

Ombudsmen and Legislatures: Allies or Adversaries?

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In most parliamentary jurisdictions, and certainly in the nine Canadian provinces which have them, the Ombudsman is a servant of the Legislature, not of the Government. Yet in Canada, at least, few formal mechanisms exist to link the Ombudsman with the Legislature. Only Alberta and Ontario have permanent committees with a specific mandate to deal with Ombudsman matters. In this article, I set out some ideas on the relationship between the Ombudsman and the Legislature within the context of a legislative committee delegated by the House to consider the Ombudsman's Office and the Ombudsman's reports.

My observations derive largely from experience with Ontario's Select Committee on the Ombudsman. I see no reason why lessons drawn from Ontario should not apply generally.

While I speak from the perspective of Chairman of the Committee, the following views are my own. I would like to think that what I have to say accurately reflects the opinions of committee members, but I make no claim to represent any official committee position.

I cannot imagine how an Ombudsman can function without something like our Select Committee. Now I expect the vast majority of Ombudsmen, who have no such committee to deal with, think precisely the reverse. Possible that is because the only time they hear about us is when we are having a run-in with our Ombudsman. I can assure you that, in the overall scheme of things, these disagreements are relatively few and substantially less important than our routine day-to-day work.

I do not intend to give an account of the routine work of our committee; a fairly comprehensive treatment has been published elsewhere, outlining the committee's procedures and the principles underlying our work.¹ Nor do I intend to rehash our widely publicized disagreement in late 1982 with the Honourable Donald Morand, over committee access to financial information about the Ombudsman's office.²

Prior to their most recent meeting in Vancouver, Canadian Ombudsmen twice held sessions on "the Ombudsman and the Legislature" at annual meetings in Saskatoon (1981) and in Toronto (1977). Inevitably, discussion focussed on the independence of the Ombudsman and the threats to it posed by the Legislature.

I understand full well why it is necessary for an Ombudsman to be independent of politics, of political pressure and interference,

but I would point out that independence is not an end in itself, but a means to an end: fair treatment and service for aggrieved citizens. I was most interested to see that Donald Morand, until recently Ontario Ombudsman, spoke to the Saskatoon meeting of "our often exaggerated emphasis on our independence", adding that "too much independence might not necessarily be a good thing".³

Much of the debate over independence has been cast in hypothetical terms and premised on the assumption that governments and legislators are constantly looking for ways to meddle in the Ombudsman's affairs, reduce his power and hinder his effectiveness.

The fact that concerns over independence tend to be hypothetical rather than based on actual experiences suggests to me that the most important defence against incursions by politicians has been quite successful: the courage and conviction of the Ombudsman himself. So long as the Ombudsman is willing to speak up strongly in defence of his office, I see little reason to worry about theoretical possibilities.

As for the implicit view that "we are out to get you," it seems to have little more foundation. Here I am speaking of legislatures not governments. I am not privy to governments' views on Ombudsmen and what they may have done or contemplate doing about Ombudsmen. The only point I would make is that if a government is truly dedicated to scuppering an Ombudsman, there are infinitely more effective ways of doing so than through a committee of the Legislature.

In Ontario and, I presume, elsewhere, fears have been expressed that if the Ombudsman is not careful and vigilant, the Select Committee or elected members generally, will try to interfere in the day-to-day operations of the Office. This concern is, to my way of thinking, totally unfounded. If there is a member with the inclination – and, more important, the time – to interfere in the detailed administration of an Ombudsman's office, I have not met him or her.

To be fair, what members might see as well-intentioned advice and comment on the operation of the Ombudsman's office, could be viewed by the Ombudsman as improper interference. Moreover, it would be unrealistic to presume that members' criticisms of Ombudsmen will always be high-minded and noble of purpose; elected representatives can be as venal as anyone else. For these reasons and others, the relationship between the Ombudsman and the members of the Legislature may not always be smooth. But in my view the Ombudsman must be prepared to respond to criticism or advice from the members on its merits and not dismiss it as a threat to independence.

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In Ontario, the Select Committee has had a number of disagreements with the Ombudsman over what the Ombudsman believed to be unwarranted intrusion into his affairs. The most noteworthy took place several years before I became a member of the Legislature. An MPP brought before the Committee a charge that certain of the Ombudsman's staff had been improperly involved in partisan politics. The Ombudsman, Mr. Arthur Maloney, contended that the Committee had no jurisdiction even to consider the matter, and when the Committee persisted, walked out of the meeting. Although I was not personally involved in this episode, I do endorse the observation subsequently made by the Committee. The essence of the relationship between the Assembly and the Ombudsman does not lie in any legislative definition of jurisdiction, but in good faith, mutual respect and cooperation, with open and free discussion between this Committee and the Ombudsman.⁴

This theme has not been echoed by Dr. Randall Ivany, the Alberta Ombudsman, who recently wrote: "cooperation exists primarily because the Ombudsman and the elected Members have a respect for the role of each in ensuring the protection of the citizen".⁵ Significantly, Alberta is the only other province with a Committee which regularly reviews the work of the Ombudsman.

Quite simply, elected members have much better, more interesting, and more politically rewarding things to do than try to meddle in the day-to-day work of the Ombudsman. If Ombudsmen who worry about such things could be at our committee meetings when we consider detailed statistical breakdowns of one year's workload against another year's, (the definition of a "file opening" versus a "fast action" etc.) and watch the MPPs' eyes glaze over, they would be much less worried about our meddling.

Even if it were our intention to meddle, to be effective any action we took would require approval by the House. Quite simply the select committee and its recommendations are very low priorities for the House; we have to fight even to be noticed. This, too, is an important practical safeguard of the Ombudsman's independence.

Ombudsmen make much of the fact that the Ombudsman is an officer of the Legislature and not answerable to the Government. Yet being a servant of the Assembly must mean more than a convenient mechanism for being independent of Government. To me, the Ombudsman's position as officer of the Assembly has three elements.

First, the Ombudsman works on behalf of the Assembly, doing things that individual members cannot do themselves, and doing them in ways prescribed by the Legislature.

In a general sense, I'm sure that Ombudsmen are aware that their functions of receiving, investigating and reporting on citizens' complaints about government represent a direct delegation of traditional legislative function. I am not so sure that Ombudsmen realize the extent to which elected members remain problem solvers for their constituents and develop substantial expertise in dealing with complaints. Since they are often engaged in the same work, Ombudsmen and members stand to learn a great deal from one another, but in my experience seldom do. Moreover, Ombudsmen must understand that members are very much of two minds in their attitude towards the work done on their behalf by Ombudsmen. On the one hand, the constituency caseload is so crushing that we are delighted to have help from any quarter. Conversely, though, since

the dominance of cabinet over the legislature is so overwhelming, both Opposition members and Government backbenchers tend to have little share in real power, and therefore find solving constituency problems an important source of satisfaction in an often very frustrating job. In Ontario at least, this has resulted in some jealousy over what members see as the sumptuous resources of the Ombudsman's Office devoted to rectifying injustices which they themselves might be dealing with. This is not the place to evaluate the accuracy or legitimacy of this attitude, but it is important that Ombudsmen understand the psychology of the members they serve. Although I would not personally wish to see the implementation of the British procedure requiring complaints to be referred to the Ombudsman by MPs, I find it a useful reminder of the Ombudsman's purpose.

Similarly, and this is germane to the independence question, I find it highly significant that all Ombudsman acts have a provision for the Legislature to make rules by which the Ombudsman is to operate and that in seven of nine Canadian Ombudsman acts (the exceptions being Ontario and Quebec) the Ombudsman is required to look into matters referred to him by legislative committees.

This ruling-making power and committee reference power have been used sparingly. In Ontario, our Committee is vested with the responsibility of proposing rules to the Legislature. We have done so only once in seven years, and only then after much thought and consultation.

The second consequence of the Ombudsman's position as servant of the Legislature is that the frequently repeated assurances that the Ombudsman is "responsible" to or "accountable" to the Legislature must mean something. It is pointless to expect anyone to be accountable to as unwieldy, busy and bizarre a body as an entire legislature. Unless some mechanism exists, such as our select committee, the Ombudsman's accountability to the elected members can be little more than a meaningless platitude. If Ombudsmen truly believe that they work on behalf of the legislature – as I think they should – then there must be some method of receiving, discussing and answering the members' criticism and advice. To me, the select committee must serve as a communications link between the Ombudsman and the Legislature, and I further believe that the Ombudsman is better served in having inevitable problems and misunderstandings which crop up discussed openly in the committee than in allowing them to fester unspoken among the members.

My final point concerns the Legislature's duty towards the Ombudsman. The Legislature has created the Ombudsman and expects him to do a job; it must therefore assist in whatever way it can. In part, this is rendered by having an all-party Board of Internal Economy authorize the Ombudsman's budget, rather than leaving this to the Government. Principally, however, it means having some method of following through on those cases the Ombudsman has seen fit to report to the House the government having refused to accept his recommendation.

Once the Ombudsman has taken a case as far as he can, and reported to the Legislature, the Legislature must not permit the matter to end there. I would think it enormously frustrating for an Ombudsman to see his report tabled in the House, knowing that the unresolved cases contained in it and his recommendations would

sink from public sight within days, with no hope of action by the Legislature (other than providing fuel for Opposition attacks on the Government, which is certainly not the Ombudsman's role). Again, the only practical vehicle for the Legislature to pursue the "recommendation denied" cases is a legislative committee.

I do not know how much is due to good luck and how much to good management, but in Ontario, our committee has always been extremely non-partisan. We examine – not, I hasten to add, re-investigate – the Ombudsman's "recommendation denied" cases carefully, taking evidence from both the Ombudsman and the Government and evaluate each on its merits. During both majority and minority government, the great proportion of the Committee's recommendations have supported the Ombudsman's position against the Government. We are not always successful in convincing the Government of our views, but I have absolutely no doubt that the weight of the Select Committee, both in the cases it reviews and in the Government's anticipation of it reviewing a case, has added very substantially to the effectiveness of the Ombudsman.

In short, the corollary of the Ombudsman's genuine accountability to the Legislature through a committee seems to be

the Legislature's active support of the Ombudsman and his recommendations through a committee.

My basic message is that members of the Legislature and Ombudsmen can and should be allies and sources of mutual support. I would not for a minute pretend that there will not always be significant frictions, but so long as we all recognize our responsibility to the public through the fight against injustice, we can profit from a closer relationship.

Notes

- ¹ Graham White, "Ontario's Select Committee on the Ombudsman", *The Table*, vol. 50 (1982) pp. 52-61.
- ² Those interested should consult the *Tenth Report of the Select Committee on the Ombudsman*, Toronto, 1983, pp.3-5, 55-61.
- ³ International Ombudsman Institute, *Proceedings of the Seventh Annual Conference of Canadian Legislative Ombudsmen*, Saskatoon, Saskatchewan, August 30 – September 3, 1981, p. 15.
- ⁴ *Second Report of the Select Committee on the Ombudsman* Toronto, 1977, p. 53.
- ⁵ Randall E. Ivany, "The Ombudsman and the Elected Member", *The Parliamentarian*, vol. 64 (October, 1983), p. 199