

Notes for Remarks

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***Fairness Now:  
Administrative Justice, Ombudsmanship and Institutions***

Thank you for the invitation to participate on this panel. It is a privilege to talk with you about the role of an ombudsman. I think, that as lawyers, you are uniquely situated to influence policy, advise your clients and litigate on their behalf.

Your responsibility is weighty when it comes to issues of fairness, equity and social justice. But you have the opportunity, indeed the obligation, to provide guidance to a myriad of clients that can assist leaders make bold shifts in their approaches and behaviours on these issues.

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 persons who are vulnerable, marginalized, and not well positioned to deal with powerful and often impersonal institutions. My contribution to the panel is to engage you in dialogue about the Ombudsman as an essential instrument of progressive municipal government.

In September 2008 I was appointed by a legally required 2/3 majority of City Council as Toronto’s first Ombudsman. I took up the post in mid-November. I am what is known as a “classical” or legislative Ombudsman, that is, a person independent of government reporting to the law-making body that represents the people. The position was established by the Ontario Legislature in 2006 through the *City of Toronto Act*.

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. I receive complaints from affected persons, and I can act on my own motion. I can conduct systemic investigations, particularly when they are in the public interest. I may also have issues referred to me by City Council which I may investigate and make recommendations about.

My role is neither as an advocate for the complainant nor as an apologist for government but rather as a champion for administrative fairness. We are an alternative to the courts and adjudicative bodies who render decisions and issue rulings.

As the Supreme Court, on an ombudsman case, held some 25 years ago:

*“Government now provides services and benefits, intervenes actively in the marketplace, and engages in proprietary functions that fifty years ago would have been unthinkable...As a side effect of these changes...has come the increased exposure to maladministration, abuse of authority and official insensitivity.”<sup>1</sup>*

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<sup>1</sup> BC Development Corp. v. Friedmann (1984) 2 S.C.R. 447 at 459 - 461

Ombudsmen consider the hallmarks of their work to include independence, flexibility, confidentiality, impartiality and accessibility. Our powers are those of moral suasion, reasoned argument, common sense and the capacity to make recommendations. Some would say the latter is toothless in its 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 legislature in ensuring good governance, not to manage the organization or act as a legislator.

My legislation appoints me for a 5 year term renewable once. I can only be terminated for cause and that must be through a 2/3 majority of City Council. These provisions allow me to make adverse findings without fear of reprisal.

I am Ombudsman for the sixth 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 city 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.

For the Toronto Ombudsman, as compared to provincial Ombudsman, "The Public" is much more diverse and compacted in a smaller geographical area. No level of government plays a more direct role in peoples' daily lives than that of a municipality.

From transit, potholes, garbage, recreation, and snow removal right through to public health and the water we drink, City government is involved. City councilors are closer, more accessible. This means, I expect, that we are going to find a new variety of Ombudsmanship emerging here in Toronto as compared to provincial Ombudsman offices across Canada. Already there are unique and interesting challenges to my role and how I might approach it.

For example, I report to City Council and properly have no jurisdiction over it or its Committees. Sounds right? Well at first blush indeed it does. Yet what must I do with administrative decisions made by sub-committees of Council?

For many years, I have described the Ombudsman as an "elegant alternative to the courts." I was reminded recently this could be taken as meaning the Ombudsman was an expensive, luxurious add-on to governance. To the contrary, just the savings from litigating a few civil suits because no other means of dealing with complaints was available could cover an Ombudsman's entire budget for a year.

I use the term "elegant", then, in its engineering context and as it is often used to describe well-written jurisprudence:

*“a non-obvious method to produce a solution which is highly efficient and simple, and which may solve multiple problems at once, especially problems not thought to be interrelated.”*

There are many opportunities that the Ombudsman can offer to improve the quality of administration and governance. The evolution of dispute resolution over the years in Canada has ended up with courts being granted a tightly-held near-monopoly in the resolution of disputes, requiring technicians called "solicitors" to operate its adversarial system.

It's so simple: in the civil system, one litigant becomes a winner, the other a loser. In the criminal system, you are guilty or you are not guilty. Justice almost becomes a bystander in this process. One of the gifts Canada can realize from the diversity of its people is the development of a rich mix of instruments and techniques for dispute resolution which do not require an adversarial arena.

An Ombudsman can allow the parties at issue to retain control of the process and to handcraft a solution which is mutually acceptable and which all parties take responsibility for successful implementation.

The Ombudsman is interested in fairness. But fairness cannot be approached with a lens of equality. Fairness must be examined in light of the inclusive notion of equity where people and groups are actually treated differently according to their specific circumstances and contexts in order to give them access to equitable results. It is important to intend to be fair in treatment but we must provide greater emphasis on the effects or impact of that treatment in evaluating fairness.

As Ombudsman, I am interested in assisting government throughout to develop efficient complaint handling mechanisms in which complaints are seen as opportunities to correct deficiencies, to improve service. The Ombudsman acts to eliminate the power imbalance between the parties in dispute. In all of our interactions, we are reducing friction between citizens and government regardless of the outcome.

We are positioned to help the parties see both sides of an issue, and together explore available options. If resolution doesn't happen, we can move into a formal investigation. Sometimes the parties are unable to resolve the issue. There may be a variety of reasons for this including regulation changes beyond the public servant's authority. It is at that juncture that if I have made findings of fact, I will issue recommendations, and press for implementation until those recommendations are accepted.

I have a responsibility, I believe, to present recommendations in a constructive and non-threatening manner. I also know that my responsibility is to be practical, and to understand the full implications of any particular recommended course of action.

In doing our job we work our way up the bureaucratic ladder. If the civil service does not accept my recommendations on a case. I have a choice to make. I may make the report public and press City Council to support my recommendations and have them implemented.

Most officials will recognize the practical benefits of fixing a problem before it becomes big. Most public servants, I have found, are dedicated to delivering the best possible quality of administration. Once the Ombudsman has demonstrated this non-adversarial approach to resolving issues, a critical first condition has been met in winning government's cooperation in settling disputes through mediation.

Once the Ombudsman has demonstrated the value of having an independent official to balance the equation of individual vs. powerful city, to determine the facts with an impartial eye, to make objective findings and recommendations, I believe we will add momentum to the city's public service creating progressive change from within.

Is there a need for an Ombudsman in Toronto? Well I can tell you that since opening our doors last April, with a six week civic strike in the summer, at September 30 we had topped 600 complaints and enquiries. I believe this speaks to what I mentioned earlier about the way municipal issues literally hit close to home. It speaks clearly to the fact that people in Toronto want to be heard when complaints and issues arise.

These numbers do not suggest that Toronto is not well administered. They do suggest that with the assistance of an Ombudsman to resolve complaints and issues, the City will be better administered and that people will feel they have a voice, that their voice will be heard, and that they are empowered to participate in creating change. That is one of those "unanticipated results" which are derived from this important new addition to Toronto's accountability mechanisms.

I am absolutely delighted to be a part of making it happen, committed to making it work, and I ask for your support and that of the Ontario Bar Association in making it a success.