

FROM THE OMBUDSMAN

Introduction

It is an honour to present my first annual report as New Brunswick's sixth Ombudsman.

The province's first Ombudsman, Dr. W. T. Ross Flemington (1967-1971), once stated that he "felt it was important for an individual to be treated justly and fairly regardless of the wording of a statute or regulation". This is how I intend to approach my work at the Office of the Ombudsman.

The Supreme Court of Canada has analyzed the function and powers of the Ombudsman in the case of *British Columbia Development Corp. v. British Columbia (ombudsman)* [1984] 2 S.C.R. 447. In this November, 1984, decision, Chief Justice Brian Dickson conferred a formal judicial recognition of the Ombudsman's unique role in our democratic society:

"The traditional controls over the implementation and administration of governmental policies and programs, namely, the legislature, the executive and the courts – are neither completely suited nor entirely capable of providing the supervision a burgeoning bureaucracy demands [p.459]. The Ombudsman represents society's response to the problem of potential abuse and of supervision. His unique characteristics render him capable of addressing many of the concerns left untouched by the traditional bureaucratic control devices. He is impartial. His services are free, and available to all. Because he often operates informally, his investigations do not impede the normal processes of government. Most importantly, his powers of investigation can bring to light cases of bureaucratic maladministration that would otherwise pass unnoticed [p. 461]. In short, the powers granted to the Ombudsman allow him to address administrative problems that the courts, the legislature and the executive cannot effectively resolve [p. 461]."

Though it is not a panacea for everything that ails a disaffected and sometimes cynical citizenry, the Ombudsman concept has provided relief to millions throughout

the world. All complaints received at the Office of the Ombudsman are not resolved in favor of the complainant, far from it, and many complainants do not get the answer they are looking for. But it is essential that most of them at least feel that they have been listened to and that all that can be done has been done. I have quickly learned that this is not always the easiest reassurance to convey.

Going the Extra Mile

Much of the content of this report is a product of the work of my predecessor, Ellen King, and her staff. Ms. King personified the image of an ideal civil servant. Competent, dedicated and caring, she ably listened to, and worked on resolving, complaints brought to her attention by the citizens of New Brunswick. She has set the bar high, and it will be difficult for me to match the quality of her service to the people of our province. I thank her for the advice and guidance she provided to me during my transition to the role of Ombudsman and for going the extra mile on behalf of our fellow citizens.

The year 2003/2004 was marked by several changes which have had an impact on our Office: the nomination of a new Ombudsman, the addition of a 1-800 line to facilitate communication with our staff, some changes in personnel, the installation of new technology and, late in the year, a sudden increase in the number of complaints. As well, we have attempted to spend more time on systemic issues and to recommend changes to improve the delivery of public services and prevent certain practices that lead to citizen complaints.

This latter initiative has proven to be especially challenging in an Office deluged with calls from frustrated and angry complainants who are much more concerned about having their current problem attended to and resolved. Not all of the complaints filed with our Office are valid, although virtually all of our complainants truly believe that they have been wronged in some way.

This report contains several examples of complaints that our office receives, the agencies involved and the outcomes achieved through our interventions. In 2003/2004, our Office received 1,973 complaints, inquiries and requests for information. This is a slight increase over the previous year (1,948) and reflects a significant surge over the months of January, February and March, 2004. The trend of those last three months did not subside in the months that followed. In fact, the number of complaints for the mid-year mark of September 30, 2004, (1,360) is an increase of fifty percent (50%) over the same-six month period in 2003 (904).

Although this increase will be discussed in much more detail in our next annual report, it is putting a noticeable stress on current resources, both financial and human. It also constrains the time and energy we are able to commit to more in-depth investigation. To cope with the increased workload as efficiently as possible, we have, somewhat reluctantly, shed some of the reporting procedures used for case management.

With the help of new technology (an electronic Case Management System) imported from the Ombudsman Office of Ontario, and by hiring summer law students and an articling law student and a co-op student this fall, we have managed to keep our heads above water, but just barely. In recent years, Ms. King had stated publicly that the complexity and difficulty of an increasing number of investigations seriously challenged the resources available to our Office. Given the increase in workload evidenced by the statistics of the first nine months of my term, that fact has been amply reinforced and confirmed.

Right to Information

New Brunswick courts have determined that our *Right to Information Act* favours disclosure. This means that the exemptions contained in the legislation should be strictly interpreted. Unfortunately, that is not the practice in our province. Citizens, the media and members of the legislature are routinely deprived of information that they are entitled to.

It has become apparent that at least part of the problem is a lack of understanding of the Act by officials and applicants alike. Some officials seem to believe that any information shown to a minister constitutes “advice to a minister” and is therefore exempt from disclosure. This narrow view causes frustration for those seeking information. Conversely, some applicants think that, by asking for everything under the sun, they will get what they are actually looking for. In fact, little is accomplished when wide-ranging and obscure requests are made; the results are predestined to be disappointing. These requests are invariably costly and time-consuming and do not serve the public interest. Another problem is that municipalities are not covered by the *Right to Information Act* and the *Protection of Personal Information Act*. In an effort to promote transparency and a more open government, it is recommended that municipalities and municipal structures be included in Schedule A of the *Right to Information Act*. Following this recommendation would provide the additional benefit of increased protection for the privacy of individuals’ personal information, as inclusion of municipalities under

Schedule A of the *Right to Information Act* will bring these public bodies under the *Protection of Personal Information Act*.

- 1. The Office of the Ombudsman recommends that municipalities and municipal structures be enumerated in Schedule A of the *Right to Information Act*.**

For some months, I have been suggesting a one-day workshop for officials, MLAs, reporters, editors, interest groups and members of the public. It would help improve and clarify our mutual understanding of the *Right to Information Act* and the role it plays in an open, transparent and democratic society.

I have decided to make this suggestion a formal recommendation in this report in the hope that it will find support in both government authorities and in broader civil society.

- 2. The Office of the Ombudsman recommends that as soon as possible the Executive Council Office organize and sponsor a one-day right-to-information workshop. It is recommended that the major stakeholders be invited to participate in an open and frank discussion of the roles of the parties, and the intention and practical operation of the *Right to Information Act*.**

Access to Government Files

Much of the effectiveness of any Ombudsman depends on the timely accessibility of relevant information. It is not possible to investigate a citizen complaint without having access to the information concerning the issue and the reasons motivating the administrative decision complained about.

The *Ombudsman Act* recognizes this fact in several sections which provide the Ombudsman with wide powers to conduct investigations and obtain information. In the vast majority of situations, cooperation of the various public bodies, agencies and departments is beyond reproach. However, a disagreement over access to information in one particular department requires some effort to remove obstacles to the ability of our Office to do our work.

The Department of Family and Community Services maintains that its legislation prohibits it from providing to our Office some types of information. While we disagree with their interpretation, we are much more anxious to remove the

impediments to our work. For example, if departmental investigative reports are held back, how can we assure complainants they are being treated fairly? Surely, this could not have been the legislators' intent when our Office was created in 1967.

3. The Office of the Ombudsman recommends the following legislative amendments to eliminate this misunderstanding:

a) that the *Family Services Act* be amended as follows:

I. by adding a new paragraph (d) to the Ombudsman or to a person appointed by the Ombudsman to subsection 11(3), with the current paragraph (d) to become paragraph (e);

II. by adding the words or an investigation by the Ombudsman after “judicial proceedings” in subsection 30(6).

b) that Regulation 95-61 under the *Family Income Security Act* be amended as follows:

I. by adding a new paragraph (h) to the Ombudsman or to a person appointed by the Ombudsman to subsection 31(4).

c) that the *Ombudsman Act* be amended as follows:

I. by deleting subsection 18(4) and subsection 18(5).

Privacy

New Brunswick, Manitoba and the Yukon are the only three jurisdictions in Canada where the Ombudsman is also responsible for right-to-information appeals and privacy complaints. All other Canadian provinces, except P.E.I., which does not have an Ombudsman, have a separate information and privacy commissioner.

Our workload in the privacy area remains quite limited. Complaints are few, with most inquirers looking for information, and they are referred to other offices. This is surely due to the limited scope of our *Protection of Personal Information Act* (POPIA). It deals only with the protection of personal information in the hands of a number of designated “public bodies.” Unlike a growing number of other provinces, our legislation does not cover private sector entities. New Brunswick's Justice Minister has indicated that we will rely on the relatively new federal legislation (*the*

Personal Information Protection and Electronic Documents Acts (PIPEDA)) to do that in our province. As well, other provinces have decided to enact specific laws to protect personal health information; that is not the case in New Brunswick.

Nonetheless, security threats and resulting new intrusive legislation have raised concerns amongst civil rights advocates, both here and abroad, that privacy is taking a beating. The U.S. *Patriot Act*, enacted shortly after 9/11, is a prime example. It allows government access to personal information in the possession of U.S. companies, or their subsidiaries, anywhere in the world. While it may be premature to panic over this type of legislation, a recent B.C. case has caused more than one privacy commissioner to worry about how far the Act can reach.

We can only conclude that this is an area of jurisdiction that is likely to grow in future years.

Conclusion

This report reflects the hard work and dedication of every single member of the Ombudsman Office staff, including four law students who spent the summer of 2004 with us. By means of research, writing, discussion or statistical analysis, each contributed to the final product. I am grateful for their enthusiastic involvement in a new and demanding approach to meeting our mandate.

This report contains a number of recommendations which we have highlighted to make them as clear as possible. Those requiring legislative amendments are set out in the first part of this report while the others can be found in the following pages.

Dealing with public complaints is our central purpose and occupation. Listening, investigating, mediating and recommending are the tools of the trade. But we cannot fully accomplish the mandate set out in the *Ombudsman Act* and other legislation that defines our work unless we are able to consider systemic issues and encourage improvements to the mechanisms (procedures, policies, laws and regulations) used to serve the citizens of New Brunswick. We will continue to strive to do both, knowing that, if we succeed, New Brunswickers and the public administration will both be the ultimate winners.



Bernard Richard
Ombudsman