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# Time for a Federal Ombudsman

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by Donald C. Rowat

*In 1967 two provinces, Alberta and New Brunswick, became world leaders among democratic countries by appointing an ombudsman, as an agent of the legislature, to receive and remedy complaints about bureaucratic action (or inaction). Soon other provinces followed suit, as did governments in other democratic countries at the national, state and municipal levels. Within ten years all provinces except Prince Edward Island had adopted the institution, and by 1995 it had spread around the democratic world.*

Of the 180 ombudsman offices in the world, 65 are national, 70 are provincial, state or regional, and 45 are at the municipal level. Developed countries with national schemes are the Nordic countries (where the institution began), New Zealand, Netherlands, Britain, France, Israel, Austria, Germany, Spain and Australia. Australia has an ombudsman not only at the federal level but also one for each of its six states.

The federal government in Canada, however, has not yet adopted this badly needed bulwark of democratic government. In 1978 the Trudeau government actually introduced a bill to provide for an ombudsman, but, for reasons which are difficult to explain, never proceeded with the measure. A rumoured explanation, hard to confirm because of cabinet secrecy, is that the cabinet, split on the measure to begin with, became put off by the bold way in which Ontario's new ombudsman, Arthur Maloney, was battling the government of Ontario. Since that time, presumably for fear the ombudsman might criticize the government itself, no federal government has had the political fortitude to provide for a general ombudsman.

It is true that since then the federal government has created five specialized complaint officers for specific

purposes. The first one was the Commissioner of Official Languages, among whose functions is that of remedying complaints from the public about the bureaucracy's use (or non-use) of the two official languages. But the Commissioner has other and more proactive functions than those of the classical ombudsman, and so his status as a genuine ombudsman is doubtful.

The second complaint officer to be created, one closer to the classical ombudsman, was the Correctional Investigator, who investigates complaints from prisoners and recommends remedies. But he is an officer appointed by the Solicitor General, not an independent officer of Parliament like an ombudsman (though his independence was strengthened recently by legislation).

The next ombudsman-like office was the Privacy Commissioner, appointed under the *Canadian Human Rights Act* of 1977 to receive complaints about the bureaucracy's handling of personal information. The Commissioner was then absorbed under the *Access to Information and Privacy Act* of 1982. This Act also provided for the fourth complaint office, the Information Commissioner, to receive complaints about refusals of requests for government documents. The fifth one is the Public Complaints Commission for the RCMP, set up in 1988. In this case the office does not receive and investigate all complaints directly, but instead monitors complaints to the RCMP about police actions.

Though all five of these offices receive complaints and recommend remedies, only three of them can legitimately be called ombudsmen in the sense that they have all four essential features of the ombudsman concept: being an officer of Parliament and thus

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independent of the executive, receiving all complaints directly, and having the power to investigate them and recommend remedies. But the main problem is that, even adding to all five offices together, they cover only a very small fraction of the thousands of administrative decisions and actions taken each year at the federal level. To the average citizen the federal public service is bewilderingly big and complex. It has nearly 600,000 employees, more than 50 departments and department-like agencies, and over 100 semi-independent organizations of various kinds and sizes. For this reason it is hard to understand why the federal government has not created an ombudsman scheme that covers the whole administrative system.

In recent years, with the coming of democracy in many more countries, there has been a resurgence of interest in the ombudsman plan. The new democracies of Eastern Europe and Latin America are seriously discussing it, and several have already adopted it. Also, the Administrative Conference of the United States, a body that monitors federal administrative agencies, recently had a study prepared on the concept and passed a resolution in favour of the idea. In Canada, the federal Law Reform Commission recently recommended a federal ombudsman in one of its administrative law reports. It was working on a full report with detailed recommendations for a federal scheme just before the Commission itself was abolished by the Mulroney government.

By now the provinces have had successful ombudsman plans operating for nearly two decades, and Ontario and Quebec have two of the most fully developed and most highly regarded schemes in the world. All of the provincial ombudsmen receive numerous complaints against federal departments and agencies, and feel frustrated because they cannot deal with them. At their annual conference they have collectively urged the federal government to take action on the matter.

Australia has had a federal ombudsman, operating with great success, since 1975. By now his office handles more than 17,000 complaints and over 23,000 inquiries a year, and this is done with a full-time staff of only 95. Since Australia's population is much smaller than Canada's, this gives you some idea of the tremendous number of complaints and inquiries that would be received by a federal ombudsman in Canada. Since typically an ombudsman finds that about 20 per cent of complaints are justified, Australia's experience indicates that every year there must be thousands of Canadian citizens who suffer from maladministration by our federal bureaucracy and for whom no remedy is ever

found. A democracy should be ashamed of treating its citizens in this way.

A frequent argument that has been used to oppose a federal ombudsman is that other avenues for complaint and remedy are already adequate. The three traditional avenues have been these: complaining to your Member of Parliament, airing your complaint in the press, or taking your case to the courts. All of these have serious inadequacies.

Regarding complaints to MPs, the main problem is that the administrative side of government is far too big in relation to the total number of MPs. They cannot possibly handle all of the potential complaints against the administration in our gigantic federal bureaucracy. Also, they are all members of political parties, and so may be suspected of being partisan. They are expected to devote a lot of their time to policy-making and to become experts on legislative matters, and therefore do not have the time that is needed to investigate minor administrative complaints. Another problem is that the majority party's MPs hesitate to complain against their own government. And Ministers are very likely to support a decision made by one of their own officials, even if made by a relatively junior one within the department. A related problem is administrative secrecy. MPs are often unable to get at relevant information about why a decision was made. This is why, even though there is an *Access to Information Act*, even MPs may have to resort to using it.

If we look at the press as a device for airing complaints, there has been an interesting development in recent years - the newspaper ombudsman. Newspapers have instituted what are often called "Action Line" or even "Ombudsman" columns, which receive complaints from the public, try to settle them, and then write up the most interesting cases in the column. Although these columns often settle administrative complaints, there are serious limitations on what they can do. They deal with any kind of complaint, not specifically complaints against government administration, and so do not have the expertise necessary to investigate in any administrative field. They have no specific legal power to investigate as the ombudsman does, and so, because of administrative secrecy, often they cannot get at the relevant information in a case. Because they exist in some localities but not others, their coverage of the total need is spotty. If they happen to take an interest in a case, they may get success, but one cannot be sure they will deal thoroughly or fairly with all the complaints they receive.

Turning to the courts, they are not at all satisfactory for handling administrative complaints. The power of the courts to review administrative decisions is very limited - mainly to reviewing the fairness of the decision rather than the content. And courts are costly: only the well-off

can really afford to make appeals to the courts. Courts are also slow, cumbersome, and complicated, often using ancient prerogative writs and nearly always requiring the services of a lawyer. Because of these disabilities we in the English-speaking world have been too proud of our tradition of using the ordinary courts to protect the rule of law. The Europeans have been far ahead of us with their specialized, easily accessible administrative courts and their laws on administrative procedure.

***Our courts are ill-equipped to handle the thousands of complaints that an ombudsman receives.***

One can argue that there is a greater need for a federal ombudsman in Canada than in Australia, because Australia has recently set up a special court for administrative appeals. From the viewpoint of dealing fairly with citizens, our federal administration has the following weaknesses:

- many independent agencies with power to decide individual cases;
- limited opportunities for appeal to the courts;
- antiquated laws on Crown privilege, expropriation and government liability;
- weak arrangements for free legal aid to needy people.

There is also inadequate prescription of administrative procedure, with no national *Administrative Procedures Act* as in the United States and several West European countries.

Even if there were to be reforms in all these areas, a federal ombudsman office would still be desirable because of the relative ease and cheapness with which it could settle minor grievances, and the recommendations it would make for improving administrative action. The immediate adoption of an ombudsman system would help to bring about these other reforms. Most of them are legally complicated and technical, and it is therefore difficult to create an informed public opinion about them. A government does not easily submit to limitations on the free exercise of its own executive powers that such reforms imply. The ombudsman system, on the other hand, is simple, easily understood, has great popular appeal, and does not limit a government's powers. The public discussion generated by the creation of a federal office, and later by the office's own recommendations for reform, could help to bring about these more technical reforms in the realm of administrative law. Now that the Law Reform Commission has been abolished, the need for a federal ombudsman is greater than ever. In relation to the benefits it would give us, it is a cheap reform that we cannot afford to do without even in a period of financial stringency.