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THE MANITOBA OMBUDSMAN ACT 1969

Another Canadian province has recognized that the existing means, political and legal, for the protection of the citizen against the possibility of abuse of power by the administration are inadequate and has supplemented them by creating an Ombudsman. The Ombudsman Act 1969, which in terms of s. 47 is to come into operation on a day fixed by proclamation, has much in common with the Ombudsman Act 1969 (Alberta). That Act was based on the New Zealand legislation of 1962. Where different provisions have been contained in the Manitoba statute, they demand close scrutiny and in some instances they call for justification because they curtail, unnecessarily it is believed, the sphere of the Ombudsman and his accepted role as the watchdog on the administration. This note falls naturally into two parts. The first contains a general description of the Act and the second part deals with those provisions which place restrictions on the powers of the Manitoba Ombudsman and thereby reduce the effectiveness of that office. They may be interpreted as evidence that the government was unwilling to permit the Ombudsman to conduct investigations likely to cause embarrassment. If this is the explanation, the first Ombudsman will take up office under conditions different from those applying to his counterparts elsewhere.

I

The Act subjects all government agencies, other than those named in s.18 (principally the legislature, the executive council and the courts), to the jurisdiction of the Ombudsman. The definition section removes some of the doubts which arose under the corresponding section of the Alberta statute; that section was amended soon after its enactment to include the Workmen's Compensation Board, an entity different in some respects from the usual government departments. But the Ombudsman is by s.15 given power to investigate any decision, recommendation, act or omission "relating to a matter of administration" in a government department or agency or by an officer of such a department or agency. This phrase, which awaits judicial interpretation in Alberta, may be held to confer narrower powers than those which have been asserted in New Zealand and elsewhere. It is to be hoped that a narrow construction will not be adopted and thereby exclude from investigation any powers which are exercised by government agencies after a hearing, loosely termed "judicial", and those powers which may be described as "legislative" in the sense that circulars issued by a Ministry were termed legislative in *Blackpool Corporation v. Locker*, [1948] 1 K.B. 349, [1948] 1 All E.R. 85. A narrow construction which restricted the Ombudsman to the review of "administrative" powers only would substantially reduce his competence and curtail, if not eliminate, investigatory powers over such bodies as the Workmen's Compensation Board.

An amendment made during the progress of the Bill through the legislature provides that the Ombudsman (and the Acting Ombudsman) are to be appointed by the Lieutenant-Governor in Council on the advice of the Assembly. He is an officer of the legislature and holds office (unless he resigns or is removed or suspended) for six years. He is eligible for appointment for one further term of six years. These provisions will probably be found to be satisfactory, both to the holder of the office and to the legislature. The number of persons with the necessary qualifications will be small and an appointment is unlikely to be offered to a person younger than 50 years of age. The appointee can, therefore, regard appointment as the culmination of his career and not be concerned that he would have difficulty resuming his earlier position. The salary of the Ombudsman is fixed at \$20,000 (which is reasonable in relation to comparable offices) and it may not be reduced except by a resolution passed by a two thirds majority. Members of the Ombudsman's staff, but not the Ombudsman himself, are subject to the Civil Service Act.

The Ombudsman and his staff, who will have access to government files, take an oath of secrecy, but a necessary exception is made in s.12(2) under which the Ombudsman may disclose in any report made by him "any matters which he considers necessary to disclose in order to establish

grounds for his conclusions and recommendations." It is to be hoped that this will be given a wide interpretation because it has been found that much useful information on the policies and practices of the civil service, not elsewhere available, is to be found in the reports of the New Zealand and Alberta Ombudsmen.

The Ombudsman may make investigations either on receipt of a written complaint or on his own initiative; the latter power has already been found useful in Alberta where the Ombudsman made an investigation of conditions in mental hospitals following a newspaper story. In addition, the Ombudsman may be asked to report on petitions or other matters referred to him by a parliamentary committee or on "any matter relating to administration" referred to him by the Lieutenant Governor in Council. This latter provision would enable the Ombudsman to conduct inquiries that might otherwise have been the subject of a commission of inquiry.

As already stated, the Ombudsman may not investigate decisions, recommendations, acts or omissions of the legislature, the Executive Council or the judiciary. Also excluded by s.18 are awards of arbitrators made under the Arbitration Act and decisions, recommendations, acts or omissions in respect of which there is a right of appeal or objection or a right to apply for review on the merits of the case, whether or not that right has been exercised. But the jurisdiction of the Ombudsman is preserved where he is satisfied that it would have been unreasonable in the particular case to expect the complainant to have resorted to the court or tribunal, but in that case the investigation shall not commence until the period for the exercise of the right has expired. No restriction similar to that made in New Zealand and Alberta under which the Ombudsman may not investigate decisions of Crown counsel is imposed, but, as will be seen, much more serious restrictions can be imposed by Ministerial decision in Manitoba to cover these and other cases.

The Ombudsman will begin most of his investigations on receipt of a written complaint. Complaints by those in government institutions, including mental hospitals and gaols, must be sent to the Ombudsman unopened. This is a necessary provision. A recent Alberta investigation conducted by the Ombudsman disclosed that a respectful petition addressed by an inmate of an institution to the Lieutenant-Governor was opened and retained by the authorities without the knowledge of the petitioner. The Ombudsman is authorized to decline to investigate if the complaint is delayed more than twelve months, if it is frivolous or if the complaint is not seen to justify an investigation. In fixing the twelve months as a bar to a complaint no express provision is made for any back-log that might exist, but the Ombudsman will presumably use his discretion in favour of the complainant in those cases where the complaint

is meritorious. If he decides to investigate, the deputy minister or administrative head must be notified of the Ombudsman's decision. His investigation is to be conducted in private but provision is made for hearings. There is a slight conflict between these provisions (ss.26 & 27), but the intention is clear that any hearing should not be open to the public. The Ombudsman is given wide powers to secure all necessary information; he has a power of subpoena in respect of persons and documents and may examine witnesses on oath. But as will be shown later, restrictions on disclosure may be imposed by the Attorney-General under s.31 which is drafted in such wide terms that the investigation of the Ombudsman would be seriously inhibited by the use of that provision.

The Ombudsman is given access to ministers, deputy ministers and departmental officers concerned with an investigation. It will probably be found that those complaints which are found to be justified will be rectified in the course of these discussions and that a formal report or recommendation will in most cases be found to be unnecessary. However, if a formal recommendation is found to be necessary, it may relate to a decision, recommendation, act or omission which in the opinion of the Ombudsman appears to have been, "contrary to law, or unreasonable, or unjust, or oppressive, or improperly discriminatory, or in accordance with a practice or procedure that is or may be unreasonable, unjust, oppressive, or improperly discriminatory, or based wholly or partly on a mistake of law or fact, or wrong." He has similar powers in respect of a power or right which has been exercised "for an improper purpose, or on irrelevant grounds, or on the taking into account of irrelevant considerations, or that reasons should have been given." These are extremely wide powers and it is clear that the Ombudsman is not concerned solely with the legality of the act or omission; he is entitled to intervene even if the act or omission is in accordance with the law, policy or administrative practice where the decision is nonetheless "wrong". This has frequently been the basis of a report by the New Zealand and Alberta Ombudsmen.

Where a recommendation has been made in terms of s.36, the department or agency may be asked to notify him within a specific time of the steps it has taken or proposes to take to give effect to the recommendation. If no action which the Ombudsman regards as adequate or appropriate is taken, a report may be made to the Lieutenant Governor in Council. This course, judged by Alberta's experience, will be exceptional. Nearly all justified complaints will have been rectified before this stage is reached. The pressure that can be exerted by an independent Ombudsman is likely to be found almost irresistible by departmental officers whose actions have been the subject of an investigation.

The Ombudsman is to make an annual report to the legislature; these reports should contain statistics enabling those interested to identify

the departments in respect of which complaints have been made and the number investigated and found to be justified. Sufficient details should also be given of a sample of the complaints as has been done by the New Zealand and Alberta Ombudsmen. The Ombudsman is also entitled to publish reports in relation to particular cases, even though they may not at that time have been included in his annual report. This will enable the Ombudsman to give publicity, particularly when the legislature is in recess, to investigations attracting great public interest and anxiety. The Alberta Ombudsman has already used a similar power to allay public concern.

II

The provisions discussed in the first part of this note are essentially the same as those contained in the New Zealand and Alberta statutes. But the provisions about to be discussed are not comparable with any provisions in those statutes and must raise doubts concerning the willingness of the Manitoba government to have its administration exposed to the independent and occasionally critical eyes of the Ombudsman. There are four provisions to which attention is directed.

Perhaps the most disturbing provision is s.19(1) which obliges the Ombudsman to discontinue an investigation whenever the Attorney-General certifies that the investigation "would be contrary to the public interest." The Attorney-General is necessarily the sole judge of the circumstances when such a certificate should be issued and no guidelines as to what constitutes the public interest are provided. Clearly, this power could, but one hopes will not, be used to stifle an investigation likely to be embarrassing or inconvenient. Bad faith need not be assumed. There are many instances of decisions taken by politicians in perfect good faith which have prevented a full investigation of the facts being made. The effect of s.19(1) is slightly reduced by s.19(2) under which the Ombudsman must include a brief description of the circumstances in which a certificate from the Attorney-General was issued in his next annual report. This would enable the opposition parties to raise and attempt to have debated the justification for the decision by the Attorney-General to issue a certificate.

A further restriction on the investigatory powers of the Ombudsman is contained in s.31(c) under which the Attorney-General can certify that the giving of any information, the answering of any question or the production of any document might involve the disclosure of matters of "a secret or confidential nature, or the disclosure of which would be injurious to the public interest". If a certificate is issued, the Ombudsman may not require that the information or answer be given or the document be produced. A provision of this kind would be justified to protect secret informa-

tion relating to external affairs, defence, security or similar matters, but the province has no competence in these fields. It would have been better to have placed restrictions on the investigatory powers of the Ombudsman in such areas as the work of crown legal advisers as well as the proceedings of cabinet and its committees, which should be privileged, than to have given such wide discretionary powers to the Attorney-General. Again, there is a modest concession to the wider public interest in that the Ombudsman is required to report on those cases where a certificate is issued, thereby enabling the legislature to debate the issue if it chooses.

There are two other provisions which restrict the investigations of the Ombudsman. Section 23(1)(c) enables the Ombudsman to refuse to investigate a complaint if "in his opinion, upon a balance between the public interest and the person aggrieved, it should not be investigated or the investigation should not be continued." Section 23(2) is difficult to reconcile with s.36. Under the earlier provision where the Ombudsman "is satisfied that the decision, act or omission is not clearly wrong or unreasonable, the Ombudsman shall make no further investigation of the matter and shall report to the complainant that he is so satisfied." The effect of this provision is to give a department the benefit of the doubt; it speaks of what has been done or omitted being "not clearly wrong or unreasonable". In other words, merely because the Ombudsman might believe that a different decision could or should have been taken, this will not justify his continuing his investigation. But in terms of s.36(1), "after making an investigation" (including one discontinued under s.23(2)? he is empowered to make a report if the decision is *inter alia*, unreasonable, unjust, oppressive, improperly discriminatory, in accordance with a practice or procedure which is or may be unreasonable, unjust, oppressive or improperly discriminatory or wrong. It is to be hoped that even if an investigation is discontinued under s.23(2), the Ombudsman will, in proper cases, make a report in terms of s.36. Both the New Zealand and Alberta Ombudsmen have taken the position that lawfulness is not the only yardstick by which decisions are to be measured and that their powers include comment on decisions, which though lawful and not unreasonable, may nonetheless be unfair or wrong.

As both the New Zealand and Alberta experience has shown, the terms of the legislation creating an Ombudsman are important, but possibly even more important is the choice which the legislature makes of the first appointee. An Ombudsman possessing the qualities of administrative experience, independence, tact and common sense, can succeed where others not so well qualified will fail. It is to be hoped that a satisfactory appointment can be made and the foundations laid for an independent scrutiny of administrative powers. The general public, who have come to expect a great deal from the new institution, can be expected to react strongly

against the appointment of an Ombudsman who is unlikely to be able to withstand the pressure from the executive that he should not rock the boat.

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THE INTERPRETATION OF STATUTES

The (English) Law Commission's report in June 1969 on the Interpretation of Statutes is the final version of cogitations extending over several years. Thirteen pages of introductory considerations (Chapters I, Introduction; II, the Scope and Nature of the Problem; and III, the Relevance of Comparative Material) are followed by 24 pages of text-book discussion (Chapters IV, the Functions of "Rules" and "Presumptions" in Interpretation; and V, the Context of a Statutory Provision). This latter chapter contains a discussion on so much of the "context" as is at present inadmissible in an English court, and leads on to another six pages (Chapter VI) of consideration of the possibility of providing "specially prepared material" other than the statute itself to help in the elucidation of its meaning. The remaining 7 pages are occupied with two special notes on treaties behind statutes and on delegated legislation, and with a Summary of Conclusions and Recommendations (Chapter IX), leading to a single-page draft statute on the subject.

Of the four sections of this draft statute, the first would allow attention to be paid to punctuation, side-notes and so on, and to any relevant document (including a treaty) within the formal notice of Parliament before the passage of the legislation. Subsection (2) deserves quotation:

"The weight to be given for the purposes of this section to any such matter as is mentioned in subsection (1) shall be no more than is appropriate in the circumstances."

Apart from being patronisingly otiose this subsection lends itself, by the ordinary grammatical principle of *expressio unius*, to the interpretation that less than appropriate weight may legitimately be given.

Section 2 prescribes preference for a construction in accordance with treaty obligations, and also for a construction "which would promote the general legislative purpose underlying the provision in question." "Underlying" presumably indicates that the purpose is not expressed, and will have to be discovered with the aid of the extraneous documents admitted by section 1.

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