



## **Response to the Framework for Reforming the Board of Directors of the Ombudsman for Banking Services and Investments**

May 28, 2012

### **Introduction**

The Consumers Council of Canada thanks the directors of the Ombudsman for Banking Services and Investments for the opportunity to comment on its draft “Framework for Reforming the Board of Directors of OBSI.”

The method, duration and deadline of the consultation leave something to be desired. A more systematic approach that is more appreciative of the resources required for effective public participation might have been undertaken.

However, the opportunity for consultation is welcomed.

The Council recently urged the federal government to create a national statutory ombudsman for banking and investments if Canada’s banks cannot peacefully cooperate within a single voluntary system of dispute resolution that meets international standards of justice and fairness for consumers. The Council observes that OBSI’s current effort at governance reform is intended to preserve what has been a compromise approach to financial services dispute resolution and consumer redress.

The Council notes that the existence of OBSI has improved the opportunity for Canadian consumers to obtain cost-effective dispute resolution and redress.

OBSI slowly has increased its credibility as scandals and market meltdowns since the 1990s led financial institutions to empower it to recommend consumer redress rather than have public dispute resolution imposed by government.

OBSI has been one of the better angels of Canada’s financial system.

However, institutional challenges to OBSI by two banks have led the Council to urge the Minister of Finance to secure immediate comprehensive commitment to OBSI from the financial services sector or alternatively to legislate into existence a national public ombudsman.

The reasons for the withdrawal of two major banks from OBSI appear to be driven by a desire to directly control the processes of non-judicial consumer redress affecting them. It seems unclear that a rebalancing of the governance of OBSI as proposed will satisfy the unreasonable objectives of those two banks. However, OBSI’s effort to set new governance standards hopefully will persuade the Minister of Finance of the strength of OBSI’s approach to providing consumer redress, by comparison to alternatives, and contribute to standards-setting that will at

worst restore the OBSI compromise or at best either improve upon it or begin the transition to publicly controlled dispute resolution and stronger consumer protection.

The evolution of OBSI has been both purposeful and useful. However, if the Government of Canada favours an institution for dispute resolution that involves industry directly in its governance, then it should ensure financial institutions all participate in it, rather than allow financial services dispute resolution to devolve into more red tape, greater complexity and increased confusion for consumers. The system of dispute resolution should not fall short of international standards of justice and fairness for consumers.

In particular, there should be no exception to the principle that an arbiter who recommends or orders consumer redress be independent in fact and perception.

## **OBSI Governance in Context**

OBSI says the responsibilities of its board of directors include: “The protection of the independence of the Ombudsman in fact and perception; the involvement and commitment of individuals with knowledge and or experience in consumer-related issues and the financial industry; and, the continued development and promotion of good governance.”

While public accountability for dispute resolution outcomes is weaker than it might be, the apparent performance in reaching acceptable outcomes presents as better than any existing alternative and is often satisfactory. Unfortunately financial institutions may exempt themselves from participation in OBSI or its decisions.

To secure consumer confidence, OBSI’s governance and arbitration should be:

- Transparent
- Involve informed and well-supported participation
- Offer a method of dispute resolution that is an improvement upon judicial remedies
- Accommodate a proper understanding of what constitutes consumer representation in its governance

## **Comments on Proposed Governance Changes**

The proposed changes in OBSI’s governance reflect a conviction that knowledge of the financial services industry needs to be formally represented in all decisions of its board of directors. This seems, in part, intended to ensure industry perspectives are fully represented in decisions about OBSI’s processes, so that OBSI maintains the confidence of the industry.

To this end, it is proposed that the industry, as an estate, have the opportunity to nominate candidates for specified seats on OBSI’s board of directors.

However, the confidence of consumers is important, too, for OBSI to succeed in its role.

What organizations will play the role of ensuring expertise is at the boardroom table concerning consumer rights and responsibilities, and how will that participation be supported?

Presumably the industry estate and its status on the board has been created to leverage the resources and relationships of industry. Ultimately, consumers pay for industry participation in

OBSI. If the costs of dispute resolution are to be embedded in the transaction, so to speak, how will a share of those resources be allocated to consumer representation at the governance level? How will the perspective of consumers be represented? How will this be reflected in OBSI's governance formally?

The Consumer Council of Canada recommends that there should be members of the board of directors of OBSI with a role and responsibility to bring to OBSI's governance independently sourced professional expertise, knowledge and perspectives on consumer rights and responsibilities and the factors that impact them. The 2011 Independent Reviewer's Report suggested introducing seats for consumer representation.

Such consumer representatives should be able to:

1. Discern the difference between the public interest and the narrower consumer interest.
2. List the consumer rights and responsibilities and apply them as a screen to decision items.
3. Access or initiate consumer research.
4. Represent a view without fear.
5. Make tough decisions when called upon.
6. Assess facts in formulating positions as part of their critical thinking skills.
7. Communicate well.
8. Be flexible and encourage new approaches and innovation when change is needed.
9. Seek to establish a dialogue with other consumer representatives.
10. Understand and discharge their fiduciary duty, and commit to governance excellence by learning and acting on accepted governance best practices, and go to meetings prepared with a plan of action, including how to introduce points and facts or research needed as support.
11. Recognize and avoid "groupthink."
12. Seek out and utilize information developed by consumer advisory committees and independent consumer groups committed to providing quality consumer perspective research applicable to OBSI's function.

OBSI may find it helpful to consider the findings of the Council's 2006 research report "Improving the Effectiveness of Consumer & Public Representatives On Delegated Administrative Authorities" to identify principles of effective consumer representation.

### **Director Majority Requirements for Voting**

Voting majority requirements will go some way towards ensuring the integrity of decisions affecting key independence questions. However, proper resourcing of a formal role for consumer representation on the board of directors, so that these members of the board can act with the same purposefulness, independence, collegial counsel and professional strength as industry members, would contribute to an effective board of directors capable of making balanced decisions about key independence questions.

## **Shortlisting**

OBSI's governance reforms include the concept of shortlisting in the appointments process for industry positions on the board of directors, so that industry board members are recommended rather than named by industry. A similar process of shortlisting by recognized consumer groups should be part of the selection of Board members with a specific role and responsibility to bring consumer perspectives to OBSI's governance. To ensure high quality processes for short-listing board candidates, OBSI should financially assist this work by participating groups, since consumer groups do not have the same opportunity to charge costs of representation to consumers as does industry for its involvement.

## **Composition & Terms**

For the purposes of discerning eligibility for the non-industry members of the board of directors, the proposed requirements should be enhanced to specify that an independent director should not be a partner, director, officer, employee or a person acting in the capacity of, or the holder of a "Significant Interest" in or be dependent professionally upon a participating Financial Service Provider and/or Industry Entity.

## **Equal Standing of Directors**

While the elimination of dual class board membership voting on "independence decisions" may aid board cohesion, it will be important to achieve greater public accountability and transparency around these decisions, so the level of independent-mindedness of board members can be observed. OBSI should implement recorded voting and public reporting of minutes of "independence decisions."

## **Conclusion**

The Council would be pleased to participate in a future appropriately resourced review of OBSI's governance, which could consider the Council's suggestions and practical ways to implement them. The comments contained in this document are necessarily limited and qualified by the capacity of the Council to review the proposed framework within the time allowed. The Council's review would have been assisted by having received a more thorough discussion of the options considered, the reasons for them and the goals within OBSI's mandate to be realized.



**Don Mercer**  
President