AN *OMBUDSMAN* FOR MANITOBA*

I. WHAT IS AN *OMBUDSMAN*?

An *Ombudsman* is an independent officer of the legislature whose function is to investigate and report to the legislature on complaints from citizens about the operation of the administrative branch of government. He is not a judge, and his remedial powers are usually restricted to making recommendations to the officials concerned, and reporting to the legislature. Nevertheless, the respect with which the *Ombudsman* is regarded, and the publicity which attends his reports, usually make it difficult to ignore his recommendations. His activities frequently lead to one or more of a variety of beneficial results: the redress of individual grievances, the abandonment of particular inequitable laws or practices, increased awareness by the civil service of the need to protect individuals from being bruised by the administrative machinery, and the scotching of unfounded criticisms of the civil service.

The idea is Swedish in origin. The Swedish constitution of 1809 established two *Ombudsmen*: one for military affairs and one for civil affairs. Both offices have operated continuously since then, and have played a significant role in avoiding the bureaucratic excesses that might otherwise have accompanied Sweden's extensive program of social legislation.[1] Finland established an *Ombudsman* in 1919.[2] Denmark did so in 1954,[3] and Norway in 1961.[4] A military *Ombudsman* was created in West Germany in 1956.[5]

For countries that share the British constitutional heritage, the most significant recent development was the creation of the office of *Ombudsman* (also called Parliamentary Commission for Investigations) by New Zealand in 1962. The difficulties of transplanting the institution to a Commonwealth country (with certain alterations, of course) proved to be easily overcome, and, after three years in existence, the reports on the operation of the New Zealand *Ombudsman* are uniformly favorable.[6]

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1. Brief descriptions of the Swedish *Ombudsman* will be found in Sawer, *Ombudsmen*, Melbourne, 1964, p. 6ff., and Whyatt, *The Citizen and the Administration*, London, 1961 (nereinafter referred to as the *Whyatt Report*), p. 45ff. A fuller account is contained in Rowat, *The Ombudsman—Citizen's Defender*, Toronto, 1965, p. 17ff. The latter book is an excellent collection, by a Canadian scholar, of material concerning *Ombudsmen*.
2. Sawer, p. 9; Rowat, p. 58ff.
3. Sawer, p. 9; Rowat, p. 75ff; Whyatt, p. 53ff.
4. Sawer, p. 9; Rowat, p. 95ff; Whyatt, p. 61ff.
5. Rowat, p. 119ff. A somewhat similar official, the Inspector General, has dealt with complaints about the United States army since 1813: Rowat, p. 147ff.
6. Several good descriptions of the New Zealand *Ombudsman* are available: Sawer, p. 35ff; Rowat, p. 127ff. One of the best accounts was given by the *Ombudsman* himself, Sir Guy Powles, to the 1964 Annual Meeting of the Canadian Bar Association: *The Office of the Ombudsman in New Zealand* (1964), *Canadian Bar Association Papers*, p. 1. The text of the New Zealand Act is reprinted in Whyatt, p. 90.

In Great Britain, pressure to provide protection against administrative error has been mounting for several years. A partial remedy was provided by the improved administrative procedures recommended by the famous *Franks Report* in 1957[7] and incorporated in the *Tribunals and Inquiries Act*, 1958. But the demand for a more comprehensive reform continued, and in 1961 "Justice", a highly respected organization of British lawyers, published a report by Sir John Whyatt, entitled *The Citizen and the Administration*, which proposed the creation of a British *Ombudsman*. The British government has announced its intention to do so at the current session of Parliament, and has just published a white paper describing the basic features of the Act which will establish a "Parliamentary Commissioner for Administration".[8]

In Canada, too, the demand for creation of *Ombudsman* is mounting. In 1963 the Glassco *Royal Commission on Government Organization* recommended that the government consider establishing such an office.[9] In 1964 a private member's bill, modelled on the New Zealand Act, was introduced and debated in the House of Commons,[10] and referred to the Standing Committee on Privileges and Elections, which heard extensive evidence.[11] On March 1, 1965, that Committee recommended by a majority of 14 to 1, that:

> . . . the Government consider the establishment of an office, like that of an *Ombudsman*, for the purpose of investigating and reporting on administrative acts of the Government of Canada complained of by members of the public. The Committee recommends also that the Government of Canada should take an early opportunity to urge the establishment of a similar institution by each of the provinces, for scrutinizing in the same way administrative action under provincial jurisdiction.[12]

Several provincial governments have decided to explore the feasibility of provincial *Ombudsmen*.[13]

II. IS THERE A NEED?

Almost everyone would agree that as a rule those who administer provincial and municipal government in Manitoba are fair, courteous and efficient. Is there, therefore, any need for improved administrative safeguards in this province? To answer this question our Committee conducted two different inquiries.

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7. Cmd. 218.
8. *The Parliamentary Commissioner for Administration*, October, 1965, Cmd. 2767.
9. *Report of Royal Commission on Government Organization*, vol. 5, p. 95.
10. House of Commons Debates, 109, p. 1167-73 (March 17, 1964).
11. Much of this evidence is reprinted in *Minutes of Proceedings and Evidence*, Standing Committee on Privileges and Elections, Nos. 6, 7, 8 and 9.
12. *Minutes of Proceedings and Evidence*, Standing Committee on Privileges and Elections, No. 10, p. 558.
13. Ontario has referred this matter, among others, to the McRuer *Royal Commission on Civil Rights*. Alberta has established a Special Committee of the Legislature to explore the matter (see *Votes and Proceedings*, Legislative Assembly of Alberta, No. 35, April 7, 1965). The Saskatchewan Government is considering the matter, but has not set up an inquiry committee (letter from Department of Attorney-General, Oct. 1, 1965). In Nova Scotia, a Select Committee of the Legislature, in a rather anaemic Report, tabled March 13, 1964, recommended against an *Ombudsman*. British Columbia, Quebec, New Brunswick and Prince Edward Island are not yet actively considering the proposal at the governmental level (letters from the respective Attorneys-General, or their representative, October, 1965) The Newfoundland government did not reply to our inquiry.

First, we asked Mr. David H. Jones, one of our members, to make a study of all Manitoba statutes with a view to discovering the powers of, and the rights of appeal from, every significant administrative agency in the province. This would seem to be a necessary starting point for any meaningful enquiry into the adequacy of administrative safeguards. Yet, to our knowledge, it has never been done before.[14] The reason soon became apparent. There are so many administrative agencies, with such diverse powers and procedures, that to discover and analyse them all is a very formidable research project. Unfortunately, Mr. Jones was not able to complete his survey in time for the presentation of this brief. Nevertheless, even the beginning that he made disclosed some interesting facts. For example, in some cases there is no appeal available at all (Architect's Council re discipline, Minister of Labor re licensing barbers, Construction Safety Board re safety of construction projects). Where there is an appeal it is sometimes not on the merits, but only on a question of law or jurisdiction (e.g., Motor Carrier Board). And sometimes the appeal lies only to another level of the administration, instead of some external tribunal (e.g., Civil Service Commission). On the basis of this information we believe that if the survey were completed it would disclose a significant number of instances where the existence of non-appealable administrative power creates a risk of injustice. If, as we urge, your Committee chooses to commission a complete study of this type, we suggest that it include a comparison of the procedures used by the various agencies in reaching their decisions, and that it not overlook the municipal levels of government.

Our second method of exploring the need for administrative safeguards was to canvass our members and the legal profession generally for examples of cases illustrating the need. In our view, they amply demonstrate the necessity.

We must emphasize that we made no attempt to assess the statistical significance of our illustrations. It would probably be impossible to establish scientifically the ratio of "just" to "unjust" actions in the administrative realm. All that we can offer on that subject is the unanimously held opinion of our committee that the conduct of our administrators is exemplary in all but an extremely small percentage of cases. Nevertheless, the comparative ease with which we collected these examples shows, we believe, that while the *percentage* of such cases may be small, the *number* of them, and the hardship and distrust of government they engender, is significant.

We must also make it clear that we have not investigated these cases. It is probable that on investigation some of them would turn

14. In a letter to our committee a Winnipeg lawyer made the following comment: "Recently, in connection with a paper I was asked to give, I inquired of several Provincial Officials as to the number and names of all administrative Boards and tribunals operating in Manitoba at all levels of government. To a man, they were unable to help me and no one could state with any certainty the exact number and names. This, in itself, is frightening."

out to be groundless. However, they all came to us from respected Manitoba lawyers who believe in their soundness. This indicates to us that the percentage that would be found to lack foundation would not be very great. In any event, we believe that the very fact such complaints have been made, and that suitable methods to investigate their soundness do not exist, is significant.

In our submission the material obtained by our researches provides striking evidence of the risks to individual rights implicit in the administrative process. As the area of governmental activities expands, as it seems rapidly to be doing, these risks will inevitably increase. The need, therefore, to provide the citizens of Manitoba with adequate safeguards against administrative errors and excesses is, we submit, incontestable.

III. ARE EXISTING SAFEGUARDS ADEQUATE?

Once it is accepted that some safeguards are necessary, the natural question is whether those which now exist are satisfactory.

So far as *legal* remedies are concerned, there are two basic types: (a) administrative appeals, and (b) supervision by the courts through prerogative writs. We believe that Mr. Jones' research demonstrates that a consistently satisfactory system of administrative appeals does not exist in Manitoba. On the complex and technical subject of prerogative writs, we asked one of our members, Mr. D'arcy C. H. McCaffrey, to make a study. His study makes clear that these writs are very valuable, but, because of their cost and the legal uncertainties surrounding their application, they offer no panacea. Existing legal safeguards are, therefore, not adequate.

Of course there are also certain *extra-legal* recourses which are often very effective. The chief ones are (a) to appeal to some individual legislator, and (b) to invoke the weight of public opinion through publicity media. Both methods are of very great importance in protecting the individual in his dealings with the state, but both suffer from shortcomings which limit their usefulness in many types of case.

In the case of appeals to individual legislators these shortcomings stem from several factors. In the first place, although legislators frequently play a useful role in the redress of grievances, they simply do not have the time or staff to carry on such work in more than a sporadic way. Their primary function is to deal with legislation, and with statute books expanding at a very rapid rate, this is a very large job. It leaves little time for systematic investigation of alleged administrative errors.[15] Secondly, the effectiveness of individual legislators as grievance investigators varies greatly with the prestige, competence, diplomacy and independence of outlook of the particular legislator.

15. Rowat, p. 195, refers to the problems that United States Congressmen face in this regard.

Conciliation is a highly sophisticated art, which few people are able to perform really well. Thirdly, individual legislators seldom have ready access to the relevant information. Finally, there are serious restrictions imposed on the legislator's usefulness in this area by political factors. If he is a supporter of the government he will usually be unwilling to make use where necessary of the only real weapon an individual legislator has against the government—publicity. If, on the other hand, he is in opposition, the administrators are much less likely to pay heed to him, and the public is likely to discount his criticisms of the government.

Publicity is another useful way to keep administrators in check, but it too, has shortcomings, the chief one being that it can do serious harm where, as is frequently the case, a complaint turns out to be unjustified. This danger can be illustrated by a recent newspaper story concerning the parents of a young boy whose hand was accidentally injured in a school door. The parents were dissatisfied with the explanation of the accident they received from the school's principal, so they appeared at a meeting of the Winnipeg School Board and voiced their criticism in the presence of the press. As a result, stories appeared in very prominent locations in both daily newspapers, in addition to radio and TV coverage. The *Free Press* story, printed at the top of page 3, carried a headline five columns in width: "PRINCIPAL'S OUSTER ASKED". The article gave the principal's name and a very full statement of the parent's side of the dispute. A separate article underneath carried the principal's reply. Two weeks later, the *Free Press* carried a much less prominent story (on the same page, but only one column in width), headed "TRUSTEES ABSOLVE PRINCIPAL", stating that the principal was "not responsible for the accident". Regardless of who was right in that case, the publicity has probably caused unnecessary harm. If the principal's conduct was beyond reproach, his reputation may have been damaged seriously for no reason, since the second story, even if given much greater prominence, could not possibly neutralize the effect of the first story completely. Even if the parents were right, the damage to the principal's reputation could well be excessive in relation to the alleged wrong. If this dispute could have been referred to some impartial authority, it could have been dealt with suitably if well founded, and quietly dropped if not.

These informal remedies certainly have an important role to play in the redress of grievances (and would continue to do so even if an *Ombudsman* were established) but, it is submitted, there is a substantial area of administrative error where neither they nor the various legal remedies are effective. Improved grievance machinery is needed.

IV. ARE THE VARIOUS ALTERNATIVES TO AN *OMBUDSMAN* SATISFACTORY?

The creation of an *Ombudsman* is only one of several different types of reform that have been proposed.

Several countries have created special administrative courts, separate from the regular judiciary, which have proved quite effective in dealing with many (though not all) of the types of grievance we have referred to. The prototype of such courts is the French *Conseil d'Etat.*[16] Some have suggested that similar institutions ought to be established in the common-law countries.[17] This would be a much more radical step than creating an *Ombudsman,* since administrative courts are much more complex institutions than *Ombudsmen* and are, for a variety of reasons, much more foreign to our legal system. Because of the grave difficulties that would be involved in so major a change,[18] and the fact that it would still leave a significant number of complaints unremedied,[19] we submit that the creation of administrative courts would not be a suitable solution to the need for improved administrative safeguards.

This is not to say that many improvements in the system of administrative hearings and appeals would not be welcomed. We understand that an Administrative Procedures Act, which would improve and standardize the way in which hearings before administrative tribunals are held, is being considered by the government. We have already mentioned that there is also a need to provide more satisfactory methods of appeal from some agencies. And, in view of the proliferation of tribunals, the establishment of a body similar to the English "Council on Tribunals" might be desirable.

As a separate brief to your Committee from the legal profession will indicate, there is also a need to strengthen our present system of legal aid.

All of these reforms should, in our view, be carried out. But when they are there will still remain a core of complaints that cannot be effectively dealt with.

Clearly, some other type of administrative safeguard is called for.

V. IS AN *OMBUDSMAN* THE ANSWER?

An *Ombudsman* could provide less expensive and more flexible relief than legal remedies. He could accomplish this with considerably less risk of unjustified harm to the reputation of individual administrators and government generally than the news media. And, because

16. See Sawer, p. 15ff. and Rowat, p. 217ff for brief descriptions.
17. For example, see the proposals of J. D. B. Mitchell in Rowat, p. 273ff.
18. These are well summarized in Sawer, p. 17ff.
19. It has been argued that there is room for *both* administrative courts and an *Ombudsman* in one country: Rowat, p. 213ff.

of his skill in mediation, access to information, political independence, and greater time, he could do so more effectively than most individual legislators.

For these reasons, we believe that the appointment of a provincial *Ombudsman* would be the best solution to the problems with which we are concerned. We are aware, however, that a number of objections to such a reform are likely to be raised. Let us examine the validity of these objections.

(a) *Interference with Ministerial Responsibility*—The terms of reference of this Committee indicate concern that the institution of an *Ombudsman* might interfere with "the principle of ministerial responsibility". This is probably the most frequently voiced objection to the establishment of an *Ombudsman.* That this should be so is strange, since of all the objections that can be raised, this one has the least substance. The reason is, we submit, that it is based on a mistaken understanding of the role of an *Ombudsman.*

Ministerial responsibility is, as Professor R. McGregor Dawson has said, "the central fact of parliamentary democracy". The principle operates in his words, as follows:

> The Minister at the head of every department is held responsible for everything that is done within that department, and, in as much as he will expect praise or assume blame for all the acts of his subordinates, he must have the final word in any important decision that is taken.[20]

Clearly, if an *Ombudsman* were allowed to make decisions concerning the administration of government, he would be encroaching on ministerial responsibility. However, no existing or proposed *Ombudsman* has the power to make such decisions. The function of an *Ombudsman* is simply to make *recommendations* to government. It is true that his prestige and the publicity that often accompanies his recommendations do create some pressure to follow them. But if such pressure is regarded as an encroachment on ministerial responsibility, then that principle has long been subverted by newspaper criticism, royal commissions, parliamentary enquiries, and so on. No democratic government can rely on the doctrine of ministerial responsibility to free it from public criticism. Indeed, one of the very purposes of the principle is to provide a focus for criticism by fixing the Minister with responsibility for acts of often unidentifiable subordinates. It ensures that the government will be, in Professor Dawson's words, "constantly amenable to popular control".[21] Therefore, the establishment of an *Ombudsman*, far from subverting the principle of ministerial responsibility, would, by improving such public scrutiny, be furthering one of its basic aims.

20. Dawson, *Government of Canada*, p. 208.
21. *Ibid.*

This can be explained in another way. Even more fundamental to our constitution than the principle of ministerial responsibility is the doctrine of "legislative supremacy". The legislature is the highest organ of government, superior to both the cabinet and other administrators and the courts. Only when this is realized does the doctrine of ministerial responsibility become meaningful. Because the legislature is supreme, those who are entrusted from time to time with the power of government must always remain responsible to the legislators (and through them to the people) for the proper exercise of those powers. An *Ombudsman* would be nothing more than an *agent of the legislature* for the purpose of reporting to it on the way the administration exercises its powers. The establishment of such an office would, therefore, be a means of ensuring that the administration remains responsible to the legislature.

Perhaps more persuasive than these theoretical arguments is actual experience. The concept of an independent officer appointed by the legislature to watch over and report upon the activities of the administration is not particularly new. In 1866, for example, Great Britain established a "Comptroller and Auditor-General" to scrutinize the government's management of public monies.[22] A similar office was created in Canada at the federal level in 1878. The following description emphasizes the similarity, in the financial field, of the function of the Canadian Auditor-General to that of the *Ombudsman*:

> He is an official of Parliament—not of the Cabinet—and he holds office during good behaviour, subject to removal only by the Governor-in-Council after the passage of a joint address by both Houses of Parliament. His function is to check all receipts and payments of the Consolidated Revenue Fund, to ensure that money has been or is to be paid for the purposes intended (including, of course, authorizations made by the Comptroller), and generally to investigate every aspect of the public service as it affects finance. His decisions can also be overruled by the Treasury Board, but these cases must be submitted to the consideration of Parliament in his annual report. In this report he is further found to call attention to any irregularity, any exceptional procedure, any special payments by warrant, any refund of a tax or similar payment under statutory authority, or any matter which he feels he should bring to the attention of Parliament; and Parliament may, of course, take what it considers to be appropriate action.[23]

In Manitoba, an officer known as the Comptroller-General maintains a somewhat similar scrutiny over the management of provincial finances, though he is not as independent as his federal counterpart.[24]

The reports of the Auditor-General have frequently been embarassing to the government of the day, but no one has suggested that he constitutes a threat to ministerial responsibility. In other countries, where full-fledged *Ombudsmen* have been established, those who

22. *Whyatt Report*, p. 63ff.

23. Dawson, *Government of Canada*, 4th ed., p. 399. The office is more thoroughly described in Ward, *The Public Purse*. See also the testimony of the present Auditor-General (who favors an *Ombudsman*) to the House of Commons Committee; *Minutes of Proceedings and Evidence*, Standing Committee on Privileges and Elections, No. 9, Nov. 30, 1964.

24. Donnelly, *The Government of Manitoba*, p. 94-5.

predicted interference with the principle have been proven wrong. In Sweden, the principle of ministerial responsibility does not exist,[25] but in Denmark, Finland, Norway and New Zealand[26] where it does, there is no evidence that the *Ombudsman* has interfered with it. The New Zealand *Ombudsman*, Sir Guy Powles, emphasized this in his most recent report to Parliament:

> I am aware of the fears expressed in Britain that the office of *Ombudsman* would erode the classic principle of ministerial responsibility, but I see no evidence of this happening in New Zealand.[27]

Even if there were a risk of encroaching on ministerial prerogatives, ample protection would be provided by allowing the Cabinet to veto any investigation by the *Ombudsman*, as we suggest in a later section of the brief.

(b) *Ombudsman Might Stifle Administrative Initiative*—There are some who fear that with an *Ombudsman* constantly "breathing down their necks" civil servants would be afraid to exercise initiative, and that their already marked tendency to caution might become excessive.[28]

This is a danger that accompanies all forms of supervision—it is not peculiar to *Ombudsman* schemes. Once it is accepted—as it must be— that the administration must submit to the scrutiny of the legislature and the public, the risk of discouraging initiative becomes inevitable. The answer lies not in decreased supervision, but in more positive devices—such as rewarding initiative, criticizing the lack of it, and so on.

To the extent that an *Ombudsman* scheme differs from other methods of supervision, it probably involves less, rather than more, danger to initiative. One of the common ways to attack administrative actions at present is through the press, which frequently involves unjustified criticisms of named officials. Civil servants have much more to fear from that type of "supervision" than from the activities of an *Ombudsman.*

(c) *Encouragement of Frivolous Complaints*—It is probable that the very existence of the *Ombudsman's* office would encourage a few "crank" complaints that might not otherwise be made. Experience in other countries has shown that the number of such cases is not excessive, and amounts to a small price to pay for the increased number of genuine grievances that receive redress. In addition, the *Ombudsman* is often able to dispose of frivolous complaints without the publicity which frequently accompanies them at present.

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25. *Whyatt Report*, p. 46.
26. "New Zealand has not preserved the fiction that the Minister himself has taken" every administrative decision. Nevertheless, every government department is "subject to the control of a Minister who is answerable to Parliament for their administration". Rowat, p. 127.
27. *Report of the Ombudsman*, March 31, 1965, p. 11.
28. See, for example, J. Willis, *Civil Rights—A Fresh Viewpoint* (1965), 13, *Chitty's Law Journal*, 224, at 225 and 227.

(d) *Cost*—The existing *Ombudsman* schemes demonstrate conclusively that the cost of maintaining the office is insignificant in comparison to the benefit it provides. The cost of operating the New Zealand office, with a staff consisting of the *Ombudsman*, a legal officer, two other officers, and two secretary-typists was 11,500 pounds in 1964.[29] In Manitoba, where the staff might be slightly smaller, but the salaries somewhat higher, the annual cost should not be much more than that.

VI. MAJOR FEATURES OF A MANITOBA *OMBUDSMAN* SCHEME

(a) *Appointment*—There seems to be unanimous agreement among those who have written on the subject that the success of an *Ombudsman* is primarily dependent upon two things: the personality of the individual appointed to the position, and the assurance of his independence.

The person chosen must be energetic, familiar with the machinery of government, courageous, fair-minded and diplomatic. He must, in short, possess all of the qualities expected of a high court judge, plus a degree of political sophistication that judges are not usually required to possess. To attract such a person to the position, the terms of appointment must be generous. The salary must be sufficient to ensure his financial independence while in office. The Scandinavian *Ombudsmen* are paid salaries equivalent to those of High Court judges. It is submitted that this would also be an appropriate amount for a Manitoba *Ombudsman*. The New Zealand Act provides a salary of 4,100 pounds annually, which is somewhat less than a judge receives, and this provision has been criticized on the ground that it will probably mean that only retired persons will seek the position.[30] An appropriate pension scheme should also be available. Protection from legal liability for defamation, etc. would be necessary as well.

To carry out his role effectively an *Ombudsman* must be absolutely free from influence (or the suspicion of influence) by the government or anyone else. There must, therefore, be reasonable security of tenure. At the same time, however, the danger of an incumbent "going stale" or becoming incompetent in office must be guarded against by providing for periodic changes of *Ombudsmen*, and removal for just cause. The countries that have *Ombudsmen* have all dealt with this problem in much the same way. In every case, the *Ombudsmen* are elected by the legislature (in Sweden's case, by electors chosen by the legislature from its own number).[31] In almost every case the term of appointment is four years (in New Zealand it may be either 3 or 4 years). In Sweden the custom has developed that an appointment is usually renewed once,

29. *Report of the Ombudsman*, March 31, 1965, p. 11.
30. Rowat, p. 135.
31. The British Act will apparently provide for appointment by "the Crown": *The Parliamentary Commissioner for Administration*, Cnd. 2767, p. 3. This, we submit, involves a greater risk to the independence of the office than legislative appointment.

but never more than twice, so the normal term of office is 8 to 12 years. It appears likely that the other countries will adopt similar conventions. In every country except Finland the legislature may remove the *Ombudsman* from office before his term expires if it loses confidence in him. In Norway, this can only be done by a 2/3 majority, and in New Zealand it can only be done for certain specified reasons (disability, bankruptcy, neglect of duty or misconduct). In Sweden and Denmark it can be done by a simple majority without specifying reasons. This will apparently also be the case in Britain. We believe that this would not afford sufficient protection for tenure, and suggest that the Manitoba Act allow removal only by a 2/3 majority of the Legislature.

Bill C7, the private member's bill before the Canadian Parliament, proposes that a Canadian *Ombudsman* should be appointed "during good behavior until he attains the age of 65 years, but he is removable by a joint resolution of the Senate and House of Commons". This has the advantage of discouraging the practice of treating the *Ombudsman* as a political appointment. (The same result could, of course, also be achieved in other ways, such as giving the power of appointment to an impartial panel of nominators composed of judges and other non-partisan persons.) A disadvantage of life appointment is that an incumbent's term of office might long outlive his enthusiasm, initiative and energy. For this reason, we recommend appointment for a six-year period, which would normally be renewed once.

(b) *Staff*—An *Ombudsman* does not require a large staff. In New Zealand, which has a unitary system of government, a population of 2¼ million, and a relatively advanced welfare state, the *Ombudsman* is assisted by only three officers (one of whom is a lawyer) and two secretary-typists.[32] In Manitoba this number could perhaps be reduced slightly.

(c) *Function*—One valuable, though minor, function of an *Ombudsman's* office would be to assist citizens to locate the "proper channels" for dealing with particular types of problems. Sometimes the frustration a person feels about the administration stems from nothing more than fruitless hours wasted trying to find the right office. A well-trained clerk in the *Ombudsman's* office could, by directing people to the appropriate officials, do much to help the administration serve the public more efficiently. This function would, however, be purely ancillary to the *Ombudsman's* main duty of investigating and reporting upon alleged deficiencies in the administration of government.

Every existing *Ombudsman* is empowered to commence an investigation, either on complaint of some individual or on his own initiative. To discourage "cranks" it is common to require that a complainant

32. *Report of the Ombudsman*, March 13, 1965, p. 11.

have some personal interest in the matter complained about. New Zealand also requires the complainant to pay a fee of one pound, though one writer claims that the collection of this fee is regarded as a nuisance by the *Ombudsman.*[33] The *Whyatt Report* recommended, and the British Government agreed, that for the first five years of operations of the English *Ombudsman* complaints should be channelled through a member of Parliament. It is submitted that this procedure should not be followed in Manitoba. Even in Britain it has been criticized,[34] and one of the reasons for suggesting it in Britain—the flood of complaints that might be expected from a population of 50 million[35]—carries little weight in Manitoba. To channel complaints through members of the Legislature would be to sacrifice much of the speediness and accessibility which are prime virtues of the *Ombudsman* concept. The experience of New Zealand shows us that no such preliminary screen is necessary.

Most *Ombudsmen* have quite wide powers to refuse to investigate complaints they regard as frivolous, unduly delayed, or capable of being remedied by other means.[36] Section 3 of the proposed federal Act, Bill C7[37], might be an appropriate model for Manitoba to follow in this regard.

The degree of formality of investigation varies somewhat from one country to another. Generally speaking, however, the *Ombudsmen* are given a good deal of discretion with respect to their manner of investigation. The New Zealand Act, for example, provides only a few requirements, such as notifying the department concerned before beginning an investigation, keeping all proceedings secret, and holding a hearing before reporting adversely affecting the administration. It leaves the rest to the *Ombudsman's* discretion.[38] Bill C7 proposes a similar procedure for Canada, and it is submitted that it would also be appropriate for Manitoba. Should the *Ombudsman's* investigations be secret? As noted above, they are in New Zealand. This, it is submitted, is wise. It is true that an *Ombudsman's* only real sanction, and the key to his effectiveness is publicity. However, it is sufficient if the *Ombudsman's report* is publicized. To make the progress of investigations public would encourage all manner of unwarranted assumptions.

All *Ombudsmen* are given certain powers to compel evidence during the course of their investigations, but there are differences as to the extent of those powers. Two types of restriction are common. One type is found in the New Zealand Act, which states that the Attorney-General may prevent access to information by certifying that its disclosure would prejudice security, defence, international relations, or

33. Sawer, p. 30.
34. Rowat, p. 270.
35. Rowat, p. 184.
36. See, for example, the discussion of the New Zealand provision in Rowat, p. 138.
37. Rowat, p. 301.
38. Rowat, p. 138.

cabinet secrecy.[39] The proposed Canadian Bill, C7, would place no such restrictions on the *Ombudsman* (except to the extent that common law principles of Crown privilege might do so). The other type of restriction is the rule in force in the Scandinavian countries,[40] and proposed by the *Whyatt Report*,[41] that all intra-departmental memoranda are excluded from the *Ombudsman's* scrutiny; only incoming and outgoing correspondence, official reports, etc., being compellable evidence. This limitation is supported on the ground that without it civil servants might become overly cautious and less than frank in their intra-departmental communications. However, it has been criticized[42], and is not to be found in the New Zealand Act, the proposed British Act, or the proposed Bill C7. We submit that it should not be adopted in Manitoba. The evidence it excludes might well be the very evidence necessary to show the administration's error.

Having completed his investigations, the *Ombudsman* might wish to make informal recommendations to the government department or official involved. Having done this, his only remaining duty would be to report to the complainant and the Legislature. Some of the Scandinavian *Ombudsmen* are also empowered to prosecute certain officials for dereliction of duty. This function is seldom exercised, however, and there seems little point in burdening a Manitoba *Ombudsman* with a similar duty.

What should the reports to the Legislature contain? A summary of the operations of the office since the last report would be required, but even more important would be a full report of all cases in which the administration was found deficient, and of all recommendations made by the *Ombudsman* and any action taken as a result. These reports should, of course, be made public as soon as they are presented to the Legislature. For this reason, it would be desirable to follow the common practice of *Ombudsmen* of not naming individual complainants or officials in the reports.

How often should the *Ombudsman* report? New Zealand *requires* a report at least annually, but *allows* the *Ombudsman* to report more frequently, if he wishes. Bill C7 and the proposed British Act contain similar provisions which, it is submitted, would be appropriate for Manitoba.

(d) *Jurisdiction*—It has already been suggested that the *Ombudsman* should be authorized to decline jurisdiction for any of the reasons stated in section 8(1) of Bill C7:

> (a) a remedy already exists;
>
> (b) (the grievance) is trivial, frivolous, vexatious or not is made in good faith, or

39. Rowat, p. 139.
40. *Whyatt Report*, p. 50 and p. 71.
41. P. 71.
42. Rowat, p. 279.

(c) upon a balance of convenience between the private interest of the person aggrieved and the public interest, the Parliamentary Commissioner is of opinion the grievance should not be investigated.

It is further submitted that the proposal of the *Whyatt Report* to allow the Minister concerned to veto any particular investigation[43] should be followed in Manitoba (though the veto should be exercised by the Cabinet as a whole). This would enable the government, in circumstances like those referred to in (c) above to call off an investigation even if the *Ombudsman* refused to do so. This sweeping veto power is not found in the existing *Ombudsmen* systems or in the proposed British Act, and it has been criticized as unduly hampering the *Ombudsman's* activities.[44] It must be remembered, however, that the *Ombudsman* would publicize any exercise of the power, so the government would not be likely to use it except in justifiable circumstances.

Should there be any additional restrictions on the *Ombudsman's* jurisdiction? The commonly discussed restrictions relate to:

(i) *The Merits of Administrative Decisions*—The *Whyatt Report* proposed that the British *Ombudsman* should only have jurisdiction in cases of "maladministration" (bias, negligence or incompetence),[45] and should leave complaints about the merits of administrative decisions to a system of administrative appeals. Provided that adequate appeal machinery exists, this is, of course, the best solution. And, as we have suggested above, the Manitoba *Ombudsman* would be authorized to decline jurisdiction in such cases. However, the existing appeal machinery is not completely satisfactory, and, in the nature of things, is unlikely ever to be perfect. The very function of an *Ombudsman* is to provide relief against the imperfections of administrative machinery. Therefore, it is submitted that it would be unwise to follow the Whyatt proposal. The proposed British Act appears not to have followed it.

There are some who argue that even though an *Ombudsman* should be able to review the merits of administrative decisions he should have no jurisdiction where the decisions involve the exercise of discretion. Again, it would be unwise to interfere with most exercises of administrative discretion, and the provisions we have suggested above would *allow* the *Ombudsman* to decline jurisdiction in such cases. To *require* him to do so would, however, be a mistake, since one of the major sources of administrative injustice is bad judgment in the exercise of discretion. No existing *Ombudsman* appears to be so restricted, although in some countries they are limited to reviewing "unreasonable"[46] or "clearly unreasonable"[47] discretionary decisions. The New

43. Rowat, p. 68.
44. Rowat, p. 270.
45. Rowat, p. 5.
46. Denmark, see Rowat, pp. 89-91.
47. Norway, see Rowat, p. 97.

Zealand *Ombudsman* may investigate any decision or action, discretionary or not, which appears to him to be (*inter alia*) "wrong". It is submitted that Manitoba ought to follow the New Zealand Act in this respect. Bill C7 contains a somewhat similar provision in section 11(1), but its language is not as clear as the New Zealand Act that discretionary decisions are included.

(ii) *Municipal Government*—There is wide agreement that many problems arise at the level of municipal government which could be dealt with by an *Ombudsman*. See, for example, the brief study of British local government in Appendix A of the *Whyatt Report*. The Scandinavian *Ombudsmen* all have jurisdiction over the acts of municipal officials. In New Zealand, however, this is not the case, and the British Act will exclude municipal government from the British *Ombudsman's* jurisdiction, at least initially. The reasons for this exclusion appear to be two: to encourage autonomy of government at the local level, and to avoid overloading the *Ombudsman*. As to the first reason, there has always been supervision of municipal government in Manitoba by such bodies as the Municipal Board, and a slight increase in this supervision in the interests of justice does not seem unwarranted. As to the second reason, it should be noted that Manitoba is smaller than either Britain or New Zealand, and our *Ombudsman* would be free from responsibility for the many "federal" matters (Immigration, Defence, Railways, etc.) with which *Ombudsmen* must concern themselves in those countries. Accordingly, it is submitted that municipal government should be included in the Manitoba *Ombudsman's* jurisdiction. Even in New Zealand, the latest report of the *Ombudsman* indicates that extension of jurisdiction to the municipal level is being studied,[48] and the British White Paper refers to it as a future possibility. A possible alternative solution would be the creation of separate *Ombudsmen* for large urban areas, such as Metropolitan Winnipeg.[49]

(iii) *The Judiciary*—The question of whether an *Ombudsman* should supervise the courts is a vexed one. On the one hand is the fact that individuals are occasionally treated unjustly in the courts, particularly the lower ones. On the other hand is the need to maintain judicial independence. The divergent ways in which the countries with *Ombudsmen* have handled the question reflects this dilemma. In Sweden and Finland (the older systems) courts are supervised by the *Ombudsman*. In Denmark, Norway and New Zealand, they are not. Professor Rowat advocates a compromise solution: jurisdiction over the lower courts only.[50] Both the *Whyatt Report* and Bill C7, however,

48. *Report of Ombudsman*, March 31, 1965, p. 9.
49. Rowat, p. 192.
50. Rowat, p. 192.

recommend a complete exclusion for the judiciary. Having regard to the fact that there is a well-established and effective system of appeals from all levels of judicial decision, it is submitted that this would be the better approach for Manitoba to take.

In summary, it is recommended that the only restriction that ought to be placed on the *Ombudsman's* jurisdiction, apart from his right to decline jurisdiction and the government's veto, is to exclude the courts. After all, the *Ombudsman* has no remedial powers—he can do nothing but investigate and recommend—therefore, little serious harm can occur if he occasionally deals with a matter he ought not to.