



LOOKING AHEAD:

Symposium on the Future of the Parliamentary Ombudsman Functions and Services

Victoria, June 20-21, 2019
Report of Proceedings

November 2019

The Honourable Darryl Plecas
Speaker of the Legislative Assembly
Parliament Buildings
Victoria, BC V8V 1X4

Dear Mr. Speaker,

It is my pleasure to present the Ombudsperson's Special Report No. 43, *Looking Ahead: Symposium on the Future of the Parliamentary Ombudsman Functions and Services*.

The report is presented pursuant to section 31(3) of the *Ombudsperson Act*.

Yours sincerely,



Jay Chalke
Ombudsperson
Province of British Columbia

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FROM THE OMBUDSPERSON

This year marks the 40th anniversary of the BC Office of the Ombudsperson, four decades of receiving and impartially and rigorously investigating complaints from hundreds of thousands of individuals who feel they have been treated unfairly by public sector organizations. It has, and continues to be, work that makes not only a significant difference to the individuals who turn to us, but to the lives of many as we strive to make public administration more fair and just for all.

There is no better time as we look to the future to take a close look at not only how our organization is meeting our goals, but also to examine how the institution of Ombudship itself is meeting society's needs in a rapidly changing world. Over two days in June 2019 we invited a broad range of people including academics, our Ombuds colleagues across Canada, Indigenous leaders, senior public servants and students to help us consider the future of parliamentary Ombudship.



Through highly engaged dialogue and debate we explored a range of topical issues that intersect with our evolving mandate and role. We discussed how Ombudspersons fit into wider access to justice initiatives, how our individual and systemic investigations could be strengthened, and how our proactive and preventative work can be leveraged to help unfairness from occurring in the first place. We looked at how the learning and expertise of Indigenous communities can be better understood by us as we pursue reconciliation efforts and how we can be available to share our knowledge of administrative fairness with these communities. We looked to the future at major challenges being posed to oversight and accountability as artificial intelligence increasingly replaces humans as decision-makers in public service design. And ultimately, we came together to assess the collective impact of Ombuds work and how we can better measure this impact moving forward.

The insights and reflections contained in this report will continue to be invaluable to our team as we continue to deliver on the vital mission of the BC Office of the Ombudsperson. I know this will be equally so for those who work in all areas where upholding the value of fairness is key. The symposium was a success due to the high level of engagement of the participants. Their individual and collective wisdom served to identify solutions to critically important questions in oversight of public administration.

My deep gratitude to all who participated.

A handwritten signature in blue ink, appearing to read 'Jay Chalke', written in a cursive, flowing style.

Jay Chalke
Ombudsperson
Province of British Columbia

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EXECUTIVE SUMMARY

Over two days in June 2019, invited participants gathered at the *Future of Ombudship Symposium* on the campus of the University of Victoria to consider a number of timely questions regarding the current and future state of 'Ombudship' with particular attention to the role of parliamentary Ombuds offices. Discussion at the Symposium included such issues as:

- the evolving role of the Ombuds function including questions of procedural vs. substantive fairness, relationship with legislators, and the currency of mandates;
- self-government, reconciliation, and administrative fairness;
- proactive/preventative efforts and the possibility of moving beyond a reactive model;
- effectiveness and performance and the viability of measuring impact; and
- potential changes to Ombudship in the digital age.

In discussions at the Symposium, key issues surfaced by participants included (but were not limited to):

- the importance of the Ombuds model in illuminating important principles and practice when set against Canada's current access-to-justice crisis;
- insights from Indigenous traditions as a challenge to colonial assumptions regarding what works and what is important in dispute resolution and fairness by governments;
- the close and sometimes blurry relationship between investigation of specific complaints and Ombuds work with broader, systemic implications;

- the major challenge posed to oversight, governance and accountability of decision-making (and thus, to fairness) by the emergence of artificial intelligence in public sector service design; and
- the difficulty of identifying and/or measuring effectiveness or progress in Ombuds practice given the broad range of potential manifestations of success and the resulting challenges to questions of attribution.

Symposium participants' ideas about next steps as expressed in plenary can be grouped into 11 general thematic suggestions going forward:

1. Develop and enhance Ombuds digital/data competence
2. Develop strategies for vulnerable communities, increasing visibility and accessibility
3. Strengthen national/international Ombuds networks and comparative understanding
4. Build and sustain awareness of Ombuds
5. Enhance Ombuds approaches to reconciliation and Indigenous self-government
6. Consider legislative change to strengthen influence, awareness, and independence
7. Consider expanding (or contracting) the Ombuds mandate
8. Explore the potential of partnership between Ombuds and Information/Privacy Commissioners
9. Conduct foundational work on performance measurement

Executive Summary

10. Develop an operations-specific dialogue
11. Share and research these ideas, and keep the Symposium dialogue alive

The Symposium was understood by organizers and participants to be an experiment. The

gathering addressed questions which had not necessarily been raised before and included a blend of practitioners and theorists. Reflecting this mix, a special issue of *Canadian Public Administration* focused on Ombudship will follow the Symposium.

INTRODUCTION: THE FUTURE OF OMBUDSHIP

In an era of changing state-society relations, rapidly changing communications, and increasing demands for institutional accountability and transparency, the parliamentary Ombuds function is uniquely situated as an important voice addressing ordinary people's experience of the exercise of public authority.

Over two days in June 2019, invited participants gathered at the *Future of Ombudship Symposium* on the campus of the University of Victoria to consider a number of timely questions regarding the current and future state of 'Ombudship' with particular attention on the role of parliamentary Ombuds offices. Facilitated by former Deputy Attorney General of Canada George Thomson, discussion at the Symposium included such issues as:

- the evolving role of the Ombuds function including questions of procedural vs. substantive fairness, relationship with legislators, and the currency of mandates;
- self-government, reconciliation, and administrative fairness;
- proactive/preventative efforts and the possibility of moving beyond a reactive model;
- effectiveness and performance and the viability of measuring impact; and
- potential changes to Ombudship in the digital age.

The Symposium was a unique event; as far as the organizing committee could establish, not since the creation of parliamentary Ombuds roles beginning in the 1970s had such a range of practitioners and academics gathered in Canada to consider the function in broader, strategic context. Attendees included representatives of parliamentary Ombuds functions from across Canada, including incumbent members of the Canadian Council of Parliamentary Ombudsmen, and like functions; senior public servants, experts in public administration and law, including academics and practitioners; students of law and public administration; and other subject matter experts and informed observers of Ombuds.

As a novel approach, the Symposium was understood by organizers and participants to be an experiment. The gathering addressed questions which had not necessarily been raised before and included a blend of practitioners and theorists. Reflecting this mix, a special issue of *Canadian Public Administration* focusing on Ombudship will follow the Symposium. Beyond the substance of the Symposium agenda, participants were also asked to consider whether this 'experiment' warranted subsequent gatherings in the future to continue and update the dialogue begun in Victoria.

Day One

SESSION I: OPENING

To open the Symposium Diane Sam, representing Songhees First Nation, welcomed participants from across the country to the traditional territory of the Lekwungen-speaking Peoples. Professor Astrid Brouselle, Director of the School of Public Administration, welcomed participants to the University of Victoria.

To provide both the context for the Symposium and to set out the challenge for participants over the two days of the main dialogue, the facilitator George Thomson introduced remarks from event host Jay Chalke, BC Ombudsperson, and then a keynote address delivered by the Honourable Thomas Cromwell, retired Justice of the Supreme Court of Canada.

Ombuds at Mid-life: The Past and Future 40 Years

(Jay Chalke)

BC Ombudsperson Jay Chalke stressed that the title of his talk was not intended to suggest there is a mid-life crisis at play; but rather that after four or five decades Canadian parliamentary Ombuds are asking introspective questions about *who we are and what we want to be*. In light of this reflective moment, the Symposium organizers had invited an interdisciplinary set of participants not only to reflect on Ombuds work, but to challenge what Ombuds do. He noted that while the rationale for Ombudship remains strong, given the enduring importance of fairness in all aspects of our society, it remains important to ask if the work is relevant, inclusive, forward-looking and responsive.

The need for attention to administrative fairness predates formal establishment of Ombuds offices by many centuries, whether in European or Indigenous tradition. The institutional form of Ombudship in Canada has nevertheless evolved significantly in the past 50 years. With formalization of the parliamentary Ombuds role beginning in 1967 in Alberta and spreading soon to other provinces, early aspirational hopes quickly ran up against the realities of oversight in a constitutional setting in which until quite recently the Crown had been considered infallible. Gradual improvements to administrative fairness made by governments, and the introduction of checks and balances in the form of administrative justice through the 1970s and 1980s, were complemented in 1984 by the Supreme Court's ruling in *BCDC v. Friedmann* that an Ombudsman could and indeed should investigate all aspects of unfairness. Mr. Chalke noted that although the comprehensive scope of *Friedmann* has meant little subsequent challenge to the powers of parliamentary Ombuds in the courts, complacency is unwise. Ombuds effectiveness is essentially norm-based. Norms have recently proven to be fragile in a number of political settings. Vigilance is required and the threat to oversight is real, a state of affairs which has prompted the European Commission on Democracy and Law to issue a set of *Principles on Protection and Promotion of the Ombudsman Institution* (the 'Venice Principles'). The dialogue invited by the Symposium is thus a timely and important one for the Ombuds role in Canada.

Changing the Culture of Disputes: Lessons from Ombuds

(The Honourable Thomas Cromwell)

The Honourable Thomas Cromwell's keynote remarks centered principally on his contention that parliamentary Ombuds serve an important access to justice purpose, one with broader lessons for the contemporary justice system.

Mr. Cromwell noted that the weakest aspect of the rule of law in Canada is considered to be the civil justice system, a system which underperforms in terms of accessibility, affordability and timeliness, neither *sui*ted to the needs of the people nor *capable* of meeting them. There is near consensus that solutions to this issue are not to be found in incremental reforms, but in broader systemic

and cultural change in our approach to justice. Currently, a richness of formal process is not matched by the outcomes arrived at through such formality. More flexibility and suitability is required. Some important parallels, and perhaps a model for some of the systemic and cultural change required, may be found in the way the work of parliamentary Ombuds is conducted. As the Supreme Court noted in *Friedmann*, the state's formal checks and balances "are neither completely suited nor entirely capable of providing the supervision a burgeoning democracy demands," whereas the Ombudsperson is "capable of addressing many of the concerns left untouched by the traditional bureaucratic control devices." The key Ombuds attributes identified by Mr. Cromwell were impartiality, economic accessibility, informality and investigative capacity.



The Future of Ombudship Symposium brought together more than 100 participants, from across Canada and from different disciplines, for two days of expert dialogue at the University of Victoria.

Four additional reasons exist to support the notion that the Ombuds model can contribute to resolving some of Canada's access to justice challenges. First, we live in societies and times that do not simply tolerate, but support and encourage legal

pluralism, and the powers and processes of Ombuds are highly suitable to certain kinds of legal problems. Second, our respect for parties' right to choose their own dispute resolution process renders the flexibility of approach available to Ombuds – responding

to complaints, acting on own-motion, and/or pursuing matters referred to the office – very valuable. Third, as shown by the effectiveness of new dispute resolution platforms, informality and convenience are highly valued: even though they may offer a perhaps less perfect justice, they also yield more effective and acceptable outcomes. These attributes are shared by the Ombuds role. Finally, the lustre of the adversarial process is wearing off.

Collaborative problem-solving and increasing recognition that accommodation of interests

is often more fruitful than the vindication of rights both align well with contemporary Ombuds practice.

Mr. Cromwell suggested to participants by way of conclusion that the experience of the Ombuds office points the way to the sort of cultural shift that is urgently needed in the broader justice system. He encouraged participants to become part of the change required by advocating for the approaches they represent.

SESSION 2: THE EVOLVING ROLE

Following the opening remarks, in Session 2 participants formed small discussion groups to explore how the Ombuds role has changed in Canada over its five-decade existence, assessing ‘where we are today’ relative to original intent. There were three questions considered by participants.

1. How has the parliamentary Ombuds function in your jurisdiction evolved since it was introduced? Has it become stronger or weaker? In what way?
2. Thinking of instances where Ombuds reports drove significant changes in public administration, what made this possible?
3. The Supreme Court of Canada has described the growing crisis of access to justice as the greatest threat to the rule of law in Canada. What role, obligation or opportunity does the Ombuds have in this area?

Themes expressed by participants in the main discussion period, having considered these questions, were as follows:

Evolution of the Parliamentary Ombuds Role

- While there remains a focus on the merits of individual complaints, Ombuds are

now moving towards identifying systemic issues. There is a noticeable trend towards proactive work, with attention to fairness of process, to the application of values and principles, and making early and alternative dispute resolution a priority.

- The range of Ombuds responses has become more flexible and can now be more or less formal to suit each situation.
- Ombuds have been affected by and have influenced a shift in government structures from hierarchical to horizontal. Horizontal challenges and issues sometimes require that Ombuds investigate across boundaries.
- The mandates and jurisdictions of parliamentary Ombuds have typically expanded. Associated risks include watering down of the function, erosion of process and further ‘mandate creep’ which muddies public understanding of the nature of Ombuds work. Broadening the mandate beyond the traditional role risks diluting effectiveness.
- With some caveats, Ombuds have become stronger over time, with increasing public trust in the office. Their relationship with government has matured since the offices were founded: important early jurisdictional struggles proved helpful in minimizing similar

issues down the line.¹ Governments now exhibit greater willingness to modify their behaviour to avoid Ombuds getting involved.

- Required skills are changing, raising the issue of broadening expertise in specific areas: do we need to expand in-house expertise, or contract out?
- There is more proactive education of public servants, and a more active role in public education. There have been changes in public management style toward more collaborative, consultative engagements.
- Ombuds are increasingly positioned to provide another level of scrutiny of an authority's internal complaint processes, and to comment on fairness of process.
- Ombuds are now telling their stories in a more relatable way. Report titles have changed from an academic to a more engaging style and are more inclusive.

The Effectiveness of Ombuds as a Driver of Significant Change

- Ombuds are increasingly recognized as a unique and effective remedy. Case law in multiple provinces continues to affirm the Ombuds responsibility to shine a light on darker corners of administrative practice. The referral by the Legislative Assembly of BC regarding the health firings was a key recognition of impartiality and independence by legislators.
- Influenced by Ombuds work, governments have developed complaints processes and improved their overall engagement with citizens.
- Publicity makes changes possible and maintaining a high public profile during or after investigations is a predictor of

success. This underscores the impact of the media and external pressure in creating accountability. High profile events like the BC Ombudsperson's report, *Misfire*, can raise public awareness (and also expectations regarding follow-through). Individual Ombuds personalities can impact how publicity develops.

- Individual instances of unfairness can, following an Ombuds investigation, result in systemic improvements.
- Major investigations may require extraordinary resources. The *Misfire* report, which did have systemic and legislative effects, was resourced at a level appropriate to its impact.
- Fairness is the principal standard applied by Ombuds, and that standard must be managed carefully, particularly as in practical terms it falls to Ombuds to define fairness in public administration.
- The focus on fact-based investigations from a generalist perspective allows Ombuds to maintain impartial credibility amongst other voices. Ombuds' generalist approach to fairness provides some assurance to the public that, as outside observers of any given realm of public administration, Ombuds have not developed the kinds of biases and allegiances or inherited the assumptions which may be common in that professional realm.
- Writing a report is not enough. Ombuds have to invest the resources to follow-up and be prepared to re-engage on an issue down the line. This implies committing resources to follow-up for more lasting success, and raises the question of how long Ombuds hold the torch before passing it on to the broader community. The public

¹ The ruling in *BCDC v. Friedmann* [SCC 1984], in which the Supreme Court endorsed a relatively broad interpretation of Ombuds jurisdiction, was recently reaffirmed by the Nova Scotia Court of Appeal in *Nova Scotia Office of the Ombudsman v. Attorney General of Nova Scotia* [NSCA 2019], in which the Court of Appeal also noted [at 128] that "[t]he Ombudsman's authority is a potent force which acts as part of a system of legislative checks and balances on the proper functioning of our democratic institutions. The Ombudsman's oversight reminds both government and its bureaucracy that they – like the citizens they serve – are bound by the Rule of Law, and will be held to account for its breach."

needs to be reminded of what the Ombuds can and can't do.

- There is an important balancing act between collaborating and building relationships with a public authority versus public reporting and strong recommendations to create an impact when needed. Success is sometimes linked to networking and marshalling support across organizations to achieve effective implementation, as in e.g. the Québec 'Duplessis orphans' case.² Positive feedback, where warranted, can also contribute to success.
- Timing: reporting drives change when it comes at the right time at the right place. Ombuds reporting can be a catalyst for a desired change already under consideration within the authority but has not occurred due to lack of priority, funding or other reason, resulting in inertia.
- Effective reports also pay attention to the feasibility of implementation. It is vital to get buy-in from key decision makers and their staff, and to be wary of the instantaneous comprehensive political embrace of report recommendations only intended to smooth over the release of a critical report rather than demonstrate genuine commitment to change.

Ombuds and Access to Justice

- The Ombuds role is not that of a lawyer or a complainant but is an alternative to adviser and advocate more broadly, particularly for those who have no real access to the courts. Ombuds services may resolve matters and achieve outcomes in ways not typically available through the courts.
- The Ombuds process may be used as an early diversion from formal legal process in court.
- Lack of awareness of the Ombuds function is a significant issue; many potential clients (both individual and institutional) have little information on Ombuds, which limits access to this avenue of justice. There is a broader need to educate the public about role of the Ombuds.
- No wrong door: Ombuds have a role in directing people to the right place with respect to their complaint.
- Ombuds can offer a form of justice different from that delivered by the courts. Ombuds may not provide justice in direct compensation – though they can recommend it to others – but through recommendation of improved policies and procedures the Ombuds can change the future in a more just direction.
- Participants reflected on the merits of the Ombuds being a last resort. There is a concern that at that point, in some cases, it may be too late for the Ombuds to be an effective remedy for the individual.

² The Duplessis orphans case refers to a 1997 intervention by the Quebec Ombudsman concerning the amount awarded in compensation to thousands of Quebec residents who as orphaned children had suffered a range of harms due to ill-treatment while in the care of provincial and/or Catholic institutions. See the Ombudsman's report, *The "Children of Duplessis": A Time For Solidarity* (https://historyofrights.ca/wp-content/uploads/QCombuds_report1997.pdf).

SESSION 3: ADMINISTRATIVE FAIRNESS, DECOLONIZATION AND SELF-GOVERNMENT

Session 3 explored issues related to the Ombuds function which relate to Indigenous knowledge, tradition and law in the context of emergent self-government. The session commenced with a roundtable panel discussion addressing the challenges of achieving administrative fairness in the era of self-government and was followed by a general discussion between the panelists and participants. Panelists included Patrick Kelly of Leq'á:mel First Nation, President Eva Clayton of the Nisga'a Lisims Government, and Assistant Professor Dara Kelly of the Simon Fraser University Beedie School of Business, also of Leq'á:mel First Nation.³

Roundtable Remarks

(Patrick Kelly, Eva Clayton, Dara Kelly)

In setting the stage for the discussion, Patrick Kelly reminded participants that 'First Nations' as a term encompasses significant cultural diversity, with 38 of 53 distinct linguistic and cultural groupings being located in British Columbia. Thus, there is no common 'First Nations approach' to administrative fairness: Stó:l'to principles apply to Stó:l'to, Nisga'a principles apply to Nisga'a, and so on. In the absence of colonization, these principles would have applied in each corresponding territory.

Nisga'a Lisims President Eva Clayton noted that under the *Indian Act*, prior to the treaty with Canada and BC,⁴ the Nisga'a did not have a process for administrative justice, or a voice to ensure fairness in the delivery of programs and services. However, the Nisga'a have always had a process for fairness, exercised through hereditary chiefs and matriarchs.

Whether applied to criminal wrongdoing or other matters, the goal is to right the wrong and heal the community, rather than to punish or shun. At the time of the treaty, a new way was required given the lack of appropriate provisions under the *Indian Act* and the fact that the BC Ombudsperson does not have jurisdiction over the Nisga'a Lisims Government.

The Nisga'a Treaty provides for the Nisga'a Administrative Decisions Review Board, a three-person panel appointed by the Nisga'a Lisims Government. The Board ensures that complaints apply to Nisga'a jurisdiction and legislation, which are in turn derived from *Ayuukhl Nisga'a* (the inheritance of Nisga'a oral culture and laws). Nisga'a villages established under the Treaty have legal status and capacity and are responsible for ensuring administrative fairness in village-level programs and services. President Clayton pointed out that there have been challenges along this road. The Nisga'a Lisims Government has no jurisdiction over Crown corporations of the BC government, the operations of which have significant impact on people in the territory. The process of understanding how self-government works is also a long one. Given the many years of being disempowered by the *Indian Act*, many citizens do not yet understand that they have a right to fairness.

Dara Kelly noted that life under the *Indian Act* created a significant gap in administrative fairness in Indigenous communities. Moving to self-governance and developing administrative responsibilities after the *Indian Act* means piecing the story together from

³ Leq'á:mel First Nation (LFN), formerly known as Lakahahmen First Nation, is located in the Fraser Valley east of Agassiz. Nisga'a Nation is located along the Nass River, north west of Terrace.

⁴ For information on the Nisga'a Treaty, see <https://www.nisgaanation.ca/about-accomplishments-and-benefits-nisga-treaty>.

oral history and tradition in many different communities: trying to look through a tiny hole at something that existed and trying to see the whole picture. Not every community has Elders that can inform what the knowledge of the past looked like, though some Nations are now able to articulate a role for someone involved in administrative fairness quite clearly. We are at a time when the exclusionary process for Indigenous people who had not participated in the Canadian economy is winding down. There is an opportunity now for communities to choose how and when they want to engage, and to revive and reclaim their own traditions and philosophies and apply those to economic and administrative relationships.

Patrick Kelly set out some of the prospective provisions of the forthcoming Stó:lō treaty (to be signed with Canada and the province of British Columbia) applicable to the discussion. Under the proposed text, Stó:lō would have six village governments responsible for program and service administration, and a national government which would include a justice council responsible for the administration of justice. Within this setting, an independent body similar to an Ombuds role, acting independently of the national government, will have the ability to review matters that may have been decided by national or village governments. This office will build on traditions of fairness which have existed for hundreds of generations.

Discussion

In a question and answer session with participants, the following additional points emerged.

Mandate and independence of Review Board. The Nisga'a Review Board functions independently from the Nisga'a Lisims Government, with its authority provided

under the *Review Act*. The Review Board can also conduct hearings concerning issues associated to the *Elections Act*. The Review Board makes recommendations to government and is required to report to government on hearings conducted. No evaluation has yet been conducted regarding performance under the *Review Act*.

Question colonial assumptions about disputes. The assumption of an adversarial relationship inherent in colonial justice does not resonate in some Indigenous contexts. In considering the challenges of developing self-government, the Maori comparison is useful. Long-standing conflict resolution mechanisms are applied in the setting of traditional gatherings (*hui*), to create alignment and cohesion and reinforce a sense of responsibility to prior generations. Linkage to culture and history and deliberation in a community setting have a powerful effect on the chances of resolving disputes.

Consensus-based decision-making takes time. This time is typically not available and not reflected in colonial processes, and this is an important consideration in reconciliation. The way Stó:lō people solved conflict was through feasting practice and the feast economy. Hosting a feast allowed Indigenous laws and governance to play out and strengthened good relationships internal and external to the community: 12 days is how long it took to come to agreement. It is hard to imagine we could take that kind of time now when 'time is money.' Yet building in greater amounts of time holds great promise when it comes to creating the kinds of societies that we want to live in.

Ombuds for Indigenous and Human Rights. Panelists welcomed the Missing and Murdered Indigenous Women and Girls Commission of Inquiry recommendation of a National Indigenous and Human Rights Ombudsperson.

SESSION 4: RESEARCH ROUNDTABLE

Linked to the Symposium, a special issue of *Canadian Public Administration* (forthcoming) will address several contemporary themes in the Ombuds sphere of practice, with authorship teams being drawn from academic experts in public administration and from the community of practitioners. Session 4 was an opportunity for participants to learn about some of this contemporary research on the Ombuds function and provide researchers with practitioner feedback. Selected authors from four of the research teams contributing to the special issue participated on this panel, engaging the audience with key issues arising from their research and stimulating dialogue among participants.

In introducing the panel, Professor Evert Lindquist, editor of the special issue, described the overarching question animating the research as: what does contemporary Ombudship look like? The limited literature on Ombudship tends to be institutional and historical. Very little of the literature applies insights from other fields, and the Symposium and the special issue afford the opportunity to do just that. The authors were, through a variety of approaches, taking on the range of issues surfaced in the morning's opening sessions.

Each of the four research teams represented on the panel provided participants with an in-process summary of their research, with the summary of their abstracts reproduced here.

Canadian Perspective on the Emergence, Diffusion and Evolution of Ombuds Models

(Norman Dolan and Colin Bennett)

In discussing this work, Norman Dolan noted that the Ombuds office provides an especially interesting example of the institutional development which can occur as the initial concept is subject to practical experience which shapes both the functions performed and the public's expectations. The proliferation of national and international associations has provided valuable arenas for sharing ideas and experiences as well as standardizing best practices. That information sharing also contributes to a common understanding about institutional definition, and a desire to stake out an institutional profile, that is distinctive within the broader constitutional and administrative culture of a particular society.

The construction of an institutional identity supports individual Ombuds offices and justifies their position and importance in contrast to other agencies such as courts, tribunals, commissioners and so on. After a review of the various national and international efforts at institutional definition and standardization of 'ombudsperson,' the paper will offer a typology of current forms including an in-depth examination of how the concept and application appears in the Canadian context. The authors will contend that some agencies call themselves ombudsman, regardless of the international consensus and the wider attempts to impose some conceptual clarity; and contend, in conclusion, that there are some important explanations for the apparent disconnect between the theory of what an Ombuds should be, and the comparative evidence of institutional practice.



The Symposium was designed as a working event, with formal presentations alternating with sessions of multidisciplinary discussion on key issues. Facilitator George Thomson placed the focus on participants' own expertise and experience.

In discussion, participants considered the relevance of Ombuds' traditionally rigorous investigation and rational analysis of complaints in an age of social media and instant individual reaction. It was observed that one of the most important roles Ombuds can play is as a communicator of high-quality information, a skill which is increasingly relevant in an era of prevalent, instantaneous, poorly researched information. Ombuds can provide a guiding light, offering thorough, robust reporting on particular issues, providing a cornerstone for discussion that will only increase in value over time.

Participants felt there was a clear need for proactive engagement with public authorities, but that there was also a strong onus on the Ombuds to be very clear about how and why that engagement happens. It is important in doing proactive work that all parties understand what you're doing and what your role is. It is particularly important to consider downstream implications of this work: can Ombuds offices investigate and comment on policies on which they have engaged in prior consultation?

Reimagining Public Sector Complaint Systems: Constructing Justice with Citizens

(Tara Ney, Aaron Leahey and Alyson Miller)

Tara Ney and Alyson Miller summarized the work of this team to date, which focuses on the design of complaint systems. Complaint systems play an important administrative justice role to challenge the status quo, enhance democratic governance, and ensure direct participation in public decision-making, but do not always meet the needs of those who use them, those who operate them, and others who have a stake in them. The research being undertaken involves re-thinking how internal complaint systems in public services are designed and makes the case that a dispute system framework using principles and best practices aligned with 'Human Centered Design' will support dispute designers to make good administrative justice design choices. Using this lens, a critical analysis of the dominant 'Dispute

System Design' approach will provide insight into underlying principles and practices for designing effective complaints systems that can unlock innovation and transform public services.

In discussion, participants observed that the existence of the Ombuds role has had the collateral effect of spurring the development of appropriate complaint mechanisms within organizations. There are continual improvements in this area, but still plenty of occasions when those avenues present more difficulty than they should. Government ministries and departments are also reaching out to Ombuds with growing frequency for assistance in designing complaint mechanisms. It is important for Ombuds to encourage public agencies to view complaints as a constructive opportunity to spur improvement.

How Ombud Offices Triage Cases, Organize Expertise, and Prepare for New Challenges

(Roya Rouzbehani and Suzy Flader)

This research, focusing on Ombuds case triage, was summarized for participants by Suzy Flader. Three hundred years ago, fewer layers existed within institutions to hold citizens at arm's length. Technology and mechanization had not yet replaced front line human contact. From the beginnings of Ombuds practice in Sweden through later global dissemination of the function, Ombuds have facilitated the resolution of grievances related to executive and administrative branches of government and bridged power distances between citizens and institutions. Ombuds practices have evolved considerably since their debut. There is every reason to believe that they will continue to evolve and proliferate, especially in Canada where several new offices have been established over the last two decades, particularly in the federal, university and private sectors. Contemporary Canadians are caught up more and more in

technologically advanced, computer-mediated settings. Rouzbehani and Flader will argue that if time and opportunity for human contact and personalized attention to issues continues to contract as expected, the services of Ombuds offices will become ever more essential and will require increasingly effective triage mechanisms. Based on application of organizational theory combined with observation of Ombuds offices in practice, the authors will recommend strategies for managing higher volumes and diverse complaints.

In discussion, participants observed that Ombuds clients/complainants have usually developed theories about what has happened within the agency in question by the time a complaint is laid with Ombuds. This tends to increase the challenge of taking sufficient time for a proper investigation – or of electing not to pursue an investigation – while the court of public opinion is 'in session.'

Ombuds Offices and Public Sector Reform: From the NPM to the Digital Era

(Stewart Hyson and Evert Lindquist)

Evert Lindquist and Stewart Hyson provided the final research overview to participants, summarizing their work on recent evolution of Ombuds offices. Legislative Ombuds offices first emerged in Canada during the 1960s, inspired by the Swedish model and understood as democratic institutions. While a literature has developed on the global diffusion of the Ombuds model, there has been less effort expended on understanding Ombuds offices as a population or class of organizations acting to establish, consolidate and modify their niches and repertoires in broader evolving institutional environments. Likewise, little writing has explored how Ombuds models have intersected with waves of reform in broader public administration reforms like those associated with the great growth in government of the 1960s and

1970s (policy analysis, evaluation, democratic engagement, and system coordination), the rationalization and performance orientation of the New Public Management (1980s and 1990s), the more partnership and collaboration-oriented New Public Governance movement (2000s and 2010s), and the current era of digital government and open innovation (2010s plus). The paper will connect these three strands of literature, explore how Ombuds offices have been influenced, energized, or constrained these developments. It will also consider whether, as caseloads, responsibilities and expectations have evolved, legislative Ombuds have become materially different in terms of roles, repertoires, culture, and niches in broader government systems.

In discussion, participants considered the issue of whether an Ombuds office's jurisdiction extends over private sector actors involved with the delivery of government services. This varies by jurisdiction and by practice.

Participants also identified issues associated with the proliferation of parallel offices with Ombuds-like functions. Agreements are required to avoid parallel investigations.

The digital era is presenting Ombuds offices with significant challenges. The scarcity of necessary skill sets has occasionally meant contracting with third parties to get to the information required for an investigation. These skills will be increasingly necessary given the rise in complaints about the delivery of services via complex technology.

Day Two

SESSION 5: FOSTERING PROACTIVE OMBUDSHIP

Session 5, which began the second day of the Symposium, provided an opportunity for participants to consider the appropriate balance of proactive and reactive functions. An initial presentation by David Loukidelis, former Information and Privacy Commissioner of British Columbia, seeded the discussion. Commentary and plenary discussion was led initially by Marianne Ryan, Alberta Ombudsman and Public Interest Commissioner, and Howard Sapers, former Correctional Investigator of Canada, before being opened up more generally to the room.

Proactive or Reactive: What's the Right Balance for Watchdogs?

(David Loukidelis)

David Loukidelis commenced his address by referring participants to the core features of the Ombuds role as expressed in the Supreme Court's decision in *Friedmann*, i.e. that the Ombuds function is impartial, often informal, does not impede government operations with its investigations, and can maintain or restore the confidence of the public service. These features, he argued, are relevant to the question of proactivity. Noting that the line between reactive and proactive operations was often blurry, Mr. Loukidelis identified three clear categories of proactive work: systemic investigations, policy guidance and advocacy.

Systemic investigations involve an Ombuds examining a matter of administration that is of concern because it is widespread within a public institution or across multiple institutions. If investigations must be complaint based, it is unwise for an Ombuds to be seen to leverage a specific complaint into a much broader, systemic, evidence gathering exercise. Where a systemic issue is apparent, a more

promising route is to focus the investigation rigorously on the particulars of a complaint, while drawing wider lessons to enable broader recommendations to be made for improvement. In egregious cases, where no real remedy is otherwise available, an Ombuds might conclude intervention is necessary and may decide to expend moral or institutional capital in a broader investigation that is about policy, not maladministration. These cases, however, are relatively rare and the risks substantial. The exercise of judgment is critical.

A well-functioning Ombuds office should make the proactive tool of policy guidance available to public bodies and the public, particularly where the guidance has to do with the core fairness mandate of the office. Guidance – however it originates – supports better practice, better administration and better policies. Critically, guidance must not become advocacy of a kind that risks perception – and legal reality – of bias or partisanship. Neutrality, impartiality, and independence are key to the moral authority necessary for any Ombuds office to be effective. Systemic scrutiny, where warranted, should be grounded in solid empirical research which clearly justifies such attention. Data collection and analysis are key to track trends, inform budget requests, identify appropriate allocations between individual complaints and systemic needs, for transparency, and to demonstrate value of the Ombuds plan to legislators.

Discussion

(Howard Sapers and Marianne Ryan)

Howard Sapers noted that the line between responding to individual complaints and addressing systemic issues is often blurry. Investigations of individual complaints often involve or result in policy analysis

and recommendations, and remedies are mostly future oriented to help prevent the occurrence of similar concerns. Responses to individual complaints may become wide-ranging investigations, as in the Ashley Smith case. Moreover, triaging cases with the aid of a strategic plan and priorities is tantamount to being proactive. He noted that in his work he had benefited from advice passed on by a Cree Elder to the effect that in such a role one needed to look at the world both with a 'moose eye' (strategic lens) and a 'mouse eye' (tactical lens). Specific versus systemic may thus be a false dichotomy. Sometimes an individual complaint is best addressed through a systemic investigation.

Marianne Ryan reflected that in principle it is healthy to have a balance between reactive and proactive work. For her, the more challenging issue is the concept of 'advocacy,' and the importance of defining what is and is not appropriate advocacy on the part of Ombuds. We cannot advocate for individuals or causes, but we can advocate for the principle of fairness and its manifestation in policy. There is a high value in having a strategic lens and thus being able to put individual complaints in context. The challenge of selecting those complaints where an investigation will have the most meaning for fairness as a whole is made easier when we track available data and engage in environmental scanning which allows us to see the broader landscape. Following up on recommendations is a related practice which will increase institutional memory regarding administrative fairness.

In plenary discussion, participants made the following observations with respect to proactive Ombudship.

Value of behind-the-scenes work. Proactive Ombudship can be exercised in a more private setting with stakeholders, particularly where there is history of a high volume of complaints. Ombuds can share feedback and statistics and in doing so give the authorities a

chance to respond. This has worked well and has led to positive changes in Ontario.

Communicate frequently. Despite occasional stakeholder concerns to the contrary, Ombuds are not looking for 'gotcha' moments. There can and should be ongoing discussion, even at early stages of investigations, such that by the time a recommendation is made, the authority may already have begun implementation of needed changes. It is even more important to have early discussions in the case of own-motion investigations. Response needs to be flexible and exists on a continuum, but ongoing discussion is typically what serves the public the best and results in positive change.

Embrace transparency. The 'value added' of an Ombuds includes managing key stakeholder relationships and building relationships and trust with Deputy Ministers, parliamentarians and the media. It is important to be accessible and open with information. In managing communications before and after an investigation, Ombuds offices should keep in mind the longer-term relationship with authorities.

Use data to seek patterns of unfairness. When it comes to balancing individual and systemic investigations, Ombuds should comb data to look for patterns. The media will focus attention on easily visible issues, but we don't know what we don't know. When processes are opaque, people don't know what to complain about, and thus there is a need for proactive audit and investigation functions. Individual complaints may not be representative of the scope of underlying issues.

How to define advocacy? Some participants felt that advocacy has a place in the Ombuds toolkit, appropriately defined. In this view, advocacy is certainly justified when the time comes to make a persuasive case to the public and to government on behalf of the Ombuds' own recommendations.

Clearly communicate boundaries. Ombuds don't need to get into justifying or defending what they investigate, but they do need to be strategic when choosing what to investigate and in communicating. The work often needs to touch policy, but Ombuds need to be very clear that they aren't making policy and that they recognize the right of government to do so. Rather, the Ombuds role is to identify and expose how a particular policy renders an unfair outcome and to recommend improvements.

Broadly applicable recommendations can arise from individual investigations.

Individual complaints can enable Ombuds offices to make broader recommendations. One example would be recommendations related to training. The common goal shared by independent offices and government agencies is for the government to have the best policies and processes for serving citizens and strengthening the administration of public services.

SESSION 6: OMBUDSHIP IN THE DIGITAL ERA

Session 6 was designed to engage participants regarding the impact of technology on government services and the resulting effect on oversight of government, all in an era of instant social media with transparency an increasingly entrenched norm. Issues arising within this topic include open government, digital tools for administration and investigations, algorithmic decision-making, user-centric and precision/personalized citizen services, and the double-edged sword of social media.

The discussion began with a presentation from Professor Justin Longo, Johnson-Shoyama Graduate School of Public Policy and Cisco Chair in Digital Governance, University of Regina. New Brunswick Ombud and Public Interest Disclosure Commissioner Charles Murray took the role of discussant.

Ombudship in a Time of Disruption: Scanning Some Implications of the Digital Era

(Professor Justin Longo)

Professor Longo noted a number of defining characteristics of the digital era. These include the ubiquity of computing and multi-function smartphones; the trend of miniaturization; the state of constant connectivity and

tracking; burgeoning social media and an increasingly user-driven Internet; and big data accompanied by its natural consequence, artificial intelligence (AI).

AI development can be divided into three categories. The first, the algorithmic approach, sets rules for computers to follow in analyzing data, a specific set of instructions which can be coupled together. The second, machine learning, is a guided approach in which the computer is tasked with looking at data and providing feedback on what is observed. Advances due to machine learning include many applications in everyday use, such as autopilot control of vehicles, email categorization, and recommendation systems. The third category is deep learning, where machines look at the world and come to 'understand' what they are seeing, similar to natural language processing. In both deep and machine learning: algorithms develop on their own without human involvement, becoming a 'black box' which is difficult for outsiders to examine. The computer cannot explain to humans what the algorithm means and how it came up with it. This presents significant theoretical and increasingly practical challenges for oversight of public sector computing. Citizens may have the right to an explanation of a decision, and we may encode

this right in law, but all the same it may not be possible for AI to provide an explanation.

There are various ways in which these and other digital developments – such as user-centered service design, robotics, recommendation systems, or geo-tracking – impact public administration. New technologies and approaches can be applied to what governments do to make government more efficient and more effective. Expectations within government are changing regarding the sharing of information and knowledge. Externally, citizens now have different expectations of what government's response should be and look like.

There are three broad implications of the digital age for administrative fairness. First, the trend favouring efficiency and personalization in service design based on the 'user' may lead to the development of public services which are exclusionary or provide unfair advantages to certain groups. These practices are often based on the voluntary or unwitting surrender of personal information. Only those who can be traced have the potential to become the prototype. Second, the social media environment has altered the potential influence of the Ombuds, and of the public, on specific issues of fairness. Ombuds can use social media to identify issues for government, and – to a degree – determine the pulse of sentiment. Social media may confuse the issue of what constitutes a complaint and may invite multiple voices of varying standing into an issue, though offering no central authority in the discussion venue. Third, the digital era may increase expectations placed on Ombuds offices. There may be pressure to engage in proactive investigations using predictive analytics. The social media reality of everyone having a voice may come to affect expectations around hearings: who counts, who gets heard, and what constitutes true civic engagement?

The issue of AI requires specific attention, as algorithms come to support and replace

human decision making. There are many questions, but currently few answers. How can Ombuds offices evaluate fairness in an algorithmic decision-making scenario? How does bias emerge, as it can even in the digital arena? How do we embed values and ensure they are applied with appropriate social context? Most of all there are clear administrative law concerns around procedural fairness, the right to be heard, the right to impartial decision making, the right to reasons, and the right to appeal.

The Treasury Board of Canada has issued a directive on algorithmic decision making that seeks to ensure that principles of administrative fairness apply in such systems. However, it is unclear how these standards would be enforced and by whom.

Professor Longo concluded his remarks by asking if an independent oversight body for digital public administration – an algorithmic Ombuds – might be considered and established, similar to steps being taken in the United States. However, our expectation that government explains its actions will be challenging to apply in certain versions of AI development. Sometimes the computer cannot explain.

Discussion

(Charles Murray)

Discussant Charles Murray reflected on the particular challenge the digital era poses for Ombuds offices, offices whose primary function is to offer a check on bureaucratic power. There is a frequent tension between what is fairest (what is championed by the Ombuds) and what is most efficient/effective (what is attractive to government), a situation which allows bureaucrats to make an argument from a risk/efficiency position when addressing unfair outcomes. And unlike efficiency of investment or action, fairness is very difficult to measure and is rarely measured, which means the counterargument to efficiency is usually neither codified nor

quantifiable. Furthermore, the question of curated, user-focused design raises the problem of outliers, which exist in all systems and are vitally important for Ombuds work often being the test cases for fairness. Digital technologies risk isolating or ignoring outliers.

The introduction of more complex algorithms allows a potential blurring of accountability: often an objectionable effect of technology introduced by government is legitimately unintended, but sometimes it is intended and yet the opacity spoken of by Professor Longo allows government to 'blame the computer.' Mr. Murray gave the example of a Facebook AI experiment in computer-to-computer negotiation. In the experiment, the machines learned to be deceptive and altered their language of communication to a degree that the negotiations could no longer be understood by the experimenters. The negotiations were still successful, but we just don't know what they were about. These were unintended consequences, and unintended consequences happen all the time in government. But the difference is in our ability to understand, rectify and create public trust in government, to be able to say 'this will not happen again.' Increasingly Ombuds will not have the tools to understand and address unfair outcomes.

Mr. Murray offered three questions for Canadian Council of Parliamentary Ombudsman members and others present to consider. First, can/should Ombuds investigate algorithmic unfairness, and if so what changes within Ombuds office would be needed to do this? Second, given the large capital costs involved in most IT/AI projects, should Ombuds be requested to 'pre-certify' public sector AI applications as being fair before they are put into use? Third, what are the implications for traditional Ombuds investigations of rapid, mass social media engagement on instances of public sector unfairness?

Participants raised further points in plenary discussion.

Failure to evaluate fairness. The difficulty of judging the fairness of black box processes risks defaulting to evaluating programs based on outputs, rather than on the process used to get there. For example, if the driverless car gets us where we need to be, and minimizes accidents, the outcome (who was injured, who was not) is the way we will evaluate that system. Society risks arriving at a point where we accept those outcomes, determining morality based on results. Only if we get too many bad outcomes will we evaluate how this occurred.

Ombuds/OIPC partnership. In determining how data is collected and used, and if it is fairly processed, there is a growing rationale to align elements of the work of Ombuds with that of Information and Privacy Commissioners. In both areas of work, the machine must often be 'taken apart' to determine if processes are fair and lawful. The cost alone of retaining technical services to take the black box apart to explain what's happening suggests this alignment should be explored actively.

Ombuds must be human 'last resort.' There are limitations to the use of algorithms and AI in Ombuds work. While in theory, AI might be very applicable to e.g. triaging complaints, we must remember that one of the services Ombuds provide is being a human voice that listens, validates and treats people with respect. It's not just about what happened, it's about how it made them feel. The majority of complainants will accept a decision they don't like, but what they object to is being made to feel unimportant by big government. We are unlikely to be able to trust algorithms to fix that piece.

Digital divide. Existing requirements for electronic access to government services excludes many people without the necessary skills or devices and may involve a breach of confidentiality if those people are forced to go

to a third person to obtain access. We should be considering these citizens when assessing fairness, notwithstanding improvements to web design and user interfaces. We need the equivalent of storefront service accessibility online, not workarounds.

Culture trumps policy. If you have built a service where these devices are the mainstay it will start to show up in the culture. If the

outlier represents more work, it's naïve to think the system is going to embrace the outlier. Ombuds must be alive to concerns with bias towards early digital adopters, because they are the group programming new systems. We need to look closely at who is designing these services, including issues of diversity in the IT sector. Our job is to get in front of the train and wave the red flags.

SECTION 7: GOOD OMBUDS PRACTICE AND EVALUATING SUCCESS

The final discussion, Session 7, engaged the question of the Ombuds mission – and how we would know if success is being achieved.

Participants heard an initial set of panel remarks intended to seed the discussion. Panelists included Allan Seckel, former Deputy Minister to the Premier and Head of the BC Public Service, Professor Linda Reif of the University of Alberta Faculty of Law, and Les Leyne, provincial parliamentary columnist for the *Victoria Times-Colonist*.

Ombuds, Public Sector Response, and Impactful Investigations

(Allan Seckel)

Allan Seckel's remarks focused on the reaction of the public service to work of Ombuds and other independent officers. Of the three general categories of Ombuds investigations – specific cases, aggregations of specific cases, and systemic reviews – he suggested that the first two are generally well received by the public service, allowing that the political side of government is hypersensitive to perceived criticism. In many cases, Ombuds reports of these types are actually helpful to the public service, by highlighting a problem they would like to solve but for which to date

they have lacked political traction. Ombuds are often able to bring or enlist a high level of expertise to specific investigations; their recommendations are usually right and should be implemented.

Systemic reviews, Mr. Seckel argued, are a different matter, and tend to veer towards the political as well as the administrative. Issues management, already a time-consuming aspect of government, is amplified when Ombuds scrutiny is systemic in nature, and the outcome of the investigation is more likely to attract media attention. In these cases, it has become increasingly frequent for us to see an immediate response from the Minister, accompanied by instant acceptance of the full suite of recommendations. It is reasonable to ask how sincere such an acceptance is, when it occurs moments after the report has dropped, and can lead in some cases to unthinking acceptance of bad policy.

Such encroachment on the political risks usurping democracy. Public servants are not elected, and nor are those appointed as Ombuds. We elect people to make choices about resource allocation, and when the report of an independent officer becomes untouchable in the media or in the political arena, we sideline two normally healthy sources of policy change and this is not

right. We have to be careful to consume and implement recommendations in a manner that is consistent with democracy. Independent officers often do not have area expertise to make policy decisions. Good policy is based on two underlying principles: first, it is rigorously determined, not based on single episodes or anecdotes; and second, decisions over that policy are taken following debate by elected officials.

Canadian Ombuds in an International Context

(Professor Linda Reif)

Professor Linda Reif examined the international context to see where we can situate Canadian Ombuds. How do other countries define success? Increasingly, this is through the exercise of an Ombuds mandate with a substantial human rights, women's rights, and access to justice component.

Internationally, many formerly 'classic' Ombuds offices have taken on additional mandates, such as human rights, information, privacy, and public interest disclosure. Internationally, Ombuds with a human rights mandate have increased from 50 to 64 percent of national Ombuds institutions around the world. The classic Ombuds is now a minority, a phenomenon driven in part by new treaties on human rights – for example, treaties on torture and on people with disabilities – which require parties to designate national institutions to monitor and implement obligations. Ombuds offices are often the default choice.

Several Canadian Ombuds use international human rights law and norms in their work, even if not officially designated as such. For example, some special investigations have dealt with egregious treatment of prisoners, and women prisoners in particular, using international law as a normative approach. However, there is still more to be done in this area. Ombuds can and should prioritize women's need to access justice

in a variety of ways, including the Ombuds process. Similarly, issues of intersectional discrimination need to be paid greater attention. Professor Reif's research sets out recommendations for increasing Ombuds focus on women's rights and gender issues, as Ombuds may not be receiving complaints from vulnerable groups. We need to ask: who is not complaining at all? The Canadian Human Rights Commission identified twenty barriers to Indigenous women accessing that institution; these barriers surely apply equally to Ombuds. Given the constitutional difficulty which may attend creation of an Ombuds for Indigenous people, we should start thinking now about what provincial Ombuds can do within their jurisdictions to improve the situation of Indigenous women.

Ombuds, the Media, and Sustaining Attention on Unfairness

(Les Leyne)

Les Leyne reflected on the Ombuds role from the perspective of a career in political journalism. There is some commonality between Ombuds work and the work that reporters do or really want to do. Despite differing mandates, the two areas of work intersect at certain point. Appealing news for reporters is where officialdom has locked itself into a wrong position that leaves a citizen holding the short end of the stick. Ombuds resolutions are an appealing end to the David and Goliath story.

Unfortunately, the mainstream media's stamina to sustain interest in such stories is waning, and newspapers have to pass on issues that they used to tackle, because the necessary time and staff don't exist anymore. While the media still relish reporting findings, their attention span is shorter than it used to be and maintaining focus on an issue is hard. There are of course some exceptions, as with the health firings scandal in BC, which the

media helped keep alive before the Ombuds inquiry was set in motion.

Thus, a key and continuing success for Ombuds is their capacity to pay sustained attention to everyday stuff that only matters to the citizen. The Ombuds reputation is built brick by brick on the small stuff, rather than the really big stuff. The media's involvement now appears to be to backstop and amplify those findings, having previously been more involved at the front end of those breaking stories.

Discussion

Reflecting on the panel, participants raised a number of related points in the following plenary session. Ideas generally fell into one of two categories, as regards success of the Ombuds venture: empirical success in the form of demonstrated effectiveness, and reputational success by being known to be operationally fair-minded and independent.

Empirical Success

When are recommendations successful?

It was suggested that one could look at the percentage of Ombuds recommendations accepted by government. However, there are numerous caveats to this. If the recommendations are accepted and implemented, but the complainant and/or the public are unsatisfied the outcome is fair, is that success? Participants observed that governments often accept recommendations and then proceed to implement something entirely different. Governments may accept recommendations because it is politically expedient to do so. This doesn't always mean the problem is solved.

Differing interpretations of effectiveness.

In terms of empirical demonstrations of effectiveness – performance measurement – participants saw that success might have many different manifestations and possibly competing definitions. For example, is it a success or a failure not to issue a report

following an investigation? Are a larger number of small 'wins' to be preferred over a smaller number of landmark investigations?

Challenge of performance measurement.

Related points were made with respect to the idea of the most useful measures with which to assess Ombuds performance. Is it in the public interest to have a single, impactful report? Is it important to process a lot of cases? Or is having fair government practice to be preferred to both? Participants observed that linkages between the Ombuds community and academia could still be strengthened, particularly if scholars had a role in developing indicators. In Europe there is a closer relationship between government and researchers, bringing the advantage of a range of methodologies to work with.

Deterrence as evidence of effectiveness.

Some participants identified the deterrent effect of Ombuds work and potential scrutiny as a kind of success which could be detected yet was very difficult to measure. Some offices offer complainants the option of being able to copy the Ombuds office on all of their correspondence with the authority, and anecdotally this is held to be effective.

Does increased scope equal greater success?

From one perspective, having more jurisdiction and a greater number of distinct mandates assigned to Ombuds offices can be seen as a sign of success – if accompanied by sufficient resources to execute the additional required activity. Conversely, the addition of mandates on top of 'core' or 'classic' Ombuds work without additional funding may only serve to dilute the office's efforts across the board.

Reputational Success

Independence vs. advocacy. Reflecting on the Supreme Court of Canada's description of the public reporting role of the Ombuds in *BCDC v. Friedmann* as being that of "marshal[ling] public opinion behind appropriate causes," some participants felt

that characterization was problematic. In their view, Ombuds seek to illuminate issues, not causes. However, remaining independent is not an issue as long as good processes are followed, investigations are rigorous, and the philosophy remains that of everyone being on the same side (*i.e.* the side of fairness).

Caution in allying with media. Ombuds and journalists can be allies in creating impact, and participants provided examples of the effect of those two areas combining to prompt early change. However, clear boundaries must exist: a good media story often has an element of sensationalism, which is not what Ombuds are looking for. Additionally, to be effective Ombuds must remain aware of the iterative nature of their relationship with government.

Maintaining a focus on fairness and equity. Success in this sense is staying beyond

reproach and modelling the behaviours sought in others. These behaviours include avoiding delay, maintaining a focus on fairness, maintaining human rights standards, and otherwise functioning as a role model in the public administration community.

Addressing how the disempowered experience unfairness. Some participants noted that the knowledge and self-confidence needed to register a complaint may be elusive for marginalized groups of people. To be successful, Ombuds should be conscious of and address this diversity of capacity. This may require finding ways to educate vulnerable groups who have systemically been treated unfairly, and whose experience of public authority may leave them without the tools or experience to be able to name the unfairness.

SESSION 8: PARTICIPANTS' SUGGESTED NEXT STEPS

In the final session, participants were asked to reflect on the experiment of the past two days and develop suggestions for approaches by Ombuds, governments and others to ensure relevant, useful oversight over the coming decades. Participants also considered if and how the Symposium dialogue should be reconvened in the future and were asked to bring forward ideas for collaborative work or research which may have germinated in discussion.

Symposium participants' thoughts are summarized here, grouped into 11 more general thematic suggestions.

Develop and enhance Ombuds digital/data competence

Participants felt it important for Ombuds to catch up/get ahead of contemporary

technologies with implications for Ombuds work, including developing the expertise and capacity to engage, seeking funding to capitalize on available tools, and partnering with private sector expertise where possible and appropriate. Improved strategic use of social media was also seen as an important goal. In particular, artificial intelligence as a locus of public sector decision making was identified by participants as a significant challenge looming in the near future, and in some cases as a challenge today. Ombuds must rapidly learn how these technologies are being applied, and work with the public service and academia to ensure that procedural fairness is not only built in but can be assessed after the fact. Finally, participants suggested that intake data was an untapped source of information on public demand for Ombuds services, and who is/is not engaging with these offices.



Dialogue during the final session of the Symposium was focused on immediate steps as well as possibilities over the longer term.

Develop strategies for vulnerable communities, increasing visibility and accessibility

Numerous participants recommended Ombuds offices develop stronger connections with vulnerable communities and with the groups who serve and advocate for them, including but not limited to partnerships with Indigenous communities and governments. It is important to make efforts to reach people who don't have a voice; participants asked how we might focus on people and populations that we know Ombuds are not reaching. One suggestion was a requirement for all government departments to include information on all routine communication to make it easier for the public to make complaints and to socialize/normalize the idea.

Strengthen national/ international Ombuds networks and comparative understanding

It was suggested that international representation and case studies at such gatherings would be helpful, to build comparative knowledge and learn best practices from other jurisdictions. This could include attention to international norms and standards such as the Venice Principles, as well as more rigorous assessment of the effects and outcomes of assigning the human rights mandate to Ombuds offices. Nationally, participants suggested enhanced collaboration between parliamentary Ombuds offices in Canada via sharing of resources and ideas, or via staff exchanges. More unified communication between offices across Canada was also suggested. Such an approach would have the potential to keep the actual and implied questions of this Symposium – how have Ombuds changed? is success being achieved? is the model still valid? and what challenges exist?

Build and sustain awareness of Ombuds

Participants commonly observed that awareness of Ombuds' existence and activities remains too low. Specific research may be required to assess awareness of our offices across Canada and adopt strategies to bridge identified gaps, and this work will require resources. It was also observed that Ombuds must find better ways to communicate the impact of the work. Ombuds should develop compelling stories that show the relevance of the function and look to augment 'dry' annual reporting with other vehicles, such as podcasts. Such work might assist in enlisting allies willing to promote the Ombuds' role, mandate and

importance in democratic process. At the client level, Ombuds can only benefit from a well-informed and aware population, and this might be enhanced by working regularly with civil society entities that are involved with high volume complaint areas.

Enhance Ombuds approaches to reconciliation and Indigenous self-government

Participants saw considerable benefit for all parties in a more fully elaborated relationship between Ombuds offices and Indigenous government. This included developing a better understanding of Indigenous governance models which are engaged, adapted or developed, but also included direct benefit to the Ombuds community through incorporation of wisdom, experience and philosophical approaches to fairness and community stemming from Indigenous law and tradition. Through these relationships, Ombuds goals with respect to reconciliation can be developed through direct dialogue and exchange of information.

Consider legislative change to strengthen influence, awareness, and independence

Some participants suggested a legislated requirement mandating debate in the legislature on the Ombuds reports when issued. This step would likely require that legislative committees examine and discuss the work of the Ombuds office, bringing more attention and more traction to Ombuds work. To bolster the independence of Ombuds offices and their ongoing insulation from political influence, participants also suggested embedding the Venice Principles⁵ in legislation.

Consider expanding (or contracting) the Ombuds mandate

In dialogue, participants identified a tension between the costs and benefits of an expanded mandate for parliamentary Ombuds. While the addition of human rights advocacy, public interest disclosure or other issue areas to the mandate expands the theoretical impact of the role, in practice some participants saw the dangers of resources being spread too thinly and of creeping politicization emerging with this trend. Participants suggested Ombuds promote an intentional, proactive discussion about these issues and the related issue of organizational capacity. A recurring corollary of this discussion was the issue of the term Ombudsman/Ombudsperson. Some participants noted that the obscure nature of the word is already an issue; whether or not new mandates are added, it may be time to 're-brand' the role as a step towards increased accessibility.

Explore the potential of partnership between Ombuds and Information/Privacy Commissioners

Participants saw a growing rationale for aligning elements of the work of Ombuds with that of Information and Privacy Commissioners, examples of which are already occurring through necessity. In both areas of work, the machine must often be 'taken apart' to determine if processes are fair and lawful. The cost of investments in technical services to aid in this determination, now common to both functions, suggests this alignment should be explored actively.

⁴ See: [https://www.venice.coe.int/webforms/documents/default.aspx?pdf=CDL-AD\(2019\)005-e&lang=EN](https://www.venice.coe.int/webforms/documents/default.aspx?pdf=CDL-AD(2019)005-e&lang=EN)

Conduct foundational work on performance measurement

Useful measures with which to assess Ombuds performance remain outstanding. Participants observed that in Canada there is room to strengthen linkages between the Ombuds community and academia, particularly if scholars assume a role in developing indicators. In Europe there is a closer relationship between government and researchers, bringing the advantage of a range of methodologies to work with.

Develop an operations-specific dialogue

Participants identified a number of specific operational issues where an enhanced office-to-office dialogue or forum may be warranted. These include strategies around employee mental health and wellness, timeliness of reporting, Ombuds transparency, the use of plain language and other accessibility measures in reporting, creating opportunities for front line/senior staff to chat about specific emergent issues, and sharing best practices (in *e.g.* own-motion or systemic investigations), as well as lessons learned from failures.

Share and research these ideas and keep the Symposium dialogue alive

Participants wished to see a summary of the two days distributed broadly within the Ombuds and partner community, ideally paired with an online venue in which others could add to these ideas, share new insights, and otherwise contribute to the discussion. Follow-up research on some of the issues raised was also desired, in order to capitalize on the engagement with academia which has begun with the Symposium. Participants suggested that future Symposia could be attached to national meetings of the Canadian Council of Parliamentary Ombudsman: if not every year, perhaps biannually. This would provide an opportunity to check in on progress made regarding the key issues raised here. Some participants felt there should be greater diversity of symposium attendees, with the agenda including the voices of complainants' lived experience and more of a 'bottom-up not top-down' event design, such that we are not simply speaking amongst ourselves.

ORGANIZING COMMITTEE AND ADVISORY COMMITTEE

The Symposium was developed by a core organizing committee chaired by BC Deputy Ombudsperson David Paradiso. Other members of the organizing committee included:

- Colette Baty, Principal, Castle Consulting
- Allan Castle, Principal, Castle Consulting (Symposium Coordinator)
- John Greschner, Deputy Ombudsperson, BC Office of the Ombudsperson
- Evert Lindquist, Professor, School of Public Administration, University of Victoria
- Jay Chalke, Ombudsperson, BC Office of the Ombudsperson

The organizers were supported by an expert advisory committee, whose members included:

- Stewart Hyson, Independent Researcher
- Patrick Kelly, Leq'á:mel First Nation and Past Board Chair, Coastal First Nations
- Andrea Migone, Director of Research and Outreach, Institute of Public Administration of Canada
- Charles Murray, New Brunswick Ombud
- Carol Anne Rolf, Adjunct Faculty Member, School of Public Administration, University of Victoria
- Marianne Ryan, Alberta Ombudsman
- George Thomson, Senior Director, National Judicial Institute (Symposium Facilitator)

APPRECIATION

The organizers would like to express their appreciation to Diane Sam of Songhees First Nation for taking time to welcome participants to the traditional territory of the Lekwungen-speaking Peoples, and to Professor Astrid Brouselle, Chair of the UVic School of Public Administration, for her welcome on behalf of the University. Thanks are also due to the staff and management of the UVic Legacy Art Gallery, Cadboro Commons Conference Centre, the UVic University Club, and Degrees Catering, for their contributions to the success of the event.

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Thanks to those participants who kindly shared their expertise in formal speaking roles: Jay Chalke, the Honourable Tom Cromwell,

President Eva Clayton, Patrick Kelly, Dr. Dara Kelly, David Loukidelis, Howard Sapers, Marianne Ryan, Professor Justin Longo, Charles Murray, Allan Seckel, Professor Linda Reif, and Les Leyne. Thanks are due as well to the participants in the research roundtable led by Professor Evert Lindquist: Norman Dolan, Professor Tara Ney, Alyson Miller, Suzy Flader, and Stewart Hyson.

Thank you to Symposium Coordinator Allan Castle for his work through the planning of the event and preparation of the draft proceedings report. He and Colette Baty were instrumental in bringing this initiative to life from start to finish.

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