

Leveraging Moral Suasion Through SORT Investigations

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Our effectiveness as ombudsmen depends on moral suasion – convincing those in authority that our recommendations are sound and should be implemented. Limiting ourselves to the traditional, low-profile “complaint resolution” model of ombudsmanry threatens our continued existence, limits our effectiveness, and short-changes complainants. This is why the Ombudsman of Ontario created the Special Ombudsman Response Team (SORT), and moved from a culture of deference to that of a proponent of good governance. The SORT model is unequalled in its ability to root out systemic maladministration and incite better, fairer and more responsive public administration, while encouraging government officials to be more responsible money managers. The modest investment in training investigators and dedicating them to gathering solid evidence on complex issues is more than repaid in benefits to the public. Our systemic SORT investigations have inspired improvement in the quality of governance in Ontario that no amount of shuttle diplomacy could have achieved. It is a model that meets the objectives of enhanced public service and financial stewardship – the pinnacle of moral suasion.

It’s an honor to speak at this historic conference, celebrating the 200th anniversary of the ombudsman as we know it. Today I want to discuss something I’m often asked about – and I suspect that every ombudsman since Lars Mannerheim has probably been asked about it, too. It’s about power: If we as ombudsmen don’t have any real power to enforce our recommendations, how do we get governments to listen to us?

Ombudsmen generally do not issue binding recommendations. That principle is well established in the tradition of the classical parliamentary ombudsman, as pioneered right here in Sweden. Ombudsmen are not governors, either by law or democratic convention. We cannot tell those who govern what to do. We must achieve results without powers of compulsion, acting as the “conscience” of an institution by sharing our judgment about whether or not it is acting fairly and reasonably.

We are a rather strange breed of public official – one that looks more like a platypus than anything else. For those unfamiliar with this animal, it is a furry creature from Australia which appears to have been put together as an afterthought. The body parts don’t seem to belong together. The fur comes with a broad tail, a duck’s bill and webbed feet. Similarly, classical ombudsmen normally have very robust – at times even intrusive – investigative powers,

such as the ability to subpoena witnesses and examine them under oath, to access documents and to gain entry into government premises. Couple this with our lack of executive powers and apparent inability to dictate change, and we start looking quite a bit like a man-made platypus, with key parts that don't fit together. Or do they?

Given the inherent platypus-like contradictions between our investigative powers and our recommendatory powers, it may be hard initially for students of public administration to understand how we, as a profession, could be effective. Practicing ombudsmen know, however, the key to success: It is the use of moral suasion. As we tackle thousands of complaints every year, our effectiveness depends on convincing those in authority that our recommendations are sound and should be implemented.

We harness moral suasion through various means. Most ombudsmen do it in three ways. First, on an ongoing basis, we establish our general credibility with government through informal networking. We exchange information with government about our work. We establish strategic contacts in positions of power that we can rely on to move issues forward. We meet key stakeholders to educate them about our processes. All the while, we are seeking to reassure government that we are all part of the same mission: Improving public policy. We want to demystify our work and create an atmosphere of mutual trust and understanding.

The second way we exercise moral suasion is by formulating recommendations in individual cases. This is often done through shuttle diplomacy. We call, email or write government officials and try to convince them to move in our direction. We use the goodwill we have developed with government combined with practical, logical and sound informal intervention to fix a problem. At times, to be successful, both sides must put water in their wine. Each side gives a bit and takes a bit in the interest of compromise and achieving consensus.

The third traditional way to exercise moral suasion is to publish an annual report. There are many styles of annual reports. Some are written in dry, turgid, and bureaucratic prose. Others are more colorful, exploring the limits of the language, serving more as an advocacy tool. But regardless of its style, the ombudsman's annual report is somewhat like a report card on government. How many complaints have been filed about government decisions? How many were justified? What bureaucratic behavior attracts the censure of the ombudsman? Whether couched in diplomatic jargon or delivered in a more direct fashion, the annual report is a tool of moral suasion. We use it to warn governmental authorities about maladministration, to recommend changes in public policy or to encourage sound decision-making. The impact of the annual report is made more important by its publication. The shining of the public spotlight by the ombudsman delivers additional impetus to the recommendations that he – or she – makes.

The exercise of moral suasion through informal networking, shuttle diplomacy and the ritual annual report has been, an effective and satisfactory way to resolve complaints for the past 200 years. However, ombudsmen who limit

themselves to those three means of exercising influence over government risk undermining their effectiveness, and in some cases, their very existence.

I can say this without exaggeration, because it almost happened to my own office. The office of the Ontario Ombudsman had a brush with death in late March 2005, on its 30th anniversary. Senior bureaucrats in the Ontario government recommended to government that the Ombudsman's office should be eliminated to save funds. The office had toiled far too long in obscurity and below the public radar, focusing its efforts virtually exclusively on the resolution of individual cases in a low-key, invisible fashion. The bureaucrats figured it would not be missed. There is no better administrative example of the expression that "necessity is the mother of invention" than what occurred next. We were on the chopping block. Either we reinvented ourselves, or we perished.

Limiting ourselves to the traditional "complaint resolution" model of ombudsmanry not only threatened the continued existence of our office, it also short-changed complainants. It limited our effectiveness in resolving cases and being agents of change. The fact is, the traditional exercise of moral suasion through low-level intervention has its limits – and it can become the ombudsman's Achilles heel. This is true for several reasons. First, shuttle diplomacy relies on discussions in good faith. As persuasive as you may be, if the interlocutor does not want to "play ball" and deal with the issue at hand, no amount of discussion will advance the resolution of the issue. And because this kind of intervention happens away from the public eye, there is little outside pressure on bureaucrats who decide they won't be helpful because they don't have to be.

Second, low-level intervention is not particularly suited to cases where the parties are intensely litigious or where the facts are hotly in dispute. Suppose the government's factual assumptions are completely opposite to those of the complainant, and both sides are adamant that they are right. Which version of the facts will the ombudsman use to draw conclusions and make recommendations? In those cases, the celebration of angelic consensus so ardently sought by ombudsmen is simply impossible.

Third, there may be issues that need to be addressed by the government that are simply not on its priority list. Government policy priorities are normally pre-set, and absent an external catalyst are not likely to be disturbed in favor of something raised quietly at the table by the ombudsman.

Fourth, it is nearly impossible for docile ombudsmen working in the background to demonstrate their value to the public. If you cannot be seen to be producing results, you might as well be invisible. An invisible ombudsman is an ineffective ombudsman. And an ineffective ombudsman may soon become an unemployed ombudsman.

Fifth, limiting your work to the traditional informal resolution of cases will inexorably lead you toward the "easy cases" where very little work is required to resolve complaints. An ombudsman who falls into this pattern will start to sacrifice hardcore cases that require more formal fact-finding in favor of those that require little grey matter and even less effort.

Finally, there are cases that re-occur in our business that beg for closer scrutiny. They may raise systemic issues. When similar cases with similar themes repeat themselves over and over again, a more in-depth investigation is warranted, seeking broad solutions to broad problems, which informal investigations cannot achieve. Of course, ombudsmen are not precluded from commenting on the emergence of trends in complaints, but such comments do not have the same gravitas as a conclusion based on carefully gathered evidence.

Two things drove us to make major changes as the office of the Ombudsman of Ontario: The self-centered objective of the survival of our office, and the need to better and more effectively serve our constituents. The office moved from a culture of deference, which avoided conflict at all costs, to one that was principled and sought a place at the table as a proponent of good governance. Mere moral suasion escalated into ombudsman jawboning – that is, speaking publicly to persuade the powers that be to do the right thing. In the process, not only was our office saved, but its transformation catapulted its effectiveness to unprecedented levels.

University of Ottawa management professor Gilles Paquet recently urged ombudsmen across Canada and elsewhere to modernize their approach in this vein. His address, entitled “Failure to Confront,” and a related paper called *Ombuds as Producers of Governance*, contended that:

... the only way out of this quandary is greater depth in the inquiry process; accepting the need to tackle the issues revealed by the cases head-on, with an explicit intention to unearth and expose the source of the problem, and to become the architect of better governance arrangements capable of eradicating the cause of the difficulties.

This, in Prof. Paquet’s words, is “value-added ombudsmanry,” since it elevates the Ombudsman from a mere complaints department to an “architect of better governance.” This latter role is not only one in which we in the office of the Ombudsman of Ontario have excelled, but one we helped to pioneer.

As part of our transformation after our near-death experience, one of the first steps I took upon assuming the position of Ombudsman of Ontario was to create the Special Ombudsman Response Team (SORT) to tackle high-profile systemic investigations. SORT is the Ombudsman’s equivalent of an investigative SWAT team. It is made up of a group of investigators whose mandate is to formally investigate contentious systemic issues where the facts are in dispute. SORT investigations are conducted within tight deadlines and rely on formal investigative methods and techniques. Witnesses are interviewed in person, statements are tape-recorded, documents are retrieved from the government as necessary, investigators look at best practices in other jurisdictions and a formal report is issued and made public.

Since SORT’s creation in April 2005, its investigations have had an enormous impact on government policy in Canada’s largest province. The property tax assessment system has been overhauled, as has the security of the lottery system. Medical screening for newborn infants has been revolutionized, and lives have been saved. Parents of severely disabled children are no longer forced to make them wards of the state to get them the help they need. Com-

pensation for victims of crime, once mired in delay and operating in a culture of bureaucratic obstruction, has been vastly improved. SORT has exposed deficiencies in the Special Investigations Unit that investigates serious civilian casualties involving police, and helped instigate a more rational process for reviewing the legal accounts of state-funded criminal counsel. More recently, SORT has looked into problems with government oversight of private and community colleges and is nearing completion of an investigation into the enforcement of quality standards for nursing homes for senior citizens.

Part of SORT's value is that it is not a "hit and run" squad. We follow up on every SORT investigation. We demand and receive agreement from government organizations to report back to us on their progress in implementing our recommendations. We re-investigate to confirm the progress that is claimed, and we keep the pressure on.

The results have been dramatic. Our reports have made waves internationally, and ombudsmen and other administrative investigators from across Canada and around the world have asked us to share our systemic investigation techniques. In the past two years, we developed the first training course of its kind in the world, called "Sharpening Your Teeth: Advanced Training for Administrative Watchdogs," conducted by SORT. So far we have trained more than 150 ombudsmen and investigators from around the world, with another edition of the course set for this fall. And the SORT director and I have also been invited to conduct training in countries from South Africa to Hong Kong to Trinidad and Tobago – all on a complete cost-recovery basis. This international training is already bearing fruit for our colleagues, as they launch their own special systemic investigations. It has been amazing to see how jurisdictions across North America have used our lottery report, for example, to inspire their own investigations – which have uncovered "insider win" problems in government-run lotteries in several different parts of Canada and the U.S., and prompted security reforms to protect millions of lottery players.

Without question, our systemic SORT investigations have inspired improvement in the quality of governance in Ontario that no amount of shuttle diplomacy could have achieved. We know that many of the issues SORT has tackled and resolved are the same that had plagued my office for years. Sometimes the sharp end of the stick is needed to inspire movement on an issue.

Adding even more value to these results is the fact that the bang is bought with relatively few bucks. One of the things we should celebrate here in our commemoration of the institution of the ombudsman is that it is the least expensive dispute settlement mechanism ever devised. Ombudsmen work with speed and informality, without rigid procedures. If we want to make a difference, we have to be right, and we have to persuade; even jawbone.

The fact that we can't force people to do our bidding actually increases our efficiency, because wherever there are powers of enforcement or compulsion, there must also be traditional "due process," with all of its delays and complications. The tools of the ombudsman aren't legal pleadings or binding judgments worked out by paid-by-the-hour litigators and adjudicators. The tools of the ombudsman are fact-finding and reason. Our cases should be resolved

quickly, keeping forms and formalities to a minimum. The role of the ombudsman is to broker the efficient, timely and low-cost resolution of complaints – be it on an individual or a systemic scale.

This is another feature highlighted by Professor Paquet as essential to the modern ombudsman:

The independence, accessibility, informality, cheapness, and speed of the ombudsing process, together with the powers of investigation ... all these features make ombudsing better suited to appreciate the new fluid realities, and better prepared to deal with governance failures than the more traditional legal (more rigid) and political (less reliable) processes.

I don't think I can add much to what has been written on the role of the Ombudsman in making government more just and fair. But an often overlooked challenge that we face is how to innovate and keep our work relevant to the times. If we investigate and recommend outlandish solutions with little regard to financial consequences, we lose credibility and thus, moral suasion capital.

We are always mindful of this in our SORT investigations. Our aim is not only to ensure we make recommendations that are financially sound, but that, wherever possible, actually improve financial governance. As we are gathered here in 2009, all of our governments are dealing with a global economic crisis, the worst since the Great Depression. In Canada, we have seen our large national budget surplus become a \$50-billion deficit almost overnight. The deficit in the U.S., now well over a trillion dollars, is a staggering 13.7% of the American GDP, while Japan's and Britain's deficits hover at nearly 10% of their GDP.

As Ombudsmen, we can roll with the times by emphasizing the resolution of issues that not only emphasize fairness, but also financial prudence and wisdom. We can help governments in making decisions that are not just more reasonable, but also more fiscally responsible. We can help them be better financial managers – something we have always done, but which is now more important than ever.

Through our SORT investigations, we continually provide recommendations that focus on increasing efficiencies and frugality. For example, since our much-publicized 2006 investigation of the Ontario Lottery and Gaming Corporation (OLG) and our report, *A Game of Trust*, the corporation has spent hundreds of millions of dollars to improve security and better protect the public from “insider” fraud. This year, the OLG released an audit that estimated “insiders” had taken home nearly \$200 million in prizes in the past 13 years. This is an astounding amount of money – yet, until our investigation, no one had any idea it was that much; when pressed, the lottery corporation's estimate was only half that amount. Even today, the amount of actual fraud that has been committed by lottery “insiders” over the years still isn't clear, but what has changed completely is the culture of the government-run lottery. It has cleaned house and recognized that it is supposed to be a public servant, not a purely profit-driven business. It has identified the most common “insider” scams and found ways to stop most of them, safeguarding dollars not just for deserving winners, but for the public projects that are funded by lottery ticket sales. I have no doubt that if not for the reforms sparked

by our investigation, people would have lost confidence in the lottery and crucial projects like schools, roads and hospitals would have suffered. Instead, lottery revenues are rising – a clear sign that the public trust is alive and well.

Another of our SORT investigations that involved large sums of money was our probe of the long-ignored and grossly underfunded body that compensates victims of violent crime in Ontario, called the Criminal Injuries Compensation Board (CICB). Following the publication of our report, *Adding Insult to Injury*, the CICB was given an immediate infusion of \$20 million and, in 2008 it received \$100 million to help clear its enormous case backlog. But this was not new money that the government had to raise as a result of our report. Rather, as our investigation pointed out, it was money that had been there all along, languishing in something the government called the “Victim Justice Fund” (money raised through surcharges on fines). We simply recommended this be used as intended – to help victims of crime, instead of forcing them to wait for years in a brutally bureaucratic system.

In our 2005 report *Between a Rock and a Hard Place*, we revealed a scandal that had great moral costs as well as financial ones: Parents of severely disabled children who could not get funds to have them cared for in a residential facility were forced to surrender them to children’s aid societies so that the state would provide the required care. The children were getting the care they needed, but at the terrible price of their parents having to pose as unfit. The solution we offered – finding the money outside of the child protection system and ending this practice – cost no more than what was already being spent, but it spared untold emotional trauma for the families. Moreover, the cost of pointless child protection applications was saved. The value of this investigation is still being demonstrated, as we have resolved several new complaints about this practice again this year, by diligently following up on our previous work.

In 2008, our report *A Test of Wills* dealt head-on with government waste by reviewing how the province wound up spending \$1.2 million to pay the runaway legal bills of a murderer and self-proclaimed millionaire who had given away his assets in order to get legal aid. Not only did that report inspire the development of systems and practices that will reduce the risk that this will ever happen again, it also led to unprecedented efforts by the government to potentially recoup the money from both the killer and his family, and any of his lawyers who over-billed.

Often, when government spends money in response to our reports, it saves money in the long run. That is unequivocally so in the case of infant screening. In our 2005 report *The Right to Be Impatient*, we recommended that Ontario increase its testing of newborn babies for preventable disorders. It has since gone from being one of the worst in the world – doing only two tests – to one of the best, testing every baby for 29 conditions. While there are obviously costs associated with this kind of upgrade, over time it will actually reduce health costs. Think about it – under the previous, antiquated program, 50 children a year were dying or becoming severely disabled, requiring exceptional and costly medical measures. Those expenses will be saved. Add to

that, at the time of our investigation, the Chief Coroner was about to call an inquest into the issue – which could have cost hundreds of thousands, if not millions, of dollars. SORT’s investigation was done in less than 40 days.

We have had many similar cases in the health-care field, an area traditionally associated with out-of-control costs. In an investigation we reported in last year’s Annual Report, we persuaded the government to provide oxygen saturation monitors for children with severe respiratory problems to use at home. The cost of providing the machines was far outweighed by the savings realized by not keeping these children in hospital. Likewise, our 2007 investigation into the lack of timely mental health services for the traumatized children of Canadian soldiers serving in Afghanistan, which resulted in a quick cash infusion to pay for treatment for these children, will undoubtedly mean social and health care savings in the future.

Beyond all this, there are indirect savings – such as the litigation costs that we save by resolving disputes informally, and by identifying systemic areas of potential conflict and helping to fix them before they create more casualties. Every case that enters the courts or the administrative tribunal system costs the province significant money. How many of the complaints we resolved would have ended up in litigation had we not gotten involved?

The Swedish Parliament’s 200-year-old legacy, the ombudsman, may well have parts that don’t appear to be destined to fit together, just like the platypus. On the one hand, we have intrusive investigative powers but, on the other, no power to implement our recommendations. However, these disparate pieces are brought into harmony through the use of a specialized team like SORT. The SORT model is unequalled in its ability to root out systemic maladministration and incite better, fairer and more responsive public administration, while at the same time encouraging government officials to be more responsible money managers. The modest investment in recruiting and training investigators and dedicating them to gathering solid evidence on complex issues is more than repaid in benefits to the public. When both the objectives of enhanced public service and financial stewardship are met, the ombudsman can achieve the pinnacle of moral suasion.

It is, I believe, a model that can serve us well in the challenging times ahead, as we begin a third century of ombudsmanry. Combining 200 years of tried-and-true methods of helping our citizens with state-of-the-art investigative techniques, it allows us to change both ourselves and our governments for the better – and exchange our platypus image for something a bit sleeker: The effective, modern watchdogs we all aspire to be.