

OSGOODE

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CLINIC**

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To: Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Financial and Consumer Services Commission (New Brunswick)
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Nova Scotia Securities Commission
Nunavut Securities Office
Office of the Superintendent of Securities, Newfoundland and Labrador
Office of the Superintendent of Securities, Northwest Territories
Office of the Yukon Superintendent of Securities
Ontario Securities Commission
Superintendent of Securities, Department of Justice and Public Safety,
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**Re: CSA Notice and Request for Comment – Registered Firm
Requirements Pertaining to an Independent
Dispute Resolution Service – Proposed Amendments to National
Instrument 31-103 Registration
Requirements, Exemptions and Ongoing Registrant Obligations and
Proposed Changes to Companion
Policy 31-103CP Registration Requirements, Exemptions and
Ongoing Registrant Obligations**

The Osgoode Investor Protection Clinic (“IPC”) appreciates the opportunity to comment on the Canadian Securities Administrators’ (“CSA”) proposal for a new regulatory framework under which an independent dispute resolution service (“IDRS”) would have the authority to issue final, binding decisions (“proposed framework”).

By way of background, the IPC, the first clinic of its kind in Canada, is dedicated to providing free legal advice and services to retail investors

across the country. Since launching in 2016, we have worked with a wide range of clients who have suffered investment losses. From seniors whose adviser mismanaged their entire life savings on the cusp of their retirement to low-income investors whose advisers recommended leveraged loans, we have worked with vulnerable retail investors who need assistance in seeking redress but cannot afford a lawyer.

We are pleased to bring their voices to the CSA proposal.

We appreciate your consideration of our comments; in the spirit of brevity, we have focused on those questions and topics that we think we can best add value to the process.

Sincerely,

Brigitte Catellier, Associate Director
Azka Anees, Student Caseworker
Diana Damiani, Student Caseworker
Ayisha Malik, Student Caseworker

The Osgoode Investor Protection Clinic

Question 1

The CSA contemplates that under the proposed framework, an IDRS would be authorized to issue binding decisions in circumstances where it is designated or recognized in a jurisdiction as the identified ombudservice. It is possible that some CSA jurisdictions may not designate or recognize OBSI as the identified ombudservice at the same time, resulting in the status quo (e.g., OBSI making non-binding recommendations only) applying in those jurisdictions until OBSI were designated or recognized as the identified ombudservice. If jurisdictions designate or recognize OBSI as the identified ombudservice at different times, what operational impacts, if any, would you anticipate from an IDRS being designated or recognized in some but not all jurisdictions? How can these impacts best be managed?

We strongly support the proposed framework as an important milestone in investor protection. This development has taken years and is long overdue. We would not support any further delays in implementing the proposed framework. We believe the different timelines of adoption can be managed and should not prevent this material investor protection development from moving forward.

Based on our analysis of data collected through our years of operation 2018-2023, we have assisted retail investors through the OBSI complaint process in 19 files. In 85.3% percent of these files, our clients resided in Ontario and in the remainder of the files, our clients resided in Alberta, British Columbia, and New Brunswick.

We would encourage the adoption of the proposed framework in all jurisdictions as quickly as possible. We would also highlight the importance of a clear plain language explanation of the process based on the retail investor's jurisdiction of residence. This should include clarifying whether an ongoing complaint in a jurisdiction that adopts the new framework can benefit from the binding decision framework notwithstanding that it was initiated before the jurisdiction adopted the legislation implementing binding authority.

Question 2a

With respect to a recommendation made by the identified ombudservice following the investigation & recommendation stage, we intend the recommendation become a final decision where (i) a specified period of time has passed since date of the recommendation, (ii) neither the firm nor the complainant has objected to the recommendation, and (iii) the complainant has not otherwise withdrawn from the process in a manner authorized by the identified ombudservice (the deeming provision).

What are your general thoughts about the deeming provisions and the circumstances that trigger it? Please also comment on whether 30, 60, 90 days would be an appropriate length of time to be specified for a recommendation to be deemed a final decision under the deeming provision.

The proposed deeming provision for recommendations becoming final decisions presents a delicate balancing act from the standpoint of a complainant, who must determine if the outcome is fair. The time it takes for a recommendation to become final also in effect becomes the waiting period for a complainant who accepts the recommendation. A lengthy waiting period, such as 90 days, could pose significant challenges for vulnerable individuals or those in urgent financial need. However, rushing the process

with too short a timeframe risks compromising thorough consideration and understanding of the recommendation by the complainant following the investigation and recommendation stage.

Drawing from the IPC's experience with clients, we have observed that decision-making often requires many conversations and a reasonable amount of time to assess all options. We believe that a 60-day period provides the necessary time for complainants to thoroughly evaluate the recommendation and decide whether to accept it or object. Should they not respond within that period, they should be deemed to have withdrawn from the process. (In other words, a complainant can only be bound by a recommendation upon formally accepting it.) A 30-day period, while seemingly brief, may not afford sufficient time for retail investors to make informed decisions, especially considering the complexities of financial matters. Thus, a balance should be struck between efficiency and the need for thorough consideration in the interest of fairness for complainants.

The appropriate length of time for considering a recommendation before it becomes final is a balancing act that could be impacted by several factors, such as the complexity of cases and the time needed for complainants to review and consider their options. 60 days should be required to allow complainants of more complex cases sufficient time to deliberate, reach an informed decision and formally accept the recommendation or object. Absent a formal acceptance or objection, a complainant should be deemed to have withdrawn from the process and therefore have the opportunity to seek resolution in court or other available forums.

Question 2b

With respect to the decision made by the identified ombudservice following the review & decision stage, we contemplate the decision becoming final where (i) a specified period of time has passed since the date of the decision (the post-decision period), and if the complainant did not trigger the review and decision stage, (ii) the complainant has not rejected the decision and has not otherwise withdrawn from the process in a manner authorized by the identified ombudservice. Please comment on the provision of this post-decision period and whether 30, 60 or 90 days would be the appropriate length for the post-decision period.

The proposed post-decision period, where a decision made by the identified ombudservice becomes final, presents an opportunity for timely closure and clarity for complainants. From our perspective at the IPC, we believe that a 30-day period is an appropriate length of time for this post-decision period.

In our experience, complainants, in most cases, do not typically engage in comprehensive research or analysis before accepting or rejecting a decision. Instead, they primarily seek decisions that are accompanied by thorough reasons that provide them with a clear understanding of the rationale behind the outcome. Our experience at the IPC has shown that on average, we receive OBSI decisions that are approximately 659 words and range between two to thirty paragraphs. The long-form decisions are rarer but provide the most clarity, transparency, and accountability in the resolution process. Complainants benefit greatly from comprehensive and detailed long-form decisions.

Therefore, a 30-day post-decision period strikes a balance between providing complainants with adequate time to consider the decision and ensuring timely resolution. As long as the OBSI decision is detailed and comprehensive, a 30-day period should allow sufficient time for review and formal acceptance or rejection while promoting efficiency in the dispute resolution process.

Question 3

The proposed framework contemplates that complainants could not reject a decision of the identified ombudservice if they initiated the second-stage review of the recommendation by objecting to it. What are your views on this approach?

We recommend that the proposed framework be amended, such that complainants who triggered the review and decision stage are not bound by the ombudsman's final decision, in circumstances where the monetary amount of their claim is lower than the maximum amount of a claim in Small Claims Court (in Ontario, that amount is currently \$35,000). We believe that complainants should retain the option to pursue their case in the Small Claims Court, as an additional avenue for compensation for the harm they have suffered.

It is noted that in other jurisdictions with similar institutions as Canada, like the United Kingdom¹ and Australia,² complainants are only bound by the decision when they formally accept it. In these jurisdictions, in the event that complainants do not accept the ombudsman's decision, they have the opportunity to seek resolution in court or other available forums. Consistency with other jurisdictions, while not always necessary, would be preferable, especially when deviating from processes in those jurisdictions could result in denying complainants further avenues for seeking compensation for the harm they have suffered that previously existed.

The Small Claims Court offers a minimal cost pathway for seeking redress, with no legal representation required. Nearly 28% of the IPC's current cases are actions in Small Claims Court. The IPC has extensive experience dealing with these matters, which has resulted in two successful judgments in the past nine months.

In circumstances where the complainant triggers the second-stage review of the OBSI decision, we believe that allowing them to reject the final decision and pursue their claim in the Small Claims Court is fair and serves investor protection goals.

Question 4

Please provide any comments on maintaining the compensation limit amount of \$350,000.

Based on our analysis of data collected through our years of operation 2018-2023, the IPC assisted investors through the OBSI complaint process in 19 files. None of these 19 files involved a claim amount of more than \$350,000. We have a current file that involves an investment loss slightly above \$300,000 and this file represents our highest compensation claim to date.

We would support maintaining the current compensation limit subject to the legislation expressly providing for annual cost of living increases on a go forward basis.

¹ Financial Ombudsman Service (UK), "Final Binding Decisions", online: <https://www.financial-ombudsman.org.uk/who-we-are/make-decisions>.

² Australian Financial Complaints Authority, "Determination (a binding decision)", online: <https://www.afca.org.au/what-to-expect/the-process-we-follow>.

Question 5

The proposed framework does not contemplate an appeal of a final decision to either a securities tribunal, or a statutory right of appeal to the courts (although parties could still seek judicial review of a final decision). What impact, if any, do you think the absence of an appeal mechanism will have on the fairness and effectiveness of the framework for parties to a dispute?

We recommend that, in addition to the option to pursue judicial review of the identified ombudsman's final decision, the proposed framework be amended, such that in circumstances where the monetary amount of their claim is lower than the maximum amount of a claim in Small Claims Court, complainants have the option to pursue their case in the Small Claims Court, as an additional avenue for compensation for the harm they have suffered.

The benefit of limiting this option to cases involving lower monetary amounts is that it expands avenues for resolving the dispute for the individual investor, while also taking due consideration of the concern that a general right of appeal may undermine the primary goal of the framework (i.e., giving both parties finality with a binding decision in proceedings that are fair and more cost-effective than is available via securities tribunals or the courts).

Subject to our comments above, we do not recommend including a statutory right of appeal for monetary amounts higher than the above specified threshold, largely for the reasons identified in the CSA proposal. Firms involved in such matters may be more motivated to pursue further litigation, and including a statutory right of appeal in those cases would risk reinstating the same problems that the proposed framework seeks to eliminate.

Judicial review and statutory right of appeal

Provisions that provide for statutory appeals from decisions made by tribunals are typically found in the parent statute of the administrative body in question. If there is no such statutory right of appeal, as currently contemplated by the proposed framework, following the tribunal decision, parties can only go to court for a judicial review of the decision made by the tribunal or administrative body.

An appeal is a process where a party in a lower court, or administrative proceeding that is quasi-judicial in nature, can argue that the decision below made an error that should be set aside or varied. The evidence in appeals is based on the evidence on record before the tribunal or administrative body, and fresh evidence cannot be admitted, unless there are exceptional circumstances.

Judicial reviews, on the other hand, challenge any government action or decision, regardless of whether it is quasi-judicial in nature. The process is intended to ensure that the decisions made by government bodies are fair, reasonable, and lawful. In Ontario, judicial reviews are heard by the Divisional Court, pursuant to s. 6(1) of the Judicial Review Procedure Act ("*JRPA*").³ Judicial review is only available after parties have exhausted all possible avenues for resolving the dispute at the administrative level. If a party seeking judicial review fails to do so, they risk the application for review being dismissed on the grounds of prematurity.

³ R.S.O. 1990, c. J.1.

The procedural and substantive grounds for judicial reviews are much narrower in scope than that of statutory appeals. Procedural grounds include an apprehension of bias from the decision maker, failure to provide an oral hearing, where credibility is at issue, failure to provide notice of concerns, inadequate disclosure, and failure to provide an opportunity to present the case.⁴ Substantive grounds include ignoring evidence, factual errors, and decisions focused on irrelevant considerations.⁵

While it is important to preserve procedural fairness, judicial review has certain limitations. The process tends to be complicated, lengthy, and expensive. The appeal mechanism for a judicial review is limited, as is the ability to add to the record.⁶ For these reasons, Legal Aid Ontario “strongly recommends working closely with a lawyer” before making the decision to apply for a judicial review.⁷

Applications for judicial review

The procedure for applications for judicial review alone is complex and, in most cases, would require complainants to retain a lawyer for advice and representation. If a complainant wishes to seek a judicial review of a final decision of the identified ombudsman, they would have to apply within thirty days of the final decision, as per s. 5(2) of the *JRPA*. Complainants would have to file a Notice of Application for Judicial Review (Form 68A) at the Divisional Court and serve the Notice to the Attorney General of Ontario and the relevant administrative decision maker, in this case, the identified ombudsman. The following are factors that complainants would have to consider before initiating an application for judicial review and implications under the proposed framework.⁸

1. The remedy requested from the court - Generally judicial review applicants seek an order from the court to set aside a tribunal or administrative body's decision. They can also ask for the matter to be sent back to be re-heard. It will be important to emphasize to complainants that this will not be an opportunity for their case to be reheard at the court. Rather, in judicial reviews, courts will look at the procedures used by the decision maker below, and whether any error of law was made, or whether rules of natural justice and procedural fairness had been breached.
2. The grounds for the application - Grounds for application from tribunals typically require applicants to show that the decision below contained at least one type of legal error, such as errors in interpreting the law, unreasonable exercise of discretion, or making decisions based on irrelevant factors. However, for the purposes of reviewing OBSI decisions, these types of errors of law would be very rare. What would be relevant for our purposes in the context of judicial review would be the extent to which OBSI processes comply with the rules of natural justice and procedural fairness. These rules are intended to ensure that all parties get the opportunity to make submissions and lead evidence. In *Vavilov*, the Court has established that when courts review administrative decisions below, the analysis will be contextual, depending on the factual circumstances of the case on record, and will be

⁴ *Baker v. Canada (Minister of Immigration and Citizenship)*, [1999] 2 SCR 817 is the leading case on procedural fairness requirements.

⁵ *Canada (Minister of Immigration and Citizenship) v. Vavilov*, 2019 SCC 65 clarifies the standard of review for administrative decisions.

⁶ See *infra* note 8.

⁷ Legal Aid Ontario, FAQs on Judicial Review, online: <https://www.legalaid.on.ca/faq/judicial-review/>

⁸ For details see “Ontario Superior Court of Justice Guide to Judicial Review in Divisional Court,” online: <https://www.ontariocourts.ca/scj/files/pubs/guide-div-ct-judicial-review-EN.pdf>.

concerned with both the decision-maker's process in arriving at the outcome as well as the outcome itself.⁹

If OBSI adheres to the decision-making processes laid out in the CSA proposal, the procedural fairness requirements established in the case law would generally be met. It is therefore unlikely that complainants' applications for judicial review would be successful, save for the most unusual of circumstances in which the complainant was not given the opportunity to provide evidence to OBSI or if OBSI made its decisions based on irrelevant facts or ignoring the evidence before it.

3. The documentary evidence to be used at the hearing - The court will not allow fresh evidence to be introduced in a judicial review application. As such, only evidence submitted to OBSI will be allowed by the court. Although the Supreme Court in *Vavilov* establishes that reasons are not always required from the administrative decision-maker, i.e., the decision may be reviewed by the court on the basis of evidence on record,¹⁰ we strongly recommend that OBSI provide a fulsome explanation of how it made its decision, what factors were relevant, and the evidence on which it was based.

Given the complexity and procedural knowledge required to make an application for judicial review, cost consequences of pursuing a judicial review will be an important factor for complainants with limited resources.¹¹ In Canada, a successful litigant is entitled to costs and this rule is in place for applications for judicial review as well. However, costs are subject to the court's discretion, and parties may ask for no costs be ordered against it in matters of public interest or other novel cases.¹²

Complainants should not be foreclosed from pursuing litigation in the Small Claims Court

While the option to pursue a judicial review application is welcome, by its nature judicial reviews are narrow in scope, as highlighted above.

Our experience representing the IPC's clients in the Small Claims Court suggests that the concerns raised about pursuing appeals in court (associated costs, length of time taken for a decision, procedural complexities, etc.) do not outweigh the potential benefit for complainants who choose to pursue their claims in Small Claims Court. Our experience of the length of time to resolve claims in the Small Claims Court is that it is a much faster conflict resolution route. Typically, if parties resolve the dispute at the settlement conference, it takes approximately 150 days from filing in the Small Claims Court. If the matter goes to trial, the process typically takes about nine months to a year from filing.¹³

⁹ See paras 87 and 94-96.

¹⁰ *Ibid.*

¹¹ As was the case in Air Canada's case against BC couple over flight delay complaint. See National Post, online: <https://nationalpost.com/news/air-canada-bc-couple-flight-delay>.

¹² *Doern v British Columbia (Police Complaint Commissioner)*, 2001 BCCA 446 ["Doern"] at para. 69. But the Court ordered costs of an intervener against the Attorney General, not because the Attorney General did anything warranting an order of costs against it, but because it had "access to public funds for the purpose of paying these costs," at paras 69-75.

¹³ For details of typical timelines, see Justice Matters, "How Long Does a Lawsuit Take?" online: <https://justicematters.ca/how-long-does-a-lawsuit-take/#:~:text=To%20get%20from%20filing%20a,Small%20Claims%20Courts%20in%20Ontario>.

Therefore, in our experience, while there are costs associated with pursuing a claim in the Small Claims Court, they are not prohibitive, and the time taken to get a judgment or arrive at a settlement is relatively fast. For these reasons, we recommend that complainants who would otherwise have the opportunity to pursue litigation in the Small Claims Court be allowed to continue doing so under the proposed framework.

The Clinic does not recommend including a statutory right of appeal for monetary amounts higher than the maximum monetary amount for pursuing the claim in the Small Claims Court, largely for the reasons identified in the CSA proposal. We agree that it would undermine the policy rationale for the proposed framework; complainants who seek to take advantage of a statutory right of appeal would not have the benefits of the relatively quick, inexpensive, simplified processes available in the Small Claims Court; and resource-rich firms would be more motivated to take advantage of such a right to appeal at the expense of the investor protection goals underlying the proposed amendment.

Question 9

Please provide your views on the anticipated effectiveness of prohibiting the use of certain terminology for internal or affiliated complaint-handling services that implies independence, such as “ombudsman” or “ombudservice”, to mitigate investor confusion.

We believe that prohibiting the use of the terms such as “ombudsman” or “ombudservice” for internal complaint handling services will be effective in mitigating confusion. A large majority of our clients have low investment knowledge and are challenged by the many stages of the firms’ internal complaint process. The use of terms such as “ombudservice” can be misleading as implying that the last stage of the process is an independent and impartial assessment of their complaint.

More importantly, there is a lack of consistency in internal complaint handling services and no set guidelines on the number of stages retail investors have to go through before submitting their complaint to OBSI. We would encourage you to take this opportunity to clarify that retail investors need not exhaust all of the stages of the internal complaint handling service before submitting their complaint to OBSI.

Additional Comments

In addition to our comments above, we would also like to address OBSI’s limitation period.

Complainants often face significant challenges due to limited resources and financial literacy, especially when pitted against large financial institutions with abundant resources and expertise. Merely establishing external complainant bodies as independent and impartial does not level the playing field. In reality, a process that treats both parties equally in terms of means and opportunities tends to favor the better-resourced party, which in this case, is typically the firm. This inherent imbalance is exacerbated by the practice of external complaint bodies like OBSI applying a limitation period to screen complaints for timeliness.

We would urge you to consider a different approach to the current 6-year limitation period. Many complainants lack the knowledge and sophistication to recognize when they have been wronged, and it often takes time for them to navigate the avenues for redress, including OBSI. Therefore, the limitation period should only be considered if the firm raises timeliness as an issue, and, when the complaint is brought beyond 6 years, the firm should bear the burden of proving the complaint has been brought beyond a “reasonable” time.

To ensure that harm is rectified and promote fairness and public trust in the financial system, OBSI should refrain from imposing a specific 6-year limitation period. Instead, retail investors should be allowed to lodge complaints beyond that timeframe, as long as it is within a “reasonable” timeframe, determined by guidelines that consider various factors contributing to the delay in making a complaint, such as low financial literacy, lack of awareness of pertinent facts, language barriers, health issues, or other intervening factors¹⁴.

Lastly, we would take this opportunity to request that OBSI’s decisions on any complaints that have been determined to have been submitted outside the current 6-year limitation period be published to provide additional guidance to retail investors on how OBSI interprets the limitation period.

¹⁴ For details see, “Investor Advisory Panel: Request for Comment on the Independent Evaluation of the Ombudsman for Banking Services and Investments with respect to Investment Related Complaints” online: <https://www.osc.ca/sites/default/files/2022-01/com_20220131_iap_0.pdf>