

The Winds of Change Blow at the Ombudsman's Office

Keynote Speech by

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It's a real pleasure to be the closing speaker at the 2nd Annual Summit on Child and Youth Mental Health. I'm pleased to see that Children's Mental Health Ontario has shown a keen interest in the work of the Ombudsman of Ontario and hope you have had a fruitful couple of days of discussion and deliberation.

I was appointed Ombudsman of Ontario on April 1, 2005 and embarked on an ambitious program of reform and revitalization of the Office to once again make it relevant to provincial public policy. Today I will talk to you about the role of the Ombudsman as I see it, some of the reforms I have instituted in how we conduct business and the work that lies ahead.

The function of the Ombudsman is described in rather terse language in the *Ombudsman Act* as recommendatory in nature. Whenever, I've investigated an issue, I conclude that a decision, recommendation, act or omission appears to be contrary to law, unreasonable, unjust, oppressive, improperly discriminatory or just plain wrong.

At first blush, the authority of the Office over 500 government ministries, agencies, tribunals and corporations appears to be very broad. And it is. We process over 23,000 complaints per year. We also exercise a much more fundamental role. The Ombudsman is Joe Q. Public's gateway to the avenue of power. He is the ordinary citizen's friend in righting wrongs outside the legislative or judicial branches of the state. In our cherished democratic society, the wealthy can always avail themselves of the courts, which are already overburdened, to fix their problems with the state in an adversarial setting. The less wealthy can become impoverished by risking this route, and the poor are left out altogether. The Ombudsman is there to fill the void by providing free, independent, impartial oversight of governmental action or inaction.

Thirty years ago, in the 1975 Speech from the Throne, the intention of the government to create an Ombudsman's Office was captured in the following words:

"As a safeguard against the growing complexity of government and its relationship with the individual citizen, the government will establish the Office of the Provincial Ombudsman to ensure the protection of our citizens against arbitrary judgments and practices."

The Ombudsman is therefore integral to the provincial civil rights protection apparatus even though he is outside the governmental net.

As an independent officer of the Legislature, the Ombudsman is also an indispensable tool for parliamentarians who strive for good government and administrative efficiency. In 1970, the Supreme Court of Alberta said:

“... as an ultimate objective, the Ombudsman can bring to the Legislature his observations on the misworking of administrative legislation. He can also focus the light of publicity on his concerns as to injustices and needed change.”

There are many ways in which the Ombudsman safeguards individual rights and enhances the democratic process in Ontario by investigating, recommending and reporting. One can investigate, recommend and report by shuttle diplomacy. This is a less threatening, less thorough, more cursory “looking into” an issue that may be quite appropriate, even desirable, for some matters. The vast majority of our cases follow this route. For example, a citizen may feel aggrieved if denied a provincial license he believes he is entitled to receive. A sensible approach, may be to approach the responsible official in the provincial government to obtain an explanation. The citizen may not qualify to receive his license. Or the functionary may have overlooked facts. Either way, the investigation will be low-key and uninvolved and have as much or more chance of succeeding quickly than a more intrusive approach.

There are cases, however, where the low key, diplomatic approach will be unsuccessful. Cases where the government appears to be immovable and intransigent. Where the issue is hotly contested. Where the facts are disputed. Where there appears to be a strong *prima facie* case of systemic flaws causing great injustice. Where a solution appears distant and elusive. For these cases, there is no substitute for a field investigation.

Such was the case of *Between a Rock and a Hard Place*, an investigation into complaints that parents were being forced to place their children with severe disabilities in the custody of Children’s Aid Societies to obtain necessary care. This was the first field investigation of its kind in the 30-year existence of the office.

Why was it necessary to invoke the more intrusive means of a field investigation as opposed to adopting a more casual approach to case resolution? Simply put, there was an abominable failure by government to take appropriate action. Consider this:

- In 2000 and again in 2001, the Ministry’s own Child Advocate rang the alarm bells by publishing two reports that proved unfortunately prophetic, warning officials that

changes in practice by the Ministry would produce large cracks in the system through which special needs children would fall. Hundreds of parents with special needs children would be placed in the position of having to compromise their custody and parental rights and endure the infamy of having their children enter the child welfare system;

- 4 years ago, in 2001, my predecessor, who conducted a review of the same issue concluded that one of the contributing factors was the lack of residential facilities for children with special needs;
- Faced with the Child Advocate and the Ombudsman's informal findings that parents were manufacturing protection issues to have the CAS take over the custody and care of their children, the Ministry's response was vapid and unsympathetic. One undertaking, for example, was to update the Ombudsman every six months on the progress of the Ministry in addressing the issues raised;
 - Upon assuming office on April 1, 2005, my morning mail greeted me with the latest "6 month" letter dated March 31, 2005. It struck me as the mother of all bureaucratic responses – we're studying the issue. It was a jargon-laden missive which would prove all too familiar. Let me quote: "As you are aware, our work to date has been related primarily to children with special needs, in group setting. However, in keeping with the goals of the Ministry of Children and Youth Services to provide families with integrated and seamless services, a decision has been made to examine the broader children's residential system";
 - My curiosity was piqued. I pulled the file. What I saw astonished me. There were several "6 month" letters in the file. Each "6 month" letter served as a template for the next, with no real movement in providing a solid solution to the problem. More troublesome was the lack of recognition of the urgency of the problem and the suffering inflicted by every day of stalling.
- The obstacles listed by the Ministry for not solving the plight faced by the affected parents and families appeared to be standard government issue: we can't afford it, there will be a floodgates of cases if we act, we shouldn't let the squeaky wheel get the grease and the complainants were milking the system;

- To summarize why, in my book, this case warranted a field investigation: There had been failure of shuttle diplomacy to fix years of inaction on a serious systemic issue causing enormous prejudice with no likelihood of resolution otherwise;
- Finally, the then Minister of Children and Youth Services appeared to be unaware that the prejudice complained of was still happening in her Ministry. In May 2005, she declared in the Legislature: “no family in this province, in this day and age, should have to consider giving up their children to get help.”
- With our investigation we proved that this was happening regularly and we debunked the reasons for inaction cited by ministry officials.

Since this case was completed, we also conducted two other investigations. Our second foray into field investigations was prompted by another complainant who was experiencing an equally frustrating plight. In *From Hope to Despair*, we chronicled the experience of Christopher Comeau-D’Orsay who suffers from Batten’s Disease, a cruel degenerative condition that was destroying his brain and would eventually kill him. He had turned to the Ministry of Health and Long Term Care for help in funding his rare disease under existing programs but had been turned away. Why did we shy away in this case from shuttle diplomacy? Simply because the complainant was at the end of his rope. Having exhausted all his resources, he was doomed. The Ministry of Health and Long Term Care was quite prepared to continue treating Christopher’s symptoms with limited success and at a cost of \$20,000 a year but were refusing to fund what neurologists were calling a miracle drug which had not only halted the disease but reversed its ravages, at \$5,000 less a year, wrongly claiming that the issue was one of federal jurisdiction which was patently false. To add insult to injury, his family was told to throw themselves on the mercy of the pharmaceutical company, a for-profit conglomerate that bore no responsibility to even answer their request.

Finally, we investigated the extent to which the province tests newborns for a variety of diseases in a report we called *The Right to be Impatient*. There are 130,000 births in Ontario per year. The list of tests had not been updated for 27 years. For years, our province has been guilty by omission in the deaths and disability of 50 babies a year by maintaining a newborn testing regime which is worse than any of those found in developed countries. We rate lower than some third-world countries in the testing of disease at birth

that, if detected, could be virtually cured by a simple change in diet. Instead, we sentence those babies to death or an agonizing life of pain and disability. The cost for bringing the system up to speed? A mere few millions dollars, arguably much lower than the cost of caring for manufactured disabled citizens. Why was a formal investigation required? The Ministry of Health and Long Term Care's historic neglect and bureaucratic lethargy successfully stonewalled complainants, activists and professionals for years. Even the Coroner of Ontario had warned the government repeatedly of his concerns following post mortems on dead babies. All to no avail. Within days of announcing our field investigation, the Ministry announced that newborn testing would increase from 2 to 21 tests. Recently, 6 more tests were announced, bringing the total to 27, closer to the internationally accepted norm. The irony is that the best technology for newborn testing is exported from here in Toronto to all around the world. When we contacted the company that manufactures the necessary equipment, it was in the process of finalizing a shipment to Mexico.

We are now in the process of investigating the Municipal Property Assessment Corporation for the way in which it conducts property assessments in Ontario. Specifically, we are investigating the transparency of the assessment process and how the Corporation deals with cases where citizens successfully challenge the assessed value of property. We announced the case as we believed we had received a large number of complainants, 75 of them, dealing with these issues which we believed were compelling enough. In view of the fact that this would be a systemic investigation of a hotly contested issue, we chose to conduct the investigation in the field. Within weeks of announcing our investigation, we received over 2500 similar complaints from across Ontario. You will have to stay tuned. I intend to report my findings and recommendations early in the new year.

The introduction of this type of field investigations in the Office of the Ombudsman is one of the first initiatives I undertook after taking over the post on April 1 of this year. *Between a Rock and a Hard Place*, *From Hope to Despair* and *The Right to be Impatient* speak loudly of the unique function served by this approach in helping citizens with their problems and in demonstrating our value. An approach so new to the office required a quick retooling and reorganization of our investigations section. I created the Special Ombudsman Response Team (SORT) whose chief mandate is to conduct extensive field investigations into high profile, sensitive issues when there is a *prima facie* case in favour of intervention and when shuttle diplomacy has failed to resolve the issue. The head of SORT was

recruited from outside the office and is a highly skilled professional investigator. SORT investigations are methodical. Investigators are required to develop a detailed plan, interview witnesses in the field, and obtain documents and physical evidence as necessary. Each investigation has strict milestones and deadlines. My initial objective is to conduct 6 SORT investigations per year. The vast majority of cases we process every year will continue to be investigated the “soft” way, using diplomacy and good will, without publishing a concluding report.

The new approach to case management has necessitated profound internal changes to the Ombudsman’s Office. Some were designed to “free up” resources to reallocate priority to field investigations of systemic issues. Although systemic investigations appear to have been welcomed by parliamentarians and stakeholders, the budget for the Ombudsman’s Office has not only not kept up with the times, but has lagged sadly behind. Our budget in 1975 was 8.1 million dollars and today it is 9.3 million dollars. In 30 years, our budget has only increased 15%, while the average rate of inflation for the same time period was just under 270%! The provincial bureaucracy has expanded considerably since 1975 while we have had to weather years of budget cuts and flat lining with personnel cutbacks of 30% compared to our numbers in 1975. Oversight of public administration has consistently been the fodder of political campaigns in the last 30 years. What has trailed is the sustained financial commitment to match the rhetoric.

As we return the Ombudsman’s Office to its rightful place as Ontario’s watchdog and as a main player in provincial public administration, it will be necessary to turn our minds to whether the office is sufficiently funded. Even an adequate budget would be infinitesimal compared with government spending. The return on the investment can be gargantuan. Just ask the Special Needs parents or the 130,000 families who have children born every year and who will soon have the confidence of knowing that their newborn will be tested for 27 diseases instead of the paltry two.

Ontario’s first Ombudsman, Arthur Maloney, who in legal circles is still remembered as a leading jurist of his time, did not mince words when it came to budgeting. In 1979 as the office was only 4 years old, he produced a 600-page blueprint calling for an overhaul of the Ombudsman’s mandate and noted signs that the office was already falling behind in its budget, a remark that proved prophetic. He said: “Obviously, an office structured in accordance with the (principles of ombudsmanship) cannot be done on the cheap. Indeed, I

do not think it an overstatement to say that an ombudsman's office not properly budgeted, not properly staffed and not properly backed by those who brought it into being amounts to nothing more than a front and a façade. The public are led to believe that they have a crutch on which to lean when in fact they have nothing at all.”

The budget is not the only casualty of the last 30 years. Once a leader in the field of oversight, the jurisdiction of the office has failed to keep pace with the times and with the evolution of oversight in other provinces. It is difficult for governments to step up to the plate, champion oversight and make sure it continues to evolve with the times. It requires deft handling of the anxieties of public servants who do not always feel comfortable with someone looking over their shoulder. It also means that governments may be forced to stray from their prepared script of public policy announcements. Public censure by the Ombudsman may mean that some issues that were at the bottom of pile may reach the top faster. That may not be a bad thing, but governments are never fond of having issues they did not want to address suddenly foisted on them. Reinforcing oversight requires a clear vision and strong political leadership.

The *Ombudsman Act* was in 1975 a thoughtful, avant garde piece of legislation. It provided broad and powerful investigative tools over what was then a large constituency. But our social welfare net was still developing back then. In 2005, the net is cast very wide and so are people's expectations of public institutions. Over the last 30 years, the Province of Ontario has failed to meet the citizens' increased demands and expectations for strong oversight and accountability of public service sectors.

What is required is recognition and championing by the provincial government of “one-stop oversight” over crucial bodies and institutions caring for the most vulnerable in our society who do not enjoy the benefit of independent oversight enjoyed by the rest of us. They are the sick, the young and the elderly. Stories abound in the media about problems with services available through hospitals and long-term care facilities. In Ontario, there is no independent oversight of these institutions and the public has no place to go for effective resolution of complaints. If you live in British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Saskatchewan and the Yukon you are in luck. If you have complaints about hospitals and residential care facilities, you can access your friendly provincial Ombudsman. There is currently a bill before the Quebec National

Assembly to extend the provincial Ombudsman's mandate to oversee hospitals and many social services.

Another significant service area in which there is no independent oversight model is the provincial education system. But if you're lucky enough to live in British Columbia, New Brunswick, Newfoundland and Labrador, Nova Scotia and the Yukon you can complain to the friendly provincial Ombudsman about your school boards.

Finally, an important flaw in our mandate is the lack of jurisdiction over Children's Aid Societies. Despite this well-known gap in our mandate, I still received over 300 complaints last year about CAS. In at least one province, the responsibility of administering child protection is retained exclusively by the provincial government. In most jurisdictions, there is shared responsibility between government and private agencies. Ontario is the only jurisdiction in which child protection services are carried out solely by private agencies.

In British Columbia, Manitoba and Nova Scotia, the Ombudsman has jurisdiction over complaints about private protection agencies. In most provinces, the Ombudsman has jurisdiction to investigate complaints about the provincial government's administration of child welfare. For example, in Nova Scotia, legislative amendments in 2004 provided that the Ombudsman had jurisdiction over child welfare agencies and child-caring facilities licensed under the Child and Family Services Act.

Once again, Ontario's at the back of the oversight pack. Here, there is substantially less accountability with respect to the provision of child protection services, in that there is no independent investigative oversight of children's aid societies. More importantly, Bill 210, which proposes amendments to the Child and Family Services Act, would claw back the very limited oversight we now have over a segment of Directors' reviews, leaving the CAS without any independent oversight. Closing the small window we have to oversee the CAS. Rather than reduce independent oversight to nothing, the government should seize the opportunity to play catch up to the other provinces. It is time now, to modernize oversight. It's time to move to the front of the pack.

It has been a very busy first 8 months on the job in which we have redefined our way of doing business. We are continuing the task of re-aligning our personnel and internal processes to maintain the momentum we quickly achieved. Shortly, we will be completing the infrastructure changes with a fresh logo, a new office location and a reinvigorated work

force. In the coming months, we will step up our efforts at inviting a public dialogue over the need to modernize the Ombudsman's mandate. Not only has the mandate not been revisited in over 30 years (except for shortening the tenure of the Ombudsman from 10 to 5 years), Bill 210 will completely remove the CAS from the ambit of the Ombudsman. The independent, impartial oversight provided by my office is not always easy medicine to swallow but, as we have recently demonstrated, it is effective medicine.

I leave you with a reflection from the Supreme Court of Alberta. In commenting on the recommendatory nature of the Ombudsman's work, the Court stated:

"It must, of course, be remembered that the Ombudsman is also a fallible human being and not necessarily right... If his scrutiny and observations are well-founded, corrective measures can be taken in due democratic process; if not, no harm can be done in looking at that which is good."

Thank you for your attention.