



Notes for Remarks  
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***Accountability Officers:  
Balancing Independence and Accountability***

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It has been many years – 30 perhaps – since the Supreme Court of Canada has said anything much regarding the role of the Ombudsman. Perhaps that speaks to a broad consensus about the role of the Ombudsman in Canada. Perhaps too broad.

Among legislated Ombudsmen at least, the term has very precise meaning, and independence is a key factor in that definition. To a certain degree, the term is redundant – I would argue that if there is not a high degree of independence, the position under discussion is not an Ombudsman at all.

In the early 19<sup>th</sup> Century, the person with the title of ombudsman was an official appointed by the King. The ombudsman was not appointed to investigate complaints about the King, but rather to ensure that the servants of the King were doing their job.

Today, the ombudsman is appointed by a two thirds super majority of City Council, not to work for the Mayor and monitor the public service but rather to report to the legislative body as a whole, funded by that elected body to investigate the public service as a representative of the people.

The adaptation we have made has a certain elegance and ingenuity connected with it, but it has never been a clean merger.

The inherent conflict is self-evident: the government is appointing an official seemingly to criticize the government. The conflict usually becomes manifest in the form of threats to the independence of the very ombudsman who was established to provide independent review of complaints. In my view, this often arises because of a shallow understanding of the role of the ombudsman.

True, at first glance, the Ombudsman could be seen as a critic of government. But on closer examination, it becomes clear that the Ombudsman is not dealing with complaints about governance. Rather, he/she is acting on behalf of the People, investigating the administration of government.

It is said the Ombudsman's jurisdiction stops at the Cabinet door. It is the people who render their judgment of government at election time. The Ombudsman is really a mediator between the public and the public service. She or he is the protector of the public's right to receive fair, equitable, competent public service.

In the process, the Ombudsman is also the protector of the public servant unjustly criticized but unable to speak out.

Despite the inherent conflicts in the Ombudsman's role, the concept has grown throughout the world. This is because it works. At least it works when every part of the system touched by the Ombudsman's functions – the public, the public service, the governing body, the members of the legislative branch, all have respect and support for the Ombudsman's actions and functions. If one element in that system fails to respect and support the function, it is the responsibility of the other elements to correct the

failure. In particular, the independence of the Ombudsman must be respected and vigilantly protected. There can be no hint of interference in an ombudsman's work.

Having an ombudsman for the City of Toronto is very, very recent – just two years in reality. With the *City of Toronto Act* came the requirement for to have an independent ombudsman.

Canada has been a leader globally in the promotion of the Ombudsman institution except, I must say, at the municipal level, where Italy's heritage of city-states has resulted in a wide network of municipal ombudsman.

Toronto is only the second city in Canada to create a statutory ombudsman, Montreal being the first.

There are four universally accepted criteria that are fundamentally necessary for a government to say it truly has an ombudsman:

- the power to investigate, enter facilities, review documents, compel witnesses, and decide whether and how to take on an investigation
- the ability to offer services without charge, to be accessible to all parts of the public, to keep confidentiality by, for example, being exempt from Access and Privacy legislation
- ensuring ombudsman procedures are transparent and conduct is fair, impartial and objective
- independence from both government and legislature, financially and politically, usually guaranteed by a statutory base to establish permanence and freedom from functional control

That independence is demonstrated by giving the Ombudsman a long term of office – one that outlives any particular elected government; protection from reduction of salary, adequate resources to operate; freedom to choose staff, set policies and procedures, freedom from having to take instructions.

Removal of an ombudsman from office usually is only for cause and requires a super-majority for the legislative body. In 1978, the Ontario Legislature was grappling with this question of independence of its recently created Ombudsman office.

After returning from an extensive international study tour, the legislative committee responsible for the Ombudsman said in its report that year:

“the dignity and integrity” of the Ombudsman's office “can only be engendered and maintained by a mutuality of understanding on the part of the legislature and the government generally towards the office and person of the Ombudsman ... and by

the Ombudsman towards the elected members and all others touched by his function. . .”

Any discussions about the exercise of the Ombudsman’s duties, the Committee said, should always be arrived done in an open forum, and involve consultation with the Ombudsman. In return, the Ombudsman respects the role of the governing body.

That is the principle.

But the Committee expressed its concern about the Legislature's lack of understanding as to the role and function of the Ombudsman. It stated:

"[The Ombudsman] must be placed in a position where he is not constantly looking over his shoulder, concerned with the Committee's, the Legislature's, and the government's reaction to a particular course of conduct. . .

The Committee took pains, in its words,

“not to diminish the ...autonomy of the office in relation to the Assembly and the Government...It is a unique and delicate flower in any democratic system, and its preservation and growth requires almost infinite and endless care.”

Because of this high degree of independence, the process through which an ombudsman is appointed must be open and rigorous. In the case of Toronto's Ombudsman, a two-thirds majority is required by Council to appoint the person.

This independence requires reciprocal action. I have a responsibility to promote and maintain the confidence of both the People and City Council.

I know that I must always ensure that my investigations are thorough and fair; that my conclusions are well-founded and objective; that the recommendations I make are appropriate. In other words, I know I must demonstrate that the independence of my office is constantly well-earned and justified.

That is where accountability comes in. Beyond my statutory obligation of reporting annually to City Council and the public – and having external auditors look at my books, I have a continual obligation to ensure that I am accountable.

If an ombudsman is to scrutinize public service then surely we must meet the highest standards ourselves? I set out our standards of service on my web site. If they are not adhered to I hear about it.

Being transparent and explicit about all our processes is precisely about being accountable. A modern government cannot expect to retain the confidence of the people unless it is willing to hold itself accountable by submitting itself to the kind of scrutiny an independent ombudsman provides.

As Justice Dickson said in the *Friedman* decision:<sup>1</sup>

“The vital necessity is the impartial investigation of complaints... What every form of government needs is some regular and smooth-running mechanism for feeding back the reactions of its disgruntled customers, after impartial assessment, and for correcting whatever may have gone wrong.

He went on to say:

[The Ombudsman] “can bring the lamp of scrutiny to otherwise dark places, even over the resistance of those who would draw the blinds.”

Conversely, a former Commonwealth Ombudsman, Dennis Pearce, cautioned that an ombudsman makes a government look good but to underfund the office makes sure it is not too troublesome. And that can be an issue.

That said, in my view, the costs of government increases when the Ombudsman’s resources are limited – there is in effect no “saving”. To the contrary. Without access to a fully-resourced ombudsman, people must turn to the courts for their remedies, a slow, expensive and adversarial process. There are other consequences.

Once the People have reason to believe that their ombudsman does not have the resources to do the job, or that the Ombudsman’s independence has been violated, the public loses confidence that their government is willing to be held accountable.

The opposite is also true:

A legislature which has an independent ombudsman as its officer is not a sign of poor government.

To the contrary, the presence of an ombudsman acting with independence is a sign of good government, notice to the people that the government is willing to hold itself accountable to them. Having an ombudsman is simply recognition that, self-remedy is generally difficult for governments to achieve, particularly big governments. That is why objective evaluation by an independent ombudsman is a sign that democracy and good government is at work.

For the government's part, safeguarding the independence of the office requires sustained leadership, support and respect for the function.

For my part, I have a duty to demonstrate tangible accountability by being transparent, objective and impartial.

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<sup>1</sup> <http://scc.lexum.org/en/1984/1984scr2-447/1984scr2-447.html>