CURRENT OMBUDSMAN ISSUES -
AN INTERNATIONAL PERSPECTIVE

by

Stephen Owen, Ombudsman for British
Columbia and President, International
Ombudsman Institute

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A. <u>Introduction</u>

The concept of the Ombudsman, from its classical legislative model to the many manifestations of executive, local government, specialized mandate and commercial Ombudsman offices, has taken firm hold as an instrument of democratic accountability between the individual and the administrative state, world-wide.

In this paper, I would like to highlight some of the major initiatives and common challenges currently affecting Ombudsmanship internationally. The reality of modern administrative bureaucracy and its massive impact on individuals transcends all forms of government and, at this time of expanding democratic expression and positive structural change in many parts of the world, the sharing of experiences and support within the international Ombudsman community is particularly timely. As we are all acutely aware, the Ombudsman process is a fragile thing, particularly in those jurisdictions where it is a relatively new institution. In order to achieve its potential, the process must be flexible in its approaches as it is rigid in its principles. Different styles of individual Ombudsmen, new political initiatives, fickle media dynamics, changing bureaucratic structures and challenging social and economic conditions will all demand that the Ombudsman process evolve if it is to maintain its effectiveness in holding government accountable for administrative fairness.

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The experiences and challenges of Ombudsman offices worldwide are sufficiently similar to make such international exchanges highly relevant; yet they are sufficiently different to make them fascinating and instructive.

B. Nature of the Administrative State

State action is initiated in most democratic situations, not in aid of an elaborate power grab, but rather in response to the complexity of modern society and the voracious demands of individuals for public services. Yet the massive influence that this response has on each of our individual lives often causes unfairness.

Individual fairness is the end to which democratic society aspires; accountability is the means by which it achieves it. However, the dominance of the public sector strains the ability of traditional control systems to hold public bureaucracies effectively to account. The political process is not sufficiently fine-tuned to monitor all individual concerns. The judicial system is expensive, slow and often impotent to review administrative action. The media are not always reliable investigators of individual unfairness. Further, local control over the relevance and responsiveness of public services can be frustrated by centralist tendencies in senior government.

Unfairness in public administration is not simply the result of ill will or incompetence. Generally, the opposite qualities are demonstrated by our public servants. However, bureaucratic insensitivity and error can be caused by the overwhelming responsibility assumed by modern government and the size of the institutional machinery required to discharge it.

That democratic government must treat individuals fairly is both trite to say and challenging to accomplish in a complex society. Laws and government action must achieve public policy objectives for the general good of society and these can

sometimes cause unfairness in individual situations. The resulting bitterness can tarnish our democratic ideal, leading to political polarization, cynicism towards our public institutions and destructive litigation between individuals and the state. To counter these tendencies, we must develop administrative practices and mechanisms to promote the fair application of public policy to individual situations and to resolve conflict in a non-adversarial way when it arises. This is the business of Ombudsmen.

In a partisan system of government, there is a natural tension between democracy, which demands the devolution of power, and politics, which pursues the concentration of power. The system is kept in equilibrium by traditions of fairness and the systems that support them. However, it is necessary to adapt our thinking and practices to preserve this balance in the face of the modern realities of the administrative state and polarized party politics. Concepts such as the separation of powers among the legislative, executive and judicial branches of government, ministerial responsibility and the subjection of the state to general law must not be presumed blindly to endure effectively for our benefit.

Partisan politics can effectively subordinate the legislative branch of government to the executive during a majority mandate. Public policy, public accounts and public administration are often simply not subject to the constant scrutiny of the legislature that is contemplated by parliamentary theory.

We generally hold government to account through elections. However, the effectiveness of this control mechanism relies heavily on the notion of ministerial responsibility for the administrative furtherance of government policy by the numerous ministries and other public institutions. While such responsibility can be effectively exercised and monitored for broad public policy objectives, the size and complexity of the modern administrative state have made it unrealistic to expect a minister to take personal responsibility for the individual acts of unfairness or impropriety of all of the officials who report to him or her. If

this political responsibility has been weakened or severed, how then are we to monitor and resolve situations of individual unfairness?

The judicial branch of government is often an impractical instrument for enforcing individual rights against the state. Cost, delays, immunities, privileges, privative clauses and judicial deference limit effective review. But litigation will often be the least appropriate way to resolve disputes between individuals and the state for more fundamental reasons. The democratic state will never simply be another party to litigation; it is a positive force with responsibility to harmonize and order society. These will not be achieved by an adversarial approach, even if judicial review is effective in a given case. Apart from defending the public against frivolous claims and contesting constitutional issues, it is unseemly for government to have to be sued by its citizens. Rather, more constructive resolutions must be found which reconcile all apparently conflicting interests.

The slow erosion of these traditional notions weakens the accountability of modern government for individual unfairness. Resolving this dilemma requires that we address the reality of the extent to which the administration of public affairs has become dominated by the public bureaucracy. Administrative law, which regulates the relationship between individuals and the state and affects almost every aspect of our lives, is not exercised totally in parliament, the cabinet room and the courts or tribunals. Rather, it is to a substantial extent applied across the desks of public servants as they exercise the discretion necessary to translate public policy into individual situations.

Achieving individual fairness, therefore, depends largely on quality control in the administrative decisions, actions and practices of the government bureaucracy. In this context, fairness involves more than legal authority. Laws may accomplish a general purpose or define a specific goal; fairness requires justice in an individual situation. Unfairness includes improper discrimination,

arbitrary or oppressive behaviour, arrogance, delay and unreasonableness by public officials, which nevertheless may be impractical, inappropriate or impossible to challenge at law. It is these challenges of the modern administrative state that the institution of the Ombudsman is intended to meet, thereby empowering individuals to participate meaningfully in a democratic process and sensitizing state bureaucracies to considerations of individual fairness.

C. Nature and Variety of the Role

The International Bar Association provided an excellent summary of the common features of Ombudsmanship in this 1974 definition:

> An office provided for by the constitution or by action of the legislature or parliament and headed by an independent, high-level public official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies, officials amd employees or who acts on his own motion and who has the power to investigate, recommend corrective action, and issue reports.

Ombudsman offices now exist at the local, state and national levels in more than 40 countries on all continents. Beyond the most simple and direct forms of democracy, considerable power must be entrusted to government officials in order for them to carry out the public purpose. The need for protection for the ordinary citizen against the possible abuse of this delegated power has been recognized for many centuries. The Control Yuan of ancient China and the Roman Tribune are precedents. The Swedish institution of Justitieombudsman, created in 1809, inspired the concept and name for the most common modern model of the Ombudsman office. This model was more sharply defined and settled with the

creation of the Danish Ombudsman office in 1953 and the first English-speaking Ombudsman office in New Zealand in 1962.

While the term Ombudsman has been adopted into many languages, the concept has also inspired many other terms: Mediateur (France), Defensor del Pueblo (Spain and Puerto Rico), Protecteur du Citoyen (Quebec), Volksanwalt (Austria), Parliamentary Commissioner for Administration (United Kingdom), Commissioner for the Enforcement of the Leadership Code and Permanent Commission of Enquiry (Tanzania), Provedor de Justica (Portugal) Wafaqi Mohtasib (Pakistan), Inspector General of Government (Uganda), Public Complaints Commission (Nigeria), Petitions Committee (Federal Republic of Germany), Te Kaitiaki Mana Tangata (New Zealand-Maori), Commission for Civil Rights Protection (Poland), and Ayukta (India) demonstrate both the variety of language and the common ideas encompassed by the Ombudsman concept.

A comprehensive review entitled The Place of the Ombudsman in the World Community was presented to the Fourth International Ombudsman Conference in Canberra in 1988 by Professor Walter Haller of Switzerland. The paper identifies the widespread joint objective among Ombudsman offices of seeking satisfactory action for the individual against bureaucratic unfairness and ensuring that public administrators fulfill their obligations - both while acting neither as agent for government nor advocate for the complainant. At the same conference, Professor Gerald Caiden of California concluded, in a paper entitled Maturation Issues For The Ombudsman, that "[d]espite the rising criticism of government performance around the world, the presence of the Ombudsman has by every account increased public confidence in public administration." It acts as both a civilizing and democratizing force in a complex and demanding modern society.

While generally pursuing common objectives, different Ombudsman offices demostrate the flexibility of the concept by taking different institutional forms to suit the particular democratic structures and traditions of the jurisdiction. The

classical Ombudsman or Parliamentary Commissioner appointed by and reporting to parliament might receive petitions directly from the public or only through a select all-party committee. Scandinavian and Commonwealth Ombudsmen generally follow these models. The Ombudsman institution might actually consist of a tribunal of officials representing the major political parties, as in Austria, or a Petitions Committee of the legislature itself, as in the Federal Republic of Germany.

While Ombudsmen are generally responsible to the legislative branch of government, they can also be appointed by and responsible to the president and executive branch. This raises interesting philosophical and practical questions as to the value of the Ombudsman as a means of strengthening the legislature against the often overwhelming influence of the executive and the value of drawing authority and influence from the effective source of power.

Ombudsmen generally hold only the power to recommend rather than to order change. Perhaps, paradoxically, this inability to force change represents the central strength of the office and not its weakness. It requires that recommendations must be based on a thorough investigation of all facts, scrupulous consideration of all perspectives and vigorous analysis of all issues. Through this application of reason, the results are infinitely more powerful than through the application of coercion. While a coercive process may cause reluctant change in a single decision or action, by definition it creates a loser who will be unlikely to embrace the recommendations in future actions. By contrast, where change results from a reasoning process, it changes a way of thinking and the result endures to the benefit of potential complainants in the future. If genuine change is to take place as result of Ombudsman action, the office must earn and maintain the respect of the public service through its patent reasonableness.

However, there are exceptions to this general practice. For example, the French Mediateur can compel administrators to comply with the decision of a Law Court within a time he fixes himself;

the Swedish and Finnish Ombudsmen supervise the Courts; the Ontario Information and Privacy Commissioner has the power to order the production or otherwise of information held by government; and the Pakistani Wafaqi Mohtasib in some circumstances may award compensation to an aggrieved party for loss or damage suffered on account of maladministration.

Although the classical Ombudsman role is that of a generalist, with jurisdiction over all matters of administration practised by a particular level of government, it is becoming increasingly common to appoint specialist Ombudsman offices with jurisdiction variously covering police, information and privacy practices, prisons, armed forces, hospitals, long-term care facilities and children's rights. Commercial Ombudsmen in the insurance, building trades, banking and newspaper businesses have also been appointed in different countries.

Understandably, concern has been expressed about the potential public confusion arising from the proliferation of Ombudsman-like offices which do not conform to the classical model. New Zealand has recently passed legislation restricting the use of the word "Ombudsman" to the official legislative office. However, what we can all celebrate is any indication of the proliferation of the principle of administrative fairness to individual citizens.

What can be said of all these various Ombudsman offices is that they are responding to a common phenomenon - the potential in all bureaucracies for insensitivity towards individuals. Delay, indifference, rudeness, sloppiness, arbitrariness, oppressive behaviour, arrogance and even unlawfulness can be structural shortcomings of all hierarchical institutions in which employees receive their directions, authority and rewards from above. Fundamental to the Ombudsman concept is the ability to invert bureaucratic attention towards the individual citizens who are intended to be served.

D. Current Initiatives

One of the most dramatic and potentially heraldic incidents in international Ombudsmanship was the appointment of a Polish Ombudsman, Dr. Ewa Letowska, effective January 1, 1988. The initiative, strongly supported by scientific circles, was undertaken in 1983 by the Patriotic Movement for National Rebirth, a non-party movement grouping public organizations and persons striving for state and social revival. In consequence, a bill was prepared and made available for wide public discussion and critical comment. The Act of 1987 provided for the Polish Sejm (Parliament) to appoint a Commissioner for Civil Rights Protection, or Ombudsman, for a term of four years. The Commissioner is independent of other state bodies and responsible only to the Sejm.

That the Polish Ombudsman office originated from outside the Communist Party and preceded the creation of a multi-party form of government demonstrates the powerful democratic force of the office, both as a symbol and as a practical expression of individual rights. There is great potential for the Polish experience to be followed elsewhere in Eastern Europe. Hungarian officials met with the Directors of the International Ombudsman Institute during their meeting in Austria in May, 1989 to discuss the creation of an Ombudsman office in that country; Yugoslavia, with the assistance of the O.E.C.D., held an international symposium in October, 1989 promoting the Ombudsman concept in that country, in which several Western European Ombudsmen took part; officials from Saudi Arabia and Singapore attended the meetings of the Ombudsman Forum at the International Bar Association meeting in Strasbourg in October, 1989; and a senior member of the Soviet Chamber of Deputies involved with constitutional and criminal code reform has been invited to meet with the International Ombudsman Institute in Edmonton in February, 1990 to discuss the potential role of the Ombudsman in the Soviet Union.

A significant movement working for the establishment of the Ombudsman institution in Latin America is the Instituto Latino American Del "Ombudsman". Headquartered in Caracas, Venezuela, its objective is to form chapters in each Latin American country involving constitutional, administrative and international lawyers working to promote the formation of Ombudsman offices. To date, chapters are active in Argentina, Uruguay, Chile, Venezuela and Costa Rica, and others are being started in Brazil, Paraguay, Equador, Bolivia, Panama, Honduras and Guatemala. The Institute identifies the need for Ombudsman offices to defend the rights of citizens facing the growing powers of government institutions by strengthening their participation in the management of public matters and giving the democratic system the coherence it needs to survive the difficult social and economic times. Buenos Aires has already appointed a municipal Ombudsman and Costa Rica and Argentina are reported to be considering the idea at the national level. Guatemala has apparently recently appointed a Procurador de los Derechos Humanos, although I have not learned of the details of the mandate.

Tanzania and Uganda are enthusiastically promoting the Ombudsman concept in East Africa. At the International Ombudsman Conference in Canberra in 1988, African Ombudsmen strongly emphasized the need for the international community to appreciate the different leadership traditions in Africa and the need for the establishment of appropriately adapted Ombudsman models that are not necessarily patterned after those which developed in Europe. Uganda is hosting an African Regional Ombudsman's conference in December, 1989 to discuss the creation of a separate African group within the International Ombudsman Institute, a topic that was also discussed at the I.O.I. Directors meeting in May. The President of Tanzania, Ndugu Mwinyi, in a strong statement of support for the Ombudsman concept and in recognition of his country's early appointment of the Permanent Commission of Enquiry in 1966, recently announced his support for the convening of a

Symposium in Tanzania in 1990 to promote the concept throughout East Africa. Kenya, Burundi, Rwanda, Angola, Malawi, Mozambique, the Sudan and Zaire would be encouraged to adopt the concept.

The Canadian Ombudsmen, at their annual meeting held in Quebec City in October, 1989, approved plans to join with the Canadian government, the Canadian International Development Agency (C.I.D.A.) and the International Ombudsman Institute to promote the adoption of the Ombudsman concept in francophone Africa. Canadian financial and technical support for this initiative was seen as an important extension of the long-standing political, economic and social relationship with francophone countries and the official language status of French in Canada.

Another significant addition to the international Ombudsman community was the appointment in 1988 of Mr. A. Garcia as Ombudsman for Hong Kong, an office that "Justice", the British section of the International Commission of Jurors had been working for since 1969.

Surprisingly, the concept of Ombudsmanship has not taken firm root in the United States, in contrast to most of the democratic world. There is no federal Ombudsman and there are only four state Ombudsmen (Alaska, Hawaii, Iowa and Nebraska). However, a growing number of federal agencies, including the Postal Service and Internal Revenue, have Ombudsman-like offices to monitor the fair treatment of citizens. As well, there has been a healthy proliferation of local government and specialized Ombudsman offices dealing with long-term care, education systems, hospitals, children's rights and prisons, among other things. These offices were well represented at a lively meeting of the U.S. Ombudsman Association in Seattle in June, 1989. I suspect that a critical mass is building to the point where American society will embrace the Ombudsman concept with the traditional enthusiasm it displays for democratic and individual liberty issues.

E. Common Challenges

Whatever the structure of a particular democratic system, or the variant of the Ombudsman office that has been developed as one of its institutions, the nature of state bureaucracy presents similar challenges to all societies. Professor Caiden in his paper on Maturation Issues For the Ombudsman discusses common challenges inherent in the nature of the Ombudsman institution as an independent and neutral office. These include the political tightrope, jurisdictional and resource constraints, bureaucratization of Ombudsman offices and maintaining relevance.

Ombudsman offices must constantly evolve along at least two dimensions: one recognizes the maturation within a particular office and the experience, skills and community goodwill that it has accumulated; the other is in reaction to changing external trends and threats. The strong and growing links among Ombudsman offices, regionally and internationally, help us to compress the evolutionary process and to anticipate and deal more effectively with the major common challenges. In this section, four major issues currently affecting Ombudsman offices internationally will be discussed.

(i) Preventative Action and the Systems Approach

Increasingly, Ombudsman offices in all parts of the world are analyzing their role in the development of administrative policy and practice and considering the introduction of a "systems approach" as a supplement to the more traditional role of reacting to individual complaints. This shift of emphasis is from the critical to the constructive.

Introducing a systems approach requires a threshold maturity for an Ombudsman's office. It is not an alternative to individual complaint resolution; rather it is intimately dependent on the technical expertise and casework experience acquired through

investigating, analyzing and resolving thousands of individual concerns over many years. This daily exposure must continue as the lifeblood of effective oversight and direction. However, as skill and experience accumulates within an Ombudsman's office, there evolves both the capacity and the responsibility to identify and remedy systemic causes of recurring unfairness.

Care must be taken to distinguish administrative policy from legislative policy. Developing legislation is a political task which typically involves debating the relative merits of differing social and economic policies. In this, an Ombudsman has no business. Only if legislation offends established principles of fairness in an absolute way does an Ombudsman have a responsibility to enter the debate. Administrative policy development is very different. It involves the translation and application of broad legislative policy to individual situations. It describes method, not purpose, and it requires the exercise of discretion by public servants which creates the potential for arbitrariness. These are fundamentally the business of an Ombudsman.

Fair public administration is not merely the application of good will to particular situations. It requires a comprehensive body of administrative policy which includes the following elements:

(1) There is a need for clear foundational links between all policy and practice regarding public business to statutes and regulations, so that the lawful authority is apparent to all. Public officials left to develop policy and exercise discretion without reference to obvious legislative authority risk losing public confidence in the fairness of their actions;

(2) There is a requirement for principled codes of service which emphasize the fundamental responsibility of public officials as being to ensure fairness to individual members of

the public, while pursuing general public policy objectives. If we keep our attention focused on this basis tenet of our democratic system, it will be less likely that we will set special interests against each other, rather than help them to identify common objectives;

(3) There is a need for structured criteria against which discretion is exercised to ensure that similar situations are treated consistently and different situations are treated individually. While officials must not fetter the exercise of discretion by absolute rules, they must avoid arbitrary decisions through the application of objective standards to which each individual situation is subjected;

(4) There is a need for the publication of the above noted legislative references, codes, policy, practices and decision-making criteria in plain language to assist administrators to act consistently and the public to measure administrative confidently. Perhaps nothing is more disarming of public controversy than openness. On the other hand, confrontation surrounding public interest dsputes is often generated by the extremes, which are able to gain influence over more moderate elements in society in a climate of suspicion created by secrecy;

(5) Equally, there is a requirement for clear, reasoned and published criteria governing public access to government information and processes. As a general rule, public information should be available to the public. The exceptions should be few in number and subject to discretionary disclosure where no reasonable expectation of injury is shown. Trade secrets or confidential business information should be exempted from disclosure, except where specific information is severable or when the public interest regarding health, safety

or environmental protection overrides private commercial interest. Exceptions are also required in cases of criminal investigations, where disclosure would be contrary to law or where the cabinet decision-making process might be involved;

(6) Personal information, on the other hand, generally should be stored, used only when authorized and only when the individuals concerned know that information about them is being retained. Those concerned must have the opportunity to see and to correct the information on file about them. This type of information must be kept confidential;

(7) There is a need for the opportunity for meaningful participation in administrative decision-making to ensure that all relevant information is taken into account and to instill public confidence in the fairness, openness and effectiveness of action taken. This includes long-range planning which should involve all public and private interests with a stake in the outcome. While this consensual process may be initially time-consuming, it ensures stability and eliminates costly confrontation and correction of errors in the future;

(8) It is important that reasons are given for administrative decisions, whether required by law or not, so that performance can be measured accurately and openly against policy. This promotes quality in administrative decision-making and, at the same time, builds public confidence in government. Where the giving of reasons is standard practice, it will ensure cautious attention to the decision-making and avoid a retroactive justification of outcomes;

(9) Where public services or assets are being offered for private participation, the process must be manifestly open, market competitive, impartial and subject to audit.

An Ombudsman's office is qualified to advise on such policies and practices and should not shy away from playing an active and constructive role in their systemic development.

There is a risk that if an Ombudsman's office invests too much in the development of administrative policy, it may be inhibited in the objective and rigorous review of its application. While this demands caution, it does not require abstinence. It is not a sufficient reason to remain merely reactive and critical after unfairness has occurred. Administrative policy exists, even if it is not practised, under a reasoned and articulated discipline. An Ombudsman's office is regularly involved in recommending change in individual situations and, where implemented and repeated generally, later reviewing the fairness of its own recommendations. Administrative practices must regularly adapt to meet new circumstances, experience and insights; an Ombudsman's office may evade its duty if it remains unwilling to voice its opinion in a timely way.

The role of the Ombudsman's office is not to replace or oppose government decision-making. Rather, the office exists to assist the public service to be more aware of and responsive to the public's individual concerns. In addition to helping resolve individual complaints, an Ombudsman's office can, over time, serve as a resource to government institutions in identifying recurring unfairness, which may not display an obvious pattern to the agency itself, and can advise on how to avoid it in the future.

It is often incorrectly assumed that administrative fairness can only be achieved at the cost of displaced efficiency to the authority. Disproving this requires creativity and clear thinking, but it is a major opportunity and responsibility for an Ombudsman's office. The task often involves reconciling apparently conflicting objectives by demonstrating their mutual dependence; fairness is not only compatible with effectiveness, but can be shown to be a necessary precondition, especially if its absence contributes to ill-will, recourse to expensive appeal systems or a decline in

confidence in the democratic system.

An important opportunity for an Ombudsman's office to apply systems solutions arises in cases involving more than one authority. It may be able to play a useful coordinating role where individual fairness requires a reconciliation among institutional interests or mandates of various ministries, where budgetary restraint has encouraged the transfer of responsibility amongst ministries or where a resolution requires an inter-ministerial response.

Public service management can draw on systems initiatives by an Ombudsman's office in a number of ways. First, it can seek advice on lowering cost and raising its public image through providing high quality services which are both fair and effective. Second, it can use an Ombudsman's recommendation for necessary change to support additional resources from the budgetary process. Third, it can publicly defend its legitimate practices in a more credible way through the independent review and endorsement of the Ombudsman's office and, fourth, it can present line staff with the Ombudsman's recommendations on fair treatment of the public outside of the complex and sensitive labour relations context.

A fundamental aspect of the systems approach is a belief that public institutions, despite their size and complex responsibilities, are able and willing to respond to individuals in a fair way, on their own initiative. While individual problems will always occur and can be resolved on a case-by-case basis through an Ombudsman's office or internal complaint offices, the vast majority of potential complaints simply should never arise in institutions which are systematically sensitive to their overriding duty to ensure individual fairness and quality in their administrative actions, decisions and practices.

A by-product of the systems approach can be requests from government agencies for the Ombudsman's office to review or even take part in the development of administrative policies, from a fairness perspective. These provide an important opportunity for

the office to have a broad, preemptive impact without having to wait for unfairness to occur.

(ii) Private Delivery of Public Services

The widespread discussion of the privatization of public service delivery raises accountability concerns for ensuring fairness to individuals. This has become an important issue for Ombudsman offices in many countries.

The nature of public services must be distinguished from the means of delivering them. Public services in our society are those whose social value is democratically determined to exceed the cost, but which would be unprofitable for any private person to provide at a reasonable or recoverable cost. Where these are both essential and not universally affordable, the cost is publicly underwritten. Such services should be distinguished from those which are essentially private in nature but merely provided publicly to protect or advance some broader public purpose. When these latter services are privatized it represents merely the return to a competitive market, which itself can generally hold the deliveries of the service accountable for quality.

By definition, however, it is not possible for a true public service to be offered in a free market because its very existence represents a market failure. However, it is possible to deliver a service which remains public in nature through the private sector: this is what most of the privatization debate is about. The distinction between the nature of a service and its delivery model is fundamental because understanding it allows us to turn the focus of the private sector versus public sector debate from one of ideology into one of accountability. Public services are paid for out of public funds and these must be spent in the most cost-effective way. The key to making the optimum decision on the delivery model is the relative cost/benefit of achieving the required standard by different means. If all things are equal,

which they rarely are, then the issue will be determined simply as a matter of democratic preference.

Public services, whether delivered by a public bureaucracy or a private firm, must meet set standards. The deliverers must be responsible for quality to both government and individual consumers. Quality in private or public services is not necessarily synonymous with high cost. Rather, it involves matching performance with expectation. To the extent that private services are offered in a perfect market, the existence of real alternatives holds the competitors accountable for meeting the expectations of consumers. Public services are never subject to this market control, even if they are delivered privately. While privately owned firms might bid competitively for the right to provide a public service, what they acquire is non-competitive market power during the term of their service contract. An intriguing question, though, regarding public service delivery is the extent to which the threat of privatization of the delivery model induces public sector managers and employees to become more sensitive to individual fairness issues. In this sense, competitive market forces may indeed be having a positive impact on the quality of public services.

Public services are delivered by individuals, whether under an employment contract in the public sector or a business contract in the private sector. Government holds the public sector accountable for quality through its direct public management expertise. The mere size of many public bureaucracies can make this a formidable task. Government holds private firms accountable for quality in the delivery of public services by setting, monitoring and enforcing exact standards. Whereas it manages the public sector, it must regulate the private sector. If quality is to be ensured in public services, it is not possible to achieve both private delivery and deregulation at the same time.

Private or public deliverers of public services must be held accountable for quality to individual consumers as well as to

government. This accountability is tenuous because of the market power held in either sector. The Ombudsman's office has been established as an independent quality control mechanism to balance the market power of the public sector. Individuals and firms can express their concerns to the office regarding the quality and fairness of public sector actions, omissions, decisions and practices. Through this process, the Ombudsman's office assists public managers to identify and resolve quality concerns.

Where public services are delivered privately, government must ensure that private sector firms are equally accountable to individual members of the public for quality. While private delivery contracts must be monitored and enforced by government through general cost and quality controls, methods must also be in place to resolve individual complaints. Private contracts negotiated with government should therefore provide explicitly for access to the Ombudsman's office by individual users in order to ensure quality control over the public service delivered.

In addition to the public sector increasingly passing public service delivery responsibility to the private sector, many traditionally private sector industries and services are taking on more of a public sector character; an interesting convergence is taking place which can have significant impact on public accountability and should therefore be of concern to Ombudsman offices. For example, large resource extraction companies in the forestry, mining and fishing industries are exploiting public resources; are often publicly subsidized through development grants, loan guarantees and tax write-offs; are managed under regulatory controls designed to achieve public policy objectives; and can have a major impact on other legitimate users of our public environment. As such, we must have effective accountability to ensure integrated resource management and consensual dispute resolution, outside of the traditional, distinct public and private sector mechanisms. Ombudsman offices are well placed to give leadership in this area, as is discussed in greater detail below.

Another example of this blurring of traditional private and public sector roles is among the professions. Increasingly, medical, legal, accounting, engineering and other professions are exhibiting public sector attributes. The fundamental impact of many professional services on life, liberty, livelihood, health, safety and shelter makes them essential in many situations. The degree of public subsidy to professional education, professional facilities such as hospitals and courts, the payment of professional fees such as for public health services and legal aid and the extensive employment by government of a wide range of professionals all tend to shift the locus of the professions towards the public side of the public-private spectrum. Because they are essential, many professional services form part of the public health, justice, financial, social and physical infrastructure of our societies. Because of the frequent market failure in the provision of professional services (caused by the difficulty in differentiating among professionals on the basis of quality, the existence of severe information blocks regarding the nature of professional services and the exclusive rights to practice professions), we must pay particular attention to holding professionals accountable for quality and fairness to public consumers. In this regard, Ombudsman jurisdiction over professional self-governing societies makes good sense.

(iii) Resolving Public Interest Disputes

Increasingly, Ombudsman's offices in many jurisdictions are being requested to assist in the resolution of disputes between individuals and various levels of government involving competing demands for public resource allocation and land use rights. These should be distinguished from disputes involving pure constitutional issues, contract terms or tort claims. The courts can be very effective in interpreting the law, determining fault and assessing damages. However, the adversarial process is not well suited for

achieving an enduring solution to various competing but legitimate interests within and between governments and private individuals and corporations - alternative models
must be found. Ombudsman offices are well placed to advise on their form.

All of the public and private interests involved in such public interest disputes may be legitimate, compelling and yet competing. They may also be interdependent and the failure to reconcile them will be to the detriment of all. However, neither the courts nor the current administrative structure may be well suited to ensure a balanced and enduring resolution. Clearly, an integrated and consensual process is required which will identify the common interests among the various parties and achieve a result to which all can voluntarily subscribe.

Litigation will almost always be the least appropriate way to resolve public interest disputes for the following reasons:

(1) The interests and issues are usually too numerous to benefit from an adversarial process and a simple win-loss decision. A characteristic of public interest disputes is the interdependence of the various competing interests. Effective resolution requires a voluntary crafting of mutually acceptable terms and trade-offs, and the adversarial court process is ill suited to meet this need;

(2) The expense and delays involved in complex litigation may favour parties with the greatest resources, but not necessarily those with the highest and most legitimate degree of interest;

(3) Private interests will never be an equal adversary in litigation given government's effectively limitless resources, its political and institutional stake in its own policies and its control over information;

(4) Many administrative and executive decisions and actions of government are non-reviewable on their merits and, therefore, there is simply no remedy at law to their potential unfairness or unreasonableness;

(5) Where litigation succeeds in changing or setting aside government action, the result may simply be avoided by a subsequent change in the legislation or in the process by which an offending decision or action was taken;

(6) Government has a harmonizing role in society, as well as a regulating one, and it is often unseemly and inappropriate for it to be in court with its citizens. Because of its special responsibilities, government owes a duty of fairness to individuals in society which can go well beyond bare statutory or other legal mandate and responsibility. The courts cannot deal with such fairness issues. Indeed, as soon as litigation commences or is even contemplated, positions harden along legalistic lines and broader fairness issues can get lost;

(7) Court decisions are imposed against the will of the losing parties. As such, in public interest disputes, although they may create legal rights they are unlikely to attract the cooperation necessary for continuing enjoyment of those rights. Adverse publicity campaigns, continuing legal challenges, civil disobedience, political agitation and simply a lack of necessary cooperation can eliminate stability from a court-awarded victory;

(8) Courts are not well suited to resolving the dynamic issues in situations that often arise in public interest disputes. A resolution must be sufficiently flexible to allow for changing circumstances and the inability or unwillingness of

courts to play a monitoring role reduces their effectiveness in resolving such disputes;

(9) Public interest disputes are often miscast as one dimensional battles between economic and social interests, with recourse to litigation seen as the only way to divide the spoils or declare the victor. Yet the courts are not well suited to providing a solution which is flexible, self-regulating, enduring and mutually productive. Social harmony, political consensus and economic competitiveness are essential objectives in public interest disputes. All are poorly served by an adversarial process which imposes settlements, drains resources and distinguishes winners and losers.

The consensual resolution of public interest disputes requires a recognition by all major private and public interests that the best chance of achieving their individual objectives will occur through the enhancement rather than at the expense, of apparently competing interests. This is a building process, rather than a destructive one, and it exhibits the following major characteristics:

(1) While it requires creativity, patience and goodwill, it does not require self-sacrifice. In fact, self-interest is its sustaining force;

(2) Because the various interests will value aspects of the public issue differently, resolution packages can be crafted which satisfy each party's major concerns while trading off less vital ones;

(3) The interdependence of interests empowers even relatively minor stakeholders so that they can be valued partners in the resolution, rather than bothersome but defeatable opponents;

(4) It is a negotiated process, not an adversarial one, which will likely require the assistance of a trusted, neutral facilitator or mediator to ensure free communication, full disclosure and balanced participation. An Ombudsman's office may be well suited to this role;

(5) It is essential that all significant interests voluntarily involve themselves in the process, through the participation of a legitimate and authorized representative. Each party must believe that its particular interest will be better served by a negotiated settlement than by an imposed one. If any one party believes that it can win a dispute outright, judicially or politically, then the process will not work;

(6) The process requires each party to define its objective in positive terms, rather than referring to the other party in a negative sense. By thinking in terms of what it wants to achieve, each group becomes better disposed to accommodate apparently competing interests by concentrating on creative alternatives for reconciling them;

(7) Government must show leadership in promoting consensual resolution rather than confrontation. It may be required to fund the mediation, research, resource and representation costs of some or all of the parties to ensure full and effective participation in the process. Ombudsman recommendations may stimulate this action;

(8) Because solutions are voluntarily entered into, they will be self-regulating and enduring. Because they have been designed through a process based on openness and respect, the positive relationship will allow flexible adjustment of terms to meet changing circumstances in the future;

(9) Business interests will gain from stability and certainty in the exercise of commercial rights and from an enhanced reputation as good corporate citizens;

(10) Special interest groups will play an influential role in designing solutions to difficult public conflicts. They will be recognized as legitimate participants, introducing important concerns to the process rather than strident and absolute positions;

(11) Where scientific, technical, legal or other experts are required to advise the process, they should not be engaged to align with particular interests, but rather to develop a common set of acceptable assumptions, standards or conclusions on which joint decision-making can be based;

(12) The legal profession will undoubtedly play a major role in consensual negotiation as mediators, counsel or expert advisors. More fundamentally, lawyers must be able to redefine the notion of success for their clients. Public interest disputes are often won not through winner-take-all but often illusory court victories, or through cost and risk cutting compromises, but rather through voluntary, enduring, mutual-gain solution building;

(13) Our overburdened court system would clearly enjoy the absence of protracted, multi-party public interest law suits to which its remedial tools are not well suited. It may be that judges can assist the diversion of such disputes by appointing or recommending pre-trial or mid-trial mediators or masters to work with the parties towards consensual resolutions under the alternative threat of a costly and inadequate court-imposed settlement which may fail to meet any party's major interest;

(14) Consensual resolution requires courage from the participants. Single interest confrontation is straightforward in that each representative feeds off the support of his or her interest group. However, it takes boldness and skill to bring one's own group over to supporting another group's objectives in its own enlightened self-interest;

(15) Fundamentally, consensual resolution is a reasoning process rather than a coercive one; as such, it is immensely more powerful. A reasoning process stimulates a voluntary change in the way of thinking which enures to the benefit of all parties in the future. By building understanding and respect among the parties, it generates productive energy. In contrast, a coercive process drains energy from all parties and produces a weak outcome by leaving embittered and resistant losers.

As our communities become more pluralistic, as our natural resources become less abundant, as society becomes more interdependent and as international economic competition becomes more intense, it is clear that political polarization, public interest litigation and industrial confrontation are not the answers. We simply cannot afford in political, social or economic terms the debilitating waste of energy and goodwill that such disputes cause or the cost and burden of government regulation and judicial intervention required to control them.

Instead, we must creatively and realistically identify our individual self-interest as being inextricably linked to that of other interests in society. The consensual resolution of public interest disputes requires maturity and clear thinking, but it has the potential to promote social harmony, political stability and economic growth in an otherwise complex and threatening environment.

The institution of the Ombudsman is perhaps uniquely suited to promoting this type of consensual resolution process, given its neutrality and its sensitivity to fairness issues. The International Ombudsman Institute is taking a lead in this area by co-sponsoring a conference with the University of Victoria (British Columbia) Institute for Dispute Resolution in July, 1990 entitled "The Resolution of Natural Resource Disputes". Internationally respected leaders in creative approaches to solving this type of dispute, including the New Zealand Ombudsman, will participate in this symposium using the current land use conflicts in British Columbia among business, labour, government, environmental and native Indian groups as a case study for resolution.

(iv) Administrative Negligence and Ex Gratia Payments

Most Ombudsman legislation identifies negligence as well as unlawfulness as an element of maladministration to be identified and rectified by the Ombudsman office. While these categories are not mutually exclusive, they are not always identical either and this can have major consequences on a government's willingness to pay compensation for damages shown to be caused by actions of public servants that are negligent, but not unlawful in the sense that they give rise to a private law duty of care and therefore to legal liability for damages.

This concept of "administrative negligence" describes acts, omissions or decisions of public officials which fail to meet the standard of care that a reasonable person would recognize to be required of them. This is a common sense test, although in many situations explicit statutory responsibilities will provide a clear indication of the appropriate standard to apply.

A finding of administrative negligence and a recommendation

for compensation to remedy the harm caused by it under an Ombudsman Act is not necessarily based on the same findings as a court would require to establish legal liability. An Ombudsman's authority to recommend remedial action derives from the premise that a fair remedy with respect to administrative wrongdoing is not always available at law. This is a premise that is fundamental to the creation of the institution of the Ombudsman as an entity separate from the formal justice system. To a large extent, the office of the Ombudsman is established by legislatures in recognition of the inadequacy of the courts to deal with many injustices arising from the nature of modern bureaucracy. To quote Chief Justice Dickson from an unanimous decision of the Supreme Court of Canada:

> The limitations of courts are also well-known. Litigation can be costly and slow. Only the most serious cases of administrative abuse are therefore likely to find their way into the courts. More importantly, there is simply no remedy at law available in a great many cases.
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> Read as a whole, the Ombudsman Act of British Columbia provides an efficient procedure through which complaints may be investigated, bureaucratic errors and abuses brought to light and corrective action initiated. It represents the paradigm of remedial legislation. It should therefore receive a broad, purposive interpretation consistent with the unique role the Ombudsman is intended to fulfil. (<u>B.C.D.C.</u> v. <u>Friedmann</u>, [1984] 2 S.C.R. 447, at 460 and 463)

Many Ombudsman Acts authorize the Ombudsman to conclude that public officials, in the administration of their duties, have acted negligently and, where this has occurred, to recommend to government the means by which the harm caused by such failure

should be remedied. This authority is independent of the existence of a private law remedy through the courts.

The strict legal principles by which the courts determine the liability of public officials for the consequences of their negligence are complex and uncertain. Although a strong legal argument might be made out that government, because of the administrative negligence of its officials, is legally liable to the investors for their losses in a particular case, such liability would not be certain and might only be settled by a decision of the final court of appeal, which could take many years at vast public and private expense.

In many situations, the law does not apply to the actions of public administrators in the same manner as it applies to those of private citizens. The Law Reform Commission of Canada has recently commented on this dilemma:

> Concepts and principles which are appropriate to private law are often ill-suited to deal with problems arising in the public law context. Tort liability of the Crown, for instance, is addressed in the same terms as are used to determine liability between private parties. The use of private law offers many opportunities for the State to escape liability which we might, as a matter of public policy, want it to bear.
>
> As well, given the fundamental economic inequality between the parties and the extraordinary procedural privileges enjoyed by the Administration, the procedure which governs curial proceedings in contentious matters is manifestly ill-adapted to the special nature of litigation between the individual and the Administration.
>
> One non-curial external control could be provided by Ombudsmen... This institution is non-adversarial in nature and

exemplifies the diverse avenues of redress for individuals, which, although non-judicial, can and do enjoy a high degreeof independence. (Towards a Modern Federal Administration, 1987)

Like the Supreme Court of Canada, the Law Reform Commission points out the effectiveness of an Ombudsman office in identifying error and resulting harm and in recommending a remedy in situations where there may simply never be a fair judicial resolution of the harm caused by bureaucratic error.

The fact that the application of strict legal principles and processes may not provide a remedy in all cases does not mean that government can ignore its responsibility to remedy the consequences of the negligence of its own officials. It has a duty to treat people fairly, not simply to meet technical legal standards, and when individuals have been harmed through the clear failure of public officials to act reasonably in their administrative duties, government should act quickly to remedy that harm.

Where an Ombudsman's recommendation for compensation is made to rectify the damage caused by administrative negligence, there must be legislative authority for government to make the payment. Where the aggrieved party's claim gives rise to the potential legal liability of government, the Attorney General could typically settle the matter through the payment of compensation under the authority of a Crown Proceeding Act, or like statute. However, where no such potential legal liability exists or is admitted, compensation would have to be by way of an ex gratia payment, and for this there should be some form of standing legislative authority. Although the requisite authority could be included in an Ombudsman Act, it is more appropriately located in a general financial statute. The power to make such ex gratia payments out of a Ministry of Finance Contingency Fund is now included in the annual Supply Act passed in British Columbia following an Ombudsman recommendation in 1986. This is of current

major significance in British Columbia due to the government's acceptance of a September, 1989 Ombudsman recommendation that compensation exceeding $25 million be paid to investors in failed financial institutions as a result of the Ombudsman's findings of causative administrative negligence by government regulators, even though legal liability is uncertain and is expressly rejected by the government.

F. <u>International Connections Among Ombudsmen</u>

As has been discussed above, there is a great deal taking place in the international Ombudsman community and many common challenges are to be faced. It is vitally important that all of us who are dedicated to this fundamentally democratic institution bind together to strengthen and promote the concept worldwide.

Currently, the major international connections among Ombudsmen are the International Ombudsman Institute (I.O.I.), the International Ombudsman Conferences held every four years and various formal and informal regional Ombudsman groupings. The I.O.I. was established in 1978 at the Faculty of Law of the University of Alberta, following the convening of the first International Ombudsman Conference in Edmonton in 1976. The first President was the Chief Parliamentary Ombudsman for Sweden, Mr. Ulf Lundvik, who served until 1985. He was succeeded by Dr. Bernard Frank of the U.S.A., past President of the Ombudsman Forum of the International Bar Association. Dr. Frank retired as President in 1988, but remains an Honourary Director.

The I.O.I. is a non-profit organization whose objectives include: promotion of the concept of Ombudsmanship, encouragement and support of research in the Ombudsman field, development of training programs associated with Ombudsmanship and the provision of a centre for storage and dissemination of information about the Ombudsman institution. I.O.I. activities include the publication of Newsletters, the Occasional Papers Series, The Ombudsman Journal

and the Ombudsman Directory, as well as facilitating technical and training support for new Ombudsman offices and funding for regional Ombudsman initiatives in economically disadvantaged areas.

The international Ombudsman community meeting at the Fourth International Ombudsman Conference in Canberra in 1988 urged the I.O.I. to take a strong leadership role in the promotion of the concept, to assume responsibility for the planning of the International Ombudsman Conferences, to ensure balanced and effective participation from all world regions and to create strong links with other international institutions concerned with democracy and human rights. At its 1989 Board of Directors meeting, the I.O.I. resolved to follow these directions, most immediately through the appointments to Board vacancies and, throughout the next year, through a thorough review and amendment of the I.O.I. By-Laws in consultation with the worldwide membership.

Regional Ombudsman meetings and institutes play a vital role in strengthening and promoting Ombudsmanship around the world. These are becoming more frequent and more formalized in Europe, Africa, Australasia, Canada, the U.S.A. and Latin America; the current initiative in the Caribbean is an important further contribution.

Finally, the importance of strong links between the whole international Ombudsman community and other international organizations dedicated to democracy and human rights must be emphasized. Ombudsmanship must act as an integral part of any democratic system and its essential independent quality should not suggest that it is not tightly woven into the democratic fabric of society. As neutral and trusted invetigators of bureaucratic unfairness, Ombudsman offices are the repositories of invaluable data on matters of universal concern. Democracy in any one country will become strengthened, not in isolation, but with arms locked and hearts open internationally. Ombudsmen are a key link in that expanding and strengthening chain. It is no interference with

national political policies for Ombudsman offices to join internationally to share information and to promote together and with other institutions the practical enhancement of universally celebrated principles.