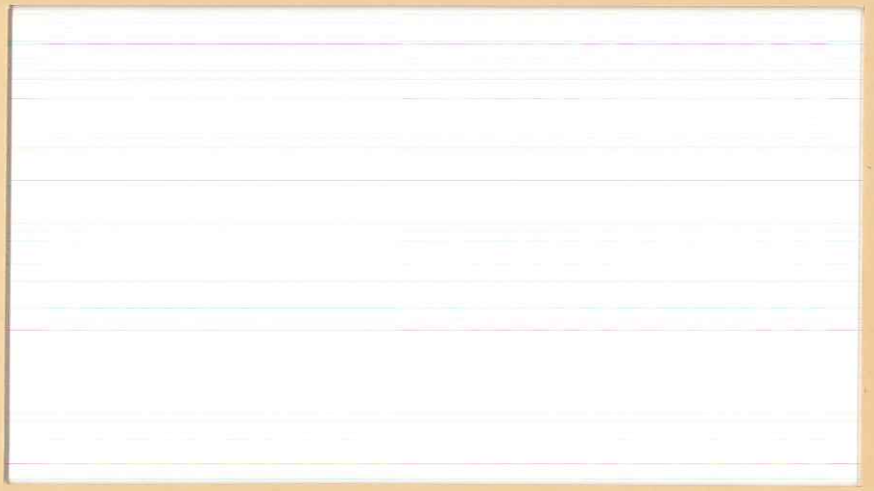
S. Anderson



INTERNATIONAL OMBUDSMAN INSTITUTE

CANADA'S LANGUAGE OMBUDSMAN: AN ASSESSMENT OF THE INNOVATIVE CHARACTERISTICS OF THE OFFICE

BY

Yvan Gagnon

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CANADA'S LANGUAGE OMBUDSMAN: AN ASSESSMENT OF THE INNOVATIVE CHARACTERISTICS OF THE OFFICE

There can be no doubt that the ombudsman idea is not only promoted by important organizations, such as the International Bar Association, the American Bar Association, and the Council of Europe,[1] but also that it is slowly gaining worldwide acceptance.[2]

There are many good reasons for promoting the institution of ombudsmen,[3] and this paper intends to reinforce the usefulness of this institution to promote justice for individual citizens who have suffered, or believe they have suffered, injustice from the officials who govern.

A second and perhaps more important goal of this paper is to show that the Canadian Office of the Commissioner of Official Languages has something special about it, and that this peculiarity does not detract from its being a genuine ombudsman office but actually enhances the positive reasons for the establishment of such ombudsman offices.

1. The Nature of the Office

Section 25 of the Official Languages Act stipulates that

> it is the duty of the Commissioner to take all actions and measures within his authority with a view to ensuring recognition of the status of each of the official languages and compliance with the spirit and intent of this Act in the

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1 See Bernard Frank, "The Ombudsman - Revisited," International Bar Journal, May 1975, pp. 48-60, especially pages 50, 52, and 53 for details on the three organizations mentioned here.

2 Mr. Frank concludes the article just cited with the following statement: "A growing list of countries, provinces, states and local governments adopting the ombudsman system indicates that its day has come." (p. 60). For such a list see also Bernard Frank, "Ombudsman Survey, July 1, 1974-June 30, 1975," by the Ombudsman Committee of the International Bar Association and the Ombudsman Committee of the Section of Administrative Laws of the American Bar Association. Mr. Frank is chairman of both these committees.

3 In B. Frank, op.cit., pp. 55, 57, repeated in Appendix A.

> administration of the affairs of the institutions of the Parliament and Government of Canada, and, for that purpose, to conduct and carry out investigations either on his own initiative or pursuant to any complaint made to him and to report and make recommendations with respect thereto as provided in this Act. (Section 25).

Using this description of his mandate in his Annual Reports, or in describing his role to audiences or to the news media, the COL often calls himself an ombudsman, or a linguistic ombudsman. However, to confirm such assertions, it is not sufficient to verify the coincidence of the roles and functions of this commissioner with some satisfactory definition of the nature, roles and functions of ombudsmen. It is only by comparison with other ombudsman offices that the true nature of the commissioner's office can be understood. Let us then try to determine whether the Commissioner is technically correct when he calls himself an ombudsman.

The first ombudsman, established by the Swedish Parliament in 1809, was appointed "to receive complaints from the public about alleged bureaucratic mistakes, abuses, or incompetence."[4] However, even if the most important role of ombudsmen is still to handle complaints, it cannot be flatly asserted that any complaint-handling officer is ipso facto an ombudsman. There are many other characteristics and differences among complaint-handling officers which make each particular type more or less suited to perform different roles.

Professor Alan Wyner asserts that "an executive ombudsman is a centralized complaint-handling officer who has been appointed to office and who serves at the pleasure of an elected or appointed chief executive."[5] He

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4 Alan J. Wyner, "Executive Ombudsmen and Criticisms of Contemporary American Public Bureaucracy," in Alan J. Wyner, (ed.), Executive Ombudsmen in the United States, Institute of Governmental Studies, University of California, Berkeley, 1973, p. 6.

5 Alan J. Wyner, op. cit., p. 10.

also notes that "appointment by the chief executive stands as the most prominent difference between the executive ombudsman and the classical model."[6]

From these basic differences, other differences and consequences follow. Professors Anderson and Wyner go on to show that the two types of ombudsmen do not look at quite the same cases and do not use the same procedures in their inquiries and their follow-up procedures and show that, in general, the executive ombudsman is much less formal in his role than the classical ombudsman. Even if nothing yet indicates that the Commissioner of Official Languages is an ombudsman per se, it is quite easy to show that the Commissioner is more akin to the classical than to the executive type of ombudsman. Since "the Commissioner shall be appointed by resolution of the Senate and the House of Commons"[7] and, "subject to this section, the Commissioner holds office during good behaviour for a term of seven years, but may be removed by the Governor in Council at any time on address of the Senate and House of Commons,"[8] it is obvious that the Commissioner is not appointed by, and does not serve at the pleasure of, an elected or appointed chief executive. Therefore the Commissioner is not an executive ombudsman, the Commissioner needs to have the essential characteristics of the office. Such characteristics, again according to Professor Anderson, require that the person filling the position be "independent, impartial, expert in government, universally accessible and empowered only to recommend and to publicize."[9] It would seem that the Commissioner does

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6 Ibid., p. 11. See also Stanley V. Anderson, "Comparing Classical and Executive Ombudsmen," in Alan J. Wyner, (ed.), op. cit., p. 307.

7 Official Languages Act, Section 19(2)

8 Ibid., Section 19(3)

9 Stanley V. Anderson, Ombudsman Papers: American Experience and Proposals. Institute of Governmental Studies, University of California, Berkeley, 1969, p. 3.

indeed have all these characteristics and consequently any further argument on this matter could be readily dismissed by declaring the Commissioner to be a classical ombudsman. But these characteristics, although necessary, are not sufficient.

Aside from the essential characteristics, there are many criteria which have been used to compare the different ombudsmen. For example, Professor Anderson uses twenty-three such criteria,[10] while Kent Weeks uses twenty-two similar or identical ones.[11] Using all these criteria, we could compare the Commissioner's Office with the existing Canadian Provincial Ombudsmen and with many others used in Kent Weeks' comparison. However, the lengthy analysis needed to compare all these criteria will not be necessary, because in most cases the position of the Commissioner is very similar to that of other ombudsmen.

This is true with respect to the following criteria: method of appointment, period in office and time of removal, salary, delegation of powers, invocation of jurisdiction, advisory opinion on jurisdiction, optional rejection of jurisdiction, investigatory procedures, basis for decision, enforcement, reports, the press coverage and the attitude of the civil service when the post was created.

Some minor differences can be indicated with respect to the Commissioner's title, the size of the population served by him, and the staff at his disposal. However, an important distinction must be made with respect to his scope of jurisdiction. Any ombudsman's scope of jurisdiction is usually commensurate

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10 Stanley V. Anderson, Canadian Ombudsman Proposals. Institute of Government Studies, University of California, Berkeley, 1966, pp. 38-65.

11 Kent M. Weeks, "The Ombudsmen: Comparative Analysis of Ten Civil Ombudsmen Offices," in S.V. Anderson, Ombudsman Papers: American Experience and Proposals, op.cit., pp. 339-376.

with the jurisdiction of the unit of government, which creates his position, and extends over most of the agencies of that government, with a few exceptions which are expressly stipulated in each Act passed in any country which creates ombudsmen.[12] The scope of jurisdiction in the sense of the number of governmental agencies over which the ombudsman can exert his influence is the criterion used by both Stanley Anderson and Kent Weeks in their comparison of different ombudsmen. In this sense of the criterion of the scope of jurisdiction, the jurisdiction of the COL is comparable and compatible with the jurisdiction of most other ombudsmen.

In the further respect of jurisdiction over local or municipal governments, if we use Anderson's fourteenth and Weeks' fifteenth criteria for comparison, the Commissioner, the British Ombudsman, and the provincial ombudsmen in Canada have no such jurisdiction.[13] Therefore the Commissioner's position is not unique and thus not completely different with respect to this criterion. The same conclusion could be reached if we analyze his jurisdiction over the courts and the military, two other criteria used by Anderson and Weeks. In summary then, the Commissioner has a vast scope of jurisdiction over all agencies, including the courts and military, but not over the lower levels of government, and there is no significant difference between the Commissioner and other ombudsmen with respect to this aspect of the scope of jurisdiction.

However, the scope of jurisdiction of an ombudsman cannot be limited solely to the different administrative or juridical divisions over which a

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12 The New Zealand Act is the only one which lists all the agencies over which the ombudsman has jurisdiction, instead of stipulating only the exceptions.

13 But the ombudsmen of Finland and Hawaii, U.S.A., have jurisdiction over all levels of local government, and those of Denmark, New Zealand, Norway, and Sweden have acquired some jurisdiction over some lower levels of government.

government has a legal authority. If this kind of limitation over the scope of jurisdiction is the only kind to have been considered so far by both Professor Anderson and Kent Weeks, it is because they had no reason to consider any other aspects. All the ombudsmen they have studied show some difference with respect to the agencies over which they can exert their influence, but none of the limitations deals with the subject matter over which the ombudsmen have jurisdiction. In this respect, i.e., the subject matter of jurisdiction as opposed to the agencies concerned, the position of the Commissioner is totally different because it is very limited. In other words, and this is a very peculiar situation because the Commissioner can deal only with matters directly related to the Official Languages of Canada, his scope of jurisdiction is not limited vis-a-vis the agencies he may deal with; but his scope of jurisdiction is limited to one subject matter, i.e., languages, while most other ombudsmen are not limited at all with respect to subject matter. This kind of limitation which affects the scope of jurisdiction of the Commissioner is important enough to warrant a major change in the categorization of ombudsmanship.

The distinction which is made between the classical ombudsman (including the departmental ombudsmen, such as the military ones) and the executive ombudsman is not sufficient to account for the kind of work performed by the Commissioner. His subject-matter jurisdiction is narrower than that of either the classical, the executive or even the departmental ombudsmen, while his agency jurisdiction is broader than that of a departmental ombudsman. In the light of these distinctions, it will therefore be convenient for us to describe as monojurisdictional any ombudsman whose jurisdiction is limited to a specific subject-matter.

The term "monojurisdictional" seems heuristic in this case, but most

observers[14] also seem to find it awkward, aside from the fact that it is debatable that a new categorization of ombudsman is necessary every time some minor divergence from the classical form is established and eventually analyzed. The problem here is to determine how minor or serious an innovation we have from the classical type so that a new categorization becomes necessary. It would seem that the seriousness of the consequences of such innovations for the office of ombudsman should be an indicator as to whether a new category is warranted. Let us then continue our analysis to see some of the consequences of this monojurisdictional characteristic.

It has been argued that the Commissioner does have independence, impartiality, expertise in government (but limited to language matters), universal accessibility and the power only to recommend and to publicize. But aside from these essential characteristics, an ombudsman must also perform the three following related functions: "First, he investigates citizens' complaints of grievance against specific agency action. Second, he contributes generally to efficient and fair governmental administration. Third, he assists the legislature in carrying out its supervisory role vis-a-vis the executive branch of government."[15]

Taking into consideration the limitation on his scope of jurisdiction, it can be asserted without further extensive substantiation that the Commissioner does perform these related functions through his Complaints and Special Studies Services.[16] There is, however, one more important point to clarify with respect

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14 At least to those who attended the session on this topic at the CPSA meeting in Fredericton (June 1977).

15 See Stanley Anderson, Canadian Ombudsmen Proposals, op.cit., p. 65.

16 This point and many others are analysed in detail in my dissertation entitled "The Commissioner of Official Languages, and Bilingualism in Canada," UCSB, 1975. It is available from the Parliamentary Library in Ottawa, the Massey Library of the Royal Military College of Canada, Kingston, Ontario, and the library of the University of California at Santa Barbara, California.

to the third function, which is his supervisory role vis-a-vis the executive branch of government. In other words, what is the Commissioner's own interpretation of his duty "to take all actions and measures within his authority with a view to ensuring recognition of the status of each of the official languages and compliance with the spirit and intent of this Act" (Section 25)? Does he simply supervise or does he directly implement the law? To implement is not the role of an ombudsman; therefore where does the Commissioner stand in practice, with respect to this function?

First, the Commissioner does see himself as a promoter of the Official Languages Act (OLA). He was not surprised when Sir Alan Marre, the British Ombudsman, labelled him as a "promoter" when they met in the summer of 1973.[17] The German Military Ombudsman also attested to this specific role for the Canadian Commissioner, and Keith Spicer admitted that a very important part of his role was indeed to promote the Official Languages Act.

When asked why his staff was so numerous in comparison with the staff of other ombudsmen, Mr. Spicer noted that "to accellerate the linguistic reform" the Special Studies Service needs more staff than does a classical ombudsman. According to Mr. Spicer, a classical ombudsman cannot organize a general reform for an entire administration, but since his scope of jurisdiction is so limited and therefore concentrated, the Commissioner thinks that he is in a position to promote such a reform with respect to language matters. In fact, this capacity to promote an Act is the greatest advantage that a monojurisdictional ombudsman has over a classical one. It is certainly a very good reason why, in some cases and under the proper circumstances, a monojurisdictional ombudsman should be preferred to the classical type; but this excellent reason is not necessarily

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17 This point and the two others to follow came from the first Commissioner, Keith Spicer, in a private interview held in his office in Ottawa on September 4th, 1973.

sufficient to prevent the parallel establishment of a classical ombudsman for Canada, who would leave language matters to the Commissioner.

Therefore, because he sees himself as a promoter of the Official Languages Act who wants to accelerate the reform and to try to have the Act implemented within his first term in office, it is evident that the Commissioner views his role as being more than a supervisory one with respect to language matters in Canada. He does more than supervise the administration, or advise Parliament, or initiate investigation; the Commissioner actually tries to speed up the reform by using all the means he can find. In this sense, the Commissioner's role somewhat exceeds the normal functions of other ombudsmen. Even to promote an Act is more than an ombudsman can normally do, and it is only because of his limited scope of jurisdiction that the Commissioner can play this reformatory role.

On the other hand, this somewhat extended role for the Commissioner does not give him any capacity actually to implement the Official Languages Act. There is still a margin between promoting strongly and implementing, just as there is a margin between supervising and promoting an Act. The Commissioner does not tell the departments what to do; each one must do what is necessary to implement the Act. It is only if he receives a complaint or if he finds that the department is not respecting the intent of the Act that the Commissioner will make recommendations, but in all cases the onus of taking the first step is with the departments concerned, not with the Commissioner. In other words, the Commissioner cannot directly implement the Official Languages Act because he has only the power to recommend. Consequently, in the light of the previous distinctions, and for the two following reasons, the Commissioner is both a linguistic ombudsman for Canada and a promoter of a specific Act.

First, the Commissioner has a limited scope of jurisdiction with respect to a specific subject matter, i.e., language. This is not a unique case, but it represents a different kind of limitation imposed upon an ombudsman. However, since the Commissioner, to a considerable degree, both possesses the main characteristics and performs the normal functions of any other ombudsman, he can still be considered an ombudsman.

Second, because of the limitation in his scope of jurisdiction, the Commissioner can and does exceed the normal functions of other ombudsmen in the sense that he can promote a specific Act. But since the Commissioner can only recommend and cannot implement the Act, he is still within the realm of ombudsmanship, separated from the executive branch of government but assisting the legislature in carrying out its supervisory role vis-a-vis this executive, and contributing generally to efficient and fair governmental administration. Therefore, the Commissioner cannot call himself an ombudsman in the executive or in the classical sense; this would be a misleading appellation since he cannot deal with the vast majority of the complaints that such general-competence ombudsmen would have to deal with. However, the Commissioner could call himself a linguistic ombudsman because he has the attributes and functions of an ombudsman, but deals only with linguistic matters. And finally, to distinguish this new category, we have proposed the term "monojurisdictional" ombudsman to identify the ombudsmen whose scope of jurisdiction is limited to one subject matter as specified in one specific law. A better word than monojurisdictional is perhaps still to be found, but a significantly new category exists and, especially if this case is not to remain unique, this new category must be identified.

2. Evaluation of the Office of the Commissioner

Having identified a new type of ombudsman who can not only protect the citizens, but who can also promote the principles of justice and equality as they are specifically spelled out in a particular law of a state, let us now try to evaluate the usefulness of such an office. This evaluation should also allow us to advocate its replication or abolition.

The main difficulty in evaluating this office is to choose a standard. Aside from the usual epistemological and methodological problems normally encountered in choosing and using any criteria for evaluation in the social sciences, there are two problems which should be pointed out in this particular study of the Office of the Commissioner of Official Languages.

The first problem is that this Office is a new kind of ombudsman. Keith Spicer himself has acknowledged that he had no model to copy from when he organized his Office in 1970, and we also have no identical institution to use as a standard for comparison or evaluation.

We can, once again, look at the duties of the Commissioner as described in the OLA and try to evaluate his performance of these duties. But this approach leads to the second problem, which comes from the vagueness of the OLA. The Act stipulates that

> it is the duty of the Commissioner to take all actions and measures within his authority with a view to ensuring recognition of the status of each of the official languages and compliance with the spirit and intent of this Act in the administration of the affairs of the institutions of the Parliament and Government of Canada and, for that purpose, to conduct and carry out investigations either on his own initiative or pursuant to any complaint made to him and to report and make recommendations with respect thereto as provided in this Act. (Section 25).

But who is to determine the "spirit" and "intent" of the Act? The Commissioner certainly had to do so. He did determine his attitude and it seems that he was consistent in his approach; but was his understanding of this "spirit and intent"

of the law the correct interpretation? In fact, too many assumptions are possible on the part of the Commissioner, from my point of view as the observer and from your point of view as the reader, for us ever to agree on a precise standard to be used in evaluating the Office of the Commissioner. However, in this case, it must be known that the observer tends to be in general agreement with the Commissioner's own evaluation of his duties as he has explained them in his annual reports. And furthermore, it must be noted that the Commissioner's activities were never seriously challenged in a court of law.

The difficulty of choosing a standard of evaluation is not insurmountable, but it could lead to a broader debate about the purposes of the OLA itself, a debate which is not to be undertaken in this paper. One way around these problems is simply to list the advantages and disadvantages of this new institution which was set up with a view "to ensuring recognition of the status of each of the official languages . . . in the administration of the affairs of the institutions of the Parliament and Government of Canada. . ." (Section 25).

It can be asserted that since the Commissioner possesses most of the attributes of a classical ombudsman, the establishment of his office offers the same advantages for the citizens and the public servants as the establishment of a classical ombudsman. Like other complaint-handling officers, the Commissioner strives to achieve equity and responsiveness in the administration of one specific policy.[18] The Commissioner is also apolitical, in the sense that he is independent of party politics and other political pressures. He does not have to bargain his views or expenses with any other departments and he is not responsible to a minister, but to the whole of both Houses.

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18 See Wyner, A., op.cit., p. 5.

Because of the freedom of action that he enjoys, one of the better analogies used by some public servants to describe most of the roles of the Commissioner is to compare him with a multi-level and multi-purpose safety valve. For example, without the Commissioner, where could the public servants, the members of the armed forces or the ordinary citizens direct their complaints about the delicate problems which arise in the interpretation of the OLA? The number and the nature of the complaints received by the Commissioner are a clear indication of the number of people who might have been frustrated, and of the amount of time that could have been wasted by members of Parliament and others, if the Commissioner had not been there to do the job.

Another interesting suggestion is that since it is the duty of the Commissioner to report to Parliament any non-compliance with the OLA, he may be regarded as the ultimate safety mechanism to prevent any political party coming to power in Canada from subverting the implementation of the OLA. Mr. Bruce Keith of the Secretary of State Department speculated that one of the main reasons for the Liberal Government to have such an independent and invulnerable Commissioner was precisely to ensure that, in future, nobody could tell the Treasury Board or any other department to ignore the OLA or to delay its implementation. In fact, inquiries made of the Trudeau Cabinet on the author's behalf have confirmed this hypothesis.

Also, because of the important effects that the Commissioner's reports can have on the implementation of the Act, a government could try to influence the Commissioner in his report. As far as we know, such attempts have not been made and it must be remembered that the Commissioner has enough independence not to comply with such attempts and that he could even publicize them.

Aside from protecting the languages rights of the citizens, as they

are set out in the OLA, the Commissioner is also in an excellent position, as described in the first part of this paper, to promote the implementation of the OLA. This advantage is unique among ombudsmen. More than any other kind of ombudsman, a monojurisdictional ombudsman, created by a specific law which is designed to implement a very precise policy, has more time, more knowledge, more expertise and therefore more authority (not necessarily in the legal sense, but in a political sense, since his authority is derived from both Houses) to oversee the implementation of this Act. Because of his function as an auditor-general for a specific law, a monojurisdictional ombudsman can be an asset in the implementation of an important policy.

Having acknowledged the fact that, as an ombudsman, the monojurisdictional type can only make recommendations, and that he cannot directly implement a law, it is still a very fair question to ask what has been the usefulness of the Office of the Commissioner of Official Languages in contributing to the implementation of the OLA. Looking at his annual reports, the number of complaints he has investigated, the number of recommendations he has made and the follow-up procedures he has instituted to make sure that the deadlines for implementation of his recommendations are respected, one can only conclude that the Commissioner's role has been very positive.[19] He seems to have very significantly accelerated the linguistic reform in the Canadian bureaucracy, and, in the process of doing so, the activities of his Office seem to have had positive influences despite some irritating results. But how can one support such conclusions? Since the contribution to the implementation of a specific policy

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19 The Fifth Annual Report, 1975, pp. 40-50, reveals that the special studies service has undertaken 71 distinct studies and made some 2500 recommendations to 41 institutions of the federal government since it was set up in 1971 to play the role of an auditor with respect to the implementation of the OLA. The other service, which handles complaints, has opened 4,430 files since its establishment; 3,981 of these have been dealt with and 449 were still active on January 1, 1976.

was an advantage more specifically akin to a monojurisdictional ombudsman, a better evaluation of this particular asset had to be sought.

To get some information about this specific question, it was decided that a fairly large sample of knowledgeable people who would have had to deal directly with, or even directly to implement the OLA, should be asked to evaluate the usefulness of the Office of the Commissioner of Official Languages in contributing to the implementation of the OLA. This question, with a letter of explanation, was sent to 145 deputy or assistant deputy ministers, or equivalent ranks, of all the departments of the government of Canada and to some other corporations affected by the OLA. They were asked to rate the usefulness of the Commissioner on a scale ranging from -5, completely harmful, to +5, completely indispensable (see Appendix B), and to return their evaluation, anonymously if they so desired, in a pre-addressed envelope. The question was sent on February 15, 1977, and most of the answers (approximately 80%) were received before the Commissioner announced his resignation a week and a half later.

The results of this inquiry are as follows: 87 replies were received, which constitutes 60% of our total sample. Of these 87 answers, 78 were usable because they indicated a number on the given scale. Perhaps the most striking result is that not one answer was in the negative range, nor even in the neutral or no-effect zone (0). The positive results were the following: 10 people (13%) thought that the Office of the Commissioner had some positive influence (+1); 16 (20%) declared his Office to be quite useful (+2); 27 (35%) said very useful (+3); 12 (16%) evaluated the Office as invaluable (+4); and 12 (16%) others said it was completely indispensable (+5). One individual gave an evaluation of 3.4, which gives an average of +3.003 for these 78 answers. According to the wording

on the scale, this means that the higher-ranking public servants think that the Office of the Commissioner of Official Languages is "very useful" in contributing to the implementation of the OLA. But what else can we conclude from this survey?

Comments on the survey have already been received from those who took part in it. Eight answers were refusals to answer the question because, as senior public servants, "it would be inappropriate to comply with your request, even on an anonymous basis, because an assessment would not be based on any first-hand experiences," or because, "even if I were in a position to respond to your survey, I doubt that I could conscientiously attempt to reduce my views on such a complex and significant question to a single numerical rating on a scale."

The total absence of negative answers does not necessarily mean that no one had negative feelings about the usefulness of the Commissioner. It may simply mean that higher-ranking public servants are very loyal to the legislative branch, even under anonymous circumstances. However, it would be unwarranted to attribute negative feelings to all those who did not return our questionnaire.

Also, many answers were accompanied by a letter, one of them probably from an official more versed in surveys than I am who reworded all my scale, but most others simply explaining their position. One assessment which I would qualify as being typical because of its coincidence with the overall average of +3 went as follows:

> as you can obviously gather, my office transacts with the Office of the Commissioner of Official Languages on an on-going and frequent basis. These negotiations therefore put me in a suitable position to answer your query. At the same time, you will, I am sure, realize that it is most difficult for me to make a snap judgement on the usefulness of the COL's office in his role in support of the Official Languages Act. In some areas, his impact has been invaluable and, in others, quite useful. Overall, I would say that because of his presence and the subtle pressure he exerts on Federal Government Agencies and this Department in particular (Transport Canada) the implementation of the OLA has been accelerated. This, I hope, will explain why we find his presence "very useful."

Another important consideration is whether we asked the right people. To get a valid assessment, we had to ask people who know about the OLA and about the duties of the Commissioner. One of the main reasons why there was quite a backlash against B and B in Canada is most likely because most citizens never understood what the law was about, let alone knowing the duties of the Commissioner. We thought that the average citizen could not have answered this very specific question about the Commissioner. Some Members of Parliament may have been very familiar with the law and its intent, but what about its implementation in practice in the bureaucracy of the Public Service? Therefore, we were left with those directly affected by the policy, and we took a chance on having a significant number of answers by consulting only the top of the hierarchical pyramid. We were hoping for a 30% response: we received twice that percentage. This percentage in itself and some of the written comments indicated a strong interest in the question asked, and we feel that we have a fairly good assessment of the usefulness of the Commissioner, at least from the concerned senior public servants.

Finally, what weight can be attributed to a +3 average answer? We find this answer to be very significant. There can be no doubt whatsoever on the usefulness of this first monojurisdictional ombudsman. Without this institution, the implementation of the OLA by all the institutions of the Government of Canada would certainly not have occurred with the same haste. The implementation of the OlA would probably have reached the stage that the acceptance of the reality of the Parti-Quebecois by most English-Canadians had achieved before the November 15th election in Quebec. Of course, we cannot determine exactly what this level of acceptance was, nor can we really compare the implementation of the OLA in the federal government with the overall attitudes of the Canadian citizens about the language issue in Canada. We know that we cannot get everyone to accept any specific conclusion based on the results of our questionnaire, but after

overseeing the operation of the Office of the Commissioner since its formation in 1970, we dare assert that the institution of this new kind of ombudsman had a very positive effect on the implementation of an extremely important policy for all Canadians. In this case, the innovation taken by the federal government in instituting a monojurisdictional ombudsman has proved to be very valuable and useful.

The two minor possible disadvantages of this innovation, that is, its cost and potential delay in the creation of a normal classical ombudsman for Canada, are certainly compensated by the numerous advantages described in this paper.

Now, since we think that such an innovation turned out to be a really positive asset in contributing to the implementation of the principle of justice and equality as embodied in the OLA, why should we not propose the duplication of this new kind of institution for other important policies?

3. Potential duplication of this new kind of ombudsman?

The previous survey, despite its various shortcomings, coincides with our earlier findings from personal researches; this new kind of ombudsman has been a very useful tool for the implementation of a very delicate and important policy in Canada. Can this tool fit any other policy, or is it the nature of the OLA that made this ombudsman such a good tool, but for only one kind of application?

It must be stressed, once more, that a monojurisdictional ombudsman's jurisdiction is limited to only one subject matter. This seems to be the main reason for his success with the OLA. The nature of the office and its use of informal diplomacy coupled with low-key persuasion[20] are now well enough known

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20 First Annual Report, p. 5.

to be duplicated in other instances. But are there any reasons to believe that, because of the nature of the OLA, the same kind of ombudsman could not have the same success for any other policy?

To answer this question, one should study and compare the OLA with other policies in order to determine which ones are most amenable to the good offices of an ombudsman.

It was my understanding, for at least a couple of years, that a good interpretation and handling of Theodore Lowi's types of policies could yield some light on this problem. It seems quite evident that, as a policy, the OLA did not fit the first three of Lowi's categories, the distributive, the constituent or the regulatory types of policies. Yet the OLA does fit the following description of the redistributive type:

> redistributive policies are like regulatory policies in the sense that relations among broad categories of private individuals are involved and, hence, individual decisions must be interrelated. But on all other counts there are great differences in the nature of the impact. The categories of impact are much broader, approaching social classes.[21]

> Issues that involve redistribution cut closer than any other along class lines and activate interests in what are roughly class terms.[22]

Lowi finally postulates that:

> In redistribution, there will never be more than two sides and the sides are clear, stable and consistent. Negotiation is possible, but only for the purpose of strengthening or softening the impact of redistribution. And there is probably one elite for each side.[23]

Especially from this last statement, there can be little doubt that the Canadian

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21 Lowi, T., "Distribution, Regulation, Redistribution: The Functions of Government," in R.B. Ripley (ed.), Public Policies and Their Politics, New York: W.W. Norton and Co., p. 28.

22 Ibid., p. 36.

23 Ibid., p. 38.

policy with respect to languages fits the redistributive type best. The nature of the two groups involved, their own elites, the kind of issue and the level at which the decision had to be taken all coincide quite well with Lowi's formulation of this type of policy.

Peter Aucoin's interpretation[24] of this redistributive type gives even more credence to our inclusion of the OLA in this type of policy. However, Bruce Doern rightly suggests that "Lowi's typology has some weakness in that not all the categories are logically exclusive... . Because of this, certain empirical problems develop because the policy types are expressed in terms of 'relative' positions along a continuum and are expressed in phrases such as the directness or indirectness of coercion and in terms of the relative sizes of the objects of coercion (e.g. individuals, groups, classes)."[25]

Also, if the OLA fits the redistributive category in many respects, it would seem that the implicit rationality used in Lowi's categorization is of an economic kind. The example of the welfare state battle of the 1930s or of the large groups such as labour unions, corporations, business associations, large industries, bureaucracies and political parties, tend to illustrate this sort of economic concern. Yet the OLA is not primarily an economic issue. It is more akin to a human right debate. Economic classes exist in both language groups in Canada, but this economic aspect is not the primary source of the conflict. The debate is more along linguistic and cultural rights.

Consequently, even if the OLA can be classified as a redistributive

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24 P. Aucoin, "Theory and Research in the Study of Policy-Making" in G.B. Doern and P. Aucoin (eds.), The Structures of Policy-Making in Canada, Macmillan of Canada, 1971, p. 21.

25 B. Bruce Doern, "The Concept of Regulation and Regulatory Reform" in B. Doern and S. Wilson, (eds.), Issues in Canadian Public Policy, Macmillan of Canada, 1974, p. 14.

policy, it would now seem inappropriate simply to state that all redistributive policies would benefit from the services of a monojurisdictional ombudsman. This is because of the difficulty of classifying policies along Lowi's continuum, but in a much less important way,[26] because the OLA is not primarily an economic policy. Therefore in an attempt to reconstruct my logic-in-use, I would now tend to reverse my way of assessing what policies would best be served by a monojurisdictional ombudsman. Instead of trying to categorize the OLA solely on the basis of any theoretical framework, I would go back to the nature of this new kind of ombudsman and perhaps try to combine the two aspects, the theory and the subject matter. The key element in the nature of a monojurisdictional ombudsman is his limitation to one subject matter. Is it the nature of that subject matter which really explains why the Commissioner has been so useful? We can speculate quite extensively on this question, and trying to answer it leads us back to what we wanted to avoid in the first place, that is, linking the usefulness of the Commissioner to the nature of the OLA as opposed to linking it to a given theoretical kind of policy. I have no convincing answer to settle this issue.

Reasserting that the primary role of an ombudsman is to receive complaints from aggrieved persons against government agencies, officials and employees,[27] and acknowledging the first reason for having ombudsmen, which is that "the modern state has assumed an enormous multitude of functions as the result of social and welfare legislation - welfare, education, medical care, housing, and social security - affecting the lives and property of everyone," and for all the

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26 It is possible to distinguish between political and economic policies, but I do not wish to spell out this distinction since I consider this second reason as being quite secondary in the overall argument.

27 See definition of ombudsman, Appendix A.

other good reasons given in Appendix A, it would seem that an ombudsman should exist wherever an individual may be aggrieved by his government. Any policy which affects a citizen when it is implemented should be amenable to the good offices of an ombudsman. This, of course, is the rationale for instituting classical ombudsmen, but why a monojurisdictional kind?

The monojurisdictional kind should be instituted for the same reasons as the classical one, but the former kind would seem to be more adequate when a special expertise is needed and when the caseload would warrant such a use. The urgency of the needed reform could also be a significant factor. Since the number of laws directly affecting the citizens continues to increase, it may be that an ombudsman can no longer acquire a sufficient knowledge of all the departments and all the intricacies and the peculiarities of all the social and other measures, or laws, that he has to deal with.[28] Under such conditions, he could divide his office into sections, or the more important sectors could be singled out to a monojurisdictional ombudsman. In this case, to safeguard the independence that an ombudsman should have, it would seem that an independent monojurisdictional ombudsman would be preferable to a hierarchical sort, except perhaps for reporting purposes at the end of each year when a single combined report could suffice.

In the case of the OLA, the language issue was a major issue which would affect many public servants and citizens. The issue was also a delicate one, and it did attract enough complaints to warrant the institution of a special ombudsman. Even more important, because he was a specialized ombudsman, the Commissioner could become, and even had to become, an expert on this particular issue, and that expertise allowed him to promote the policy. This

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28 Especially if the incumbent does not long remain in office.

advantage is not found with the classical type. Accordingly, it would seem preferable to have many specialized (monojurisdictional) ombudsmen for all the important policies: that is, an expert ombudsman on each of such policies as housing, welfare, unemployment, etc., leaving the remaining, less controversial issues to an ombudsman no longer classical, but residual.

Therefore our analysis would indicate that a policy which is very controversial and which is most likely to attract many complaints should benefit from the good offices of a monojurisdictional ombudsman who can specialize in and become an expert on one specific issue and can, consequently, contribute, together with the government and the public, to the implementation of that specific policy. It may be added that the lack of a classical ombudsman in Canada probably militated in favour of this new type.

The reasons for having ombudsmen are so strong (especially reasons four and five in Appendix A) that the institution of ombudsmen is increasing rapidly. What this analysis of the Office of the COL has indicated is that in some very clear case, as with the language policy in Canada, it is very useful and advantageous to have a specialized or monojurisdictional ombudsman who deals with only one issue, one policy as expressed in one or a small set of laws. This precedent should not and will not prevent the institution of classical ombudsmen, but it certainly can be, or perhaps even must be, replicated in some other field of endeavor. The very positive results achieved by this new type of ombudsman clearly indicate that an institution which can, because of its innovative characteristics, not only protect but also promote justice and equality, should be replicated.

APPENDIX A

From Bernard Frank,
"The Ombudsman - Revisited,"
International Bar Journal,
May 1975, PP. 55-57.

OMBUDSMAN - A DEFINITION

It is unfortunate that the term "Ombudsman" has been and is increasingly used throughout the world to mean any complaint-handling mechanism whether governmental or non-governmental. This is particularly true in the United States. The International Bar Association Resolution makes it clear that the term should be applied only to those officials who come within the definition: An office provided for by the constitution or by action of the legislature or parliament and headed by an independent, high-level public official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies, officials, and employees or who acts on his own motion, and who has the power to investigate, recommend corrective action, and issue reports.

REASONS FOR AN OMBUDSMAN

The reasons given in 1971 remain the same today. These are reviewed again because they are necessary to an understanding of the Ombudsman concept.

1. The modern state has assumed an enormous multitude of functions as the result of social and welfare legislation - welfare, education, medical care, housing, and social security - affecting the lives and property of everyone. Extensive powers and discretion has been given to all types of boards, agencies, and departments, and in one party states, to party as well as government officials. The possibilities of friction between officials and the citizens have greatly increased. Protection of the individual is required against executive and administrative mistake and abuse of power. This is true in the industrial countries as well as in the developing countries.

2. The traditional concern for the guaranty of the legal rights of the individual has become even greater in modern society. The activities of public administration have become so comprehensive and the power of the bureaucracy so great that the legal status of the individual needs additional protection.

3. The legislature traditionally concerned with the observance of laws and rulings by public officials has at the same time extensively delegated powers to the administrative authorities. The Ombudsman can serve to aid the legislature in its function of supervising the executive and administrator.

4. Existing mechanisms for adjusting grievances are inadequate.

(a) The legislator (if he investigates complaints) is taken away from his main function of studying and passing legislation. His role in adjusting complaints is frequently limited because of lack of sufficient funds and staff and inability to have direct access to files and information. He must of necessity rely in most cases upon a reply from the agency or department he is investigating. Party consideration may affect his role in handling grievances.

In Parlimentary countries, the Parliamentary Question is inadequate. The investigation is by the department against whom the complaint has been made and the reply by the Minister is that of his department.

(b) The courts everywhere play a major role in the correction of abuses by government. But litigation is expensive, tension creating, protracted and slow moving and, in many cases, the citizen bears with injustice because he cannot afford or does not wish litigation. Courts may be precluded from hearing appeals either by law or by technicalities of form, time, standing, jurisdiction, nature and extent of interest, the character of the administrative act, and the wording of statutes. Review of administrative acts may be limited

by such questions as to whether the agency acted within its powers, was the ruling supported by substantial evidence or was the action reasonable and not arbitrary. Courts cannot conduct informal investigations and are limited by rules for the production of evidence. Courts are limited to basically adversary party proceedings.

(c) Administrative courts even using procedures as informal as possible still follow court-like adversary procedure. Legal representation is the normal rule. Such courts frequently move slowly and there is great delay in ensuring the execution of the judgment when delivered. Grievances must concern an administrative decision and must generally be brought before local courts or regional courts initially.

(d) The executive may frequently handle grievances but is in essence investigating himself and in great part relying on the reply from the agency or official against whom the complaint was made. Party affiliation of the person making the complaint may be important. Executive complaint agencies lack the essential characteristic of independence from the executive.

(e) Administrative agencies may have within their structure channels for complaint but such a system lacks impartiality. The appeal system, if one exists, is expensive and time consuming.

5. The Ombudsman gives the citizen an expert and impartial agent without personal cost to the complainant, without time delay, without the tension of adversary litigation, and without requirement of counsel or the intervention of those highly placed.

6. The presence of the Ombudsman has psychological value. His office gives the citizen confidence that there exists a watchdog for the people who will hold government accountable.

7. The Ombudsman can best be engrafted upon the political and legal systems of a country.

APPENDIX B

MY EVALUATION OF THE USEFULNESS OF THE OFFICE OF THE COMMISSIONER OF OFFICIAL LANGUAGES IN CONTRIBUTING TO THE IMPLEMENTATION OF THE OLA IS: IN NUMERICAL FORM: OR ON THE SCALE BELOW:

-5	Completely Harmful
-4	Very Detrimental
-3	Detrimental
-2	Not Useful At All
-1	Not Useful
0	No Effect
1	Some Positive Influence
2	Quite Useful
3	Very Useful
4	Invaluable
+5	Completely Indispensable