Consultation Questions
External Complaints Handling System in Banking

October 2021

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 complaints handling service should render decisions that resolve consumer complaints, either a through a remedy or a clear explanation as to why a remedy would not be appropriate, and banks are to adhere to these decisions***

The broad principles are generally laudable goals. However, one of the goals (i.e., that complaint handling services should be free to customers) ultimately leads to one of the industry's perception problems. If customers aren't paying for the services, then there are only two other possible sources that can – the banks, or the government. I can understand the argument that banks should pay – i.e., as a cost of doing business. However, as long as customers know that banks are ultimately the ones paying for the services, then there will *always* be a perception that the service is biased towards the bank – because they are paying for it, and therefore some customers allege they have purchased a result.

In truth, the biggest reasons that banks tend to win cases are (1) they are generally extremely organized, and (2) most of the relevant laws and policies are slanted in their favour to begin with. In the absence of legislative/regulatory change, the percentage of

cases that get decided in banks' favour is unlikely to change, because substantively their arguments tend to be on stronger footing.

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?

If the government is concerned with customers' perception that banks are too powerful in this structure, then it has the necessary tools to do things about that – specifically, by enacting laws that are more favourable to consumers, even if it harms banks' profitability. However, governments of both stripes have been unwilling to do this for many years. The best way the government could address these perception problems is to get directly involved in the field, and set up a government agency that would set policies and issue binding decisions against banks – and fully fund it, i.e., take the funding of the system away from the banks.

I think both ADRBO and OBSI have been put in difficult positions by the existing structure, which gives the banks far too much power to dictate what they think reasonable ranges for case outcomes ought to be. There is a perpetual existential threat to the organization that if the banks don't like what you are doing, they can leave and go to the other one; banks should not have that power. It also sets up an informal 'competition' of sorts between ADRBO and OBSI, that I don't think either organization enjoys.

But I do not agree that the multiple-ECB model confuses customers about where to go – each bank specifically tells customers in its letters and brochures that the next escalation step is to go to ADRBO (in our case), and the volume of complaints we receive convinces me that customers have no problem knowing where to go.

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?

I don't believe that the profit structure of an ECB has any *actual* impact on its impartiality, even if I am willing to accept it could possibly create such perceptions. I think this question unfairly targets ADRBO. The truth is, throughout my time with ADR Chambers, in a number of contexts, I have understood that ADRBO has a negligible impact on ADR Chambers' profitability. The biggest beneficiaries of the work are probably the Investigators – who work on a contract basis. ADR Chambers tangentially shares some of the revenues, but the company alone incurs all of the expenses. ADR Chambers was a long-standing company prior to ADRBO's inception, and I have never understood ADR Chambers' viability to be linked with ADRBO's profitability.

I think this question focuses too much on the *motivation* for profits, in a conceptual sense – i.e., "profit" vs. "non-profit" – as if non-profits don't also have to pay their bills. I have worked with many non-profit organizations in my career, and even when their legal

"purpose" isn't profit, my experience is those organizations are constantly concerned for bringing in sufficient revenue to cover their expenses. Staff and facilities don't pay for themselves – the money has to come from somewhere, whether through program operations or government assistance. Further, business law jurisprudence is clear that for corporations that aren't designated as non-profits, they are presumed by default to operate for the purpose of profit – which impacts directors' fiduciary responsibilities. Therefore, I think the 'profit' vs. 'non-profit' distinction is a misguided focus in this context.

I have already stated that I think the best way the government could address harmful perceptions would be to set up a government-run and funded organization (i.e., akin to a tribunal, like the Landlord Tenant Board, Human Rights Commission/Tribunal, Securities Commission, etc.), which would be empowered to both create policy and issue binding decisions against banks, and which all financial institutions would be subject to.

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

In my opinion, there is no meaningful difference between whether ECBs are funded through "hourly rates" for investigations or through "historical complaints data". The costs to run the organization have to be recouped from somewhere, and time spent conducting investigations is a meaningful data point, which can also be moderately strong indicator of one case's complexity vs. another. However, when using hourly rates, lengthier investigations actually *cost* banks more – so some banks have tried to discourage it, I know this personally. I assume the parties more upset with assessment formulas are the banks, not customers. In my opinion, banks should be more concerned with the quality of investigations being conducted, and not the costs of investigations that are found to be necessary.

I think the question would be better focused on the bigger picture issue of who should be paying for the services in the first place. In my opinion, this field is a matter of public interest, and therefore the government should be fully funding its services, to address perceptions of undue influence by the banks.

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

Having staff with broad dispute resolution expertise helps significantly in conducting investigations and administering the complaints process (i.e., active listening, writing, attentiveness to procedural fairness). I'd also expect it to be difficult to retain quality staff if the scope of work in this field was too narrowly limited.

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

I accept that there is some merit to helping customers understand the process of bringing a complaint. However, the most important part of working in any field of complaint resolution is providing a procedurally-fair process – i.e., ensuring that the process of reaching results is neutral and unbiased. Results matter too, but the process is paramount. A similar logic is used by appeal courts in administrative law generally – appellate judges usually won't overturn a decision simply because they disagree with a factual conclusion, but they will *always* overturn a decision if there was significant procedural impropriety. I endorse the FCAC's statement that "… on the other hand, depending on the level and type of assistance offered, it could impair perceptions of independence and impartiality of the ECB".

I also note that, many times, when a customer cannot understand the complaints process or articulate their complaint helpfully, that is frequently correlated with how they got into the dispute with their bank in the first place. In my experience, it is uncommon for a customer that has difficulty articulating their complaint to end up with a meritorious case in the end, when all the facts are known – especially given that the opposing party is usually quite organized, and understands the applicable laws and policies well. Many such customers simply don't understand well the laws and rules that they are up against. It may be that a broader customer education initiative by the government would be helpful.

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.

Definitely – I think ECB decisions should be binding on banks, and reiterate my belief that a government-funded tribunal-like structure (which would achieve this) would be appropriate. While banks frequently argue that they have never failed to adopt one of our recommendations, in my opinion they shouldn't appropriately have that option in the first place. A bank couldn't ignore a court or arbitration decision, and a decision based on a thorough investigation shouldn't need the losing party's consent in order to be actioned on.

Further, I suspect that if ECBs didn't have to worry about banks possibly "taking their business" elsewhere, and were empowered to make binding decisions, then there's a higher likelihood they'd be willing to take bolder stands in borderline cases that just "seem wrong", but aren't against any law or policy. The banks are frequently granted latitude in such cases.

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?

My own experience, having participated in board meetings, is that most of the important work at an ECB takes place "on the ground" – i.e., among the staff conducting the daily operations. The field is highly regulated, so there aren't many opportunities for the

board to make consequential decisions at the strategic level. For example, there are no steps that can be taken to increase customers – nor would that even necessarily be a socially laudable goal. Further, the board has no discretion to tell staff what the decision in any particular case ought to be – which is the biggest concern any consumer would have.

So long as the predominant standard for decision-making must be "general principles of good financial services and business practice", the nature of decisions reached are unlikely to change from the status quo, in the absence of targeted legislative amendments by elected officials. I take no issue with an ECB being required to publicly outline its governance process, but I think its pragmatic significance is presumed to be greater than the reality.