

THE ONTARIO LEGISLATURE'S  
SELECT COMMITTEE ON THE OMBUDSMAN  
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## THE ONTARIO LEGISLATURE'S SELECT COMMITTEE ON THE OMBUDSMAN

### A. PREFACE

This paper will consider the Ontario Legislature's Select Committee on the Ombudsman, first established on July 15, 1976. Although the focus of the paper will be Ontario's Select Committee, passing reference will also be made to parliamentary committees which perform similar functions in other jurisdictions, most notably Great Britain and Israel.

At the outset I ought to declare my interest in the subject. From the establishment of the Committee to the present, I have, from time to time, appeared on behalf of the Ombudsman as Counsel before the Committee. As such, I am intimately acquainted with the work of the Committee, and have my own views with respect to the Committee's strengths and weaknesses, and its advantages and disadvantages to the Office of the Ombudsman.

Although much has been written about the Ombudsman worldwide, there is, perhaps not unsurprisingly, a dearth of material dealing with parliamentary committees that consider the Ombudsman's work. In fact, I have been unable to find even one published book or article devoted entirely to the subject, although Gregory and Hutchisson have considered the British Committee in two chapters of their book.<sup>1</sup> Of necessity then, this paper relies heavily upon original source material, namely the comments contained in the nine Reports of the Select Committee on the Ombudsman that to date have been tabled in the Ontario Legislature.

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<sup>1</sup> Gregory, Roy. Hutchisson, Peter. *The Parliamentary Ombudsman: a study in the control of administrative action*. George Allen and Unwin, 1975. Since writing this paper, an article by Roy Gregory entitled "The Select Committee on the Parliamentary Commissioner for Administration, 1967-1980" has appeared in *Public Law*, Spring 1982.

## B. BACKGROUND

On June 27, 1975, Bill 86 entitled *An Act to provide for an Ombudsman to investigate Administrative Decisions and Acts of Officials of the Government of Ontario and its Agencies* received third reading in the Ontario Legislature. It was during debate of the Bill that mention was first made of the possibility of a legislative committee on the Ombudsman. Mr. Patrick Reid (Liberal/Labour – Rainy River) thought there should be a “mechanism so that we could debate the report of the Ombudsman, because in the final analysis it is going to be public opinion and the glare of publicity that may effect some change”.<sup>2</sup>

Mr. James Renwick, Q.C., MPP (NDP – Riverdale) who was ultimately to become the first Chairman of the Select Committee on the Ombudsman, felt strongly that the Ombudsman was restricted by the oath of office and secrecy to a formal relationship with the Assembly, and that members “would have little, if any opportunity to question him about any matters” since “he will not, except in accordance with section 13(2) disclose any information”.<sup>3</sup>

To meet this problem, Mr. Renwick proposed that the Ombudsman “report to a Select Committee of this Assembly and the Select Committee pick up where [he] leaves off”.<sup>4</sup> The Committee should “have the rules settled and promulgated for the time when the Ombudsman . . . takes over,” and then “continue to sit as a Select Committee indefinitely”. In this way, Mr. Renwick felt it could, “in consultation with the Ombudsman” carry through “on the criticism of whatever departments of Government . . . deserve that criticism for maladministration”.<sup>5</sup>

The then Attorney General, the Honourable John Clement, Q.C., agreed with these recommendations, and remarked that they could form the backbone of the creation of a

<sup>2</sup> Ontario Hansard, June 10, 1975, p. 2844.

<sup>3</sup> *Ibid.*, p. 2820.

*The Ombudsman Act*, R.S.O. 1980, c. 325 s. 13. The 1975 Act, which has not been amended, is now cited as the *Ombudsman Act*, R.S.O. 1980, c. 325.

13(1) Before commencing the duties of his office, the Ombudsman shall take an oath, to be administered by the Speaker of the Assembly, that he will faithfully and impartially exercise the functions of his office and that he will not, except in accordance with subsection 2, disclose any information received by him as Ombudsman.

(2) The Ombudsman may disclose in any report made by him under this Act such matters as in his opinion ought to be disclosed in order to establish grounds for his conclusions and recommendations.

<sup>4</sup> *Ibid.*, p. 2821.

<sup>5</sup> Ontario *Hansard* June 18, 1975, p. 3153.

Committee.

On October 29, 1975, a Select Committee on Guidelines for the Ombudsman was established under the chairmanship of Mr. Vernon Singer, Q.C., then Liberal Member of the Provincial Legislature for Downsview. It was Mr. Singer, who, in 1965, had introduced a private member's bill calling for the appointment of a Parliamentary Commissioner to investigate administrative decisions and acts of officials of the Government of Ontario and its agencies, and to define that Commissioner's powers and duties. Over the next nine years, Mr. Singer was to introduce nine similar bills calling for the appointment of a Parliamentary Commissioner or Ombudsman.

Section 16(1) of the *Ombudsman Act* provides that:

"the Assembly may make general rules for the guidance of the Ombudsman in the exercise of his functions under this Act."

The terms of reference of the Singer Committee were "to consider and set out general rules and guidelines for the guidance of the Ombudsman". Ontario's first Ombudsman, Arthur Maloney, Q.C., was not sworn in until October 30, 1975, the day following the establishment of the Select Committee on Guidelines. That Committee completed its work quickly, and issued a report on December 11, 1975.

The Singer Committee recommended certain minor rules be adopted, but deferred any delineation of general rules for the consideration of a permanent committee of the Legislature which it recommended be immediately established which would review:

- (a) the Ombudsman's Reports;
- (b) the Ombudsman's estimates; and
- (c) the actions, or the lack of action, taken by those persons referred to in the Ombudsman's Reports.

The Singer report was not acted upon by the Legislature.

### C. ESTABLISHMENT

Whether a permanent committee would have been established in the normal course of events is a moot point. On July 15, 1976, on a motion by the Premier, seconded by the then Leader of the Opposition, the predecessor of the current Select Committee on the Ombudsman was appointed "to review from time to time the Reports of the Ombudsman as they become available . . .". The striking of the Committee was

precipitated by the Ombudsman's presentation of a report to the Assembly pursuant to section 22(4) of the *Ombudsman Act*.<sup>6</sup>

*The Report of the Opinion of the Ombudsman, his Reasons Therefor and Recommendations Concerning the North Pickering Project to the Honourable Minister of Housing of Ontario* was highly critical of the methods employed by the Ministry of Housing and its agents in acquiring land in the North Pickering Project area. It marked the first time that the head of an Ontario governmental organization had declined to accept the Ombudsman's opinions and recommendations, and the first time that the Ombudsman had seen fit to proceed to the Premier and the Assembly. The seriousness of the matter clearly demanded evaluation and response by the Assembly, yet no vehicle existed for the detailed consideration of the Ombudsman's report and of the Ministry's response. A small committee was the obvious forum for the House to deal with the issue, and to serve generally as the Assembly's mechanism for maintaining communication with the Office of the Ombudsman.<sup>7</sup>

When Mr. Maloney's report dated June 22, 1976 was rejected by the then Minister of Housing, the Honourable John Rhodes, the Ombudsman sent a copy of his report to the Premier of the province, the Honourable William G. Davis, Q.C., urging him to accept the opinions and recommendations contained therein. Several meetings followed between the Premier and the Ombudsman in an attempt to find a common ground to deal with the report. During these discussions it was agreed between the Premier and Mr. Maloney that a Select Committee of the Legislature, representing all of the political parties in the same proportions as they were represented in the House, should be appointed to consider the Ombudsman's report and the Minister's response. The first Select Committee on the Ombudsman accordingly was comprised of eight members, whose party affiliations were as follows: three Conservatives, three New Democrats and two Liberals. Ontario then being in a minority government situation, the

<sup>6</sup> s. 22(4) If within a reasonable time after the report is made no action is taken which seems to the Ombudsman to be adequate and appropriate, the Ombudsman, in his discretion, after considering the comments, if any, made by or on behalf of any governmental organization affected, may send a copy of the report and recommendations to the Premier, and may thereafter make such report to the Assembly on the matter as he thinks fit.

<sup>7</sup> See an article on Ontario's Select Committee on the Ombudsman, by its present Clerk, Dr. Graham White, which, since writing this paper, I have learned is to be published in Volume 50, 1982, of *The Table*, being the Journal of the Society of the Clerks-at-the Table in Commonwealth Parliaments.

party leaders agreed that the Committee ought to be chaired by a member of the New Democrat opposition. As a result, James A. Renwick, Q.C., the respected Member of Provincial Parliament for Riverdale, was appointed first Committee chairman. Mr. Renwick had played a major role in the debates concerning Bill 86, when the Ombudsman Bill was in a Committee stage.

#### D. TERMS OF REFERENCE AND ORGANIZATION

The precise terms of the Order of Reference made by the Assembly on July 15, 1976 were as follows: Ordered,

"that, a Select Committee of this House be appointed to review from time to time the Reports of the Ombudsman as they become available, to report thereon to the Legislature, and to make such recommendations as the Committee deems appropriate; Reports and recommendations of the Committee to be placed on the Order Paper for discussion after presentation. And that the Select Committee have authority to sit during recesses and the interval between Sessions and have power to employ such staff as it deems necessary and to call for persons, papers and things and to examine witnesses under oath, and the Assembly doth command and compel the attendance before the said Select Committee of such persons and the production of such papers and things as the Committee may deem necessary for any of its proceedings and deliberations for which the Honourable the Speaker may issue his warrant or warrants."

The United Kingdom, the only other English-speaking jurisdiction with a committee expressly established to consider Ombudsman Reports, appointed its Select Committee on the Parliamentary Commissioner for Administration in November, 1967.<sup>8</sup> Its terms of reference were "... to examine the Reports laid before the House by the Parliamentary Commissioner for Administration, and matters in connection therewith", and subsequently to report thereon to the House of Commons.

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<sup>8</sup> It is important to note that all complaints to the Parliamentary Commissioner for Administration in Great Britain must be referred by a Member of Parliament. Other than the French Mediateur, the Parliamentary Commissioner for Administration in Northern Ireland and the Commissioners for Local Administration in England, Scotland and Wales, all other classical Ombudsman offices receive complaints directly from the complainant. Provisions in the enabling legislation for the Commissioners for Local Administration permit the Commissioners to act on complaints received 'directly' from the public under certain circumstances such as a member of the local authority has refused to refer the complaint to the Local Ombudsman or an unreasonable delay has passed since the request to refer the complaint to the Commissioner was tendered by the complainant. This important difference in the procedure of approaching the Ombudsman may account for the almost immediate appointment of the British Select Committee on the Parliamentary Commissioner for Administration. The role of the British Parliamentary Commissioner might be considered to be more intimately involved with the Parliament as a whole and with the role of individual Members of Parliament.

Another parliamentary committee, created solely to consider Ombudsman Reports, is the State Control Committee of the Israeli Knesset. It is within the State Comptroller Law itself that the duties of the Comptroller/Ombudsman vis-a-vis the Knesset and the State Control Committee are set forth, as well as the functions of the Committee. The pertinent sections are reproduced in their entirety:

Section 6 The Comptroller shall carry on his activities in contact with the State Control Committee of the Knesset and shall report to the Committee on his activities whenever he thinks fit or is required to do so by the Committee.

Section 46(a) The Commissioner shall each year submit to the Knesset, at the beginning of its session, a report on his activities, containing a general survey and an account of the handling of selected complaints;

Section 46(c) When a report has been tabled in the Knesset, the Committee shall consider it and shall submit to the Knesset its conclusions and proposals for approval.

The State Control Committee was first appointed early in 1974. Prior to that, functions connected with the State Comptroller had been performed by the Finance Committee of the Knesset, along with its many other tasks. While Ontario, Israel and the United Kingdom are the only jurisdictions with parliamentary committees appointed exclusively to consider Ombudsman Reports, there are many other jurisdictions worldwide, where existing committees with a broader mandate consider, among their many other tasks, the work of the Ombudsman. For example, the Justice Committee for Parliament of Denmark, which performs functions similar to the Standing Committee on Administration of Justice of Ontario, has the authority to receive and consider the annual report of the Ombudsman and to report thereon to Parliament. Similar roles are performed in Sweden, Finland, Austria, Alberta and two of the American states. The Swedish, Finnish and Austrian Committees on the Constitution consider the Ombudsman's Annual Reports and comment on them in Parliament. In Alberta, the Select Committee on Legislative Offices considers the Reports of the Ombudsman, Auditor General and the Chief Electoral Officer. The Select Committee in Alberta reviews the salary of the Ombudsman on an annual basis. In Hawaii and Iowa the Finance Committee and the Legislative Service Committee respectively act as intermediaries between the Ombudsman and the Legislative Assembly. In other jurisdictions such as the state of Rheinland-Palatinate in the Federal Republic of Germany and the City of Rotterdam, Netherlands, the Ombudsman is the Chairman of the Petitions Committee with case

reports being considered by those bodies.

Ontario's Select Committee on the Ombudsman convened for the first time on July 19, 1976. Notwithstanding that three of the eight members including the Committee Chairman were lawyers, the Committee saw fit, at one of its first organizational meetings, to appoint Mr. John P. Bell of the law firm, Shibley, Righton and McCutcheon, as its counsel to advise and assist the Committee on matters relevant to its terms of reference. Although questions have been raised from time to time by various Committee members over the past nearly six years concerning the necessity of legal counsel, Mr. Bell continues to act as counsel to the Committee. The Committee staff also includes a clerk and a secretary.

The Select Committee met for twelve sessions during the period commencing July 19, 1976 and ending October 1st of that year. The majority of these sessions were taken up by a consideration of the Ombudsman's report respecting the North Pickering Project and the Minister of Housing's response. The specifics of the case are complex and not germane to this account, although the "North Pickering affair" was important for the Committee in that it established the Committee's basic approach to all subsequent work and its attitude to the Ombudsman.

On October 15, 1976, Committee Chairman Renwick tabled before the Legislature the *First Report* of the Select Committee on the Ombudsman. For obvious reasons, the largest part of the report namely Part IV, considered the North Pickering report and response. Again, although the details of the case are not important, it is worth noting that it was during the hearings held before the Committee, that a Committee member suggested that the Ombudsman and the Minister of Housing ought to try to find a solution to the impasse that had developed. As a result of this suggestion, the Minister and the Ombudsman met privately and arrived at an agreement which was subsequently ratified by the Select Committee with minor variations. The terms of the agreement were also acceptable to counsel for five land acquisition agents who had brought an application to judicially review certain aspects of the Ombudsman's investigation and subsequent report.

Since the Committee sees itself as the catalyst which led to the agreement concluded between the Ombudsman and the then Minister of Housing, the Committee has indicated as recently as December, 1981, when its *Ninth Report* was tabled, that it

"intends to regularly and diligently pursue with the Ombudsman and others the progress of his efforts in bringing this matter to an appropriate conclusion".<sup>9</sup>

In its *First Report*, the Committee also made reference to its predecessor, the Select Committee on Guidelines, referred to earlier in this paper. The Committee expressed its opinion that the Legislature intended it to be the successor of the first Select Committee "to undertake the task of gaining a 'greater ongoing experience' in respect of the office and function of the Ombudsman and thereafter to recommend to the Legislature from time to time, general rules for the guidance of the Ombudsman in the exercise of his functions".<sup>10</sup>

In order that it could discharge the full range of responsibilities which it viewed was intended by the Legislature, the Committee recommended in its *First Report*, that its terms of reference be amended on motion in the Legislature, by substituting for the former terms of reference the following:

That, a Select Committee of this House be appointed to review from time to time the Reports of the Ombudsman as they become available, and to formulate from time to time, as the Committee deems necessary, pursuant to section 16(1) of *The Ombudsman Act, 1975*, general rules for the guidance of the Ombudsman in the exercise of his functions under the *The Ombudsman Act*, to report thereon to the Legislature, and to make such recommendations as the Committee deems appropriate; Reports and recommendations of the Committee to be placed on the order paper for discussion after presentation.<sup>11</sup>

On Thursday, December 16, 1976, the Legislative Assembly ordered that the terms of reference of the Committee be amended to give the Committee authority to formulate such general rules. Section 16 of the *Ombudsman Act* provides for the Assembly to make such rules which, when made, are deemed by the Act to be regulations within the meaning of the *Regulations Act*. In essence, the Assembly delegated unto the Committee, the authority to formulate rules for consideration by the House. The Committee's interpretation of its rule-formulating term of reference has led to serious problems in the Committee's relationship with the Ombudsman, about which more shall be said later.

Although the precise wording of the Committee's Order of Reference has varied somewhat over the years, its principal tasks have always been to review the Reports of

<sup>9</sup> Ontario, Select Committee on the Ombudsman [hereafter referred to as Committee] *Ninth Report* (December, 1981) p. 25.

<sup>10</sup> Committee *First Report* (October, 1976) p. 2.

<sup>11</sup> *Ibid.*, p. 3.

the Ombudsman, to formulate general rules for the guidance of the Ombudsman, and to report to the Legislature. On May 29, 1980, however, the Order of Reference of the Select Committee was further amended to include a function that had nothing whatsoever to do with the work of the Ombudsman. It was on that date that the Legislative Assembly passed a resolution put forward by former Chairman Renwick in the following terms:

"That this Assembly request the Select Committee on the Ombudsman to consult with the United Nations Commission on Human Rights, Amnesty International, and the International Commission of Jurists and others, if advisable, with a view to reporting to this Assembly on ways in which this Assembly may act to make its voice heard against political killings, imprisonment, terror and torture."

Although, in proposing the resolution, Mr. Renwick recognized that this new term was foreign to the routine work of the Committee, the Assembly acceded to his submission so that the establishment of a new Committee with this mandate (which would have been unlikely) became unnecessary. Since the Committee was unable to complete its task before the general election held in the spring of 1981, it obtained the approval of the Legislature on October 13th of that year to finish the work of its predecessor Committee. In its *Ninth Report*, the Committee indicated that it intended to complete the matter and report to the Legislature before the end of the Spring 1982 sitting.

Following that general election which, for the first time since the establishment of the Ombudsman's office saw a Conservative majority elected, the Committee was reappointed on July 2, 1981. The current Select Committee on the Ombudsman is composed of twelve members, with the three political parties represented roughly in proportion to their numbers in the House. Thus the Progressive Conservative Party, which forms the Government, has seven seats, while the official opposition, the Liberal Party, has three seats and the New Democratic Party, two. The present Chairman, for the first time since the establishment of the Committee, is a member of the Government party, the vice-chairman being a member of the Official Opposition.

For all intents and purposes, the Select Committee on the Ombudsman is a permanent one, despite the fact that in Ontario a "select" committee is usually considered to be a special, temporary committee.<sup>12</sup>

<sup>12</sup> For an overview of the Committee system, see an article written by the present Clerk to the Select Committee, Dr. Graham White, entitled "Committees in the Ontario Legislature" *The Parliamentarian* 61:7-21, January 1980. For a comparison of Standing and Select Committees, see also the Ontario Law Reform Commission's *Report on Witnesses before Legislative Committee* 1981.

## E. PROCEDURE

Section 12 of the *Ombudsman Act* requires the Ombudsman to report annually upon the affairs of his office. The first Ombudsman determined that this provision should be regarded as a minimum requirement, and that both the members of the public and the Legislature would be better served if Reports were issued on a semi-annual basis. The present Ombudsman, the Honourable Donald Morand, is content to report on an annual basis.

Four types of matters are normally included in the annual Reports:

- (1) an analysis of performance and changes at the Office of the Ombudsman;
- (2) a summary of cases, both typical and significant, illustrative of the type of work performed by the office;
- (3) a summary of all "recommendation denied" cases – that is, instances where the governmental organization has either rejected the Ombudsman's report or failed to take action which the Ombudsman felt was adequate and appropriate in response to the Ombudsman's report following his investigation of a case; and
- (4) charts containing all cases outstanding since the inception of the office, where either a recommendation was denied or the Ombudsman recommended that a practice be altered or a law reconsidered.

The Committee concentrates its work on these four areas, with particular emphasis on the very few "recommendation denied" cases summarized annually.

It should perhaps be clarified that the Ombudsman's *North Pickering Report* was the only occasion, from the date of establishment of the office until now, that the Ombudsman saw fit to make a special report to the Assembly pursuant to section 22(4) of the Act. Rather than making a number of special Reports on individual cases where a governmental organization has resisted the Ombudsman's recommendation, both Mr. Maloney and Mr. Morand have determined that, absent a degree of urgency, the better course would be to include detailed summaries of such cases in the annual report.

Once the Ombudsman's report is received by the Speaker, it stands referred to the Committee. After reading the report, Committee counsel then reviews the contents of the general section of the report as well as that year's "recommendation denied" cases with relevant members of the Ombudsman's staff and with officials of the governmental

organizations involved. Relevant documentation is obtained, indexed by counsel and an agenda is set. Loose leaf binders are prepared containing the agenda and documentation. Since the Ombudsman has made it a practice to make the case summaries anonymous, all documents have names of complainants, public servants and other identifying references removed. No one associated with the Committee knows the complainant's identity, unless the complainant makes himself known to the Committee.

The actual Committee meetings are among the most formal of any held by Ontario legislative committees. In large measure, this reflects the Committee's non-partisan approach and its desire to maintain a neutral stance between the Ombudsman and the Government. Even so, witnesses are not normally sworn in, and the preference has been for common sense flexibility rather than for restrictive, court-like rules of evidence. Most Committee meetings are open to the public and the press; exceptions are all meetings at which Reports are being drafted or considered, and occasional instances when the Committee feels it best to take evidence *in camera*.

Since the "recommendation denied" cases reviewed by the Committee are usually quite complex, with many technical and legal issues, Committee counsel normally leads the evidence, beginning with the Ombudsman's report of the investigation and the opinions expressed therein, with a view to bringing all the pertinent facts out clearly for the Committee members. Of course, members regularly ask their own questions to clarify matters raised by counsel or pursue their own lines of inquiry, generally unimpeded by counsel. However, questioning of both Ombudsman staff and government officials is rigorous and pointed, so that both "sides" must be prepared to convince the Committee that their assessment, and the actions that they have taken are well documented and are justifiable. Ombudsman personnel are seated beside the officials representing the governmental organization, at a witness table facing the Committee, rather than beside the Chairman.

The procedure followed by Ontario's Select Committee on the Ombudsman closely parallels that pursued by the United Kingdom's Select Committee on the Parliamentary Commissioner for Administration. One significant difference, however, is that the British Committee lacks the staff and resources of our own, and particularly is without the assistance of legal counsel. As a result, the Committee relies heavily on the

resources of the Parliamentary Commissioner and his office to brief it respecting the nature and substance of the complaints, and the manner in which they have been investigated. A further difference has been the British Committee's failure to exercise its powers to admit the press and public to its sittings.

The procedure at Israel's State Control Committee is somewhat different. The Ombudsman, who is seated to the right of the chairman at the head of the table, opens with a short statement. Usually the cases picked by the Committee are those where the body complained of has not taken sufficient corrective measures, and its representative is then called on to explain this attitude and to answer questions from members of the Committee. The Ombudsman, if he so chooses, closes the session with his reactions to the statements made, and his assessment of the situation. As in Ontario, at a later session the Committee discusses and votes on its conclusions and recommendations with regard to the report and those sections it has debated.

#### **F. ONUS AND BURDEN OF PROOF BEFORE SELECT COMMITTEE ON A "RECOMMENDATION DENIED" CASE**

In considering the *North Pickering Report* and response before the Memorandum of Agreement was entered into between the then Ombudsman and Minister of Housing, the Committee, of necessity, grappled with some basic issues respecting its role in the "recommendation denied" case: Was it intended that the Select Committee reinvestigate anew the complaint investigated and reported upon by the Ombudsman? As with the British Committee, its Ontario counterpart decided that this could not have been the intention of the Legislature, nor did the Committee have the time or resources to properly discharge this mammoth undertaking. Was the Committee "the Ombudsman for the Ombudsman" or a "Court of Appeal" from opinions expressed by the Ombudsman in "recommendation denied" Reports? Again, like its English cousin, the Committee also doubted that this was its legitimate role, however, nowhere in its *First Report* did it address this issue.

Since there were no "recommendation denied" cases in the *First Annual Report of the Ombudsman, 1975-1976*, the Committee likewise did not deal with the question in its *Second Report, 1977*.

In the Ombudsman's *Second Report*, Mr. Maloney referred to four recommendations which had been made by him pursuant to section 22(3) of the *Ombudsman Act*<sup>13</sup> which had, for various reasons, been rejected by the governmental organizations in question. However, in none of the cases did the Ombudsman exercise his discretion to send a copy of his report and recommendation to the Premier, and thereafter to the Assembly. Instead, the Ombudsman included an account of the cases in detail in his *Second Report*. In each case, the Ombudsman confirmed before the Committee that, notwithstanding the responses of each governmental organization, he continued to support his recommendations fully before the Committee. It was the Committee's view that the Ombudsman had, in effect, requested that the Committee in each case support his recommendation, and so report to the Legislature for implementation. In its *Third Report*, also tabled in 1977, the Select Committee expressed its view that, by referring the recommendations directly to the Legislature in his *Second Report*, while continuing to seek the relief in accordance with his recommendations, the Ombudsman had eliminated the step to the Premier's office contemplated by section 22(4) of the *Act*. The Committee stated its role as follows:

"This Committee will, when the circumstances warrant, give full support to a recommendation made by the Ombudsman rejected by a governmental organization. However, the Committee in those situations will require that the Ombudsman has, in every respect, carried out the necessary provisions of the statute. To do less would be to expose the Ombudsman to criticism and might undermine the confidence which the public must have in his office."<sup>14</sup>

As a result, the Committee determined that it would not make any recommendations to the Legislature, that the recommendations made by the Ombudsman in each of the four

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<sup>13</sup> s. 22(3) If in any case to which this section applies the Ombudsman is of the opinion,  
 (a) that the matter should be referred to the appropriate authority for further consideration;  
 (b) that the omission should be rectified;  
 (c) that the decision or recommendation should be cancelled or varied;  
 (d) that any practice on which the decision, recommendation, act or omission was based should be altered;  
 (e) that any law on which the decision, recommendation, act or omission was based should be altered;  
 (f) that reasons should have been given for the decision or recommendation; or  
 (g) that any other steps should be taken,  
 The Ombudsman shall report his opinion, and his reasons therefor, to the appropriate governmental organization, and may make such recommendations as he thinks fit and he may request the governmental organization to notify him, within a specified time, of the steps, if any, that it proposes to take to give effect to his recommendations and the Ombudsman shall also send a copy of his report and recommendation to the minister concerned.

<sup>14</sup> Committee, *Third Report* (November, 1977) p. 37

cases be in some way implemented by the governmental organizations in question. However, the Committee did proceed to comment further on the cases individually, making such recommendations as it deemed appropriate, on the basis that "it would not be fulfilling its obligation to the Legislature and to the people of the Province of Ontario if it failed to comment further".

The Committee has continued to require "scrupulous adherence to the provisions of the statute",<sup>15</sup> notwithstanding section 24 of the *Act*, which provides, in part, that no proceeding of the Ombudsman is to be held bad for want of form.

In its *Fifth Report*, the Committee expanded on its view as to its proper function in reviewing "recommendation denied" cases:

"Accordingly, the Committee will review with the Office of the Ombudsman all phases of the Ombudsman's functions which were exercised in the particular complaint. It will also examine with the governmental organization in question the adequacy and appropriateness of its response. If that response has been less than complete and if the exchange between the Ombudsman and the governmental organization contemplated by section 22 of the *Ombudsman Act* has been less than thorough, the Committee will inquire into as much detail as it considers necessary in the circumstances.

When it appears to the Committee that the Ombudsman has complied with the provisions of the legislation and where the governmental organization's response is not adequate, appropriate or reasonable to the Committee, it will *prima facie* support the Ombudsman's recommendation. When the Ombudsman was created in Ontario, the Legislature intended that a vehicle for the scrutiny of decisions of the Public Service would ultimately press the Legislature to redress the consequences of certain decisions considered by him to be warranted, within the context of the *Ombudsman Act*. If the Committee chose not to support a recommendation of the Ombudsman after it had satisfied itself as set out above, it would seriously undermine the effectiveness and credibility of the Ombudsman in the eyes of the people of the Province of Ontario and the members of the Public Service."<sup>16</sup>

In its *Seventh Report*, the Committee added that it:

"wishes to assure the Legislature that it will continue to investigate exhaustively and review all aspects of Ombudsman Reports before reporting thereon to the Legislature, particularly on matters of Ombudsman recommendations. This process will ensure that the Legislature, through this Committee, before effectively approving and adopting a recommendation of the Ombudsman will have fully investigated, examined and thoroughly reported upon all relevant and appropriate issues."<sup>17</sup>

It is true that, from the very outset, the Committee has taken great pains to be – and to be seen to be – entirely fair and unbiased in its dealings with the Ombudsman and with the governmental organizations on "recommendation denied" cases. The Committee's third

<sup>15</sup> Committee, *Second Report* (March, 1977) p. 33

<sup>16</sup> Committee, *Fifth Report* (November, 1978), pp. 98–9.

<sup>17</sup> Committee, *Seventh Report* (September, 1979), p. III.

chairman, Patrick Lawlor, Q.C., described the Committee's stance as one of "weighted neutrality" – that is, the Committee carefully and objectively weighs the evidence presented to it, but, without automatically taking the Ombudsman's part in the dispute, tends to lean towards the Ombudsman's point of view. On the other hand, the Committee has not been afraid of disagreeing with the Ombudsman, and has done so on a number of occasions, even where the Committee concurs that it was open for the Ombudsman to reach the conclusions and recommendations which he did. The Committee has even, on occasion, made recommendations wider in scope than those originally made by the Ombudsman in his report.<sup>18</sup>

The present Clerk of the Committee, Dr. Graham White, has likened the Committee to a quasi-judicial tribunal or a Royal Commission, in which evidence is brought out by the staff counsel, and the members reach a decision favouring the views put forward by the Ombudsman or by the Government.

Despite the high-principled language employed by the Committee in its Reports with respect to its role in reviewing "recommendation denied" cases, experience has demonstrated that the Committee has yet to come to grips with the basic issues of onus and burden of proof when hearing "recommendation denied" cases. On the other hand, it is fair to say that, while the Committee does not *prima facie* support the Ombudsman, it does assiduously attempt to maintain a neutral stance as between the Ombudsman and the governmental organization. However, should the Committee disagree with the Ombudsman's assessment of the facts, or with the Ombudsman's conclusions and recommendations flowing therefrom, the Committee does not hesitate to say so.<sup>19</sup>

One must question the wisdom of the Committee in so blithely disagreeing with the Ombudsman's opinions. No one, least of all the Ombudsman, expects the Select Committee merely to act as a rubber stamp of Ombudsman Reports and recommendations. On the other hand, the Ombudsman's opinions are formed after a careful investigation. He is an expert in matters of administration, surveying approximately five hundred provincial governmental bodies. As such, surely he is entitled to a greater degree of deference by the Committee. After all, had the Legislature

<sup>18</sup> See for example, Committee, *Eighth Report* (December, 1981) p. 37.

<sup>19</sup> See for example, the Committee's consideration of complaint #24, Ombudsman's *Eighth Report*, as found at pp. 28–31 of the Select Committee on the Ombudsman *Ninth Report* 1981.

intended the Committee to act as Ombudsman, it could have done so, as has been done in the Federal Republic of Germany, with the Parliamentary Committee on Petitions.

In a letter dated December 20, 1979 to Mr. Patrick Lawlor, Q.C., former Chairman of the Select Committee, the present Ombudsman, Mr. Morand, set forth what he viewed to be the appropriate onus and burden of proof before the Committee:

"Just as I, as a rule, do not criticize a decision reached by a governmental organization if it could reasonably have arrived at such a decision with all the relevant facts before it, so in my view and with respect, the Committee ought not to substitute its opinion for mine, unless I could not reasonably have arrived at the conclusion and recommendation which I have – even if the Committee might have reached a different opinion on the same facts."

In the same letter, Mr. Morand expressed his concern that the Committee in failing to support an Ombudsman recommendation, might well have the unintended effect of undermining the effectiveness and credibility of the office. It may be interpreted by some governmental bodies with whom the Ombudsman must deal on a regular basis, as a pretext for not taking remedial action at an earlier stage, on the basis that they stand a greater chance of success if they go to the limit, and take their chances before the Committee. Of course, an Ombudsman cannot function effectively without support and cooperation from the administrative arm of government.

It is significant that, while Mr. Morand's letter was acknowledged, the above issues were never addressed, and to date remain unresolved.

Perhaps the most interesting phenomenon, virtually unique to the work of this Committee, is the non-partisan approach taken by the members in considering the recommendation denied cases. In the six years that the Committee has been in existence, there has been only one dissent registered by a Committee member to a Committee report.<sup>20</sup>

Clearly, given the Committee's mandate, the opportunities for direct political confrontation are not so numerous as in other Committees or in the House, yet many issues have surfaced in the Committee which, in a different setting, might well have resulted in bitter, protracted partisan conflict. Dr. White has observed that the Select Committee on the Ombudsman has, however, generally been the least partisan committee in the Ontario Legislature; in most instances, observers would be hard-pressed to

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<sup>20</sup> The dissent of Larry Grossman, M.P.P. to Recommendation 1 as contained in the *Second Report* of the Committee (March, 1977).

identify members' party affiliations from their remarks in the Committee. This apolitical approach has been a key element in the Committee's effectiveness.

Prior to the establishment of the Select Committee, Ontario's first Ombudsman considered whether there should be a free vote in the Assembly when considering the Ombudsman's Reports, especially Reports where a government agency and the Premier had not responded to the Ombudsman's recommendations. Mr. Maloney thought that an advantage of a free vote would be to underline the fact that the Ombudsman was the agent of the Legislature as a whole, and not of any particular party. He concluded, however, that if the issue was one on which the Government felt strongly, party solidarity would be enforced and therefore the appointment of a Select Committee was a more workable alternative.

Of course, Mr. Maloney's analysis begs the question as to whether party solidarity would likewise be required before the Committee on a contentious political issue. Although the Committee has yet to consider a case with the political ramifications of the Ombudsman's *North Pickering Report*, in its *Eighth Report*, 1980, the Committee unanimously supported a recommendation of the Ombudsman, which was potentially embarrassing to the government, since it related to his interpretation of a key section of the *Workmen's Compensation Act* dealing with assessments for permanent disability.<sup>21</sup> The Ombudsman's interpretation differed from the Board's.

However, when the Select Committee's Report was debated in the House, party solidarity was enforced with the result that the Conservative majority in the House declined to adopt and approve this recommendation of the Committee. The Committee's reaction to the Assembly's rejection of its recommendation will be explored, in further detail, in the next section.

The proceedings of the British Committee on the Parliamentary Commissioner for Administration consists entirely of a review of selected cases referenced in the Commissioner's report with respect to what steps, if any, the government authority has taken or intends to take to implement redress of the maladministration, and/or to effect a change in administrative policy in order to avoid a repetition of similar consequences. Sir Hugh Monro-Lucas-Tooth, sometime Chairman of the Committee, stated that it was not

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<sup>21</sup> Committee, *Eighth Report* (December, 1980) pp. 50-55.

for him and his fellow members to "retry" cases or "to review the Commissioner's findings" rather, the concern of a Select Committee on the Ombudsman should be with:

- (a) remedy to the aggrieved person . . . where the Commissioner found that injustice . . . had not been, or would not be remedied;
- (b) the nature of any defect in a Department's administrative systems revealed by the Commissioner; . . .
- (c) the adequacy of the Commissioner's powers for the performance of his function.<sup>22</sup>

The Committee is generally supportive of the Parliamentary Commissioner, and it certainly has been the exception rather than the rule that the conduct of the Commissioner or his staff has been questioned respecting the handling of any complaint or the substance of any report. The Committee has encouraged the Commissioner to take a broader view of his jurisdiction, and has assisted and reinforced his work.

#### G. SELECT COMMITTEE RECOMMENDATIONS TO THE LEGISLATURE

As previously mentioned, the Order of Reference of the Select Committee empower it to ". . . report . . . to the Legislature and to make such recommendations as the Committee deems appropriate." Beginning with its *Second Report*, the Select Committee has to date, in its formal report to the Legislature, included a number of recommendations directed to governmental organizations subject to the Ombudsman's jurisdiction, the Ombudsman himself, and the Legislature as a whole.<sup>23</sup>

It is fair to say that, while the Ombudsman may not have agreed with some of the Committee's recommendations to him, he has nevertheless agreed to implement the recommendations, in most cases even before the Select Committee's report was debated in the House.

Relations between the Committee and the Executive have not always been so accommodating in terms of response to the Committee's recommendations. In early 1979, the Committee felt it necessary to issue a Special Report, complete with a black-edged "death notice" on the front cover, in order to ensure "meaningful comment and response by representatives of the Government to whom Committee

<sup>22</sup> Gwyn, William, "The British P.C.A.: "Ombudsman or Ombudsmouse?" *Journal of Politics* 35:45-69, 1973.

<sup>23</sup> See for example, the thirty recommendations summarized by the Committee in its *Second Report* (March, 1977) in Schedule "A", pp. 56-63.

recommendations are addressed.”<sup>24</sup> The excerpt from the Introduction of the Report, highlighted on the cover, outlined the purpose of the Special Report as being

“... to focus the Legislature’s attention solely on outstanding matters wherein recommendations of either or both of the Ombudsman and this Committee have been ignored or refused. It is the Committee’s intention that its recommendations in this report will be individually debated and voted upon by the Legislature. Only when that has been done, will the Ombudsman’s function have been completed. Only when that has been done, will this Committee’s Order of Reference have been fulfilled.”

The Committee’s *Sixth “Special” Report* was a reaction to the debate which took place on November 27, 1978, of the Committee’s *Fifth Report* and recommendations. During the period scheduled for debate, no Ministers of the Crown representing ministries or governmental organizations to whom the Committee had addressed recommendations in its *Fifth Report* were present in the Legislature, or represented by any other member, for the purpose of speaking to the *Report* generally, and responding to any recommendation specifically. Following the debate, the then Chairman of the Committee, Mr. Michael Davison, resigned from the Committee to protest what he regarded as not only a serious affront to the Committee, but to the Ombudsman institution as well.

It its *Sixth Report*, the Committee agreed with Mr. Davison observing that:

“To ignore the Committee’s efforts and Reports only serves to demean the concept of the Ombudsman in Ontario, the role and function of select committees of the Legislature, and the legislative process generally.

Unless our Ombudsman has access, directly or indirectly to the Legislative Assembly, to seek support for any of his recommendations, he will not be fully effective in his office. Where it is appropriate and where the circumstances so warrant, unless the Legislative Assembly is prepared to give full support to the Ombudsman’s recommendations, then it is paying mere lip service to the concept of the Ombudsman in Ontario. Without such support of the Legislature, the Ombudsman is reduced to a reporter and record-keeper of complaints.”<sup>25</sup>

The Committee proceeded in its *Sixth Report* to make nine recommendations, including two providing that “the Legislature require the Workmen’s Compensation Board to implement the recommendation of the Ombudsman . . .”. As previously mentioned, it was the Committee’s intention that its nine recommendations be individually voted upon and adopted by the Legislative Assembly.

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<sup>24</sup>Committee, *Sixth Report* (May, 1979), p. II. On this subject, see also Gregory and Hutchisson, *The Parliamentary Ombudsman*” at pp. 609–10.

<sup>25</sup>*Ibid.*, pp. III and IV.

The Legislature responded on June 21, 1979 by ordering that the Report of the Committee of the Whole House, which concurred in the nine recommendations contained in the Committee's *Sixth Report*, be received and adopted.

The Committee, in its *Seventh Report*, 1979, remarked that this process had "elevated the Office of the Ombudsman . . . to a new level of effectiveness".<sup>26</sup> The Committee proceeded to express its confidence that a procedure had been attained, whereby the Ombudsman could attempt to invoke his "ultimate sanction" in such situations wherein a governmental organization had neglected or refused to implement a recommendation made by him in one of his Reports.

During the hearings held in 1979 preceding the issuance of the Committee's *Seventh Report*, a debate took place as to the legal force of Committee recommendations adopted by the House. Committee counsel and the then new Committee Chairman, Mr. Lawlor, were of the view that such recommendations were binding upon the Government and its administrative agencies. The Attorney General, the Honourable R. Roy McMurtry, Q.C., appeared before the Committee to argue the contrary: that Committee recommendations, even when endorsed by the House, are in no way legally binding. While I would obviously have preferred to agree with the Committee, when invited by its Chairman to assist the Committee, I was forced to agree with the Attorney General. It is clear that, although a resolution of the Legislature may bind in matters relating to procedures of the House and its committees, the Legislature can only affect substantive matters outside its own internal operations by appropriate legislative action.<sup>27</sup>

In its *Seventh Report*, the Committee went on record as disagreeing with the position of the Attorney General, and argued that "the issue of the legal effect of legislative action in this context is by no means clear and unequivocal".<sup>28</sup>

However, the *Report* also contains the following observation, which is rather more important:

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<sup>26</sup>Committee, *Seventh Report* (September, 1979) p. III.

<sup>27</sup>See for example May, Erskine, *Parliamentary Practice*, 19th Ed., pp. 382, and II3-5, and also Dicey, A.V. *The Law of the Constitution*, 10th Ed., 1964, pp. 406-8.

<sup>28</sup>Committee, *Seventh Report* (September, 1979) p. 3.

The weight in law of an Order of the Legislature adopting a Select Committee's report and recommendations is, in the Committee's opinion, not the critical issue in this discussion. That critical issue is best expressed by the Attorney General in a Letter to the Chairman of this Committee dated July 4, 1979 as to what is 'the best way to implement recommendations of the Ombudsman and the Select Committee.' Certainly the discussion should not be centred upon the possible consequences of a failure or refusal to implement such recommendations, but upon the 'best way' that the governmental organizations affected thereby are to implement those recommendations.

The Committee hopes that any governmental organization affected by such a recommendation adopted by the Legislature, would be loathe not to implement that recommendation as quickly as possible. If that were not the case it would have a serious undermining effect on the integrity of the Legislature and the respect which all governmental organizations must have therefor. Certainly any governmental organization who embarks upon a technical 'word game' with respect to the legal affect of the legislative action is demonstrating a profound disrespect for both the concept of the Ombudsman in the Province of Ontario and the Legislative Assembly."<sup>29</sup>

The earlier referred to opinion of the Attorney General was prompted by a letter from the then Chairman of the Workmen's Compensation Board, Mr. Michael Starr, requesting specific direction from the Honourable Robert G. Elgie, M.D., Minister of Labour, and the Government as to the Board's position vis-a-vis the Report of the Committee received and adopted by the Legislature. The Minister of Labour advised the Workmen's Compensation Board that it "must be particularly responsive to recommendations of the Ombudsman that receive the support of the Select Committee on the Ombudsman". Notwithstanding the Attorney General's legal opinion, when Mr. Starr appeared before the Committee, he indicated that the Board was prepared to comply with the wishes of the Assembly and to implement its recommendations. The then Minister of Labour replied in like fashion.

The Committee expressed its wish in its *Seventh Report*, that all of its recommendations thenceforth would be dealt with in the same way as the nine recommendations in its *Sixth Report*: that is they must be approved, and by Order, adopted by the Legislature. Since the Committee's *Sixth Report*, the Government has generally been receptive to the recommendations of the Committee. For example, of the six recommendations in the *Eighth Report* of the Committee, five were accepted by the Government.<sup>30</sup>

<sup>29</sup> *Ibid.*, pp. IV and V.

<sup>30</sup> The exception being Recommendation #6 as contained in the Committee's *Eighth Report* (September, 1980) p. 55. As previously mentioned, the Government rejected the Committee's recommendation having received two legal opinions disagreeing with the interpretation placed by both the Ombudsman and the Committee upon the interpretation of section 42(1) of the *Workmen's Compensation Act*. In its *Ninth Report* (December, 1981) the Committee expressed its view that such a decision by the Assembly to reject a

## H. THE COMMITTEE'S RULE-MAKING ROLE

Mention has previously been made of the rule-formulating term of reference granted to the Committee by the Legislature. The Committee's broad interpretation of its rule-formulating mandate has largely been responsible for a deterioration in the relationship between the Ombudsman and the Select Committee.

In December of 1976, the Committee's first Chairman, Mr. Renwick, wrote to all M.P.P.'s, requesting that they each provide the Committee with their comments and observations on the role and operations of the Office of the Ombudsman. Sixteen of the Legislature's 125 members replied, either in writing or in person before the Committee. The Committee commented in its *Second Report*, tabled in March, 1977, that it considered it was necessary to review and report to the Legislature on the operation of the Office of the Ombudsman internally, and with respect to its working relationship with various governmental organizations and with the Legislative Assembly. From the Committee's vantage point, the purpose of the inquiry was, in part, to determine whether the formulation of any rules for the guidance of the Ombudsman in the exercise of his functions was, at the time appropriate.

In its *Second Report*, the Committee described its role in the following terms:

The relationship that exists between the Ombudsman and the Legislature requires a Select Committee of this nature with authority and flexibility to deal, on a continuing basis, with matters affecting the Ombudsman such as Reports, rules for his guidance in the performance of his functions under the Act and any other matter arising which is within its Order of Reference. . . . The Committee should have and continue to have an identity of its own to deal with the unique matters that arise from the consequence of the operation of the Ombudsman's Office."<sup>31</sup>

As mentioned earlier in this paper, the Committee's *Second Report* included a number of recommendations directed to the Ombudsman, respecting the administration of his office. In his *Second Report*, Mr. Maloney termed these recommendations

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<sup>30</sup>(cont'd) Committee recommendation "should only be taken in exceptional circumstances and only when, after a full debate has occurred, the Legislature is able to conclude that the implementation of the Committee's recommendation would in the circumstances be contrary to the public interest or to be contrary to some generally recognized principle of law." (p.2) "If a situation were permitted to develop whereby rejection of such Committee recommendations were the norm, or were made for some capricious reason, the Ombudsman's effectiveness in the eyes of the governmental organization and the people of the Province of Ontario would be irreparably harmed." (p. 3)

<sup>31</sup>Committee, *Second Report* (March, 1977) p. 48.

"important" and "helpful".<sup>32</sup>

When the Committee met during the summer of 1977, it again reviewed the operation of the Office of the Ombudsman internally, and with respect to its working relationship with governmental organizations and with the Assembly. The purpose of the review was, in part, to determine whether the formulation by the Committee of any general rules for the guidance of the Ombudsman in the exercise of his functions was then necessary and appropriate. In its *Third Report*, tabled in late November, 1977, the Committee expressed its opinion that it was then necessary for it to begin the formulation of certain general rules.

The Committee outlined ten areas wherein it was considering such rules. Its stated purpose in doing so was two-fold: firstly, to give the Ombudsman an opportunity to consider the Committee's comments, and for him to provide whatever comments he thought were appropriate to assist the Committee in its deliberations, and secondly, to inform each member of the Legislature of the areas wherein the Committee was considering general rules and to invite their comments. These areas ranged from "preliminary investigations" by the Ombudsman's office, to the Ombudsman's report and recommendations pursuant to section 22(3) of the Act.<sup>33</sup>

In August, 1978, the Committee forwarded to each Member of the Legislature, a letter referring to the areas included in the Committee's *Third Report* and inviting Members' comments. The Committee received seventeen replies, including thirteen from Cabinet Ministers. The members who responded to the Committee's letter generally supported the formulation of general rules.

During the Committee's sittings in the summer of 1978, it reviewed the matter of general rules with Mr. Maloney, and settled upon a more comprehensive list of areas wherein rules were considered to be appropriate. Mr. Maloney advised the Committee that, in his opinion, the majority of areas considered by the Committee either did not require general rules, because the matter was already sufficiently covered by the Act, or by procedures instituted in the Ombudsman's office in response to the Committee's *Third Report*. Mr. Maloney also submitted that certain other areas were more properly the subject matter of legislative amendment, as opposed to rule.

<sup>32</sup> Ombudsman. *Second Annual Report*, July 1976-March 1977 at p. 40.

<sup>33</sup> Committee. *Third Report* pp. 31-42.

Mr. Maloney's protestations notwithstanding, in its *Fifth Report* tabled on November 9, 1978, the Committee expressed its opinion that some of the areas required the immediate formulation of general rules, even in the event of amendments to the *Ombudsman Act*. The Committee accordingly recommended the formulation of general rules in these areas, expressing its hope that it would, with the benefit of the views of the Members of the Assembly as would be expressed during the debate of the *Fifth Report*, formulate the general rules and submit them for the adoption of the Assembly. The Committee recommended nine general rules be formulated.<sup>34</sup>

It should be mentioned that on August 15, 1978, the Committee Chairman had received a copy of a letter, bearing the same date, from Mr. Maloney to the Premier advising him of Mr. Maloney's intention to tender his resignation on October 9, 1978. Following Mr. Maloney's resignation, Keith Hoilett, then the Ombudsman's Executive Director, was appointed Temporary Ombudsman until the Honourable Donald R. Morand assumed office on January 23, 1979.

In June of 1979, the Committee considered with the new Ombudsman the issue of the appropriateness of rules. Mr. Morand expressed his agreement with Mr. Maloney that the rules contemplated by the Select Committee did not appear to be necessary. The Committee disagreed and, in its *Seventh Report* tabled in September of 1979, formulated six general rules which it recommended for approval and adoption by the Legislature.<sup>35</sup> On November 27, 1979, the Committee of the Whole House recommended the adoption of the amended *Seventh Report* of the Select Committee on the Ombudsman, including the six rules formulated by the Committee, and it was ordered that the amended Report be received and adopted.<sup>36</sup>

By letter dated December 20, 1979, Mr. Morand advised the then Committee Chairman, Mr. Lawlor, that:

"every member of my staff has been provided with photocopies of the relevant pages of the Votes and Proceedings . . . , and have been instructed by memorandum that they are required to adhere to the rules which the Assembly has now made under section 16 of the *Ombudsman Act*. As the Committee notes at page 30, the Office has without exception, been complying for some time now with the matters set forth in that part of the Committee's report."

<sup>34</sup> See Committee. *Fifth Report*, pp. 83-91.

<sup>35</sup> See Committee. *Seventh Report* pp. 29-36.

<sup>36</sup> See Ontario Legislative Assembly. Votes and Proceedings No. 99: 391-4, November 27, 1979.

Mr. Morand proceeded in his letter to advise that he still foresaw problems with the rule dealing with the notice to be given under section 19(3) of the Act.<sup>37</sup> Simply stated, Mr. Morand's concern was, in part, that section 19(3) of the Act imposed a higher standard than that set forth in the rule<sup>38</sup> in that a person or governmental organization may be adversely affected by the Ombudsman's report, even where the Ombudsman's opinion under section 22 falls short of having "the effect of altering, opposing or causing the original decision, etc. to be changed . . .". Mr. Morand advised that he would continue to be guided by the *Act* in such cases, and would afford an opportunity to adversely affected parties to make representations.

During the sittings of the Committee in the summer of 1978, Mr. Maloney referred the Committee to a number of substantial amendments to *The Ombudsman Act, 1975*, that Mr. Maloney then considered to be necessary. The Committee subsequently noted in its *Fifth Report*<sup>39</sup> that it agreed that certain amendments were necessary, and suggested that the Ombudsman incorporate his proposed amendments in the form of a report to be tabled with the Speaker of the Assembly, with a request that the Speaker refer it to the appropriate persons for consideration and implementation. The Committee recommended that the Speaker, upon receiving the Ombudsman's report, refer it to the Committee for consideration and report to the Legislature.<sup>40</sup>

Since Mr. Morand determined that he lacked the authority to make the kind of report contemplated by the Committee, in January, 1981, he proceeded to provide the

<sup>37</sup> s.19(3) The Ombudsman may hear or obtain information from such persons as he thinks fit, and may make such inquiries as he thinks fit and it is not necessary for the Ombudsman to hold any hearing and no person is entitled as of right to be heard by the Ombudsman, but, if at any time during the course of an investigation, it appears to the Ombudsman that there may be sufficient grounds for his making any report or recommendation that may adversely affect any governmental organization or person, he shall give to that governmental organization or person an opportunity to make representations respecting the adverse report or recommendation, either personally or by counsel.

<sup>38</sup> Regulation 697, R.R.O., 1980, Rule 6. The Committee concurs in the recommendation where at any time during the course of an investigation it appears to the Ombudsman that there may be sufficient grounds for formulating opinions under subsections 22(1) and (2) of the *Ombudsman Act* or of making any recommendations under subsection 22(3) of the *Ombudsman Act*, which has the effect of altering, opposing or causing the original decision, recommendation, act or omission to be changed in any way, the Ombudsman shall give the governmental organization and any person who is identified or is capable of being identified as having made or committed or caused to be made or committed, as the case may be, the decision, recommendation, act or omission, and opportunity to make representations respecting the adverse report or recommendations either personally or by counsel. *Seventh Report* pp. 34-35.

<sup>39</sup> Committee, *Fifth Report* (November, 1978) pp. 91-2.

<sup>40</sup> *Ibid.*, Recommendation 51 at p. 92.

Attorney General with a draft bill to amend the *Ombudsman Act*, and with a draft policy submission to Cabinet in support. Mr. Morand notified the Committee, during its September 1981 sittings, of his actions in this regard, and that he had as yet not received any formal response from the Attorney General or Cabinet.<sup>41</sup>

Mr. Morand declined the Committee's request to provide it with a copy of either the bill or policy submission at the time, since he felt this might prejudice any discussions with representatives of the Ministry of the Attorney General. In its *Ninth Report*, the Committee expressed its displeasure with the Ombudsman in this regard, and recommended "that any legislation tabled in the Legislature amending or otherwise dealing with the *Ombudsman Act* be referred for consideration, after second reading, to the Select Committee on the Ombudsman".<sup>42</sup>

Given the Select Committee's wide interpretation of its rule-making mandate, it was perhaps inevitable that a rift would develop in the relationship between the Committee and the Ombudsman. The stage was set when the Committee decided in March of 1977 that it had the authority to deal, and would proceed to deal, with a complaint to the Committee from an M.P.P.. The complaint alleged that a member of the Ombudsman's staff had appeared on two cable television programs with a nominated and opposing candidate in the Member's riding.

The Chairman of the Select Committee at the time, Mr. Renwick, advised Mr. Maloney during the Committee sittings on March 14, 1977, that he had confirmed with Committee counsel that, in light of the Committee's rule-formulating term of reference, the Committee had authority to deal with the Member's complaint.

Mr. Maloney expressed his view that the member's complaint was "totally outside the terms of reference of the Committee and the Ombudsman did not accept the jurisdiction of the Committee relating to (the member's) complaint. Mr. Maloney would not authorize any member of the Ombudsman's staff to participate in a discussion".<sup>43</sup> Mr. Maloney indicated to the Committee that he had advised the Member that he had commenced an internal investigation, and would inform the Member of the results. In the event the Member was dissatisfied, he could ask the Speaker to refer the matter to the

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<sup>41</sup> This remains the situation today.

<sup>42</sup> Committee, *Ninth Report* (December, 1981) Recommendation 8 at p. 39.

<sup>43</sup> Committee. *Minutes of Proceedings* for March 14, 1977 a.m. at .p. 27.

Procedural Affairs Committee.

In response to Mr. Renwick's request for a written submission addressing the matter of the Committee's jurisdiction to consider this issue, Mr. Maloney wrote an eight page letter dated March 18, 1977.<sup>44</sup> In the letter, Mr. Maloney amplified his position that the rule-formulating mandate of the Committee was confined to the exercise by the Ombudsman of his functions under the *Ombudsman Act*. While such rules may relate to the investigating and reporting functions of the Ombudsman, they clearly do not extend to matters of employment, as between the Ombudsman and a staff member.<sup>45</sup>

Mr. Maloney set forth his view that, were the Committee to consider the member's complaint, it would compromise the independence of the Ombudsman and his freedom from political interference. He asserted that the Ombudsman must remain free from the control of any body, with the exception of the Legislature, which alone has the responsibility to dismiss him for cause.

When the Committee reconvened on March 22, 1977, Mr. Maloney had, as at that time, not received a reply to his letter. Mr. Renwick proceeded to ask the member to outline his complaint, expressing the hope that Mr. Maloney would stay to hear and comment. Mr. Maloney reiterated his view that the matter complained of fell beyond the Committee's jurisdiction, and that he would be open to serious criticism were he to stay. He advised that he had investigated the Member's complaint, taken remedial action, and advised the Member to that effect. Despite the entreaties of the Members that Mr. Maloney remain, the Ombudsman withdrew with the members of his staff from the Committee room.<sup>46</sup>

Mr. Maloney's actions in retiring from the Committee chamber sent shock waves throughout the Assembly. The then First Clerk of the House, Mr. John Holtby, commented that "that just wasn't done". After recounting its version of the incident, the Committee observed as follows in its *Second Report*:

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<sup>44</sup> The letter appears at pp. 578-85 of Mr. Maloney's *Blueprint for the Office of the Ombudsman in Ontario*, sent to the Premier on March 29, 1979.

<sup>45</sup> s.8 of the *Act* empowers the Ombudsman to employ such officers and employees as he considers necessary, and to determine their salary, remuneration, and terms and conditions of employment.

<sup>46</sup> Committee. *Minutes of Proceeding* for March 27, 1977, p.m., pp. 11, 12.

"The committee regrets the conduct of the Ombudsman in walking out of the Committee's meeting, although requested by the Committee to remain. This was an ill-advised act displaying an unfortunate attitude and a misunderstanding of the role of this Committee and its obligations to report to the Assembly.

In the opinion of the Committee there must be an on-going relationship based on mutual respect and understanding between the Ombudsman and the Committee. In order to achieve this respect and understanding, the Committee chooses not to comment at length upon this incident or to make any recommendation about it. The Committee hopes it will not occur again".<sup>47</sup>

Possibly in the spirit of reconciliation, Mr. Maloney decided not to refer to the incident in his annual report. Unfortunately, such a reconciliation never took place. In fact, Mr. Maloney was greatly disturbed at the ensuing deterioration in his relationship with the Committee.

In March of 1979, five months after his resignation, Mr. Maloney sent the Premier of the province his *Blueprint for the Office of the Ombudsman in Ontario*. While the aforementioned incident concerning the member may have escaped mention in Mr. Maloney's Annual Reports, such was not the case with his *Blueprint*. Before referring in detail to the events, Mr. Maloney commented as follows:

"The Committee's mandate is clear and unambiguous. I reiterate that operating within that mandate and in close cooperation with the Ombudsman the Committee could have augmented inestimably the effectiveness of the Ombudsman's office. There is the potential in this structure for a partnership between the Ombudsman and the Select Committee combining a capacity to investigate and point up injustice to the individual with an ability to carry forward recommendations to rectify these injustices to the very floor of the Legislature.

Unfortunately, such a partnership has never developed. Instead an arm's length adversarial relationship grew up between the Committee and the Ombudsman's office. The Ombudsman's direction regarding those areas in which the Committee could be of real assistance was never sought. An atmosphere of hostility pervaded the Committee's meetings with members of the Ombudsman's staff. A stringent, legalistic interpretation of the Legislation was urged upon the Ombudsman by the Committee which interpretation, if followed, would render the Ombudsman's job virtually impossible. Most seriously, however, the Committee chose to ignore the limitations of its mandate and attempted to exercise control over the administration of the Ombudsman's office itself."<sup>48</sup>

Interestingly enough, despite Mr. Maloney's concern with the Select Committee's intrusion into the administration of his office, he concurred with the Committee's recommendation, first made in its *Second Report*, that its Order of Reference be expanded to enable it to consider the estimates of the Ombudsman and report to the Legislature. In this regard, he observed as follows:

<sup>47</sup> Committee, *Second Report* (March, 1977) pp. 52-3.

<sup>48</sup> Maloney *Blueprint* pp. 400-1.

"An expansion of the Committee's mandate in these terms would underline the necessity for the Committee to remain sensitive to the requirement of the absolute independence of the Ombudsman's office. Control having political overtones or the suggestion of such would be just as offensive as control by the Executive or the appearance of such. Certainly, if this jurisdiction were conferred upon the Select Committee it would emphasize the need for a cessation of the hostility and the requirement of a close partnership between the Ombudsman and the Select Committee".<sup>49</sup>

Since June of 1976, the estimates of the Ombudsman have been considered by the Board of Internal Economy, with the Chairman of the Select Committee on the Ombudsman in attendance to observe the preliminary examination. The Board considers the estimates of all legislative offices, including those of the auditor. It has been a matter of continuing frustration to the Committee that, despite recommendations on four separate occasions that its terms of reference be extended to consider the Ombudsman's estimates,<sup>50</sup> and the comment in one report that the matter was one of "utmost priority", the House has, as yet, failed to so amend the Order of Reference.

It is unfortunately painfully clear that the Committee continues to interpret its rule-formulating mandate as encompassing virtually any and every facet of the administration and operation of the Ombudsman's office. As recently as March 1982, the Chairman of the Committee requested the Ombudsman provide the Committee with a copy of his budgetary submission to the Board of Internal Economy and salary and job description information for all of his employees. A further example of the absurdity resulting from the Committee's interpretation of its rule-making mandate, was the Committee's decision to consider the appropriateness of the Ombudsman attending an Ombudsman seminar with expenses paid for and sponsored by the I.B.A. While a Select Committee cannot institute inquiries beyond its terms of reference, the interpretation of the Order of Reference of a Select Committee is a matter for the Committee itself.<sup>51</sup>

One final item remains to be considered under this heading, namely communications from the public. Almost from the moment of the Committee's establishment, it began receiving letters from members of the public who had previously brought a complaint to the Ombudsman's office and were still dissatisfied. While most of these complainants criticized the Ombudsman for not supporting their complaint, some

<sup>49</sup> *Ibid.*, at p. 423.

<sup>50</sup> *Second Report*, Recommendation 29; *Third Report*, Recommendation 41; *Fifth Report*, Recommendation 52; *Ninth Report*, Recommendation 7.

<sup>51</sup> May, *Parliamentary Practice*, 18th Ed. at p. 620 and Ontario Law Reform Commission 'Report on Witnesses before Legislative Committees', 1981, at p. 22.

expressed displeasure with the service received from the Ombudsman or members of his staff.

Although the Committee has indicated that it is not prepared to act as a "Court of Appeal" from Ombudsman Reports, it decided that it would, in appropriate circumstances, hear from members of the public in person, when, in the Committee's opinion, it would assist it in the formulation of general rules for the guidance of the Ombudsman.<sup>52</sup>

The Committee also determined that, as a matter of general policy, it would not consider a concern of a complainant before the Ombudsman had issued a report or taken other appropriate steps under the *Ombudsman Act*; in other words, the Committee was not prepared to hear "premature" complaints to it that were still undergoing the Ombudsman process.<sup>53</sup>

When the Committee receives a letter from a former complainant of the Ombudsman's office, the Clerk sends a copy to the Ombudsman's Office. We forthwith write to the complainant advising that our office intends to cooperate fully with the Select Committee, and requesting that the complainant execute an attached form of authorization. The letter further advises that the authorization will enable us, notwithstanding our duty of confidentiality to the complainant, to comply with any request by the Committee for copies of Reports or correspondence exchanged between the complainant and the Ombudsman's office.

The Office's experience to date is that this procedure has worked out satisfactorily, and it has rarely been the case that the communications received by the Committee contained anything which, in the Committee's view, would have assisted it in its rule-formulating function.<sup>54</sup>

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<sup>52</sup>Committee, *Fifth Report* (November, 1978) pp. 99–100.

<sup>53</sup>Committee, *Ninth Report* (December, 1981) pp. 10–11.

<sup>54</sup>An exception was a communication that prompted the Committee to formulate Rule 4(ii) prohibiting a member of the Ombudsman's staff from expressing opinions or making comments respecting actions or omissions purported to have been committed by the governmental organization in question, or respecting anything else arising out of the Ombudsman's investigation.

## I. AN ASSESSMENT OF THE ONTARIO COMMITTEE'S VALUE TO THE OMBUDSMAN AND TO THE PUBLIC GENERALLY

It is hopefully clear from the preceding pages that the Committee's relationship with the Ombudsman has, at times, been uneven and ambiguous. Notwithstanding this history, however, both Mr. Maloney and Mr. Morand remain of the view that a Select Committee can be a valuable adjunct to the Ombudsman's office, provided of course, each works closely with the other, at the same time respecting their distinct spheres of responsibility.<sup>55</sup>

The Committee provides an important sequel to the Ombudsman's investigation and report in "recommendation denied" cases. It has largely been the experience of Ombudsmen in jurisdictions without such a committee, that in the absence of a committee, the Ombudsman's report is not acted upon by the government after it is tabled with the Speaker.

For example, the present New Brunswick Ombudsman, Judge Joseph Berube has said that:

"... The Ombudsman's annual report appears to be little read by individual members, there is little or no comment on it in the proceedings of the Legislative Assembly. It is the Executive, rather than the legislative branch, which has traditionally initiated action on the Ombudsman's recommendations. . . . The result is that while the Ombudsman's role appears to complement that of the Legislature, there may be a need for a greater consciousness of this relationship, possibly through the creation of a Select Committee."<sup>56</sup>

One of the earliest proponents of the Ombudsman institution in Canada, Professor Donald Rowat of Carleton University, agrees with Judge Berube:

"I think that when the Ombudsman make recommendations for legislative change, that is, for amendment to the laws, for improvements in administrative procedure, their recommendations are likely to fall on barren ground if there is no specific committee of the Legislature ready to take up those proposals and recommend them to the Legislature. I think that that is one of the main advantages of having the Select Committee on the Ombudsman on a continuing basis."<sup>57</sup>

Dr. Graham White has attributed much of the tension in the relationship between the Ontario Ombudsman and the Committee to the rudimentary fact that the Ombudsman is doing a job that, rightly or wrongly, many M.P.P.'s believe to be theirs. Given the limited

<sup>55</sup>Maloney *Blueprint* p. 406 and see also the Ombudsman's *Sixth Report* (October, 1978 – March 1979) where Mr. Morand referred to the Committee "as the final arrow in the Ombudsman's quiver" at p. 14.

<sup>56</sup>New Brunswick, Office of the Ombudsman *Sixth Annual Report* (October, 1978 – March, 1979) p. 14.

<sup>57</sup>*Canadian Legislative Ombudsman Conference Proceedings 1977* at p. 181.

resources with which they must tackle all manner of problems, many Members are frankly jealous of the Ombudsman's formidable resources. In this connection, the former leader of the Ontario New Democratic Party, Mr. Stephen Lewis, has said that:

"Number one, I think the problem in this jurisdiction and perhaps in others lies with the legislators and not with the Ombudsman. I think that some of my colleagues suffer palpable tremors about the intrusion on what was a sacred ground for the legislators, and I suspect that this is a continuing anxiety in the evolution of the Ombudsman's office. I don't know whether it's a fear which politicians have or legislators have from time to time of having inadequacies exposed, or whether it's a fear which emerges at least early on that may persist which to me frankly makes little sense".<sup>58</sup>

It is perhaps partly as a result of this rivalry that has yet to be resolved, that the kind of partnership envisaged by both Mr. Maloney and the legislators when the Committee was established, has never come to pass.

The impression should not be left that the Committee is continually at odds with the Ombudsman, for such is not the case. The relationship of the Committee with the Ombudsman has, for the most part, been amicable and cooperative in recent years, the occasional differences in opinion notwithstanding. Sometimes that collaboration has achieved outstanding results. For example, with the aid of the Select Committee, the Ombudsman was able to assist the Workmen's Compensation Board in formulating a clear policy of 'benefit of the doubt' which is now applied at all levels of decision-making at the Board.<sup>59</sup>

While I have earlier argued that the Committee ought to accord a greater degree of deference to the Ombudsman's opinions in a 'recommendation denied' case, it is also true that the Committee has an almost perfect record in ensuring that the Ombudsman's recommendations are carried out, when the Committee agreed with the Ombudsman and so reported and recommended to the Legislature.

The following passage from the Committee's *Sixth Report* summarizes the role that the Select Committee on the Ombudsman has attempted to perform:

"The Committee has historically functioned as more than an information source to the Legislative Assembly respecting the organization and operation of the 'Ombudsman concept' in Ontario. It has served as a liaison and catalyst in the establishment, maintenance and improvement of the relationships between the Ombudsman and the many governmental organizations within his jurisdiction. It has also served as a means of implementing matters outstanding between the Office of the Ombudsman and governmental organizations. It has

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<sup>58</sup>*Ibid.*, p. 158.

<sup>59</sup>See Committee, *Seventh Report* (September, 1979) pp. 27-9, and Committee, *Ninth Report* (December, 1980) p. 29.

been acknowledged by most who have come into contact with it as an effective instrument in the overall concept of an Ombudsman in the Province of Ontario.<sup>60</sup>

In his *Blueprint* Mr. Maloney characterized his relationship with the Committee as an unhealthy one, that tended to inhibit rather than enhance the Ombudsman function.<sup>61</sup> Since assuming office, Mr. Morand has attempted to do his best to ameliorate that relationship.

Earlier extensive reference was made to what could be considered to be a major stumbling block to a complete reconciliation between the Ombudsman's office and the Committee, namely the Committee's overly generous interpretation of its rule-formulating mandate. Until and unless the Committee is prepared to confine itself to considering the appropriateness of rules for the guidance of the Ombudsman in his investigative and reporting functions, as opposed to such matters as the administration and organization of his office, it is likely that the road ahead will remain a rocky one. Since the Committee continues to feel that it is the appropriate legislative agency to consider virtually any matter concerning the Ombudsman, the prognosis does not look good.

In conclusion, I can do no better than repeat the observation made by Professor Jack Richardson, Ombudsman for the Commonwealth of Australia:

"Although there are obvious dangers, as early Ontario experience shows, in having a zealous Select Committee, the balance of opinion is clearly that select committees have facilitated the work of the Ombudsman and promoted an alertness in Parliament to his role in exposing deficiencies in official action and seeking appropriate remedies. In Sweden, Denmark, Israel and Britain this is clearly so, and it appears it may be so in Ontario.<sup>62</sup>

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<sup>60</sup>Committee, *Sixth Report* (May, 1979) p. iii.

<sup>61</sup>Maloney *Blueprint* p. 406.

<sup>62</sup>Richardson, Jack, "The Ombudsman among the State Authorities" *International Ombudsman Conference (Second) Proceedings*. Jerusalem, 1980. p. 60.