
CONSUMER PERSPECTIVE DISCUSSION

November 2018

**A Case for Preservation of the Ombudsman for
Banking Services and Investments as Dispute
Resolver for Retail Banking Consumers**



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Acknowledgements

The Consumers Council of Canada has as its mission “Working Towards an Improved Marketplace for Consumers in Canada.” To this end, it seeks to promote discussion and debate about consumer protection issues and the consumer interest. As a not-for-profit voluntary organization seeking to provide representation for Canada’s consumers, it hosts the mission-related creation and publication of research and public policy discussion, in addition to developing policy positions of its own. This work is intended to enrich the quality of the Council’s own and other independent consumer representation in public policy and standards development, complaints handling, regulation, and judicial proceedings.

This discussion paper has been prepared by experienced Council volunteers closely involved in providing consumer representation concerning banking and investments.

The Council wishes to thank the authors of this paper, Andrew Teasdale, CFA, and Harvey Naglie, for contributing this discussion paper to support the Council’s mission: *A Case for Preservation of the Ombudsman for Banking Services and Investments as Dispute Resolver for Retail Banking Consumers*

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Abstract:

The purpose of this report is to discuss issues surrounding the defection from the Ombudsman for Banking Services and Investors of the majority of Canada's "big five" banks. It discusses the veracity of the reasons cited by these banks for this defection and the advantages of having a single dispute resolution service for Canada's retail banking consumers governed according to public interest principles.

Keywords: banking, dispute resolution, arbitration

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Introduction

A Case for the Ombudsman for Banking Services and Investments

A compelling case exists for designating Ombudsman for Banking Services and Investments as the exclusive alternative dispute resolution provider (ADRP) serving Canadian consumers in disputes with Canadian banks. This case for doing so is based on the following considerations:

- The fundamental advantages of the ombudsman model, as it has evolved at OBSI
- Conflicts of interest existing within the status quo model, currently under consideration for reform by Parliament
- A flawed policy that has led to an uneven playing field among banking competitors and between banks and consumers
- The weak evidence supporting the reasons cited by banks for exiting from participation in OBSI, in particular based on the most recent case of this involving Scotiabank
- Statistical analysis comparing existing dispute resolution alternatives available to Canada's banks

Canada's Parliament soon will debate provisions of Bill C-86 *A second Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures*.¹ The bill was tabled for first reading on October 29, 2018. In particular, this discussion paper is relevant to provisions included in Part 4, Division 10, of the Bill, under which the Financial Consumer Agency of Canada could designate how retail consumer disputes with banks will be handled in the future.

¹ Bill C-86, Part 4, Division 10, *A second Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures*. 1st Session, 42nd Parliament, Canada, 2018 (First Reading).



Fundamentals of the Ombudsman Model

Reducing the time and cost of dispute resolution and increasing the benefits to wronged consumers, with justice for all

Alternative dispute resolution is a process that has grown in importance given the costs and protracted timeliness of the more formal adversarial justice system.²³ Given that mediation and arbitration require expensive legal representation,⁴ ombudsman with powers of binding decisions and compulsory membership have become an increasingly important part of the international complaint resolution landscape, especially in financial services. This is especially so for small complaints and vulnerable consumers, and more so for those with limited financial means and other supports. This levelling of the “playing field” has been acknowledged as an important social value.

In the ombudsman model the judge, legal representation and expert witnesses are replaced by the ombudsman, its deputies, investigators and processes. This requires the ombudsman organization and processes to operate with objectivity, independence, impartiality and professionalism with adherence and reference to objective standards of good conduct, fairness and proficiency.

We believe that two objectives of an ombudsman, the integrity of construct and the levelling of the playing field, which is not advocacy but a primary function of all regulation, are lacking in competitive market ADRP business models.

² NADRAC, Discussion Paper on Issues of Fairness and Justice in Alternative Dispute Resolution (Commonwealth of Australia, 1997).

³ Farrow, Trevor C. W., "Dispute Resolution, Access to Civil Justice and Legal Education" (2005). Articles & Book Chapters. Paper 2059.

⁴ Gowling WLG, (October 2018). Guide to Doing Business in Canada: Dispute Resolution & Litigation.



Conflicts of Interest

It's not fair for banks to select their own arbitrator

Conflicts of interest are inherent in a system that allows banks to select service providers within parameters that may conflict with the intent of the consumer that chose to elevate the dispute to an ADRP in the first place. For-profit ADR service providers are financially motivated to position their service to satisfy the requirements of their customers – the banks. By permitting external dispute resolution to operate as a competitive market service supplied to banks, the intent, integrity, independence and objectivity of the service is undermined.



A Flawed Policy

The public interest has been impacted

The flawed policy that has allowed banks to select their own dispute resolution provider has adversely impacted the OBSI and the public interest in many ways:

1. Faced with the higher level of reputational risk posed by the more transparent OBSI process, banks have been motivated to choose the much less transparent ADRBO. Consequently, patterns of systemic problems that would otherwise be easier to detect, are rendered opaque because of a policy that allows banks to choose a less transparent ADRP to handle their unresolved complaints.
2. The loss of a critical mass of banks by OBSI as they migrate to ADRBO reduces available funding for the OBSI's vital public interest mandate, a development that, over time, is destined to erode public confidence and trust in the banking system.
3. An external complaint provider with a public interest mandate, and implicit obligations to level the playing field with respect to the complaint process, is at a competitive disadvantage in the current marketplace. In this circumstance, the only viable alternatives available to the OBSI may be exiting the marketplace or to reducing the scope and/or quality of its service.

Positioning the choice of ADRP as one defined by competitive market forces conflicts with and weakens the objective of regulation. In terms of regulation, principles of competition, must and should be trumped by an over-arching imperative to treat and be seen to be treating consumers fairly.



Debunking Scotiabank's Reasons for Leaving

There is no performance-based reason for this decision

According to the Scotiabank press release⁵ it left the OBSI because ADRBO offered a more streamlined and more timely process. Based on a review of the available statistics from ADRBO and the OBSI, we could find no basis for Scotiabank's reasons for leaving. In addition, Scotiabank's justifications seem at odds with its own internal dispute process which requires aggrieved consumers to negotiate multiple steps:⁶

- Talk to the branch or customer contact centre
- If not happy with response, speak to management officer.
- If not happy with response, contact the Office of The President
- If not happy with the response, contact the internal ombudsman.
- If not happy with the response of the internal ombudsman, “you can refer your complaint to the OBSI”.

It appears to us that Scotiabank's internal dispute process should have been the target for streamlining and time saving rather than severing ties with the OBSI.

According to the Financial Consumer Agency of Canada (FCAC) there should be no more than two complaint process levels at a bank, although we note that general instructions⁷ provided on the FCAC site conflict with the specific instructions for each institution,⁸ all of which include their internal ombudsman as an additional third complaint level.

⁵ Scotiabank (September 2018). [Statement on Change to External Complaints Body](#).

⁶ Scotiabank. [How to Resolve Your Complaints](#).

⁷ Financial Consumer Agency of Canada. [How to file a complaint with a federally regulated financial institution](#).

⁸ Financial Consumer Agency of Canada. [Complaint-handling process for: Bank of Nova Scotia \(Scotiabank\) \(The\)](#).

According to FCAC, once a Scotiabank customer has been through the office of the President he or she should be entitled to a review by an external dispute resolution service. There should be no need to go through the internal ombudsman. Yet, this is not the instruction provided by Scotiabank nor does it reflect the instruction provided by ADRBO on its website.

- the Member Bank's internal ombudsman has either (1) rejected the Complaint in writing or (2) made a recommendation for resolution of the Complaint, but the Complainant has not accepted it. ADRBO may also investigate a Complaint, upon

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a Complainant's request, if more than 90 days has passed since the Complaint was received at the Member Bank's second level of complaint handling, no rejection or recommendation has been made, and the Member Bank has sent a letter to the Complainant specifically advising that the 90-day period has expired and the Complainant may raise their Complaint directly to the ADRBO if they wish ("90-day letter").

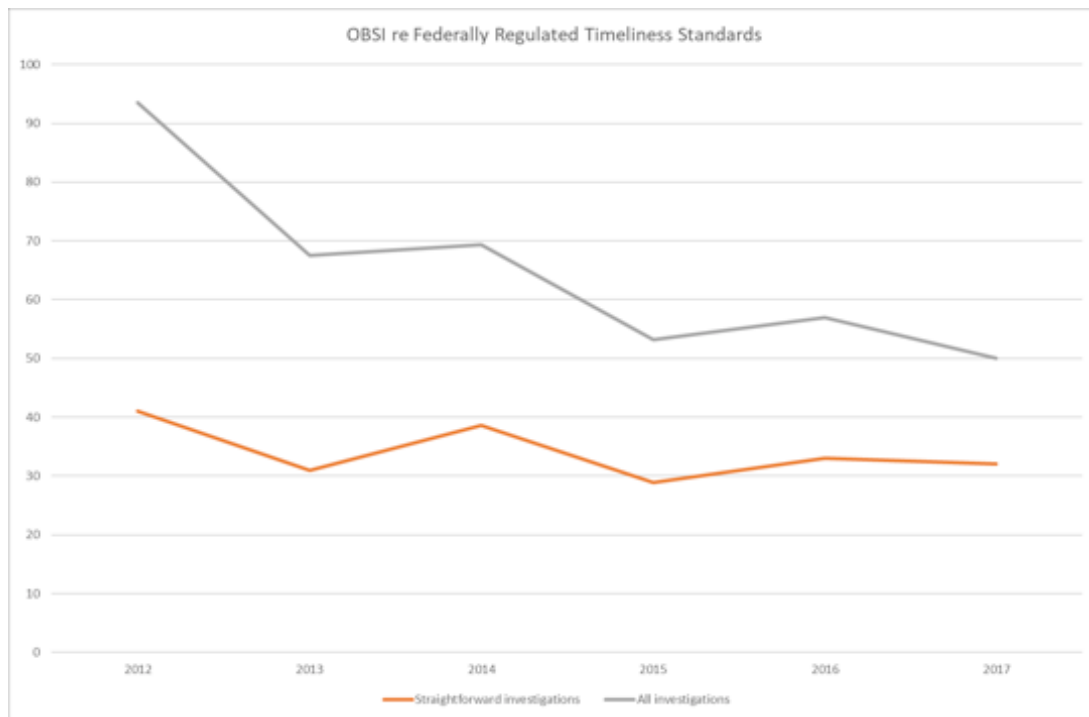
ADRBO requires the complainant to fully exhaust all three levels of the bank's complaint pyramid including the unnecessary internal ombudsman requirement. In contrast, a consumer can access the OBSI process the earlier of receiving a final response from the firm (step 2 in the banking complaint process) or 90 days after the complaint was submitted to the bank. On this basis alone, the OBSI process is the more timely for the consumer, whereas the ADRBO process affords the bank an additional opportunity and more time to settle the complaint on its terms. We do not believe that this is conducive to fair process. In fact, it is more likely to exhaust the complainant than satisfactorily and fairly resolve his or her dispute.



Statistical Analysis

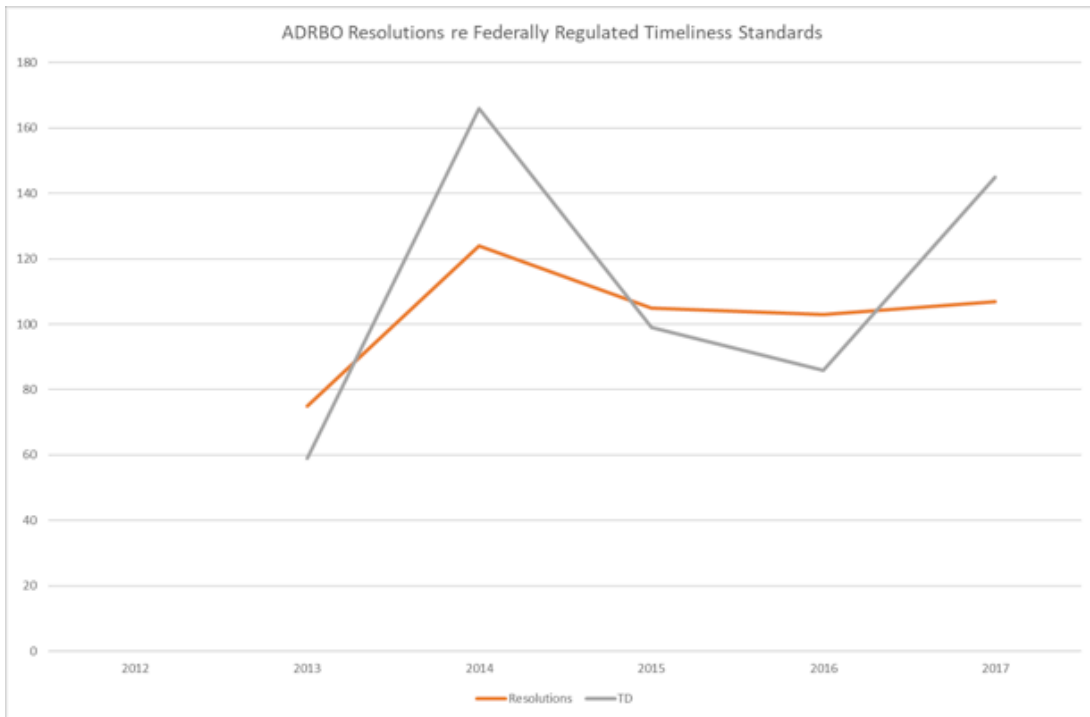
OBSI is at least as efficient as the current alternative

Our statistical analysis of the available data found no evidence that, with respect to timeliness, the OBSI is less efficient than ADRBO. The following chart depicts the average times for OBSI completion of straightforward investigations and all investigations with respect to Federally Regulated Timeliness Standards.

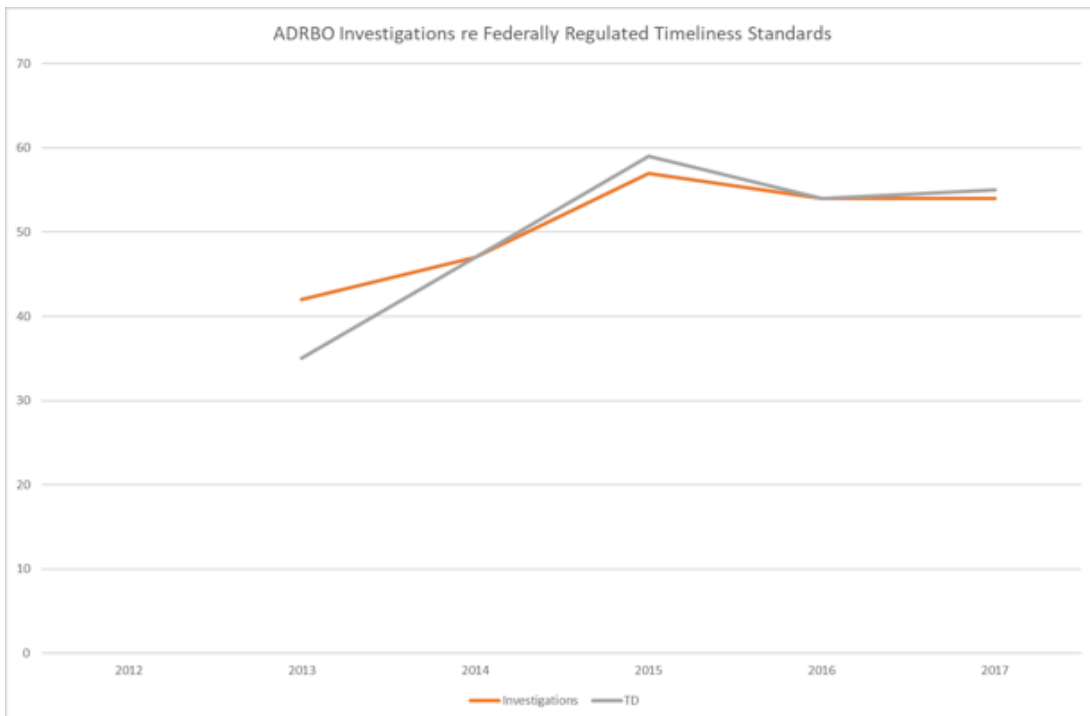


The above chart measures efficiency, based on average times to resolve cases, for the OBSI in the five-year period from 2012 to 2017. The trend is consistent, stable and progressively lower, indicating improvements in efficiency over time.

ADRBO data are more difficult to interpret because they are presented in two separate categories – resolutions and investigations (the latter includes cases that are reviewed and rejected at an early stage). The following charts show average time for resolutions, and investigations, respectively.

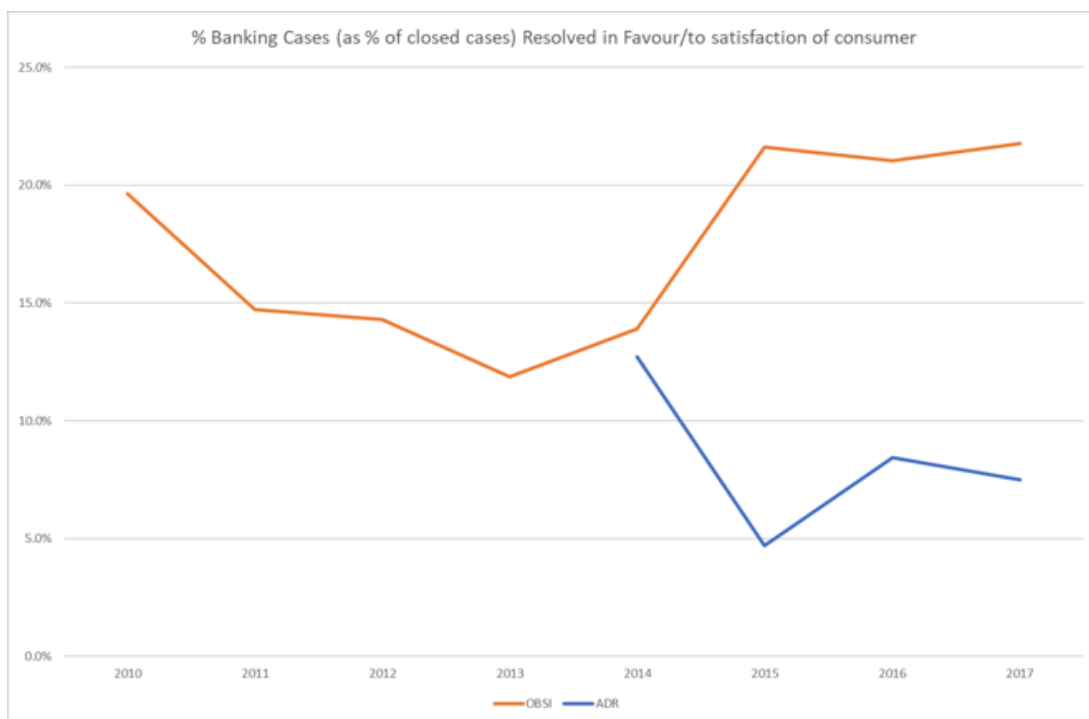


Clearly resolutions are showing an upward trend between 2012 and 2017. We have chosen to benchmark this against TD data for comparison purposes.



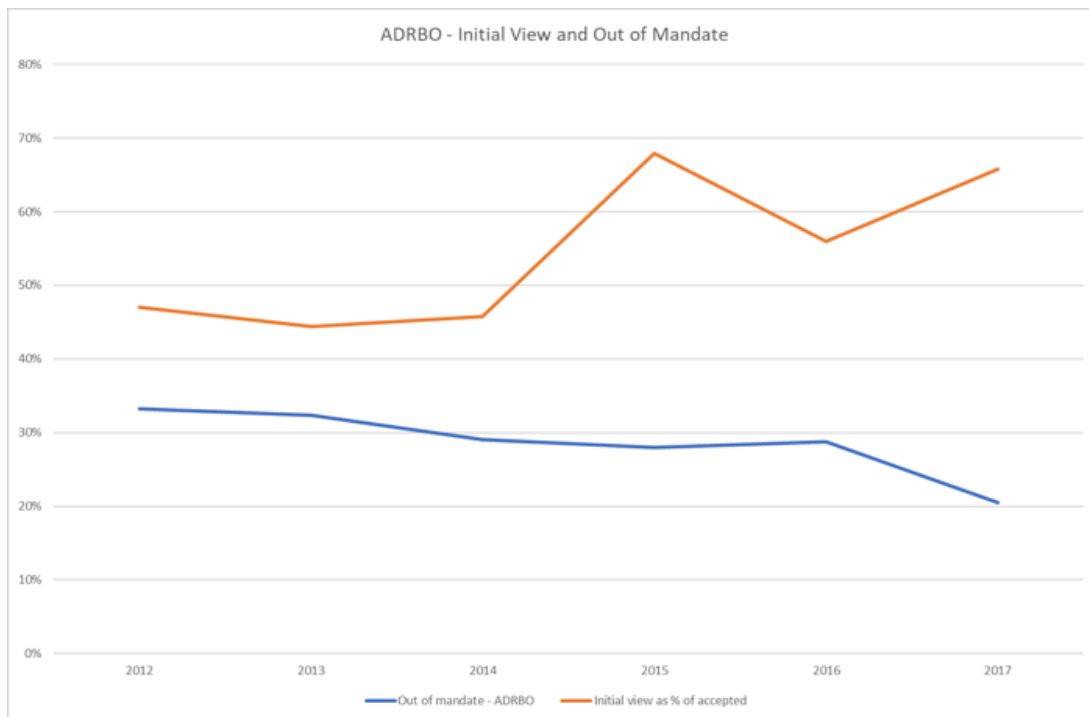
Timeliness for investigations are also on an upward trend for ADRBO (orange line) suggesting potential bottlenecks due to process and/or volume. Irrespective of which data set corresponds more closely to the OBSI timeliness data, the OBSI is unambiguously more efficient than ADRBO with respect to timeliness. This analysis must be qualified by the small data set available; however, it certainly does not substantiate complaints from banks about OBSI efficiency.

We have also compared the data for complaints resolved in favour of the consumer by each of the OBSI and ADRBO. The data reveal that the OBSI finds more frequently in favour of the consumer than ADRBO.



Again, we acknowledge the limitations of the data sets available. What we can see is OBSI cases resolved to the satisfaction of the consumer running on average 2.77 times higher than comparable resolutions by ADRBO during the period 2014 to 2017 (4 years of data).

The final chart shows out of mandate and initial view data for ADRBO:



Initial view letters are on the increase, and out of mandate, while moving lower in 2017 (we note a similar pattern in the OBSI data), remain significantly higher than those posted by the OBSI. This data is much harder to interpret since there are many reasons why out-of-mandate decisions could be higher for ADRBO than the OBSI, but it does raise concerns.

We have noted that issues of timeliness and streamlining of process cited by Scotiabank in its press release appear to be without merit. We note that TD Bank also made similar claims when it left the OBSI: it stated at the time that “customers could expect a 50% reduction in response times to previous processes.”⁹ In 2017 the average time to complete all banking cases for the OBSI was 50 days. For TD cases (dealt with by ADRBO) average times were 55 days for investigations and 145 days for resolutions and for TD ombudsman 67 days (including investment cases). We could not find the purported time saving initially promised by TD. Moreover, if we are talking timeliness in precise terms, process times should be judged from start to finish. If the ADRBO enforced process which includes exhausting the internal ombudsman organization is compared to one that does not require this additional level of internal review, we would find additional time savings for those able to choose the OBSI process.

⁹ TD Bank Group (October 2011). [TD Bank Group announces agreement on new independent dispute resolution process for Canadian banking customers.](#)

The 2011 Navigator review found no evidence of inefficiencies and no evidence that banks were unreasonably hampered by complaints, or indeed burdened by costs, while OBSI staffing costs were in line with international norms. Costs per complaint were higher, but these were adjudged to have been due to the small scale of the OBSI operations relative to the much larger constituents of international benchmarks.

The more recent 2016 review, that only assessed investment complaints, found that there were inefficiencies compared to international benchmarks (not domestic benchmarks) but these were due to the impairments brought about by lack of binding decisions and a need to rely on negotiated settlements.

We suspect that there are inefficiencies within the banking systems' own internal dispute resolution process and that there are likely inefficiencies of process and structure within ADRBO itself. But these have not been subject to public evaluation. At the investigative level we feel that ADRBO's hourly costs of \$290 likely exceed those of the OBSI and that the higher cost structure within the OBSI is due to the wider public interest mandate and its strategic remit about case analysis and process.

If we look at the costs that bank organizations pay annually to the OBSI for banking complaints, we do not feel these are onerous. TD paid \$361,307 to ADRBO in 2017 and ScotiaBank \$433,148 to the OBSI. Adjusting for number of cases, the total cost differential runs to about \$101,270. We could further adjust for the differences in cases ruled in consumers' favour which would further erode the differential as well for the cost of investment in processes supporting the wider public good that might also reduce banks' time and effort processing complaints.

We do not feel that the costs to the banking system for OBSI membership are onerous or that the differences in costs between the OBSI and ADRBO justify jeopardizing the OBSI's financial sustainability and its capacity to pursue its wider public interest mandate.

Conclusion

A single fair, independent and impartial dispute resolver is required

Canadian banks and their customers require access to a single fair, independent and impartial dispute resolution provider. Our current system, which allows banks to choose their own provider, harms consumers. We believe Canada's federal government must designate a dispute resolution provider of choice and compel all banks to use its services.

While banks moving to the for-profit provider have argued their decision is based on reasons of efficiency and timeliness, those arguments don't hold up under investigation. We believe banks are moving to the for-profit provider because it tends to investigate a smaller percentage of claims received and its findings favour the banks more often.

Allowing banks to continue to choose their own referee to resolve customer complaints is not in the public interest. We call on the Federal Government to take immediate action to protect Canadian consumers by changing this unfair policy.

Other Reading

More reports and policy discussion from the Council and other consumer perspective sources about this issue

Consumers Council of Canada, “Council joins other consumer advocates in campaign for one banking ombudservice”, 2018, <https://www.consumerscouncil.com/obsi-campaign>

—, *Canada’s Banking Dispute Resolution System*, 2012, <https://www.consumerscouncil.com/obsiebook>

Get Engaged

Become involved with and support our work.

The Consumers Council of Canada needs help of many kinds in order to authoritatively represent Canadian consumers. To be an effective organization:

- **The Council consults regularly with thoughtful consumers.** Joining the Council's Public Interest Network is *free* and one important way to have your views heard. Learn more and sign-up for the PIN!
- **You can follow the Council through social networking** on Twitter, Facebook or LinkedIn. Or add the Council's RSS feed to the news reader on your computer, tablet or smartphone.
- **The Council seeks qualified, hardworking individuals to join the organization** and volunteer to participate in its governance, operations and consumer policy making. Learn more about options to actively participate!
- **The Council seeks small financial contributions by individuals** to support its objectives. Make a financial contribution.
- **The Council is assisted by the advisory input and financial support of organizations** interested in a fair marketplace and cognizant of the rights and responsibilities of consumers. Non-governmental organizations, associations, other advocacy groups, businesses, government departments, regulatory bodies and delegated authorities all find the Consumers Council of Canada helps them serve their stakeholders better by improving understanding of the needs of consumers. Learn how to become a supporter.
- **Public Policy Oriented Consumer Interest Researchers** can connect with the Council and take steps to mobilize their knowledge by completing any one of eight easy action steps.