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## FAIR TRADING COMMISSION

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# *Report on the 2009 Standard Form Contracts Used By Commercial Banks*

CONSUMER PROTECTION DIVISION

DATE: December 11, 2012

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## 1.0 INTRODUCTION

### A Report of the 2009 Standard Form Contracts used by Commercial Banks

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#### Background and Overview of the Report

1.1 During the six (6) year period from 2003 to 2009, the Commission received fifteen (15) complaints against Commercial Banks. The Commission recognises the significance of these complaints and the possible impact of Unfair Contract Terms (UCTs) in the banking industry can have on consumers. Therefore, in an effort to assess the level of harm to consumers, the Commission embarked on an investigation of Standard Form Contracts (SFCs) utilised by Commercial Banks.

1.2 SFCs also known as ‘adhesion contracts,’ can be found in a variety of businesses. They are contracts that are presented to a party for acceptance but have not been individually negotiated. In such contracts, the business has a greater bargaining capacity over the consumer<sup>1</sup> and in most cases, the consumer is in no position to negotiate. Consumers are thus in a “take it or leave it” situation. This can give rise to the inclusion of UCTs in the contracts.

The authority for this undertaking is vested in Section 4(6) of the Fair Trading Commission Act, CAP. 326B. It states:

*“The Commission may on its own initiative or on the request of any person carry out any investigation that it considers necessary or desirable in connection with matters falling within the provisions of this Act, Utilities Regulations Act and any laws relating to consumer protection and fair competition which the Commission has jurisdiction to administer.”*

The Consumer Protection Act, CAP. 326D “the Act” governs whether a contract term is unfair. In accordance with the Act, several contracts of the six (6) Commercial Banks were reviewed. For the sake of consistency, the Commission examined those services which were common to all banks. These included:

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<sup>1</sup> The Act defines a consumer as an individual. See Section 2.0 for full definition

- *Client Agreement – Personal Loans*
- *MasterCard Cardholder Account*
- *Personal Loans – Terms & Conditions*
- *Mortgage Agreement*

Of the one thousand, two hundred and ninety-one (1,291) contract terms reviewed, fifty-six (56)<sup>2</sup> were found to be in breach of the Act. This represents approximately 4.3% of the total number of terms reviewed.

The terms of the contracts were analysed and cross-referenced against the general characteristics of UCTs as specified in the Act. The Commission is seeking compliance of those Banks contravening the Act through the modification or the removal of UCTs.

### **1.3 THE COMMISSION'S INVESTIGATION**

The following characteristics were found in the terms contravening the Act.

- (a) Banks can change/vary contract terms or charges attached to services without giving notice or a valid reason.
- (b) Imbalance in rights between supplier and customer, with supplier having superior rights;
- (c) Banks can limit their liability;
- (d) Banks can limit the liability of their agents; and
- (e) Banks can terminate or renew the contract at their sole discretion.

Although businesses can in fact alter their contract terms or charges attached to services without notice, Parts (2), (3) and (4)<sup>3</sup> of the Schedule of the Act played a

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<sup>2</sup> Please refer to Appendix A

<sup>3</sup> However, a contravention is negated if the conditions of Part 2, 3 and 4 are adhered to.

vital role in analysing the contracts for unfair terms since these sections could negate breaches by the bank. The fundamental feature of these parts of the Schedule is the imposition of conditions which the Banks must satisfy, in order to avoid breaching the Act.

These conditions make it mandatory for the bank to notify consumers of intended changes to agreements immediately or at the earliest opportunity. In addition, the consumer must be free to dissolve the contract without a penalty being imposed.

Where a consumer submits a complaint against a bank and it appears that the bank has breached paragraph 1(g) and 1(j) of the Schedule to the Act, the Commission ensures that the conditions stipulated in Parts (2), (3) and (4) of the Schedule have been met. If the bank has fulfilled the requirements, then the bank is not in breach of the Act.

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Part 2 of the Act states:

“1 (g) does not apply to a term by which a supplier of financial services reserves the right to terminate unilaterally a contract of indeterminate duration without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties immediately.”

Part 3 of the Act states:

“Paragraph 1(j) does not apply to a term under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties at the earliest opportunity and that the latter are free to dissolve the contract immediately.”

Part 4 of the Act states:

“Paragraph 1(j) does not apply to a term under which a supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract”

Paragraph 1(g) of the Schedule to the Act state that a term may be unfair if it has the object or effect of “Enabling the supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;...”

Paragraph 1(j) of the Schedule to the Act states that a term may be unfair if it has the object or effect of “enabling the supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract.”

## **1.4 THE COMMERCIAL BANK'S RESPONSES TO THE COMMISSION'S FINDINGS**

1.5 On June 1, 2011, the Commission informed all Banks of its preliminary findings and requested that the Banks review and modify the offending terms to ensure compliance with the Act. Furthermore, the Banks were also asked to examine all other SFCs which may contain terms of a similar nature and either amend or delete such terms.

Five (5) of the Banks responded to the Commission's preliminary findings in the following manner. They either:

- Deleted
- Suggested proposed amendments, or
- Rewrote some of their contracts

## **1.6 STRUCTURE OF THE REPORT**

Section One (1) provides an overview of the report. Section Two (2) examines the legal framework of SFCs under the Act. Section Three (3) provides a simple illustration of how the contract terms of the Commercial Banks were analysed and Sections Four (4) to Nine (9) of the report, have been dedicated to the six (6) Commercial Banks and outline the following:

- a) Original Unfair Contract Terms
- b) The Commission's Preliminary findings forwarded to the Banks on June 1, 2011
- c) The Banks' subsequent responses to the Commission's findings, and
- d) The Commission's comments to the suggested amendments.

Section Ten (10) summarises the Commissions' Findings and makes Recommendations.

## 2.0 LEGAL FRAMEWORK

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2.1 The legal framework which governs whether a SFC term is unfair, is the Act.

The following Sections of the Act will be applicable in this report:-

- Section 2 states:-

*“Consumer” – means an individual who*

*(a) Acquires from a supplier goods or services of a kind ordinarily intended for private use or consumption;*

*(b) Does not acquire the goods or services for the purpose of*

*i. Supplying them in trade or commerce; or*

*ii. Consuming them in the course of a process of production or manufacture; and*

*(c) In the case of goods, does not acquire them for the purpose of repairing or treating in trade or commerce other goods or fixtures on land.”*

- Section 3 states:-

*... “contract term” means a term in a consumer contract, being a term that has not been individually negotiated within section 4.*

- Section 4 (1) states:-

*“A contract term is not individually negotiated for the purposes of this Part or the Schedule if it was drafted in advance and the consumer was not able to influence the substance of the term.”*

- Section 6 states:-

*“A supplier shall ensure that any written contract term is expressed in plain and intelligible language.”*

- Section 7 states:-

*“A contract term is unfair if, to the detriment of the consumer it causes a significant imbalance in the rights of the supplier and the consumer.”*

- Section 8 states:-

*In determining whether a contract term is unfair, consideration is to be given to the following:*

- (a) the nature of the goods or services for which the contract was concluded;*
  - (b) all the other terms of the contract or of another contract on which it is dependent;*
  - (c) the interests of the supplier;*
  - (d) the interests of the particular class of consumers who are likely to adhere to the contract;*
  - (e) all the circumstances attending the conclusion of the contract at the time of its conclusion.*
- (2) In so far as a contract term is in plain, intelligible language, the assessment of its fairness shall not relate*
- (a) to the definition of the main subject-matter of the contract; or*
  - (b) to the adequacy of the price or remuneration as against the goods or services supplied in exchange....*
- (4) Without prejudice to the generality of subsection (1), a contract term which is described in the Schedule is unfair .*

- Section 9 states:-

*“An unfair contract term is unenforceable against the consumer”*

- The Schedule to the Act (see Appendix B)



2.2 The general characteristics of a UCT are captured in Sections 6, 7, 8 and the Schedule of the Act. These characteristics are summarised below:

- Supplier has superior rights over the consumer;
- Customer penalised if the contract is terminated but not the supplier;
- The ability of the supplier to change/vary contract terms, the price, the goods or service without notice;
- Supplier has the sole right to interpret the meaning of the contract;
- Supplier can avoid or limit the contract from being carried out;
- Supplier can terminate or renew the contract but the customer cannot;
- Supplier is the only party allowed to determine whether the contract has been breached;
- The right of the customer to sue the supplier during the contract is restricted;
- The font size of the contract is difficult to read, and contains confusing jargon and technical terms.

### **3.0 ANALYSIS OF STANDARD FORM CONTRACTS OF COMMERCIAL BANKS**

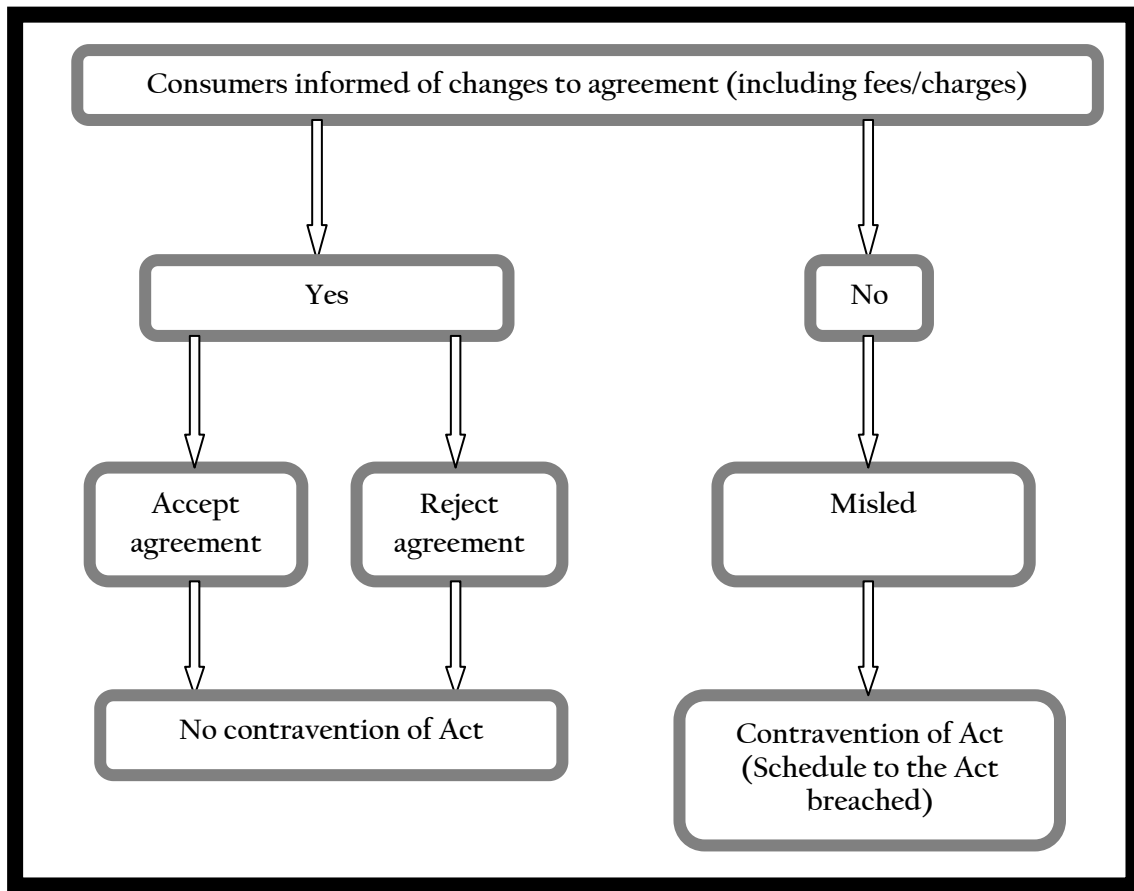
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3.1 The diagram at Figure. 1 provides a simple illustration of how the contract terms of Commercial Banks were analysed. For example, if any of the Banks decided to amend their contracts, the diagram illustrates how such changes would affect the Bank's compliance with the Act.

3.2 An important element that the diagram illustrates is the ability of the consumer to accept or reject changes to the agreement. It should be noted that the Act is not contravened if the Bank gives the consumer adequate notice of its intention to change the agreement. Where the consumer is not informed of the amendment, then the Bank would have misled the consumer and contravened the schedule to the Act. However, the Act specifies conditions (see parts 2 - 4 of the Schedule to the Act, Appendix B) under which a breach will not occur.

3.3 It can be concluded therefore, that the flow of information from the Bank to consumers is important in complying with the Act.

**Figure 1: Diagram Depicts How Changes to a Banking Contract Affects Compliance with the Consumer Protection Act, CAP. 326D**



The full analysis of the UCTs identified for each Bank and the Banks' responses (including the Banks' suggested amendments) to the UCTs is provided in Sections Four (4) to Nine (9) listed below.

**CIBC FirstCaribbean  
International Bank**

#### 4.0 CIBC FIRSTCARRIBEAN INTERNATIONAL BANK (CIBC FCIB)

#### 4.1 PERSONAL ACCOUNT AGREEMENT

##### Original Clause

##### CLAUSE 10 (B) - *"Interest Rates"*

*"The Bank may change applicable interest rates at any time in the future without prior notification to me. The change will become effective on the date stipulated and will be deemed to have been unequivocally accepted by me."*

#### 4.2 Commission's Comments

This clause is unfair as consumers cannot consent to futuristic agreements. Requiring consumers to consent to such agreements creates an imbalance in the rights of the Bank and the consumer, to the detriment of the consumer. Section 7 of the Act states:

*"A contract term is unfair if, to the detriment of the consumer it causes a significant imbalance in the rights of the supplier and the consumer."*

4.3 In addition, paragraph 1(j) of the schedule to the Act deems clauses which allow the supplier to unilaterally alter the terms of the contract without a valid reason to be unfair. However, Part 3 of the Act also makes the breach contingent upon the Bank's fulfilment of certain conditions. Paragraph 1(j) of the Schedule to the Act states that a term may be unfair if it has the object or effect of:

*"enabling the supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract."*

Part 3 of the Schedule to the Act states:

*"Paragraph 1(j) does not apply to a term under which a supplier of financial services reserves the right to alter the rate of interest payable*

*by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties at the earliest opportunity and that the latter are free to dissolve the contract immediately."*

#### **4.4 Bank's Amended Clause received October 2012**

*"The Bank may change applicable interest rates at any time in the future and notify me by mail or any means of public notification. The change will become effective after thirty days of the date that the notice is mailed or published, and will be deemed to have been unequivocally accepted by me if I do not communicate my non-acceptance of the charge in the applicable interest rate to The Bank within the thirty day period. I acknowledge and agree that notwithstanding the foregoing The Bank may give me less than thirty days' notice of changes in interest rates where such changes are mandated by a regulatory authority or government body with authority over The Bank. The Bank will only be required to give me prompt notice of such changes in the interest rates."*

#### **4.5 Commission's Comment on Clause received October 2012**

The amended clause is acceptable.

#### **4.6 Original Clause**

##### **CLAUSE 12(IV)**

*"The Bank's liability."*

*"The Bank will not be responsible for any costs, damages or expenses that I may incur due to The Bank's acting or failing to act upon my electronic instructions, except for The Bank's gross negligence or wilful misconduct where The Bank's liability will be limited to the amount of the transaction. The Bank will not in any event be liable for any special, incidental, consequential or indirect damages or losses."*

#### 4.7 **Commission's Comments**

This clause is unfair since it seeks to limit CIBC FCIB's liability for the bank "*...acting or failing to act upon my electronic instructions, except for **The Bank's gross negligence or wilful misconduct.***" Paragraph 1(b) of the Schedule to the Act states that a term may be unfair if it has the object or effect of:

*"inappropriately excluding or limiting the legal rights of the consumer vis-a-vis the supplier or another party in the event of total or partial non-performance or inadequate performance by the supplier of any of the contractual obligations of the supplier, including the option of offsetting a debt owed to the supplier against any claim which the consumer may have against him."*

4.8 The statement "**except for our gross negligence or wilful misconduct**" in this clause is too high a degree of negligence to prove. According to Blacks Law Dictionary, Ninth Edition, "*negligence*" is defined as "*the failure to exercise the standard care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally wantonly, or wilfully disregarding of others' rights.*"

4.9 On the other hand, it defines gross negligence as "*...a conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party who may typically recover exemplary damages.*"

*"... several courts... have construed gross negligence as requiring wilful wanton, or reckless misconduct, or such utter lack of all care as will be evidence thereof..."*

#### 4.10 **Bank's Amended Clause received October 2012**

*"...The Bank will not be responsible for any costs, damages, demands or expenses that I may incur due to The Bank's acting or failing to act upon my electronic instructions, except for The Bank's negligence or misconduct where The Bank's*

*liability will be limited to the amount of the transaction. The Bank will not in any event be liable for any special, incidental, consequential or direct damages or losses”.*

**4.11 Commission’s Comment on Clause received October 2012**

The amended clause is acceptable.

**4.12 Original Clause**

**CLAUSE 12(V)**

*“Indemnity Clause.”*

*“I will indemnify and save The Bank harmless from any claims, damages, demands and expenses that **The Bank** incurs (other than due to its own gross negligence or willful misconduct), including among other things, all legal fees and expenses, arising from **The Bank** acting, or declining to act, on any of my instructions given under this agreement. I provide this indemnity in addition to any other indemnity or assurance against loss provided by me to **The Bank**.”*

**4.13 Commission’s Comments**

See comments for Clause 12 (iv) at paragraphs 4.7 – 4.9.

**4.14 Bank’s Amended Clause received October 2012**

*“...I will indemnify and save The Bank harmless from any claims, damages, demands and expenses that The Bank incurs (other than due to its own negligence), including among other things, all legal fees and expenses, arising from The Bank acting, or declining to act, on any of my instructions given under this agreement. I provide this indemnity in addition to any other indemnity or assurance against loss provided by me to The Bank.”*

**4.15 Commission’s Comment on Clause received October 2012**

The clause in its amended form is acceptable.



#### 4.16 CREDIT CARD AGREEMENT

##### Original Clause

#### 4.17 CLAUSE 6

*“Credit Limit. The Credit Limit appears on your Card Carrier (the document which accompanies your credit card) when it is issued or re-issued, it also appears on your monthly Credit card statement. You agree that from time to time we may review the Account and increase or decrease the Credit Limit without prior notice, based on overall Account performance.”*

#### 4.18 Commission’s Comments

This clause is unfair and breaches paragraph 1 (i) of the Schedule to the Act. CIBC FCIB is asking its consumers to agree to changes to the credit limit without being notified of the change. A credit limit is a fundamental component of the agreement and should not be changed without informing the consumer. Paragraph 1 (i) states that a term may be unfair if it has the object or effect of:

*“irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract.”*

Therefore, CIBC FCIB should notify consumers if they are going to increase or decrease the credit limit on their credit card. CIBC FCIB should therefore amend the clause to prevent it being deemed an unfair term.

#### 4.19 Bank’s Amended Clause received October 2012

*“We note the Commission’s comments that the Bank should inform customers of decreases in credit limit as well as increases. The Commission wishes to have further discussions on this point and the Bank is open to have such discussion with a view of understanding the specific concerns of the Commission.”*

#### 4.20 **Commission's Comments on Clause received October 2012**

Most consumers would consider an increase in their credit limit to be advantageous. However, consumers should always be made aware of all changes so that, they can make an informed decision. The Commission is of the view that the Bank should notify consumers of an increase in their Credit Limit.

#### 4.21 **Original Clause**

##### **CLAUSE 20**

*"...Certain card services and benefits are supplied by third parties; we are not liable for any services or benefits not directly supplied by us..."*

#### 4.22 **Commission's Comments**

CIBC FCIB is attempting to limit the liability of its agents. It is therefore necessary to determine if the third party is acting as an agent of the Bank or as a principal in his/her own capacity. This will affect whether or not the term is viewed as unfair.

If the third party is acting as an agent of the Bank, then the Bank ought not to be able to exclude its liability. Paragraph 1 (b) of the Schedule 1 (b) of the Act states that a term may be unfair if it has the object or effect of:

*"inappropriately excluding or limiting the legal rights of the consumer vis-a-vis the supplier or another party in the event of total or partial non-performance or inadequate performance by the supplier of any of the contractual obligations of the supplier, including the option of offsetting a debt owed to the supplier against any claim which the consumer may have against him."*

4.23 In addition, this clause may be considered unfair under Paragraph 1(n) of the schedule if the third party is an agent of the Bank. The clause has the object or effect of:

*“limiting the supplier’s obligations to respect commitments undertaken by his agent, or making his commitments subject to compliance with a particular formality.”*

4.24 It is also necessary for CIBC FCIB to provide the Commission with the exact definition of “services”. For example, “services” may refer to benefits, services or features that do not relate to the credit card service but rather to fringe benefits that are linked to this programme.

A definition would assist the Commission in determining the true nature of the service and whether or not the clause is unfair.

#### 4.25 **Bank’s Response to UCT**

The Bank *“... recognizes that outsourcing can increase its dependence on third parties, which may increase its risk....The Bank, is however committed to managing outsourcing risk by complying with applicable laws and regulatory guidelines... Further, the Bank has specifically disclosed this outsourcing to cardholders in the Cardholders Agreement and it is on this basis that the cardholder can decide whether or not to contract with the Bank.”*

#### 4.26 **Commission’s Comments**

The Bank has clearly stated that it will comply with all applicable laws of the country in which it operates.

Where the law of agency is applicable with respect to engaging third parties, consumers should be capable of obtaining redress from the Bank. The clause is acceptable.

#### 4.27 Original Clause

##### CLAUSE 23

*"You understand that optional services may be available to you at an additional cost. Further, you understand that all services available with the Card may be governed by separate agreements, terms, or authorisations by which you agree to be bound. You also understand that firms independent of FirstCaribbean supply some of these services and that FirstCaribbean shall not have any responsibility or liability with respect to such services. To the extent that we may provide any other cardholder services and products, any such services and products shall be subject to modification or discontinuance by us, at any time, without notice."*

#### 4.28 Commission's Comments

Consumers should be given the option to decline additional features or services if there is a charge attached. Paragraph 1(i) of the Schedule to the Act states that a term may be unfair if it has the object or effect of:

*"irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract."*

#### 4.29 Banks Amended Clause received October 2012

*"You understand that optional services may be available to you at an additional cost. Further, you understand that optional services available with the Card are governed by separate agreements, terms, or authorisations by which you may agree to be bound. You also understand that firms independent of FirstCaribbean supply some of these services and that FirstCaribbean shall not have any responsibility or liability with respect to such services. To the extent that we may provide any other cardholder services and products, any such services and products shall be subject to modification or discontinuance by us, at any time, without notice."*

#### 4.30 Commission's Comments on Clause received October 2012

The Bank has removed the uncertainty in the clause by replacing the word 'may' with 'are'. The amended clause is acceptable.

#### 4.31 Original Clause

##### CLAUSE 26

*"Termination of Agreement – You may cancel this Agreement by informing us in writing that you want to do so and returning the Card to us. We may terminate this Agreement at anytime without notice if you are in breach of this Agreement, if you are in default with respect of any other loan arrangement you may have with us, or if we receive information about you which leads us to believe that you may be unable to repay us the Debt..."*

#### 4.32 Commission's Comments

This clause is unfair since it allows for disproportionate rights of termination of the contract between the supplier and the consumer. The manner in which the contract can be terminated should be applicable to both parties of the contract. Section 7 of the Act states:

*"A contract is unfair if, to the detriment of the consumer, it causes a significant imbalance in the rights of the supplier and the consumer."*

The clause should be amended.

#### Commission's Comments on Clause received October 2012

*"You may cancel this Agreement by informing us in writing that you want to do so and returning the Card to us. We may terminate this Agreement or suspend your Account privileges at any time if you are in breach of this Agreement, if you are in default with respect of any other loan arrangement you may have with us, or if we receive information about you which leads us to believe that you may be unable to*

*repay us the Debt, however, if we terminate the Agreement or suspend your Account privileges we will notify you*".

*"The Card (s) is always our property and you are required to give it back to us, or someone acting on our behalf when requested or destroy the Card..."*

*We also wish to clarify that the statement "if we receive information about you which leads us to believe that you may be unable to repay us the debt". This instances in which this may arise is for example, if the Bank is made aware of a judgement debt against the Cardholder or the Cardholder is bankrupt or other analogous situations which may affect any Cardholder's ability to repay a debt.*

#### 4.33 **Commission's Comments on Clause received October 2012**

The clause in its amended form is acceptable.

#### 4.34 **Original Clause**

##### **CLAUSE 37**

##### ***"Validity of Communications"***

*"All your Communications that FirstCaribbean accepts and acts upon will be considered to be valid and authentic. This will be the case even if, among other things, they did not come from you, were not properly understood by us (except for our gross negligence or wilful misconduct) or were from any of your previous or later Communications. Communications will only be valid at the FirstCaribbean office at which they are received."*

#### 4.35 **Commission's Comments**

With regards to *"gross negligence"* or *"wilful misconduct"*, please refer to Clause 12 (iv) at paragraphs 4.6 - 4.9.

Paragraph 1(b) of the Schedule to the Act states that a term may be unfair if they have the object or effect of:

*“inappropriately excluding or limiting the legal rights of the consumer vis-a-vis the supplier or another party in the event of total or partial non-performance or inadequate performance by the supplier of any of the contractual obligations of the supplier, including the option of offsetting a debt owed to the supplier against any claim which the consumer may have against him.”*

CIBC FCIB should therefore amend the clause to prevent it being deemed an unfair term.

**4.36 Bank’s Amended Clause received October 2012**

**“Validity of Communications”**

*“All your Communications that FirstCaribbean accepts and acts upon will be considered to be valid and authentic. This will be the case even if, among other things, they did not come from you, were not properly understood by us (except for our negligence or misconduct) or were from any of your previous or later Communications. Communications will only be valid at the FirstCaribbean office at which they are received.”*

**4.37 Commission’s Comments on Clause received October 2012**

FirstCaribbean has removed the words *“Gross Negligence”* and *“Wilful Misconduct”* and replaced with *“Negligence and Misconduct”*.

The clause in its amended form is acceptable.

**4.38 Original Clause**

**CLAUSE 40**

*“Indemnity Clause” – You will indemnify and save FirstCaribbean harmless from any claims, damages, demands and expenses that we incur (other than due to our own gross negligence or wilful misconduct), including among other things all legal fees and expenses, arising from FirstCaribbean acting, or declining to act, on any of your*

*Communications given under this Agreement. This indemnity is in addition to any other indemnity or assurance against loss provided by you to FirstCaribbean.*

**4.39 Commission's Comments**

See comments for Clause 12 (iv) at paragraphs 4.6 – 4.9.

**4.40 Bank's Amended Clause received October 2012**

*"Indemnity Clause" – You will indemnify and save FirstCaribbean harmless from any claims, damages, demands and expenses that we incur (other than due to our own negligence or misconduct), including among other things all legal fees and expenses, arising from FirstCaribbean acting, or declining to act, on any of your Communications given under this Agreement. This indemnity is in addition to any other indemnity or assurance against loss provided by you to FirstCaribbean."*

**4.41 Commission's Comments on Clause received October 2012**

FirstCaribbean has removed the words "*Gross Negligence*" and "*Wilful Misconduct*" and replaced with "*Negligence and Misconduct*".

The amended clause is acceptable.



# **RBC Royal Bank Limited**

RBC Royal Bank Limited has several terms which have not been amended. The Principals of the Bank have indicated that they are committed to working with the Fair Trading Commission to make the required amendments. The Commission will continue to work with the RBC Royal Bank Limited to resolve these matters.

*RBC Royal Bank Limited has merged with RBTT Bank Barbados Limited*

## 5.0 RBC ROYAL BANK (BARBADOS) LIMITED (RBC)

### 5.1 *CLIENT AGREEMENT - PERSONAL DEPOSIT ACCOUNTS*

#### Original Clause

#### CLAUSE 2

*“General Agreement to terms: This Agreement applies to each account. It replaces all prior agreements between you and us for an Account. Completion of the Signature Card serves as an acknowledgement that you received and read the RBC Client Agreement. Further, that you have understood and agreed to its terms and conditions and to the clauses written on the Signature Card. Unless we otherwise agree, you must make all payments under this agreement in money which is legal tender at the time of payment.”*

### 5.2 **Commission’s Comments**

This clause states that *“Completion of the Signature Card serves as an acknowledgement that you received and read the RBC Client Agreement.”*

The signature of the consumer on the Signature Card does not indicate that the consumer has received, read and understands the Agreement. RBC should ensure that customers have in fact received a copy of the Client Agreement prior to signing the Signature Card and an RBC representative should go through the agreement with the customer. Failing to provide customers with the agreement contravenes Paragraph 1(i) of the Schedule to the Act which states that a term may be unfair if it has the object or effect of:

*“irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract.”*

RBC should therefore amend the clause to prevent it being deemed an unfair term.

### 5.3 Bank's Response to UCT

The agreement has been amended. It states: "...Your agreement with us governing your Personal Deposit Account comprises this Agreement and the Signature Card. You are required to sign the Signature Card in acknowledgement of your acceptance of and agreement with the terms and conditions of this Agreement and the Signature Card. Please ensure that you have received a copy of this Agreement and the Signature Card prior to signing the Signature Card..."

### 5.4 Commission's Comments

The amendment is acceptable.

### 5.5 Original Clause

#### **CLAUSE 22 - Liability for Damages**

*"We will not be liable to you in contract or tort or out of breach of statutory duty or custom or in any way from loss, damage or inconvenience incurred howsoever arising except to the extent that there has been negligence on our part or fraud on our part, even if we have been previously advised of the possibility of such damages. We shall be under no liability of any sort, however arising or caused to you, and shall not in any circumstances in particular whether we are negligent or not be liable for any indirect, consequential, special aggravated, punitive or exemplary damages, whether in contract or in tort or out of breach of statutory duty or custom or in any other way.*

*We will not be liable to you, in any circumstances, in particular whether we were negligent or not for any loss or damage suffered by you resulting from:*

- a) any failure error, **malfunction**, delay or inaccessibility of any machine, system or equipment,*
- b) any failure, error or delay by any third party,*
- c) your failure to fulfil any of your obligations under this agreement, or*
- d) any circumstances beyond our control.*

*You also acknowledge the limitations on our liability in this Agreement, including those in Section 11, 12, 13, 18 and 20”.*

## 5.6 **Commission’s Comments**

This clause purports to exclude different levels of liability. In the first part of the clause, RBC has stated that they will only be liable where there has been loss, damage or inconvenience due to negligence or fraud on their part.

- 5.7 However, the second part of the clause is wider and can encompass the first part. It appears that RBC accepts liability in the first instance, but rescinds it in the second part of the clause which states, *“We shall be under no liability of any sort however arising or caused to you, and shall not in any circumstances, in particular whether we were negligent or not, be liable for any indirect, consequential, special aggravated, punitive or exemplary damages...”*. Therefore, loss and damages due to negligence or fraud, maybe negated by the second part of the clause. Section 7 of the Act states:

*“A contract is unfair if, to the detriment of the consumer, it causes a significant imbalance in the rights of the supplier and the consumer.”*

- 5.8 The clause is also unfair under paragraph 1(b) of the Schedule to the Act which states that a term may be unfair if it has the object or effect of:

*“inappropriately excluding or limiting the legal rights of the consumer vis-a-vis the supplier or another party in the event of total or partial non-performance or inadequate performance by the supplier of any of the contractual obligations of the supplier, including the option of offsetting a debt owed to the supplier against any claim which the consumer may have against him.”*

RBC should therefore amend the clause to prevent it being deemed an unfair term.

## 5.9 Bank's Response to UCT

The amended clause states *"We will not be liable to you in contract or tort or out of breach of statutory duty or custom or in any other way for any loss, damage, cost, expense (collectively "damages") or inconvenience incurred howsoever arising except to the extent that there has been negligence or fraud on our part. In any event, our liability is limited to direct damages only and we are not responsible to you for indirect, consequential, special aggravated, punitive or exemplary damages, whether in contract or in tort or out of breach of statutory duty or custom or in any other way. Furthermore, we will not be liable to you in any circumstances for any damages suffered by you resulting from:*

- a) any failure error, malfunction, delay or inaccessibility of any machine, system or equipment;*
- b) any failure, error or delay by any third party;*
- c) your failure to fulfil any of your obligations under this agreement; or,*
- d) any circumstances beyond our control.*

*You also acknowledge the limitations on our liability in this Agreement, including those in Section 11, 12, 13, 18 and 20".*

## 5.10 Commission's Comments

Clarity has been brought to the clause by the amendment with respect to RBC accepting liability in the first instance, but rescinds it in the second part of the clause which states, *"We shall be under no liability of any sort however arising or caused to you, and shall not in any circumstances, in particular whether we were negligent or not, be liable for any indirect, consequential, special aggravated, punitive or exemplary damages..."*.

However, there is still the issue relating to the Bank rejecting liability for technical problems e.g. malfunctioning of their equipment.

RBC should accept liability for malfunctions where they are solely responsible.

#### 5.11 LOAN AGREEMENT

##### **Original Clause**

##### ***“REPAYMENT”***

##### **CLAUSE 5(C)**

*“We reserve the right at any time without notice to you:*

- i. To add to the principal amount of the loan outstanding from time to time any sum together with interest thereon paid by us under any one or more of the Security Documents.*
- ii. To vary the amount of the monthly instalments payable by you under this facility.”*

#### 5.12 Commission’s Comments

RBC should inform consumers of their intended actions so that they can make informed decisions about whether or not to terminate the agreement if the terms are, or become unfavourable.

Paragraph 1(i) of the Schedule to the Act states that a term may be unfair if they have the object or effect of:

*“irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract.”*

RBC should therefore amend the clause to prevent it being deemed an unfair term.

#### 5.13 Bank’s Response to UCT

No response received.

## 5.14 NOTICES

### **Original Clause**

#### **CLAUSE 16(B)**

*“Every notice or other communication, shall, unless otherwise provided in this letter, be deemed to have been received (if sent by post) fourteen (14) days after dispatch and (if delivered personally) at the time of delivery provided that any notice or other communication to be made by you to us shall be effective only when we actually receive it.”*

## 5.15 Commission’s Comments

This clause is unfair since it allows for disproportionate rights between the supplier and the consumer, with the supplier having superior rights. The length of time for the receipt of notice should be the same for both parties to the contract. This term may be deemed unfair under Section 7 of the Act which states:

*“A contract is unfair if, to the detriment of the consumer, it causes a significant imbalance in the rights of the supplier and the consumer.”*

RBC should therefore amend the clause to prevent it being deemed an unfair term.

## 5.16 Bank’s Response to UCT

No response received.

## 5.17 CLIENT AGREEMENT

**RBC and RBTT submitted a client agreement for our examination. The agreement is dealt with under this section.**

## 5.18 PERSONAL DEPOSIT ACCOUNT/DEPOSIT CLIENT AGREEMENT

### CLAUSE 4 - *Overdrafts*

*"...If we allow you to overdraw an Account (or exceed your Overdraft Limit) from time to time, we may refuse to continue to do so at any time, without notice to you..."*

### 5.19 Commission's Comments

The Bank should notify the consumer before it discontinues the overdraft.

### 5.20 CLAUSE 5 (E) - *Access to your Account*

*"We can refuse a deposit to an Account or refuse to accept an item"*

### 5.21 Commission's Comments

The Bank should provide the consumer with the reason for the refusal at the time he/she attempts to make the deposit.

### 5.22 CLAUSE 11 - *Bill Payment Instructions*

*"If you give us instructions to pay any bill or invoice, you acknowledge that the instructions will result in funds being withdrawn from your Account on the date the instructions are given. You acknowledge that third parties may not treat payments as being received as of the date of your instructions. We will not be responsible for any losses resulting from problems or disputes such as a third party not crediting you or a payment for whatever reason (even if that third party is no longer included on your payee list) or charging you late fees or interest penalties. You agree to settle your dispute directly with that third party. You are responsible for ensuring that all payee information (including Account numbers and payee names) required by us to complete your payment instructions to a third party is accurate at all times. We may, without notice, update your payee information, including Account numbers or payee names, if informed of a change by that third party or if we think it necessary. We may, in our discretion, decline or refuse to act on an instruction given or purported to be given by you."*



### 5.23 **Commission's Comments**

With respect to this new clause, the Bank needs to clarify the grounds for stating, *"We may, in our discretion, decline or refuse to act on an instruction given or purported to be given by you"*.

Furthermore, the Bank must confirm if the consumer will be immediately informed that the Bank has not acted on his/her instructions.

### 5.24 **CLAUSE 13 - Account Verification**

*"You must regularly examine all Account transaction information in your Account statements, bankbook, or via any other method you have chosen to review your Account transaction information. You will notify us in writing of any errors in the Account transaction information within 45 days for the date of your paper Account statement or for any Account for which you have chosen a bankbook, electronic Account statement or other method, 45 days from the date of the transaction. If you do not notify us as required, you will have accepted the Account transaction information and Account statements as complete, correct and binding on you and we will be released from all claims by you in respect of the Account transaction information and Account statements, including any transaction and balance errors."*

### 5.25 **Commission's Comments**

RBC has limited the time for consumers identifying an error on account transactions to forty-five (45) days. In actual fact, it may be argued that there should be no time limit in cases where a consumer's *"statement contains any errors"*. Therefore, RBC should not limit the period to forty-five (45) days. Paragraph 1(b) of the Schedule to the Act states that a term may be unfair if it has the object or effect of:

*"inappropriately excluding or limiting the legal rights of the consumer vis-a-vis the supplier or another party in the event of total or partial non-performance or inadequate performance by the supplier of any of*

*the contractual obligations of the supplier, including the option of off-setting a debt owed to the supplier against any claim which the consumer may have against him."*

5.26 On the other hand, it may be contended that forty-five (45) days is an adequate time for consumers to check their transactions records. However, there are instances whereby, a consumer maybe unable to carry out this examination in the specified period. E.g. Sickness or being out of the island.

A more reasonable term would be where the consumer is given a thirty (30) calendar day period to contact the Bank with respect to errors found on their transaction statement. However, where this period has expired, if the consumer can provide the Bank with written proof of the error, then the period should be extended. A clause of this nature would be fair to the consumer and the Bank.

5.27 **CLAUSE 14 - Inactive Accounts**

*"Your Account will be designated as inactive if you have not initiated activity for at least two consecutive calendar years... If you do not initiate a transaction or communicate with us, an inactive fee will be charged to your Account each inactive year."*

5.28 **Commission's Comments**

The Bank should ensure that consumers are made aware of this clause. In addition, consumers should be informed of the amount of the fee. Furthermore, prior to the Account being designated "inactive", the consumer should be informed of the pending status of the Account.

5.29 **CLAUSE 16 - Application of Funds**

*"We may apply the funds on deposit in an Account against any debt or obligation you owe to the Bank or any deposit taking subsidiary of the Bank without notice to you..."*

### 5.30 **Commission's Comments**

The consumer should be informed that the Bank may carry out the actions stated at Clause 16.

### 5.31 **CLAUSE 26**

*"This Agreement contains your continuing consent and agreement and shall extend to and be binding upon us hereto and our respective heirs, executors, administrators, successors and assigns as permitted herein and shall ensure to the benefit of us, the Bank, and our successors and assigns. You shall not be entitled to transfer or assign all or any of your rights, benefits or obligations under this Agreement without our prior written consent (and/or any of our affiliates where necessary). We may at any time without your prior approval or consent transfer or assign all or any of our rights, benefits or obligations under this Agreement to any of our affiliates or any other person. We may disclose to potential or actual transferees or assignees, confidential information regarding you (including any such information provided by you to us) and we shall not be liable for any such disclosure."*

### 5.32 **Commission's Comments**

This would be a change in the agreement and the Bank must first inform the consumer of their intention to assign the agreement and seek the consumer's consent before doing so.

Where the consumer does not consent, the consumer should be given the opportunity to terminate the agreement without a penalty.

# **RBTT Bank Barbados Limited**

*RBTT Bank Barbados Limited has merged with RBC Royal Bank Limited*

## 6.0 **RBTT BANK BARBADOS LIMITED (RBTT)**

### 6.1 **MASTERCARD CARDHOLDER AGREEMENT**

#### **Original Clause**

#### **CLAUSE 1(D)**

*“The Bank reserves the right to, in its absolute discretion and without prior notice, at any time to cancel, refuse or reissue, renew or replace the Credit Card or to withdraw the right to use the Card, or to refuse any request for authorization of any particular Credit Card transactions and charges debited to the Account whether or not the same exceeds the stipulated credit limit.”*

### 6.2 **Commission’s Comments**

The Commission recognises that the Bank has certain rights regarding its Credit Card. However, it would be prudent for RBTT to notify its customers if they intend to cancel, revoke or restrict the use of the Credit Card. This clause can potentially be unfair under Section 7 of the Act which states:

*“A contract is unfair if, to the detriment of the consumer, it causes a significant imbalance in the rights of the supplier and the consumer.”*

RBTT should therefore amend the clause to prevent it being deemed an unfair term.

### 6.3 **Bank’s Response to UCT**

No response was received from the Bank. However, the Bank stated that it was addressing this issue.

### 6.4 **GENERAL**

#### **Original Clause**

#### **CLAUSE 13 (E)**

*“The Bank will not be liable if we are unable to perform our obligations under this Agreement due (directly or indirectly) to the failure of any machine, data processing system, or transmission link or an industrial dispute or anything outside our control or the control of our agents or sub-contractors*

## 6.5 **Commission’s Comments**

This clause is unfair since it attempts to limit the liability of RBTT and its agents and sub-contractors. Although breaches only occur if RBTT or their agents fail to perform their contractual duty, RBTT and their agents have an obligation to exercise due care in providing services to their customers. Paragraph 1(b) of the Schedule 1(b) of the Act states that a term may be unfair if it has the object or effect of:

*“inappropriately excluding or limiting the legal rights of the consumer vis-a-vis the supplier or another party in the event of total or partial non-performance or inadequate performance by the supplier of any of the contractual obligations of the supplier, including the option of off-setting a debt owed to the supplier against any claim which the consumer may have against him.”*

RBTT should therefore amend or delete the clause to prevent it being deemed an unfair term.

## 6.6 **Bank’s Response to UCT**

No response was received from the bank.

## 6.7 **“CLIENT AGREEMENT - PERSONAL DEPOSIT ACCOUNTS”**

### **Original Clause**

#### **CLAUSE 2 - General Agreement to Terms**

*“This Agreement applies to each account. It replaces all prior agreements between you and us for an Account. Completion of the Signature Card serves as an*

*acknowledgement that you received and read the RBTT Client Agreement. Further, that you have understood and agreed to its terms and conditions and to the clauses written on the Signature Card. Unless we otherwise agree, you must make all payments under this agreement in money which is legal tender at the time of payment."*

## **6.8 Commission's Comments**

This clause states that *"Completion of the Signature Card serves as an acknowledgement that you received and read the RBTT Client Agreement."*

The signature of the consumer does not indicate that the consumer has received, read and understands the Agreement. RBTT should ensure that customers have in fact received a copy of the Client Agreement prior to signing the Signature Card. Failing to provide customers with the agreement contravenes Paragraph 1(i) of the Schedule to the Act which states that a term may be unfair if it has the object or effect of:

*"irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract."*

RBTT should therefore amend the clause to prevent it being deemed an unfair term.

## **6.9 Bank's Response to UCT**

The agreement has been amended. It states: *"...Your agreement with us governing your Personal Deposit Account comprises this Agreement and the Signature Card. You are required to sign the Signature Card in acknowledgement of your acceptance of and agreement with the terms and conditions of this Agreement and the Signature Card. Please ensure that you have received a copy of this Agreement and the Signature Card prior to signing the Signature Card..."*

#### 6.10 Commission's Comments

The amendment is acceptable.

#### 6.11 Original Clause

##### **CLAUSE 22 - Liability for Damages**

*"We will not be liable to you in contract or tort or out of breach of statutory duty or custom or in any way from loss, damage or inconvenience incurred howsoever arising except to the extent that there has been negligence on our part or fraud on our part, even if we have been previously advised of the possibility of such damages. We shall be under no liability of any sort, however arising or caused to you, and shall not in any circumstances, in particular whether we are negligent or not be liable for any indirect, consequential, special aggravated, punitive or exemplary damages, whether in contract or in tort or out of breach of statutory duty or custom or in any other way.*

*We will not be liable to you, in any circumstances, in particular whether we were negligent or not for any loss or damage suffered by you resulting from:*

- (a) any failure error, **malfunction**, delay or inaccessibility of any machine, system or equipment,*
- (b) any failure, error or delay by any third party,*
- (c) your failure to fulfil any of your obligations under this agreement, or*
- (d) any circumstances beyond our control.*

*You also acknowledge the limitations on our liability in this Agreement, including those in Section 11, 12, 13, 18 and 20".*

#### 6.12 Commission's Comments

This clause purports to exclude different levels of liability. In the first part of the clause, RBTT has stated that they will only be liable where there has been loss, damage or inconvenience due to negligence or fraud on their part.



However, the second part of the clause is wider and can encompass the first part. It appears that RBTT accepts liability in the first instance, but rescinds it in the second part of the clause which states, *“We shall be under no liability of any sort however rising or caused to you, and shall not in any circumstances, in particular whether we were negligent or not, be liable for any indirect, consequential, special aggravated, punitive or exemplary damages...”*. Therefore loss and damages due to negligence or fraud, maybe negated by the second part of the clause. Section 7 of the Act states:

*“A contract is unfair if, to the detriment of the consumer, it causes a significant imbalance in the rights of the supplier and the consumer.”*

The clause is also unfair under paragraph 1(b) of the Schedule to the Act which states that a term may be unfair if it has the object or effect of:

*“inappropriately excluding or limiting the legal rights of the consumer vis-a-vis the supplier or another party in the event of total or partial non-performance or inadequate performance by the supplier of any of the contractual obligations of the supplier, including the option of offsetting a debt owed to the supplier against any claim which the consumer may have against him.”*

RBTT should therefore amend the clause to prevent it being deemed an unfair term.

### 6.13 **Bank’s Response to UCT**

The amended clause states *“We will not be liable to you in contract or in tort or out of breach of statutory duty or custom or in any other way for any loss, damage, cost expense or inconvenience (collectively damages) incurred howsoever arising except to the extent that there has been negligence or fraud on our part. **In any event, our liability is limited to direct damages only and we are not responsible to you for any indirect, consequential, special aggravated’***

*punitive or exemplary damages, whether in contract or in tort or out of breach of statutory duty or custom or in any other way.*

*Furthermore, we will not be liable to you in any circumstances for any damages suffer by you resulting from:*

- a) any failure error, malfunction, delay or inaccessibility of any machine, system or equipment,*
- b) any failure, error or delay by any third party,*
- c) your failure to fulfil any of your obligations under this agreement, or*
- d) any circumstances beyond our control.*

*You also acknowledge the limitations on our liability in this Agreement, including those in Section 11, 12, 13, 18 and 20”.*

#### **6.14 Commission’s Comments**

Clarity has been brought to the clause by the amendment with respect to RBTT accepting liability in the first instance, but rescinds it in the second part of the clause which states, *“We shall be under no liability of any sort however arising or caused to you, and shall not in any circumstances, in particular whether we were negligent or not, be liable for any indirect, consequential, special aggravated, punitive or exemplary damages...”*.

6.15 There is still the issue relating to the Bank rejecting liability for technical problems e.g. malfunctioning of their equipment.

RBTT should accept liability for malfunctions where they are solely responsible.

#### **6.16 CLIENT AGREEMENT**

**RBC and RBTT submitted a client agreement for our examination. The agreement is dealt with under this section.**

## 6.17 **PERSONAL DEPOSIT ACCOUNT/DEPOSIT CLIENT AGREEMENT**

### **CLAUSE 4 - Overdrafts**

*"...If we allow you to overdraw an Account (or exceed your Overdraft Limit) from time to time, we may refuse to continue to do so at any time, without notice to you..."*

### 6.18 **Commission's Comments**

The bank should notify the consumer before it discontinues the overdraft.

### 6.19 **CLAUSE 5 (E) - Access to your Account**

*"We can refuse a deposit to an Account or refuse to accept an item".*

### 6.20 **Commission's Comments**

The Bank should provide the consumer with the reason for the refusal at the time he/she attempts to make the deposit.

### 6.21 **CLAUSE 11 - Bill Payment Instructions**

*"If you give us instructions to pay any bill or invoice, you acknowledge that the instructions will result in funds being withdrawn from your Account on the date the instructions are given. You acknowledge that third parties may not treat payments as being received as of the date of your instructions. We will not be responsible for any losses resulting from problems or disputes such as a third party not crediting you or a payment for whatever reason (even if that third party is no longer included on your payee list) or charging you late fees or interest penalties. You agree to settle your dispute directly with that third party. You are responsible for ensuring that all payee information (including Account numbers and payee names) required by us to complete your payment instructions to a third party is accurate at all times. We may, without notice, update your payee information, including Account numbers or payee names, if informed of a change by that third party or if we think it necessary. We may, in our discretion, decline or refuse to act on an instruction given or purported to be given by you."*

## 6.22 Commission's Comments

The Bank should state the grounds for stating, *"We may, in our discretion, decline or refuse to act on an instruction given or purported to be given by you"*.

## 6.23 CLAUSE 13 - Account Verification

*"You must regularly examine all Account transaction information in your Account statements, bankbook, or via any other method you have chosen to review your Account transaction information. You will notify us in writing of any errors in the Account transaction information within 45 days for the date of your paper Account statement or for any Account for which you have chosen a bankbook, electronic Account statement or other method, 45 days from the date of the transaction. If you do not notify us as required, you will have accepted the Account transaction information and Account statements as complete, correct and binding on you and we will be released from all claims by you in respect of the Account transaction information and Account statements, including any transaction and balance errors."*

## 6.24 Commission's Comments

RBTT has limited the time for consumers identifying an error on account transactions to forty-five (45) days. In actual fact, it may be argued that there should be no time limit in cases where a consumer's *"statement contains any errors"*. Therefore, RBTT should not limit the period to forty-five (45) days. Paragraph 1(b) of the Schedule to the Act states that a term may be unfair if it has the object or effect of:

*"inappropriately excluding or limiting the legal rights of the consumer vis-a-vis the supplier or another party in the event of total or partial non-performance or inadequate performance by the supplier of any of the contractual obligations of the supplier, including the option of off-setting a debt owed to the supplier against any claim which the consumer may have against him."*

6.25 On the other hand, it may be contended that forty-five (45) days is an adequate time for consumers to check their transactions records. However, there are instances whereby, a consumer maybe unable to carry out this examination in the specified period. E.g. Sickness or being out of the island

A more reasonable term would be where the consumer is given a thirty (30) calendar day period to contact the Bank with respect to errors found on their transaction statement. However, where this period has expired, if the consumer can provide the Bank with written proof of the error, then the period should be extended. A clause of this nature would be fair to the consumer and the Bank.

6.26 **CLAUSE 14 - *Inactive Accounts***

*"Your Account will be designated as inactive if you have not initiated activity for at least two consecutive calendar years... If you do not initiate a transaction or communicate with us, an inactive fee will be charged to your Account each inactive year."*

6.27 **Commission's Comments**

The Bank should ensure that consumers are made aware of this clause. In addition, consumers should be informed of the amount of the fee. Furthermore, prior to the Account being designated "*inactive*", the consumer should be informed of the pending status of the Account.

6.28 **CLAUSE 16 - *Application of Funds***

*"We may apply the funds on deposit in an Account against any debt or obligation you owe to the Bank or any deposit taking subsidiary of the Bank without notice to you..."*

## 6.29 **Commission's Comments**

The consumer should be informed that the Bank may carry out the actions stated at Clause 16.

## 6.30 **CLAUSE 26**

*"This Agreement contains your continuing consent and agreement and shall extend to and be binding upon us hereto and our respective heirs, executors, administrators, successors and assigns as permitted herein and shall ensure to the benefit of us, the Bank, and our successors and assigns. You shall not be entitled to transfer or assign all or any of your rights, benefits or obligations under this Agreement without our prior written consent (and/or any of our affiliates where necessary). We may at any time without your prior approval or consent transfer or assign all or any of our rights, benefits or obligations under this Agreement to any of our affiliates or any other person. We may disclose to potential or actual transferees or assignees, confidential information regarding you (including any such information provided by you to us) and we shall not be liable for any such disclosure."*

## 6.31 **Commission's Comments**

The Bank should first inform the consumer of their intention to assign the agreement and seek the consumer's consent before doing so.

Where the consumer does not consent, the consumer should be given the opportunity to terminate the agreement without penalty.

**Republic Bank Barbados Limited**  
**formerly**  
**Barbados National Bank**

7.0 **REPUBLIC BANK OF BARBADOS formerly BARBADOS NATIONAL BANK (BNB)**

7.1 **FLEXITELLER REGULATIONS**

**Original Clause**

**CLAUSE 9**

*“The Bank may amend these regulations at any time on giving seven (7) days’ notice to the Cardholder.”*

7.2 **Commission’s Comments**

The Commission commends BNB for their willingness to notify consumers in the event of a change to the regulation. However, this clause still has the potential to breach paragraph 1(i) of the Schedule to the Act which states that a term may be unfair if it has the object or effect of:

*“irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract.”*

BNB should inform customers of all changes to the regulations. A minimum of thirty (30) calendar days’ notice is considered adequate time to notify consumers of such changes. BNB should therefore amend the clause to prevent it being deemed an unfair term.

7.3 **Bank’s Response to UCT**

BNB has agreed to amend this clause and give the consumer thirty (30) days’ notice. (Calendar days)

7.4 **Commission’s Comments**

The amendment to this clause is acceptable.



## 7.5 **Original Clause**

### **CLAUSE 11**

*"All notices and communications required or authorized by these Regulations to be given to a Cardholder shall be deemed sufficiently served or delivered to a Cardholder (or any one of joint Cardholders) forty-eight (48) hours after posting by ordinary post in a prepaid stamp envelope addressed to the Cardholder recorded on the Cardholder's Signature Card or as notified to the Bank from time to time. Any notice or communication by the Customer to the Bank may be served by being delivered personally to an officer of the Bank at the Bank's Headquarters at No. 1 Broad Street or at any Branch of the Bank where a PBM is located or by being posted in a priority prepaid envelope containing the notice addressed to the Bank at its said Headquarters."*

## 7.6 **Commission's Comments**

Please see Commission's comments to Clause 9 at paragraph 7.2.

## 7.7 **Bank's Response to UCT**

*"As it relates to the issue raised... regarding clause 11 ... which deals with the period of time after posting which the Bank will consider a document to have been delivered/received by the customer, the Bank is prepared to extend the period after which a document will be deemed to have been received by its customer from 48 hours after posting to 7 days after posting.*

*In conjunction with this, the Bank is also prepared to extend the notice period given to its customers regarding any changes to its terms and conditions from 14 days to 30 days... Therefore, practically, where the Bank seeks to change the terms and conditions of its agreements with customers, it will issue a written notice stating same and advise that the change will be effective 30 days after receipt of the said notice. Such notice will be deemed to have been received 7 days after posting."*

## 7.8 **Commission's Comments**

The clause is acceptable.

## 7.9 JOINT ACCOUNT FORM

### Original Clause

#### CLAUSE 3

*"In the event of the said account becoming overdrawn at any time we hereby agree that you shall be entitled to charge compound interest on the sum by which the said account is overdrawn calculated on daily balances with monthly rests and that the rate of interest charged from time to time shall be at your sole discretion up to but not exceeding 3% above the minimum commercial rate in force at that time. You shall not be bound to notify us in advance of any change in the rate of interest being charged but on receipt of a written request from us you shall be obliged to specify the rate of interest being charged at the time."*

## 7.10 Commission's Comments

Consumers should be informed of the interest rate charged for overdrawing their account. Failing to provide consumers with pertinent information that will enable them to make informed decisions creates an imbalance in rights between the supplier and the consumer, to the detriment of the consumer. Section 7 of the Act states:

*"A contract term is unfair if, to the detriment of the consumer, it causes a significant imbalance in the rights of the supplier and the consumer."*

7.11 In addition, the contract is also unfair since it requires consumers to consent to changes to the interest rate without notice. Paragraph 1(i) of the Schedule to the Act states that a term is unfair if it has the object or effect of:

*"irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract."*

It is recommended that consumers should be given at least thirty (30) calendar days' notice.

#### **7.12 Bank's Response to UCT**

BNB states that *"The joint account mandates referred do not give the customer the authority to operate this type of account as an Overdraft account in the normal course of business and the floating rate (3% above the minimum commercial rates) applies only in the event that the account goes into overdraft, and is applied as a penalty. Where the customer recognises that the account may go into overdraft, the customer can contact the Bank and find out the minimum commercial rate as at that date, plus 3%, which is the interest applicable in such circumstances. The commercial rate... changes as often as every three (3) months. It would be impractical.... To notify the customer by thirty (30) days...."*

#### **7.13 Commission's Comments**

The amendment to the clause is accepted.

**Scotiabank**

## 8.0 SCOTIABANK

### 8.1 SCOTIABANK MASTERCARD AGREEMENT

#### Original Clause

#### *“REQUESTING CARDHOLDER SERVICES”*

*“... You also understand that some of these services are supplied by firms independent of us and that we are not liable for them.”*

### 8.2 Commission’s Comments

This term is likely to be unfair since it attempts to limit the liability of Scotiabank. It is necessary to determine whether the third party is acting as an agent of the bank or as a principal in his/her own capacity. This may affect whether or not the term is viewed as unfair.

If the third party is acting as an agent of the bank, then the bank ought not to be able to exclude or limit their liability. Furthermore, the contract term would be unfair and Scotiabank would have contravened the Act.

Paragraph 1(b) of the Schedule to the Act states that a term may be unfair if it has the object or effect of:

*“inappropriately excluding or limiting the legal rights of the consumer vis-a-vis the supplier or another party in the event of total or partial non-performance or inadequate performance by the supplier of any of the contractual obligations of the supplier, including the option of off-setting a debt owed to the supplier against any claim which the consumer may have against him.”*

Scotiabank should also provide the Commission with the exact definition of *“services”*. Services may refer to benefits or features that do not relate to the credit card service but rather to fringe benefits that are linked to a particular

programme. E.g. Magna Reward Points or American Airlines Aadvantage Miles.

### 8.3 **Bank's Amended Clause received October 2012**

The bank has stated in their response dated October 22, 2012, *"we expect to be rolling out a new Credit Card Cardholder Agreement before the end of the calendar year that will incorporate expanded language advising the customer the Bank is not responsible for the actions of 3<sup>rd</sup> parties. I attach a copy of the cardholder agreement with the specific language..."*

#### **Below is an extract from Scotiabank's proposed "Credit Card Cardholders Agreement**

*"In addition, third parties will provide some of the benefits and services associated with the Card. These third parties, and not us, are responsible to you for the services and benefits offered or provided by them."*

### 8.4 **Commission's Comments on Clause received October 2012**

The clause is acceptable. However, it would be prudent for Scotiabank to provide customers with the names and addresses of third parties prior to signing the contract.

### 8.5 **Original Clause**

#### **"TELLING US ABOUT ERRORS IN YOUR STATEMENT"**

*"If your statement contains any errors, you must tell us within 15 days of the date of the statement. If you do not receive your statement within 15 days of the date of the statement, you must inform us promptly in writing of such non-receipt. If you do not advise us that you have not received your statement, at the end of the 15 days from the date of the statement, the statement will be considered correct **unless you can provide us with written proof that it is not.**"*

## 8.6 Commission's Comments

This clause is unfair since it seeks to limit Scotiabank's liability to fifteen (15) days for any errors on the statement. The time period is too short. In cases where a consumer's "statement contains any errors," Scotiabank should not limit the period to fifteen (15) days. In actual fact, there should be no time limit. Paragraph 1(b) of the Schedule to the Act states that a term may be unfair if it has the object or effect of:

*"inappropriately excluding or limiting the legal rights of the consumer vis-a-vis the supplier or another party in the event of total or partial non-performance or inadequate performance by the supplier of any of the contractual obligations of the supplier, including the option of offsetting a debt owed to the supplier against any claim which the consumer may have against him."*

Scotiabank should therefore amend the clause to prevent it being deemed an unfair term.

## 8.7 Bank's Amended Clause received October 2012

The Bank stated – "Without waiving our legal rights, it is our practice to review the individual circumstances of each claim that is submitted and to render a decision on whether to accept a claim that is delayed based on those circumstances."

## 8.8 Commission's Comments on Clause received October 2012

The clause is acceptable.

## 8.9 GENERAL TERMS AND CONDITIONS FOR ALL DEPOSIT ACCOUNTS

### Original Clause

*"HOW WE CAN CONTACT EACH OTHER"*

### CLAUSE 2

*"...All statements and notices we have agreed to give you will be sent to the address most recently notified by you, to us, and will be deemed to have been received by you five businesses days after it has been sent..."*

#### 8.10 **Commission's Comments**

It would be prudent of Scotiabank to provide consumers with adequate notice so that an informed decision can be made. Five (5) businesses days is inadequate where the purpose of the notice is to advise consumers of changes to the Agreement or fee structure. Paragraph 1(i) of the Schedule to the Act states that a term may be unfair if it has the object or effect of:

*"irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract."*

8.11 Furthermore, Clause 3 states *"Any instructions to us may be given in person at your branch or delivered to the branch in writing. We will accept instructions through the post, when we receive them at your branch, but we are not responsible for delays or failure of delivery of such instructions."*

This clause when linked with Clause 2, creates disproportionate rights between the supplier and the consumer, with the supplier having superior rights. The length of time for the receipt of notice should be the same for both parties to the contract. Section 7 of the Act states:

*"A contract is unfair if, to the detriment of the consumer, it causes a significant imbalance in the rights of the supplier and the consumer."*

Scotiabank should therefore amend the clause to prevent it being deemed an unfair term.

#### 8.12 **Bank's Response to UCT**

*"In our view, that provision is reasonable for the following reasons:*



- *That provision relates only to the determination of "deemed receipts" when notices are sent by mail, and is entirely distinct from the notice period that Scotiabank actually gives its customers of changes to its fees and services, which is 30 days;*
- *We rely on the customer to keep us advised of their address and when they do not we cannot communicate with them by mail; the same considerations do not apply **when** they need to contact their branch;*
- *The revised PFSA contains enhanced options for the customer to communicate with the Bank, including a new Telephone/Fax/Email Agreement;*
- *"...Scotiabank is expanding the channel of communication that it uses to communicate with its customers, including: posting notices on ATM screens, notices on our website, as well as other traditional options such as including notices in statements".*

### 8.13 **Commission's Comments**

Based on the fact that Scotiabank is extending its means of communicating with its customers to include posting notices on ATM screens and on their website, as well as other traditional options such as including notices in statements, the clause seems reasonable and is accepted.

### 8.14 **Original Clause**

#### **"YOUR PAYMENT OBLIGATIONS TO US"**

##### **CLAUSE 5**

*"Fees – We can provide you with details of the monthly fees and service charges when you request them. We may vary at our discretion all charges payable by you."*

#### 8.15 **Commission's Comments**

Scotiabank should inform consumers of charges attached to their services as well as any changes to those charges/fees. This clause is unfair since it requires consumers to consent to charges/fees that they do not know exist. Paragraph 1(i) of the Schedule to the Act states that a term is unfair if it has the object or effect of:

*"irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract."*

It is recommended that consumers be given at least thirty (30) days' calendar notice. Scotiabank should therefore amend the clause to prevent it being deemed an unfair term.

#### 8.16 **Bank's Response to UCT**

*"...Scotiabank's new retail lending documentation and revised PFSA, contain enhanced disclosure of rates and fees. The language that you quoted in your letter will not appear in the revised PFSA. ....Whenever a customer obtains a new deposit product, or is approved for a loan/credit product, the customer will be provided with the Rates and Fees Schedule for that product..."*

#### 8.17 **Commission's Comments**

Response is reasonable and accepted.

#### 8.18 **SCOTIACARD AGREEMENT**

**Original Clause**

**LIMITATION OF LIABILITY**

**CLAUSE 7**

*“We are not liable to you for any delay, loss, damage or inconvenience that results from providing or failing to provide any Service, except where such losses result from technical problems, Bank errors or system malfunctions for which the Bank is solely responsible. Also, we are not responsible for your acts of omission or those of any third party.”*

#### **8.19 Commission’s Comments**

If the third party is an agent of Scotiabank, then the bank cannot limit its liability. Paragraph 1(n) of the Schedule to the Act states that a term may be unfair if it has the object or effect of:

*“limiting the supplier’s obligation to respect commitments undertaken by his agents, or making his commitments subject to compliance with a particular formality.”*

#### **8.20 Bank’s Amended Clause received October 2012**

The Bank has stated, *“The Scotiacard Agreement in the Personal Financial Services Agreement does not have similar language to that of the Mastercard Agreement because our Debit card simply provides access to alternate delivery channels such as ATM and on-line banking. There are no 3<sup>rd</sup> parties associated with it in the sense that there are with reward partners, nor is it affiliated with VISA or Mastercard. If that should change in the future, we would consider making similar provisions to that of the Mastercard Agreement at that time.”*

#### **8.21 Commission’s Comments on Clause received October 2012**

The clause is acceptable.

**First Citizens (Barbados) Ltd**

**formerly**

**Butterfield Bank**

## 9.0 First Citizens Bank (Barbados) Limited formerly BUTTERFIELD BANK

9.1 Butterfield Bank has not provided the Commission with any feedback on the terms and conditions with respect to our preliminary findings. However, by letter dated Nov 5, 2012, FCBBL stated *"we are yet to finalise the matter of the unfair contract terms, an issue complicated by our recent acquisition by First Citizens Bank Limited and will make arrangements to meet with you to provide an update during the course of December 2012."*

Butterfield's original UCT and the Commission's comments about the said terms can be found below.

### 9.2 **Original Clause**

***"TERMS AND CONDITIONS OF SAVINGS ACCOUNT"***

#### **CLAUSE 9**

*"Where the Bank is a party to a dispute, the electronic records retained by the Bank shall (save in the case of fraud or manifest error) serve as **the sole and accurate record** of the events and shall be admissible in court of law such with equal evidentiary value as a duly authorized paper document. Further, if the Account is involved in any legal proceedings, actual or threatened, in which the Bank is not a party, or garnishee proceedings, then I/we agree to pay the Bank for its reasonable legal costs and time taken in dealing with the matter. Any amounts so due may be set-off against the balance of the Account."*

### 9.3 **Commission's Comments**

The phrase *"the sole and accurate record"* is unfair since it has the potential to create an unfair advantage in favour of the Bank. It is possible that the customer may be in possession of a document that could provide critical evidence in a dispute and this type of document should not be discounted. Furthermore, the court is the final arbiter in determining what evidence is

admissible. Butterfield is precluded from making such a determination. Section 7 of the Act states:

*“A contract term is unfair if, to the detriment of the consumer, it causes a significant imbalance in the rights of the supplier and the consumer.”*

Butterfield should therefore amend the clause to prevent it being deemed an unfair term.

#### 9.4 **Original Clause**

##### **CLAUSE 13**

*“I/We agree to pay any applicable service fees and charges which the Bank may impose from time to time in accordance with the Bank’s Schedule of Charges or change without giving me/us prior notice.”*

#### 9.5 **Commission’s Comments**

This clause is unfair as consumers cannot consent to futuristic documents. It therefore contravenes paragraph 1(i) of the Act which states that a contract term may be unfair if it has the object or effect of:

*“irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract.”*

Commercial Banks failing to provide consumers with reasonable notice of their intention to alter the charges/fees of services rendered, creates an imbalance in the rights of the Bank and the consumer. This imbalance is a contravention of Section 7 of the Act which states:

*“A contract term is unfair if, to the detriment of the consumer it causes a significant imbalance in the rights of the supplier and the consumer.”*

In addition, this clause can potentially contravene paragraph 1(j) of the Act if Butterfield does not specify in the contract a valid reason for any changes to the fees/charges structure. Part 3 of the Schedule negates the breach if Butterfield informs the consumer immediately and allows the consumer to dissolve the contract immediately. Paragraph 1(j) of the Schedule to the Act states that a term may be unfair if it has the object or effect of:

*“enabling the supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract.”*

Part 3 of the Act states:

*“Paragraph 1(j) does not apply to a term under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties at the earliest opportunity and that the latter are free to dissolve the contract immediately.”*

Butterfield should amend this term.

## 9.6 **Original Clause**

### **CLAUSE 16**

*“The Bank reserves the right to change, amend, or add to these conditions without giving prior notice of such change or alteration.”*

## 9.7 **Commission’s Comments**

Again, Butterfield should notify consumers about their intention to amend, add, or change the terms within any of their agreements. The comments made about Clause 13, paragraph 9.5 are also applicable to this clause.

## 9.8 Original Clause

### CLAUSE 18

*"Interest at a rate to be determined by the Bank will be computed on the daily balance on deposit for every three month period ending on the last day of, and credited as at the last business day of, March, June, September and December in each year. Changes from time to time to the prevailing interest rate will not be notified to depositors but will be displayed in the public service areas of the Bank.*

## 9.9 Commission's Comments

The Commission commends Butterfield for their willingness to notify consumers in the event to a change in the prevailing interest rate. However, Butterfield should use additional means to capture those customers who do not visit the bank on a regular basis. Notice of the change should also appear on the customer's statements. The clause in its present state has the potential to breach paragraph 1(i) of the Schedule to the Act which states that a term may be unfair if it has the object or effect of:

*"irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract."*

It is recommended that consumers be provided with at least thirty (30) calendar days' notice of the change in the interest rate.

## 9.10 Original Clause

*"LOAN AGREEMENT"*

### CLAUSE 2(C)

*"We reserve the right at any time without notice to you":*



- i. *To add to the principal amount of the Term Loan outstanding any sums together with interest thereon paid by us under any one or more of the Security Documents*
- ii. *To vary the amount of the monthly instalments payable by you under this Term Loan facility.”*

#### 9.11 **Commission’s Comments**

Consumers should be informed in the event of the above taking place. Failing to provide consumers with adequate notice would contravene paragraph 1(i) of the Schedule to the Act which states that a term may be unfair if it has the object or effect of:

*“irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract.”*

Consumers should be provided with at least thirty (30) calendar days’ notice of any changes to an agreement. Butterfield should therefore amend the clause to prevent it being deemed an unfair term.

#### 9.12 **Original Clause**

***“DEBIT CARD AGREEMENT”***

##### **CLAUSE 12**

*“The Bank shall incur no liability for failure of any ATM or point of sale machine to function due to electrical or mechanical failure, improper use by the Cardholder or any other cause. Also, the Bank shall incur no liability if it is unable to provide service as a result of industrial action, the failure of any computer or telecommunications system or other circumstances beyond the Bank’s control.”*

### 9.13 Commission's Comments

This clause is too wide. It outlines instances where the Bank will not be liable, and then it states *"any other cause"*. This phrase could cover almost any circumstance and widely limits the liability of the Bank. Paragraph 1(b) of the Schedule to the Act states that a term may be unfair if it has the object or effect of:

*"inappropriately excluding or limiting the legal rights of the consumer vis-a-vis the supplier or another party in the event of total or partial non-performance or inadequate performance by the supplier of any of the contractual obligations of the supplier, including the option of offsetting a debt owed to the supplier against any claim which the consumer may have against him."*

Butterfield should therefore amend the clause to prevent it being deemed an unfair term.

### 9.14 Original Clause

#### CLAUSE 23

*"...and any fees may be changed without prior notice in accordance with a fee schedule which shall be published by the Bank for time to time..."*

### 9.15 Original Clause

#### CLAUSE 25

*"The Bank has the right at all times to vary these Conditions without notice to the Cardholder."*

#### Commission Comments

Please refer to the Commission's comments to clause 23 and 25 below.

#### 9.16 **Commission's Comments**

Clauses 23 and 25 of the Debit Card Agreement are similar to Clause 13 found in the Terms and Conditions of Savings Accounts. These clauses give Butterfield the authority to make changes to the agreement without giving the consumer prior notice. The Commission's comments pertaining to Clause 13 would also be applicable to these clauses.

Butterfield should therefore amend the clauses to prevent it being deemed an unfair term.

#### 9.17 **VISA AND MASTERCARD CARDHOLDER'S AGREEMENTS**

##### **Original Clause**

##### **CLAUSE 8 - "Termination"**

*"We may suspend or terminate this Agreement or your rights to obtain credit through the use of your account at any time for any reason with or without notice to you. You may terminate this Agreement at any time by notifying us that you are cancelling your account by repaying same in full or in such manner as we may agree and by returning all current cards issued with respect to the account. Except as provided under "CHANGING TERMS OF AGREEMENT" below, any suspension or termination by you or us, will not alter your obligation to pay our outstanding balance in full in accordance with the terms of the Agreement."*

#### 9.18 **Commission's Comments**

Contravention of the Act in this case is contingent on the bank's fulfilment of the conditions stipulated in Part 2 of the Schedule to the Act. If the bank does not notify the other contracting party immediately and provide a valid reason for terminating the contract, the Bank will contravene paragraph 1(g) of the Schedule to the Act. Paragraph 1(g) states that a term may be unfair if it has the object or effect of:

*“enabling the supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so.”*

This clause has the potential to breach paragraph 1 (g) of the Schedule to the Act since it allows Butterfield to terminate the agreement with or without notice to the consumer. However, the contravention is negated if the conditions of Part 2 are adhered to. Part 2 of the Schedule to the Act states:

*“...does not apply to a term by which a supplier of financial services reserves the right to terminate unilaterally a contract of indeterminate duration without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties immediately.”*

Butterfield should amend this term.

#### 9.19 **Original Clause**

##### **CLAUSE 9 - “Finance Charges on Purchases & Cash Advances”**

*“We assess Finance Charges, on your statement closing date, on your average daily balance of purchases and/or cash advances at an interest rate determined by us. This rate is subject to change without prior notice.”*

#### 9.20 **Commission’s Comments**

See the comments made regarding Clause 13 of the Terms and Conditions of Savings Accounts.

#### 9.21 **VISA CLASSIC AND GOLD CARD AGREEMENT**

##### **Original Clause**

##### **“CHANGING TERMS OF THE AGREEMENT”**

##### **CLAUSE 14**

*“We may change any of the terms of this Agreement at any time. If we change the terms and notice is required by law, we will mail notice of the change at least 15 days before the effective date of the change. The changes will apply to all unpaid balances in your account. You can avoid all the new terms if you return all cards, pay the unpaid balance in full and make no further charges to your account. You must do these things before the new terms go into effect.”*

## 9.22 **Commission’s Comments**

The Commission commends Butterfield for their willingness to notify consumers in the event of a change in the charge/fee structure. However, this clause still has the potential to breach paragraph 1(i) of the Schedule to the Act which states that a term may be unfair if it has the object or effect of:

*“irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract.”*

It would be prudent to inform consumers of all changes to the fee structure. Butterfield should therefore amend the clause to prevent it being deemed an unfair term.

## 10.0 CONCLUSION AND RECOMMENDATIONS

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10.1 The Fair Trading Commission's analysis of the six (6) Commercial Banks' Standard Form Contracts for Unfair Contract Terms revealed that the banks' Standard Form Contracts contravened the Consumer Protection Act.

10.2 Where a consumer submits a complaint against a Bank and it appears that the Bank has breached paragraph 1(g) and 1(j) of the Schedule to the Act, the Commission ensures that the conditions stipulated in Parts (2), (3) and (4) of the Schedule have been met. If the Bank has fulfilled the requirements, then the Bank is not in breach of the Act.

10.3 As has been highlighted in this report, the Act stipulates that terms in contracts should be fair. Where UCTs are found in SFCs, they become of great concern to the Commission. The Commission requires businesses to amend or delete unfair terms from their contracts.

### 10.4 THE COMMISSION'S RECOMMENDATIONS

- The UCTs highlighted in the Banks' SFCs should be amended or deleted.
- Additionally, the protection that is given to consumers under the Act is limited by the Act's Schedule<sup>4</sup>. Therefore, to enhance consumer protection, a Voluntary Code of Practice (VCOP) should be implemented.

Section 50 of the Act makes provisions for the establishment of such Codes. VCOP are guidelines designed to influence, shape, control and benchmark behaviour in the business arena. They are also used by businesses to promote fair dealings between themselves and their consumers. The Codes inform consumers what the business or service provider should do, when conducting transactions with them. These Codes

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<sup>4</sup> Please refer to Parts 2, 3 and 4 of the Act.

can be altered in response to changing industry/consumer needs and encourage transparency in the marketplace.

- Dialogue between the Banks and the Commission should continue as this allows for ease in resolving complaints as they arise.
- Forums should be held and used as catalysts to inform businesses and consumers that UCTs are prohibited in SFCs. Furthermore, that UCTs are unenforceable in a court of law (Section 9 of the Act states, "*An unfair contract term is unenforceable against the consumer*") and that Banks should delete such terms from their contracts. The following types forums should be held:
  - i) Financial literacy seminar for the general public. A panel consisting of various agencies should address the public on issues encountered in the financial service sector. This panel should also include the Fair Trading Commission and the matter of UCTs, should be discussed.
  - ii) Meetings with Commercial Banks to discuss UCTs and the need for Banks to be in compliance with the Act.

**APPENDIX A - Analysis of Terms Contravening the Consumer Protection Act, CAP.**

**326D**

SECTION OF ACT	TYPE OF UNFAIR CONTRACT TERM	REPUBLIC BANK BARBADOS LTD (BNB)	RBTT BANK (B/DOS) LTD.	RBC ROYAL BANK OF CANADA	BANK OF NOVA SCOTIA	FIRST CITIZENS BANK (BUTTERFIELD)	FIRSTCARIBBEAN INT'L BANK	TOTAL
		Number of Terms Contravening Consumer Protection Act						
Section 7	Creates imbalance in rights	0	3	2	1	6	2	14
Paragraph 1(b) of Schedule	Limits bank's liability	0	2	1	2	3	5	13
Paragraph 1(c) of Schedule	Binding consumers while allowing the supplier to provide no service	0	0	0	0	0	0	0
Paragraph 1(g) of Schedule	Can terminate contract at sole discretion	0	0	0	0	1	0	1
Paragraph 1(i) and 1(j) of Schedule	Can change contract (including fees and charges) without notice	3	1	2	2	13	4	25
Paragraph 1(n) of Schedule	Limit liability of agent	0	0	0	1	0	2	3
<b>TOTAL</b>		3	6	5	6	23	13	56