

# Final Report

## Audit of ADR Chambers Banking Ombudsman Investigation Process

Audit Commenced: September 7, 2012

Final Report: November 30, 2012

Auditor: Gordon B. Button

### Introduction

The writer was contracted to conduct an independent external review of a representative sample of investigational files of the ADR Chambers Banking Ombudsman (ADRBO). The scope of the audit was to assess the degree to which ADRBO is fulfilling its mandate to provide an accessible and fair complaint review system after the complainant has accessed the processes provided internally by a member financial institution, including the bank's internal ombudsman, and is not satisfied with the outcome. The following considerations support the value of this audit at this time:

- ADRBO was created November 1, 2008, to provide an independent dispute resolution process for clients of participating banks who made complaints with respect to the products or services provided by the bank but did not agree with the resolutions proposed by bank employees or by the Bank's Ombudsman. Initially this service was provided only for clients of the Royal Bank of Canada (RBC). Since November 1, 2011 this service has been available to clients of the TD Bank Group (TD) as well. The ADRBO determined that an independent external review of its investigation processes and outcomes would be instructive to the Ombudsman in managing investigations and improving office procedures.
- In an article in the Globe and Mail dated April 22, 2012, the independence of the ADRBO was publicly challenged by the federally appointed Ombudsman for Banking Services and Investments (OBSI). The OBSI and the ADRBO are the only two External Complaint Bodies (ECB) currently providing these services to the banking industry in Canada. It is not mandatory for banks to utilize the services of the OBSI and they are free to contract with another institution such as ADRBO for such services. ADRBO sought an independent assessment of its processes to determine if it is meeting its mandate by providing an independent external review for consumers of banking products and services.
- In 2010 the federal government took steps to strengthen the consumer protection framework by legislating the requirement that banks and authorized foreign banks be members of an ECB that has been approved by the Minister of

Finance. The proposed Approved External Complaints Bodies (Banks and Authorized Foreign Banks) Regulations were released by the Department of Finance on June 19, 2012, for a 30 day consultation period. Once approved, the Regulations will require that a body such as ADRBO will be required to apply for approval by the Minister to act as an ECB. The Financial Consumer Agency of Canada (FCAC) also released a Proposed Application Guide for External Complaint Bodies on July 26, 2012, which proposes requirements that FCAC'S Commissioner will consider when deciding whether to recommend approval of an ECB to the Minister pursuant to the Regulations. ADRBO wants to ensure it is compliant with the proposed Regulations and Application Guide to facilitate an anticipated application for approval as an ECB and to meet ongoing requirements of such approval.

My audit revealed the principles of administrative fairness which guide the activities of an ECB are being adhered to by the ADRBO. The investigations are being conducted by knowledgeable and experienced investigators and the resulting reports are clearly written, balanced and fair. The following report will outline the process I followed and the significant findings and recommendations I made during this review.

## Audit Process

It was agreed that ADRBO would provide the writer with a list of all concluded investigations, including a brief notation with respect to the outcome of the investigation, from November 1, 2009, to July 2012. From that list I selected four files for FY 09/10 and four files for FY 10/11. For FY 11/12 it was agreed I would select eight files, of which four would be with respect to RBC complaints and four would be TD complaints, since the latter only became jurisdictional this fiscal year. The files for audit were selected independently with no further input from ADRBO. I attempted to identify a cross section of files that included an equal number of files where it appeared the outcome favoured the bank and the complainant.

I provided a list of the files selected and the Deputy Ombudsman facilitated my access to ADRBO's electronic file management system which is known as Box. She also notified the contract investigators of these files that they had been selected for audit. She then requested that if the investigators held any pertinent hard copy documents that had not been uploaded to Box, they were to provide her with the documents so they could be made available to me. I had ongoing discussions with the Deputy Ombudsman during the audit to facilitate provision of these documents for my review either by uploading them to the Box file or providing them to me in hard copy.

I am quite confident that I had the opportunity to review all relevant documentation with respect to the files selected. There was no interference of any kind by the ADRBO with respect to the selection of files for audit or the conduct of the audit itself. At various times during the audit I also made requests of the Deputy Ombudsman and the Ombudsman for other information or documentation that I felt was pertinent to my review and received prompt and full disclosure on every occasion.

## Audit Criteria

I established the criteria for the audit from a review of several sources. The criteria to be met by an ECB applying for approval under the Proposed Regulations, as elaborated on by the Proposed Application Guide, was a primary source for selection of criteria by which I assessed the quality of the investigations reviewed. In both documents there are several references to the need for an ECB to be accessible, accountable, impartial and independent and to discharge its functions in a transparent, effective, timely and cooperative manner. These are consistent with the administrative fairness guidelines I applied to every investigation conducted when I held the appointment of Ombudsman for the Province of Alberta, and also the expressed mandate of the ADRBO. I established seven primary criteria for my review of investigation files and ADRBO business practices to assess the overall quality and appropriateness of the process in light of existing expectations and ADRBO's mandate. My findings with respect to each follow.

## Analysis

1. **Participation rights and disclosure.** Parties to a fair ECB process must be allowed to fully participate in the process and must receive adequate disclosure of all relevant information and documentation to allow them to understand the outcomes and decisions resulting from the investigation.

Most of the files reviewed demonstrated good communication between investigators and the respective bank staff and complainants. However, in some files there is documentation reflecting that complainants were frustrated with the lack of timely updates or contact from the investigators. In file OMB-1448-1111 the complainant expressed concern about a lack of interaction with the investigator, in that the complainant was not interviewed and received only two questions by email from the investigator. In the same file there is an email from the complainant asking for an update and complaining that it had been two months since they had had any contact on the file. In file OMB-1510-1211 there is an exchange of communications between the investigator, the Deputy Ombudsman and office staff, which reflects a request from the investigator to "put off" the complainant in her request for an update on the status of the investigation. Timely and clear communication between the investigators, office staff and complainants is an important principle of fairness in this process. While most files reflect adherence to this principle, there were some exceptions.

### **Recommendation #1:**

**ADRBO should develop clear policy for the guidance of contract investigators and office staff with respect to provision of accurate and timely updates to parties to an investigation.**

ADRBO's Terms of Reference (ToR) require that a draft of the investigator's report be provided to both the bank and the complainant for their review prior to finalizing the report. This ensures that the parties receive complete disclosure of the information considered by the investigator in coming to their decisions. I was advised by the Deputy Ombudsman that during investigation of RBC complaints the draft report is provided to the party to whom the decision is perceived to go against first and, once they respond, the other party is provided the same opportunity. The process with respect to TD complaint investigations is slightly different in that the draft report is

always provided to TD representatives first for their comments prior to it being provided to the complainant. In many cases I noted that the complainants who were not satisfied with the outcomes took this opportunity to argue their case again. While I note the covering correspondence which accompanies the draft report when it was sent to the complainant invited their response to the report, neither that correspondence nor the ToR are specific with respect to the rights of a complainant when provided with the draft report and what ADRBO expects in the way of comments. From the documentation I reviewed, it is clear that ADRBO is only prepared to consider input from the complainant which identifies errors or omissions in the report, and they are not asking for comments on the merits of the decision. This can lead to a situation where a complainant believes they have a right to present new arguments on the merits of their complaint and expect a response to that argument from the ADRBO. When no such response is received the complainant is left feeling they have not been heard.

The Deputy Ombudsman has provided me with a copy of an updated template for the covering letter to complainants sent out with the draft report, which has recently been put into use. It is much clearer with respect to what is expected in response to the contents of the draft report and should help address this issue. However, the ToR have not been amended to reflect this new procedure.

## **Recommendation #2:**

**ADRBO should amend the ToR to be consistent with the contents of the new covering letter template and more clearly articulate what feedback is being sought when the draft investigation report is provided to parties to the investigation.**

The files reviewed generally demonstrate the provision of fair and timely disclosure and participation rights to parties to the investigation. The ToR and Consent and Confidentiality Agreement (C&CA) documents were properly completed on every file reviewed and they provide useful information to complainants. It was obvious in some files that complainants either did not fully understand the ToR or chose to ignore the provisions, but I find no fault with ADRBO in this regard.

### **2. Transparency.** Was the process employed by the ECB transparent and understood by all parties?

All complainants are provided with copies of the ToR and C&CA at the commencement of an investigation and are asked to sign both documents acknowledging they understand the contents and agree to comply with them. This provides a very transparent basis for the ensuing investigation and clearly sets out the mandate of the ADRBO and how the investigation will progress. In several files, when complainants professed confusion or a lack of understanding with the process being followed, they were referred back to the contents of these two documents. This is a good practice and one that should continue to be encouraged. These complaint investigation and resolution processes often become confrontational and confusing. Some parties will tend to see the situation and analyze the information made available, only as it supports their position. Good communication is very important to bringing closure to these matters. The files I reviewed generally demonstrated a transparent and fair process and adherence to the mandate.

I have no recommendations specific to this criteria.

3. **Effectiveness.** Was the process employed by the ECB effective in resolving the complaint?

The ToR stipulate that ADRBO investigators are restricted to considering information provided by complainants and the financial institution to make their determinations and resulting recommendations. It was often evident during my file reviews that third parties may have been able to shed light on a situation being investigated, but the investigator was limited as to sources of information he/she could pursue by their mandate. I reviewed the backgrounds of all the contract investigators currently completing investigations for ADRBO and found them to be extremely well qualified, with respect to education, training and experience, to do these investigations. I was advised by the Deputy Ombudsman that most, if not all, contract investigators are legally trained and also have taken Alternate Dispute Resolution or Mediation training. Any who have not had this type of training are offered it through ADR Chambers. This is reflected in the quality of their investigations and in their decisions and recommendations.

In file OMB-607-1209 I could not find documentation to address how the complainant's apparent disagreement with the decision of the investigator was dealt with. If this was not done it could affect the perceived effectiveness of the investigation. In other files this type of disagreement was addressed and, while the complainant may not necessarily have agreed with the outcome, the effort was made. In file OMB-1605-0112 the documentation reflected extra efforts made by the Ombudsman himself to ensure the bank representatives understood the rationale for the recommendations made, which contributed to effective resolution of the complaint.

I found that investigators provided a knowledgeable and thorough analysis of the evidence available and arrived at conclusions that are supported by the evidence. Their recommendations normally demonstrate a sincere effort to find common ground to resolve the complaint. I am not making any recommendations in this regard.

4. **Independence and Impartiality.** Did ADRBO staff and contract investigators demonstrate impartiality (remain neutral) and independence (not influenced by any of the parties or any other person or body) in the conduct of the investigations and final resolution of complaints? Was there any evidence of real or perceived bias?

This is a significant cornerstone of an effective ECB and one of the most difficult aspects to manage. There are two opposing sides to the complaint and, by the time the matter reaches the ECB, the sides may become very positional in their thinking and communication with each other. Effective resolution requires a clear demonstration of independence and impartiality in order to bring the parties to common ground and eventual agreement on the proposed resolution. At the conclusion of an investigation by an ECB the party who perceives the decision to favour the other party will often claim bias, lack of independence or impartiality. Successful resolution of these complaints usually requires that the ECB demonstrate that its decisions and recommendations are grounded in the evidence and fairly address the arguments put forward by the parties. This can be a delicate balance.

One theme that I encountered throughout my review was that, in those files where the draft investigational report was provided to the bank for their feedback first and only then was the draft provided to the complainant, an apprehension of bias or lack of independence often resulted in the minds of the complainants. It was clear in some files that this process included significant discussion between the bank's representatives and the ADRBO which may impact the perception of the complainant. In file OMB-475-0909 this was a particular concern to the complainant as there was considerable passage of time between when the draft report was first

provided to the bank and subsequently to him. I note a letter from the Deputy Ombudsman dated January 19, 2012, which provided a very clear explanation to the complainant of the process in that file. As an observation, the contents of that letter might be considered when communicating with complainants in this type of situation in future. As this process forms part of the contractual arrangement between the banks and the ADRBO, I am not making a recommendation in this regard as I am not privy to the background to this issue. I simply am including it for the benefit and consideration of the ADRBO.

In file OMB-1605-0112 there is documentation of considerable discussion between representatives of the bank and the investigator and later the Ombudsman as well. To a significant extent, this discussion facilitated a better understanding of the issues and the outcomes for the involved parties. The investigator did not take sides and fairly assessed the actions of both the bank and the complainant in coming to a well-supported resolution acceptable to both parties. This is an example of good communication contributing to the perception of all parties that the process was fair and the investigator acted independently.

Independence and impartiality were demonstrated in all the files I reviewed. The very experienced investigators employed by the ADRBO consistently adhered to these important principles.

- 5. Reports and Decision Making.** Do the reports and decisions of the ECB provide adequate reasons for the outcomes, decisions and recommendations? Do the reports provide sufficient information and rationale to be stand alone decision documents?

I found the final reports on all files reviewed were generally well structured, comprehensive and balanced. Since these final reports are in fact decision letters of the ECB, administrative fairness principles require that they be thorough stand alone documents written in a language the average person can understand. This becomes problematic when the investigator depends on significant references to case law or analysis of contractual provisions between the bank and the complainant to support their findings. I found that in some files several case law excerpts or contractual provisions were included in the body of the report. File OMB-475-0909 is an example where a significant amount of contractual documentation was quoted in the body of the report. The report may be more easily understood by the average person if the relevance of the quoted material is explained by the investigator in common language in the body of the report. The actual copy of the relevant documents can be included as an appendix to the report for ease of reference should a reader wish to do so.

File OMB-396-0709 is an example of a report containing significant legal arguments and reference to concepts of law. This may be acceptable in this case since the complainant was represented by counsel in communicating with the investigator. In the normal course of things where the complainant is a lay person, such arguments should be presented in more common language if possible.

### **Recommendation #3:**

**That ADRBO consider providing an explanation of the relevance of the case law excerpts or contract documents in the body of the report and attach the relative portions of the supporting documents as appendices to the report in instances where this would lend to the clarity and ease of understanding of the report.**

Although not a common finding, there are some reports where the inclusion of extraneous arguments or comments could be seen to indicate a lack of independence by the investigator. In file OMB-784-0310 there is a notation added at the end of the report with an asterisk. Adding it in that format could be perceived as advocacy or bias on the part of the writer. The comment was accurate and had relevance in the investigation and in my opinion would have been more appropriately included in the body of the report. Other files contained email communications between investigators and ADRBO office staff that lacked professionalism. Investigators and staff should be reminded that all reports and other communication and documents should at all times be professional, relative and balanced.

**6. Reasonableness of Outcomes and Decisions.** Were outcomes and decisions at all levels reasonably based on the evidence available?

As a general rule, decisions and recommendations should be reasonably based on the evidence presented in the report as findings of the investigator in the context of applicable law, policy and contractual provisions. Reports were comprehensive and well presented and the resulting decisions flowed from the evidence. File OMB-1743-0312 is a good example of a report where arguments for and against an outcome were presented leading to a reasonable decision and recommendation. In file OMB-468-0909 the investigator brought in personal observations that were not grounded in the evidence to argue a point. This rightfully encouraged a rebuttal from the complainant and may have negatively influenced the complainant's perception of the fairness of the investigative process.

This principle is being adhered to and I have no recommendations to make in this regard.

**7. Timeliness of Process.** Were the investigations completed and outcomes reported to the parties in a timely manner?

Current ADRBO policy is found in paragraph 15 of the ToR. It provides that a recommendation on a complaint will be made within 180 days of receipt of the complaint unless lack of availability of information prevents it. It further provides that receipt of a complaint will be acknowledged to the complainant within three business days of receipt and notice of the receipt of a complaint will be provided to the participating financial institution within 30 days. The proposed Regulations would reduce the time for conducting the investigation and making the final complaint resolution recommendation to the parties to the complaint to 120 days from the date of receipt of the complaint.

ADRBO is doing a commendable job of acknowledging complaints immediately upon receipt. However, only 8 of the 16 investigations I reviewed were resolved with final recommendations made within 180 days and only three would meet the proposed 120 day time limit. In some cases it was beyond the control of ADRBO to meet the 180 day time limit, but there were unexplained delays in others. I did note an obvious effort to meet the 180 day expectation in more recent investigations which is encouraging. No recommendations are necessary in this regard as the facts are readily evident.

**8. General Observations.**

Several of the older files I reviewed contained email exchanges about difficulties being experienced by investigators accessing RBC's filing system to get information. There are also some references with respect to difficulties the ADRBO office was having in tracking investigations. There appears to have been considerable improvement in the file management

practices within the ADRBO office in the last year and these problems do not seem to be as much of a concern as they once were.

Locating file documentation on the investigation files I reviewed presented challenges to me in completing my audit and may reflect a challenge to ADRBO in maintaining an appropriate file management system. It was explained to me by both the Ombudsman and the Deputy Ombudsman that documentation received at the head office is all entered into Box. However, each contract investigator may retain hard copy documents including emails, written notes and documentation received from parties to the complaint during the investigation in their own filing system. This documentation is not always entered into Box and stored appropriately as was the case in several of the files I reviewed. Therefore, not all relevant documentation is necessarily included in the Box system.

I was provided with a draft ADRBO File Retention Policy, which I understand is currently being considered by the Ombudsman. Article 3.4 of the draft policy stipulates that no complaint file shall be closed until: "(a) The investigator has returned all materials relating to the file in hard copy to ADRBO and has uploaded them into the electronic file folder in Box;". This would address this concern.

I also noted that the date reflected in Box relevant to a particular document is the date it is uploaded into the system and not necessarily the date the document was created or received. This presents problems trying to locate specific documents by date of generation which is often relevant during an ongoing investigation.

#### **Recommendation#4:**

**That ADRBO adopt a file maintenance and retention practices that address these issues.**

#### **Conclusion**

None of the observations or findings contained in this report are so serious as to bring into question whether the ADRBO is meeting the provisions of its mandate in receiving complaints and conducting investigations to help resolve disagreements between participating financial institutions and their clients. I found the investigative files to be well documented, reports well written and findings and recommendations consistent with the mandate of the office and the evidence available. The findings and recommendations I am making herein should be considered fine tuning of a robust process.

I reviewed the Terms of Reference and Consent and Confidentiality Agreement documents. I found them present and properly completed on each file reviewed. These two documents meet the requirement to explain the mandate and operating procedures of the ADRBO and the confidentiality of information agreement to complainants at the commencement of an investigation. I found repeated examples in the files I reviewed where investigators referred complainants to the ToR to explain the investigator's mandate to help them understand the scope of the investigation. This is a good practice.

I also reviewed the annual reports of ADRBO as well as their website and found them to be informative and a good reference for anyone needing to avail themselves of the services provided. The proposed Regulations, if approved and registered, will impose strict conditions

on any ECB applying for approval under the Bank Act. From my review, I am of the opinion that ADRBO is well positioned to pursue such approval at the appropriate time.

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