

THE OMBUDSMAN -  
AN EFFECTIVE RECOURSE FOR CITIZENS?

by

Gordon Earle, Ombudsman  
Province of Manitoba, Canada

OCCASIONAL PAPER #49  
January 1994

ISSN 7116349

## THE OMBUDSMAN - AN EFFECTIVE RECOURSE FOR CITIZENS?\*

by

Gordon Earle, Ombudsman for the Province of Manitoba, Canada

It is painfully true that with each decade that passes, society is becoming more and more complex and the systems and bureaucratic structures that govern our societies reach deeper and deeper into the everyday lives of our citizens to the point that we must often ask ourselves the question "And what about people?" What indeed about people? What recourse does the average citizen have when the weight of bureaucracy bears down heavily upon his/her shoulders creating an oppressive burden forcing one to one's knees, stifling vim and vitality as one becomes increasingly and hopelessly entangled in endless red tape that seems to cut off the breath of life. As individual citizens are choking to death by red tape and drowning in the sea of bureaucracy, what about the Ombudsman? Is the Ombudsman an effective recourse for these citizens or does he/she simply present another obstacle, another hurdle for the already weary and oppressed citizen to overcome?

I wish to examine and, hopefully, answer the question of whether the Ombudsman is *still* an effective recourse for citizens - a suggestion with which I am sure most if not all of us (particularly we Ombudsman) will agree. However the task for us today is not to dwell upon nor even debate our effectiveness in the past, but rather to look realistically at the present and determine whether in this new and increasingly complex age of bureaucracy with Big Brother and Big Sister watching us, to determine whether the Ombudsman really is an effective recourse for citizens.

To address the question of the effectiveness of an Ombudsman properly, one must first of all look at what is an Ombudsman. The word Ombudsman, as all or most of us know, is a Swedish word which has its origin in the Swedish Constitution of 1809. However, as many will also know, the term Ombudsman has found its way to all corners of the world and has been and still is used in many different contexts by many people, all of whom feel they are performing an Ombudsman's function. However, in this paper I will be focusing my attention upon what we commonly refer to as the classical or legislative Ombudsman, i.e. an Ombudsman appointed in accordance with a statute enacted by a government at a federal, provincial or state level. The legislative Ombudsman is accountable to the legislative body that appointed him/her and is not subject to control or interference in the performance of his/her mandate, which basically is to investigate complaints against government departments and agencies and to make findings and recommendations with respect to those complaints. Legislative Ombudsmen may report their findings and recommendations to complainants, respondents, the appointing legislative body and the public if necessary. Usually a legislative Ombudsman has security of tenure for a term of years.

\* Paper presented to the 1989 Canadian Ombudsman Conference, Québec City, Canada, November 1, 1989.

To explore whether the Ombudsman is still an effective recourse for citizens one must first look at the scope of jurisdiction which an Ombudsman has. In other words, with what kinds of problems can an Ombudsman be of assistance to members of the public? I have already indicated that this is an extremely complicated society in which we live today, and that people are quite often confronted with many problems as they pursue their daily tasks of making a living for themselves and their families. What recourse, if any, can an Ombudsman provide to citizens faced with such problems?

Firstly, it should be understood that an Ombudsman's jurisdiction, i.e. his/her range of authority, is limited to that conferred upon the person by the statute or law establishing the Ombudsman and his/her office. This jurisdiction may vary somewhat from state to state, province to province, and country to country. However, generally speaking, Ombudsman Acts give Ombudsmen the power to assist people with problems involving government departments and agencies, either municipal, provincial/state or federal. Some legislation will give Ombudsmen jurisdiction over more than one level of government, while other legislation restricts Ombudsman activity to one level of government only. However, most legislation excludes Ombudsmen from investigating private disputes or problems that do not involve government departments or agencies, decisions of the courts, private business and industry, professional associations, and decisions of cabinets and legislatures. Even this jurisdictional restriction may vary somewhat as we move from one province, state or country to another.

In any event, I believe it is sufficient to say, for the purpose of this discussion, that the focus of an Ombudsman's jurisdiction is upon problems involving government departments and agencies. Hence, if the Ombudsman is to be an effective recourse for citizens it would be primarily in the area of assisting in the resolution of issues between the state and citizens. While it is true that Ombudsman offices can, and quite often do, assist people informally with other problems by way of providing information and making referrals, such assistance is what one might call an extracurricular activity, and while it may constitute an integral and necessary part of the operation of an Ombudsman office, it nonetheless in most cases remains outside the strict mandate set forth by the legislation governing Ombudsman offices.

After having looked at what jurisdiction an Ombudsman has to help people, one must (if we are to pursue the question of the effectiveness of the Ombudsman as a recourse for citizens) now turn our attention to a very important factor and that is the accessibility of an Ombudsman. In reality, it does not matter what jurisdiction an Ombudsman has if he/she or his/her office is not available or accessible to citizens. How accessible is the Ombudsman to citizens? This question must be examined very closely and with a great degree of honesty because the answer to this question will in large part determine whether the Ombudsman is still an effective recourse for citizens. I will not attempt to answer this question here for any office other than my own, for I am sure that each Ombudsman knows that answer as it applies to his/her office. In the Province of Manitoba, I believe the Office of the Ombudsman is well known by the public and that citizens have access to the office. We firmly believe in the principle of accessibility and we are continuing to do what we can to make the services of the Ombudsman known and available to the public (e.g. Annual Reports, brochures, open line programs, public speaking engagements and appearances, posters in institutions, seminars and instruction classes on the role of the Ombudsman given to correctional officer trainees and others, etc.).

As well as imparting knowledge about the Ombudsman, and as well as the general principle of availability of Ombudsman services, one must also give some consideration to the practical and tactical aspects of accessibility such as: office location, accessibility for those in wheelchairs, accessibility for those with hearing or visual impairment, accessibility for those in remote areas and so forth. All of these, and many other things, must be taken into consideration when considering whether the Ombudsman is still an effective recourse for citizens.

Once we have dealt with the jurisdiction and accessibility of the Ombudsman we must now turn our attention to the powers of the Ombudsman. Even if an Ombudsman has jurisdiction over problems involving government departments and agencies, and even if an Ombudsman is accessible to citizens, he/she cannot be an effective recourse unless he/she has some powers to enable him/her to give effect to the mandate bestowed upon the Ombudsman by the legislation establishing the office. What then are the powers of an Ombudsman?

Although the powers of an Ombudsman may vary somewhat from jurisdiction to jurisdiction, generally speaking, legislative or classical Ombudsmen have four basic powers, namely: investigating, reporting, recommending and publicizing.

### **Investigating**

The power of investigating is perhaps the greatest and most essential power an Ombudsman has. The very wide sweeping power of investigation, sanctioned by law, is perhaps what distinguishes legislative Ombudsmen most from other types of Ombudsmen. The legislative Ombudsman is usually empowered by legislation with the authority to conduct, if necessary, very formal investigations aimed at obtaining any and all relevant information concerning the matter under review. In this regard, the Ombudsman and his staff have at their disposal the authority, not even held by a member of the legislature or member of parliament, to have access to confidential government files and any other information that pertains to the problem. As well, most Ombudsmen have the power to hold formal hearings and hear or obtain information from any person and make any inquiries he feels necessary. The Ombudsman may require any person to furnish information and produce documents relating to any matter being investigated. It is important to understand that this power extends even to those persons who are not officers, members or employees of a department or agency of the government, and this power also applies to documents which may not be in the custody or under the control of a department or agency of government. The Ombudsman may also summon before him and examine on oath *any* person who, in the opinion of the Ombudsman, is able to give any information relating to any matter being investigated by him/her, regardless of whether the person is a complainant, government employee or otherwise.

In Manitoba, in addition to the powers of investigation mentioned above, which are spelled out in *The Ombudsman Act*, the Ombudsman also has the protection and powers of a commissioner appointed under Part V of *The Manitoba Evidence Act*. The Ombudsman's formal powers of investigation are amplified under *The Manitoba Evidence Act* to include entering upon, viewing or inspecting any land, building, works or property and if necessary at any time by day or night. *The Manitoba Evidence Act* also strengthens the Ombudsman's powers of summoning and examining on oath because the powers conferred on the Ombudsman under *The Manitoba*

*Evidence Act* enable the Ombudsman to issue a warrant in cases where a witness summoned to appear before the Ombudsman neglects or refuses to appear, or in cases where the Ombudsman is satisfied by evidence upon oath that it is probable that a witness will not attend to give evidence without being compelled to do so. In the latter case, the Ombudsman may in the first instance, instead of issuing a summons, issue a warrant to bring in and have the witness attend before him at the time and place mentioned in the warrant. *The Manitoba Evidence Act* also empowers the Ombudsman with the authority to commit an individual to jail for refusal to be examined on oath (or affirmation), for refusal to take an oath (or affirmation) or, after having taken the oath, for refusal to answer questions without lawful excuse.

There is also under *The Ombudsman Act* an offence and penalty provision to deal with situations where a person who, without lawful justification or excuse, hinders or resists the Ombudsman in the performance of his functions, refuses or wilfully fails to comply with any lawful requirement of the Ombudsman, wilfully makes any false statement to the Ombudsman or misleads or attempts to mislead the Ombudsman. Finally, to further illustrate the extent of investigatory power available to the Ombudsman in Manitoba, the Ombudsman as a commissioner under *The Manitoba Evidence Act* during an inquiry is entitled to command the service of one or more police officers or constables to maintain order and put down breaches of the peace, or for the service of any summons or the execution of warrants issued by the Ombudsman. If no police officers are available, the Ombudsman may appoint and swear in special constables for that purpose.

Although there is probably much more that I could say with respect to the investigatory powers of the Ombudsman, I believe that I have said enough to illustrate the wide sweeping, formal powers available to the Ombudsman for purposes of investigation. In Manitoba, the Ombudsman seldom, if ever, has to resort to the full extent of these formal powers. Most cases are resolved through a less formal process of investigation, involving an understanding of the Ombudsman's function and a willingness by departments and agencies to cooperate and assist in the resolution of problems.

## **Reporting**

Another significant power of the Ombudsman is the power of reporting. Most Ombudsmen are empowered by their legislation to make reports, and while Ombudsmen may delegate to others any of their powers, the power to make a report under *The Ombudsman Act* is reserved for the Ombudsman and cannot be delegated (at least not in the Province of Manitoba). I think that this principle recognizes the significance of an Ombudsman's report, in that it must truly be a report of the Ombudsman and not a report from someone else on the behalf of the Ombudsman. The cloak of responsibility falls squarely on the shoulders of the Ombudsman when it comes to reporting formally on a matter that has been investigated. Because of the weight attached to an Ombudsman's report, there is a provision in *The Ombudsman Act* that guarantees to individuals a right to be heard if, at any time, it appears to the Ombudsman that there is sufficient grounds for his making a report that may adversely affect any department, agency of government, or person. In such a case, when a department, agency of government, or person is given an opportunity to make a presentation before the Ombudsman, the party involved may be represented by counsel.

Also, because of the potential impact of an Ombudsman's report, there is a specific provision in the *Manitoba Ombudsman Act* specifying that the Ombudsman may, at any time during or after an investigation, consult any Minister who is concerned in the matter of the investigation.

There are several sections of *The Ombudsman Act* of Manitoba which deal with the many facets of reporting by the Ombudsman: the reporting on investigations and recommendations; the further reporting, on investigations and recommendations, to the Lieutenant Governor in Council and the Legislative Assembly; the reporting on refusal to investigate; the reporting on the issuance of a certificate by the Attorney-General to the Ombudsman indicating that the investigation of a matter would be contrary to the public interest; the reporting on petitions or matters referred to the Ombudsman by the Legislative Assembly; the reporting on matters of administration referred to the Ombudsman by the Lieutenant Governor in Council; the reporting to complainants; the Ombudsman's annual report; and of course, last but not least, the publication of reports. With respect to the publication of reports, the *Manitoba Ombudsman Act* allows that, "in the public interest, or in the interest of a person, department or agency of the government, the Ombudsman may publish reports relating generally to the exercise and performance of his functions and duties under this Act or to any particular case investigated by him, whether or not the matters to be dealt with in the report have been the subject of the report made to the assembly under this Act." This power of issuing public reports and thereby gaining public support and sanction for Ombudsman work is a power which most Ombudsmen have available to them and is a power which we value greatly and utilize with great respect for it can be a very powerful and effective tool to be used in assisting citizens to obtain administrative justice.

Some important points to note with respect to Ombudsman reports are:

- 1) The Ombudsman ultimately is responsible for any report made under *The Ombudsman Act*.
- 2) The form, content and timing of an Ombudsman report are generally at the discretion of the Ombudsman, although the timing of a report in cases referred by a committee of the Assembly or by the Lieutenant Governor in Council could be determined by any special directions of the committee or the Lieutenant Governor in Council.
- 3) Any report to the Lieutenant Governor in Council or to the Legislative Assembly respecting recommendations made under *The Ombudsman Act* shall include the department's or agency's comments concerning the opinion or recommendation of the Ombudsman.
- 4) Despite the provision in the *Ombudsman Act* requiring the Ombudsman and his/her staff to maintain secrecy, the Ombudsman may nonetheless disclose in a report made by him/her any matters he/she considers necessary to disclose in order to establish grounds for his/her conclusions and recommendations.

In summary, we can see that the power of reporting is a very useful and important power of the Ombudsman.

### **Recommending**

The third power of the Ombudsman, the power of recommending is one that perhaps draws most criticism from the public, particularly those members of the public who feel that Ombudsmen should have more power. Quite often, Ombudsmen will receive from complainants the expectation that the Ombudsman can order a government department or agency to correct a problem or rectify an injustice. This expectation is as far from the truth as Newfoundland is from British Columbia. In fact, Ombudsmen have no authority, upon the conclusion of an investigation, to order anything. The Ombudsman recommends, and recommends only. The making of orders to resolve problems falls within the realm of the courts.

Despite the fact that Ombudsmen do not have authority to order solutions to problems, the Ombudsman is not a "toothless tiger" as some may wish to describe him/her. The Ombudsman's teeth remain intact, and they are still capable, even in contemporary society, of gnawing away the red tape of bureaucracy that often binds the hands and feet of citizens and renders them immobile. The Ombudsman's power of recommendation can often bring mobility to citizens. While a recommendation may not, on the surface, appear to the uninitiated to be as powerful as an order, I believe that, overall, given the structure of our democratic society and given the mandate of the Ombudsman and the relationship of the Ombudsman's role to that of the politician - I believe that the power of recommendation is a much more practical, workable, responsible and effective power than the power of ordering. I believe it would be inappropriate and would defeat the intent of the legislative Ombudsman concept to give the Ombudsman, an unelected official, the power to order the affairs of government departments and agencies responsible to elected officials. The onus for governing and the responsibility for government departments and agencies must remain with those officials whom we elect to represent us. While the Ombudsman may have a distinct mandate to help keep government administration on the rails, so to speak, nonetheless the ultimate responsibility for government administration rests with our elected representatives, by whom the Ombudsman himself/herself is commissioned and from whom he/she receives the mandate of investigating complaints.

Some important features of Ombudsman recommendations are:

- 1) An Ombudsman's recommendation is based upon a thorough investigation of a complaint including the examination of all relevant information, policies, procedures and laws.
- 2) Among other things, an Ombudsman may recommend that:
  - a) a matter should be referred to the appropriate authority for further consideration;
  - b) an omission should be rectified;

- c) a decision should be cancelled or varied;
- d) any practice on which a decision, recommendation, act or omission was based should be altered or reviewed;
- e) any law on which a decision, recommendation, act or omission was based should be reconsidered; or
- f) reasons should be given for any decision, recommendation, act or omissions.

As well, the Ombudsman may recommend any other steps that he/she feels should be taken.

- 3) From numbers one and two above, it can be seen that the Ombudsman as a recourse for citizens has a great deal of discretion regarding the recommendation he/she may make and can deal not only with specific individual complaints but also with general systemic issues centering around practices, policies and laws. Thus, the Ombudsman's power of recommendation can, to some degree, provide a venue for advocacy and social reform.
- 4) Since it is up to the department or agency head to decide whether to accept or reject an Ombudsman's recommendation, this in fact puts the onus where it properly belongs, i.e. with the elected officials.
- 5) The Ombudsman's recommendations will be only as good as his/her power of persuasion and the thoroughness and soundness of the investigation.
- 6) The Ombudsman's recommendations and the response of the department or agency can usually in most jurisdictions be reported, if necessary, beyond the department or agency to Cabinet and to the Legislature and ultimately publicly, thereby giving them the broadest possible exposure.

The power of recommending, as can be noted from the points above, is a power which lends greatly to the effectiveness of Ombudsmen in today's society.

### **Publicizing**

With respect to the Ombudsman's power of publicizing, I have already touched upon this briefly when discussing the Ombudsman's power of reporting and, in particular, the power to make a public report. Therefore, I will not repeat what I said earlier except to emphasize that the giving of publicity to the Ombudsman function, whether it be by way of a written public report or mass media coverage, is a most valuable and effective power available to most Ombudsmen. This power, properly utilized, greatly enhances the potential of the Ombudsman to be an effective recourse for citizens. Although the power to choose whether an issue being investigated becomes public or not is sometimes usurped by complainants, the media, social

advocates, politicians or others who may have some knowledge of, or interest in, the matter, the fact remains that the Ombudsman's discretion must come into play when deciding whether he/she is going to utilize the Ombudsman's power of publicizing and release any information on the issue. The Ombudsman must constantly balance the interest of the individual, the government department or agency, and the public as he/she decides whether to employ the power of publicity as a means of achieving the goal of fulfilling his/her mandate under *The Ombudsman Act*.

From a review of the powers available to Ombudsmen, it can be noted that the underlying theme common to all the powers (investigating, reporting, recommending and publicizing) is discretion. The Ombudsman must employ a great deal of discretion in the utilization of all these powers. Because the Ombudsman must use so much discretion, it stands to reason that he/she should be a very discreet person in the best sense of the word. In other words, Ombudsmen must be cautious, but not overly cautious; wise or prudent but not arrogant or self-centered; sensible, showing sound judgement, and capable of seeing errors and correcting them even in their own operation.

Having briefly reviewed the powers available to Ombudsmen, as we further pursue the question of whether the Ombudsman is still an effective recourse for citizens, we must now ask ourselves whether Ombudsmen in fact utilize the powers available to them. It is one thing to have these powers, but if we do not use them can we truly be effective in the performance of our duties? This general question of whether Ombudsmen employ the powers available to them obviously cannot be answered definitively in this paper, because the actual use of powers available will obviously vary from jurisdiction to jurisdiction, depending of course on many factors, such as: the need to use a given power; the expectations placed upon our offices by the various publics they serve; the style of the particular Ombudsman heading the office; the resources, financial and otherwise, available to Ombudsmen; the kinds of problems brought to the attention of the Ombudsmen; the response to the office by officials, and so forth. Obviously what works in one jurisdiction may not work or even be necessary in another. It is evident that each jurisdiction must decide for itself whether it is getting maximum mileage out of the powers available to the Ombudsman and, hence, whether the effectiveness of the Ombudsman as a citizen's recourse is being maximized or minimized by the use made of the Ombudsman's powers.

There is one important factor which will determine for any jurisdiction whether the Ombudsman will continue to be an effective recourse for citizens and that is the integrity and the apparent integrity of the Ombudsman himself/herself. One of the basic tenets of the ombudsman concept is the *independence of the Ombudsman*. The Ombudsman must be an independent, impartial, objective and politically non-partisan investigator of complaints who is not only *actually* free from interference in the performance of his function but is also *perceived* of as being free from interference. In other words, an Ombudsman must not only be independent but must also be seen as independent. Justice must not only be done but must also appear to be done.

The independence and impartiality of Ombudsmen may be assured in many different ways and this of course varies from jurisdiction to jurisdiction, with some jurisdictions having very good methods of assuring (as much as one can assure) independence and the appearance of

independence, while others have practically no means at all of giving such an assurance. In Manitoba, the independence and neutrality of the Ombudsman is enhanced by a number of factors, these being:

- a) an open national competition for the job when the Ombudsman position becomes vacant;
- b) the method of appointment of the Ombudsman, i.e. on the recommendation of an all-party committee of the Legislature, namely the Standing Committee of the Assembly on Privileges and Elections;
- c) the length of tenure given to the Ombudsman's term of office in that the Ombudsman is appointed for a six year term and may be reappointed for a second six year term;
- d) the Ombudsman shall not hold any other public office or carry on any trade, business or profession;
- e) the Ombudsman is an officer of the Legislature and is not eligible to be nominated for, elected as or sit as a member of the Assembly;
- f) the Ombudsman cannot be removed or suspended except on a resolution of the Assembly carried by a vote of two-thirds of the members of the Assembly voting thereon. If the Legislature is not in session, the Lieutenant Governor in Council may suspend the Ombudsman for disability, neglect of duty, misconduct or bankruptcy, but the suspension shall not continue in force beyond the end of the next ensuing session of the Legislature. In other words, any suspension of the Ombudsman must ultimately be dealt with by the Legislature;
- g) the Ombudsman reports annually to the Legislature through the Speaker;
- h) the Ombudsman is not a civil servant;
- i) the salary of the Ombudsman shall not be reduced except on resolution of the Assembly carried by a vote of two-thirds of the members of the Assembly voting thereon;
- j) subject to the *Ombudsman Act* and any rules made under the Act, the Ombudsman may determine his procedure. Any rules made under the Act would be made by the Legislative Assembly of which the Ombudsman is an officer; and
- k) the Ombudsman's budgetary and staff needs are presented to, and worked out with, an all-party committee of the Assembly called the Legislative Assembly Management Commission.

As I have indicated, the various safeguards of the independence of the Ombudsman will, of course, vary from jurisdiction to jurisdiction and I believe even more important than the safeguards which may be in place is the actual character, integrity and honesty of the Ombudsman himself or herself. It may be quite true that an Ombudsman may be appointed under an almost perfect appointment system and he/she can still have credibility problems if he or she is not of upstanding character with the appropriate personality for the job. Likewise, you may have someone appointed in a jurisdiction where the method of appointment and selection leave much to be desired, and yet the individual, if possessed with honesty, integrity and an upright character, may overcome the adversities created by the apparently politically biased or otherwise unfavourable appointment methods, although it will certainly be an uphill battle. It is indeed preferential to have the proper safeguards for independence built into the ombudsman system. That, combined with the proper blend of human characteristics, will produce an Ombudsman who has the credibility and the influence necessary to be an effective recourse for citizens.

In conclusion, I would add one note of caution with respect to the Ombudsman as an effective recourse for citizens today. No matter how much potential the Ombudsman and his staff may appear to have, no matter how perfect the Ombudsman legislation may appear to be, no matter how receptive a government may appear to be in dealing with the Ombudsman - the fact remains that an Ombudsman's office is only going to be as effective as the public it serves allows it to be. In the final analysis, it is the public at large that calls the shots regarding the effectiveness of the Ombudsman as a recourse for citizens. If the public learns about the Ombudsman, supports the Ombudsman and utilizes the office of the Ombudsman, the Ombudsman concept will surely continue as a viable alternative for problem solving. The finding of effective solutions to citizens' problems with government bureaucracy is a two-way street involving not just the Ombudsman working to assist citizens but also citizens of all stripes and sizes working to understand and support the work of the Ombudsman. Let us work together for administrative fairness and justice for all.