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**Re: Strengthening Canada's External Complaint Handling System in Banking –
ADR Chambers Banking Ombuds Office ("ADRBO") Submission**

Dear Financial Sector Policy Branch:

Thank you for the opportunity to comment on Canada's external complaints handling system in banking. ADRBO agrees with its Federal partners that there is work to be done to strengthen the operations of external complaints bodies ("ECBs") and that effective complaint handling helps ensure that the financial system works efficiently and fairly, thereby enhancing consumer confidence in the system.

ADRBO appreciates the Department of Finance Canada's support and willingness to work together to ensure that Canadian banking consumers continue to have a fair, transparent, and user-friendly process to have their complaints heard and investigated.

Sincerely,

ADR Chambers—Banking Ombuds Office
Per/ Britt Warlop, Ombudsman

CONSULTATION QUESTIONS—EXTERNAL COMPLAINTS HANDLING SYSTEM IN BANKING

1. Are the following principles appropriate to guide future policy directions on the structure and key elements of the ECB system in Canada?

- **Accessible:** complaint handling services should be available at no cost to the consumer, be easy to access and understand, and be available in both official languages
- **Accountable:** external complaint handling services should have an adequate governance structure, be accountable to the public and their member banks, and be subject to regulatory oversight
- **Impartial and independent:** there should be no undue influence or conflicts of interest, and service providers should be balanced and objective when dealing with a complaint
- **Timely and efficient:** the internal processes of a complaint handling service should be efficient, consumers should not face undue delays, and complaint handling services should be staffed by trained and knowledgeable professionals
- **Impactful decisions:** the complaint-handling service should render decisions that resolve consumer complaints, either through a remedy or a clear explanation as to why a remedy would not be appropriate, and banks are to adhere to these decisions

Yes, ADRBO agrees that the above principles are appropriate to guide future policy directions on the structure and key elements of the ECB system in Canada. ADRBO suggests that the following additional principles would also be appropriate:

- **Procedurally fair:** procedures that are used to make recommendations are transparent and the procedure followed is appropriate to the recommendation being made;
- **Free of cost to Canadians:** the ECB system provides services to consumers without charging fees and without impacting the public purse;
- **Right to be heard:** all parties to a consumer banking complaint are given a meaningful opportunity to participate and take part in the ombuds process.

2. 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?

In Canada, banking consumers may take unresolved banking complaints to one of two ECBs, depending on which ECB to which the bank (that is the subject of the complaint) is a member. There are many different financial ombudsperson/ECB structures around the world, including,

but not limited to, government, committees, arbitration based and industry appointed ECB types.¹ The current model in Canada has some distinct advantages and further advantages will be soon gained through targeted improvements to the ECB model and the complaint-handling process.²

Moving to a single ECB would not address the deficiencies identified in the FCAC report and would not be most effective in upholding the guiding principles. Deficiencies identified in the FCAC report for ECBs and banks are currently being addressed with FCAC through supervisory Action Plans.

There is no single best ECB system for all jurisdictions around the world. Canadian consumers have greatly benefitted from having a multi-ECB model.

The Thomas and Frizon source in the FCAC's *Industry Report* is cited as standing for the proposition that competition is detrimental in an ECB context. That source cites a document written by the Australian and New Zealand Ombudsman Association ("ANZOA"). The original source draws on ANZOA's policy statement, which asserts that "it is inappropriate to apply concepts of market forces and competition to what are effectively 'natural monopolies.'"³ ANZOA's policy statement (and its relevance to the Australia and New Zealand ECB model) does not apply in the Canadian context. The following are concerns raised by the ANZOA policy statement, matched with Canadian considerations for each of the concerns outlined:

- ⇒ There is a concern about "escalation confusion" (i.e. consumers not knowing which ECB to appeal to).
 - The arguments about escalation confusion and the need to provide information to consumers about different schemes do not apply in the current Canadian system, as banks are obligated to inform their consumers of the external body to which complaints can be taken and there is no direct route to any ECB before completing the previous steps.
- ⇒ There is an assertion that industry participants who are performing poorly may choose to join an alternative scheme that they believe is not as rigorous in its approach to complaints.
 - "Performance" or value-add results are statistically and quantifiably the same between both Canadian ECBs, and has been for many years, so there is no benefit (in terms of substantive results) for a member bank switch ECBs. In the Industry Review, the FCAC observed that both ECBs recommended some reimbursement for consumers in roughly a third of the complaints they investigated. In approximately half of those cases (12% to 15% of investigated complaints), both ECBs found against the bank and recommended that the consumer be reimbursed for the full amount sought. In the other half (15% to 20%), both ECBs recommended that consumers received only a portion of what

¹ See for example Consumer Complaint Committees, industry-appointed Banking Ombudsmen, and industry-appointed Insurance Conciliation Bodies outlined in Thomas and Frizon, "Resolving disputes between consumers and financial businesses: Current arrangements in central and eastern Europe", January 2012.

² See *Financial Consumer Protection Framework Regulations*, SOR/2021-181, <<https://canlii.ca/t/55580>> retrieved on 2021-10-12

³ https://treasury.gov.au/sites/default/files/2019-03/R2016-002_ANZOA.pdf.

they were seeking, or arranged for a re-extension of what the bank's designated SCO had offered.⁴

- ⇒ There is an assertion that multiple ECBs could produce different specific recommendations for the same types of cases.
 - The two Canadian ECBs produce the same kinds of recommendations for the same types of cases; each ECB produces case-specific, individualized outcomes with similar recommendations on same decision-making points.
- ⇒ There is an assertion that separate reporting and communication systems could make regulatory supervision more complicated or resource intensive.
 - The same volume of complaints is escalated from each bank yearly with an approximately 10% volume increase across industry year over year and there is no evidence that having complaint volume spread over two ECBs increases complications or becomes more resource intensive.⁵ The FCAC has kept supervision streamlined and ECBs have proven that they can work together, share information, and collaborate when required.⁶
- ⇒ There is a concern that having multiple ECBs could add unnecessary costs and inefficiencies to the dispute resolution scheme (e.g., inefficient duplication of infrastructure, resources, services or information systems).
 - There is no evidence that the Canadian ECB model adds unnecessary costs or inefficiencies to the dispute resolution scheme. The presence of two ECBs results in noticeable efficiencies and an improved quality of service. When there was only one ECB in Canada, banks and consumers received significantly lower level service than they do today. The fact that there are multiple ECBs forces each ECB to continually assess and re-evaluate its service levels to banks and consumers. A single ECB model or government ECB model will likely result in a decrease in quality of service, an increase in delays, and an overall increase in system cost.⁷

The existing framework best meets Canadian banking consumers' best interests and addresses the guiding principles.

⁴ See [ECB Industry Review](#), pg 8.

⁵ The FCAC regulates 83 Financial Institutions [Who We Regulate \(osfi-bsif.gc.ca\)](#) with operational differences.

⁶ The FCAC also suggests that "operational differences can disguise compliance issues" (p. 29 of the ECB Industry Report). As discussed in the ECB Industry Report, when it created a multiple-provider framework, the Canadian government recognized the need to hold approved ECBs accountable for meeting consistent standards and tasked the FCAC with evaluating performance under the *Bank Act*, the *Regulations* and the FCAC's CG13. If the FCAC's standards and FCAC's use of them fail to adequately identify compliance, in consideration of compliance best standards, this surely cannot lie with operational issues of the organization and rather should encourage the government to review its policies and procedures for organizational compliance. Put another way, "operational differences" will naturally exist under a broader compliance framework, such as Canadian Federal law and its Regulations (i.e. all businesses do not operate the same way in adhering to the *Canada Business Corporations Act*).

⁷ See Further Canadian Considerations below.

Further Canadian Considerations

A “common door approach” (by way of a government-run model or single ECB) would not promote the same quality of service nor the speed of a multi-ECB model.

Stakeholders were clear in 2009 when the multi-ECB model was established by the Federal government that the single ECB model was not meeting the needs of consumers. They communicated to us and our Federal partners that having a single entity serve as the external point of escalation for consumers resulted in a loss of focus on service, a lack of accountability, jurisdictional and expansion of power concerns, frustration with a non-governmental organization performing the mandate and growing in both its stature as well as its ability to function, untied expansion of its budget, and timeliness of complaint handling.⁸

The government-based complaint models in other federally regulated industries have had numerous challenges historically. For example, Bill C-26 in the early 2000s in Canada led to the creation of the position of an Air Travel Complaints Commissioner to review and attempt to resolve complaints of airline customers. There were numerous concerns of delays and frustration on all sides and in 2007, the office was restructured within the Canadian Transportation Agency (“CTA”) and changes were made to attempt to address these concerns.

Today, we know that the CTA and other government models often struggle to scale and meet appropriate timelines for consumers when unpredictable complaint volumes surge. The CTA saw a growth in air travel complaint numbers from 800 in 2015 to almost 20,000 in 2019. Challenges with scaling up public service operations to deal with such a huge increase (such as budgetary concerns, funding cycles, and structural rigidity) eventually resulted in a major backlog and significant delays in the processing of cases. We know that these backlogs and delays were recently further intensified by the COVID-19 pandemic.⁹

By contrast, the current multiple-ECB model in Canadian banking has resulted in uninterrupted service to Canadian banking consumers at all times, responds directly to volume, and has met legislative timelines for the efficient completion of complaints. Particularly during the pandemic, when consumers have faced immense financial pressure and turmoil, this uninterrupted service without the delays of a government-run or single ECB model has been most helpful to consumers in addressing their concerns and providing them with fast-acting answers and relief. The current model, and ADRBO’s volume-based model in particular, can scale rapidly and seamlessly to handle changes in complaint volumes, regardless of size.

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

The profit structure of an ECB does not impact accessibility, accountability, timeliness and efficiency, impactful decisions nor impartiality and independence.

⁸ See Press Release “RBC Introduces a New Independent Dispute Resolution Process for Canadian Banking Clients”, October 31, 2008. See also Douglas Melville, OBSI Ombudsman evidence before FINA Committee, FINA 48, March 13, 2012: < <https://www.ourcommons.ca/DocumentViewer/en/41-1/FINA/meeting-48/evidence>>. See also correspondence to the Department of Finance Canada, April 15, 2009.

⁹ Burke and Patel. CBC News: “Canada’s transport regulator hasn’t settled a single COVID-19 flight cancellation complaint” October 26, 2020:< <https://www.cbc.ca/news/politics/canadian-transportation-agency-cancelled-flight-complaints-1.5776622>>.

In reality, there is very little difference between a for profit ECB and a not-for-profit ECB. A not-for-profit ECB determines its salaries and expenses without regard to the market, and charges banks a fee to meet all of the costs of those salaries and expenses. These ECB's have a vested interest in keeping member banks as clients in order to pay the salaries, bonuses and benefits of staff and Board Members.¹⁰ A for-profit ECB sets its salaries based on market rates, and charges member banks based on market conditions.

All of the financial institutions that switched from OBSI to ADRBO said to ADRBO that they were switching because they wanted a higher quality of service for their customers, and they had no desire to have a larger percentage of investigations find in their favour. ADRBO would only accept a new banking client if it understood that switching to ADRBO would not result in a higher percentage of recommendations in favour of the bank.

In Canada, both ECBs receive funding for their services from financial institutions and publicly disclose all funding received. Industry funding of complaint resolution mechanisms is not unusual. Notably, in the Canadian federal jurisdiction, The Commission for Complaints for Telecom-television Services ("CCTS") is funded from industry payments and Budget 2018 indicated that a similar model would be developed for the CTA.

The current Canadian system legislated under the *Bank Act* does not set out requirements on the profit structure of an approved ECB, including whether it operates as a for-profit or not-for-profit corporation. Non-profit and for-profit entities may both serve the public good by providing independent, impartial ombudsman services and ensuring the interests of citizens and consumers are protected.

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

The banking division of ADRBO receives its income from Financial Institutions as fees for services. ADRBO also generates revenue by providing ombuds services to Ontario regions and municipalities.

At ADRBO, banks are assessed and an Annual Administrative Fee is applied on the basis of the volume of complaints that are received at the ECB level. Hourly fees are applied when complaints are investigated.

¹⁰ It has been previously raised that the ECB system where investigators retain the most independence may best promote the independence of an ECB. In Canada, to our knowledge, OBSI investigators are full-time employees of OBSI. Their salary is dependent on OBSI who is predominately funded by the banks. ADRBO investigators, on the other hand, are independent contractors who do not only do work for ADRBO; they do other investigations and Alternative Dispute Resolution work for other clients. They rely on their reputations for fairness and integrity to attract work from clients other than banks. In considering impartiality and independence, because only a small percentage of a roster investigator's income comes from ADRBO, they do not have the same incentive as OBSI investigators to make sure that banks are happy with them and that the banking work stays with their ECB.

ADRBO's model for the Administrative Fee (that is linked to the volume of complaints at each bank), and hourly fee for investigations, creates an incentive for banks to resolve more complaints internally and to invest more in customer service and internal complaint handling systems. The fewer cases that are escalated to ADRBO, the lower the fee the bank will pay. ADRBO's assessment formula therefore incentivizes the banks to resolve disputes with customers rather than paying the fees associated with a larger volume of investigations.

ADRBO provides training for banks, and has implemented procedures (such as mediation) to assist in the settlement of complaints. As a result, there has been a significant increase in settlements. There is significant literature and research on the increased satisfaction and maintenance of relationships that results out of settlement, mediation, and alternative dispute resolution methods.

ADRBO's model for an hourly rate for investigations, an hourly rate not only creates an incentive for banks to resolve disputes before they are escalated to the ADRBO, it also allows the investigator to conduct a thorough investigation, without worrying that the investigator must take short cuts to save time and cost. ADRBO's model therefore does not compromise the impartiality and independence of the investigation.

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

Being part of ADR Chambers, the largest dispute resolution firm in Canada, ADRBO draws on a pool of investigators who include former judges, mediators, arbitrators and lawyers who provide complainants with a wide range of experience and expertise. ADRBO has a roster of highly skilled investigators, all of whom are mediators, and many of whom are experienced senior lawyers and judges. They have the expertise necessary for handling the variety of specialized banking matters, from complex estates and family law, to issues of mental health and capacity, privacy, real estate transactions, and fraud cases. ADRBO has been referred to as the gold standard in complaint resolution services in Canada and our professionalism, integrity, objectivity and expertise have been found to be beyond repute.¹¹

As an organization built on alternative dispute resolution ("ADR") principles, ADRBO emphasizes mediation and settlement as means to preserve the relationship between the parties, maintain a high level of satisfaction for both parties, and allow both parties to maintain control over the outcome. External Financial Ombudsmen in multiple international jurisdictions attempt to resolve complaints at the earliest possible stage using an informal mediation process.¹² In comparable jurisdictions, the Ombudsman is directed by policy to try, as part of an investigation, try, as far as possible, to resolve a complaint by mediation.¹³

¹¹ Portfolio Management Association of Canada "Proposed Amendments on National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations – Dispute Resolution Service" - Page 14.

¹² See best practices from the Financial Ombudsman Service (FOS), United Kingdom. FCA Handbook (DISP Dispute Resolution: Complaints) at www.handbook.fca.org.uk/handbook. See also best practices from the Netherlands, Klachteninstituut Financiële Dienstverlening (Kifid) at <https://www.kifid.nl/>.

¹³ See for example, *Financial Services and Pensions Ombudsman Act* (2017) s. 58. (1) of Ireland <http://www.irishstatutebook.ie/eli/2017/act/22/section/58/enacted/en/html> and best practices from Office of Financial Services and Pension Ombudsman (FSPO), Ireland.

ADRBO's decision makers (the "Ombuds Team") are all lawyers, subject to professional oversight by the Law Society of Ontario ("LSO") and are trained and educated in dispute resolution, judgment, issue-spotting, active investigation and decision-making.

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

Yes, ADRBO provides complainant assistance and ADRBO agrees with the FCAC's *Industry Report* that active investigations assistance should be provided.

Although there are no legislative requirements governing the type of assistance that an approved ECB should provide to complainants, ADRBO has adopted the *ADRBO Active Investigations Policy* to achieve the purpose from the *Industry Review*: "to promote confidence and trust in the financial system by providing consumers with access to a fair hearing." The *ADRBO Active Investigations Policy* also follows the recommendation by the World Bank, OECD/G20 Task Force on Financial Consumer Protection, and the International Network for Financial Services Ombudsman Schemes that ECBs implement procedures to support active investigations of consumer complaints.

Active investigations involve:

1. Asking the consumer questions during the intake process;
2. Helping consumers articulate their complaints;
3. Helping consumers understand their rights and responsibilities;
4. Identifying relevant documentation;
5. Requesting evidence from consumers and banks; and
6. Providing access to resolution services at no cost without any requirement for legal representation.

ADRBO's Bilingual Intake Coordinators and entire Investigator roster must be "active" in the way they approach complaints, guiding consumers through the entire complaint process: during intake of the complaint; during the investigation; and during any follow-up. By being active, ADRBO Bilingual Intake Coordinators and Investigators can help consumers to overcome potential disadvantages created by any unfamiliarity with banking or the banking complaints process without advocating for any party to a complaint, so as to ensure the independence and impartiality of the complaint-handling process.

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

ADRBO holds a neutral viewpoint on whether the decisions of an ECB should be binding or non-binding on banks. Under the *Budget Implementation Act, 2018, No. 2*, S.C. 2018, c. 27, s. 3 (s.627.49 [h]), an ECB is authorized to make a final written recommendation and these recommendations have always been followed, without exception.

Considerations for Status Quo

We have heard from some consumer representatives that they “fervently oppose a binding arbitration mandate for an ECB servicing retail financial consumers.”¹⁴

In consideration of the 5 principles noted in Question 1 of this Submission, we note that with Bill C-86 going into effect, summaries of all decisions will be public. We note that banks have always accepted our recommendations; therefore, binding recommendations are unlikely to change the speed and efficiency of complaint processing. It is also very common for a corporate ombudsman, industry ombudsman, or government ombudsman to issue non-binding recommendations.¹⁵

Considerations for Change

We understand that in a 2017 study, the World Bank listed as one of its recommendations for ECBs that they have the power to “issue decisions on each case that are binding on the financial services provider (but not binding on the consumer).”¹⁶ We’ve also understood the FCAC’s suggestion that this change to binding decisions, as opposed to non-binding, could help address the perception that ECBs may lack impartiality and independence in resolving consumer disputes.

Of note, during an investigation, ADRBO has an internal review/comment-based appeals process that all consumers and banks have access to before their recommendations are finalized. If non-binding recommendations for ECBs are adopted, ADRBO will be able to continue to utilize party feedback from its procedural fairness mechanism to ensure the quality and impact of its recommendations.

8. 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?

We agree that the governance structure of an ECB can help contribute to a fair and effective complaint handling process, including by having balanced representation of stakeholder groups on the Board. We would welcome any changes that lead to a public governance process of ECBs or the establishment of requirements for ECB board representation (i.e. Board members with different experiences), as is suggested or considered appropriate by policymakers.

In 2020, ADRBO named Greg Basham as the first designated Consumer Representative Director on its Board. Basham brings to the Board of Directors his wealth of experience in consumer fairness and managing complaints and government/corporate relations. In addition to serving as a voice for consumers on the Board, Basham has been promoting consumer-friendly innovation at ADRBO to continually improve service and processes.

¹⁴ Kenmar Joint Regulators Committee Letter, received September 29, 2021.

¹⁵ In Estonia, the Committee provides a non-binding recommendation, and is a member of FIN-NET.

In Hungary, the financial arbitration board offers mediation, a non-binding recommendation and (if both parties agree in advance) a decision that is binding on both parties.

¹⁶ World Bank. (2017). [Good Practices for Financial Consumer Protection](#). Washington: State Secretariat for Economic Affairs SECO, pp. 49–52.

In 2021, ADRBO named Scott Streiner as the first designated Public Interest Director. Streiner brings to the Board of Directors broad, deep, senior-level public service experience, having served most recently as Chair and CEO of the Canadian Transportation Agency (CTA) and Assistant Secretary to the Cabinet for Economic Policy. Under his leadership, the CTA launched and completed a comprehensive modernization of its regulations, including development and implementation of the ground-breaking Air Passenger Protection Regulations and Accessible Transportation for Persons with Disabilities Regulations; a comprehensive modernization of its regulations; and a modernization of its compliance assurance program.