TELECOMMUNICATIONS OMBUDSMAN FOR CANADA

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EXECUTIVE SUMMARY

With the advent of competition in telecommunications in Canada, many aspects of the regulatory framework are evolving. As existing services become unregulated, and new services are never regulated at all, new consumer issues arise. For a regulated service, if customers cannot satisfactorily resolve a dispute with a service provider, there is recourse to the regulatory agency. For an unregulated service, generally the only recourse is switching to a new service provider. Unfortunately, this is not always easy, and in any case may not address past problems. Recourse to the courts, while possible, is expensive and often unsatisfactory from a user perspective.

In principle, competitive forces, if sufficiently vigorous, will provide incentives for service providers to be responsive to customers. However, in practice, handling of complaints can be complicated, especially in a large company. Competition, while intense enough to keep prices and terms of service reasonable, may not suffice to take care of individual customer problems. As a result, many industries have set up independent ombudsmen to deal with individual customer complaints.

This paper reviews different models for an industry ombudsman. A number of viable options are available, ranging from no ombudsman to a far-reaching government-mandated and controlled office.

Given the current regulatory framework in Canada, the paper concludes, a mandatory ombudsman would be the best solution. All telecommunications service providers would be required to participate.

The ombudsman's office should be a not-for-profit organization, funded by participating service providers and subject to general government guidelines. In all other respects it should be independent of both industry and government. The ombudsman should have jurisdiction over wire-line and wireless telecommunications, as well as Internet access and voice services (VoIP), where internal conflict resolution has been tried and failed, and where other administrative bodies do not have jurisdiction. The ombudsman should have discretion to refer a complainant to a regulator or the courts if in its judgment that is a more appropriate or convenient avenue to pursue.

For individual disputes, the ombudsman should first try to mediate a voluntary resolution to the dispute. If that fails, it should issue a recommended resolution. This will become binding on both supplier and complainant if the complainant accepts; otherwise, it will bind neither party. Recommended resolutions should include an explanation or apology, an action by the service provider, and compensation for actual damages up to a maximum of $1,000.

In its oversight role, the Telecommunications Ombudsman should also identify industry-wide trends and consumer protection in telecommunication that should be addressed by coordination at the industry level. The Telecommunications Ombudsman should undertake investigation under this oversight power and issue best practices, guidelines and recommendations. The Telecommunications Ombudsman may, in cases where such guidelines appear an inadequate approach, recommend to the CRTC that the Commission initiate a Public Notice or other process on the consumer protection issue.

In its February 2005 budget, the Government of Canada announced a major review of telecommunications policy and regulation, to take place in late 2005. The role of an ombudsman in any new regulatory framework should be considered carefully. Increased forbearance or deregulation may leave progressively larger gaps for dispute resolution that could be filled by an ombudsman, depending on the design of the new framework.

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THE NEED FOR A TELECOMMUNICATIONS OMBUDSMAN

Until a dozen years ago, telecommunications services in Canada were relatively simple. They were offered generally on a monopoly basis, and their supply was tightly regulated. The monopoly supplier, who could afford to take appropriate corrective action, initially handled complaints. If a satisfactory solution was not reached, the unsatisfied customer could lodge a complaint with the regulator, the Canadian Radio-television and Telecommunications Commission (or CRTC), who had the power to issue a binding decision.

The situation has changed dramatically. We group the changes under the headings of detariffed telephony services, Internet services, and tariffed services.

Detariffed Telephony Services

As various telecommunications services have become competitive, the CRTC has forborne from regulating these services. Significant competition in telecommunications services began in 1992, with the opening up of the long distance voice market.[1] As a result, the number of suppliers of long distance services grew dramatically. As well, pricing plans, sometimes quite complicated, proliferated. This led to confusion on the part of many consumers, who were accustomed to a straightforward price schedule from a known supplier. To some degree, the confusion continues, as competitors continue to introduce new packages of services and new pricing structures.

An additional source of difficulty for consumers arose with the practice of "slamming". [2] To be able to dial ten-digit numbers for long distance calls, customers must designate, to their local carrier, the long distance provider of their choice. Either by accident or intentionally, some suppliers caused the local carrier to change a customer's long distance provider without customer consent. This led to a flood of complaints,[3] although the flood has abated somewhat. However, other aggressively competitive practices are still an important problem

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[1] Telecom Decision CRTC 92-12 (12 Jun 92). Local service was opened to competition in 1997, as a result of Telecom Decision CRTC 94-19 (16 Sep 94) and Telecom Decision CRTC 97-8 (01 May 97). Private lines and data services have been competitive since 1979: Telecom Decision CRTC 79-11. Customer premises equipment, ranging from telephone sets to PBXs, has been competitive since 1982, but is generally not defined as a telecommunications service.

[2] For a more detailed discussion of this problem and its resolution, refer to Appendix D: (Former) Canadian Ombudsman for Telecommunications Services, pp. 40-41. Additional discussion of "slamming" can also be found at note 7 below.

[3] Appendix D, *supra*, at para 2 and following.

for consumers. An example is the termination fees charged by some service providers to customers who have signed multi-year service contracts.

Many telecommunications services in addition to long distance voice have become competitive and have been forborne over the last seven years, and hence are no longer under the active control of the CRTC. This includes almost all services by new entrants. As well, mobile telephony and Internet access are either forborne or exempted from regulation. For these services, complainants who obtain no satisfaction from the service provider have no general channel of recourse, save for the service providers and the courts.[4]

Advances in technology have permitted new and innovative applications, and also new and innovative abuses. An example is the provision of unsolicited telecommunications. This became a serious problem when telemarketers began using automatic dialers.[5] Another example is the implementation of new billing systems, designed to be more flexible and allow new ways to charge for services. This can cause massive disruption, e.g. a customer may have a series of missing bills, followed by an excessive bill, sometimes for thousands of dollars.[6]

Customer complaints in regard of these services are generally not handled by the CRTC.[7] Instead, if a customer cannot obtain satisfaction directly from the service provider, in general its only recourse is the courts.

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[4] The CRTC's main lever is tariff approval, or denial thereof. As well, CRTC staff mediate, formally or informally, in some disputes. Some complaints fall under the jurisdiction of other tribunals, e.g. false or misleading marketing practices are reviewable by the Competition Bureau, pursuant to the Competition Act.

[5] The CRTC placed limits on the use of auto-dialers in 1994: Telecom Decision CRTC 94-10 (13 Jan 94). However, recently voice-casting services, that leave voice-mail in customers' mailboxes without causing their telephone to ring, has become an issue: Telecom Decision CRTC 2004-65 (04 Oct 04).

[6] This occurred when Bell Mobility activated a new billing system from Amdocs, in May 2004 (See Financial Post, 05/01/05 at FP6). One customer was quoted as having undergone "six months of unnecessary hassles" to settle matters with Bell Mobility.

[7] Slamming is an exception, as it involves violation of the procedures set out in a provider's PIC/CARE (primary interexchange carrier/customer account record exchange) handbook, which must be approved by the CRTC. As well, CRTC staff occasionally gets involved on an informal basis even when a service is not tariffed.

Internet Access

An entirely new set of problems, as well as recurrence of old ones, has arisen with the spread of Internet access. Problems include:

- Billing problems
- Installation delays
- Service Outages
- Connection problems
- Slow speed at peak usage times
- Technical support that is difficult to contact or unhelpful
- E-mail
    - Spam
    - Deletion of archived e-mail
    - Holding senders' e-mail when recipient's account is suspended, without notifying senders
    - Limitations on attachment size
- Ignored complaints
- Difficulty canceling service: billing continues after cancellation
- High prices[8]

The CRTC forbore from regulating Internet access purchased by consumers in 1999, finding that competition was strong enough to protect consumer interests.[9] This has left a gap for consumers with complaints. At present, many complaints are solved directly with the Internet Service Provider (or ISP), either by customer service, or upon escalation to senior management. In other cases, however, the ISP may not see the complaint as justified, or the internal bureaucracy may mishandle it.[10] There is no ombudsman or other body to whom such cases can be appealed.[11]

For example, customers experience long waiting queues when calling for help, with long delays on hold. Often the customer is transferred to other departments.

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[8] Public Interest Advocacy Centre, *Consumer Issues with Internet Service: Is Industry Self-Regulation Working?* (Ottawa: August 2004) at pp.18.

[9] *Forbearance from Retail Internet Services*, Telecom Order CRTC 99-592 (25 Jun 99). "Wholesale" Internet access services, i.e. services purchased from telephone or cable companies by competitors, to provide their own competing services, are still regulated.

[10] The Canadian Association of Internet Providers (or CAIP), an industry association, has issued a voluntary Code of Conduct and a Fair Practices Policy Statement. However, it does not deal directly with customer complaints, referring them instead to the appropriate ISP.

[11] The Canadian Television Standards Council (CTSC), a cable industry self-regulatory body, does receive some complaints against cable companies offering Internet services, and tries to mediate in these cases. However, the second and third largest cable companies in Canada, Shaw and Videotron, are not members of the Council. Additional information about the CTSC, its practices and relationship with the proposed Telecommunications Ombudsman can be found at notes 47 and 49 below.

Complaint calls may not be returned, and it may not even be possible to lodge a complaint because of a full voice mailbox at the other end. Often the customer has to wait on the telephone while the problem is resolved. A combination of such problems were mentioned in one letter to PIAC:

> Called tech support a number of times over two days to fix a problem with my account and had to wait 15 to 20 minutes in the telephone queue each time. Several times my call was knocked off the queue after a long wait and I had to call back in and rejoin the queue. Over eight hours and through conversations with 10 tech support people, a problem with sending email was finally identified and resolved.

Many consumers are dissatisfied with current avenues for handling complaints. In a recent survey of consumers, 62% agreed that government should develop and enforce consumer protection rules when it comes to the Internet, while 27% disagreed, and 12% had no opinion.[12] For those who agreed with consumer protection rules, service quality and protection from spam were deemed the most important areas in need of consumer protection by the government, followed by resolving disputes between businesses and consumers, with pricing ranked last.[13]

[12] Survey of 1,350 adults in late March 2004, by POLLARA Inc. for PIAC. The survey has an accuracy of ±2.7 per cent.

[13] Respondents favouring government developed and enforced consumer protection rules were asked: "How important do you feel each of the following would be in developing such consumer protection rules?" They answered (in percentage terms):

	Very important	Somewhat important	Not very important	Not at all important	Don't know
Prices charged	37	45	11	3	4
Service quality	62	31	3	2	3
Resolving disputes	56	33	5	1	5
Spam	62	22	4	1	11

Note, problems with service quality are not necessarily the responsibility of the ISP; some difficulties may be attributed to software difficulties on the user's computer.

Tariffed Services

For basic local services, services that remain tariffed, the CRTC does carefully monitor quality of service, but at an aggregate level. Incumbent telephone companies report on a number of indicators, including provisioning interval (time until service is turned up), percentage of installation appointments met, delayed orders and upgrades per 100 requests, trouble reports and their clearing, dial tone delay.[14] Remedial action, and possibly rebates to customers, is triggered when these indicators fall below standard for three months or more. This, of course, is of very limited comfort to the individual customer with a specific problem.[15]

Individual customers can complain to the CRTC, whose staff will try to help resolve problems with tariffed services, whether basic local services or others. The service provider will be asked to address the concerns, within 20 days, with a response to the customer and a copy to the CRTC. However, the CRTC staff's role is largely limited to mediation, and it cannot issue binding orders. Rather, it must refer the complaint to the CRTC's Telecommunications or Legal Branches for further investigation. In turn, these may begin a more formal proceeding to resolve the issues raised by the complainant. These can be lengthy and require significant resources.[16] However, forcing a service supplier to take remedial action requires formal adjudication by the Commission. The remedies available are limited to future actions: the Commission may order a service supplier to improve service to the customer going forward, or to restore service, etc. The Commission does not have the power to award compensation or damages to customers, as these would in effect be retroactive.

The Commission staff does fulfill a more formal ADR function, but only with respect to disputes between competing service suppliers, usually an ILEC and a CLEC or BDU.[17] This mechanism would normally not be available to consumers.

The Commission's role in dealing with complaints, as just described, is useful. However, it seems to have been designed for a simpler world, where services (and complaints about them) were less demanding, and monopoly provision prevented many of the problems arising in today's competitive market place.

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[14] Appendix to Telecom Decision CRTC 2000-24 (20 Jan 00).

[15] In Telecom Decision CRTC 97-16 (24 Jul 97), the Commission stated: "The Commission notes, however, that a mandated rebate scheme is difficult to administer fairly in that what is deemed just compensation to one individual may not be sufficient to another. In addition, a telephone company may decide that providing rebates is less expensive than maintaining good quality service".

[16] For example, Telecom Order CRTC 2004-307 (9 Sep 04), makes a formal determination on a complaint, concerning a contract termination charge, lodged with the CRTC in April of 2003.

[17] Public Notice CRTC 2000-65 (12 May 00). Staff may issue a non-binding opinion. The issue may also be referred to CISC, an industry working group, or the CRTC may appoint an Inquiry Officer. If there is still no resolution, the matter may proceed to formal adjudication.

An Ombudsman

We conclude that, increasingly, many of the complaints expressed by customers fall outside of the traditional categories. Often, complaints do not concern tariffed services regulated under the Telecommunications Act by the CRTC. Correspondingly, as existing services have been forborne and new services and options have been introduced, the traditional regulatory treatment of complaints aimed at tariffed services, is addressing an ever-diminishing percentage of total complaints over time. Even for those complaints that are related to tariffed services, existing procedures either do not have "teeth" or are long and expensive.

In this new environment, a telecommunications ombudsman would complement the role played by the CRTC by performing two functions. [18] First, the Commission could "off-load" certain adjudicative and conciliation functions to the ombudsman.[19] Second, it could address complaints regarding non-tariffed services. Although the Commission retains the power to act on complaints regarding forborne or exempt services, it uses this power very sparingly. A telecommunications ombudsman could routinely address these complaints.

The ombudsman primarily deals with individual customers and their relationship with a service provider. By contrast, a traditional regulatory agency focuses on the relationship between the service provider and large groups of customers. Although the regulator also deals with individual complaints, that is not the principal preoccupation. As a result, the processes of an ombudsman lend themselves more readily to solving individual complaints.

Many industry ombudsmen have a strong record of reaching informal, voluntary resolution of disputes. For example, the Energy and Water Ombudsman for Victoria in Australia reports that, from its opening in May 1996 to the end of October 2003, it handled almost 49,000 cases. In only 36 of these cases was the ombudsman required to make a binding decision when resolution could not be reached otherwise. [20] Ombudsmen generally act speedily: for example, the Canadian Ombudsman for Banking and Investment Services has the objective to close 80% of files within 90 days.[21]

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[18] For a short time during the mid-1990s, there was a brief experiment with the telecom ombudsman concept in Canada. A Canadian "Ombudsman for Telecommunications Services" (OTS) was created by Canada's new long distance providers during this period, but was wound up in 2000. For a detailed consideration of this regime, its history and focus, refer to Appendix D: (Former) Canadian Ombudsman for Telecommunications Services, at pp 40-41.

[19] It is generally accepted that alternative dispute resolution should be tried before parties resort to formal adjudication, with the delays and expense that it entails.

[20] Fiona McLeod, Energy and Water Ombudsman (Victoria), Address to Administrative Review Council (12 November 2003).
Online: http://www.ewov.com.au/pdfs/ARC%20address_www.pdf

[21] Refer to Appendix F: Canadian Banking and Financial Services Ombudsman, at pp. 44-45.

Customer satisfaction with ombudsmen services also tends to be high. For example, in a study of the Australian Telecommunications Industry Ombudsman by an independent evaluator, Sweeney Research, a survey of 450 complainants to TIO found that 82% said that TIO was very or fairly good overall.

The following sections address the principles that should guide the functioning of an industry ombudsman and the manner in which ombudsmen function elsewhere. Adapting these to the Canadian situation, we identify three models for a telecommunications ombudsman and discuss the strengths and weaknesses of each. In the conclusion, we make recommendations as to an appropriate approach for Canada.

OMBUDSMAN DESIGN

There are many definitions of an ombudsman, but they tend to resemble one another. A fairly typical one is the following:

> An ombudsman is an independent, objective investigator of people's complaints against government agencies and other organizations, both public and private sectors. After a fair, thorough review, the ombudsman decides if the complaint is justified and makes recommendations to the organization in order to resolve the problem.[22]

The ombudsman tries to resolve disputes informally, through mediation and conciliation, trying to find mutually agreeable solutions. When such solutions cannot be reached, issues may have to be adjudicated, either by the ombudsman or by another body.[23]

While the vast majority of ombudsmen focus on relations with government departments and agencies, our interest here is with those that address disputes with the private sector. While these have been slower to develop than the former, there are now a significant number of "industry" ombudsmen. Indeed, the Australian Minister for Customs and Consumer Affairs in August 1997 released a document entitled "Benchmarks for Industry-Based Customer Dispute Resolution Schemes". The principles in these voluntary guidelines were used in designing the Australian telecommunications ombudsman, and are as follows:

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[22] Forum of Canadian Ombudsman, *What is an "Ombudsman"?* Online: http://www.ombudmanforum.ca/whatis_e.asp.

[23] Nathalie Des Rosiers, "Balance and Values – The Many Roles of an Ombudsman", speech to the Annual Conference of the Forum of Canadian Ombudsman Conference (Ottawa: April 2003, Online: http://www.ombudsmanforum.ca/events/2003_conference/nathalie_desrosiers_speech2_e.asp) emphasizes that the ombudsman must be sensitive to imbalances in social roles and hence in power.

1. Accessibility
   - Widely known
   - Easy to use
   - No cost barriers

2. Independence
   - The decision-making process and the administration of the scheme are independent from industry members, and are seen to be so

3. Fairness
   - Procedural fairness
   - Decisions are made on the information before the body
   - Decisions are based on specific criteria

4. Accountability
   - The body publishes its determinations and information about complaints and systemic industry problems

5. Efficiency
   - The body tracks complaints, ensures that they are dealt with by the appropriate process, and regularly reviews its performance

6. Effectiveness
   - The decision-maker has the power to make monetary awards (but not punitive damages)
   - There is a periodic external review

When specifying standards for a telecommunications ombudsman, the British telecommunications regulator, OFCOM, requires that the procedures to be put in place must be "fair, transparent, accessible, timely and inexpensive".[24]

While all of these principles and requirements are desirable, some will come into conflict with each other. In particular, the following trade-offs must be addressed.

[24] OFTEL, "Developing a Telecommunications Ombudsman: Consultation Document" (London: OFTEL, March 2001). OFTEL was the predecessor to OFCOM. The American Bar Association, in its standards for ombudsmen, stresses independence, impartiality, and confidentiality. The last principle means that an ombudsman does not reveal the identity of a complainant without that person's express consent. However, often little progress towards resolution of a specific problem can be made without disclosing a level of information that would reveal the complainant's identity. American Bar Association, "Standards For The Establishment And Operation Of Ombuds Offices" (Washington: April 2003, Online: http://www.abanet.org/buslaw/corporateresponsibility/clearinghouse/03spring/11/materials.pdf).

How is independence to be assured?

Independence from service providers is perhaps the most important characteristic of an ombudsman.[25] Independence is crucial to building trust on the part of complainants. As well, it allows the ombudsman to take actions even if these actions are not popular with service providers.

There are two opposing approaches. At one pole, the industry itself sets up an ombudsman's office, perhaps through a corporation owned by the industry members.[26] The ombudsman's office is governed through a board of directors, the majority of whom are independent of the industry. These are usually prominent academics, business people from other industries, and professionals. Persons associated with or speaking for consumer groups, although highly desirable, are not always represented.

Industry members participating in the ombudsman's office usually name a minority of the board of directors. In addition, they often also name the representatives to a members' board, a body concerned with the funding and business administration of the ombudsman's office. The members' board does not deal directly with the ombudsman. One of the major functions served by the interposition of the board of directors is to guarantee the ombudsman's independence.

At the other extreme, the ombudsman may be a government employee. They can have their own office, complete with operating staff and administrative support. Or they can be located within another agency (usually the relevant regulatory agency), either near the top (such as a Commissioner[27]) or at a staff level (such as a Bureau Chief[28]).

Such an ombudsman will be independent of the industry (unless one believes in the theory of industry capture of the regulator). However, they may be quite dependent on, and under the influence of, government. In many cases, this will not cause a major problem. In other cases, however, it may be helpful for the ombudsman to be perceived as truly independent of all pressures.

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[25] Some companies will style the person inside the company responsible for complaints as "ombudsman". But these persons typically report to senior management, and even if they report directly to the President or CEO, they cannot be said to be independent in the sense being used here. Thus, we do not consider them ombudsmen for the sake of this discussion.

[26] See, for example, Appendix F: Canadian Banking and Financial Services Ombudsman, pp. 44-45.

[27] For example, the Air Travel Complaints Commissioner in Canada (Appendix E: Canadian Air Transport Ombudsman, pp. 42-43).

[28] For example, the Chief of the Consumer and Governmental Affairs Bureau at the Federal Communications Commission in the U.S. (Appendix C: United States Telecommunications Ombudsman, pp. 37-39).

In between the two extremes, the ombudsman may be established by private industry, but in response to legislative requirements that the industry make ADR services available to its customers.[29]

When the ombudsman is a government employee, funding for their office typically comes from government sources, although there is the possibility of user charges payable by service providers. Where the ombudsman is created by the private sector, funding comes from industry members of the ombudsman scheme. This is typically through a "usage" charge per complaint against a given service provider, and an annual charge to cover overhead costs.[30]

Too high a level of fees charged by a private-industry-sponsored ombudsman can lead to a competing ombudsman being established. Thus, in the United Kingdom, the Communications Act 2003 required all public communications providers (wire-line, wireless, and Internet) to put in place, for its customers, a dispute resolution procedure.[31] In response, British Telecom and a number of other telecommunications carriers set up OTELO, receiving regulatory approval in September 2003. Other service providers, including Orange, T-Mobile, Telewest, and mm02, did not want to join OTELO, citing, among other reasons, "high joining costs and high case fees". In collaboration with the (U.K.) Chartered Institute of Arbitrators, they set up the Communications and Internet Services Adjudication Scheme (CISAS) as another ombudsman, receiving regulatory approval in December 2003.

This has led to an interesting model of competing private sector ombudsmen. As of March 2004, OTELO had 55 members with a combined market share of 96% of the wire-line market, 50% of the mobile market, and 30% of ISPs. Most of the other service providers were members of CISAS, with a few not belonging to either ombudsmen.[32]

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[29] As is the case, for example, with OTELO in Britain and TIO in Australia, (Appendix B: United Kingdom Telecommunications Ombudsman, pp. 34-36; Appendix A: Australian Telecommunications Ombudsman, pp. 31-33).

[30] For example, funding of the Australian telecommunications ombudsman, TIO, was $5.8 million in 2002-2003. Further, 44% was recovered through complaints fees and 56% through indirect funding, payable by members proportionally to their user fees. The 86% of members, who did not have complaints against them, paid nothing (Appendix A: Australian Telecommunications Ombudsman, *supra*). Furthermore, funding for the former Canadian Ombudsman for Telecommunications Services was initiated by the Competitive Telecommunications Association, i.e. member companies (Appendix D: (Former) Canadian Ombudsman for Telecommunications Services, at pp. 41).

[31] The service had to be approved by the regulator, first OFTEL and now OFCOM. It had to provide "a free, independent and effective service to customers who are unable to resolve complaints directly" with their service provider.

[32] OTELO, Annual Report 2004, Online: http://www.otelo.org.uk/UserFiles/File/annual_report.pdf. CISAS, Communications and Internet Services Adjudication Scheme, "The First Report of the Communications & Internet Services Adjudication Scheme", July 2004 (London: CISAS, 2004).

By contrast, in Australia, private industry set up a single Telecommunications Industry Ombudsman (TIO), in response to the Telecommunications (Consumer Protection and Service Standards) Act 1999. A decision by the Australian courts in June 2001 clarified that all service providers had to belong to TIO. Thus there is no competition among multiple private industry ombudsmen, in contrast to the United Kingdom.

To what extent can the ombudsman impose a solution?

All ombudsmen have a mediation role. In the first instance, this can be quite limited, and may consist of forwarding a complaint to the proper person within the supplier's organization and asking for that person to get in touch with the complainant. If there is no resolution, most ombudsmen will actively try to identify issues, gather or collate information, identify possible solutions, and help parties come to a mutually agreeable solution. This disposes of the vast majority of complaints.

Ombudsman design will differ according to the level of involvement of the ombudsman's office in such mediation. This in turn depends on, and affects, the level of resources available to the ombudsman.

Mediation does fail occasionally. If so, there are a number of alternative models. The ombudsman can (1) make a non-binding recommendation to the parties (2) issue a decision that is non-binding on the complainant, and that becomes binding on the service provider only if the complainant accepts to be bound by it (3) issue a decision that is binding on both complainant and service provider.

The first option effectively limits the ombudsman's role to issuing recommendations.[33] While not binding, the recommendations do have moral suasion. In any case, a dissatisfied complainant would be free to pursue alternative avenues of redress, including administrative measures if available, and the courts.[34]

The one source of persuasion available to the ombudsman under this model is the threat of publicity. The ombudsman can make public the issue and its recommendation, including the name of the service provider (but not necessarily

[33] Usually, if mediation failed, the mediator can simply withdraw without making any recommendations. But such a limited role would fall short of what is needed by the definition of an ombudsman.

[34] The delays and costs of more formal procedures, that the ombudsman system was trying to avoid, must now be incurred, in addition to the costs of participating in the ombudsman process. However, it is expected that such additional costs will occur only rarely, and will be greatly outweighed by the savings in those cases successfully resolved by the ombudsman process.

that of the complainant).[35] This places some pressure on the service provider, to the degree that it cares for its reputation, and in some cases it is quite effective.[36] In other cases, however, publicity by itself may not be sufficient.

One advantage of this limited role for the ombudsman is that it makes its creation more palatable to industry members who are risk averse and wary of the potential costs of new arrangements. By giving these members the option of backing out, they may be more willing to participate in an ombudsman scheme. The corresponding disadvantage is that the scheme may not be as effective as it could be.

Under the second option, decisions are binding on the service provider only if the complainant chooses to accept them.[37] This recognizes the power imbalance that usually exists between the customer and the service provider. Knowledge, expertise, and bargaining skill usually rest with the service provider. As well, an impact that is significant or even devastating for a consumer may be negligible for a large corporation, who can afford to wait out the consumer.

Where the ombudsman has a legislative mandate, binding decisions may be enforced directly. If the ombudsman is part of a regulatory authority, the enforcement may require the participation of others, such as regulatory commissioners. Where the ombudsman is an organization set up by the private sector, members of the organization must comply contractually. One possible sanction, as mentioned above, is publicizing the member's name. Another possibility is expulsion from the ombudsman organization.[38]

Advantages of this ombudsman scheme include maximizing industry participation and flexibility in operations, while maintaining some government involvement in extremis.

The third option usually exists as an extension of an existing regulatory scheme, put in place to pursue other objectives. An ombudsman's office within a

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[35] According to Bruce Hood, the first Air Travel Complaints Commissioner for Canada, "My only clout is 'if you don't do it, I'm going to tell everyone else about you'" (CBC, Marketplace, "Air Travel Complaints", Broadcast: October 17, 2001; Online: http://www.cbc.ca/consumers/market/files/travel/air_complaints/).

[36] For example, the Canadian Banking and Financial Services Ombudsman, which has been using this sanction for the past seven years, has not had a single case of a member refusing to implement a recommendation (Appendix F: Canadian Banking and Financial Services Ombudsman, pp. 44-45).

[37] Examples include OTELO, the telecommunications ombudsman in the United Kingdom, and TIO, the telecommunications ombudsman in Australia (Appendices B: United Kingdom Telecommunications Ombudsman, pp. 34-36; and A: Australian Telecommunications Ombudsman, pp.31-33, respectively).

[38] It is not clear what the consequences might be if membership is compulsory, as for Australian telecommunications service providers.

regulatory tribunal may have delegated authority for decisions and rule making.[39] In other cases, a binding decision needs authorization from the regulatory body as a whole.

A risk with this option is that the mediation function of the ombudsman may be overshadowed by its adjudicative power. Parties may not treat the mediation as seriously as it deserves. As a result, the benefits of conciliation and flexibility may be minimized.

What remedies can the ombudsman award?

There are typically four types of remedies that an ombudsman can recommend or, in certain cases, impose: (1) an explanation or apology; (2) an order to the service provider to do, or not do, something affecting the particular complainant; (3) an award of compensation or damages to the complainant; (4) an order to the service provider to change certain policies or practices that are giving rise to systemic problems, affecting many customers.

With regard to the first type of remedy, many complaints arise from a lack of communication between the customer and the service provider. In some of these cases, it turns out that the complainant really wants to know what went wrong, and recognition that they were disadvantaged by it. An explanation and apology may be sufficient to satisfy them.

More often, some sort of corrective action is needed, e.g. reconnecting a customer that was wrongfully disconnected, or not disconnecting the customer if they are still connected. A common ancillary order is that the service provider is not to take “credit management” action, e.g. third-party debt collection, for amounts that are in dispute, until the ombudsman has delivered a decision.

Thirdly, compensation to a complainant is available under some schemes but not others. Traditional economic regulation is forward-looking, and accommodates retroactive price-setting only with great difficulty. Some observers argue that this bars damages for inadequate past services. Therefore some statutes, and the articles of incorporation of some private-sector ombudsmen, explicitly provide for compensation and damages for past harms.

Most ombudsmen schemes disallow punitive damages against a service provider. They also bar all damages against a complainant. As well, awards against service providers are usually capped. Thus OTELO cannot order compensation in excess of £5,000. TIO can make awards of up to AU $10,000,

[39] For example, Chief of the Consumer and Governmental Affairs Bureau, Federal Communications Commission in the U.S (Appendix C: United States Telecommunications Ombudsman, pp. 37-39).

but special procedures must be followed if the award is to be more than AU $400. TIO may also make recommendations to a member service provider of awards up to AU $50,000, and publish these recommendations, but it cannot make them binding.

Finally, certain recurrent complaints suggest systemic problems. Some ombudsmen have procedures to investigate more widely and make recommendations to members as to policies and procedures that give rise to these complaints (e.g. TIO). In some cases, the ombudsman has rule-making authority (e.g. the CGB of the FCC). Such procedures start to resemble more traditional regulation of quality of service, rather than an ombudsman function. However, for certain unregulated or forborne services, this may be desirable.

What is the scope of the ombudsman's powers?

What complaints can the ombudsman address, what complaints must he turn away, and under what circumstances may he or she exercise discretion in deciding whether or not to deal with a specific complaint?

Ombudsman schemes are generally designed to complement other avenues of recourse and minimize duplication. As well, they are intended only for cases where the complainant has tried, and failed, to obtain satisfaction from the service provider. As a result, if a customer approaches an ombudsman directly, without first attempting to resolve the issue with the service provider, the ombudsman may register an enquiry rather than a complaint, and refer the enquiry to the service provider.

Furthermore, the products and services that the ombudsman can deal with are specified in the enabling statute, regulations, or the corporate documents of a private-sector scheme. The ombudsman's jurisdiction may be extended to other products and services if both complainant and service provider agree if the scheme so provides.

Other ombudsmen schemes follow similar approaches. In general, ombudsmen focus on issues specific to a particular customer, e.g. quality of service, and eschew more general policies, e.g. pricing. For example, the following is a list of complaints that are within the jurisdiction of TIO (the Australian telecommunications ombudsman):

- Wire-line, mobile and Internet access
- Billing or manner of charging
- Provision of (or failure to provide) telecommunications services, other than general policies or commercial practices
- Problems with white page listings

- Privacy issues
- Complaints from owners or occupiers of land used by a service provider
- Other complaints, referred by a member, with the complainant's consent

Likewise, there are certain kinds of complaints that fall outside the ambit of the Ombudsman's powers and must therefore be refused by the office. For example, access to ombudsman services is usually limited to residential and small business customers. Medium and large businesses are presumed to be able to look after themselves. As well, their issues are likely to be significantly more complex, with their resolution imposing a burden on the ombudsman's resources.

Additionally, complaints that are in the process of being arbitrated or adjudicated before an administrative tribunal or the courts are also unsuitable for the ombudsman. In the interests of economy of resources, duplication should be avoided. In addition, the ombudsman typically has discretion to refer a complainant to a regulator or the courts if in its judgment that is a more appropriate or convenient avenue to pursue.

For example, following is a list of complaints that are outside the jurisdiction of the Australian TIO:

- Customer premises equipment and inside wiring
- Yellow pages and other business directories
- Non-carriage services and activities
- Setting of tariffs
- 000 emergency service [911 service equivalent]
- Telecommunications policies, such as the Universal Service Obligation
- Content
- Matters under the jurisdiction of another body (e.g. anti-competitive practices)

Finally, an ombudsman may also exercise discretion and refuse to deal with complaints that are frivolous, vexatious, or anonymous.

What procedures should the ombudsman follow?

Procedures vary according to the circumstances specific to the complaint. However, many ombudsmen schemes share a number of procedural elements that are abstracted as follows.

A first step is to make potential complainants aware of the existence of the ombudsman, and of how to get in contact. Generally service providers who are members publicize the ombudsman service on monthly bills or through bill inserts. These inform customers that, if they have problems and are not satisfied

with the solution offered by the service provider, further complaints to the ombudsman are possible. Consumer groups and government agencies may also disseminate information about the ombudsman.

Ombudsmen try to make access to their services as easy as possible. Complainants generally can log a complaint by toll-free telephone number, toll-free fax line, email, regular post, and online via the ombudsman's homepage. To encourage use of the service, it is free to complainants (the entire cost of the ombudsman is picked up by the industry).

An initial screening by the ombudsman staff is performed to ensure whether the complaint is within the ombudsman's jurisdiction or not. If it is not, the complaint is be forwarded to the proper authority, with copy to the complainant. Screening is also performed for frivolous or vexatious complaints.

If the complaint is within jurisdiction, but has not yet been raised with the service provider, the complaint is forwarded to the service provider for its consideration, with a request that the ombudsman be copied on the reply to the complainant. The ombudsman's office tracks such requests and follows up as necessary.

Once a complaint has been filed with the service provider, if the complaint has not been satisfactorily resolved, the ombudsman's office generally begins an investigation.[40] There are then two ways to proceed. First, the ombudsman can begin on its own motion after a set time period with no resolution (the model followed by TIO). Second, the ombudsman's office can fill out a written complaint, which must be signed and returned by the complainant before the investigation can commence (the model followed by OTELO).

Complaints to be investigated are often classified according to type and complexity. For example, TIO uses four different levels of complaint, where level 1 is relatively straightforward (often resolved within 2 weeks) and level 4, which will likely take significant resources and attention.[41] A lower level complaint that is not satisfactorily resolved usually is escalated to a higher level.

Under the TIO scheme, an investigations officer proceeds to examine the complaint. Level 1 complaints are the subject of mediation. If mediation fails, the complaint is usually escalated to a higher level. Here, the investigator tries to work out a solution acceptable to both sides. To assist in this process, the investigator has the power to request documents and other information from the

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[40] Refer to note 44, which addresses the investigative powers conferred on the Privacy Commissioner of Canada, and which are typical of the fairly extensive investigative powers of this type of ombudsman.

[41] Factors used by TIO to determine the level of the complaint include (1) prior opportunities to resolve the dispute (2) length of time the complaint has been ongoing (3) time that will be required from TIO (4) time that will be required from the service provider (5) complexity of the matter (6) amount of money in dispute (Appendix A: Australian Telecommunications Ombudsman, pp. 31-33).

two parties, and may continue to dialogue with them. Further efforts at reaching consensus may take place, based on the investigator's findings of fact.

Generally, if no consensus can be reached, the investigator issues a determination, guided by a number of criteria, such as the state of the law, good industry practice, and what is fair and reasonable in the circumstances.[42] In some cases, the determination is made public. In others, the ombudsman keeps the details of the determination confidential, and limits public information to the naming of industry participants who have not reached a final resolution with complainants. Generally, the identity of the complainant is kept confidential. Some schemes provide rights of review of the ombudsman's determination, e.g. by a senior investigative officer of the ombudsman's office.

Once the ombudsman made a final determination, further steps would depend on whether the ombudsman has the power to bind the parties. For example, under the TIO scheme, decisions are not binding on the complainant, who is free to pursue other remedies. However, if the complainant accepts the decision within 21 days, it becomes binding on both the complainant and the service provider.

Further rights of review are generally limited, in the interests of finality and keeping costs low. On the other hand, procedural fairness might suggest the desirability of some review by an appropriate regulatory tribunal.[43] In any case, the judicial review to the Federal Court of Canada would likely be available.

[42] These criteria are based on TIO practices. *Ibid*.

[43] In Canada, this could be the CRTC for tariffed services, the Commissioner of Competition for misleading advertising, etc.

OTHER FUNCTIONS OF THE OMBUDSMAN

The primary functions of a telecommunications ombudsman would be conciliation/mediation and, in some cases, making determinations. However, a number of auxiliary roles could be contemplated.

The ombudsman is well placed to offer policy advice to the industry and to government. Dealing with day-to-day problems often provides insights into larger issues, and allows the development of recommendations for more fundamental changes. Care must be taken, however, to maintain both the reality and the perception of the ombudsman's independence.

The ombudsman will be ideally positioned to gain an expertise in consumer telecommunications matters. This experience may lead the ombudsman to recognize patterns indicating a systemic problem.

In those cases, or on petition by consumers that there are problems at an industry-wide or multiple service provider level, the ombudsman should be empowered to initiate an inquiry into the question. The inquiry should resemble that of other industry regulators[44] with the power to summon witnesses and obtain documents, as well as immunity from liability for good faith investigation of practices.[45] The inquiry should produce a public report with recommendations and guidelines or best practices for the industry to improve customer experiences.

Such an oversight power should reduce the number of complaints on similar issues and avoid fatigue on the part of ombudsman investigators determining the 'same old' questions. This would also lighten the load of individual complaints on the issue, freeing the ombudsman to work on individual complaints.

The ombudsman should produce public reports on the results of these inquiries and file them along with his or her annual report.

As well, it is helpful for the ombudsman to publish aggregate statistics on the numbers and types of complaints, and on their disposition. Such information can help identify emerging problem areas, trends, and issues that would benefit from being addressed more systematically.

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[44] For example, the Privacy Commissioner has many investigative powers, including: the power to summon and enforce the appearance of persons, compel the production of records, administer oaths and also the power to receive and accept evidence and other information (*Personal Information and Electronic Documents Act*, 2000, c.5 [*PIPEDA*] s.18(1)). Online: http://laws.justice.gc.ca/en/P-8.6/93196.html#rid-93280).

[45] See also the discussion under OMBUDSMAN DESIGN, Sub-section, "What procedures should the ombudsman follow?" at pp. 20-22 for additional information on investigative techniques.

The ombudsman may also take on an information and educational role. Telecommunications systems are increasingly complex, and consumers would benefit from a source of unbiased advice and information[46]. Once again, however, the independence of the ombudsman must be scrupulously maintained.

CONCLUSION AND RECOMMENDATIONS

The Canadian telecommunications industry is moving from regulated monopoly towards deregulated competition. Indeed, some sectors have been more or less competitive from the start. However, this will co-exist with some degree of regulation for some time, until the transition to full competition is completed.

An ombudsman is desirable, as part of the transition away from traditional regulation. It would provide a "safety valve" for consumer concerns regarding detariffed services. It could also lighten the load on the CRTC by handling individual complaints regarding tariffed services that do not involve policy issues or multiple parties.

It appears that the Canadian telecommunications landscape is changing. Currently there are proceedings to determine when and if the Commission will forbear from regulating the last major aspect of traditional telephony, local service. In addition, there are increasingly vocal calls for "symmetric regulation" where all telecommunications providers face at least some of the same rules regarding pricing and quality of service. As noted above, in forborne markets such as wireless and Internet Service Provider service, forbearance has not produced adequate levels of customer satisfaction, leading to calls for increased regulatory attention to individual and collective consumer complaints even in forborne environments. Accordingly, participation in an ombudsman scheme should be mandatory for all telecommunications providers and apply across all telecommunications services (wireline, wireless, Internet and emerging Voice over Internet Protocol (VoIP)). Service providers that willfully attempt to avoid participation risk undermining this system. The Telecom Ombudsman should be sufficiently powerful to impose its decisions upon the entire industry. This would mean the Ombudsman would either have an order-making power or be able to file his or her decisions with the CRTC for enforcement.

Service providers should be required to clearly state the avenues of recourse open to dissatisfied consumers, including resort to the Telecommunications Ombudsman.

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[46] For example, the Ombudsman's office could create charts comparing terms and conditions of various cell phone plans from various wireless carriers, which are myriad and confusing. Precedents for this function are the informational charts issued by the Financial Consumer Agency of Canada. See for example, the FCAC Credit Card Comparison Tables, Online: http://www.fcac-acfc.gc.ca/eng/publications/ccc/0104/default.asp.

Following are some recommendations regarding the successful implementation of an ombudsman scheme.

Recommendation # 1:
Service providers should be required to set up an industry ombudsman scheme, with participation to be mandatory.

Recommendation # 2:
Service providers who seek to ignore the ombudsman scheme should be subject to the determinations of the industry ombudsman.

Recommendation # 3:
Service providers should inform consumers of the avenues of recourse available in case of disputes. In particular, they should clearly inform customers of the ombudsman scheme.

The ombudsman's office should be a not-for-profit organization, sponsored and financed by participating industry members but otherwise independent of them. There could be a board of directors, made up equally of industry representatives, customer representatives, and notable individuals nominated by government. The ombudsman would be named by this board, and accountable to it. There could also be a management board, made up uniquely of industry representatives, dealing with administrative and financial matters, but not with policy or actual cases. The operations of the ombudsman should also be independent of government. However, to ensure that the ombudsman properly fulfills its role, government should issue a set of guidelines, and verify that the guidelines are being followed. Government should not otherwise intervene in the operations of the ombudsman.

Recommendation # 4:
The ombudsman's office should be a not-for-profit organization. It should be funded by participating service providers, and subject to general guidelines issued by government. In all other aspects, it should be independent of both the industry and government.

As mentioned previously, service providers' internal processes must have been tried, and failed to produce a satisfactory outcome, before the ombudsman takes up a complaint. Further, the ombudsman should have jurisdiction of complaints that cannot be resolved elsewhere. Therefore, if another regulatory body exists that is better suited to address a particular complaint, or if it would be more

efficient to bring the complaint before that other body, then the ombudsman would exercise its discretion and defer that complaint.[47]

For example, if a complaint were before an administrative body such as the CRTC or the Competition Bureau, the ombudsman would defer to that authority to investigate that complaint. However, a consumer or a service provider would not be permitted to start a CRTC proceeding simply to oust the jurisdiction of the ombudsman. If initiated with this result as the primary intent, the CRTC action could be considered an abuse of process and motion made to the CRTC to refuse to accept the application.

In a situation where an inquiry had been commenced under the ombudsman, but a legitimate CRTC proceeding was started prior to, or in parallel, the ombudsman could continue through to resolution despite the CRTC adjudication. However, such an overlap would create the need to coordinate the new enabling legislation and the *Telecommunications Act*. Indeed, it might require an amendment to the *Telecommunications Act* to clearly set out the respective jurisdictions of both bodies. For example, the quality of service rules might have to be modified or abandoned by the CRTC to avoid the service providers facing a form of "double jeopardy" if Telecom Ombudsman complaints could be brought with regard to individual complaints but a spate of complaints also trigger rebates for subscribers through the CRTC's quality of service rules.[48] The goal is for the ombudsman to be complementary to, and not in competition with, other dispute-resolution mechanisms. The boundary between the ombudsman's jurisdiction and that of other administrative bodies could be adjusted upon agreement of the bodies involved.

The scope of the ombudsman's mandate would encompass all forms of telecommunications services, including wire-line and wireless, and Internet access and voice services (VoIP).[49]

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[47] Also refer to footnote 49, coordinating the services provided by the Cable Television Standards Council (CTSC) with that of the ombudsman.

[48] See Telecom Decision CRTC 2005-17, *Retail quality of service rate adjustment plan and related issues* (24 March 2005).

[49] Notably, broadcast services such as cable television are now often bundled with telecommunications services. Thus, consideration must be given to the best manner in which to deal with the potential overlap between services offered by the Cable Television Standards Council (CTSC) in adjudicating on consumer television and cable concerns, and the services that will be offered by the Telecommunications Ombudsman. Although it is beyond the scope of this paper, the framework implemented must divide services between the two bodies in the most efficient and consumer-friendly manner and provide for administrative inter-referral.

Recommendation # 5:
The ombudsman should have jurisdiction over complaints that have not successfully been resolved internally by service providers, and that are not within the jurisdiction of other administrative bodies. Eligible services should include all forms of telecommunications, including wire-line and wireless, as well as Internet access and voice services (VoIP).

The ombudsman should have the authority to issue decisions that are binding. The preferred approach should be mediation and a voluntary resolution, acceptable to both sides. If this fails, however, the ombudsman should produce a recommended resolution, given the facts of the case, the principles of fairness, and the law. The complainant would be free to accept or reject the recommended resolution. If it were accepted, the recommended resolution would become binding on both the complainant and the service provider. If it were rejected, it would be binding on neither party.

Recommendation # 6:
The ombudsman should first try to mediate a voluntary resolution to the dispute. If that fails, it should issue a recommended resolution. This will become binding on both parties if the complainant accepts it within a reasonable time period; otherwise it will bind neither party.

The recommended resolutions that the ombudsman is empowered to make should encompass a range of possible remedies. In many cases, an explanation or apology by the service provider may be sufficient. In other cases, the ombudsman should be able to order the service provider to take some action, such as reconnecting a customer who was wrongly disconnected from the network. Such actions should be limited to those necessary to resolve the immediate complaint at hand. Finally, the ombudsman should be able to award damages against a service provider, up to a ceiling of $1,000, upon demonstration of actual harm caused by the service provider. There should be no punitive damages, or indeed, punitive measures of any kind.

Recommendation # 7:
The ombudsman should have the power to order an explanation or apology, an action to be done (or not done) by the service provider, and compensation for actual damages up to a maximum of $1,000. Recommended resolutions should never contain a punitive element.

The processes followed by the ombudsman should be designed to be easily accessible and used by consumers, who are typically not very knowledgeable or sophisticated when it comes to telecommunications services or administrative processes. The first step is to make the public aware of the ombudsman's existence and role, possibly by bill-stuffers by participating service providers, as well as notices in telephone directories and other places. Access should be as easy as possible, via a toll-free telephone number or fax line, email, regular post, and online via the ombudsman's homepage. The service should be free to complainants, to encourage its use.

Before action is taken, the complainant should confirm the complaint in writing. Complaints should be screened by the ombudsman's office, and out-of-jurisdiction complaints referred to the appropriate body. Within-jurisdiction complaints would be subject to mediation and, if that failed, recommended resolution, as described above. A recommended resolution should not be subject to appeal on its substance. However, appeals alleging a faulty process should be allowed, either to a senior officer in the ombudsman's office, or to an appropriate administrative body. If the complainant does not accept a recommended resolution, both parties should be free to pursue whatever remedies they think appropriate.

Recommendation #8:
The ombudsman should be empowered to undertake industry-wide inquiries on his or her own initiative based on experience in dealing with consumer complaints, or in response to invitations to do so by consumers.

The ombudsman will quickly develop an expertise in consumer telecommunications matters. This experience may lead the ombudsman to recognize a pattern indicating a likely systemic problem with customer service across the industry. In such a case, or on petition by consumers that such is the case, the ombudsman should be empowered to initiate an inquiry on the question. The inquiry should produce a public report with recommendations and guidelines or best practices for the industry to improve customer experiences. Such an oversight power would perhaps proactively reduce the number of complaints on similar issues. Copies of the ombudsman's reports should be filed, along with a summary of these investigations, in the ombudsman's annual report (see below recommendation #10).

Recommendation #9:
The ombudsman process should be publicized, with easy access, while screening out complaints that are frivolous or better considered elsewhere. A recommended resolution should be subject to appeal based on faulty process, but not based on the substance of the resolution.

As stated above, the ombudsman is well placed to help identify emerging problem areas, trends, and issues that would benefit from being addressed more systematically. In some cases, it may be part of the resolution of a dispute to publish the details, at the ombudsman's discretion.

Recommendation #10:
The ombudsman should publish an annual report containing aggregate statistics on the numbers and types of complaints and on their disposition. As well, the ombudsman should comment on trends and emerging problem areas, and on potential measures to address these, as well as on any industry inquiries undertaken. The ombudsman should have the discretion to include details of specific disputed where warranted and should include the conclusions of industry-wide inquiries.

The functioning of an ombudsman scheme should be reviewed periodically and, if necessarily amended. A review every five years would allow enough time for such a scheme to establish itself, but would be soon enough that defects will not have an opportunity to "snow-ball".

Recommendation #11:
The ombudsman scheme should be reviewed every five years.

An ombudsman's office should be complementary to other mechanisms to resolve disputes. The recommendations above are predicated on existing policies and regulatory regime.

The review announced by the federal government in February 2005 will offer an opportunity to design policies and a regulatory framework that explicitly incorporate an ombudsman. The addition of this instrument to the range of available regulatory measures should lead to better solutions to policy and regulatory issues.

APPENDIX: EXISTING OMBUDSMEN MODELS

A. AUSTRALIAN TELECOMMUNICATIONS OMBUDSMAN

Part 6 of the Telecommunications (Consumer Protection and Services Standards) Act 1999 requires each telecommunications carrier and eligible service provider to implement a Telecommunications Industry Ombudsman to:

a. Investigate complaints by end users of carriage services
b. Make determinations on end user complaints
c. Give directions on end user complaints
d. Investigate complaints of mass service disruptions or breaches of performance standards
e. Advise the Australian Communications Authority (ACA) on industry codes and standards
f. Report to Members on policies or practices that give rise to complaints, and if necessary refer these policies or practices to the ACA or the Australian Competition and Consumer Commission (ACCC)

In response, the industry established a private-sector entity, the Telecommunications Industry Ombudsman (TIO). A court ruling in June 2001 found that membership in TIO was compulsory: carriers and service providers could not implement alternative arrangements to satisfy the Act.

The Ombudsman reports to the TIO Council. The Council provides policy advice to the Ombudsman and the Board, and ensures the independence of the Ombudsman. It is composed of five industry representatives, six representatives of user groups and the public interest, and an independent chairman, appointed in consultation with the government.

The TIO Board manages TIO Limited, its business, affairs, and property. There are seven directors appointed by various service providers, plus one independent director who chairs the Board (the only director who is compensated).

The Ombudsman can consider complaints, from residential and small business customers (20 employees or less), against wire-line, wireless and Internet service providers, for network services. White pages are within the Ombudsman's jurisdiction; yellow pages and other business directories are not. Setting of tariffs, policies (such as obligation to serve), and breaches of industry codes are all outside the Ombudsman's jurisdiction.

The complainant must have known the cause of the complaint within the last year. In exceptional circumstances, the Ombudsman can extend this limitation period to two years.

Contacts from the public are classified as enquiries or complaints. A contact is an enquiry if it is limited to a request for information, if the matter has not yet been raised with the service provider, if it is outside the Ombudsman's jurisdiction, or if the complaint is frivolous or vexatious.

Genuine complaints are classified into four levels, depending on previous efforts at resolution by the service provider, the estimated time that will be required, the complexity, and the amount of money in dispute. A service provider may ask that the level of a complaint be reclassified, but the ultimate decision lies with the Ombudsman.

Enquiries and Level 1 complaints, and occasionally Level 2 complaints, are referred back to the service provider for action. For referred Level 1 and 2 complaints, service providers have fourteen days to address the complaint (48 hours for urgent matters such as disconnection, customer "churn", and slamming). During the time the complaint is handled, the Ombudsman expects the service provider to suspend debt collection for any amounts in dispute.

Complaints may be escalated to a higher level if the service provider does not respond within the time frame or if the Ombudsman finds the response to be inadequate. The Ombudsman may formally investigate the matter, following a detailed procedure to ensure fairness to both parties (notice, opportunities to make one's case, etc. The Ombudsman may request from service providers, and they are obliged to deliver, all relevant documents and other information. Parties may, but need not, obtain legal representation.

TIO is an Alternative Dispute resolution body that tries to reach resolution by consensus. If this fails, the Ombudsman may issue a decision. Complainants have 21 days to accept or reject the decision. If they accept, it is binding on them and on the service provider (the service provider has no say in the matter at this stage). If the complainants reject the decision, it is binding on neither the complainants nor the service providers. The complainants are free to pursue other avenues, e.g. the courts. They may also appeal for a review by a senior TIO officer.

The Ombudsman has the power to remedy the situation, and to order compensation to a complainant up to a maximum of AU $10,000.[50] The Ombudsman may make recommendations to a service provider for compensation to a maximum of AU $50,000. The service provider may refuse the recommendation, but then TIO will publish details in its Annual Report. If a complaint claims compensation of more than AU $50,000, the Ombudsman may make findings of fact, but no recommendation or determination. However, if there is mutual agreement by the complainant and the service provider, the Ombudsman may arbitrate the complaint.

[50] The complaint must be classified and dealt with at Level 4 if compensation is to be more than AU $400. This involves more formal procedures.

For the year 2002/03, TIO received 72,771 enquiries and complaints, of which 55,515 were deemed to be complaints. There were 62,670 complaint issues, since some complaints raised more than one issue. Of these, 60% concerned land-line services, 26% mobile, and 14% Internet. 89% of the complaints were resolved at Level 1. 55% of all complaints were resolved in favour of the complainant, 24% were resolved in favour of the service provider, and the remaining 21% of outcomes were neutral.

TIO had a staff of 56 in 2002/03. The total budget was AU $5.8 million. Of that, 44% was recovered from fees per complaint, according to the following schedule:

- Level 1 $27.50 (first four per quarter free)
- Level 2 $220
- Level 3 $440
- Level 4 $1,320
- Review $275

The remaining overhead costs were collected pro rata based on fees charged for complaints. Of the 910 service providers that were members of TIO, 86% had no complaints and so did not pay anything towards TIO.[51]

As part of its self-evaluation, in 2003 TIO commissioned a survey by Sweeney Research of 450 complainants to TIO. The complainants said that TIO:

- was very or fairly good overall (82%)
- staff were helpful (41%)
- pointed them in the right direction (32%)
- were efficient and quick (23%)
- were knowledgeable and professional (23%)
- services were very or fairly poor (8%)

Using objective measures, complaint resolution on average took 63 days for Level 2 complaints (compared to a target of 48 days). Level 3 complaints on average took 80 days (compared to an objective of 62 days), and Level 4 complaints took an average of 104 days (objective of 90 days).

[51] In cases where several service providers are involved, complaints are logged against the service provider who billed the customer.

B. UNITED KINGDOM TELECOMMUNICATIONS OMBUDSMEN

There are two telecommunications ombudsmen in the United Kingdom, OTELO (Office of the Telecommunications Ombudsman) and CISAS (Communications and Internet Services Adjudication Scheme). The Communications Act 2003 requires all public communications providers (wire-line, wireless and Internet) to put in place, for its customers, a dispute resolution procedure, approved by the regulator (at the time OFTEL and now OFCOM). The service must provide "a free, independent and effective service" to customers who are unable to resolve complaints directly with their communications company or ISP. One way, but not the only way, to meet this obligation is through an independent ombudsman.

OTELO is an ombudsman service put together by British Telecom and others, receiving regulatory approval in September 2003. At the end of March 2004 it had 55 members with a combined market share of 96% of the wire-line market, 50% of the mobile market and 30% of ISPs. Membership in OTELO is voluntary (but service providers must meet their ADR obligation somehow). Funding is from members, with a fixed yearly fee recovering about 20% of costs and the rest recovered through a fee per complaint against a member.

CISAS (Communications and Internet Services Adjudication Scheme) is a competing ombudsman service formed by service providers who did not want to join OTELO, citing, among other reasons, "high joining costs and high case fees". The founding members were Orange, T-Mobile, Telewest, and mm02, with the collaboration of the Dispute Resolution Services of the Chartered Institute of Arbitrators. CISAS received regulatory approval in December 2003. As with OTELO, membership in CISAS is voluntary. Funding is from members.

Most service providers in the U.K. have joined one or the other of OTELO or CISAS, who actively try to recruit new members. A small number have not yet set up any ADR service. This is of concern to OFCOM.

We describe the functioning of OTELO. (CISAS operates similarly.) A Council appoints an Ombudsman and safeguards his or her independence. The Council has six members, two of whom are elected by service provider members of OTELO, and four of whom are independent. There is also an Industry Member Board, which is elected by service providers that are members. The Board reviews overall performance, approves budget, and sets fees, but does not deal directly with the Ombudsman.

The Ombudsman's office publicizes its existence widely, e.g. on members' bills to their customers. It can be reached by telephone, fax, ordinary mail, e-mail, or online.

OTELO has jurisdiction over core services (voice telephony, fax, options and features) and, if the service provider member wishes, non-core services. Complainants must be residential or small businesses.

The complaints process is as follows. A dissatisfied customer contacts the billing service provider and tries to resolve the issue informally. If this is not successful, the customer makes a formal complaint to the service provider. If there is no resolution within twelve weeks, or if the service provider writes to say the complaint has reached a deadlock, the customer can apply to OTELO or the ADR service chosen by the service provider.

If an OTELO enquiry officer decides a complaint qualifies for OTELO jurisdiction, a complaint form is sent to the customer to be signed and returned. A case is declared and OTELO applies to the service provider for a case-file. An investigation officer looks at both sides, and issues a provisional conclusion to both parties. The parties have 28 days to comment. If there are no further representations, the provisional conclusion becomes final. If there are further representations, they are considered in the final decision. The complainant has two months to accept or reject the final decision.[52]

If the complainant does not accept the final decision of OTELO, “it will be open to the complainant to initiate any other proceedings to which the complainant is entitled”.

If the complainant does accept the final decision, it becomes binding on the complainant and the service provider. The service provider is to deliver the remedy within 28 days of being notified by OTELO.

The regulator, OFCOM, cannot alter an ADR decision or ask for the decision to be reviewed. However, OFCOM can intervene if the ADR process was unavailable or deficient.

OTELO may order a member to provide a service, provide an apology or explanation, award compensation not exceeding £5,000, or another appropriate remedy. No award shall contain a punitive element. No award shall be made against a complainant. As well, OTELO may, as a result of a complaint, recommend to a service provider member changes in policies or procedures.

In its first year of operation, 2003/04, OTELO dealt with 16,200 customer contacts, which led to 508 complaints. The main categories were:

i. Customer service (380 complaints)
ii. Billing (355)
iii. Equipment faults (100)

[52] The objective – not yet achieved – is to have a provisional conclusion 6 weeks from receiving the signed complaint.

iv. Mis-selling / mis-information (52)
v. Loss of service (52)
vi. Privacy (10)
vii. Disconnections (8)
viii. Other (6)

The number of complaints is expected to increase significantly as the public becomes more aware of the availability of OTELO's services.[53]

[53] CISAS started operations later than OTELO and meaningful operating statistics are not yet available. However, the most common complaints seem to match those heard by OTELO: billing, failure to provide service, contract terms and conditions, and poor customer service. The average monetary claim was for £602, and the average award was for £321. To date, 70% of successful complainants accepted CISAS' decision.

C. UNITED STATES TELECOMMUNICATIONS OMBUDSMEN

Jurisdiction over telecommunications in the United States is divided between the federal level and the states, depending on whether a service is interstate or intra-state. Accordingly, regulation and the handling of customer complaints also take place at both the federal and state levels.

There is no independent ombudsman office at either the federal or state levels. Instead, a dedicated group, located within the relevant regulatory agency, deals with complaints.

Thus, at the federal level, the Chief of the Consumer and Governmental Affairs Bureau (CGB) within the regulator (the Federal Communications Commission or FCC) carries out many of an ombudsman's functions.

Consumers are invited to file complaints by e-mail, postal mail, fax, or telephone. Complainants are invited to choose one of three categories of complaint:

- General
    a. Accessibility by the disabled
    b. Marketing and advertising
    c. Billing
    d. Early termination of contracts (wireless)
    e. Cramming (unauthorized or deceptive or misleading charges)
- Slamming[54]
- Indecency and Obscenity

A customer that has been slammed is to follow the following procedure:

a. Discuss the problem with the unauthorized (new) carrier or authorized (old) carrier
b. If the problem is unresolved, file a complaint with the FCC (or the state regulator if applicable)
c. A slammed customer, who hasn't yet paid his or her bill, doesn't have to pay anyone for the first 30 days
d. After 30 days, if the customer has not been restored to his or her authorized service provider, the customer must pay the authorized company at its rates.

[54] Slamming occurs when a customer is pre-subscribed to one carrier sense that all originating long distance calls are routed to that carrier, and the pre-subscription is changed to another carrier without the customer's authorization. This was an acute problem in the years after equal access was rolled out, but has declined in importance in recent years. Nevertheless, complaints of slamming still get special treatment.

e. If slammed customer inadvertently paid the slammer, the slammer must pay 150% of the amount to the authorized company, who keeps 50% and refunds 100% to the customer

The CGB tries to resolve complaints on a consensual basis. If a solution is not reached, however, the FCC has full powers to issue orders and rule-making authority, over matters that fall within federal jurisdiction, provided tariffed services are involved. For other complaints, consumers must look elsewhere.

The CGB also issues consumer alerts and fact sheets.

In addition, the CGB contains a Policy Division that ensures that consumer interests are represented in all of the FCC's activities. Current consumer policy issues include:

- SPAM
- Operator services (high prices from captive locations)
- 900 and other pay-per-call services
- Slamming
- Telemarketing
- Truth-in-billing

Approaches to customer complaints vary from state to state. However, most resemble the approach used by the New York State Public Service Commission (NYSPSC) and the Office of Consumer Services (OCS) located within it. This can serve as an example.

New York State Public Service Commission (NYSPSC) and the Office of Consumer Services (OCS)

The NYSPSC consumer complaint process consists of the following steps. First the customer is to seek the assistance of the service provider. If that does not produce a satisfactory solution, the customer complains to the OCS.

A Quick Resolution System, implemented in June 2002, allows service providers an opportunity to resolve an issue directly with customer prior to classifying the case as a complaint. Service providers are required to contact consumers to discuss their concerns, to seek resolution of the issue, and then to provide expedited feedback to OCS, reporting the outcome of the contact.

If the consumer is unable to get satisfactory help from the service provider, OCS staff will assist and investigate the complaint. They will conduct a full investigation of the complaint and notify complainant of the decision, the reasons for the decision and actions the complainant may take. If the complainant finds the OCS initial decision unsatisfactory, he or she may request, within 15 days, an

informal hearing. If the complainant is still not satisfied, he or she may appeal the decision of the official presiding at the informal hearing, within 15 days. The appeal must allege error or availability of new evidence, not available at time of informal hearing. The full NYSPSC decides the appeal.
A Customer Service Response Index measures a service provider's responsiveness to consumers' problems forwarded to it by the staff of the OCS. The index measures performance in four areas:

- Success in resolving a customers' problem in the first contact
- Timeliness of first contact responses
- Timeliness of complaint responses
- Age of cases awaiting reply by the service provider

D. (FORMER) CANADIAN OMBUDSMAN FOR TELECOMMUNICATIONS SERVICES

For a short time during the mid-1990s, there was a brief experiment with the telecom ombudsman concept in Canada.

During this period, a Canadian "Ombudsman for Telecommunications Services" (OTS) was created by Canada's new long distance providers,[55] shortly after the market was opened to long distance competition in 1992.[56] The creation of this ombudsman office came in reaction to pressure from regulators (the CRTC and the Competition Bureau) who in turn were reacting to complaints from consumers about 'slamming'. Although theoretically open to other telecommunications service providers such as incumbent local exchange carriers and mobile wireless companies, the OTS effectively dealt only with a handful of long-distance competitors and resellers.

Most complaints dealt with the issue of slamming, that is, the unwanted switching of customers to another long distance service provider. The OTS was fairly successful in resolving the complaints of slamming it received. David McKendry, the first ombudsman, attributes this to a number of factors, including 1-800 telephone assistance to complainants at the complaint stage, a requirement to

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[55] AT&T Canada, Sprint Canada and several resellers.

[56] An overview of self-regulatory models by Bell Canada offers a succinct overview of the scheme:

> "Another self-regulatory body that has been created in the telecommunications industry is the 'Ombudsman for Telecommunications Services'. The Ombudsman was created by a number of new entrant long distance competitors to administer a Code of Ethics developed by the industry. The Code reflects fair marketing and business practices and is partly based on rules and agreements that were approved by the CRTC. The Ombudsman provides consumers and small businesses with an opportunity to resolve complaints before an independent party in the areas of slamming, sales practices, advertising and promotion, billing practices, deposits, termination of service, and confidentiality of customer information. If the complaint is not resolved by the Ombudsman with the company in question, it becomes a dispute that the Ombudsman can mediate, dismiss, or uphold. If the complaint is upheld, the company will be required to comply with the Ombudsman's ruling, failing which the company is removed from the program and is no longer able to use the Ombudsman program logo in its sales literature."

Denis Henry, Vice-President - Regulatory Law Bell Canada, "Electronic Commerce: Is Industry Self-Regulation A Viable Model?" A paper delivered to the Internet Law and Policy Forum, Jurisdiction II: Global Networks/Local Rules, September 11-12, 2000, San Francisco, CA. Online: http://www.ilpf.org/events/jurisdiction2/presentations/henry_pr/

deal expeditiously (30 days) with complaints in the constituting agreement and an annual reporting on the companies' complaints to the CRTC and to the Competition Bureau. The ombudsman's office, by simply logging and reporting the cases of slamming to the companies involved, succeeded in uncovering business practices that exacerbated the slamming problem (namely, the practice of third parties signing up 'new customers' without adequate requirements that these customers stayed subscribed for a reasonable period). However, at its most basic level, the OTS was successful from a practical point of view in obtaining refunds for consumers who had felt they were wrongly charged for long distance services they had not ordered.

Although the OTS lacked sanction powers, there was a requirement to deal with complaints or face expulsion from the scheme. This threat of expulsion from the scheme (and the requirement to remove OTS logos, etc. from marketing literature) appears to have been of some assistance in convincing companies to not only address, but resolve, consumer complaints. Another element of the scheme which reportedly worked well was confidential reports to the companies involved, detailing their own share of complaints and if this number had risen or fallen since the last report.

Regarding funding of the OTS, the Telecommunications Customer Service Foundation (TCSF) was initiated by the Competitive Telecommunications Association (member companies). Given that the long distance service market appeared at that time to be a lucrative opportunity in an emerging market, member companies were willing to pay for the administrative fees. It is also worth remarking that over and above an administrative fee, the OTS made a discrete charge to the member companies on a per complaint basis, creating an incentive to members with problems to fix them, and not burdening better actors with the conduct of other industry members.

Mr. McKendry was replaced by Mr. Carman Baggaley in this position in 1997. The OTS experienced a peak in slamming complaints in 1998. However, as practices regarding signing up of customers improved, the long distance competitor market softened, and Mr. Baggaley left, the OTS was wound-up in 2000.

E. CANADIAN AIR TRANSPORT OMBUDSMAN

The air transport industry has certain similarities to the telecommunications services industry, when seen from the point of a consumer. Both are network industries, with complex internal operations, not easily transparent to users. Both have recently gone through major structural changes. Both have been traditionally subject to economic regulation. Both have been in a transition to forbearance or deregulation of many formerly regulated services. Accordingly, it is instructive to see the functioning of an air transport ombudsman in Canada.

The Air Travel Complaints Commissioner (ATCC) fulfils the functions of an ombudsman. The ATCC is a Commissioner within the regulatory body (the Canadian Transportation Agency) that regulates air transport in Canada. Her mandate is to review complaints, when a traveler is not satisfied with responses by the airline, and if necessary, mediate or arrange for mediation. Generally, the ATCC passes complaints along to appropriate air carriers "on the assumption that the carriers would resolve a dispute once it was brought to their attention". The ATCC is seen as a "bridge between disputing parties."

Complaints fall into three categories. Complaints are classified as Level One when the complainant writes directly to the ATCC or simultaneously to the ATCC and carrier. In such cases, the ATCC sends a copy to carrier, asking for resolution within 30 days and also asking to be sent a copy of any reply. If there is no response within 30 days, or if the complainant is not satisfied, the complaint is escalated to Level Two.

Level Two complaints are analyzed by the ATCC staff, who may seek additional information where necessary. If no further action is warranted, the file is closed. If further action is warranted, the ATCC staff works with the carrier and the complainant toward a resolution. If no solution is found, ATCC does not have the authority to impose a settlement on either party.[57]

The third category is "other jurisdiction" complaints. Thus a comment, as opposed to a complaint, does not require intervention. Other complaints are directed to responsible government departments, e.g. safety concerns to Transport Canada, false advertising to the Competition Bureau, tour operators to provincial authorities.

[57] If the complaint is in an area where the CTA has jurisdiction, it may be dealt with by a formal application to the CTA. Jurisdiction is limited to: (1) pricing (2) tariffs (3) unruly passengers (4) reduced services.

Ultimately, the ATCC has no teeth. It can't levy fines or order compensation. Its only power is that of suasion.[58]

Nevertheless, it does receive a fair number of letters of complaint. Thus, in 1999, the year before the creation of the ATCC, the regulatory agency received 169 complaints in all. In 2001, its first full year of operation, the ATCC received 1,664 letters of complaint containing 4,542 issues. By 2002, however, the number of letters of complaint had fallen back to 731, containing 1,087 issues.

[58] According to Bruce Hood, the first Air Travel Complaints Commissioner for Canada, "My only clout is 'if you don't do it, I'm going to tell everyone else about you'" (CBC, Marketplace, "Air Travel Complaints", Broadcast: October 17, 2001; Online: http://www.cbc.ca/consumers/market/files/travel/air_complaints/).

F. CANADIAN BANKING AND FINANCIAL SERVICES OMBUDSMAN

The Ombudsman for Banking Services and Investments (OBSI) had its origin as the Canadian Banking Ombudsman (CBO) in 1996, an independent organization to investigate unresolved complaints from small business customers of nine banks. Membership grew to 12 banks in 1997, and the CBO mandate was extended to include bank retail customers. In 2002 the CBO merged with ombudsman services for some 450 investment dealers, mutual fund dealers, and investment fund companies. The new OBSI has a total membership of approximately 500 financial services providers.[59]

OBSI is a not-for-profit corporation established and funded by its members. There is no government involvement or requirement for this office. To protect the office's independence, the Ombudsman is responsible to a 14-member Board of Directors that includes a majority of eight directors who are not affiliated with the financial services industry. These independent directors act as a committee of the Board and have special powers to safeguard the independence of the Ombudsman.

While responsible to the Board, the Ombudsman does not solicit its advice on specific complaints. The final decision concerning complaints rests with the Ombudsman, and there is no appeal to the board. However, the Board does establish and monitor OBSI standards for complaint handling. The Board also deals with complaints about the process of complaint handling within OBSI.

Customers of financial institutions are expected to exhaust all avenues of solving their conflict directly with the financial institution, before approaching OSFI. Banks and some other financial institutions have internal "ombudsmen".

OBSI does not entertain certain complaints, "because they are competitive issues best resolved in the marketplace":

- Complaints about the general pricing of products and services
- Complaints about the level of interest rates
- Issues related to general industry policies or procedures
- Credit-granting policies or other risk management policies and procedures

[59] At the beginning of 2003, Canadian Life and Health Insurance Ombudsman Service (CLHIO) and the General Insurance Ombudsman Service (GIO) began operations. These ombudsmen services and OBSI are linked through the Center for the Financial Service Ombudsman Network (CFSON), which operates a consumer assistance and referral services.

As well, OBSI does not handle matters that are currently before an arbitrator or the courts.

OBSI will entertain complaints by customers who have exhausted all avenues of appeal within the firm. The customer should come to OBSI within six months of completing the internal appeal route.

To encourage cooperation and openness, OBSI asks all parties to agree that nothing generated as part of the dispute resolution process may be used in subsequent legal or regulatory proceedings. As well, the Ombudsmen and staff are not to be called upon to testify.

Most cases involve a formal investigation, with findings and recommendations as appropriate. OBSI's mandate requires it to look to overall fairness, good business practices, accepted industry standards and practices, and any standards established by industry regulatory bodies or professional associations.

The Ombudsman can recommend compensation, up to a maximum of $350,000. The recommendation is not binding upon the customer or the financial services provider. However, member companies who do not agree to a recommendation by the Ombudsman will be publicly reported. To date, no member has failed to follow the Ombudsman's recommendation.

In the year ending October 31, 2003, OSBI was contacted by 3,020 individuals and small or medium businesses. It launched 321 investigations and completed 222 investigations in 2003, with 131 files still under investigation.[60] The Ombudsman recommended substantial action in favour of the client in 13% of the investigations, and minor adjustments in the client's favour in another 4% of cases.

[60] The OSBI's objective is to complete 80% of files within 90 days. This objective was not met in 2003, because of higher than expected caseload as a result of the expansion to other financial institutions.