

Response To Department of Finance Consultation: "Strengthening Canada's External Complaint Handling System"

September 2021



Response To Department of Finance Consultation: "Strengthening Canada's External Complaint Handling System"

Abstract

Consumer's Council of Canada's response to the request by the federal Department of Finance to provide comments on its consultation paper entitled: *Strengthening Canada's External Complaint Handling System*, issued in July 2021.

Keywords: banking, dispute resolution, consumers

© Consumers Council of Canada, 2021

Version: 2021-10-05-12:35:06 PM EDT

Consumers Council of Canada

Commercial Building

201-1920 Yonge Street

Toronto, Ontario M4S 3E2

Canada

<https://www.consumerscouncil.com>

Table of Contents

Introduction.....	3
Question 1: Principles.....	4
Question 2: Deficiencies.....	6
Question 3: Profit Structure Impact on Impartiality and Independence.....	10
Question 4: Assessment Formula Impact on Impartiality and Independence...	12
Question 5: Benefits of ECB Providing Non-bank Dispute Resolution.....	14
Question 6: Type of Complainant Assistance.....	16
Question 7: Binding vs. Non-Binding Decisions.....	17
Question 8: Public Governance Process.....	18
References.....	20

Introduction

Consumer's Council of Canada (the Council) welcomes this opportunity to respond to the request by the federal Department of Finance to provide comments on its consultation paper entitled: *Strengthening Canada's External Complaint Handling System*, issued in July 2021.

As requested, the Council will identify the changes needed in the existing external complaints handling system for federally regulated financial institutions by providing responses to the eight questions posed by the Department of Finance in its consultation paper, as follows.

Question 1: Principles

Are the principles [outlined in the consultation document] appropriate to guide future policy directions on the structure and key elements of the External Complaints Bodies (ECB) in Canada?

In general, the Guiding Principles outlined in the consultation document are appropriate. However, the Council offers the following specific comments:

Accessible:

The listed principles are good ones, especially availability of complaint adjudication services at no cost to consumers, and easy to access and understand procedures for making complaints. However, in addition, it should be made clear that access to the ECB's information materials and processes must include accessibility for all vulnerable consumer communities in our country.

Accountable:

Accountability is important in principle, but the manner in which this principle is articulated is inadequate.

A more appropriate accountability statement would be the following:

“External complaint handling services are responsible for providing a public service, namely, fair, efficient, and transparent access to consumers seeking redress in their dealings with federally regulated financial institutions. As such, they should be demonstrably accountable to the public for the conduct of their operations. As a practical matter, as the Minister of Finance is responsible for the consumer interest in

the operation of federally regulated financial institutions this means such bodies are accountable to the Minister of Finance, and his designated regulatory authority in this case, the Financial Consumer Agency of Canada.”

Further, this statement of principle should make clear that a key aspect of accountability is transparency in operations by ECBs, including producing annual reports on their complaint handling operations and outcomes and on their processes, procedures and finances.

Impactful decisions:

This principle and the manner in which it is expressed is essential. In particular, decisions from an ECB with respect to redress, or other matters relating to a complaint, should be binding on the bank involved. Further comments on this issue are provided in response to Question 7, below.

Related to the concept of impactful decisions, ECBs should be required to review, analyze and report on the complaints they receive on an annual basis, to better identify trends or patterns in them that would highlight potential improvements in:

- a) the handling of complaints within banks’ internal complaint handling systems or the ECB itself; or
- b) the business practices of banks when dealing with consumers.

The Commission for Complaints for Telecom-Television Services analyzes complaints in this manner annually and issues identified have, on a number of occasions, been the focus of regulatory action by the Canadian Radio-television and Telecommunications Commission, the regulator.

Question 2: Deficiencies

What ECB system structure would best address the deficiencies identified in the FCAC report and most effectively uphold the guiding principles outlined in the previous section?

The current system's structure is severely flawed and significantly disadvantages consumers seeking redress for the following reasons.

Choice of Dispute Resolution Services:

Currently, the rules only allow the financial institutions (banks) to choose which ECB will be used. Consequently, banks, not consumers, are the effective customers in this market. This creates a situation where the ECB's are incentivized to best meet the needs of only one user of the services – the banks.

In such a market ECBs will be motivated to perform well on the criteria the banks feel are most important to them, including favourable decisions and low costs. This built-in bias seriously undermines the contention in the discussion paper that the provision of these services be structured in a manner that is visibly fair and impartial to both of the parties using them.

Encouraging Multiple Service Providers is an inefficient way to provide dispute resolution compared to a single ECB, since it reduces the robustness of the process and is costly in regulatory terms

As noted in the overview by the Financial Consumer Agency of Canada (FCAC) of the operations of external complaint bodies (FCAC 2020), neither of the two

existing ECBs are dealing with a large annual case load and so total overhead costs for each organization must be spread over a relatively small number of cases. As such, in the current system, overhead costs are higher compared to a single provider due to duplication of institutional resources. This is a situation that is far from optimal for either the banks or consumers seeking redress. Banks are faced with higher dispute resolution costs, but consumers are also faced with organizations with high overhead costs relative to the number of complaints being handled and therefore fewer resources to fund investigations and assessments of complaints, especially those that are complex.

Further, as noted by FCAC (FCAC 2020), multiple providers also increase regulatory and compliance costs. With limited budgets, the agency is faced with the prospect that resources available to supervise ECBs have to be allocated among multiple individual ECBs. Obviously for consumers this is a significant negative as it means the level of regulatory oversight of these organizations is less than with a single ECB and, as a consequence, their interests as consumers, and the interests of the public more generally, are not as well protected.

Finally, it is significant that no other country that the Council is aware of uses a multi-provider model for complaints adjudication (Thomas and Frizon 2012), and, not surprisingly, no other country has adopted this model since its introduction in Canada.

A For-Profit Governance Structure is Inappropriate for ECBs

An ECB framework that allows private for-profit ECBs is incompatible with a system intended to deliver a public service focussed on adjudication of disputes.

Notably, FCAC (based on the information it was able to obtain) found little discernible distinction in adjudication decisions from the for-profit provider and the not-for-profit provider in terms of favouring banks over consumers.

Nevertheless, a key consideration for an organization that must operate in the public interest is its governance structure. For-profit organizations are governed by boards whose primary legal responsibility is the protection of the financial interests of the shareholders or owners of the company and to ensure, therefore, that the organization's operations maximize a return for the owners or shareholders of the company. All other considerations are secondary, and while the company can and will pursue other objects, those objects cannot in the long term be allowed to come into conflict with the objective of maximizing a return for the owners or investors.

A not-for-profit governance structure, by contrast, is ideally suited to the kind of multi-purpose, non-financial objectives that bodies such as ECBs need to perform to ensure their credibility (e.g. to be transparent, impartial, accessible, and fair) and to expend resources to support those objectives without needing to maximize return to shareholders. This does not mean that not-for-profit boards spend funds in a cavalier fashion, as most function with limited financial resources and spend funds judiciously. Rather, it simply means that the not-for-profit boards are completely focussed on meeting their public service obligations without competing priorities.

An Appropriate ECB System Structure:

In summary, the most appropriate structure ensure an efficient and effective ECB system that has the confidence of the public and consumers using banking services is one that has the following characteristics:

- a single ECB nominated by the Minister of Finance;
- an ECB that is incorporated federally as a not-for-profit corporation; and
- an ECB with a board consisting of representatives of consumer interest groups, representatives of the financial services industry, and

independent academic and other experts with experience in consumer-oriented marketplace dispute resolution.

These matters are elaborated further in our responses to questions 3 to 8, below, on the characteristics essential for an ECB system to function efficiently.

Question 3: Profit Structure Impact on Impartiality and Independence

To what extent does the profit structure of an ECB have a real or perceived impact on the impartiality and independence of an ECB?

For the reasons outlined in the response to question 2, an ECB that is a for-profit organization will suffer from real and perceived negative impact on its impartiality and independence.

Certainly, from a consumer perspective, knowing that the organization being appealed to in a dispute with a bank is operating for a profit, will not create confidence that all the resources necessary to fairly examine, analyze and adjudicate a case will be expended. Rather a concern will exist that, especially in complex cases, the resources devoted to a case may be rationed to ensure that the ECB can make its required profit margin on the case. This will be reinforced by the one-sided nature of the market for dispute services: where the bank chooses the ECB used on the basis of how cost-competitive they are and keeps a sharp eye on what it is billed for complaint redress costs.

More generally and notably, FCAC's evaluation of ECBs (FCAC 2020, 5-6) said that for many of the key performance indicators that FCAC laid down as necessary for the credibility of ECBs as dispute resolution organizations – such as timeliness, accessibility, accountability, impartiality and independence and

effectiveness – the not-for-profit Ombudsman for Banking Services and Investments (OBSI) performed significantly better than the for-profit ADR Chambers Banking Ombuds Office (ADBRO). This supports the contention that the governance structure of not-for-profit organizations is better suited to achieving the kinds of performance outcomes the Department of Finance discussion paper and consumers seek from ECBs. Put simply, not-for-profit organizations are more likely to devote resources and priority to those issues than for-profit organizations.

Question 4: Assessment Formula Impact on Impartiality and Independence

To what extent could an ECB's assessment formula impact the real or perceived impartiality and independence of the ECB?

The manner in which an ECB is funded bears centrally on whether consumers and the general public view it as independent and impartial. In cases where a bank pays the costs of dispute resolution with its customers, a potential will always exist of the perception that “he who pays the piper calls the tune” and, while this may be less of a risk in reality, paying dispute resolution costs, especially those that are itemized on a case-by-case basis, gives scope for the organization billed to question costs and pressure for reductions. This can have a deleterious impact on the level and quality of resources devoted to resolving cases, resulting in poor, inaccurate or unfair decisions that impact on the credibility of the dispute resolution process and directly harm the interests of consumers.

A transparent and at-arm's-length funding mechanism should be adopted for a single banking ECB. With a single banking ECB, it would be possible and advisable for the Department to adopt a funding formula where its core overhead operating costs are covered by an industry-wide levy on banks based on their respective share of the consumer banking marketplace. This could be

supplemented by an additional caseload charge levied against individual banks that generate 'excess' complaints during the year.

This approach has a number of advantages.

1. It ensures that the overall cost of the system to deliver services is fully covered in a predictable, transparent fashion through a stable levy on banks proportionate to their share of the consumer banking marketplace.
2. The annual core budget and the levy to support the ECB would be approved by the Commissioner of the FCAC, so it would be clear that the budget of the ECB is adequate to its assigned task, because it would be approved by the regulator responsible for consumer protection in the banking sector.
3. The case-load charge would incentivize banks to settle disputes within their own internal dispute settlement mechanisms and not have them brought to the ECB.

Question 5: Benefits of ECB Providing Non-bank Dispute Resolution

What are the benefits to consumers from a banking ECB that provides non-bank dispute resolution services? Are there drawbacks?

In Canada, where our banks are actively involved in a number of financial services including investment banking, wealth management and insurance, advantages can be seen in broadening the scope of a bank ECB's dispute resolution service to include other financial services. This type of financial service ECB would align more closely with the multi-service nature of Canada's banks. It would also broaden the base of participating firms with a consequent increase in base revenues or levies on firms to defray overhead costs of the operation of ECB functions. Further, lessons may be learned or experience gained in managing and adjudicating complaints from related consumer marketplaces, as is currently the case with OBSI covering complaints in the retail banking and investing marketplaces. No obvious benefits are foreseen in morphing a bank ECB into some sort of comprehensive ECB for some or all federally regulated industries. This approach would create serious challenges of defining authority and accountability too broadly without the benefit of meaningful economies of scale or shared learning opportunities gained from dealing with common issues, experiences or processes. Further, the funding

mechanisms required may be overly complex where industry structures are vastly different.

Question 6: Types of Complainant Assistance

Should an ECB be required to provide complainant assistance, and what types of complainant assistance should be provided?

FCAC is aware (FCAC, 2020) that the average consumer lacks the knowledge and experience to navigate our existing bank complaint handling system.

Providing consumers with advice and assistance in navigating the complaint system, how to assemble and organize relevant materials and how to appropriately frame their complaints, are key services an ECB can and should provide. Such services can help level the otherwise skewed playing field for a consumer who must face bank representatives who are trained and experienced in handling all the many stages and requirements of the complaint handling process.

A well-prepared consumer can make the process more efficient by presenting relevant issues and evidence in an appropriate format and clearly articulating the key points of the case. An adjudicator's task of making a clear and fair decision in a timely manner will be made easier.

Given the above, the provision of basic assistance by an ECB to a consumer will not impair the independence or impartiality of the ECB adjudication processes or role.

Question 7: Binding vs. Non-Binding Decisions

Do you have views on whether the decisions of the ECB should be binding or non-binding on banks? Please refer to the guiding principles to support your position.

The decisions of an ECB must be accepted by banks to be trusted by consumers. If uncertainty exists about whether a bank will accept a decision of an ECB, then dispute resolution leading to a decision will be undermined and viewed as without impact or authority and unaccountable to consumers who use it in good faith.

In order to eliminate any ambiguity about whether ECB decisions are impactful, they should be binding on the banks. To the extent that a bank believes that the ECB has erred in its decision, it should have the ability to appeal the decision to an independent tribunal established by the FCAC Commissioner. Such appeals should only be allowed in exceptional cases where, for example, new evidence has come to light or an error in procedure or in the interpretation of the rules has taken place. The tribunal should have the discretion to decide whether to hear an appeal.

Question 8: Public Governance Process

Should the government establish requirements for representation on the board of directors of an ECB? To what extent should an ECB be required to make public its governance process?

The government should set requirements for the composition of an ECB's board of directors and the transparency of its governance processes and operations. These measures are required to demonstrate to the public that the ECB is independent and accountable to the public for its operations and decisions.

Many models for the composition of board of directors exist for these types of public interest or adjudication bodies, but generally they should include representation from industry, consumer groups, and independent experts such as academics with experience in managing, or experience in adjudicating, consumer complaints. Care should be taken that the chair of the Board and the executive head of the ECB will be seen to be independent of industry and experienced in managing consumer dispute resolution. The board should be appointed by the Commissioner of the FCAC or the Minister of Finance.

As a body operating in the public interest, the ECB should make public the composition of its board and senior executives, its by-laws and governing instruments and its procedures for dealing with complaints. It should issue

annual reports to the public in both official languages that summarize its operations, key decisions, and financial accounts. Further, the ECB and the participating banks should be required to engage in significant and measurable awareness campaigns informing the public about the ECB's role in handling complaints, how to engage the services of an ECB and an individual bank's internal complaint handling system.

Consumer Representation

Proper resourcing of a formal role for consumer representation is required, so that these representatives can act with the same purposefulness, independence, collegial counsel and professional strength as other participants.

A process of shortlisting for the selection of consumer representatives by recognized consumer groups should be part of the selection of those representatives. To ensure high quality processes for short-listing candidates, FCAC should financially assist this work by participating groups, since consumer groups do not have the same opportunity to charge costs of representation to consumers as does industry for its involvement.

Non-industry Participants in Governance

Clear methods and requirements should exist to assure the independence from industry of those persons named as non-industry ECB board members.

References

Department of Finance. 2021. *Strengthening Canada's External Complaint System*. Ottawa.

Financial Consumer Agency of Canada (FCAC). 2020. *The Operations of External Complaint Bodies*. Ottawa.

David Thomas and Francis Frizon. 2012. *Resolving Disputes Between Consumers and Financial Businesses: Fundamentals for a Financial Ombudsman*. Washington: World Bank.