



PUBLIC INTEREST ADVOCACY CENTRE
LE CENTRE POUR LA DEFENSE DE L'INTERET PUBLIC

ONE Nicholas Street, Suite 1204, Ottawa, Ontario, Canada K1N 7B7

Tel: (613) 562-4002. Fax: (613) 562-0007. e-mail: piac@piac.ca <http://www.piac.ca>

August 13, 2011

Ms. Jane Pearse
Director, Financial Institutions Division
Department of Finance
L'Esplanade Laurier, 15th Floor, East Tower
140 O'Connor Street, Ottawa, ON K1A 0G5

BY E-MAIL to finlegis@fin.gc.ca

Dear Ms. Pearse:

Re: PIAC representations concerning the proposed *Approved External Complaints Bodies (Banks and Authorized Foreign Banks) Regulations*

CANADA GAZETTE PART 1 – JULY 14, 2012 - *APPROVED EXTERNAL COMPLAINTS BODIES (BANKS AND AUTHORIZED FOREIGN BANKS) REGULATIONS*

On July 14, 2012, the Governor in Council published a notice in the *Canada Gazette*, Part 1, indicating its proposed intention to make the *Approved External Complaints Bodies (Banks and Authorized Foreign Banks) Regulations*.¹ The Regulatory Impact Analysis Statement that is attached to the proposed regulations states in part: “An effective and efficient complaint handling system that resolves customer complaints builds consumer confidence in financial institutions and contributes to the strength of the Canadian banking system.”

It is unfortunate that the proposed regulations help to destroy the present consumer banking complaints handling system which PIAC views as already efficient and effective. PIAC therefore opposes the promulgation of these regulations in any form, as we believe their underlying premise means that they are fundamentally flawed, and cannot be improved by minor amendments. We therefore call upon the Minister of Finance and the Governor in Council to withdraw these regulations as they are, in our opinion, critically harmful to financial consumers and to the Canadian financial system as a whole.

¹ *Canada Gazette*, Vol. 146, No. 28, July 14, 2012, <http://www.gazette.gc.ca/rp-pr/p1/2012/2012-07-14/pdf/g1-14628.pdf> at pp. 2081-2087.

THE PUBLIC INTEREST ADVOCACY CENTRE

The Public Interest Advocacy Centre (“PIAC”) is an Ottawa-based non-profit organization that provides legal representation, research and advocacy on behalf of ordinary consumers of important public services.² PIAC is active in the area of consumer financial services (both banking and investments) as well as in other areas of consumer redress, such as transportation and telecommunications.

PIAC’S OBJECTIONS TO THE PROPOSED REGULATIONS

The proposed regulations are to be made under an as yet not in force section of the *Bank Act*,³ which permits the Minister of Finance to approve an “external complaints body”. This section permits any number of approved external complaints bodies, provided they are recommended by the Commissioner of the Financial Consumer Agency of Canada (FCAC) and “whose purpose, in the Minister’s view, under its letters patent is dealing with complaints, made by persons having requested or received products or services from its member financial institutions, that have not been resolved to the satisfaction of those persons under procedures established by those financial institutions under paragraph 455(1)(a).”

Such ECB corporations can be for-profit or non-profit. The FCAC is holding a separate “Consultation on the Application Guide for External Complaint Bodies” (which comments are due well after those on this consultation (September 10, 2012)) where the guidelines for acceptable ECBs will be specified. In the FCAC consultation document, the independence and impartiality criteria all relate to the independence and impartiality of the individual “arbiter and/or dispute resolver[s]” and not to the ECB itself. There is only a mention in this document that: “To ensure the impartiality and independence of the complaint resolution process, arrangements between the ECB and its members (contractual or otherwise) should not impact or be perceived to impact the outcomes of these processes.” There are no criteria for evaluating that control. There is no requirement to provide actual contracts between ECBs and bank clients, only “information on and examples of the arrangements and contractual relationships between the ECB and its members.”

The Minister already has the power under the *Bank Act*, subs. 455.1 to have appointed the present banking ombudsman service, the Ombudsman for Banking Services and Investments, which has been in continuous operation since the 1980s, as the designated external complaints body. This section includes the crucial power to require all banks to be members of OBSI. The Minister has never designated OBSI under subs. 455.1 despite repeated entreaties from consumer groups and the OBSI to do so. In the meanwhile, two major banks have seized the opportunity provided by this mistake and have left the OBSI scheme.

We view the present regulations as a transparent device to ratify the egregiously anti-consumer behaviour of these two banks and to bless a business model of a for-profit rival ECB to the OBSI.

² Please see PIAC's website at <http://www.piac.ca> for more information.

³ Subsection 455.01(3).

1) The External Complaints Bodies that Will be Approved will be Neither Independent Nor Impartial

Our first concern is that the ECBs thus designated will be neither independent nor impartial.

Having individual arbitrators have no direct conflict of interest will not assure any level of true independence nor impartiality. Banks will have direct negotiating power in concluding agreements with ECBs and can wholly remove business – or threaten to do so – in reaction to any arbitration decision. In short, any individual arbitrator who did not decide a consumer complaint in a “client-friendly” manner (client meaning the bank) will quickly receive the message that the bank client is not happy and not to decide such cases in the same manner again.

While it is possible that the FCAC’s Compliance and Enforcement Branch could respond to comments on its consultation that called for more criteria for independence and impartiality with stringent requirements in this regard (that could try to counteract the simple economic pressure of allowing banks to choose their own arbitrator and pull business from one that did not “perform”) we cannot imagine how those possibly be written or would work in practice.

The fact is, under these new rules, banks will buy their own judge. We don’t allow it in the judicial system for obvious reasons. Why financial consumers deserve less than citizens in the judicial system (that this dispute resolution system is looking to unburden) is not clear.

2) Consumers Prefer a Single Entity

Consumers prefer a “one-stop-shop” for resolving consumer complaints. It is burdensome on banking customers to inform themselves of the particular route for complaints for their particular bank, whatever disclosure requirements are made in the regulations.

Ensuring consumers know of the existence of even a unitary external complaints body in an industry is difficult. Educating them that there is more than one, and which one to go to, will require even more public education.

Finally, consumers will perceive that there is a conflict of interest, even if there is in fact none, if the bank that is the subject of the complaint is given the power to direct the complainant to its choice of arbitrator. This to PIAC as a consumer group is well-known and justified fear.

3) Destroying the Banking Ombudsman through Competition Threatens the Investment Dispute Resolution System and Other Industry Ombudsmen

We will not dignify the present proposed regulation with a detailed analysis. It is clearly inadequate to assure consumer protection in banking. However, we mention two anti-consumer highlights that are supposed to be “features, not bugs”. First, the 120 time limit on dispute resolution: we believe this will lead to rushed “resolutions” that will simply devolve into take-it-or-leave-it “offers” by banks to complainants, delivered by the ECB arbitrators. Second, the supposed “free market” thinking behind the regulation (that banks should be free to

choose the “best” arbitrator which will also benefit consumers (if we follow the Finance Minister’s thinking on this)): it appears the Minister has not considered that banks have different goals than consumers (such as not paying compensation) and therefore there is the very real possibility that banks may simply choose not to follow any recommendations of their own arbitrator, since there is absolutely no enforcement mechanism against the banks for not so doing. Recall that this entire crisis was brought to a head by the Minister refusing to require banks to accept the OBSI’s resolutions in some recent cases.

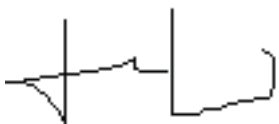
The Minister also may not have considered the obvious risk of the multiple ECB provider contagion spreading to the investment side of OBSI. Even if he has done so, we note for him that by promulgating these regulations, he is risking similar developments in other regulated industries that we had thought “solved” for individual complaint redress. For example, the Canadian Radio-television and Telecommunications Commission (CRTC) was ordered by Cabinet to create the Commissioner for Complaints for Telecommunications Services. It is working well, it is unitary, it resolves consumer complaints. Will Cabinet now consider entreaties by large telecommunications companies to have the same multiple ECB provider approach?

REQUEST TO REJECT THE PRESENT REGULATION AND DESIGNATE OBSI AS THE SINGLE BANKING DISPUTE ARBITRATOR

Section 455.1 of the *Bank Act* already permits the Minister to designate one dispute resolution service that is non-profit and independent. The Minister should use that power to designate the Ombudsman for Banking Services and Investments (OBSI) as the single, non-profit, mandatory consumer banking dispute resolution service. These new ECB regulations, and the Minister’s seemingly dogmatic reliance on “market forces” in dispute resolution are misguided; risk potential conflicts of interest between ECBs and banks; and entrench a decided lack of independence or impartiality towards consumers in an area where consumers cannot afford it.

Thank you for your consideration of our position.

Sincerely,

A handwritten signature in black ink, appearing to read "John Lawford". The signature is stylized with a prominent vertical line on the left and a horizontal line extending to the right.

John Lawford
Counsel
PIAC