing themselves with the business models and algorithms of the new players in the financial market. However, the regulatory relief offered to companies through such sandboxes needs to be counterbalanced by guarantees of investor protection.

Among the conditions imposed by regulators abroad, some seem particularly important for ensuring consumer protection.

⁴⁰ *Personal Information Protection Act*, SA 2003, c P-6.5, online at: <https://www.canlii.org/en/ab/laws/stat/sa-2003-c-p-6.5/145905/sa-2003-c-p-6.5.html> (accessed July 29, 2019); *Personal Information Protection Act*, SBC 2003, c 63, online at: <https://www.canlii.org/en/bc/laws/stat/sbc-2003-c-63/123569/sbc-2003-c-63.html> (accessed July 29, 2019); *Act Respecting the Protection of Personal Information in the Private Sector*, RLRQ c P-39.1, online at: <https://www.canlii.org/fr/qc/legis/lois/rlrq-c-p-39.1/derniere/rlrq-c-p-39.1.html>

⁴¹ Office of the Privacy Commissioner of Canada, *Summary of privacy laws in Canada*, November 2017, online at: https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/02_05_d_15/ (accessed July 17, 2019); Office of the Privacy Commissioner of Canada, “Provincial Legislation Deemed Substantially Similar to PIPEDA,” May 29, 2017, online at: https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/r_o_p/provincial-legislation-deemed-substantially-similar-to-pipeda/ (accessed July 17, 2019).

⁴² Miguel Bernal-Castillero, *Canada’s Federal Privacy Laws*, October 1, 2013, online at: <https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/BackgroundPapers/PDF/2007-44-e.pdf> (accessed July 27, 2019).

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In Singapore, the measures offered specifically excludes certain areas of legislation, such as data protection, the advisor's essential obligations to the client and the quality of services provided by the advisor.⁴³ Similar statutory limits on protection should be considered to ensure that Canadian investors can be confident that the essential obligations of financial professionals and the primary protections offered by the law remain in place, regardless of the type of service chosen (traditional or online with an algorithm) and regardless of whether the company participates in a regulatory sandbox.

In Singapore, Australia and the United Kingdom, the authorities reserve the right to exclude companies from the regulatory sandbox, particularly when major consumer protection issues have been identified. We believe this is essential for a Canadian (or provincial) sandbox; a system should also be set in place to publicize the fact that a company has been excluded, to make consumers aware of the decision.

In Australia, in addition to the conditions referred to in the last two points, companies have to meet additional criteria in order to participate in the sandbox.⁴⁴ First, the company must have internal dispute resolution measures and also be a member of an external dispute resolution system approved by the Australian Securities and Investments Commission (ASIC). This means that any consumer who has a dispute with a sandbox member company can resolve the dispute through private dispute resolution, thus avoiding potentially high legal fees, if the dispute is settled out of court. In addition, the company must guarantee a minimum of \$1 million per claim for compensation for poor quality service or malpractice; such coverage is generally protected by insurance. While this obligation is supposedly already respected by professionals in the field, protection for consumers can be guaranteed by ensuring that the company has a valid insurance policy permitting access to the benefits of the regulatory sandbox.

In Australia and Singapore, the number and type of customers of sandbox member companies is limited. Should a major problem occur with the functioning of the algorithm, for example, the damage will be limited. In addition, these two jurisdictions limit the total amount of consumer assets that can be held by sandbox companies. Considering the novelty of this type of company, these protections seem important to us.

Regulations such as those set in place by the European Union, which require companies to test their FinTech business model and demonstrate to the relevant State regulatory authority that the tests were successful, ensure clients quality services and enable the competent authority to control the intrusion of artificial intelligence into the provision of financial advice. This approach should be emulated in Canada.

Considering the speed of decision-making made possible by online robo-advisor platforms, and considering that membership contracts cannot be negotiated, it would be appropriate to include a right of withdrawal, as has been done in Europe,⁴⁵ so that consumers can change their minds after reading their service contract in a more relaxed setting.

⁴³ Monetary Authority of Singapore, "FinTech Regulatory Sandbox Guidelines," November 2016, online at: <https://www.mas.gov.sg/-/media/MAS/Smart-Financial-Centre/Sandbox/FinTech-Regulatory-Sandbox-Guidelines-19Feb2018.pdf?la=en&hash=1F4AA49087F9689249FB8816A11AEAA6CB3DE833k> (accessed August 1, 2019).

⁴⁴ Australian Securities and Investments Commission, *Regulatory Guide 257: Testing Fintech products and services without holding an AFS or credit licence*. August 2017, online at: <https://download.asic.gov.au/media/4420907/rq257-published-23-august-2017.pdf> (consulté le 30 juillet 2019).

⁴⁵ *Directive 2002/65/EC Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, 97/7/EC and 98/27/EC*, OJ L 271, 9/10/2002, p. 16-24, Art. 3, online at: <http://data.europa.eu/eli/dir/2002/65/oj> (accessed on 29 July 2019)

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Finally, legislation to provide an additional level of protection for retirement investment products and services, as seen in the United States with the *Employee Retirement Income Security Act*⁴⁶ (ERISA), would acknowledge the sensitive nature of such investments for consumers.

Regulations respecting consumer protection

Of all the jurisdictions studied, including Canada, only Singapore's consumer protection law is applicable to financial services,⁴⁷ but this law seems less comprehensive than elsewhere, in that it offers no additional protection to investors who conclude their contracts online with a robo-advisor rather than a traditional advisor.

Yet there is one reason why consumer contracts concluded online are regulated, not only in Quebec, but in many jurisdictions around the world; the United Nations Commission on International Trade Law (UNCITRAL) even adopted a model law to this effect in 1996.⁴⁸ In an era when everything is moving so fast that consumers can buy just about anything, anywhere at anytime,⁴⁹ an extra layer of protection is required. Also, when it comes to investments, consumers cannot touch the product or look at it through its packaging before buying it, hence the importance of their having a clear and detailed description of it. The same logic applies to financial services contracts: in person, consumers can ask questions and get personalized answers from a human advisor, whereas online they do not have this luxury. Similarly, contracts can be concluded online far faster than in person. Considering this, and combined with the complexity of financial products, any investor-consumer who enters into an online contract for their investments needs to have additional protection.

Regulations respecting protection of information

In this new digital era, companies can outsource the processing of their customers' personal data. With cloud storage, this data can quickly find its way to a jurisdiction other than the one where it was collected. It is therefore particularly important that at least a minimum level of legislative protection be adopted by as many States as possible. Europe is a model in this respect, since the *General Data Protection Regulation* (GDPR)⁵⁰ applies to all EU Member States. In addition, the subcontractor must agree to comply with this regulation before the company sends it the data, thereby providing it with a guarantee of security.

It should also be noted that several of the measures in the GDPR are intended to protect data "upstream" of potential problems; these are protection measures as opposed to remedial measures. For example, the company is required to adopt a code of conduct and appoint a natural person to ensure data protection. Another example is the impact analysis that the company is obliged to conduct before processing data in cases when the activity is considered risky.

⁴⁶ *Employee Retirement Income Security Act of 1974*, 29 USC 1001 et seq, online at: <https://legcounsel.house.gov/Comps/Employee%20Retirement%20Income%20Security%20Act%20of%201974.pdf> > (accessed July 30, 2019). It should be noted that at the time this research was undertaken, the documents related to the *Restatement of Consumer Contract Law* had not yet been published.

⁴⁷ *Consumer Protection (Fair Trading) Act*, c.52A, online at: <https://sso.agc.gov.sg/Act/CPFTA2003> (accessed July 30, 2019).

⁴⁸ United Nations Commission on International Trade Law, "UNCITRAL Model Law on Electronic Commerce (1996)," online at: https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_commerce (accessed July 18, 2019).

⁴⁹ Luc Thibaudeau, "Le consommateur à la recherche de la protection adéquate," in *Colloque national sur les recours collectifs: développements récents au Québec, au Canada et aux États-Unis*, Vol. 380, Cowansville, Éditions Yvon Blais, 2014, p. 595, online at: <https://edoctrine.cajj.gc.ca/developpements-recents/380/676241951> (accessed July 18, 2019).

⁵⁰ *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance)*, OJ L 119, 4.5.2016, pp. 1–88, May 4, 2016, online at: <https://eur-lex.europa.eu/eli/reg/2016/679/oj> (accessed on 1 August 2019).

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Additional protection for sensitive data (such as a Social Insurance Number) is important, especially in an industry such as the one we are studying. Europe, Australia and Switzerland are examples in this regard.

The obligation to disclose data breaches (as in Alberta) is imposed in Europe, Australia and the United States in particular.

Finally, creating a dedicated data protection sandbox, as in the United Kingdom,⁵¹ or ensuring close monitoring of FinTech-related data in the sandbox should also be an item on Canada's agenda, so as to offer enhanced security to consumers who transmit their highly sensitive data to these new market players.

A comparison between the GDPR and PIPA BC conducted by the Office of the Information and Privacy Commissioner for British Columbia⁵² showed that the GDPR, in several respects, offers more protection than the British Columbia law. For example:

- The GDPR does not recognize the individual's consent solely because he or she did not specifically "opt-out" of data collection: consent must be explicit.
- The GDPR offers individuals more rights than PIPEDA, including the right to delete their data and the right to transfer their data to another service provider.
- The GDPR requires disclosure of data breaches within 72 hours. In Canada, at the time of writing, only Alberta had such a requirement, with no time limit.
- Finally, the GDPR allows authorities to impose much higher fines than the British Columbia legislation.

4. A look at the practices of three companies

To learn about the representations made by the three FinTech companies selected, Mylo, Wealthsimple and BMO SmartFolio, we analyzed each company's website and the various legal documents found there. We also reviewed the legal documents from Tactex Asset Management, Mylo's portfolio manager.

4.1 The companies studied

Mylo⁵³ offers consumers the opportunity of saving and investing without changing their lifestyle. Whoever uses its platform has each of their purchases rounded up to the nearest dollar. The difference

⁵¹ Information Commissioner's Office, *The Guide to the Sandbox (beta phase)* May 24, 2019, online at: <https://ico.org.uk/for-organisations/the-guide-to-the-sandbox-beta-phase/> (accessed 25 July 2019).

⁵² Office of the Information & Privacy Commissioner for British Columbia, *Guidance Document: Competitive Advantage: Compliance with PIPA and the GDPR*, March 2018, p. 10, online at: <https://www.oipc.bc.ca/guidance-documents/2135> (accessed July 30, 2019).

⁵³ Mylo, "Invest the spare change" online at: <https://mylo.ai/> (accessed July 26, 2019).

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is then deposited into the user's account. At the latter's request, it may be invested by Tactex, the portfolio manager.⁵⁴ It seems to be mainly invested in exchange-traded funds (ETFs).⁵⁵

Wealthsimple⁵⁶ offers the consumer a new way to invest. The consumer can use the platform to save and trade in the stock market. The company also offers "diversified" portfolios and expert advice. Anyone opening an account with Wealthsimple must also open an account with any of the companies described as "custodians that provide trade execution, clearing, and other services" on Wealthsimple's behalf.⁵⁷

BMO SmartFolio is a BMO Nesbitt Burns product. Consumers doing business with this platform have three options: entrusting the management of their portfolio to the company (what the company calls investing "on autopilot," making their own trading decisions while obtaining "personalized advice" (investing "with a Copilot") or directing the investment process themselves (being "the Pilot").⁵⁸ BMO SmartFolio states that it "does fall into the category of online investment management services or 'Robo-Advisors'" as long as the term is used "in a Canadian context."⁵⁹ This suggests that there is an advisor working behind the platform.

4.2 On the home page

The home pages of the websites of the companies studied are attractive and filled with promotional copy. The Wealthsimple⁶⁰ and Mylo⁶¹ sites are replete with praise from Internet users or a variety of publications. Everything is designed to encourage consumers to act quickly. "Connect. Spend. Invest. That's it!" Mylo announces.⁶² At BMO SmartFolio, which claims to be "the first" service of its kind offered by a bank in Canada, consumers are urged to invest within 10 minutes and at Wealthsimple, 5!

There is also information on the products offered, but the details remain vague. For example, Mylo offers to help you save by investing "your spare change," BMO SmartFolio offers exchange-traded fund portfolios and Wealthsimple offers "Smarter portfolios diversified across the entire market," "Save money with low-fee ETFs and low management fees," "High interest savings" and "\$0 commission stock trading."

You also learn how much money it takes to get started. While a few pennies is enough at Mylo, BMO SmartFolio suggests starting with only \$1,000. Wealthsimple has three categories of clients, depending on whether the investment is \$0 to \$100,000 ("Basic"), \$100,000 and over ("Black") or \$500,000 and over ("Generation").⁶³

Every company offers portfolios composed mainly or exclusively of exchange-traded funds (ETFs). Given that these are relatively risky products, we expected this fact to be pointed out. It sometimes was. At the bottom of the Wealthsimple home page, by clicking the "investment risk disclosure" link, the consumer can find lots of information on this subject. This is an initiative we welcome.

⁵⁴ For the link between Tactex and Mylo, see <https://www.finance-investissement.com/nouvelles/actualites/la-fintech-montrealaise-mylo-acquiert-tactex-asset-management/>

⁵⁵ See: Mylo, "You've got questions. We've got answers" online at: <https://mylo.ai/faq/> (accessed September 20, 2019).

⁵⁶ Wealthsimple, "Investing on autopilot," online at: <https://www.wealthsimple.com/en-ca/> (accessed July 31, 2019).

⁵⁷ See Wealthsimple's privacy policy: Wealthsimple, *Privacy Policy*, online at <https://www.wealthsimple.com/en-ca/legal/privacy> (accessed July 31, 2019).

⁵⁸ This vivid terminology appears on the BMO SmartFolio home page, "What kind of investor are you?" online at: <https://www.bmo.com/main/personal/investments/what-kind-of-investor-are-you/>

⁵⁹ See: BMO, "What's a Robo Advisor?" online at: <https://bmo.com/smartfolio/articles/robo-advisor/>

⁶⁰ Wealthsimple, *supra*, note 56.

⁶¹ Mylo, *supra*, note 53.

⁶² BMO, "Invest online. Not alone" online at: <https://www.bmo.com/smartfolio/> (accessed July 30, 2019).

⁶³ It should be noted that services vary for each category of client.

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At Mylo, they claim to use the “Modern Portfolio Theory,” about which the general public knows very little, as well as “boosts” and “multipliers” to “accelerate” savings—given that this is all they say, it is difficult to know what it is all about. Among its other products, BMO SmartFolio offers RRIFs; it is clear that the company is not just for young people.

References to the low cost and the savings that can be achieved are everywhere. For example, Mylo says there are no hidden fees and that it charges “a fixed monthly fee of only \$1”⁶⁴. Wealthsimple promises “low-fees and ETFs” and BMO SmartFolio states: “Save on fees, with advisory fees from 0.4 to 0.7%.” Both companies provide tools that allow the consumer to calculate the return on a given amount and compare the result to what they would get if the fees were higher.

They also emphasize that they have experts on hand. For example, Wealthsimple promises, “Expert advisors to help you achieve your goals,” while BMO SmartFolio states, “Dedicated advisors help you invest smarter with confidence.” Mylo talks about “dedicated portfolio manager.”

Two of the three companies studied, Mylo and Wealthsimple, point to the security measures on their home pages. Both say they use the same security measures as the major Canadian banks, including “256-bit encryption and secure SSL connections”⁶⁵.

Mylo also lauds its privacy protections by proclaiming that its Privacy Policy was developed “by a former Canadian Privacy Commissioner.”

There are other measures taken to protect funds. For example, all the companies studied are apparently members of the Canadian Investor Protection Fund and the Investment Industry Regulatory Organization of Canada (IIROC).

In addition, the Mylo site displays the Desjardins (Desjardins Capital) logo. Desjardins is the cooperative that made a financial contribution to the start-up of the company Wealthsimple also states that it is supported by investments from some major financial institutions⁶⁶.

Finally, at the bottom of each home page there is information on the services offered, the company and related companies. There are also links to various legal documents.

4.3 Documents reviewed

In order to better understand the contract between the consumer and the companies studied and, in the case of Mylo, Tactex, their portfolio manager, we went through the legal documents indicated at the bottom of each company's home page.

⁶⁴ In Appendix A of the *Tactex Investment Management Agreement*, we learn that the client pays a “technology fee” of \$1 per month for the basic service or \$3 per month for the Advantage service (the latter allows the client to make pre-authorized payments). See also p. 14 of the agreement, online at: <https://mylo.ai/Mylo-Program-Agreement-v4.pdf> for more information on this document.

⁶⁵ According to several sources, these are relatively safe protections.
See: <https://www.ionos.com/digitalguide/server/security/encryption-methods-an-overview/> and <https://www.websecurity.digicert.com/en/ca/security-topics/what-is-ssl-tls-https>

⁶⁶ Wealthsimple has received funding from Allianz X and Power Financial Corporation, see: Finance and Investment, “Wealthsimple: New \$100 million financing,” online at: <https://www.wealthsimple.com/en-gb/magazine/news-100-million-investment> and Cision, “Wealthsimple raises \$65 million in funding from Power Financial group of companies.” online at: <https://www.newswire.ca/news-releases/wealthsimple-raises-65-million-in-funding-from-power-financial-group-of-companies-674687383.html>

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For Mylo, we reviewed the Terms and Conditions of the Mylo Program, the Mylo Program Agreement and the Tactex Investment Management Agreement⁶⁷ We also reviewed Mylo's Privacy Policy,⁶⁸ and finally, Tactex's Privacy Policy⁶⁹.

For Wealthsimple, we reviewed the Terms of Use, Full Disclosure, and Privacy Policy.⁷⁰ We also reviewed a document entitled How to File a Complaint.⁷¹

Finally, for BMO SmartFolio, we reviewed the Client Account Agreement,⁷² the document entitled "Important Legal Notices to All Users of this Website,"⁷³ the BMO Financial Group Privacy Code,⁷⁴ the Relationship Statement,⁷⁵ the Conflict of Interest Policy Statement,⁷⁶ and the BMO SmartFolio Online Security document.⁷⁷

It should be noted that in the case of BMO SmartFolio, we were surprised to find documents with different headers. In fact, only one document had the BMO SmartFolio header;⁷⁸ the others had either the BMO Financial Group⁷⁹ or Bank of Montreal⁸⁰ header. It is possible that, because several companies here are part of the same financial group, the same documents are used for all the companies in the group.⁸¹

⁶⁷ These three documents were found under the Agreement tab of the Mylo program, at the bottom of the company's home page, online at: <https://mylo.ai/Mylo-Program-Agreement-v4.pdf>

⁶⁸ Mylo, "Privacy Policy" online at: <https://mylo.ai/privacy/> (accessed July 31, 2019.)

⁶⁹ Since there was no link to this document, we looked for it on the Tactex home page, see: Tactex, "Privacy Policy," online at: <http://tactex.ca/privacy-policy/> (accessed September 24, 2019).

⁷⁰ These documents were all located under the Terms of Use tab at the bottom of the Wealthsimple home page, see: Wealthsimple, *Terms of Use*, online at: <https://www.wealthsimple.com/en-ca/legal/terms>

⁷¹ Wealthsimple, "Filing a complaint with us," online at: <https://www.wealthsimple.com/legal/file-complaint> (accessed July 31, 2019).

⁷² The version we studied was found via a Google search in June 2019, so it is difficult for us to say when and how it is presented to the client. However, considering that this is the specific agreement for the service in question, there is reason to believe that it is focused on clients who open an account at least by using a hyperlink, See: BMO SmartFolio, "Client Account Agreement" online at: <https://www.bmo.com/pdf/smartfolio/bmo-smartfolio-raf-friendtcs-e.pdf>

⁷³ This document was located under the Legal Notices tab at the bottom of the company's home page. See: BMO, "Important Legal Notices to All Users of this Website" online at: <https://www.bmo.com/smartfolio/popups/legal/>

⁷⁴ This document was found at the bottom of the company's home page via a link entitled "Confidentiality." See "BMO Privacy Code – Canada," online at: <https://www.bmo.com/main/about-bmo/privacy-security/our-privacy-code/> (consulted July 30, 2019). It should be noted that it is impossible to print or save this document in pdf format, making it more difficult to consult than it could be.

⁷⁵ This document was headed "BMO SmartFolio." See: BMO, "Relationship Disclosure," online at: https://www.bmo.com/img/smartfolio/pdf/en/Relationship_Disclosure.pdf.

⁷⁶ There is no mention in this document of BMO SmartFolio. It discusses potential conflicts of interest that may arise between "you" (the consumer) and "us" (BMO Nesbitt Burns Inc.). Nesbitt Burns Inc. is represented as an investment broker. Further on, it states: "We are a wholly-owned indirect subsidiary of Bank of Montreal." See: BMO, "Conflicts of Interest Statement," online at: <https://www.bmo.com/assets/pdfs/privatebank/tc/en/im-conflict-of-interest-statement-en.pdf>

⁷⁷ It should be noted that we also had on hand a 50-page document that was sent to us by e-mail at the beginning of our research entitled "Client Account Agreement." This document had BMO SmartFolio letterhead. It states: "This package contains copies of agreements between you, BMO Nesbitt Burns Inc. and, if applicable, between you and BMO Trust Company." It contains the following documents: (1) BMO SmartFolio Investment Accounting Agreement; (2) Joint Account Agreement; (3) BMO Trust Company Registered Accounts (BMO Nesbitt Burns Retirement Savings Plan Inc. Trust Agreement). See: BMO, "BMO SmartFolio: Client Account Agreement," online at: https://www.bmo.com/assets/pdfs/nesbittburns/Terms_En.pdf

⁷⁸ This was the declaration about relationships. See: "BMO, Relationship Disclosure of Links," online at: https://www.bmo.com/img/smartfolio/pdf/en/Relationship_Disclosure.pdf

⁷⁹ This was the case for the documents entitled "BMO Financial Group Privacy Code" online at: https://www.bmo.com/img/smartfolio/pdf/fr/rdd_final_french.pdf and "BMO SmartFolio Online Security" online at: https://www.bmo.com/img/smartfolio/pdf/en/Smartfolio_Security_EN.pdf

⁸⁰ This was the document entitled "Important Legal Notices to All Users of this Website," online at: <https://www.bmo.com/smartfolio/popups/legal/>

⁸¹ Under the headings of "Legal Notices" and "BMO Nesbitt Burns" respectively (at the bottom of the BMO SmartFolio Home Page), we found clauses that read as follows: "BMO SmartFolio is a product of BMO Nesbitt Burns. BMO Wealth Management is the brand name for a business group consisting of Bank of Montreal and certain of its affiliates, including BMO Nesbitt Burns Inc. and BMO InvestorLine Inc., in providing wealth management products and services" and "References on this website to 'BMO Nesbitt Burns' are to the corporate entity BMO Nesbitt Burns Inc. Insurance products and services referenced on this website are offered by BMO Nesbitt Burns Financial Services Inc., which is a wholly owned subsidiary of BMO Nesbitt Burns Inc. Banking products and services referenced on this website are offered by BMO Bank of Montreal. BMO Nesbitt Burns Inc. is an indirect wholly owned subsidiary of BMO Bank of Montreal."

4.4 Analysis of representations and contracts

Clarity issues

Mylo, Wealthsimple and BMO SmartFolio have very attractive home pages. Everywhere, the emphasis is on the simplicity of the process and the speed of execution. It could be difficult for consumers to understand what types of investments are available to them. Considering that these investments are mainly ETFs, and therefore quite risky, we would have preferred more restraint and also prominent warnings. By multiplying the means of attracting customers, there is a risk of diverting their attention away from information, which admittedly is included on the sites studied.

These companies also seem to have made an effort to make their documents accessible. As mentioned earlier, however, there are a few exceptions. For instance, Tactex's Investment Management Agreement was rather difficult to decipher. Also, we had some difficulty accessing the BMO SmartFolio Privacy Code.

Also noteworthy is the confusion created by the different headers on BMO SmartFolio documents. The world of securities is complex, and the links between the different companies the user of a platform has to deal with are equally so. We sometimes had difficulty understanding them ourselves.

Ever since the Supreme Court of Canada's decision in *Richard v. Time inc.*,⁸² it has been recognized in the world of consumer affairs that the ordinary consumer must be considered a gullible and inexperienced person, especially when purchasing complex products. In our opinion, this judgment, which defines what a consumer is within the meaning of the CPA, should be used to ensure better protection for consumers who do business with FinTech companies. Even educated⁸³ consumers find themselves faced with a complex world (securities) and new, equally complex technologies (FinTechs). In such a context, it goes without saying that companies have an obligation to provide them with information in a language they can understand. Moreover, since consumers are urged to commit themselves in a few minutes without having spoken to anyone, we consider this particularly important.

Privacy protection issues

What about privacy? Is only necessary information collected? Is the process fully transparent? It is difficult for us to answer the first two questions; but transparency seems to be assured, since it is the consumers themselves who provide their information.

In some cases, the question may arise of whether the lack of clarity concerning the types of investments offered and the related companies combined with the speed of execution might be an obstacle to informed consent. This impression is reinforced by practices that seem to us to be more than questionable, such as stating that the consumers' use of their services signifies their tacit acceptance, or indicating that the policy may change at any time without consumers being informed, or obliging them to compare old versions with new ones in order to know what their new obligations are.

As for the collection of information such as IP address, geolocation and browsing history,⁸⁴ which is carried out electronically, the situation is quite different. Most of the time, it is difficult to determine for

⁸² *Richard v. Time Inc.*, 2012 SCC 8, [2012] 1 S.C.R. 265.

⁸³ This is what our survey shows. See section 5.

⁸⁴ It should be noted that, in investigations conducted in different contexts, the Office of the Privacy Commissioner of Canada (OPC) has concluded that data such as IP address, geolocation, information contained in cookies and browsing history are to be considered personal information. See OPC, "Assistant Commissioner recommends Bell Canada inform customers about Deep Packet Inspection," PIPEDA Report of Findings No. 2009-010, September 2009; OPC, Review of the Use of Personal Information Collected

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what purpose this information is collected, and the consumer who wishes to refuse having this information collected has no choice other than to refuse the service. We would appreciate having more details and the consumer being given other choices.

According to PIPEDA, the more sensitive the information, the better it must be protected⁸⁵. The companies we have studied list the protective measures they take. As regards physical, technological and administrative protection, as in the case of Mylo, this seems to us to be complete. However, it is sometimes mentioned that the data is “aggregated and anonymous.” This worried us because, according to studies, even anonymized data can be used to identify individuals.⁸⁶ We also noted the lack of precision regarding the retention period, which is probably due to the companies’ legal obligations. We would in any case have preferred more clarity. In addition, we appreciated the fact that the companies do provide advice to consumers.

The FinTech companies we studied admit that the personal information they collect is transmitted elsewhere. They argue that when it is sent to related companies for the provision of services, it remains well protected. They also say that the protection would be the same in the event of the sale of a subsidiary, for example—which seems to us a difficult promise to keep. Finally, we are told that the protection is similar when the information is sent outside Canada. We have doubts about this because studies show that, in some countries, the level of protection offered to foreigners against state surveillance is not as high as in Canada⁸⁷.

When the data is no longer useful for service delivery—when the customer has closed his or her account, for example—PIPEDA provides that it must be destroyed⁸⁸. This generally takes some time, as it must be done in compliance with all applicable laws, such as securities laws. It is also necessary to act in such a way that consumers are not deprived of the remedies to which they are entitled. We did not see anything to this effect in the documents we consulted.

Finally, it should be noted that all companies designate a contact person for the consumer to contact regarding personal information, which is in compliance with the law. Similarly, Wealthsimple, BMO SmartFolio and Tactex deal with brokers who are members of the Canadian Investor Protection Fund (CIPF)⁸⁹ and are registered with the Investment Industry Regulatory Organization of Canada (IIROC). They thus offer some minimum protection to consumers.

Lots of exclusion of liability clauses

What struck us the most were the many liability exclusion clauses scattered throughout the legal documents we reviewed. Some of these clauses seem to protect businesses against anything that might occur when information is transmitted over the Internet between them and the consumer, including

Using a Global Positioning System, *PIPEDA Summary of Findings No. 2006-351*; OPC, “Customer complains about airline’s use of “cookies” on its Web site,” *PIPEDA Case Summary #2003-162*; and OPC, “Use of sensitive health information for targeting of Google ads raises privacy concerns,” *PIPEDA Case Report # 2014-001*, January 14, 2014.

⁸⁵ Federal Act, Principle 4.7; British Columbia Act, s. 34; Alberta Act, s. 34; Quebec Act, Principle 7.

⁸⁶ Pauline Gravel, “Données personnelles: un secret mal gardé” in *Le Devoir*, 26 July 2019, online at:

<https://www.ledevoir.com/societe/science/559444/un-secret-mal-garde>; Paul Ohm, “Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization,” in *UNCLA Law Review*, Vol.57, p.1701, 2019; Latanya Sweeney, “Only You, Your Doctor, and Many Others May Know,” *Technology Science*, 29 September 2015, online at: <https://techscience.org/a/2015092903>; Yves-Alexandre De Montjoye et al., “Unique in the shopping mall: On the reidentifiability of credit card *metadata*” in *Science*, Vol. 347(6221):536-9, January 2015.

⁸⁷ Heidi Bohaker et al., “Seeing Through the Cloud: National Jurisdiction and Location of Data, Servers”, and “Networks Still Matter in a Digitally Interconnected World,” University of Toronto, 2015.

⁸⁸ *Ibid.*

⁸⁹ Federal Law, Principle 4.5.

⁹⁰ For more information, see Canadian Investor Protection Fund (CIPF), online at: <http://cipf.ca/>

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fraud. But every FinTech-related operation is performed via the Internet. Given the kind of personal information and the amount of money that may be involved, these clauses seem to us to be simply unacceptable.

It should also be noted that some exclusion of liability clauses do not apply in all provinces, and that it is not always easy to determine in which provinces they do apply, which can be confusing. The same applies to dispute settlement procedures.

This is all the more shocking when we consider that the companies appear to absolve themselves of any kind of responsibility whatever. For example, they state they are not responsible for any errors that may occur on their websites or for the calculators they make available on them.

We understand that it may be difficult to inform consumers in real time of every amendment to a contract, but it is not impossible. This could be achieved by sending an e-mail or text message to all consumers as soon as a clause is modified, and posting a mention on the website at the same time.

5. Survey

As mentioned earlier, in order to obtain the opinions of consumers, we commissioned a survey of 800 Canadians from four regions: Ontario, Quebec, the Prairies and British Columbia (200 respondents per region). The aim was to determine their perceptions and knowledge of FinTechs as well as their attitudes toward them.⁹⁰

5.1 Our sampling

The sampling frame of our survey has two distinct strata. One is composed of people who had used FinTechs in the preceding three years or who were using them at the time of the survey (users) and a second is composed of people who intended to use FinTechs in the year following the survey (future users). Each of these strata is divided into two subgroups on the basis of age. The first subgroup is made up of young millennials⁹¹ and a second is composed of people from other age groups. Filter questions were used to assign respondents to the appropriate stratum.

The two age groups are represented identically within each stratum so that the respondents' behaviour and attitudes can be analyzed in accordance with this variable. This allows for the same margin of error between the different subgroups⁹². The population under study—current and future users—is not representative of the general Canadian population. The sample took this into account⁹³.

It should be noted that, in presenting our data, we have extracted the results related to different sub-categories where relevant. This has allowed us to isolate millennials aged 25–35 who, according to studies, are the ones most likely to use FinTechs for saving and investment in the coming years. In addition, as is generally the case, only statistically significant data were reported.

⁹⁰ Note that in this section, the word FinTech has been used to refer both to companies and the technology, even more freely than in the rest of the text.

⁹¹ It should be recalled that these people were born between 1980 and 2000.

⁹² Note that in comparison, a probability sample of the same size would result in a margin of error of plus or minus 3.46%, 19 times out of 20.

⁹³ We did not apply Neyman's sample allocation but instead favoured simple random selection from sub-populations.

5.2 Our results

5.2.1 Users

There are more users with the following profile: male, aged 35 to 54,⁹⁴ Ontario resident, university graduate, full-time worker with an annual family income of over \$100,000.

5.2.2 Using FinTechs to save or invest

We asked users which companies they had dealt with. The most frequently named company was Tangerine (44%). However, Tangerine is not a FinTech company, which points to some confusion. This company was followed by BMO SmartFolio (18%) and Wealthsimple (15%). In addition, 31% of candidates dealt with a bank, brokerage firm or insurance company. It should be noted that there were fewer “confused” respondents among those aged 25–35 and among those who reported being familiar with FinTechs (19% in both cases). The other most frequently named companies were Modern Advisor⁹⁵ (7%) and Mylo (5%).

We also asked users what transactions they had performed over the Internet in the past three years.⁹⁶ The 25–35 year olds⁹⁷ were the most likely to have bought or sold shares on the stock market in that period (60%). They, along with 18–34 year olds, were also the most likely to have received financial advice from a robot during the same period (43% and 42% respectively). It should be noted that this operation was particularly unpopular among those aged 50 and over (18%).

Interesting results appeared in other sub-categories. Men (72%), Anglophones⁹⁸ (68%), academics (73%) and those making \$100,000 or more (80%) were even more likely to make investment purchases. When it came to buying or selling shares on the stock market, men (59%), academics (59%) and people making \$100,000 or more annually (69%) also stood out.

5.2.3 Knowledge of FinTechs

We asked participants if they were familiar with FinTechs.⁹⁹

Only one-third of all respondents said they were familiar with them. Users aged 25–35 are the most likely to have given this answer (51%). The same is true for respondents aged 18–34 and 25–35 (40 and 41%). In addition, Ontarians were the most familiar with them (39%) and Quebecers the least (14%).

As we have just seen, when users were asked to name the FinTech companies they deal or have dealt with, there was some confusion in their responses. Similar confusion also occurred when they were

⁹⁴ People in this age group are more likely to be employed and generally earn more money than younger people; it is therefore only natural that more of them would use FinTechs to save and invest.

⁹⁵ This FinTech company is headquartered in Vancouver.

⁹⁶ The question was, “Have you done one of the following online in the last 3 years?” Choice of answers: money transfer or investment, saving or investment, financial planning, buying investments, getting advice from a financial advisor, buying insurance, getting insurance advice, buying or selling shares on the stock market, borrowing, obtaining financial advice from a robot.

⁹⁷ We have isolated the participants in this age group because they are the millennials most likely to use FinTechs.

⁹⁸ This is the term we use to describe the people who responded to our survey in English.

⁹⁹ The question was: “State whether your knowledge of Fintech platforms is: Very Poor; Quite Poor; Quite Good or Very Good.”

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asked if a FinTech is the website of a financial institution and if it offers more savings and investment options (see section 5.2.7).

5.2.4 Online savings and investment transactions

The users mainly carried out financial planning (68%), purchased investments (66%) and obtained advice from a financial advisor (64%). Those aged 25–35, on the other hand, mainly bought or sold shares on the stock market (60%).

The use of robots for financial advice is still marginal (35%), being primarily of interest to 18–34 year olds (42%) and 25–35 year olds (43%).

It should be noted that the purchase of investments and the purchase or sale of shares on the stock market were particularly popular among men (72% and 59% respectively), academics (73% and 59%) and those with an income of \$100,000 or more (80% and 69%).

5.2.5 Projected online savings and investment transactions

The operations that users plan to perform online in the coming year are similar to those they perform currently. Over the next 12 months, over half of the respondents intend to do financial planning (62%¹⁰⁰), get advice from a financial advisor (52%¹⁰¹) or buy investments (51%¹⁰²).

Obtaining financial advice from robots remains marginal because less than one in five users is considering doing this (19%); this proportion is 28% among users aged 25–35.

5.2.6 Perceptions of FinTechs

To find out what advantages consumers spontaneously associate with the savings and investment services offered by a FinTech company, and what their motivation might be, we first asked them to respond to the four following statements.¹⁰³

- 1) I can use the platform whenever I want
- 2) I can use the platform wherever I want
- 3) Doing business with a FinTech is faster
- 4) Doing business with a FinTech is easier

¹⁰⁰ This proportion is 68% among 25–35 year olds and 70% among future users in the same age group.

¹⁰¹ This proportion is 57% among future users.

¹⁰² This proportion is 60% among users as well as among users aged 25–35.

¹⁰³ It should be noted that participants were asked to respond on a scale of 1 to 10, with 1 being strongly disagree and 10 being strongly agree. Detailed results can be found in Appendix E.

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The results? A FinTech was seen as a platform that can be used any time. Users (66%) and users aged 25–35 (70%) are the most likely to think this way. It should be noted that 60% of respondents agreed with this perception.

A FinTech is also perceived as a platform that can be used irrespective of where one is; 65% of users and 68% of users aged 25–35 believe so. This is also the case for 58% of all respondents.

The speed of FinTechs seems less popular; only 46% of respondents believe they are faster. This perception is 52% among users and 58% among users aged 25–35.

Finally, FinTechs are perceived as being easier to use by only 34% of respondents. This proportion is higher among users (41%) and users aged 25–35 (47%).

5.2.7 Perceptions and attitudes towards FinTechs

We then presented the participants with 14 statements, some of which were related to their perceptions, and others to their attitudes¹⁰⁴. For each of these 14 statements, we have highlighted the most significant data. These are the statements, followed by a report on the responses received.

- A FinTech is the website of a financial institution

Overall, respondents agreed with this statement. Users aged 25–35 (41%) and those with incomes between \$40,000 and \$69,999 (41%) were the most likely to agree. The number of users (38%), academics (38%) and men (37%) who agreed was also high.

We noted some confusion here because, as we have seen previously, while some FinTechs are owned by financial institutions, others are owned private companies.

- A FinTech offers more savings and investment options

Overall, more users agreed than disagreed with this statement. However, as we have seen, FinTechs generally offer fewer options than other companies, at least for the time being. Their perception is therefore incorrect.

Those most likely to agree with this statement were aged 25–35 (49%). Other respondents agreed in significant numbers, but less so: men (42%), academics (42%), and users (40%). Finally, it should be noted that future users were those most likely to give a score of 5 or 6 (neutral).

- Saving and investing online is less expensive

Overall, respondents (57%) agreed with this statement.

¹⁰⁴ It should again be noted that participants were asked to respond on a scale of 1 to 10, with 1 being strongly disagree and 10 being strongly agree.

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Most numerous to agree with this statement were academics (67%). They were closely followed by those with incomes of \$100,000 or more (65%), users aged 25–35 (65%) and all users (64%). For their part, future users and future users aged 25–35 were the least likely to agree (50% and 47% respectively).

As we have seen, FinTech companies claim on their platforms to offer discounted services; one might deduce that this approach is working. It could also be deduced that low cost is one of the reasons for using these services.

- A Fintech could allow you to make savings or investments without an advisor

Overall, there were more respondents who agreed with this statement than disagreed. Users aged 25–35 (53%) were the most likely to agree. They were closely followed by academics (52%), those with incomes of \$100,000 or more (52%), 18–34 year olds (50%), men (50%), Ontarians (50%), users (49%) and Anglophones (47%).

- I feel in control of my choices when I choose a financial product online

This statement was intended to inform us which consumers feel most comfortable choosing a financial product through a FinTech company. Overall, however, there were more respondents who agreed than disagreed.

Users aged 25–35 (73%) were the most likely to say they felt in control when choosing an online financial product. All users (65%) were equally likely to agree, as were academics (65%) and Anglophones (61%).

On the other hand, fewer future users and users aged 25–35 reported feeling in control (52%). As they had not yet used a web platform to save or invest, this is easy to explain.

- I agree with the personal information I provide being used to make financial and investment recommendations to me

This statement was relatively well received by all participants. Prairie residents (56%), users aged 25–35 (55%), academics (55%) and men (51%) most often agreed with it.

- FinTechs protect my personal information well

Those that believe that Fintechs protect their personal information well, incidentally, are in the majority (48%).

Overall, respondents generally agreed with this statement. This reflects the confidence that consumers have in FinTechs. Those most likely to agree that FinTechs protect their personal information well are users aged 25–35 (48%), Prairie residents (45%), 18–34 year olds (44%) and 25–35 olds (44%). This is closely followed by men (43%) and Anglophones (41%). It should be noted that, overall, 39% of respondents agreed with this statement.

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- By analyzing my behaviour, robot advisors know my needs better than a financial advisor

The opinion of all respondents was also relatively divided on this statement. The most likely to believe that robo-advisors know their needs better than a financial advisor were users aged 25–35 (41%), men (36%), British Columbians (36%) and 18–34 year olds (35%). These were closely followed by academics (34%) and 25–35 year olds (33%). It should be noted that only 29% of all respondents were of this opinion.

- It makes no difference if the recommendation is made by a robot or a financial advisor

Overall, participants somewhat disagreed with this statement.¹⁰⁵ Users aged 25–35 agreed slightly more than other participants—38% agreed and 32% gave a neutral rating (5 or 6).

We noted that the older the respondents, the less they agree, with the most likely to disagree being those aged 55 and over (53%).

- I agree that the personal information I provide to a FinTech may be transmitted to other companies

Overall, participants disagreed somewhat with the fact that the personal information they provided could be shared with other companies. This disagreement was particularly strong among retirees (83%), those aged 55 and over (69%) and Quebecers (68%). It was less strong among Anglophones (49%), men (47%), Ontarians (47%), 18–34 year olds (46%) and 25–35 year olds (45%). Note that among users aged 25–35, opinions are divided—36% agreed and 38% did not.

- I agree with the FinTech having access to my bank account

Some FinTech companies request access to their client's bank account, notably to deposit profits in a timely manner (among the companies we studied, this was the case for Mylo). Only 29% of all respondents agreed that a FinTech should have access to their account.

Most likely to agree with this statement were users aged 25–35 years (39%). Academics (34%), 18-34 year olds (33%), men (33%) and Anglophones (30%) were also relatively in favour.

- It is normal for a FinTech to be able to see the details of my daily banking transactions

While respondents are divided on the idea of FinTech being able to see details of their daily banking transactions, 55% of users aged 25–35 find this normal.

All respondents were divided on this statement. On the other hand, users (35%), users aged 25–35 (36%), academics (36%) and men (35%) were relatively likely to find it normal for a FinTech to see details of their daily banking transactions.

¹⁰⁵ It should be noted that 43% of the participants disagreed and 31% gave a neutral score (5 or 6).

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- Before providing my personal information to a website, I read the terms of use

Overall, respondents agreed with this statement—57% of respondents said they read the terms of use. Since the latter are sometimes difficult to understand, this seems surprising to us. This high rate could be explained by the over-representation of academics (52%) among our respondents,¹⁰⁶ but we believe that this was more likely an answer of convenience.¹⁰⁷

Quebecers (27%) were the most likely to disagree with this statement. They were closely followed by Francophones (25%) and young people; in fact, 25% of users aged 25–35, 25% of those aged 25–35 and 24% of users aged 18–34 disagreed. One may wonder whether fewer of these respondents really read the terms of use or whether they are simply more forthright. In any case, the fact that young people are among those who disagree most seemed worrying to us.

- I know the remedies available to me in the event of a problem with a FinTech

Overall, participants somewhat disagreed with this statement.

The most likely to agree were users aged 25–35 (41%). The rate was 34% for all users, and 35% for those aged 25–35.

It should be noted that the respondents least likely to agree with this statement were future users (24%) and those aged 55 and over (18%).

These results are not surprising, as it is only normal that the FinTech users themselves would know (or believe they know) the most about their recourse. In addition, we are concerned that only a minority of users agreed with the statement.

6. Conclusions and recommendations

This study allowed us to make an incursion into the still little-known universe of FinTechs. It is a whole new world made up of diverse companies¹⁰⁸ to which, in a matter of minutes, anyone can disclose a lot of personal information and entrust large sums of money to new companies that they know very little about. However, while these companies are obliged to comply with certain obligations, such as dealing with a certified financial advisor—which is an excellent thing—they do not have sufficient oversight to ensure that consumers are well protected.

This raises many concerns. FinTechs' corporate websites are full of promotional jargon and, although they do include information on products and services, as far as we could ascertain, it is not always complete and accurate. To know what they are getting into, consumers will have to read sometimes

¹⁰⁶ This over-representation can be explained by the fact that the participants in our survey were all users or future users of FinTechs. However, this population contains proportionally more academics than the general population.

¹⁰⁷ Several studies show that consumers do not read the Terms of Use. One study them was recently carried out by the Internet Society, an American law association with an international focus. See: Daniel Rosenweg, "Les internautes ne lisent pas assez les conditions d'utilisation des sites" in *Le Parisien*, June 7, 2018. (On line, at: <http://www.leparisien.fr/high-tech/les-internautes-ne-lisent-pas-assez-les-conditions-d-utilisation-des-sites-07-06-2018-7758825.php>)

¹⁰⁸ Some FinTechs are financial institutions and therefore benefit from better oversight.

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complex legal documents, which will require time and concentration. However, they are encouraged to act quickly. In such circumstances, it is appropriate to question the quality of the consent they will be able to give.

Anyone who embarks on such a venture will find themselves dealing with a company that requires almost irreproachable behaviour, both in terms of the accuracy of the data they provide and the protections they use for their IT tools. The company itself, however, denies all liability in a multitude of circumstances—in some cases, the consumer cannot even rely on the information on the company's website. Moreover, information about the remedies available to them is often far from clear.

In such a context, it is particularly important to protect FinTech enthusiasts. As we have seen, these are largely consumers who appreciate the flexibility provided by robo-advisors and who see this as an opportunity to invest at a low cost through a process that they find relatively simple. They feel comfortable with new technologies, tend to invest in risky products (ETFs) and feel in control when they do transactions over the Internet. They value robot advice more than that of their elders and seem less concerned about protecting their personal information.

However, the answers they provided to our questions indicate some confusion and raise some concerns. For example, although they claim to know the remedies available to them, many believe that a FinTech is the website of a financial institution and do not all know that in Canada, there is a financial advisor behind each robot. It goes without saying that it is important to protect these consumers as well as anyone who will use the services of FinTech companies in the years to come.

Option consommateurs recommends:

That the federal and provincial authorities:

- Ensure that specialists in securities, financial services, privacy, and artificial intelligence and consumer associations work together to ensure that all important issues are taken into account to ensure better consumer protection with regard to FinTechs;
- Carefully study how FinTech companies operate in order to understand the issues that need to be taken into account to properly protect consumers;
- Improve provincial consumer laws by ensuring that provisions related to distance contracts, misrepresentation and the prohibition of arbitration clauses in consumer protection laws can be applied. In this context, inspiration may be found in the protections offered by Alberta's *Financial Consumers Act*, which includes some interesting measures.
- Study the consumer protection laws in foreign jurisdictions discussed in Section 3.4 of this report with a view to improving the protections available to Canadian consumers. There are several rules that could serve as a source of inspiration, notably those adopted in Singapore. Under the *Consumer Protection (Fair Trading) Act*, for example, an omission may constitute a misleading practice, the rules of evidence are relaxed, the benefit of the doubt is given to the consumer when the terms of a contract are ambiguous and, in the event of a dispute, the merchant has the obligation to prove that he has fulfilled his obligations. In addition, under the *Personal Data*

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Protection Act (PDPA), early notification to the relevant authority may result in the lessening of any fine imposed in the event of a sanction.

- Invest in privacy technologies to make them more effective in the context of FinTechs;
- Improve privacy laws to take into account the operations of FinTech companies and the new issues they give rise to. With this aim in view, lessons must be learned from what is happening on the ground and what is being done elsewhere in the world¹⁰⁹.
- To empower companies and encourage them to implement codes of conduct that take into account compliance with consumer protection and privacy laws as well as ethical rules with regard to artificial intelligence.
- Implement information strategies that adequately inform consumers and the public about FinTech issues, their rights and the remedies available to them.

To FinTech companies:

- Take the necessary steps to ensure that consumers have all the information they need to make an informed decision before committing themselves with a FinTech company, to ensure that they are able to make an informed decision about whether to deal with such a company;
- Draw inspiration from the ethical principles regarding artificial intelligence set forth in the Montreal Declaration with a view to implementing codes of conduct and improving their practices;
- Solicit the help of specialists in securities, financial services, law and artificial intelligence in order to perfect their offer to consumers.

To consumers:

- Be well informed about the identity of the FinTech company they have in mind;
- Verify how the company protects its customers' assets and personal information;
- File a complaint with the authorities if they believe that their rights have been violated as a result of doing business with a FinTech company.

¹⁰⁹ Some interesting leads can be found in section 3.4 of this report.