BRIEF ON THE OFFICE OF THE OMBUDSMAN

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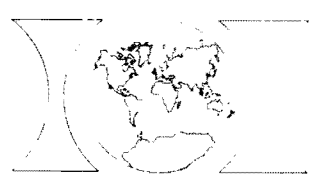

INTERNATIONAL OMBUDSMAN INSTITUTE

Background

In the course of a meeting of several members of the International Bar Association, Ombudsman Committee, held in Toronto, Canada, on September 10, 1977, a sub-committee was established, for the purpose of drafting a brief which might be of assistance to lawyers and judges in relation to legal actions involving Ombudsman Offices.

The sub-committee was established under the chairmanship of Mr. Charles Ferris, Solicitor to the New Brunswick Ombudsman, and includes Mr. Brian Goodman, Counsel and Special Advisor to the Ontario Ombudsman and Mr. Gordon Mayer, Solicitor to the Saskatchewan Ombudsman. The sub-committee wishes to gratefully acknowledge the research assistance of Mr. Charles Lugosi, a summer law student with the Ontario Office.

In addition, we gratefully acknowledge the advice and counsel provided by the Chairman of the Ombudsman Committee of the International Bar Association, Dr. Bernard Frank.

The preliminary brief draft was reviewed by a group of solicitors to Ombudsman offices; namely, Alex Weir, Solicitor to the Alberta Ombudsman; John Spinnato, Deputy Citizens' Aide/Ombudsman for the State of Iowa, and Robert Buchan, Legal Adviser to the Commissioner of Official Languages for Canada. We acknowledge, with thanks, the contribution made by these three persons.

Introduction

The purpose of this Brief is to provide a background document for use by lawyers and judges involved in legal action relative to the Ombudsman concept. The components of this Brief - concept and principal elements, historical background, jurisdiction and powers - are not intended to provide the reader with an exhaustive, formal, jurisprudential analysis of the Office;

rather, its purpose is to discuss, in brief fashion, the dynamics of an institution in a manner which will facilitate comprehension and conceptualization by the reader.

Concept and Principal Elements

The International Bar Association Resolution defines the Ombudsman as an Office established by constitution or statute, headed by an independent, high-level public official, who is responsible to the Legislature or Parliament, who receives complaints from aggrieved persons against government agencies, officials and employers, or who acts on his own motion, and has the power to investigate and recommend corrective action and issue reports. Viewed from a judicial perspective, the Ombudsman has been seen as "a watchdog, designed to look into the entire workings of administrative laws".

The basis for the establishment and the reason for the continued growth of the Ombudsman concept may be seen as the continuing need on the part of the public to be able to contact and obtain guidance from a high-level, respected official who is both independent and impartial and who has the formal power to investigate, and the more informal power to correct, an act of maladministration.

As an officer of the legislative function of government, the Ombudsman must be a keen political observer, yet one who maintains a political aloofness and independence which is above reproach.

Inherent in the definition of the concept, are factors which have given rise to public objection to its manner of functioning. These stem largely from the fact that the Ombudsman Offices, being legally and legislatively constituted, are subject to certain legal and economic restrictions which tend to encroach on their universality as problem-solving mechanisms. At the same time, the independence of the Office has, in certain instances, been

viewed as conflicting with certain established political mechanisms.

In the result, a myriad of complaint-handling agencies has been established, with a view to either supplanting or complementing the formal Legislative Ombudsman. During the experience of the concept as a world-wide phenomenon - a period spanning the last two decades - these other complaint-handling mechanisms (e.g. executive Ombudsmen, citizens' information services, media Ombudsmen) have served to complement the role of the Legislative Ombudsman. It is also suggested that, in view of the unique jurisdiction and powers of the Ombudsman as conferred by statute, such agencies have not served to, and probably will not, supplant the legislatively-based institution.

Historical Background

Although it is somewhat facile to regard the Ombudsman concept as a component of the twentieth century democratic and social welfare state phenomena, it is, rather, very much like the process of which it is a part, the product of a continuing evolutionary process with origins dating from those of the first sophisticated governmental organisms.

During the era of the Roman Empire, the Roman satirist Juvenal asked: "Quis custodiet ipsos custodes", which a free translation renders: "Who governs the Government?"

In fact, during much of the life of the preceding Roman Republic, two censors - magistrates appointed for a stated term - scrutinized administrative action and heard complaints regarding alleged maladministration.

At about the same time, there existed in China during the Han Dynasty, a continuous control system termed The Control Yuan. Its function included the supervision of administrative officialdom and the hearing of public petitions against administrative injustice.

In medieval Europe, the Christian Church often provided an office of Intercessor between subject and prince or between serf and feudal lord.

In 1722, in Russia, Peter the Great appointed a Procurator General, who, as "eye of the Czar" would not only ensure the enforcement of laws and edicts, but would also protect the population from excessive official action.

Some nine years earlier, the Swedish monarch, Charles IX, appointed an "Ombudsman" for the same basic reason, i.e., to be a legal safeguard for the executive branch relative to its state administration.

The evolution of this Office, particularly following the introduction of the 1809 Swedish Constitutuion, provided the model for the present-day Office of the Ombudsman. The Swedish Constitution provides for a strict division of powers between the executive, legislative and judicial branch of government, so that individual departments are not responsible to ministers, but rather to the rule of law. In such a circumstance, an ascendant parliament refined the Office of the Ombudsman so that he would report to the legislative rather than the executive branch, and so that the Office would have the power to scrutinize and, if necessary, prosecute members of the state administration and the state judiciary, who "committed an unlawful act or neglected to perform official duties properly".

In the course of the nineteenth and early twentieth centuries, this Office gradually evolved from one whose main responsibility was to act as an agent of, and report to, Parliament, and a prosecutorial officer, to one which primarily served the purpose of resolving citizens' complaints against bureaucracy, and one whose prosecutorial role, and role in relation to the review of judges, became a lesser one. It is generally conceded that the basis for this evolutionary process was, in large part, the result of the implementation of a so-called "social welfare state" in Sweden.

The possibility that such an Office, in its refined form, could be incorporated in the democratic process on a world-wide basis, became a reality following the adoption of the concept by Sweden's Scandinavian neighbour, Denmark, in 1954. Its introduction was characterized by modifications suitable to a governmental system which included a highly-independent judiciary and an administration run on the basis of the concept of ministerial responsibility. In the result, the jurisdiction of the Danish Ombudsman was restricted to a supervision of actions of the public administration of the country, and to the ordering of a prosecution rather than a prosecution by itself with respect to wrong-doing by public officials.

The successful transfer of the Ombudsman concept to such a system of government, combined with the excellent proselytising abilities of the first incumbent, resulted in the ignition of the spark of interest in the concept, and its adoption throughout the world.

Although the idea spread slowly at first, the last two decades have witnessed a dramatic growth in the institution around the world. As a result of the relatively recent development of the modern welfare state, government and citizen now intersect at every turn, and the citizen is confronted by all types of departments, boards and agencies that have been allotted extensive powers. With the great proliferation of bureaucracies to administer government programs, it has been necessary to provide new protection against bureaucratic failing and abuses of power. The Ombudsman should be seen then in this perspective.

At present, it might be said that three documents serve as bench-marks for the present status of the Ombudsman concept, they are:

(a) the New Zealand Ombudsman Act of 1962, which has served as a model for Ombudsman legislation in the English-speaking and/or

common law countries which have embraced the concept;

(b) the British Ombudsman Act of 1967, which, together with its French counterpart, represents the manner in which populous political jurisdictions have adopted the Ombudsman; and

(c) the I.B.A. Ombudsman Resolution of 1974, which has endeavoured to ensure that certain minimum standards or qualities be ascribed to Offices of Legislative Ombudsmen.

The above documents are reflective of a certain flexibility and adaptability of the Office. In addition, they represent a certain conventionality - a control mechanism rooted in history and encompassing universally recognized principles of administrative review.

It may be said that the International Bar Association Resolution is the present model of this phenomenon, and therefore, useful to reproduce it in its entirety as follows:

> "BE IT RESOLVED, that the International Bar Association recommends:
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> 1. That consideration be given to the establishment of the Office of the Ombudsman on the national, state, and province levels in order to protect persons against the violation of their rights by government officials and agencies.
>
> 2. That the Office of the Ombudsman so established should be in accordance with the following definition: An office provided for by the constitution or by action of the legislature or parliament and headed by an independent, high-level public official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies, officials, and employees or who acts on his own motion, and who has the power to investigate, recommend corrective action, and issue reports."

Jurisdiction

The questions: "What is an Ombudsman?" and "What does an Ombudsman do?" cannot be answered without placing the person in the context of a system of government and a particular culture and society. Characteristics of an Ombudsman and the Office are in part a product of the country lived in, the culture enjoyed, the system of government that has created the Ombudsman and, most importantly, the expectations that all have of the person. What an Ombudsman does and what an Ombudsman is, depends on what the particular country, culture and system of government want and need the institution to do.

While the role of an Ombudsman in the traditions, history, and civilization of any particular country are curiously endemic, they all share a common objective: ultimately to serve the public; to hear complaints respecting the operation of the public service; and where appropriate, to take such steps as are available to them to remedy the consequences of a parti ular act or omission of that public service.

The general Ombudsman plans adopted in Denmark, Norway and New Zealand are modelled closely on the Swedish and Finnish originals. Although in most essentials they are the same as the originals, some significant changes were made. It is mainly the new versions, especially the one in Denmark, which have become the models for the rest of the world.

Perhaps the most significant change was that, in all three countries, the Ombudsman was not given the power to supervise judges. This was partly because Denmark and Norway had no close counterpart of the Chancellor of Justice and no tradition of his supervision over the courts. A second reason was that in these countries, adequate supervisory and complaint machinery already existed within the court system itself. A third reason was the view that an agency of the Legislature should not supervise the courts. This view has also

prevailed in New Zealand, and so far, elsewhere. In Sweden the Ombudsmen are non-partisan and independent of legislative influence in individual cases. They review judicial behaviour, not the content of court decisions, and do not infringe on the political independence of judges.

Some national Ombudsmen, for example the Finnish Ombudsman, not only have jurisdiction over Cabinet Ministers, but also have the authority to prosecute them. The omission of Cabinet Ministers from the jurisdiction of the Swedish Ombudsman is understandable, as the Ministers there are not responsible for administration. Of course, the inability to prosecute Cabinet Ministers does not constitute their complete exclusion from the Ombudsman's jurisdiction. In many countries and federal subdivisions, the Ombudsman can still investigate so long as the Cabinet Minister is acting within his capacity as head of a government department. In those jurisdictions where the Ombudsman has no power to investigate the actions of Ministers, principally some following the British parliamentary tradition, the rationale for excluding acts of Ministers is that this might interfere with their responsibility to Parliament.

It is a provision of most Ombudsman plans that the Ombudsman is not authorized to investigate actions or decisions of the entire Cabinet. Likewise, no Ombudsman has been empowered to investigate the work of the main legislative organs.

Most Ombudsman Acts contain a provision underlining the fact that the Ombudsman is to be the "forum of last resort". For instance, neither the New Zealand nor the Swedish Ombudsman can investigate a complaint concerning an administrative action that is subject to full review in a special tribunal or court. In other jurisdictions the Ombudsman is empowered to investigate actions or decisions so subject to review or appeal, provided that the right of appeal or review has been exercised or the time for the exercise of the right has

expired. Still other Ombudsman schemes recognize that the opportunity to take an appeal, whether to a higher administrative body or to a court, may be illusory because of the expense, time and strain that further proceedings entail. For instance, the British Parliamentary Commissioner for Administration has been given a discretion to act if he thinks that the remedy open to the courts is not one which the complainant could reasonably be expected to use.

There have to be grievance procedures - the public demands them - and if the orthodox judicial system does not supply them, the public will turn to the Ombudsman to fill the gap. This leads broadly to the conclusion that the system of Ombudsmen is established to fill a public need, and its jurisdiction must be broadly construed so as to enable it to do so.

Many national Ombudsmen (for example Israel and Australia) are expressly prohibited from investigating complaints against the government as employer. In addition, some Ombudsmen have no power to investigate the actions of government corporations, engaged in economic operations for which conventional governmental procedures are thought to be unsuitable. (For example, in Sweden.)

In some jurisdictions the Ombudsman's competence has been extended to investigate administrative actions taken by municipal governments and officers. (For example, Finland, Sweden and Denmark.) In Canada, where the local governments derive their authority constitutionally from the provincial governments, the Ombudsmen of Nova Scotia and New Brunswick have been given authority to investigate administrative actions taken by local government. Some countries (e.g. Great Britain) have established the office of Local Commissioner to investigate a matter where a complaint is made by or on behalf of a member of the public who claims to have sustained injustice in consequence of maladministration in connection with any action taken on behalf of a local authority. Many municipalities (to cite but a few, Berkeley, California, Detroit and Flint,

Michigan, Jackson County, Missouri, New York City, in the United States, and Jerusalem and Haifa in Israel), have established their own Ombudsman schemes.

As previously stated, with the above-mentioned limitations, the Ombudsman investigates complaints from aggrieved persons against government agencies, officials and employees. Most Ombudsman Acts contain a provision enabling the Ombudsman to make an application to the courts if any question arises whether the Ombudsman has jurisdiction to investigate any case or class of cases under the Act. Accordingly, most of the decided cases around the world dealing with the Ombudsman concept have resulted from a particular organization taking the view that it was not amenable to the Ombudsman's jurisdiction. The question of what is an agency of the government is a complex one, and New Zealand has avoided the problem by enumerating all departments and agencies subject to the Ombudsman's jurisdiction in a schedule to the Act.

Most Ombudsman Acts place some limitations upon the right to submit a complaint, principally based on the notion of status or standing to complain; it is an almost unanimous requirement, although expressed in a variety of ways, that a complainant must be directly affected or aggrieved. Only in Denmark, Sweden and Finland (and possibly in Hawaii) the complainant need not have a personal interest.

With three exceptions, complaints are made in all other jurisdictions directly to the Ombudsman. In Great Britain, complaints to the Parliamentary Commissioner for Administration must come through a Member of the House of Commons; in Northern Ireland to the Parliamentary Commissioner for Administration from Members of the Assembly; and in France to the Médiateur through Members of the National Assembly. In at least eight instances, provision is made in the controlling legislation for a permissive alternative use of legislators to file complaints - New South Wales, South Australia, Victoria, Ontario, Guyana, Israel, Mauritius and Fiji.

The power to act on his own motion gives the Ombudsman an advantage which he does not have if limited to handling complaints sent to him. All Ombudsmen, with the exception of the British and Northern Ireland Parliamentary Commissioners and the French Médiateur, have the right to investigate complaints on their own initiative.

Most jurisdictions require that complaints be in writing, but practices of the Ombudsmen vary as to whether signing is required. In most cases, other formal requirements to register a complaint are minimal. A number of Ombudsman statutes make provision for the contingency that a prospective complainant is deceased or unable to act for himself, and permit a complaint to be filed by a representative (for example, in most of the Australian states and in Fiji and Great Britain).

Powers

In every jurisdiction which has an Ombudsman, the legislators have by law in the Ombudsman's controlling Act, equipped the Ombudsman with wide powers of investigation to enable him to thoroughly and impartially investigate a complaint. Most Ombudsmen statutes provide that, subject to other express limitations imposed by the Act, the Ombudsman is free to obtain information and make such inquiries as he thinks fit.

The Ombudsman is empowered to require any government official, who in the Ombudsman's opinion is able to give any information relating to the matter that is being investigated, to furnish the Ombudsman with such information, and to produce any documents or things which, in the Ombudsman's opinion, are likely to be helpful in the investigation of the complaint. In addition, the Ombudsman is statutorily empowered to resort to a range of measures of a compulsory nature: he may summon before him a complainant, any government

official, and any other person who is able to give any information relevant to the matter complained of, and he may require them to appear and testify on oath before him. Most Ombudsman Acts provide that it is an offence to willfully fail to comply with any lawful requirement of the Ombudsman.

Most Ombudsmen are given the authority, upon notice, to enter upon any premises occupied by any governmental organization, and inspect the premises and carry out any investigation within the Ombudsman's jurisdiction. In Sweden, Finland and Denmark, the Ombudsmen have been directed to make periodic inspections of the governmental establishments within their jurisdiction.

As has been indicated earlier, the Ombudsman's powers of investigation are subject to certain restrictions and limitations. It perhaps goes without saying that the Ombudsman's powers may only be exercised during the course of an investigation which is within his jurisdiction as set forth in the Act pursuant to which he is appointed.

A further potential restriction of the Ombudsman's access to information and documentation is the provision, contained in many Canadian Provincial Ombudsman Acts, that the Attorney-General may certify that the giving of information, or the answering of any question or the production of any document may interfere with or impede the investigation or detection of offences or might involve the disclosure of Cabinet deliberations including those relating to matters of a secret or confidential nature that would be injurious to the public interest. Some national Ombudsmen are subject to certain limitations if national security is involved.

Beyond this point, most Ombudsmen statutes purport to restrict the application of the Crown prerogative to withhold documents or information in the public interest. The intention of the legislators was obviously to relieve the Ombudsman from the frustrations commonly experienced by courts in bowing

to statutory prerogative privileges to withhold material evidence in legal actions. Most Ombudsman Acts provide that full disclosure must be made except where the person can show that he is bound by a special statute to maintain professional secrecy.

Finally, the majority of Ombudsmen statutes also provide certain safeguards for the person or body complained against, so as to ensure that their side of the case is heard in the event it appears to the Ombudsman that there may be sufficient grounds for his making a report that might adversely affect such a person or body.

Having enumerated the Ombudsman's formal powers of investigation, it is necessary to say that the compulsory measures in the Ombudsman's bag of tools (for example, the power of summons) need rarely be resorted to. Most investigations are conducted informally, yet thoroughtly, recognizing the fact that the complainant and the civil servant have their day to day work to accomplish. The Ombudsman's formal powers are not lightly or impetuously exercised, since this may not only make it more difficult for the Ombudsman to obtain the true facts, but may seriously jeopardize future communication with the government and perhaps the Legislature, and may even impair the credibility of the Office.

Many complaints are resolved during the course of an investigation and result in an assisted rectification, since it is generally the Ombudsman's style to promote conciliation. This is so notwithstanding the fact that the Ombudsman remains completely impartial while the investigation is ongoing.

All Ombudsman Acts provide that, upon the completion of an investigation, the Ombudsman is required to state his findings; that is, he must conclude whether the complaint is justified or not and give his reasons for so concluding. Many Ombudsman Acts set forth with some degree of

specificity the conditions that must be found to exist in order for the Ombudsman to find the complaint to be supported. For instance, the New Zealand Ombudsman can consider not only whether an administrative action complained of is illegal, but also whether it is unjust, oppressive, or simply "wrong". In addition, the Ombudsman is entitled to conclude that the action or decision was made in accordance with a law or practice that can be so described.

Some Ombudsmen have been given no authority to reach conclusions with respect to the exercise of a discretionary power of decision, while others have been given complete authority. Still others have been given a limited authority to find a complaint to be supported if a discretionary power has been exercised for an improper purpose or on irrelevant grounds or on the taking into account of irrelevant considerations.

In Norway, whose Ombudsman has been told to concern himself with "injustice", and in Denmark, where the Ombudsman can criticize "mistakes" and "unreasonable decisions", among other things, considerable latitude exists. Insofar as Norway is concerned, however, the Ombudsman has been told to concern himself only with discretionary decisions that are "clearly unreasonable or otherwise clearly in conflict with fair administrative practice". Theoretically, an Ombudsman does not criticize the exercise of administrative discretion simply because he himself might have come to a different conclusion on the same facts had he been in the administrator's place.

Having found a complaint to be supported, the Ombudsman is then entitled to make a recommendation which is appropriate under the circumstances. This recommendation may be for the purpose of providing relief for the individual complainant and his particular situation, or for the purpose of achieving general improvements in the functioning of the administration, or both. The Ombudsman may recommend the cancellation or variation of a decision or action, the rectification of an omission, a reconsideration of a decision by the relevant

authority, or the giving of reasons. He may also recommend an appropriate change in the law or practice governing the particular decision or action. Finally, many Ombudsman Acts contain a "basket clause" empowering the Ombudsman to recommend that "any other steps be taken". This could include the making of an ex gratia payment.

It has been suggested that the Ombudsman attempts to apply a rule of conscience. In many cases, he acts rather like the English chancellor of years gone by, perhaps not disagreeing with the official law, but finding an "equity" in the particular circumstances which requires remedial action.

It is important to recognize that, with the exception of those Ombudsmen who are empowered to prosecute, the Ombudsman's power is confined to the making of recommendations. He has no power to make anything in the nature of a judicial order quashing the decision complained of or specifically directing the carrying out of an act or the rectification of an omission. The Ombudsman's influence is based upon his objectivity and his prestige. The success of the institution is first and foremost a function of the administration's attitude towards the Ombudsman, the understanding with which it treats his work and the establishment of close cooperation between its services and those of the Ombudsman. Likewise, it depends to a large degree on the Ombudsman's prestige in the eyes of the community and public opinion.

Although the Ombudsman has no power to enforce his decisions, he can publicize instances where action has not been taken. This may be by way of a special or annual report to the Legislature or Parliament, in some instances through the instrument of a Select Committee of the Parliament or Legislature established to consider such reports. The ultimate forum of the Ombudsman, who is generally appointed by and responsible to the Parliament or Legislature is thus the Parliament or Legislature itself. The key weapons in the Ombudsman's

arsenal are persuasion and publicity. While some Ombudsmen are vested with a discretion to make public a report on a specific case if they feel it is in the public interest to do so, other Ombudsmen have no such power and must rely on the governmental organization or the complainant making the report public before the special or annual report is delivered.

An important aspect of the Ombudsman's work is that he exonerates and vindicates civil servants and governmental organizations in cases where unfair accusations have been made, and thus reinforces the public's trust and confidence in the administration.

The Swedish and Finnish Ombudsmen have the power of prosecution in their arsenal, and can bring government officials into court on charges of negligence, laxness, incompetence and inefficiency, in addition to the more conventional accusation of criminality in office. The Danish Ombudsman may order prosecution, and both the Norwegian and Danish Ombudsmen may recommend either prosecution or disciplinary action. Most Ombudsmen are empowered to refer the matter to the appropriate authority if, during or after an investigation, the Ombudsman is of the opinion that there is evidence of a breach of duty or of misconduct on the part of any officer or employee of any governmental organization.

It can be seen then that the Ombudsman has been given very liberal and very real powers to assist him both during and after an investigation.

Conclusion

In the course of this discussion of the Ombudsman concept, we have endeavoured to give the reader a sense of familiarity with the topic at hand, without projecting any pretentions of academic originality or legal exhaustiveness. It is hoped that the reader will be able to approach legal

problems concerning the Ombudsman with an awareness that the Office is, on the one hand, very much a formal legal entity, and on the other, an informal, almost extra-legal embodiment. It might well be argued that this duality of personality is the underlying strength of the Office, and one worthy of continuity. Finally, it must be borne in mind that this duality represents a balancing of public objectives which should be altered only after the closest of scrutiny.