In its report dated December 2011, the Task Force for the Payments System Review (“Task Force”) enumerated the development of a state-of-the-art mobile payment system as one of four requirements needed for the modernization of the payment system in Canada.

To a large extent, the process for building mobile payment systems in Canada is already well underway. On May 14, 2012, the Canadian Bankers Association published an extensive NFC mobile reference model establishing voluntary guidelines for the various participants in the Canadian mobile commerce ecosystem. This document was discussed in Torys’ bulletin Canada’s Banks and Credit Unions Introduce Guidelines for NFC Mobile Payments, May 17, 2012.1

The bulletin at hand contextualizes those voluntary guidelines by providing an overview of the ongoing evolution of mobile payments globally and in Canada. The use of mobile phones has recently expanded beyond voice calls. Together with other mobile communication devices, such as personal digital assistants, wireless tablets, and mobile computers, these devices have come to facilitate payment for goods or services by means of data transfer. Any payment method that is wireless, at least in part, and that uses a mobile device to initiate, activate, confirm, give, or receive advice concerning a transaction may be considered a mobile payment.

Domestic and international innovations have proved valuable for developing nations that lack
extensive banking and landline communication infrastructures. Consumers, including migrant workers remitting payments to their families, make substantial use of mobile payments. For example, an individual who wishes to transfer funds to a family member may text the family member, advising that funds are available for him or her. The sender will advise the family member of the code to be conveyed to an agent, who will verify the code (using a mobile device) and receive a cash payment. The agent is effectively acting as a bank branch, and the mobile communication fills the vacuum in an area that lacks adequate infrastructure.

Mobile payments have also opened new possibilities in developed countries. It is in this sense that the Task Force report referred to “the transformative power of a mobile ecosystem that combines payments, commerce and government services.” In the view of the Task Force, mobile devices can radically change how we engage the world. They can deliver both public and private sector services conveniently, and at a lower cost. The payment application is but one facet of a larger picture.

Depending on the system, a mobile device can be used to make a payment in one of several ways. First, a payment made with the mobile device may be charged to the mobile phone bill. As a rule, this would be done only for very small payments for products sold directly by the communication carrier. Second, the device may be used to access either funds or credit available in a traditional bank account. In this way, the device operates like a cheque or a debit or credit card and is used to purchase goods and services from participating merchants. Third, mobile phone companies may act either for or as banks and allow customers to deposit and withdraw funds using “mobile accounts.” A mobile account may be a subaccount in a “master account” held by the mobile phone company at a financial institution, under a system allowing the mobile device holder to withdraw up to a prepaid or otherwise-agreed value. Alternatively, the mobile account may be a software product, operating like “digital cash”—meaning, specialized software installed on a standard personal computer.

Mobile devices represent a new channel for financial institutions to communicate with their customers. The devices also have enormous potential to create a mobile ecosystem combining payments, commerce, and government services.

Communication may be undertaken by mobile devices in one of three ways:

- **SMS**—short messaging (text) service
- **NFC**—Near field communication
- **WAP**—web-based payments using wireless application protocol

NFC-enabled mobile devices can be used to make contactless (that is, “touch and go”) payments utilizing RFID (radio-frequency identification) technology. In this respect, a mobile device may expand the use of the contactless payment card. The latter imbeds silicon chips and antenna and is passive until it comes with an RFID-enabled reader installed on a point-of-sale terminal. Thus, like a card, it may be tapped on an RFID-enabled reader and passively receive data. However, an NFC-enabled mobile device can also actively send data by being waved over a magazine or poster containing passive RFID chips. It is thus more robust than the contactless card.

NFC can be used only for “proximity payments”—that is, payments in which the mobile device is in proximity of the point of sale. At the same time, SMS and WAP technologies can be
used for “remote payments,” either from traditional bank accounts or mobile accounts.

Whether mobile payments are made by access devices or stored-value products, they appear to be new variations of old themes. At the same time, they present new dimensions to the landscape of non-cash payments. Most notably, they involve communication carriers acting in the payment theatre—not as back-office third-party service providers on behalf of banks, but rather, as drivers (or at least co-drivers), sitting in the front seat, in a direct contractual relationship with users. As such, they may even seek to provide payment services on their own. Mobile payments also involve an array of non-bank intermediaries such as concentrators, who facilitate the weaving of infinite numbers of micro-payments into relatively large payment streams to financial institutions.

Mobile payments thus raise new regulatory and legal issues as well as highlight unresolved existing ones. They may prove to be a catalyst for a comprehensive reform of the regulation of the payment system in Canada.

Pertinent issues may require a re-examination of (so far) well-settled legal definitions such as “banking,” “money,” and “deposits.” They may further raise questions relating to the regulation of payment services (the power and right to provide them) and to the rights of end-users. Which level of government in Canada is in charge? What are the rights of end-users—namely payer and payee? How should participants in the system regulate their own internal processes? Other regulatory issues include those relating to security and safety, the integrity of the payment system, the impact on the monetary policy of the central bank, and the nature of the mobile account.

In welcoming the Task Force’s report, Finance Minister Flaherty said the report’s findings regarding mobile payments would help to inform the government, ensuring that the payments framework meets the evolving needs of Canadian consumers and businesses. He said that Department of Finance officials would review, in close consultation with stakeholders, the application of the Code of Conduct for the credit and debit card industry in Canada to emerging mobile payment products so that the Code’s principles of transparency, fairness, and competition would also guide the evolution of mobile payments in Canada. At present, this review is high on the agenda.

In both the anticipation and the implementation of forthcoming new forms of regulation, the resolution of such issues requires an in-depth legal analysis as well as detailed and precise contractual arrangements.

[Editor’s note: Benjamin Geva, counsel at Torys LLP, is a member of Torys’ Payments and Cards Practice. He is a leading international legal expert on payment instruments and methods, bank deposits and collections, credit transactions and facilities, electronic banking, and payment and settlement systems. Ebad Rahman is a member of the firm’s Business and Technology Sourcing Practice. He has extensive experience advising on technology and sourcing matters along with patent matters, especially related to software issues. His technology practice focuses on service agreements and conveyances of hardware, software, and other intellectual property. © 2012 by Torys LLP. Reprinted with permission from Torys LLP.]