COPING WITH CHANGES ON ALL FRONTS: REAFFIRMING THE OMBUDSMAN'S POWERS AND ADAPTING ITS ACTIONS

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Clare Lewis, Q.C.[*]

Today the institution of the ombudsman must cope with changes on all fronts and to do so must both reaffirm its powers and adapt its actions. That challenge demands that the traditional assumptions and interpretations of the enabling legislation of legislative ombudsman can no longer suffice if we are to remain relevant and be useful to the public we serve and the governments whose administration we as legislative ombudsman oversee.

In meeting many of my colleagues nationally and internationally, and in considering papers presented by them or by others considering their work, I have become aware that there is a spectrum of approach to the work of the legislative ombudsman which is not always driven by the enabling legislation, but often by the personality and bent of the individual ombudsman or by the culture within which he or she functions. This point is buttressed by the comments of Daniel Jacoby, former Ombudsman (*Protecteur du Citoyen*) of Québec, who stated in his paper, delivered before the 7th Conference of African Ombudsman and Mediators at its meeting in the Seychelles:

> Actually, the ombudsman is an institution that can adapt easily to changes. It is a mechanism for "soft" justice, which is both highly informal and accessible to all citizens. It is an institution capable of flexibility and multidisciplinarity, able to stay at the leading edge of progress.
>
> I believe that [the ombudsman] cannot remain passive when faced with repeated similar complaints. He must resolve them but, in addition, he must identify the source of the problems and learn to prevent them.

It does appear, however, that many hold firmly to the traditional Scandinavian model of dedication to the resolution of specific complaints of government maladministration, while others adopt, to varying degrees, a broader approach of using individual complaints as a springboard to, at a minimum, assessing and commenting on the management capacity and quality of certain government administration to, at the limit, determining and commenting on the impacts of certain government programs, or overall policies.

There is much debate in the legislative ombudsman community as to the extent of the institution's reach. If I may presume to judge, or at least assess my own instinctive approach throughout my rather varied career, I bring to the work of the ombudsman the seeking of a moderate middle ground, neither cleaving to a formalistic, case-by-case resolution of complaints as defining my role, nor asserting an ombudsman authority which may be perceived as representing a political response to the policies of the government of the day.

It is my respectful view that today no ombudsman office can expect sufficient resources

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[*] Ombudsman of Ontario, Canada. The following is an edited version of an address delivered on September 10, 2001, in Quebec City, Canada, at the Annual Meeting of the Canadian Ombudsman Association.

to consider and investigate fully each complaint received. The challenge is to interpret one's statutorily granted jurisdiction creatively, so that a broader public can be served better by the government.

The generally accepted canon of legislative ombudsman is perhaps best stated by the International Ombudsman Institute in its Year 2000 Communiqué as:

> ...the role of Ombudsman [provides] a mechanism which can balance the fundamental requirements that government must be able to govern but with appropriate accountability.

And so, how best to achieve that accountability while ensuring ombudsman relevance? If it is accepted that to be effective any ombudsman office must be relevant to the institution which created it and to the public whose complaints it receives, then it must not only reaffirm but reassess its powers and adapt its action to current expectation. Individual complaint resolution must remain as the core ombudsman responsibility, whether through informal enquiry, through alternative dispute mechanisms such as mediation or conciliation, or through investigation with findings and recommendations. Nonetheless, current realities of limited resources, rapid government restructuring and heightened, educated public demand and expectations require reassessment of our role and new approaches to effect accountability while being seen as continuing to enhance democratic principles and concurrently serving public need.

Granted that no solutions for adapting to changes on all fronts are ever perfect given competing pressures, I do nonetheless suggest that monitoring of complaint trends, monitoring of implementation of government undertakings in response to earlier ombudsman recommendations and monitoring of evolving government policies and their public impacts, all in conjunction with targeted complaint resolution, offers the "best worst" means of wholly meeting our responsibilities and maintaining essential relevance.

Bluntly put, most ombudsman are required to investigate each complaint received. The ombudsman is then to dismiss the complaint in one manner or another, such as determining it to be trivial, frivolous or vexatious, or made in bad faith; not filed within prescribed time limits; not requiring further investigation; unfounded; or if found to be valid to find in support with consequent recommendations. There is rarely stated authority for informal resolution of individual complaints and monitoring is not normally named as an ombudsman power or strategy.

Certainly, legislative ombudsman cannot cope with complaint numbers without creative approaches including informal, non-investigative resolution. I suspect that most ombudsman employ informal approaches which result in quick resolution of the majority of matters received and that we do so without reproach. If possible, it is clearly in the best interests of the public service and of the person complaining to correct misunderstanding, settle matters of uncertainty and remedy error promptly, without time-consuming investigation. And yet, such informal processes can only occur and be effective if the ombudsman is seen by the subject of complaint to be impartial, but also to have real power to investigate if necessary.

If we are to be effective, we must be able to dispose of most matters quickly and informally so that we can choose those cases worthy of full investigation and conduct those enquiries expeditiously. It is indeed necessary to be sparing in our deployment of investigative resources, whatever our stated mandate. Protracted and often unfocussed and ineffective investigation can be the result of our undertaking more investigations than we can rationally handle. A lengthy investigation ending in dismissal of the complaint will be seen as without value by the complainant unless the complexity of the matter justifies the time taken. Too rarely is the time taken the result of the inherent needs of the case and it may be the result of overburden in caseload. It is not to be understood that careful investigative planning cannot be time-saving and have value. It is a necessity for proper, timely result. But taking on more cases for investigation than can be rationally handled will confound the most careful investigative planning.

Therefore, we must seek better understanding of our powers and better means of using them, or we risk foundering, becoming ineffective and irrelevant. We must maintain a precarious balance. Just as is a judge or a referee, we are entitled to be wrong. But if we dismiss too many valid complaints, we will be seen by all as mere enablers of the bad practices of our governments. If we support too many invalid complaints, we will be seen by our legislators and public servants as incompetent or partisan or fools.

So what to do? We must sharpen our focus and reduce our wasteful workloads to permit necessary, important investigations to be conducted well and with expedition. We must quickly resolve or jettison the trifling and attend in depth to cases selected as important in themselves or reflective of a systemic or system-wide problem. It is not how many times we turn the crank that counts, it is how many sausages come out the end of the machine. Our managers and our staff must share a corporate view that while all complainants are to be treated with respect, courtesy and understanding, nonetheless, all complaints are not created equal. We should reduce the number of cases afforded full investigation, attempting to select those in which there is some possibility, if not probability, of as yet unresolved error, unfairness or malfeasance. Such an approach requires systems in which staff propose such cases and managers or the ombudsman select. Even investigations which are underway should be reviewed by managers and perhaps the ombudsman to determine if further investment in the case is warranted and, if so, what direction it might take. Conversely, it is necessary to conduct audits to ensure that cases worthy of investigation are not being cursorily dismissed by staff

However, it is not sufficient to our mandate simply to conduct fewer, if better, investigations. We must consider other means of being of value. Again, I assert that the most promising means is to be found in monitoring our own complaint trends, government implementation of our recommendations, and government programs, policies and impacts. These will signal areas of needed concentration and may give rise to better deployment of resources. It is important for legislative ombudsman to remember that most possess the authority to conduct an own-motion investigation without complaint. It is monitoring of one form or another which will give rise to such important action.

One may question our right to monitor and argue that no such authority is to be found in our enabling legislation. Certainly, if we are to cope with changes on all fronts by reaffirming our powers and adapting our actions, then we must do so within a sound framework. While

legislative ombudsman are limited as creatures of statute, nonetheless it must be remembered that the essence of the ombudsman concept is that it is intended to be remedial and its processes to be flexible. It is within that basic intention that inherent authority and scope for creative action may be found. Although few ombudsman statutes speak of public education as a function of the office, few would deny its need and propriety.

It is worth looking to early Canadian ombudsman jurisprudence, in particular, the 1984 Supreme Court of Canada decision in *B.C. Development Corporation v. Friedmann* to find support for a purposive approach to achieving the legislative ombudsman substantive goal of ensuring fairness and elimination of error and abuse in administration of government policy.[1]

The *B.C. Development Corporation* case, in which the Ombudsman of Ontario, Québec and Saskatchewan intervened, set a national standard for the exercise of provincial ombudsman authority. The Court stated that while the ombudsman is a statutory creation, "[a]ny analysis of the proper investigatory role the Ombudsman is to fulfil must be animated by an awareness of [the] broad remedial purpose for which the office has traditionally been created."[2] Further, the Court said that the general legislative framework "create[s] the possibility of dialogue between governmental authorities and the Ombudsman;....facilitate[s] legislative oversight of the workings of various government departments and other subordinate bodies; and....allow[s] the Ombudsman to marshal public opinion behind appropriate causes."[3] The Court noted with approval that because the ombudsman often operates informally, ombudsman investigations do not impede the normal processes of government. Finally, the Court stated that ombudsman legislation "represents the paradigm of remedial legislation. It should therefore receive a broad, purposive interpretation consistent with the unique role the Ombudsman is intended to fulfil."[4]

A major example of monitoring for my office is to be found in our correctional facility complaints which last year numbered eight thousand. They are rising swiftly in the context of our government's agenda of tough law and order, no-frills incarceration, reduced parole eligibility, pilot-project privatization of a jail and a protracted labour dispute with correctional officers. It is simply absurd for us to try individually to address these complaints about a broad range of issues, including: alleged inadequate health care; improper staff conduct and use of force; lost property; inadequate care of special-needs inmates; denial of prescribed fresh air yard time; inadequate food and so on. And so, through monitoring correctional complaint trends, we have clustered matters and instituted ombudsman own-motion investigations to address broad issues. These have been largely successful in finding institutional practices at odds with ministry correctional standards, standing orders and procedures. They have resulted in positive responses from ministry officials with our recommendations being largely accepted and, at least in theory, implemented.

The problem is the reality. In the face of an implacable government law and order agenda, one which is becoming rather universal throughout North America, and in the face of reduced ministry resources, we are required to monitor the fulfillment of these assurances of remedy. We now do regular monitoring checks and report back to the ministry when we find inadequate or no implementation. Certainly, at the senior levels of the ministry public service, the problem is not ill will. It is capacity. We now find that our recommendations are almost routinely accepted and remedial assurances given, but our challenge is the frequent inability of strained ministry staff to deliver. Our need is, therefore, to monitor implementation and to insist

on being the burr under the saddle of a galloping agenda which may be inattentive to or result in unfair consequences to individuals.

So, what is the extent of the ombudsman monitoring power? Since, in my view, that power is largely implied as a necessary condition of the fulfillment of our mandate, I suggest it extends to the point at which it is challenged. Should that degree of resistance occur, then the ombudsman must consider whether ombudsman reach has exceeded its grasp. While these matters can often be negotiated and perhaps protocols developed, there will be times when no such agreement can be reached. Although presenting the dispute to the legislature can bring public scrutiny to bear and might result in a favourable statement, that process will provide a political, not a legal result and it may be counter-productive. It may be more appropriate for the ombudsman to decide whether to test the ministry position in court. As usual, common sense should apply, both in deciding whether a particular form of monitoring is appropriate to the mandate and not excessively intrusive and disruptive and in determining whether resort should be made to the court. It is better to win in court and if there is real doubt that the ombudsman might win, then that doubt should signal that the monitoring attempt is perhaps inappropriate to the mandate.

It is most important to monitor development of government policy to determine if public accountability is part of the plan and, if not, to approach the involved minister for the purpose of recommending appropriate safeguards. So too, if monitoring complaint trends reveals that implementation of government policy is giving rise to unusual numbers and nature of complaints, it is appropriate for the ombudsman to approach the deputy minister or minister to seek correction in implementation or a change in policy to alleviate the grievances disclosed.

Again referring to the decision in *B.C. Development Corporation*, the Court said "the growth of a distant, impersonal, professionalized structure of government has tended to dehumanize interaction between citizens and those who serve them."[5] It further quoted with approval the statement of H.W.R. Wade in *Administrative Law*, explaining the special role the ombudsman has come to fill:

> But there is a large residue of grievances which fit into none of the regular moulds, but are nonetheless real. A humane system of government must provide some way of assuaging them, both for the sake of justice and because accumulating discontent is a serious clog on administrative efficiency in a democratic country....What every form of government needs is some regular and smooth-running mechanisms for feeding back the reactions of its disgruntled customers, after impartial assessment, and for correcting whatever may have gone wrong.[6]

Certainly my predecessor, Roberta Jamieson, found that the reduction of more than thirty percent in the staff and budget of her office demanded new strategies in coping with changes on all fronts and new means of reaffirming the powers of the office while adapting its action. I have continued many of her initiatives and continue to seek new means of meeting my mandate in an ever-changing environment. Monitoring, in its many facets, has proved not only useful, but essential. In monitoring changes in government policy, three privatization initiatives have required responses, two in Transportation and one in Corrections. In each, the issue has been to

ensure that government retains its public accountability in its oversight of the privatized initiative. In Corrections, we were successful in the case of a superjail, which will be run by a contracted private corporation, in obtaining legislation confirming our jurisdiction and contract clauses between the government and the corporation further outlining our authority and practices to which the private partner will be subject. In each of the Transportation initiatives, monitoring of policy changes alerted us to the need for our intervention at the Deputy Minister and Minister levels to seek assurance of government requirement for appropriate public complaint mechanisms and to assert our jurisdiction to require government to monitor those mechanisms effectively.

We have, based on large numbers of similar complaints and based on our monitoring of the effects of government downsizing, used monitoring to permit us to persuade several agencies—such as the Workplace Safety and Insurance Appeals Tribunal, the Adoption Disclosure Registry, the Health Professions Appeal and Review Board, the Social Assistance Review Board and the Ontario Human Rights Commission—to address significant systemic delay issues within them. They have each responded with meaningful improvements which we continue, through their periodic reporting to us, to monitor and comment upon. These are examples of the ombudsman providing a form of management consultant function which has had broad value well beyond the resolution of individual complaints giving rise to our concern.

The Ontario Family Responsibility Office which oversees, enforces, collects and disburses funds for all court-ordered spousal and child support orders in our province has been plagued with complaints, averaging 1,400 per year to our office. We continue to address and often remedy individual complaints, but as a result of our monitoring have also conducted several system-wide investigations resulting in numerous accepted remedial recommendations. Furthermore, monitoring of implementation of those recommendations recently revealed a failure to ensure certain necessary computer policies and modifications. As a result of our monitoring of implementation, we did another quick system investigation and have recommended that government provide funding for a study to determine the structure of a new information technology platform, without which that office will never perform properly. That funding has been provided and we continue to monitor its use and results.

Our monitoring of public response to government programs provided me with the opportunity to investigate on my own motion the Ministry of Health and Long-Term Care's funding for breast and prostate cancer patients who must travel for radiation treatment to determine whether it had differential effects upon patients from Northern and Southern Ontario. I reported to the Legislative Assembly my opinion that the Ministry's funding of Cancer Care Ontario's Radiation Re-Referral Program, when considered in conjunction with the funding of another government program, the Northern Health Travel Grant was, while unintended, nonetheless improperly discriminatory to the residents of Northern Ontario

I take a somewhat expansive view of my authority and powers and of the means of using them to give best effect to my mandate. I am not insensitive to the right of government to govern but, conversely, I am aware that large government can be daunting in its approach to individuals. The Supreme Court of Canada in *B.C. Development Corporation* recognized the statement of Gregory and Hutchesson in their book *The Parliamentary Ombudsman* that:

> in the modern state...democratic action is possible only through the instrumentality of bureaucratic organization; yet bureaucratic power—if it is not properly controlled—is itself destructive of democracy and its values.[7]

It is my respectful opinion that monitoring as described can assist and, indeed, is critical to enabling us to provide some of those proper controls. Further, if the generally stated ombudsman goal of supporting democratic values is to continue to have force and effect, if we are to remain relevant, then ombudsman powers must be continually creatively, but responsibly, reassessed and ombudsman actions appropriately adapted to cope with rapid changes on all fronts.

Endnotes

[1] *B.C. Dev. Corp. v. Friedmann*, [1985] 1 W.W.R. 193 (S.C.C.).
[2] *Ibid.* at 196.
[3] *Ibid.* at 207.
[4] *Ibid.*
[5] *Ibid.* at 204.
[6] *Ibid.* at 205; H.W.R. Wade, *Administrative Law*, 5th ed. (Oxford: Clarendon Press, 1982) at 73-74.
[7] R. Gregory and P. Hutchesson, *The Parliamentary Ombudsman* (London: G. Allen & Unwin, 1975) at 15; B.C. Dev. Corp. v. Friedmann, supra note 1 at 204.