

THE OMBUDSMAN — A NEGLECTED LAWYER'S TOOL

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The purpose of this article is:

- (1) to describe the utility of an ombudsman - that is, when and how an ombudsman can be of help to an individual or his lawyer, and
- (2) to describe some aspects of the administration of the Office of the Ombudsman by the Late Dr. W. T. Ross Flemington, the first Ombudsman for the Province of New Brunswick, who was appointed October 11, 1967 and resigned June 1, 1971.

The following beliefs prompted me to write this article:

- (1) the belief that many lawyers do not appreciate the utility of the powers of the Office of the Ombudsman, and
- (2) the belief that many politicians, particularly at the federal level, do not fully appreciate the unique way that an ombudsman can be of assistance to an individual aggrieved by some government action or inaction.

The general function of an ombudsman is to provide an appeal for an individual who claims that his rights have been abridged by the exercise of, or failure to exercise, a statutory power. However, wide differences of approach can be taken by the men occupying the office. For example, I recall meeting one day with Dr. Flemington and another ombudsman. The ombudsman stated his belief that one of his primary responsibilities was to see that government employees abided by the letter of the statutes and regulations of his province. Dr. Flemington replied that he felt it was important for an individual to be treated justly and fairly regardless of the wording of a statute or regulation. Dr. Flemington's approach is supported by Section 21 of the Ombudsman Act, S.N.B. 1967, c. 18, which invites the ombudsman to characterize the actions of a government department as **unreasonable or unjust** or **oppressive or discriminatory**, whether or not the government action is taken pursuant to a statute or an accepted practice.

He was a clergyman and he was President of Mount Allison University at Sackville, New Brunswick from 1945 to 1962. Our law firm was privileged to advise him during his tenure as Ombudsman. Early in our relationship with him, we felt that his lack of legal training was somewhat of a handicap. We quickly changed our minds. In dealing with specific grievances, Dr. Flemington had a deep concern for helping individuals regardless of their technical legal position. He considered a legal opinion as only one weapon in his arsenal. Had Dr. Flemington been legally trained, he might have relied more on legal opinions rather than using several alternative arguments in support of recommendations.

Dr. Flemington worked quietly and without publicity. He felt that the cooperation of departments of government might be im-

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paired if an ombudsman regularly publicized his successes or used the press in an attempt to induce government action.

The credibility of an ombudsman with departments of government is of prime importance when you consider the limited power given to most ombudsmen. Probably the most important of these powers is the right of access to government files. This power, when first considered, might seem to be of limited value. But in most cases there is no legal process which will give an aggrieved person access to government files, and ministers of the Crown usually will not be given access to any particular file (except files in their own departments) in order to dispose of a grievance. I cannot recall a single occasion on which Dr. Flemington was refused access to a particular file, including R.C.M.P. files. Accordingly, a person should feel assured of receiving a proper evaluation of his grievance because of the ombudsman's statutory right of access to files. In case after case, Dr. Flemington was able to resolve the grievance of an individual by examining a file and by making a suggestion to the appropriate departmental employee.

With respect to specific grievances, the amount of investigation required by an ombudsman can vary enormously. The investigation might involve fifteen minutes and two telephone calls, or it might involve days and weeks of study and correspondence. The Ombudsman in New Brunswick is employed by the Legislature and he reports to it. Consequently, an investigation by the Ombudsman of a grievance is independent of the influence of the interests of any department or the government in power. Four reports to the Legislature by Dr. Flemington are available from the Office of the Ombudsman in Fredericton. These reports list anonymously the character and disposition of the more than three hundred grievances received annually.

The provisions of the Act provide that where a department chooses not to accept the recommendation of the Ombudsman, he may make a recommendation to the Lieutenant-Governor-in-Council. Where the Ombudsman's recommendation is not adopted by the Lieutenant-Governor-in-Council, he may use his ultimate weapon of making a recommendation to the Legislature. During his term of office, I recall only one instance where Dr. Flemington made a recommendation to the Lieutenant-Governor-in-Council. He made no recommendations to the Legislature with respect to specific grievances.

Dr. Flemington said on a number of occasions that he felt that one of his most important functions was to recommend to the Legislature the amendment of statutes to provide for effective appeal procedures. He did, in fact, make several recommendations with respect to appeal procedures which he felt were deficient. For example, Dr. Flemington received a large number of complaints from persons alleging a grievance against the Workmen's

Compensation Board. The Workmen's Compensation Act does not give claimants an appeal on the merits from awards made by the Board. He recommended that the Workmen's Compensation Act be amended to provide an effective appeal procedure.

On the other hand, Dr. Flemington received a minimal number of complaints with respect to the assessment of real property for the purpose of taxation - a function of the Provincial Government in New Brunswick since 1967. The Assessment Act of 1967 contains a full and effective appeal procedure, including an appeal to the courts, which undoubtedly accounts for the small number of grievances received by Dr. Flemington in this area.

The Act does not give jurisdiction to the Ombudsman to investigate grievances with respect to which there already exists an effective statutory appeal procedure.

Dr. Flemington felt that the Act gave him jurisdiction to investigate only where an individual's rights were affected. Accordingly, he declined to investigate decisions concerning the construction, location, and maintenance of jails, schools, roads etc. since he believed that decisions on such matters did not directly affect individual rights. In any event, the Act prohibits the Ombudsman from investigating policy decisions of the Legislature and policy decisions of the ministers of the Crown.

In summary, I would emphasize again the value of the ombudsman's access to government files, which can be of immeasurable assistance to an individual who feels he is fighting a hopeless battle against "the bureaucracy".

The individual remains central and important in our system of government and an office of ombudsman is consistent with such values. Many citizens in Canada with justifiable and unresolved grievances against the federal government would probably receive satisfaction from a federal ombudsman - were such an office created. How many individuals have to be benefited in order to justify the creation of an office of ombudsman?

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