Canada's Banking Dispute Resolution System

Consumers Council of Canada

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© August, 2012, 1st Edition

Report Prepared for the Consumers Council of Canada
by Denise Barrett Consulting

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Introduction

From 1996 to 2008, all of Canada's major banks participated in a single national dispute resolution system, first known as the Canadian Banking Ombudsman, then later as the Ombudsman for Banking Services and Investments. In 2008, one of Canada's largest banks left OBSI, retaining a private firm to provide external dispute resolution services. Another large bank did the same in 2011. In early July 2012, Canada's Ministry of Finance formalized previously announced plans to require Canada's banks to have an external dispute resolution provider, but did not mandate a specific provider.

Instead, the Financial Consumer Agency of Canada will be tasked with overseeing the approval of the dispute resolution services, as well as ensuring that each bank's internal resolution services follow new guidelines.

In this Consumer Perspective 360° report, the Consumers Council of Canada will summarize the key elements of this proposal including: a history of the development of the ombudsman services in Canada's banking and securities sector, a discussion of the key changes proposed, an issue-by-issue analysis of many of these elements, and a summary of the known views of other interested parties.

In making the announcement, the Minister of Finance characterized the rules as strengthening consumer protection. But do the new regulations truly offer stronger protection, and what are the key determinants of this?

Chapter 1

A Short History of Dispute Resolution in Canada's Financial Services

The roots of the current ombudsman service trace back more than 20 years to the early 1990s. Public sentiment turned against Canada's major banks because of a number of factors. Banks began unilaterally imposing charges for services they once provided for free. Credit policies began to tighten, based in part on credit scores, which were not well known or understood by customers or businesses. Concerns arose about executive compensation. One industry participant recalls a series of searing editorials in one of Canada's leading newspapers against bank policies. Another characterized the time as "Bay Street" losing touch with "Main Street".

Politicians caught that dissatisfaction and MPs pressed for change. After a number of discussions – and with the threat of a public solution close at hand – the Canadian Bankers Association announced the formation of ombudsman offices at each bank and a Canadian Banking Ombudsman to hear appeals of individual bank ombudsman decisions. The CBO began operation in mid-1996, hearing small business complaints only, expanding to include unresolved complaints from consumers in 1997.

The initial reaction to the CBO was generally negative. The common thread to initial reaction was that an industry group would be biased in favour of the industry and would not treat consumer complaints fairly. As an industry-led dispute resolution entity, the CBO was similar in many ways to organizations like the Better Business Bureau or Advertising Standards Canada. The CBO had the right to make a decision in favour of the consumer, but no power to enforce it. Its rulings were not binding, though industry participants accepted every one until 2007.

Both the McKay Task Force (1998) and a 1999 policy paper from Finance Minister Paul Martin called for a single independent dispute resolution system for all financial institutions. Securities regulators and members of the Investment Dealers Association (IDA), Mutual Fund Dealers Association of Canada (MFDA) and Investment Funds Institute of Canada (IFIC) elected to have securities dispute resolution follow the CBO model. The CBO became the Ombudsman for Banking Services and Investments (OBSI) and membership swelled to almost 500 firms. For investment issues, membership was mandated by the appropriate self-regulatory Organization, though the OBSI rulings remained non-binding.

In December 2007, following the recommendations of a required tri-annual review, OBSI announced plans to change its terms of reference to investigate "systemic issues." This would allow OBSI to recommend that the financial industry compensate all affected customers when a complaint appeared relevant to a large number of customers. Though OBSI later softened its rules on systemic issues, it led to criticism that OBSI was in danger of turning from a dispute resolution service to a regulator, even though its ultimate authority was only moral suasion.

On October 31, 2008, Royal Bank of Canada withdrew from OBSI. It cited only a desire to provide more timely resolution to its customer complaints, but in numerous industry regulatory filings, RBC and its affiliates were very critical of a number of OBSI policies and practices. RBC hired ADR Chambers to serve as the independent arbiter of their banking complaints. OBSI membership of RBC affiliates in the securities business was still required, despite efforts by RBC, TD Bank and others to remove this requirement in discussions with IIROC (the successor organization to IDA). TD Bank withdrew from OBSI at the end of October 2011, also retaining ADR Chambers.

After TD Bank's withdrawal, concerns grew that other banks would follow, reducing the effectiveness and efficiency of OBSI. OBSI's Board of Directors asked the government to make bank participation in OBSI mandatory, but Finance Minister Jim Flaherty told the Financial Post in late April 2012 that he had no such plans.

In early July, the Ministry of Finance released a new framework for banking dispute resolution. Under the proposed rules, banks must provide an external complaints body at no cost to the consumer, but they are free to choose any supplier that meets the guidelines established by the Financial Consumer Agency of Canada. Systemic issues that affect groups of consumers are not to be part of a dispute resolution provider's services, but must be reported to FCAC.

Securities regulators require that market participants require firms have independent dispute resolution services at no cost to their customers. Current IIROC and MFDA rules require these disputes all be handled via OBSI.

Chapter 2

Some Facts and Figures

Here are some simple facts and figures, drawn from the OBSI and ADR Chambers annual reports (both ending October 31, 2011, so TD Bank figures are part of the OBSI report.) Neither group reports complaints at the branch or firm level, so they cover only a small portion of the total number of consumer complaints. Some banks' ombudsman offices produce their own annual reviews.

How many banking complaints reach OBSI and ADR Chambers each year?

OBSI received just over 6,000 complaints (both banking and securities), while ADR Chambers received 312 contacts in the most recent year.

OBSI opened a total of 802 cases in the year, down from 1,024 in 2010 and 990 in 2009. They opened 397 banking cases and 405 securities cases. Of the banking cases, the largest number related to TD Bank (131). TD affiliates also led in securities complaints.

Of ADR Chambers' 312 contacts, 238 (75 per cent) were referred back to RBC because the complainant had not completed RBC's internal complaint process. ADR Chambers accepted a total of 42 intakes. Of these 42, 12 complainants did not return the completed forms and three were determined to be out of scope, six were resolved and a complainant withdrew one. That left just 20 that involved ADR Chambers to completion.

Of the files closed during the year, 15 per cent of OBSI's banking complaints ended with compensation, and another six ended with non-monetary restitution (such as an amended credit rating). Compensation ranged from $30 to $74,983, with an average of $7,387 and median of $1,100. Thirty-seven percent of investment complaints ended with compensation, which ranged from $154 to $220,000, with an average of $16,118 and a median of $7,500.

The average banking case was resolved in 126 days, while the average investment case took 290 days.

Of the 32 final reports issued by ADR Chambers, 13 (41 per cent) recommended payment of compensation and/or other action by RBC. Three of 14 Initial View Letters recommended payment of compensation as previously offered by RBC. ADR Chambers does not disclose recommended levels of payment.

The average time for completion of an investigation was 6.6 months.

OBSI's annual operating budget is about $8 million for 2012 ($8.4 million in 2011). That works out to about $1,300 per complaint received or about $10,000 per case opened.

ADR Chambers does not publicly disclose costs of its operations.

In summary:

- A very low percentage of complaints turn into cases

- A low percentage of cases result in judgments in favour of the consumers (this is true historically, not just in the most recent year.)
- Consumer complaints are more likely to be upheld on the investment side than banking side
- Awards on the security side are larger than on the banking side
- It is an exceedingly small sample size, but it is troublesome that 12 of 42 ADR complainants did not follow through on a unresolved complaint of some merit that had escalated outside the bank's own systems. It would suggest that perhaps the ADR "forms" were too complex or cumbersome.

Chapter 3

The New Proposal

The Department of Finance released a new framework for banking dispute resolution on July 6. The draft legislation followed July 13. The new regulations clarify the early statements of the Finance Minister that Canadian banks will be required to provide an external complaints service for consumers for complaints that are not resolved internally, without cost to the consumer. The FCAC released guidelines for banks' internal complaints as well as the compliance of external third-party services July 26. Rather than requiring OBSI membership, or grandfathering OBSI and ADR Chambers, the proposal simply requires third parties to meet the FCAC-defined criteria.

In addition to allowing banks to choose from approved complaints services, the other key changes in the proposal include:

- External complaints bodies will concentrate on resolving individual complaints, and notify FCAC of systemic issues, leaving the role of response to system issues to FCAC.
- A requirement that complaints be resolved in 120 days "compared to the current industry standard of 180 days."
- External complaint bodies will need to consult with consumers who have been through the complaint process as well as the banks annually to determine satisfaction with the level of dispute resolution service and publish the results.

Chapter 4

The Issues

The balance of this document will examine a number of relevant issues:

1. The role of the FCAC, its limitations and its powers, as relates to internal and external dispute resolution in banking.
2. What are the merits of giving banks a choice, and what are the risks?
3. Federalism and why securities firms don't have a choice.
    1. What about Quebec?
4. What is independence?
5. Governance and accountability
6. What is a consumer to do?

Issue 1: The FCAC, its readiness, limitations and powers

The FCAC was founded in 2001 to handle oversight of consumer protection measures in the federally regulated financial sector and to expand consumer education. Its launch traces back to the 1998 McKay report that recommended stronger consumer protection against Canada's banks. Consumer education was a significant portion of FCAC duties, and much of its work has been on financial literacy.

The FCAC consumer protection powers were limited to breaches of the law. It was not designed to establish policy or develop laws and regulations. FCAC was not designed to deal with individual disputes. Redress of individual consumer issues was the responsibility of ombudsman services. Its focus has been to ensure that institutions comply with laws.

The proposed legislation would expand FCAC's responsibilities. Among the new responsibilities are requirements to:

1. Develop guidelines for banks to follow in internal complaints resolution
2. Develop the criteria for external dispute resolution firms to meet in order to become approved
3. Define the regular reporting criteria they must follow once approved
4. Define the third-party evaluation required by external dispute resolution firms required every five years
5. Work with the approved firms to establish ongoing compliance rules, as well as guidelines for non-compliance, (such as an external firm's inability to consistently resolve complaints within 120 days.)
6. Develop procedures to handle "systemic complaints."

The FCAC's first draft related to the first two points was published July 26.

The final point about handling "systemic complaints" is one that has a potentially large impact on consumers. The change raises many questions and its implications are unclear. Among the important questions as yet unanswered:

- If the external dispute firms become aware of a potential systemic issue, and make FCAC aware, what will be FCAC's procedure?
- What can FCAC do with these issues?
- How will they investigate systemic issues?
- Will FCAC be able to request compensation on systemic issues that it confirms?
- What are the sanctions they have at their disposal?
- Can it enforce its recommendation, and, if not, will it at least disclose the nature of the issue?
- Can it require compensation for all affected investors, or merely those who have initiated a complaint?
- How can they inform affected but unaware investors of their rights in such a matter?
- What measures can FCAC take to enforce the desire for investigations to be completed within 120 days?
- How FCAC prevent firms from taking unnecessary shortcuts to meet this obligation?
- Does FCAC have the resources and legal tools to break logjams when banks are slow to provide information to the external complaint-handling organizations?

OBSI's movement into investigating and recommending compensation of systemic issues appears to have been a turning points for that organization's ability to retain the voluntary participation of all of Canada's major banks. FCAC's guidelines in this area will be critically important to consumers. If FCAC's powers are restricted to merely identifying issues, reporting them back to banks, and ensuring that they do not happen again, consumers who have been harmed without compensation will not be properly protected.

Issue 2: What are the merits of giving banks a choice and what are the risks?

If the new provisions are enabled, Canada's banks will be able to choose their own dispute resolution provider. Both OBSI and ADR Chambers have indicated their plans to seek whatever approval process FCAC finalizes. It seems likely that both will eventually qualify, although there is no certainty about the time it may take to finalize and then enforce the eligibility criteria.

Banks will also need to ensure that their internal complaints processes meet FCAC's criteria. As the vast majority of consumer complaints are resolved at the bank level, it is easy to see the importance of ensuring that all consumers encounter some widely accepted minimum standards of fairness and competence in the first stages of their complaints process.

In the months prior to the new policy announcement, there was a great deal of public speculation about what banks might do if given a choice. The OBSI suggested that unless banks were required to be members, it could wind up its banking operations. It was suggested that other banks would leave OBSI for ADR Chambers (or others) and OBSI would slowly erode.

To date, just two banks have opted out of OBSI. RBC left in 2008, citing slow response times. Since OBSI is funded by members and RBC had the largest client and asset base, RBC was likely the largest financial supporter of the service. And RBC had notably lower complaint rates during its final years of OBSI membership than other banks. In a sense, RBC was paying for more of OBSI's service than it used.

The situation with TD Bank was quite different. TD Bank led in complaints both among banks and securities firms, according to the 2011 OBSI Annual Review. That review also noted what was the first refusal by a bank to compensate customers who suffered a loss as a result of what was determined to be systemic problems with a bank's mortgage documentation. Under OBSI's terms of reference, for systemic issues, it is only allowed to state the nature of the issue and the lack of compliance. It is not allowed to specifically name the firm involved.

(In individual disputes, however, it is allowed to "name and shame" the firms involved, as it has done just once, in a 2007 claim against an Ontario mutual fund dealer.)

In published reports, OBSI has expressed confidence that its other bank members will remain in the fold.

One argument in favour of competition is a theoretical one: competition is good. Competition is generally assumed to produce lower costs, greater efficiency and other benefits to consumers. In this context, however, the "consumers" of the competitive dispute resolution services are the banks, not the end consumer. And it is not clear that a dispute resolution service that is of lower cost to a bank is of benefit to the other participant in the dispute, an aggrieved, end consumer.

Membership costs to OBSI and ADR Chambers are not disclosed. But a commonly stated assumption in the banking industry is that, in a competitive market for dispute resolution , banks will buy the services of ADR Chambers because they will be less costly.

There are competitive markets for dispute resolution in other countries, most notably, Australia and New Zealand. These competitions came about as a consequence of other decisions, mainly changing regulatory structures. In Canada, there is no parallel change: instead an industry-formed arbiter has had two key members opt out, prompting an explicit government policy establishing a new regulatory regime in which banks will likely be granted the opportunity to choose the arbiter for complaints made against them by consumers choosing not to seek justice through the civil or criminal courts.

In its January 2012, report "Resolving Disputes Between Consumers and Financial Businesses" the World Bank notes the trend to competition between ombudsmen, but notes the risks.

> "A few countries have the unusual idea of 'competitive' ombudsmen, where – subject to specified minimum standards – the financial industry is able to choose between two or more competing financial ombudsmen. Such a choice presents severe risks to independence and impartiality – because financial businesses may favour the ombudsman they consider likely to give businesses the best deal.
>
> "It overlooks the role of financial ombudsmen as an alternative to the courts and creates one-sided competition – because, unlike the financial businesses, the consumers are not given any choice of ombudsman." (p.38)

The Australian and New Zealand Ombudsman Association, a blanket organization of ombudsman in the two nations most affected by competition of dispute resolution services, offered a longer critique. It noted that competition among ombudsmen runs counter to the principles of independence, accessibility, fairness, efficiency, effectiveness and accountability.

The document then summarized why it believes competition is undesirable. The reasons include confusion among consumers, unnecessary duplicative costs and redundant reporting systems for different regulatory mechanisms, a need to focus on participating firms rather than complainants in order to grow its membership, and the dilution of industry-wide information gathering.

The Finance Ministry's new proposal may not be giving the banks a choice in so much as it has certified a choice already made when two banks were allowed to choose their own dispute resolution system when they didn't like the way the industry-built one worked.

However, giving banks a choice is not the same as giving consumers choice. Consumers will benefit from firms that resolve disputes quickly and show them the greatest largesse in their judgments. Banks can agree on speed but may hold different perspectives on achieving customer satisfaction. The risk for consumers is substantial that banks could "race to the bottom" by selecting low-cost firms that meet the minimum acceptable standard.

Issue 3: Federalism and Why Investment Firms Don't Have a Choice

If the proposed changes are implemented, banks will be able to select from an approved list of dispute resolutions services. Investment firms, however, will be required to stay within OBSI. Or to put it another way, escalated customer disputes with Royal Bank of Canada may reach ADR Chambers, while escalated customer disputes with Royal Bank mutual funds or Royal Bank's discount brokerage or full service brokerage would ultimately reach OBSI.

This duality is the product of the unique elements of Canada's regulatory environment for financial services. Banks are a federal responsibility. Securities are regulated largely under provincial laws, though the provinces do work to harmonize rules through the Canadian Securities Administration. Self-regulatory firms such as IIROC (securities dealers) and MFDA (mutual fund dealers) are also national in scope.

The result is a sharp contrast. Somehow Canada's 10 provinces, territories and SROs have agreed on a single system, but the Federal government wants variety for banking.

As a result, the federally regulated banks will be allowed to choose from a list of dispute resolution services after two of the largest members eschewed OBSI. The different provincial regulatory bodies and securities SROs all require their regulated securities operations to use OBSI.

However, some of the disgruntled securities firms have tried, also, to shed the OBSI obligation. Published reports from the spring of 2011 indicate that a number of firms – the securities arms of TD Bank and RBC among them – sought permission to leave OBSI. They were rebuked. (More details are available in the 'Timeline' section of this document.)

It has been suggested that dissatisfaction with OBSI operations on the securities side led RBC and TD Bank to withdraw from the banking side as a way to express that dissatisfaction.

Critics of OBSI's operations – as outlined in the 2011 independent review conducted by The Navigator Company – appeared more focused on securities issues than banking ones. OBSI has been criticized for the length of time it takes to clear cases. Securities cases typically take much longer than banking ones. Compensation recommendations are much higher in securities cases. Opportunity costs that factor into OBSI's loss calculations are also higher in securities cases. The Navigator report indicates investment complaints are 70 per cent more costly to investigate than banking complaints.

What's keeping securities firms in OBSI? And is there a risk that membership will become optional, or subject to similar competition?

The Canadian Securities Administration is the umbrella group of provincial securities commissions. It revised its policies (National Instrument 31-103) in 2009 to require all licensed firms to offer no-cost dispute resolution systems to its members. (The fact that it didn't specifically name OBSI was one of the points firms used to try to lever their way out of OBSI in 2011.) However, both IIROC, the SRO for investment dealers, and MFDA, the SRO for mutual fund dealers, specifically require OBSI membership. There is some evidence that the CSA is considering a change that would make OBSI participation mandatory for all registrants. This was recommended in the 2011 Navigator report to ensure the ongoing vitality of OBSI.

Because of its role in securities regulation, OBSI has two other ties. Its operations are governed by the Framework for Cooperation established by the Joint Forum – a mechanism through which pension, securities and insurance regulators co-ordinate, streamline and harmonize the regulation of financial products and services. The 2011 Navigator report is part of that process, as the Framework requires a through review of OBSI's operations against their objectives.

The second tie is OBSI's participation in the Financial Services OmbudsNetwork, which includes the OmbudService for Life and Health Insurance (OLHI) and the General Insurance OmbudService (GIO).

Allowing multiple dispute resolution services in the securities industry would require complex changes to those arrangements.

Of course, federalism is fluid and definitions can change. The federal government has frequently made efforts to create an effective national securities regulator. These efforts may succeed someday.

The federal government once had express rights to telecommunications legislation, yet technological developments and the assertion of provincial authority over contractual matters have changed the regulatory environment for buyers and sellers of wireless telecommunications services, for example. Could an assertion of provincial contractual rights lead to an erosion of federal authority over banking?

Issue 3.1: What about Quebec?

Quebec consumers are less reliant on banks in general, because many consumers use caisse populaires for their everyday financial affairs. As a result, there are fewer complaints and cases from Quebec in the OBSI files than you would expect, based on the population.

The Quebec government uses the Autorite des marches financiers (AMF) to regulate the province's financial markets and provide assistance to consumers of financial products and services. This includes insurance, securities, deposit institutions (other than banks) and the distribution of financial products and services. Quebec requires firms to use the AMF dispute resolution service. The AMF is headed by a President and Chief Executive Officer appointed by the Quebec government. In applying its governance rules, the AMF is supported by an Advisory Board.

The 2009 Expert Panel on securities law called the AMF procedure on financial redress the best practice in Canada. If the ruling by the independent adjudicative tribunal is in the consumer's favour, they may submit a claim for up to $200,000. The amounts paid are drawn from a compensation fund. Fees come from regulated entities and, if required, are recouped from the responsible firms. In this system, settlements are binding and investors are compensated quickly, the report noted.

All registered firms in Quebec must file a complaints report twice a year, via the AMF's Complaint Reporting System. Failure to file a report exposes a firm to administrative penalties imposed by the AMF.

ISSUE 4: WHAT IS INDEPENDENCE?

One thing that every participant agrees is that financial dispute resolution services need to be independent. The problem comes from defining what being independent means.

The July 6 guidelines from the Finance Ministry define it like this:

> *Independence* – Consumers would be provided with an independent and impartial hearing for their complaint.
>
> - Every person who acts on the behalf of the external complaints body in connection with a complaint is impartial and independent of the parties to the complaint.

The October 2011 G20 High-Level Principles on Financial Consumer Protection includes this segment:

> 9. Complaints Handling and Redress
>
> Jurisdictions should ensure that consumers have access to adequate complaints handling and redress mechanisms that are accessible, affordable, independent, fair, accountable, timely and efficient. Such mechanisms should not impose unreasonable cost, delays or burdens on consumers. In accordance with the above, financial services providers and authorised agents should have in place mechanisms for complaint handling and redress. Recourse to an independent redress process should be available to address complaints that are not efficiently resolved via the financial services providers and authorised agents' internal dispute resolution mechanisms. At a minimum, aggregate information with respect to complaints and their resolutions should be made public.

The January 2012 World Bank Report "Resolving Disputes Between Consumers and Financial Businesses" has this to say:

> A financial ombudsman provides an alternative to the courts; so the ombudsman should be (and also be seen to be) as independent and impartial as a judge – as well as having the necessary legal and technical expertise to resolve financial disputes authoritatively. In order to obtain the confidence of consumers:
>
> - the financial ombudsman should not be appointed by the industry, nor by a body with a majority of industry members; and
> - the person appointed as financial ombudsman should not have worked in the financial industry nor for a financial industry association within the previous three years.

The World Bank comment is particularly important because it raises the issue that dispute resolution needs to be "seen to be" independent to be effective.

In considering the current proposed legislation, independence is probably the most commonly cited concern. Can a third-party dispute resolution firm, hired by a bank, be "seen to be" independent in this context?

"Will these for-hire bodies be able to make recommendations that go against their paying clients without fear of losing business to a competitor?" asks The Globe and Mail in a July 16, 2012 editorial, before recommending a single industry-funded body such as the OBSI.

"There will still be a conflict of interest when banks can hire and fire their own complaints mediators," noted Toronto Star personal finance commentator Ellen Roseman.

The Canadian Federation of Independent Business, and consumer groups such as the Public Interest Advocacy Centre, Kenmar Associates, Canadian Foundation for Advancement of Investor Rights, Union des Consommateurs and CARP all made fundamentally the same point in recent commentaries and releases. Whether the arbiters act fairly or not, that they may not "be seen to be" independent clouds their effectiveness.

Today, this criticism is leveled at ADR Chambers. But in 1996, many of the same points were being made about the new Canadian Banking Ombudsman. Many of the forces that were agitating for government solutions to the issue were disappointed that Ottawa approved an industry-led solution. The new office would be ineffective, they said, because an organization of bankers would always favour bankers.

Today, after a few changes in the composition of their board of directors to reduce the proportion of industry members, it is the OBSI that is among those questioning the independence of ADR Chambers.

Doug Melville, the current Ombudsman for Banking Services and Investments, testified to the Finance Committee of the House of Commons this spring: "A service hired by the bank, and that consequently has the bank as a client, creates the perception, if not the reality of a loss of critical independence. The service will know who it is they need to please in order to keep the business, and it's not the individual making the complaint."

One apt metaphor that sometimes gets used is that letting banks choose their own dispute resolution provider is like letting the home team select the referees for each NHL game. If the Ottawa Senators were able to select the referees for their games, even if those chosen referees were considered exemplary, premier arbiters, the best available, the possibility that they would make a controversial call in favour of the Senators would lead to questions about their impartiality. It is not a perfect metaphor, but avoiding these suspicions that an economic dependence would lead to a conscious or subconscious bias in favour of the sponsor is probably the largest force that leads professional sports referee choices to be made by the league rather than the home team. Suspicions of biased arbiters would lead to questions of the fairness of outcomes and hurt overall interest in the game.

In banking instead of hockey, the issue is still framed in the appearance of fairness rather than actual fairness. Allowing the banks to choose their own provider creates the perception – if not the reality – of a loss of independence.

Can consumers reasonably believe that a complaint will be handled credibly by a private for-profit supplier chosen and paid for by a bank? Will the for-profit providers weigh on the side of the banks to preserve their business?

ADR Chambers may have the best-educated, fairest arbiters available – just as the Montreal Canadiens could hire the best referees in the world. But would their hiring by the Montreal Canadians mean that they could not be independent?

One overlooked element of the new regulations is a measure that would require external complaints firms to consult with both parties (banks and complainants) to determine satisfaction

with the level of service. The results would be reported to FCAC and publicly available. OBSI currently does this in their annual reviews. Proper measurement and use of this information could benefit consumers, if used to improve the service offered.

Interestingly, the 2011 Navigator report says that OBSI also fails to meet the established guidelines on independence. Though OBSI has the structures, procedures and processes to meet the objectives, "the public collapse of support from industry means that OBSI is not fully achieving it. In particular, its funding has not kept pace with the workload and industry compliance has deteriorated with firms walking away, threating to walk away, using more aggressive negotiating tactics and in some cases outright refusing to comply with regulations."

The FCAC provided a more detailed criteria of the information applicants will need to provide to help it judge their impartiality and independence. (Section 4.4.4 of this document: http://www.fcac-acfc.gc.ca/eng/industry/complianceI/consultation/applicationG-eng.asp)

They do include a requirement that arbiters and dispute resolvers demonstrate "that they alone are responsible for their decisions and not subject to review or change by senior management or others in the organization who have not been involved in the process."

Issue 5: Governance and Accountability

Who is the OBSI accountable to? From where does it draw its powers?

The answer to those questions is surprisingly difficult to discern.

First, it depends on whether you look at the banking side or the securities side. On the securities side, the OBSI is empowered by required membership from self-regulatory organizations. The CSA says to be registered a firm must offer no-cost external dispute resolution. MFDA and IIROC rules say that those firms must belong to OBSI. The CSA makes OBSI part of the Joint Forum, establishes a network with other regulators, and as part of that, ensures that OBSI conducts an external review of its performance against seven objectives (independence, accessibility, scope of services, fairness, methods and remedies, accountability and transparency and third-party evaluation) every three years.

The accountability on the banking side is one of the reasons that Ministry of Finance officials have said they needed to act. In the 2010 Budget, they laid out plans to establish requirements for banks to become members of an external complaints body. The CBO was developed by the Canadian Bankers Association to avoid federal government regulation. Established to be an independent arbiter, the CBO had an independent board of directors, from both the industry and the general public. The CBO, then as now, drew its authority from its constituents. Funding came from the members. Banking membership was voluntary (at least until recently). Its authority was to make recommendations, but its only true enforcement power was to publicly embarrass firms that did not comply. Firms complied, but only to the limits of their tolerance. When those limits were exceeded, banks were free to walk away and select a different arbiter.

The CBO was established with a board of directors. Since its inception, CBO and then OBSI made a number of changes to its board composition. Today, there are 10 members of the independent board of directors; seven are independent (one independent is always the chair) and

three appointed by industry or regulators. Directors are involved in policy, not case files. Only the independent directors approve the budget and control the hiring and firing of the Ombudsman.

As a quick comparison, the OmbudService for Life and Health insurance has eight directors, an independent chair, four other independent directors and three industry directors. Its budget is determined only by the independent directors. The General Insurance Office OmbudService has seven directors, two from the industry and five independents.

From the securities point of view, OBSI's accountabilty appears acceptable. The independent Navigator 2011 review praised its consultative mechanisms, periodic independent evaluation and independent board. It did note a "fracture" within the board structure, in part because of the requirement that certain decisions could only be made by independent directors, leading to industry directors feeling they were being excluded from discussions.

The Finance Minister viewed a weakness in accountability on the banking side, however, and pursued change. It is not the formal introduction of competition that aims to improve accountability, but rather the introduction of the FCAC role in the process.

After watching the banking industry's attempt to police itself fracture, Ottawa responded not with a forced participation in OBSI (as the OBSI and many others may have wished) but rather with guidelines for interested participants to follow.

There are certainly many questions about FCAC's new role, and dozens of details of how everything might work, but the proposal shows formal government acceptance of responsibility to set the standards for policing process, where they had once been perfectly happy leaving that with the industry.

The change in how systemic issues are being resolved can be seen in a similar light. The Minister of Finance is taking formal responsibility for systemic issues. Rather than leaving the responsibility in the hands of the complaint firms, responsibility will now accrue to a federal agency already charged with oversight of consumer protection measures in the federally regulated financial sector. (Of course, that also means a transfer of the costs of investigating and ruling on systemic issues is being moved from the industry to the public.)

The new guidelines state that all external complaints bodies would be accountable to consumers, banks and the FCAC, and that there would be regular reporting to FCAC. They would need to consult with consumers and member banks that have used their services to determine satisfaction levels, and make the results publicly available.

ADR Chambers will need to make changes to its processes to meet the criteria. The new regulations require public disclosure of its funding, participation in a detailed five-year evaluation (similar to the three-year evaluation OBSI is required to conduct by the Joint Forum) as well as to publish consumer satisfaction results. Its governance may be clear – it is being retained by two banks to perform specific services – but its board of directors are not named on its website, nor is there any indication of independent board oversight, of how its terms of reference were developed or of whether it will accept different terms of service for different clients.

Issue 6: What is a consumer to do?

It is a mistake to think that external dispute resolution is the "last resort" available for a consumer to seek redress. Going to court is an option.

Most settlement awards have fallen within the current small claims court limits ($25,000 for Ontario). IIROC offers an arbitration program (outside Quebec) that may award up to $500,000 if an investor cannot resolve an issue satisfactorily with a member. However arbitrations and legal proceedings in court have access costs and the risk of adverse cost awards if the claim proves unsuccessful.

(It does give one pause to think about how a bank might react if all its aggrieved customers suddenly were to march together with all their unresolved complaints directly to small claims court.)

It also bears mentioning that a consumer always has the right to include a bank's dispute resolution provider as one consideration in deciding with which bank to transact their business. As unlikely as it may seem in practice, it is their right.

It has not been the focus of this document to make numerous recommendations. Its purpose has been to collect and present facts. It has included the viewpoints of others, relevant background information and listed important questions still to be answered.

The Consumers Council of Canada does believe that the timeline to define the standards, create the legislation, create the applications, define the processes and grant approvals may be considerable, and measured in years rather than months, particularly if a thorough and fair effort is made rather than an expedient one. In the meantime, consumers will not be appropriately protected. Securities legislators pushed back by two years an upcoming deadline that mandated that registrants must provide no-cost external dispute resolution. Banking disputes are being addressed every day by a firm hired directly by a bank, with no common consensus that this achieves "independent" judgment.

In that light, the Council sees merit in requiring all banks to participate in OBSI for at least the interim. This would maintain consumer confidence and ensure consumers' legitimate access to redress, without confusion or delay. OBSI may not meet the Minister of Finance's definition of accountable, and it certainly does not meet some banks' description of fairness. However, we believe it has a superior claim to legitimacy to provide fair consumer redress while any new process for certifying dispute resolution options and the framework around this new system is reviewed and implemented.

OBSI already represents as close to a consensus capacity as can be found. It is, in our judgment, closer to compliance with the outlined guidelines. Its operations are well viewed by the independent firm hired to measure its operations against the Joint Forum's guidelines, and although those guidelines are rooted on the investment side of the marketplace, they do seem very similar to the Ministry of Finance's and Financial Consumer Agency of Canada's guidelines under development. It has more experience, more transparent reporting in its annual review,

greater awareness in the marketplace, established connections with other regulators, and shorter response times to current banking disputes.

Until there are competitive choices to make, it is simply unfair that some consumers receive differing levels of protection offered by the two providers. From a competitive perspective, it is unfair for two banks to exploit a policy vacuum created by the new Federal initiative while all the unresolved regulatory issues are sorted out. Given the regulatory constraints accepted by all other industry players, their actions are anticompetitive.

We are also concerned that the desire to improve the speed of resolutions may result in a loss of quality decision-making. Both OBSI directly and the Navigator report indicate that a substantial portion of the current delays come from a lack of co-operation from the firms facing consumer complaints. Adding the pressure of a deadline may encourage obstructive or un-cooperative behaviour to the detriment of consumers.

To improve investor complaint handling and redress mechanisms in 2009, the Expert Panel on Securities Regulation recommended:

- a securities regulator with the power to order compensation in the case of a violation of securities law so that the investor would not be required to resort to the courts;
- establishment of an investor compensation fund funded by industry to allow the securities regulator to directly compensate investors for a violation of securities law; and
- mandatory participation of registrants in the dispute resolution process of a legislatively designated dispute resolution body.

Moving from the current system to one in which the recommendations were binding would represent a very large change. Likewise Quebec-style compensation, with an investment pool from which awards were granted and then replenished by firms at fault also has considerable merit. Consumers would get compensated quickly, and avoid the current risk of having their claim endorsed, but compensation never paid.

Summary Conclusions About the Issues

Many other releases and documents on this proposal have focused almost exclusively on the merits of allowing banks to choose a dispute resolution provider and concluded that banks will use this liberty to automatically choose the low cost provider, or the one that judges most frequently in their favour. Some have argued that merely allowing this choice erodes consumer confidence. Many have suggested that OBSI participation become mandatory for all banks.

This report seeks to provide a balanced and thorough examination of many key aspects of the environment in which the situation has and is developing. Many of the concerns outlined are valid. Some may come to pass and consumer protection may suffer.

We do note, however, that the Minister of Finance, through his department's proposal, is formally accepting responsibility to set the standards for consumer protection in the banking sector. Likewise, there is formal government acceptance that systemic issues may arise from disputes that should be the responsibility of federal authority. The industry solution may have

been preferable to some, but it is challenged, if only because major industry participants do not accept its terms.

The government is indicating it is willing to accept responsibility in this area. If the participants behave as many fear they will, consumer protection will depend on how the government acts to exercise the new responsibility it has taken for its own.

Chapter 5:

Financial Dispute Resolution Internationally

INTRODUCTION

As described previously, from 1996 to 2008, all of Canada's major banks participated in a single national dispute resolution system, first known as the Canadian Banking Ombudsman, then later as the Ombudsman for Banking Services and Investments. In 2008, one of Canada's largest banks left OBSI, retaining a private firm to provide external dispute resolution services. Another large bank did the same in 2011. In early July 2012, Canada's Ministry of Finance formalized previously announced plans to require Canada's banks to have an external dispute resolution provider, but did not mandate a specific provider. This had the effect of making banking dispute resolution in Canada a competitive market. (OBSI membership of securities firms remains mandated by industry regulatory organizations.)

Here is a short summary of banking dispute resolution systems in other major countries, with particular emphasis on countries where there has been a "competitive" element to dispute resolution.

AUSTRALIA

Australia's Financial Ombudsman Service (FOS) is open to any financial services provider carrying on business in Australia. It is free to consumers, and designed to be used only if the dispute cannot be resolved with the individual firm. FOS offers a conciliation process or will investigate the dispute. Decisions are binding on the financial services provider.

A potential conflict among dispute resolution services was created when non-bank firms in the credit industry (mortgage brokers, payday loan companies, credit unions) were placed under a new national regulatory regime instead of a combination of state and territory guidelines. The new regulations require these firms to be members of an approved dispute resolution program, of which there are two – the FOS and the Credit Ombudsman Service Limited (COSL) that the firms were already using. The Australian Securities and Investment Commission is reviewing an independent report that assesses COSL's operations against benchmarks.

GREAT BRITAIN

The Financial Ombudsman Service was established in 2001, incorporating existing banking (industry formed), building society, insurance (also industry formed) and investment ombudsmen into a single office. There is no charge to complainants, who must first attempt to resolve the dispute with the firm involved. Once the ombudsman issues a final decision, if the complainant accepts the decision, it becomes legally binding on both parties.

NEW ZEALAND

Recent regulatory reform requires all financial services providers to be part of an approved dispute resolution scheme. However, there are four, as the Banking Ombudsman and Insurance and Savings Ombudsman – both in existence for about 20 years - have been joined by Financial Dispute Resolution (FDR) and Financial Services Complaints Limited (FSCL).

The reform resulted in thousands of newly licensed financial services providers, and required all the providers to join an approved dispute resolution provider. Before the changes were enacted, both the existing Banking and Insurance & Savings programs were unwilling to guarantee that all the new licensees would be accepted as members.

The government-established Financial Dispute Resolution (FDR) and private Financial Services Complaints Limited (FSCL) both entered the market, and now there are four dispute resolution services competing for members. The 2011 Navigator Report on OBSI notes a complication from the New Zealand experience. The government FDR set its prices (annual and case fees) in line with other programs to avoid undercutting, and also proposed a lower compensation cap − an upper limit on penalties − than the existing programs. The existing programs complained, so the compensation cap was raised to $200,000, matching the existing services. However, FSCL set its compensation cap at $100,000, and the lower compensation limit proved attractive to the market. The government FDR, with its own set of costs, was then forced to begin competing for members, further angering the established services.

The Navigator summary notes: "some clearly see the tensions between schemes as healthy and offers of 'free' training and the lower compensation cap as evidence of competition improving the service." Others note that having four alternatives has confused consumers, complicating awareness of where to seek external dispute resolution, and proven to be inefficient in a nation of 4 million people.

United States

In the United States, the opening of the Financial Services Credit Bureau in 2011 provides some of the elements of dispute resolution, but not the full suite of ombudsman powers. The FSCB was created in the aftermath of the financial services breakdown in 2008-9 to protect consumers from deceptive practices. While still being phased into operation, its first responsibilities included serving as a single point of complaint for consumers concerning credit cards, mortgages, student and consumer loans, and other bank products and services.

The FSCB consumer response team hears directly from consumers about the challenges they face in the marketplace, brings their concerns to the attention of financial institutions, and assists in addressing their complaints.

One substantial challenge facing U.S. financial services consumers is simply understanding the regulatory system. There are five different federal agencies that regulate banks, savings and loans, and credit unions.

Jeannine Kenney, Senior Policy Analyst at Consumers Union noted in her December, 2007 testimony to the U.S. House Subcommittee on Financial Institutions:

> Consumers should not need to know whether their financial institution is a federally chartered bank, a state-chartered bank, a thrift, or a credit union. They should not need to know that national banks and their operating subsidiaries are regulated by the Office of the Comptroller of the Currency, that savings banks and associations are regulated by the

Office of Thrift Supervision, that credit unions are regulated by the National Credit Union

Administration, that state-chartered banks are regulated by their state regulator, supervised by the Federal Reserve Board and insured by the Federal Depository Insurance Corporation. To most consumers, a bank is a bank, regardless of how and by whom it is regulated. The regulatory maze creates not only confusion for consumers, but it promotes unnecessary duplication and costs and reduces the utility of the information that regulators can glean from the complaint and inquiry process.

Chapter 6:

Timeline of Developments in Dispute Resolution in Canada

November 7, 1995 – The Canadian Bankers Association announces plans to create a national ombudsman to hear complaints from consumers and small businesses. This follows many months of discussion with government officials, who were considering a government ombudsman. Through 1994 and 1995, each bank had established and administered access to a national system of dispute resolution for small business clients. Small businesses had been angered by the introduction of numerous service charges, the use of credit scores to tighten lending and the lack of transparency. The new Canadian Banking Ombudsman would handle complaints that could not be resolved by the firm and the customer.

May 1996 – Canadian Banking Ombudsman operations begin, with Michael Lauber named ombudsman. The office handles only small business complaints, but cannot address an individual bank's credit policies. That limitation and the office's ability to make non-binding recommendations only are the two most common criticisms of the office. At the launch, Lauber indicates that his office is expected to handle dispute resolution of individual consumers and banks within a year.

March 1, 1997 – The CBO mandate is expanded to include complaints from individual consumers.

August 27, 2002 – A press release announces the expansion of the Canadian Banking Ombudsman operations to include dispute resolution for member firms of the Investment Dealers Association (IDA), Mutual Fund Dealers Association of Canada (MFDA) and Investment Funds Institute of Canada (IFIC). This follows a multi-year review of Canada's financial services sector. Both the McKay Task Force (1998) and a 1999 policy paper from the office of Finance Minister Paul Martin called for a single independent dispute resolution service for all financial institutions. The organization is renamed Ombudsman for Banking Services and Investments (OBSI) and membership jumps from 13 firms to almost 500. While membership for banking services remains voluntary, for investment issues, membership is mandated.

May 10, 2007 – OBSI announces that Toronto mutual fund dealer Financial Architects Inc. has refused to honour its recommendation for compensation, following an investigation into an unresolved dispute between the firm and a former client. This is the first time that a firm has refused to comply with a recommended settlement, It remains the only time a dealer has been subject to the OBSI's "name and shame" policy for firms that do not abide by its recommendations.

December 2007 – Following recommendations of an independent review, OBSI announces changes to its terms of reference. The most controversial of those changes is the ability to investigate "systemic issues." This would allow OBSI to recommend that banks compensate all

affected customers when a complaint appears relevant to a large number of customers (for example, a flawed product or brochure.) IFIC and IIAC warned that OBSI was in danger of becoming a regulatory body. Another change would allow the OBSI to assist complainants in articulating their complaint. Royal Bank of Canada noted that OBSI was becoming an "advocate for the complainant, not an impartial arbiter of the complaint itself."

October 27, 2008 – OBSI's Board of Directors approved revised terms of reference, to take effect April, 2009. Under the revised terms, OBSI will follow up on potential systemic issues that arise out of individual complaints by asking the firm to undertake an investigation. OBSI will offer to work with the firm to remedy the problem and arrange compensation for affected clients. If OBSI and the firm disagree on the problem or the remedy, the file will be referred to the appropriate regulator for review.

October 31, 2008 – Royal Bank of Canada announces its withdrawal from OBSI. A bank representative said the change was solely from a desire to provide more timely resolution to its customer complaints and had nothing to do with the revised terms of reference or costs. RBC paid the largest share of the OBSI budget, but had fewer complaints than many other smaller banks. RBC announced plans to use ADR Chambers for banking dispute resolution. (Membership of RBC securities affiliates was still required). The unanticipated RBC withdrawal led to changes in OBSI's budgeting process. Outstanding open cases involving RBC at the time of the withdrawal were eventually transferred to ADR Chambers, after RBC resisted OBSI efforts to complete ongoing investigations.

March 26, 2009 – OBSI announced that the revised Terms of Reference would not be implemented April 1, but rather in conjunction with revised complaint-handling rules from IIROC and MFDA.

January 22, 2010 – OBSI announces its revised terms of reference would take effect February 1, 2010, coincident with new IIROC and MFDA complaint handling rules.

March 4, 2010 – In the 2010 Federal Budget, Ottawa announces plans to require banks to belong to "an approved third-party dispute handling body" as part of each bank's dispute resolution. It also said it would work with industry to establish standards for each institution's internal complaints procedure to ensure fair, efficient and timely treatment of consumer's' complaints and "improve the effectiveness of the third-party dispute resolution process."

March 2010 – In submissions to IIROC regarding proposed changes to its arbitration program, both RBC Dominion Securites and TD Waterhouse offer more detailed criticism of OBSI. RBC DS remarks on a lack of transparency – while OBSI publishes details of selected complaints in its annual report, it does not publish the rationale for its decisions. TD Waterhouse's submission finds OBSI's decision-making is at times questionable. "When presented with established legal precedent, this would not be taken into consideration in their decision."

June 9, 2010 – With the release of its 2009 Annual Report, OBSI notes that consumer complaints have increased dramatically following the extended and extreme equity market downturn that began in the summer of 2008. For its November 1, 2008 to October 31, 2009

year, OBSI investigated 990 banking and investment consumer complaints, a 48 per cent increase over 2008, and more than three times the cases from 2006. OBSI received more than 12,400 individual inquiries from consumers and small businesses. OBSI said investment complaints drove the overall increase, as they were up 73 per cent over 2008. In 2009, consumers received compensation in 28 per cent of cases reviewed by OBSI, 20 per cent for banking complaints and 35 per cent for investment complaints.

October 8, 2010 – In a follow-up submission to IIROC regarding the IIROC arbitration system, RBC DS asks IIROC to remove the requirement that member firms participate in OBSI. "We strongly believe that investors should have viable access to dispute resolution services that are fair, transparent and efficient; we do not believe that OBSI …. provides a dispute resolution service with these merits." The submission criticizes the lack of consistent rules governing investigations or assessment of damages methodology. "This is compounded by a complete lack of regard for legal principles and accountability that results in complaints being handled in an inefficient and ultimately, unfair manner."

May 12, 2011 – The Financial Post reports that representatives from RBC Capital Markets, TD Waterhouse and Manulife Financial meet with CSA, IIROC, MFDA and OBSI representatives to discuss their application for an exemption from the mandatory provision that requires them to use OBSI for dispute resolution. The firms had filed that request in late April, but the request was denied by IIROC. The article suggests the main point of contention was OBSI's loss calculation methodology, which factored in "opportunity costs" – the inclusion of amounts an investor might have theoretically gained had the firm chosen a suitable investment instead of the unsuitable one.

May 26, 2011 – OBSI issues a consultation paper on its suitability and loss assessment process, inviting public comment on the process and principles discussed in this paper. OBSI notes that when there is no agreement between OBSI and the firm, it can lead to significant delays in resolving client complaints, and that firms use a wide variety of alternative approaches.

September 21, 2011 – As part of its operation with financial market regulators, OBSI must submit itself to knowledgeable, independent third-party evaluations. The Navigator Company of Australia releases its second review of OBSI (the first was completed in 2007). The report is largely positive on OBSI operations, noting that the ability to address systemic complaints is one major improvement from 2007. It also praises OBSI's investment complaints methodology. On the other hand, the report notes that OBSI is subject to rising levels of criticism and pressure, constantly defending itself, and inadequately funded. "Our investigation found that OBSI compares favourably with international EDR services, and we found no substantive basis for the level of local criticism."

October 26, 2011 – TD Bank announced it would no longer use OBSI to resolve banking disputes, as of November 1, 2011. Its banking-related disputes would be handled through ADR Chambers, the same service retained by RBC.

October 28, 2011 – The CSA, OSC, IIROC and MFDA jointly author a letter to OBSI, stating that they were reviewing the Navigator report, and intended to work with OBSI to "improve and enhance the current system so that investors have the best complaint handling system available." This included possible changes to securities laws and/or SRO rules. They asked OBSI to urgently act to reduce the number of outstanding "stuck" cases.

October 30, 2011 – OBSI's Board of Directors issues a statement asking financial services regulators to make bank participation in OBSI mandatory, declaring that "an effective consumer protection service that operates in the public interest cannot survive without the voluntary support of the banking sector, or in the absence of that voluntary support, mandatory participation through designation under the Bank Act." The statement added: "Government needs to know they have an effective partner in dispute resolution, one that independently and credibly deals with consumers and investors, and is transparent and accountable to regulators."

March 26, 2012 – A Globe and Mail article indicates that OBSI's board has approved a scenario that would see its consumer banking complaints office close unless Ottawa prevents banks from choosing their own dispute resolution services. The article also notes the testimony of Ombudsman for Banking Services and Investments Douglas Melville to the House of Commons Finance Committee the week earlier, suggesting that if banks use their own mediators, they will have all the power and the consumers none. "A service hired by the bank, and that consequently has the bank as a client, creates the perception, if not the reality of a loss of critical independence. The service will know who it is they need to please in order to keep the business, and it's not the individual making the complaint."

April 27, 2012 – Finance Minister Jim Flaherty tells the Financial Post's editorial board that Ottawa will not make OBSI participation mandatory for federally chartered banks. Instead, the government plans to release new rules and regulations that will allow financial institutions to hire their own mediators for client disputes.

July 6, 2012 – The Department of Finance releases a new framework for banking dispute resolution, originally discussed in the 2010 budget. It clarifies that banks must provide an external complaints body to handle complaints that aren't resolved internally, at no cost to the consumer. The Financial Consumer Agency of Canada will prepare guidelines for banks' internal complaints, and will supervise the compliance of external third-party services. External complaints bodies would concentrate on resolving individual complaints, and notify FCAC of systemic issues, leaving the role of investigation to the FCAC. The new rules also require complaints to be resolved in 120 days "compared to the current industry standard of 180 days." Draft legislation is released July 14.

Chapter 7:

Perspectives

Global Voices

Because in early July 2012, Canada's Ministry of Finance formalized previously announced plans to require Canada's banks to have an external dispute resolution provider, but did not mandate a specific provider, this had the effect of making banking dispute resolution in Canada a competitive market. (OBSI membership of securities firms remains mandated by industry regulatory organizations.) Banks could choose to remain in OBSI, or select a private "for-profit" dispute resolution service approved by the government's Financial Consumer Agency of Canada (FCAC).

Here is a summary of public comments on the key elements of this proposal, from interested parties and relevant international groups and documents.

G20 High-Level Principles on Financial Consumer Protection
October 2011[1]

9. Complaints Handling and Redress

> Jurisdictions should ensure that consumers have access to adequate complaints handling and redress mechanisms that are accessible, affordable, independent, fair, accountable, timely and efficient. Such mechanisms should not impose unreasonable cost, delays or burdens on consumers. In accordance with the above, financial services providers and authorised agents should have in place mechanisms for complaint handling and redress. Recourse to an independent redress process should be available to address complaints that are not efficiently resolved via the financial services providers and authorised agents' internal dispute resolution mechanisms. At a minimum, aggregate information with respect to complaints and their resolutions should be made public.

World Bank: Resolving Disputes Between Consumers and Financial Businesses
January 2012

Independence[2]

> A financial ombudsman provides an alternative to the courts; so the ombudsman should be (and also be seen to be) as independent and impartial as a judge – as well as having the necessary legal and technical

[1] Page 7

[2] Page 35

expertise to resolve financial disputes authoritatively. In order to obtain the confidence of consumers:

- the financial ombudsman should not be appointed by the industry, nor by a body with a majority of industry members; and
- the person appointed as financial ombudsman should not have worked in the financial industry nor for a financial industry association within the previous three years.

Coverage[3]

At the outset, especially where it is necessary to create a consensus amongst all those involved, it may be easier to start by creating an ombudsman for a particular sector – such as for banking or insurance.

But the traditional boundaries between banking, insurance and investment are becoming increasingly blurred in many countries, with – for example – banks selling insurance and investments alongside bank accounts and loans.

So there is a growing trend towards bringing the sectors together in a single financial ombudsman. An ombudsman scheme that covers all financial services offers economies of scale and flexibility when workload swings between different financial sectors. It is also simpler for consumers to understand…..

A few countries have the unusual idea of 'competitive' ombudsmen, where – subject to specified minimum standards – the financial industry is able to choose between two or more competing financial ombudsmen. Such a choice presents severe risks to independence and impartiality – because financial businesses may favour the ombudsman they consider likely to give businesses the best deal.

It overlooks the role of financial ombudsmen as an alternative to the courts and creates one-sided competition – because, unlike the financial businesses, the consumers are not given any choice of ombudsman.

WORLD BANK: GOOD PRACTICES FOR FINANCIAL CONSUMER PROTECTION

Financial Inclusion Practice, Financial and Private Sector Development, June 2012

In General: Dispute Resolution Mechanisms[4]

26. Consumers have access to an affordable, efficient, respected, professionally qualified and adequately resourced mechanism for

[3] Page 38

[4] Page 8

dispute resolution, such as an independent financial ombudsman or equivalent institution with effective enforcement capacity. The institution acts impartially and independently from the appointing authority, the industry, the institution with which the complaint has been lodged, the consumer, and the consumer association. Decisions by the financial ombudsman or equivalent institution are binding on the financial institution.

Australian and New Zealand Ombudsman Association

Policy Statement, September 2011

Competition among Ombudsman offices

Members of ANZOA, both parliamentary and industry Ombudsman/ Commissioner offices, operate according to the principles of independence, accessibility, fairness, efficiency, effectiveness and accountability.

ANZOA considers that 'competition' among Ombudsman offices runs counter to these principles, particularly the key principle of independence, for the reasons set out below. ANZOA's position is that there should be only one external dispute resolution (EDR) Ombudsman's office for any industry or service area.

Competition in Ombudsman offices is most likely to impact on industry Ombudsmen, and is considered inefficient and undesirable on a range of policy levels:

- It is not in the interests of consumers/citizens or their advocates, as it may not be clear where to take complaints or which is the most appropriate service to deal with particular issues.
- It is likely to add unnecessary and inefficient costs to Ombudsman services, e.g. inefficient duplication of infrastructure/resources/services/ information systems, mechanisms to establish a 'common door' approach, and the need to provide information to consumers about different offices.
- It may lead to manipulation of dispute resolution services, differing standards, and inconsistencies in decision making which could be adverse for consumers and participating organisations.
- Poor performing organisations may choose to join an alternative office that they believe is not as rigorous in its approach to complaints.
- An office may focus more on participating organisations rather than on complainants or consumers in order to keep or grow its membership.

- Where offices are subject to regulatory approval and/or other regulatory mechanisms, regulators may need to set up separate reporting and communication systems for different offices, potentially about the same issues.
- The value of the Ombudsman's office as a source of information and analysis to contribute to the ongoing improvement of an industry or service area will be diluted, to the detriment of consumers, service providers and the wider community.

ANZOA believes that while it is inappropriate to apply concepts of market forces and competition to what are effectively 'natural monopolies', other appropriate mechanisms can be utilised to provide a proxy for the benefits that can otherwise be derived from competing services. These mechanisms include appropriate governance arrangements, independent reviews, public reporting, effective self-regulatory and/or regulatory mechanisms, benchmarking, formal or informal peer reviews, and scrutiny through avenues such as ANZOA.

There may be overlaps between some Ombudsman offices, but this is different from competition between offices. An overlap is usually dealt with by way of a Memorandum of Understanding between the offices, or other transparent arrangements.

Canadian Perspectives

THE GLOBE AND MAIL
Editorial, July 16, 2012

New ombudsman rules tip playing field in banks' favour

Ottawa's confirmation this month that Canadian banks will be able to hire a third-party ombudsman of their choice to settle disputes with retail customers is unsettling and raises important questions. Among them, will the banks routinely switch ombudsman firms in a search for the one that provides the most favourable rulings? Can Ottawa guarantee customers will have a transparent, stable and impartial way to settle disputes with their banks?...

As before, it will be the banks that foot the bill; customers who are unhappy about an unexpected account charge or high mortgage prepayment penalty will still be able to file a complaint for free and avoid the expense of going to court against a Goliath. This is a vital service; Canada's highly profitable major banks operate under a charter system that limits competition, and the average retail customer needs something to level the playing field in a dispute. The Finance department says it will

regulate the makeup and practices of the companies that get into the bank ombudsman business in order to guarantee their impartiality. But by creating an open market for ombudsman services, the field has been tipped back in the banks' favour. Will these for-hire bodies be able to make recommendations that go against their paying clients without fear of losing business to a competitor?

A single industry-funded body such as the OBSI that all financial institutions must join would be protected from commercial pressures and be able to help settle disputes without fear of economic consequences. That in turn would help secure Canadians' faith in the fairness of our banking system.

TORONTO STAR
Ellen Roseman Personal Finance Column, July 6, 2012

By allowing multiple ombudsmen to exist only for banking complaints, Flaherty is saying that two Canadian banks can drop out of OBSI [with] impunity – and other banks can follow suit.

He is weakening OBSI's authority and financial strength by letting banks shop around for a complaints body they like.

And despite the new standards being created for complaints bodies, there will still be a conflict of interest when banks can hire and fire their own complaints mediators.

CANADIAN FEDERATION OF INDEPENDENT BUSINESS
Brien Gray, Executive Vice-President, Phone/e-mail interview, July 20, 2012

For small and mid-sized businesses (SMEs) the service was constrained from the outset in that it could not be used to deal with complaints related to credit. This was a fatal flaw in that the overwhelming issues for our constituency with respect to the banks are those relating to financing. As a result, it can be safely said that for our constituency, the current service is little known and scarcely used NOT because there is no need, but because the way it is currently constructed it has no impact on issues that matter. Rather than allowing the service to wither as the funding banks walk away it would be important to enhance the service through expanding its scope, expecting all banks to be subject to it, ensuring its independence, resourcing it sufficiently and making its decisions binding. Making such enhancements would give the service a far greater chance to make a difference for SMEs on matters of importance to small firms and help to garner confidence and credibility in the service.

PUBLIC INTEREST ADVOCACY CENTRE

Press Release, July 6, 2012

Final Betrayal: Finance Minister's Multiple Banking ADR Decision Harms Consumers

> The Public Interest Advocacy Centre (PIAC) today condemned the Minister of Finance's publication of draft regulations for "external complaints bodies" under the Bank Act. The new rules are weak and allow multiple consumer banking arbitration services, thereby destroying the Ombudsman for Banking and Investments (OBSI) which had resolved consumer complaints well.
>
> "The regulations require these external complaints providers to have people who are working on complaints be "impartial and independent of the parties" but everyone knows the banks will choose a provider that gives them favourable results," stated John Lawford, Counsel for PIAC. "It makes no difference that the arbitrator assigned is not a bank employee – the fundamental conflict of interest is there and consumers can expect poor results and less compensation when wronged by their bank."

KENMAR ASSOCIATES

Public Submission to Minister of Finance, July 16, 2012

(Kenmar Associates is an Ontario not-for-profit organization focused on retail investor education and protection. Principal Ken Kivenko authored an eight-page submission to the Minister of Finance, excerpts of which are here…)

> In the financial services sector, there is only one national Ombudsman for investments and mutual funds. There is only one Ombudsman for life and health insurance complaints at the national level (OLHI). There is only one ombudsman for general insurance complaints (GIO). The federal government has a taxpayers' ombudsman, a Canada Post ombudsman, a National Defense and Canadian forces ombudsman and an Office of procurement ombudsman. By allowing multiple ombudsmen to exist only for banking complaints, the Government is weakening OBSI's authority and financial strength by letting banks shop around for a complaints body that will need to please it to stay in business….
>
> Accordingly, we recommend that the Government make a gracious retreat and instead establish a legislation-enabled Financial Ombuds service for banking and investments and possibly insurance. That would demonstrate real leadership.
>
> We have the highest respect for the Department of Finance and appreciate the many proconsumer initiatives it has undertaken including the initiative for a national securities regulator to better protect investors. Indeed, the primary argument for such a regulator cited by Minister Flaherty was that

in today's globalized, complex world, a strong efficient single national regulator was required to best protect investors and improve our regulatory and enforcement performance. These very same arguments apply to a national Ombuds service.

FAIR (Canadian Foundation for Advancement of Investor Rights)

June 1, 2011 (Excerpt)

FAIR Canada is opposed to the efforts of the investment and banking industries to undermine OBSI by permitting them to choose and remunerate private, for-profit dispute resolution service providers. Such efforts raise a serious threat to investor protection and would likely further exacerbate existing weakness in complaint handling and consumer redress mechanisms.

July 26, 2012 Newsletter Excerpts

The Federal Government's proposed new regulations for banking complaints represent progress in that they: (1) set standards for external dispute resolution services for banks that have left OBSI, where no such standards existed previously, and (2) provide for government oversight of these entities.

However, they do not live up to the G20 Principles on Financial Consumer Protection and, fall short of being "pro-consumer" as touted by the government. First, consumers have no choice of dispute resolution service provider – they must use the service chosen by the bank. Banks, on the other hand, will be able to entertain bids from approved service providers and choose the one that gives them the best deal and serves their interests. This could result in severe risks to independence and impartiality, two principles which are fundamental to effective dispute resolution for consumers.

Second, there is no requirement that the external complaints body be truly "independent". The regulations permit a non-independent body and only require that the individual who hears a particular complaint be impartial and independent of the parties to the complaint.

Third, the regulations open the door to more competition among dispute resolution service providers who will compete with each other to be hired by a bank, in order to be the bank's chosen supplier. Competition will mean that banks will receive more favourable service from the suppliers. This will lessen the focus on fairness to consumers, as there will be no reason for competition to entice consumers to use a service provider. This competition for banks' business will not benefit consumers.

Finally, opening up banking dispute resolution to multiple disparate, for-profit service providers will reduce consistency in decision-making and could contribute to increased consumer confusion about the dispute resolution process.

Union des Consommateurs

News Release (translated and excerpted), May 1, 2012

Union des Consommateurs strongly condemns the decision of the federal Minister of Finance Jim Flaherty, to not require banks to use the services of the Ombudsman for Banking Services and Investments (OBSI) for the resolution of disputes with consumers.

"The Minister is ignoring its own commitments in the regard of consumers," denounced Charles Tanguay, spokesman of the Union des Consommateurs. The finance ministers of the G20 have in effect adopted, in October 2011, new principles developed by the OECD to improve the protection of consumers of financial services. Among these principles is the importance of providing consumers with access to an independent and impartial recourse mechanism.

CARP

Newsletter, March 23, 2012

Canadians Deserve Robust Investor Protection and Redress for Complaints

CARP has called for comprehensive investor protection. But, with the demise of the [National Securities Regulator} and with OBSI left precarious after the TD and RBC withdrawals, investors and Canadians may now be less protected and have less recourse for their complaints against banks.

CARP strongly endorses a national initiative to protect retail investors and bank clients from fraud and financial crimes. It's time provincial and federal governments act together to implement common regulations, oversight, enforcement and independent conflict resolution. In this uncertain economic climate, Canadians and their hard earned money deserve the proper protections.