

Notes for Remarks
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***The Role of the Ombudsman in Municipal
Accountability***

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Thank you for the invitation to participate. It is a privilege to talk with you about the role of an ombudsman in municipal accountability.

I think, that as lawyers, particularly public sector lawyers, you are uniquely situated to influence public policy, advise your clients and litigate on their behalf. I welcome the opportunity to ensure that the concept of Ombudsman is firmly embedded in the constellation of your thoughts about administrative justice.

I also want to be sure you understand that the Ombudsman concept has the potential to go beyond issues of administrative justice and can be seen as an instrument meaningfully connecting “the people”, especially those who are vulnerable, marginalized, and not well positioned to deal with powerful and often impersonal institutions.

My contribution today is to engage you in dialogue about the Ombudsman as an essential instrument of progressive municipal government. Let’s look at the nature of 21st century city government.

First, as is the case of most municipal governments, the City of Toronto has a monopoly on public services – a resident has nowhere else to go when the quality of service is not up to standard.

Second, much more so than is the case of federal and provincial governments, in city government, the services provided to the public affect the lives of the people in very fundamental ways – the water we drink, the parks we play in, the daycares our children go to, the roads we travel on. These services are fundamental to urban living and an integral part of our daily lives.

Third, the resident, the public, is paying out of their own pockets for the services being provided, and the public has the right to have value given for money spent. The public expects and demands not only good service, but it demands accountability – the duty to explain and justify actions. It calls for the duty to act impartially without bias and to do so as trustees on behalf of all citizens.

The dilemma we have is that the attributes of good service and a high degree of democracy are not easily combined. As Václav Havel noted, the first principle of democracy is the sovereign power of the people.¹ But for the people to exercise their sovereignty, there must be the instrument of “democratic government”. This means the need to select officials who are charged with the responsibility of doing the actual governing.

The *City of Toronto Act* is a recent manifestation. Others have arrived at different configurations. There are countries in the world in which the leader of the government alone appoints the head of state; appoints one whole house of the legislature; appoints judges of the higher courts; appoints members of tribunals; appoints members

¹ *Vaclav Havel: A Political Tragedy in Six Acts*, by John Keane, Basic Books, 2001, p. 195.

of Cabinet;
appoints heads of government departments.

Imagine a country where one person has that power. Well, Canada is among those countries. The powers I have just listed are the powers of the Prime Minister. And yet we accept that as “democratic” because we think we have sufficient checks and balances.

Six years ago, the *City of Toronto Act* became the statutory means through which the people of Toronto would enjoy the best mix of democracy and good public service. I think the drafters of the *City of Toronto Act* found a better balance here than we have federally. When the Joint Province-City Task Force reported in 2005, it said:

A modernized *City of Toronto Act* requires new – or strengthened – measures to promote transparency and accountability...To ensure high standards of professionalism and ethics, Toronto requires strong oversight functions. The Task Force therefore recommends that the new Act require (not simply allow) the City to have an empowered and independent integrity commissioner, ombudsman, auditor general, and a lobbyist registry.²

This has resulted in the strongest accountability scheme, certainly in Canada, if not North America. The legislation is very serious about having empowered and independent accountability officers who act on behalf of the public.

The assumption was that the people and their government alike would ensure that these officers be independent. While we call the Ombudsman an Officer of City Council, the reality is that an ombudsman is an “Officer of the People”. The office is a last resort that promotes fair administration. The Ombudsman’s function is to investigate any decision or recommendation made or any act done or omitted in the course of the administration of City government, its agencies, boards, and commissions.

We receive complaints from affected persons, and I can investigate on my own motion, which I do, particularly when they are in the public interest.

Case: The Duty to Care

We are an alternative to the courts and adjudicative bodies who render decisions and issue rulings. Our powers are those of moral suasion, reasoned argument, common sense and the capacity to make recommendations. We tend not to pursue financial remedies or make recommendations that may be punitive in nature. Our job is not to manage. It is to shine a light on maladministration and recommend improvements.

² http://www.toronto.ca/david_miller/pdf/toact_finalreport111405.pdf

Ombudsmen treat the legislation as remedial and look at systemic fixes in order to improve administration and public services. Some would say that powers of recommendation are toothless in their ability to render change.

In my view, while it is important for an ombudsman to make clear what the consequences of our findings should be, it is for the governing body to decide what action to take about those consequences.

My job is to assist the governing body in ensuring good governance, not to manage the organization or act as a legislator. City Council, pursuant to the Municipal Code, appointed me as the first Ombudsman in 2008.

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 ombudsmen. Toronto is only the second city in Canada to create a statutory ombudsman, Montreal being the first. And recently we have a third in Sherbrooke.

I am Ombudsman for the 6th largest government in Canada... an Ombudsman who is an intermediary for a richly diverse public of which half were born outside Canada, a public of which a third at home speak one or more of 140 languages other than English or French.

These are significant statistics for an ombudsman, since it means that the chances are that a person with a complaint was dealing with a public servant of a very different cultural background, with differing expectations of what should have happened, and what now should happen to end the dispute.

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.

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

- the imperative of ombudsman procedures that are transparent and conduct that 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.

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 that any discussions about the exercise of the Ombudsman's duties, should always be 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.

The Committee went on to express 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. . .

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 2/3 majority is required by Council to appoint the person. This independence requires reciprocal action. 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.

And in this regard, we look at three aspects of fairness: procedural, substantive and equitable. 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:³

"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."

³ <http://scc.lexum.org/en/1984/1984scr2-447/1984scr2-447.html>

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.”

Having an ombudsman is simply recognition that, self-remedy is generally difficult for governments to achieve, particularly big governments.

For the government's part, safeguarding the independence of the office requires sustained leadership, support and respect for the function. Never has the fear and distrust of government been higher. The public's anger is palpable – certainly my office experiences it.

But the current anti-government ideology and private sector panacea for curing all ills is both short sighted and simplistic. Government is both a necessary and important part of citizens' lives if we are to have a healthy democracy. And in that mix, public service is a noble calling – a calling to act without bias, with a high degree of ethics and with the public good top of mind on a daily basis.

Experience is telling me is that in municipal government – even a government as large as Toronto – the space between legislator and public servant is not adequately buffered. In fact, the space is razor thin and I would argue in significant jeopardy for public servants and good governance in general.

In the federal and provincial governments, the principle of “ministerial responsibility” is at play. There is a Deputy Minister responsible for running the shop. There is a *Public Service Act*⁴ that ensures a non-partisan, professional, ethical and competent public service. That Act is designed to ensure the public service is effective “in serving the public, the government, and the Legislature.” It protects public servants from reprisals when they disclose wrongdoing and sets the standard for their duties and obligations.

I believe the promise of the *City of Toronto Act* would be better realized if we were to have a *Public Service Act* to fill this important vacuum in city government.

⁴ *Public Service of Ontario Act*, <http://canlii.ca/s/26h>