



PUBLIC INTEREST ADVOCACY CENTRE
LE CENTRE POUR LA DÉFENSE DE L'INTÉRÊT PUBLIC

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October 15, 2021

Department of Finance Canada
Financial Sector Policy Branch
90 Elgin St, Ottawa, ON K1A 0G5

BY EMAIL to: complaintsconsultation-consultationplaintes@fin.gc.ca

Re: *Consultation on Strengthening Canada's External Complaint Handling System in Banking - Submission of the Public Interest Advocacy Centre*

Dear Consultation Secretariat Staff,

The Public Interest Advocacy Centre (PIAC) is pleased to provide the Department of Finance with our submission on the Consultation on Strengthening Canada's External Complaint Handling System in Banking, which is attached.

Sincerely,

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Consultation on Strengthening Canada's External Complaint Handling System in Banking

The Public Interest Advocacy Centre (PIAC) is providing the below comments to the Department of Finance (government) on the Consultation on Strengthening Canada's External Complaint Handling System in Banking (Consultation). PIAC is a national non-for-profit organization and registered charity that provides legal and research services on behalf of consumer interests, and, in particular, vulnerable consumer interests, concerning the provision of important public services.

Before responding to the government's posed questions, PIAC acknowledges that banks' internal complaints processes are outside the scope of the Consultation because the Financial Consumer Agency of Canada (FCAC) will be using "its supervisory tools to address any issues arising from its *Bank Complaint Handling Procedures* report."¹ PIAC notes that the FCAC is tasked with the supervision of both federally regulated financial institutions and external complaints bodies (ECBs) and asks for more clarity on the government's reasons for soliciting comments on only one aspect of the banking complaints process. Respectfully, PIAC posits that even the best ECBs cannot be effective tools for consumers if consumer complaints are mishandled or suppressed, intentionally or inadvertently, at the level of the banks' internal complaint handling processes or consumers agree to inadequate compensation from their bank out of lack of awareness that an ECB option is available. In its *Bank Complaint Handling Procedures* report (Internal Complaints Report), the FCAC found that consumers at the six major banks escalated 95,000 complaints to level 2 and 3,100 complaints to the highest level of the banks' internal complaints handling process and that of those consumers dissatisfied with the banks' decision at these levels 65% and 68%, respectively, did not further escalate their complaint.² These numbers suggest both significant levels of consumer banking complaints and high attrition and likely discouragement of complaints within the banks' internal complaint handling process. Despite these high numbers, the FCAC, between 2003 and September 29, 2021, has issued only 141 decisions about financial institutions' violation of their market conduct obligations.³ PIAC acknowledges that the FCAC's enhanced powers only came into force April 30, 2020 and that other aspects of the financial consumer protection framework coming into force next year may improve FCAC supervision. That said, we still suggest that the small number of FCAC decisions relative to the large volume of consumer dissatisfaction with banking services may indicate an inadequate response to consumers' dissatisfaction with banks' execution of their market conduct obligations, including their complaint handling obligations. PIAC asks both the Department of Finance and the FCAC, to provide the public more details on any plans to address internal complaint handling concerns identified in the Internal Complaints Report. PIAC is able and willing to provide additional comments on internal complaint handling reforms should the government seek such a consultation. We respond to the government's Consultation questions below.

¹ Department of Finance Canada, "Consultation Document: Strengthening Canada's External Complaint Handling System," (July 2021), online: <<https://www.canada.ca/en/department-finance/programs/consultations/2021/consultation-strengthening-canada-external-complaint-handling-system-banking/consultation-document-strengthening-canada-external-complaint-handling-system.html>> [Consultation].

² Financial Consumer Agency of Canada, "Industry Review: Bank Complaint Handling Procedures," (2020) at 16, online: <<https://www.canada.ca/en/financial-consumer-agency/programs/research/banks-complaints-handling-procedures.htm>> [Internal Complaints Report].

³ Financial Consumer Agency of Canada, "FCAC Decisions," (2021), online: <<https://www.canada.ca/en/financial-consumer-agency/services/industry/commissioner-decisions.html>>.

1. Are these principles – accessible, accountable, impartial and independent, timely and efficient, and impactful decisions – appropriate to guide future policy directions on the structure and key elements of the ECB system in Canada?

In 2014, PIAC asked the government, in response to the Department of Finance’s consultation paper on Canada’s Financial Consumer Protection Framework, to “honestly reflect and consider the financial impact on individual Canadian financial consumers of any principle or rule” and argued that more needs to be done to ensure all Canadians, including vulnerable Canadians, benefit from high quality financial services.⁴ This position continues to be relevant in the context of ECB regulation.

Rather than focusing on principles independently, PIAC believes it is more appropriate for the government to consider the purpose of the ECB system in Canada and to produce directions that further that purpose. Depending on the interpretation they are given, these principles may support or conflict with one another and promote or undermine the purpose of ECB regulation. For example, accessibility and timeliness may go hand-in-hand if processes are expedited in order to ensure consumers are not discouraged from bringing and maintaining their complaints. Alternatively, these two principles may be at odds with one another if, for example, timeliness is used either to justify shorter, less rigorous investigations that favour banks over consumers or to deny consumer access to services on the initial determination that they, the ECB, would not find differently from the bank.⁵

PIAC generally agrees with the purposes identified in the Consultation: “effective complaint handling helps ensure that the financial system works efficiently and fairly, thereby enhancing consumer confidence in the system.”⁶ It is our view that the primary purpose of an ECB is to provide consumers with an avenue for third-party, impartial and independent adjudication when their bank is unable to provide a satisfactory resolution to their complaint within a prescribed timeframe. Underlying this purpose is the aim of improving and maintaining public confidence in financial institutions, which in turn strengthens Canada’s financial services industry and economy more broadly. In sum, ECBs serve a key public interest purpose. With these purposes in mind, we are providing our opinion of the proper scope and interpretation of the government’s selected guiding principles below.

We note that the *G20 High-Level Principles on Financial Consumer Protection*⁷ lists additional guiding principles that we believe are relevant to ECBs and that the government, for no obvious reason, has not included in this Consultation. We, therefore, have incorporated the following additions from the *G20 High-Level Principles on Financial Consumer Protection* into our discussion below: equitable and fair treatment of consumers, disclosure and transparency, financial awareness and education, protection of consumer data and privacy, and competition.

⁴ Public Interest Advocacy Centre, “Canada’s Financial Consumer Protection Framework: Consultation Paper,” (February 2014) at 9-13, online: <https://www.piac.ca/wp-content/uploads/2014/11/piac_financial_code_28_feb_2014_final_for_finance_smaller.pdf>.

⁵ Internal Complaints Report, *supra* note 2 at 13. The FCAC takes issue with ADRBO’s practice of rejecting complaints at the initial review stage based on whether it is “highly unlikely” the ADRBO will reach a different position than the bank.

⁶ Consultation, *supra* note 1.

⁷ *G20 High-Level Principles on Financial Consumer Protection* (October 2011), online: <<https://www.oecd.org/daf/fin/financial-markets/48892010.pdf>>.

Accessibility

PIAC supports the FCAC's interpretation of accessibility articulated in their report, *The Operation of External Complaints Bodies* (ECB Report),⁸ but asks that it be applied to more aspects of ECB policy and procedural regulation.

In the ECB Report, the FCAC stated its expectation that ECBs allow consumers to communicate in writing, by phone, by fax, or electronically and to provide services at no cost to consumers, in both official languages, using language that is clear, simple, and not misleading. The FCAC clarified that underlying their expectation that services be provided at no cost is an expectation that consumers not be required to obtain legal representation or consultation in order to meaningfully participate in the ECB complaint process.⁹ The FCAC recognized that consumers are at a distinct disadvantage to their banks and that it is necessary for ECBs to respond to this disadvantage by taking active steps during investigation to help consumers articulate their complaint and understand their rights and responsibilities. PIAC believes that each of these components of accessibility contributes to the equitable and fair treatment of consumers and allows the ECB process to be better tailored to the needs of vulnerable consumers.

PIAC believes that in order to provide a fair, equitable, and accessible process an ECB must provide consumers assistance through the ECB process. We recognize that this assistance may lead to concerns, real or perceived, related to ECB impartiality and independence. However, we believe there are appropriate ways to mitigate these risks, such as mandating stringent standards or designating a specific team within the ECB to provide only complainant assistance, and that these potential risks are outweighed by the benefits of an ECB system that effectively assists financial consumers in the public interest.

We note that the *Financial Consumer Protection Framework Regulations*, which will be in force July 2022, will formally require banks to deal with a customer complaint within 56 days following the day a complaint is made. PIAC supports these changes to both the starting point and duration of the timeframe for concluding complaints.

Regarding the starting point of the timeframe, the current 90 day timeframe begins after the bank escalates the consumer complaint to level 2 of their internal complaints process. There are two issues with the escalation requirement.

First, consumers often have little to no control over if or when the bank escalates their complaint and may not have adequate knowledge of their banks internal complaints processes to advance their case to the next level, since many of these banks' internal processes are not standardized. Customers may believe, incorrectly though justifiably, that the 90 day period begins if their complaint is escalated to a branch manager or senior regional manager, even though this escalation to senior staff is considered by the bank as merely a step within level 1 of their complaint handling process.¹⁰ Under the current

⁸ Financial Consumer Agency of Canada, "Industry Review: The Operations of External Complaints Bodies," (2020), online: <<https://www.canada.ca/en/financial-consumer-agency/programs/research/operations-external-complaints-bodies.html>> [ECB Report].

⁹ *Ibid.* at 15.

¹⁰ Internal Complaints Report, *supra* note 1 at 6.

approach, consumers who complain to the bank have no recourse unless the bank chooses to escalate their complaint.

Second, the FCAC's "CG-12 Internal dispute resolution" (Guidelines) acknowledge that consumers can advance their complaint to an ECB either after a final resolution by the bank's senior complaints officer (SCO) or if their complaint has not been resolved within 90 days following receipt of the complaint at level 2 of the internal complaint handling process. However, these Guidelines state that a bank only needs to advise consumers about their right to advance their complaint to an ECB if the bank takes longer than 90 days to reach a resolution after those 90 days have lapsed. This means a consumer may be left without a decision from the bank for a significant length of time before they are even told that they have the option to have their complaint reviewed by an ECB even without final resolution from the bank.¹¹ We believe that the CG-12 Guidelines should be overhauled to require banks to proactively inform consumers about their right to advance their complaint to an ECB when the consumer initially complains.

We strongly believe the inclusion of the confusing and needless internal bank escalation requirement, which is often misunderstood by the customer (or is misrepresented by the bank) as a prerequisite for ECB access is fundamentally at odds with creating a fair, equitable, and accessible ECB system for consumers. We therefore support the change to allow consumers to access an ECB 56 days following the day a complaint is made. We note that the UK's Financial Ombudsman Service¹² and the Australian Financial Complaints Authority¹³ both start their timelines from the date the consumer initially submits their complaint.

Regarding the duration of the timeframe, we believe the new standard of 56 days to deal with a complaint is a more appropriate duration than 90 days, since the three most frequent consumer banking complaints, as the FCAC found in their Internal Complaints Report, concern access to their money, unauthorized transactions, and fraudulent access to funds.¹⁴ These types of complaints are extremely expensive, mentally distressing and time-sensitive to consumers and any undue delay in the complaints process may result in additional financial and other harm, particularly if consumers are not aware of the running of any applicable civil liability limitation period during the bank's internal review processes. A shorter timeline to address these complaints is more appropriate to their severity.

PIAC also understands that at least one of the ECBs claims to require "90 day letters" or final resolution letter provided by the bank, as "evidence" that the consumer meets the requisite time lapse. There is no

¹¹ Financial Consumer Agency of Canada, "CG-12 Internal dispute resolution"(2013), online: <<https://www.canada.ca/en/financial-consumer-agency/services/industry/commissioner-guidance/guidance-12.html>>.

¹² Financial Ombudsman Service, "Timelines," online: <<https://www.financial-ombudsman.org.uk/consumers/expect/time-limits>>.

"A business has 15 days to consider complaints about: payment services – such as bank transfers or direct debits and electronic money – for example, online money transfers, Apple Pay or travel money cards. For most other complaints, a business has eight weeks to consider a complaint."

¹³ Australian Financial Complaints Authority, "How to Resolve a Complaint," online: <<https://www.afca.org.au/about-afca/publication>>. "Once you lodge a complaint, there are set timeframes for your financial firm to respond: 45 days for superannuation or traditional trustee complaints; 21 days for complaints involving financial difficulty; or 30 days for all other complaints."

¹⁴ *Ibid.* at 22.

evidentiary burden in the Guidelines that requires the consumer to “prove” their waiting period has run or that their complaint has been escalated. The consumer’s word that this has been done, backed with acknowledgement of any kind that the complaint was escalated, should suffice. This would allow consumer access to ECBs to be less dependent on their bank’s desire to engage with the consumer’s complaint.

Lastly, using these principles – accessibility and equitable and fair treatment of consumers – the government should prohibit ECBs from refusing to review complaints for any reason other than the complaint falling outside their authority as defined by their Terms of Reference to hear. ECBs would not be permitted, for example, to refuse to investigate a complaint based on a preliminary view that they would have made the same decision as a bank’s SCO. This amounts to no review at all and is unreasonable. These restrictions could improve accessibility by ensuring complaints are reviewed *de novo*, on their merits, unless determined to be outside the scope of the ECB’s mandate. Should the ECB determine that the complaint is outside the scope of the ECB, this ruling should be made promptly, and provided to the complainant in writing with information about how to complain to the FCAC should the complainant disagree with the scope assessment.

Accountability

The ECB Report notes that the FCAC’s expectations concerning accountability are that ECBs continuously monitor and review their operations and identify opportunities for improvement; consult annually with member banks and complainants; report the findings of consultation to the FCAC Commissioner and publish them in their annual reports. Accountability also requires an ECB to monitor itself for non-compliance, promptly self-report compliance issues, and have a third-party evaluate its functions and performance every five years.¹⁵ PIAC respectfully suggests that the government use an alternate interpretation of accountability that requires an ECB re-consideration process, and includes the principles of disclosure and transparency, financial awareness and education, competition, and protection of consumer data and privacy, all taken from the *G20 High-Level Principles on Financial Consumer Protection*.

PIAC submits that the principle of accountability should require ECBs to be accountable to the public and to the regulator. ECBs should be accountable to their member banks only in so far as to demonstrate their compliance with regulation, including the ECB obligation to be impartial and independent. Requiring ECBs to have a formal reconsideration process (likely before the FCAC) would improve ECB adherence to their policies and procedures and make ECBs more accountable for the actions and omissions taken in the course of their investigations, decision-making, record-keeping and administration.

PIAC supports requiring ECBs to monitor and review their operations and identify opportunities for improvement, which would necessitate ECB solicitation of feedback from member banks and complainants. Feedback from both banks and consumers should come through proper and accessible channels, be reported to the FCAC, and shared as aggregate statistics in publicly available annual reports. In the ECB Report, the FCAC suggested that ECBs consult more widely with member banks’ staff “because typically they are investigating the conduct of staff who work in the lines of business and they

¹⁵ ECB Report, *supra* note 4 at 15.

need strong knowledge of the bank's products, policies, and procedures."¹⁶ PIAC recommends a corresponding requirement that ECBs gain insight into consumer reaction to the products, policies, and procedures of banks both from consumers and consumer advocacy groups and based in part on details of complaint investigations and in part on consumer and consumer advocates' reviews of banking materials and policies.

Disclosure and Transparency

PIAC recommends that disclosure and transparency be added as a guiding principle related to accountability. ECBs should be expected to publicly disclose significant amounts of information. ECB decisions should not be conducted as confidential arbitration, especially if such arbitration requires consumers to forgo their right to go to court or to sign any form of non-disclosure agreement.¹⁷ Both requirements undermine the impartiality of the decision-making process and introduce an unbalanced power dynamic between the ECB and the public seeking to use their services. Decisions should be made based on publicly available guidelines and policies, and while every decision should be redacted to protect personal information of complainants, these decisions should be otherwise fully published on the ECBs website and all FRFIs implicated should be named. As an example, the UK's Financial Ombudsman Service publishes both illustrative case studies and every decision made by an ombudsman.¹⁸ The Privacy Commissioner of Canada likewise publishes its decisions (redacted) but allows the complainants the ability to, on their own judgment, release the entire unredacted decision (which is provided to both parties). Parties complained about cannot halt or threaten to sue the complainant who releases the full text of such Privacy Commissioner decisions.¹⁹

We note that amendments to the *Bank Act* not in force include a requirement that ECBs, within 90 days after making a final recommendation, make a summary of the final recommendation available on its website free of charge, which summary is to include: (i) a description of the nature of the complaint that is the subject of the final recommendation; (ii) the name of the institution that received the complaint; (iii) a description of any compensation provided; (iv) the reasons for the final recommendation, and (v) any prescribed information.²⁰ We support this inclusion, but believe the summary should also include a record of the complainant's requested financial or other relief and the bank's responses, in order to allow regulators and consumer advocacy groups, such as PIAC, to monitor whether ECBs that report complaints have been "resolved to the satisfaction of the consumer" are reporting so even when the consumer receives only a small portion of what they asked for or the ECB merely re-extended the bank's original offer. PIAC has previously argued in the context of investment firm complaints handling, and the CSA, MFDA, and IIROC have acknowledged, that "low-ball" offers can be an indication of problems with a registered firm's obligation to deal fairly, honestly and in good faith with clients, act within the

¹⁶ *Ibid.* at 16.

¹⁷ This position is also articulated by the World Bank: World Bank, *Good Practices for Financial Consumer Protection*. (2017) Washington: State Secretariat for Economic Affairs SECO at 52, online: <<https://openknowledge.worldbank.org/bitstream/handle/10986/28996/122011-PUBLIC-GoodPractices-WebFinal.pdf?sequence=5&isAllowed=y>>.

¹⁸ Financial Ombudsman Service, "Decisions and Case Studies," online: <<https://www.financial-ombudsman.org.uk/decisions-case-studies>>.

¹⁹ See, for example: *Lawson v Accusearch Inc et al*, 2007 FC 125, online: <http://www.canlii.org/ca/cas/fct/2007/2007fc125.html>

²⁰ *Bank Act*, S.C. 1991, c. 46, s.627.49 (i) (not in force).

applicable standard of care, or implement and maintain effective complaint handling procedures.²¹ PIAC submits that including the history of requested and offered sums in the ECB's publicly available decision summaries could highlight whether complaint "low-balling" is occurring as transparency around ECB decisions is improved.

Publishing decisions (or at least a summary) could also set the stage for a system in which consumers can publicly complain to the FCAC about ECB non-compliance. As noted in the first paragraph of this section, an ECB is required to monitor itself for non-compliance and promptly self-report compliance issues, in addition to having a third-party evaluate their functions and performance every five years. PIAC suggests that the government consider implementing a system whereby consumers and consumer advocacy groups are permitted to report directly to the FCAC that ECBs are, in the consumers' or advocates' view, non-compliant with their obligations. We make this suggestion based on the FCAC's finding "that both of the ECBs would be challenged to demonstrate that they can effectively monitor, identify and report potential non-compliance issues in a manner consistent with regulatory expectations"²²

Financial Awareness and Education

The ECB Report included public awareness as a component of transparency, stating "[t]ransparency about ECB operations promotes awareness among consumers who have been unable to resolve disputes with banks. Importantly, FCAC also expects banks to increase public awareness of ECBs."²³ PIAC agrees that public awareness, including financial awareness and education, are important to ensure access to and the accountability of ECBs. The ECB Report somewhat implausibly found that both ECBs met the requirements for transparency, despite the fact that 83% of the Canadians surveyed had not heard of either ECB. PIAC believes that much more needs to be done to educate the public on banking misconduct and complaint processes, both internal and external. As will be discussed more under question 2, PIAC suggests that it is easier to improve public awareness of a single ECB rather than a multi-ECB system.

Protection of Consumer Data and Privacy

ECBs handle significant amounts of personal financial information, which may reveal sensitive person information about the complainant and people associated with the complainant. The government must ensure that ECBs comply with their legal requirements to handle personal information in accordance with applicable privacy laws and are held accountable in the event of personal information mishandling or data breach. We believe this continuing obligation can be reconciled with increased transparency around publication of ECB decisions through appropriate redaction of details. Many tribunals successfully navigate this challenge in a variety of regulatory contexts.

²¹ The Public Interest Advocacy Centre, "FAIR Canada and PIAC Welcome Steps to Ensure Compliance with OBSI Requirements" (2017), online: <<https://www.piac.ca/2017/12/08/fair-canada-and-piac-welcome-steps-to-ensure-compliance-with-obsi-requirements/>>.

²² ECB Report, *supra* note 4 at 17.

²³ *Ibid.* at 22.

Competition

If consumers were to factor complaints-handling conduct into their decision about which banking products and services to use, then banks, in theory, would be incentivized to compete with each other for customers by improving their complaints handling. In order for consumers to have any understanding of this potential competitive differentiator, the government must create laws that hold ECBs accountable by implementing disclosure, transparency, and personal information protection requirements, and by improving consumer awareness of and education about banking misconduct and avenues for redress, including internal and external complaints handling processes. This is necessary because PIAC has never once, in any industry it monitors, found companies advertising their complaints resolution process as a competitive differentiator.

Impartial and Independent

PIAC supports the use of impartiality and independence as guiding principles for regulation. We suggest that some ECB hiring practices create a risk of the perception of partiality. Notably, we believe a two-year cooling off period during which investigators are not permitted to handle complaints from their former employees,²⁴ while a step in the right direction, is inadequate. This policy still permits investigators to move directly from working at a bank and protecting the interests of that bank to working in a role intended to be a neutral third-party. It also permits investigators after two years to hear complaints against the bank where they worked. More importantly, ECBs who entertain arbitrations by banks in other contexts besides consumer banking disputes are, whatever their claimed corporate structure, at risk of a reasonable apprehension of bias. We will discuss impartiality and independence in more detail below, notably under questions 3, 4, 7, and 8.

Timely and Efficient

PIAC supports the use of timeliness and efficiency as guiding principles for regulation in so far as they are used to improve accessibility and reduce harm, as specified under the principle of accessibility above. We do not support the use of these principles to justify practices that reduce consumer access to ECBs or promote ECBs treating consumers hastily, unfairly or inequitably, particularly when banks pay hourly rates for ECB investigations. The funding aspect of this statement will be discussed more under question 4.

We take no issue with the 120 day timeline in which an ECB must make a final written recommendation to the parties, but suggest that this timeline should begin when the consumer is notified that the complaint is within the ECB's mandate and will be investigated, rather than when an ECB has all of the information that it requires to deal with a complaint, since consumers may be left in limbo while the ECB obtains information from the consumer's bank.²⁵ The incentive, therefore, must be for the 120 day deadline to put the ECB into the position of making efforts with the subject bank to obtain information.

Impactful Decisions

The Consultation describes "impactful decisions" as the complaints handling service's ability to render decisions that resolve consumers' complaints, either through a remedy or a clear explanation as to why

²⁴ *Ibid.* at 19.

²⁵ *Ibid.* at 10.

a remedy would not be appropriate, and that banks adhere to these decisions. The first part of this principle can be better addressed through accountability and transparency, discussed above. The second part of this principle, bank adherence, could be dealt with by making ECB decisions binding. This second aspect will be discussed more under question 7. We further believe that any time a consumer's claim for monetary compensation is denied, that such a denial should not be characterized as an "impactful" decision simply to relieve the bank of financial liability. Apologies, public or not, do not constitute individual consumer redress, which is the primary goal of a dispute resolution system.

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

PIAC recommends Canada implement a single ECB system. That is, there should only be one, single, authorized ECB for all FRFIs. The present bifurcated ECB system is highly prejudicial to consumers.

The government could achieve this result without any new amendment to the Bank Act as the act already has all of the requisite authority to return the system to a single ECB. This could be done by repealing s. 455.01 of the *Bank Act*, having the Minister designate a single ECB under s. 455.1, and phasing out the second existing ECB over the course of a relatively short timeframe, adequate to close files in progress, at most in a year. Based on the FCAC's findings in the ECB Report and anecdotal evidence of consumers, we believe OBSI is the more appropriate entity to be designated as Canada's sole ECB. However, the Department of Finance may wish to allow each ECB to present a case that it is the better choice.

A single ECB system would contribute to the public interest purpose of ECBs, which is to provide consumers with an avenue for third-party impartial and independent adjudication in order to assure individual redress of consumer losses due to banking errors, to improve and maintain public confidence in financial institutions and, in turn, strengthen Canada's financial services industry and economy. We will articulate our view of these contributions in relation to the government's selected principles.

Accessibility

PIAC believes a single ECB system will improve accessibility by removing the time and effort consumers expend determining which ECB their bank is a member of and how to navigate the relevant ECB process. The change to a "one stop shop" will eliminate the risk to and frustration of consumers pursuing one course of action only to discover their bank is not a member of the ECB they have attempted to access. Additionally, regulators and consumer advocacy groups could better monitor whether a single ECB is treating consumers fairly and equitably because there would be no need to parse out possible discrimination from mere operational differences between ECBs. Lastly, a single ECB may result in more consistent and coherent decision-making as a single ECB, properly following investigative and decision-making guidelines, will produce decisions more in line with one another than decisions made by ECBs that may have different policies and priorities. Consistent decisions improve consumer confidence in the system, thus improving the likelihood that consumers will seek out the ECB process. Any public awareness efforts will be considerably simplified and likely will be far more effective if promoting the services of a single ECB.

Accountability

PIAC believes a single ECB system will vastly improve ECB accountability. We agree with the FCAC's concerns that regulatory supervision is more complicated and resource-intensive in a multi-ECB system because operational differences can disguise compliance issues.²⁶ The current system divides member bank funds between the two ECBs, thus reducing the resources each have available to implement the policy and procedures needed to comply with, and ideally exceed, their regulatory obligations. We also agree with the FCAC's statement that "[t]he challenge of raising consumers' awareness about their right to escalate a complaint is compounded when there are multiple external dispute resolvers." This issue is relevant to both consumer access to the ECB process and, if consumers are able to play a more active role in reporting ECB non-compliance, the accountability of the ECB to its regulator. Finally, a single ECB will be able to focus its "accountability" efforts where they matter: to the regulator and consumers, instead of considering how to please banks who may make indirect demands on the ECB or threaten to "leave" the ECB or even set up a new ECB to adjudicate "their" complaints.

Impartiality and Independence

In 2012, PIAC publicly opposed the creation of the Department of Finance's *Approved External Complaints Bodies (Banks and Authorized Foreign Banks) Regulations*, commenting that allowing for-profit entities to offer competing banking dispute resolution services would result in services that are neither independent from the banks hiring the service nor impartial between complainants and the ECBs' real clients, the banks.²⁷ PIAC again argues that competition between ECBs for member banks does not benefit consumers. Member banks, under the multi-ECB system, have the ability to wholly remove their business, or threaten to do so, in reaction to any investigatory line of questioning or ECB decision they disagree with. We agree with the FCAC that the perceived lack of impartiality and independence in the multi-ECB system "has the potential to undermine one [of] the principal purpose of effective complaint handling, which is to enhance consumers' trust and confidence in the financial system."²⁸ This is particularly true given that, as the Consultation notes, Canada is one of "few other countries, if any, [that] feature a multiple ECB system where banks are permitted to choose between service providers" and "the World Bank has suggested that allowing banks to choose among multiple external dispute resolution bodies poses severe risks to their impartiality."²⁹ We agree. Now is the time, once and for all, to remove the multi-ECB structure in Canada. It has failed consumers.

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

As the Consultation notes, the FCAC "did not find evidence that a for-profit funding model resulted in more favourable treatment of the banks."³⁰ We strongly disagree with this assessment. PIAC suggests that a for-profit funding model necessarily introduces profit maximization into an ECB's governance considerations and there is a clear risk that such a consideration may not further an ECB's public interest

²⁶ *Ibid.* at 29.

²⁷ Public Interest Advocacy Centre, "PIAC representations concerning the proposed *Approved External Complaints Bodies (Banks and Authorized Foreign Banks) Regulations*," online: <https://www.piac.ca/wp-content/uploads/2014/11/piac_comments_external_complaints_bodies_bank.pdf>

²⁸ ECB Report, *supra* note 4 at 28.

²⁹ Consultation, *supra* note 1.

³⁰ *Ibid.*

purpose. The purpose of an ECB, as stated above, is to provide consumers with redress of financial losses for bank errors and is an avenue for third-party impartial and independent adjudication when their bank is unable to provide a satisfactory resolution within the prescribed timeframe. An ECB is meant to contribute to creating a financial system that works efficiently and fairly, thereby enhancing consumer confidence in the system. Profit motivations of ECBs may lead consumers to believe that the ECB prioritizes its relationship with its funding bank members above its function as a consumer complaints resolver, thus raising concerns about the perception of impartiality and independence and reducing the consumer trust in ECBs, whatever the outcome in particular cases. As FAIR Canada has noted: “[m]ore than 38% of OBSI banking complainants are over age 65, and many are low income. They often need extra assistance and focused attention, which is more likely to be available from an independent non-profit ombudsman than a dispute resolution service provider that is focused on its bottom line.”³¹ While it is not impossible for for-profit entities to carry out activities in the public interest, regulators must be alive to the reality that the profit motive can lead ECBs away from serving consumers with higher needs, lower claims or more complex cases. While it may be possible to take some steps to reduce the negative impact of conflicts of interest, real and perceived, that may arise in this context, PIAC believes the challenge already has proven too strong for some ECBs and therefore encourages the government to require ECBs to be not-for-profit entities, who have no economic motive to discourage complaints or favour or disfavour particular types of complaints for resolution.

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

By this question, PIAC understands the government is asking about financial assessment of FRFI members to allow the ECB to function. PIAC would most fully support a banking dispute resolution body funded by the government, as ECBs currently rely on funding from the very financial institutions whose practices they are reviewing. In the absence of this possibility, and in the likely event of continued industry funding, PIAC recommends the government implement safeguards around ECB funding models.

PIAC is concerned that an ECB that charges an hourly rate for services may risk undermining its independence and impartiality. As an example, an ECB, particularly one that must compete with other ECBs for member banks, may conduct shorter or less rigorous investigations or create additional barriers to access in an attempt, intentional or otherwise, all to reduce member fees and to please present members and to attract new members looking for cheaper adjudication services. Such scenarios or the perception that these scenarios occur may reduce consumers’ confidence in the independence and impartiality of the ECB. We acknowledge that banks may be concerned, particularly in a single ECB model, that an ECB may conduct needlessly long investigations, or otherwise be inefficient. PIAC believes that the 5 year external operational review an ECB must conduct is an adequate counterweight

³¹ Ermanno Pascutto, “The slow death of Canada’s banking ombudsman,” Investment Executive (October 17, 2019) online: <<https://www.investmentexecutive.com/insight/letters-to-the-editor/time-to-pull-the-plug-on-obsi/>>. (Ermanno Pascutto is founder and executive director of FAIR Canada).

Note that FAIR Canada’s assessment that lower-income and older Canadians disproportionately use ECB banking dispute resolution services is supported by recent research released by OBSI. See OBSI, *Report on Income and Canadian Financial Consumer Complaints*, (2021), online: https://www.obsi.ca/en/news-and-publications/resources/PresentationsandSubmissions/income-report_EN.pdf

to these concerns, if any. Due to the possible impact on independence and impartiality, real or perceived, PIAC recommends the government prohibit the use of hourly rates in ECB funding models.

PIAC therefore recommends a funding model that may incentivize banks to resolve complaints internally, for example a volume-based fee or a blended market-share/volume-based contribution system. We note that the Commissioner for Complaints for Telecommunications-television Services (CCTS) has such a blended model, and that the evidence supports the hypothesis that these factors encourage banks to settle complaints internally rather than having them referred to the ECB.

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

PIAC believes it is beneficial to have one complaints body for both banking and investment services. A consumer may well have related banking and investment complaints, since all six of Canada's major banks have at least one subsidiary registered with IIROC, and may not have the knowledge necessary to either recognize there are jurisdictional distinctions between banking and investment services or understand which components are governed by which entities. Having a single ECB with jurisdiction over both areas would be highly beneficial to consumers.

PIAC recommends that if ECBs are to engage general dispute resolution professionals that the government require these external dispute resolution professionals to have sufficient experience with disputes between businesses and customers, rather than simply with disputes between sophisticated or legally represented parties. Consumer adjudications require a very particular set of dispute resolution skills that are not normally well-developed in commercial arbitrators. If investigators or decision-makers have experience advocating on behalf of commercial interests, this experience should not be allowed to negatively impact their role as neutral decision-makers nor their fairness to consumers, particularly vulnerable consumers. In order to manage this potential impact, ECBs must ideally have sufficient control over their staff via an employment relationship, not merely a contractual one, and must engage these staff in robust and ongoing consumer dispute resolution training. PIAC shares the FCAC's concerns regarding lack of training and the use of independent contractors expressed in its report.³²

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

As stated under question 1, PIAC believes that in order to provide a fair, equitable, and accessible process an ECB must provide consumers with assistance throughout the ECB process. We recognize that this assistance may lead to concerns, real or perceived, related to ECB impartiality and independence. However, we believe there are appropriate ways to mitigate these risks, such as mandating stringent standards that prohibit discussing outcomes or designating a specific team within the ECB to provide only complainant assistance. The government must provide the ECB with access to additional funding and support to ensure the ECB is able to implement appropriate safeguards and effectively aid consumers. This assistance function is a well-recognized aspect of dealing with the general public in the public interest and is present in all government public service contexts. It is likewise required here.

At a minimum, PIAC believes an ECB should provide consumers with the following assistance:

³² See ECB Report, *supra* note 4 at 26 and 27.

Before accepting the complaint, the ECB should:

1. Inform the consumer that the ECB can only review complaints that fall within its authority under their Terms of Reference.
2. Provide the consumer with a copy of the ECB's Terms of Reference and review this document orally or in any other manner necessary for the consumer to understand its contents.

After accepting the complaint, but before investigating, the ECB should:

3. Inform the consumer that the ECB will help the consumer throughout the complaint process.
4. Inform the consumer that they may authorize someone to communicate with the ECB on their behalf.
5. In regards to limitation periods,
 - a) Inform the consumer that there is a limitation period after which the consumer will no longer be able to bring a civil action in relation to their complaint.
 - b) Inform the consumer that this limitation period was running throughout the course of their bank's internal complaints handling process.
 - c) Provide the consumer with information on where to obtain more information about their limitation period, including how to determine its start and end dates.
 - d) Inform the consumer that this limitation will be suspended during the course of the ECB review and provide the consumer with the duration of this suspension, as well as the authority under which the suspension is granted, so the consumer can be confident in the authenticity of the suspension.
6. Inform the consumer that the ECB will generally not review a complaint that is or has been before the courts and the reason for this position.
7. Explain to the consumer that the consumer will not be able to use any communications between itself and the ECB, including the ECB's decision, as evidence in a court of law and provide legal information on the reason for this restriction.
8. Explain that information the consumer provides to the ECB may be shared with their bank and that the ECB may choose to share information provided by the bank with the consumer.
9. Inform the consumer of any other organizations or individuals the ECB may disclose consumer information to and the purpose of that disclosure; for example, a joint investigation with the Ombudservice for Life and Health Insurance (OLHI) or the General Insurance Ombudservice (GIO).
10. Explain to the consumer the application and scope of any limitation of liability the ECB has contracted.
11. Provide the consumer with a detailed outline of the timeline (mandatory or otherwise) and steps the ECB will take to collect evidence, investigate the complaint, determine compensation including the extent to which the ECB considers financial and non-financial harm, and issue a decision.
12. Inform the consumer that banks may make legal arguments and provide consumers with a list of relevant legislation, regulations, and guidelines and provide the consumer with legal information about, for example, definitions of relevant financial products and services.
13. Explain the mechanisms the ECB may use to enforce its decisions, whether that is the current "name and shame" system or some other method, such as court order.

14. Inform the consumer of any right they have reconsideration of the ECB decision, the limitation period to submit an ECB decision for reconsideration, and the process the ECB will follow should the consumer request reconsideration.
15. Notify the consumer that the outcome of their complaint may be used in a publicly available case study and, if it becomes a requirement, will be published in full after removing individuals' personal information.
16. If it becomes applicable, inform the consumer of their ability to report ECB non-compliance with its policies or obligations directly to the FCAC.
17. Ensure the consumer, and their representative if applicable, has read and understood this information and meaningfully consents to participate in the ECB process.

During evidence collection, investigation, and decision-making, the ECB should:

18. Ask the consumer non-leading questions to understand the consumer's complaint and desired outcomes.
19. Assist the consumer in identifying sources of evidence that may be relevant to their complaint.

After a decision is issued, the ECB should:

20. Provide the consumer with a final written report that summarizes the consumer's complaint and desired outcome, the bank's position, the evidence considered, the outcome of the investigation, the ECB's recommendations, and next steps available for enforcement or reconsideration, including any relevant timelines.
21. Review the final report with the consumer orally or in any other manner necessary for the consumer to understand its contents.
22. Solicit feedback from the consumer about their assistance throughout the process.

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

PIAC recommends the government make ECB decisions binding on banks. We again reiterate that the purpose of ECBs is to provide consumers with appropriate financial redress for bank errors and an avenue for third-party impartial and independent adjudication in order to improve and maintain public confidence in financial institutions which, in turn, strengthen Canada's financial services industry and economy. We believe that the absence of binding ECB decision-making negatively affects consumer confidence in the ECB system because may result in consumers being left without access to adequate redress despite undergoing both their bank's internal complaints process and the ECB process. We are concerned that the increased transparency and shorter timelines required in the recent changes to the banking regulations may tempt banks to start to behave as investment companies have with OBSI, that is, to refuse to honour financial redress orders or to submit "low-ball" settlement offers in banking disputes.

Binding decisions may incentivize banks to create better internal complaints processes that treat consumers fairly and equitably and provide them with meaningful compensation. Of course, the government must take steps to ensure banks are actually handling internal complaints appropriately and not merely implementing measures to suppress complaints or discourage complainants in order to avoid ECB adjudication.

The World Bank shares the opinion that it is important for ECB systems to have the ability to issue decisions that are binding on financial service providers, especially as they become more fully operational, formalized, and trusted.³³

The World Bank has also stated that “[a]llowing providers to appeal decisions would defeat the purpose of having ADR schemes, as financial service providers could bring consumers through costly and lengthy processes in the court system, where consumers will be highly disadvantaged.” PIAC recommends against any appeal process for banks (while continuing to permit complainants to go to court as an alternative to ECB adjudication), but recommends if the Department of Finance or FCAC implements an appeal process that it very significantly restrict the grounds upon which banks can appeal to ensure that the ECB system is not undermined by this inclusion. In order that banks not routinely appeal decisions to avoid paying compensation, any appeals should be exclusive of the remedy given to consumers; that is, the appeal should not affect any amounts awarded and should only affect future adjudications of a similar nature.

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

PIAC recommends the government establish requirements for an ECB’s board of directors to include consumer representation and independence from banks or other financial services operators in order to ensure the ECB properly interprets the government’s identified principles and fulfills its public interest purpose. For example, the CCTS requires a majority of non-telecom representatives be appointed to the Board and that the Chair position be occupied by a non-industry affiliated director. Such requirements would promote ECB governance that meet, and ideally exceed, their requirements to be: accessible and fair and equitable to consumers; accountable and transparent; impartial and independent; timely and efficient; and above all an effective tool for consumers to obtain redress for bank misconduct that has not been satisfactory addressed through the bank’s internal complaints handling process.

Conclusion

In sum, PIAC supports the government’s efforts to improve the ECBs system. We recommend the government repeal s. 455.01 of the *Bank Act*, revoke the ECB regulations and have the Minister designate OBSI as the only ECB under s. 455.1. The Department of Finance and FCAC can phase out any other ECBs over at most one year (to complete in progress adjudications) in order to create a single ECB system. Doing so will make it easier for the government to regulate the ECB system in the public interest and to ensure the single ECB implements, monitors, and maintains policies and procedures that further the public interest purpose of the ECB as well as the government’s identified principles and principles from the *G20 High-Level Principles on Financial Consumer Protection*.

*** End of Document ***

³³ World Bank, *Good Practices for Financial Consumer Protection*, (2017), Washington: State Secretariat for Economic Affairs SECO at 52, online: <<https://openknowledge.worldbank.org/handle/10986/28996>>.