

Ombudsman Ontario and Mandate Modernization: What are the Chances?

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Introduction

Democratic governments, both well established and relatively young, are increasingly making use of the Ombudsman as part of the machinery of government and as the citizen's defender. This Officer of Parliament, who protects citizens against arbitrary authority, works to make government actions more open and accountable to the public therefore enhancing their democratic nature. While the origin of the modern Ombudsman dates back to 1809, the Office did not gain worldwide popularity until much later. Since the 1970s the Ombudsman has been quickly emerging in countries around the world, as a standard part of democratic political systems.

Ontario was one of the first North American jurisdictions to introduce an Ombudsman as part of the government framework, providing academics and media alike with an early example of how such a resource would and could be applied in our system. In addition paving the way in this respect, Ontario also made history by appointing Arthur Maloney as the first Ombudsman of the province. Maloney proved to be quite a memorable figure, as he aggressively and tirelessly fought to ensure that the Ombudsman would become and remain a permanent and important figure in the provincial political system.

The current Ombudsman, André Marin, finds himself in familiar territory as he has made mandate modernization one of his primary goals. Increasing the mandate of the Ombudsman, which is prescribed in the *Ombudsman Act* and has been little changed since it was first introduced in 1975, is an important and undoubtedly reasonable ask. In addition to having an out of date Act, the Ontario Ombudsman also has significantly less authority than similar Offices in other provinces in the country. However, despite Marin's strong arguments and aggressive calls for enhanced jurisdiction, Ontario will likely not have an Ombudsman with increased powers in the near future. The political implications and ramifications are simply too great for any government to justifiably increase the mandate of what can arguably be described as one of the sharpest thorns in the government's side.

Spread of the Ombudsman

The origin of the modern Ombudsman is found in the Justitieombudsman (ombudsman for justice) of Sweden, which was established in 1809. The Office did not spread to other jurisdictions until the twentieth century when other Scandinavian countries adopted the scheme, including Finland in 1919, Denmark in 1955 and Norway in 1962. In the early 1960s the popularity of the Ombudsman began to increase and was established in various Commonwealth and primarily European countries.

By the mid-1980's, there were only about twenty-one countries with Ombudsman Offices at the national level and about six other countries with such offices at the provincial/state or regional levels.¹ However, in recent years, with the transition of many countries to democratic structures of governance, there has been a significant increase in the number of Ombudsman offices around the world. In the mid-1990s there were 180

Ombudsman offices in the world, with 65 at the national level, 70 provincial, state or regional, and 45 at the municipal level.² By 2004, the Ombudsman office existed in approximately 120 countries at a national level alone.³ The Ombudsman plan has also been implemented at the super-national level, as the European Union has created a European Ombudsman (E.U.) under the Maastricht Treaty, appointing the first E.U. Ombudsman in 1995.

Ombudsman: Essential Elements

The Ombudsman is essentially an officer of Parliament who investigates complaints brought forth by citizens who feel they have been mistreated by government departments. If a complaint is justified, the Ombudsman will seek a remedy on behalf of the citizen. Typically an Ombudsman has the ability to make an objective investigation into complaints from the public about the administration of government. An Ombudsman often has the ability to initiate an investigation even without having a registered complaint. The International Ombudsman Institute, which was established in 1978 as a worldwide organization of Ombudsman Offices working to promote the concept and encourage its development, identifies the central powers of the Ombudsman as including:

1. to investigate whether the administration of government is being performed contrary to law or unfairly;
2. if an objective investigation uncovers improper administration, make recommendations to eliminate the improper administrative conduct; and,
3. report on his activities in specific cases to the government and the complainant and, if the recommendations made in a specific case have not been accepted by the government, to the legislature. Most ombudsmen also make an annual report on their work to the legislature and the public in general.⁴

The Ombudsman typically does not have the power to make decisions that are binding on governments; rather he/she has the ability to encourage change through the provision of recommendations. These recommendations are founded and supported through the investigations made into complaints received from citizens. They must be based on a thorough investigation of all of the facts, taking into account all of the perspectives and including an analysis of all of the issues involved.⁵ It can be argued that this inability to force change may be one of the Ombudsman's greatest strengths rather than a weakness. While a coercive power could possibly result in reluctant change of a particular decision or action, the power of moral suasion can elicit change that challenges a way of thinking, resulting in a benefit for future potential complainants.⁶

A central principle of the Ombudsman is the independence of the office from the executive/administrative branch of government. The Ombudsman is intended to be a non-partisan and impartial figure, to ensure that he/she "is interested neither in embarrassing nor in protecting any particular party in power, and can be trusted on all sides – by citizens, politicians, and civil servants."⁷ This impartiality that works to maintain the integrity of the Office also ensures the credibility of the Ombudsman's

investigations and recommendations to the government and the public. For the Ombudsman to succeed in encouraging real change, the respect of the government must be secured through this impartiality and reasonableness. Without this, the office and the recommendations it puts forth will be ignored or even ridiculed.⁸

While generally Ombudsmen in the public sector enjoy jurisdiction over a broad range of government organizations, the extent of this authority varies in each federal or regional/provincial/state Office. In some jurisdictions that range of authority can include the judiciary, police and military; while in other countries these (along with other areas) are specifically excluded from the Ombudsman's mandate. For example, in Ontario and other provinces in Canada, the Ombudsman is prohibited from launching investigations into government agencies that are either fully or partially funded with public dollars, including hospitals and universities. Many countries have created Ombudsmen to deal specifically with only one aspect of government, such as police services, the armed forces or access to information. This is the case in Canada at the federal level, where there is not found one overarching Ombudsman but rather a compellation of various independent officers that have authority over one specific aspect of government.

What is consistent with Ombudsman offices around the world is that they are all responsive to a similar phenomenon, the tendency and potential for bureaucracies to be insensitive toward the individual. "Delay, indifference, rudeness, negligence, arbitrariness, oppressive behaviour, arrogance and unlawfulness can be structural shortcomings of all hierarchical institutions in which employees receive their directions, authority and rewards from above."⁹ One of the fundamental components of an Ombudsman's mandate is to turn the attention of the bureaucracy toward the individual citizen; essentially it is the individual citizens who the civil service is meant to serve.¹⁰ This challenge associated with bureaucracies is found in various structures of democratic systems throughout the world, thus the need and spread of the Ombudsman in democratic societies in recent times.

The Ontario Ombudsman

Established by the Ontario Legislature in 1975, the Office of the Ombudsman's powers and authority are contained in legislation known as the *Ombudsman Act*. Following the passage of the Act, Arthur Maloney was sworn in as the first Ombudsman of Ontario. However, there was effort to persuade the government to establish an Ombudsman Office in Ontario much earlier, since the early 1960s. In 1965, Vernon Singer, MPP for Downsview, introduced a Private Member's Bill proposing the appointment of a "Parliamentary Commissioner" to investigate administrative decisions and actions of government officials and agencies. The Bill was introduced by Singer in the following ten consecutive sessions in the Legislature. During that time, Ombudsman Offices were established in six other provincial governments, including: Alberta and New Brunswick (1967), Quebec (1968), Manitoba and Nova Scotia (1970) and Saskatchewan (1972). Since 1975, with the appointment of Arthur Maloney as Ontario's first Ombudsman, there have been five other Ombudsmen in the province.

In many ways the Ontario *Ombudsman Act* is similar to the Ombudsman statutes in other Canadian jurisdictions. The provincial plans all have common features that are based on the New Zealand pattern model.¹¹ Similar to the Auditor General, the Ombudsman is appointed for a term that does not coincide with that of the government. In Ontario this term is set at five years, with the possibility of renewal. As an Officer of the Legislature, the Ombudsman can only be removed from his post by the Legislature.

The function of the Ombudsman, as ascribed in legislation, is to investigate any decision or recommendations made or any act done or omitted in the course of a governmental organization affecting any person or body of persons.¹² Governmental organization is defined as a Ministry, Commission, board or other administrative unit of the Government of Ontario, including any agency thereof. As a result of this definition, many significant public services, primarily found of the MUSH (municipalities, universities, schools and hospitals) sector, are not within the Ombudsman's jurisdiction to investigate. This, as will be more thoroughly assessed in the pages to follow, is the central and most controversial issue now facing the provincial Ombudsman, as expanding the jurisdictional authority has been one of Marin's prime objectives since taking Office.

The Act further enables the Ombudsman to make an investigation on a complaint made to him by an affected person or by an MPP to whom a complaint was made.¹³ He also has the ability to launch investigations of his/her own motion.¹⁴ However, before investigating any matter, the Ombudsman must inform the head of the governmental organization that would be affected by such an investigation.¹⁵ In conducting an investigation, the Ombudsman may obtain information and make inquiries as he/she deems fit, and may also consult any Minister on any investigated matter.¹⁶ Upon completion of an investigation, if the Ombudsman has found that a discretionary power was exercised for an improper purpose or irrelevant grounds, the findings and recommendations shall be reported to the appropriate governmental organization.¹⁷ The Act also states that if no action is taken by the governmental organization in question within a reasonable time-frame once a report is made, the Ombudsman then has the authority to send a copy of the report and recommendations to the Premier and if desires report the matter to the Legislative Assembly.¹⁸

When first established, the Ontario Ombudsman plan included a select committee of the legislature appointed to review the Ombudsman's reports and to make general rules for his guidance. This was a unique feature found in Ontario, directly connecting the Ombudsman with the Legislative Assembly. The Committee was famously known for having some heated battles with Ombudsmen, particular in the first years of its existence. Maloney created controversy with Committee members over his large budgetary requests and staff, which grew to about 140 strong.¹⁹ The Committee did not stand the test of time however, and was eliminated in the 1990s.

Section 11 of the *Ombudsman Act* states that the Ombudsman shall make annual reports regarding the affairs of the Office to the Speaker of the Assembly, who will in-turn bring the report before the Assembly. In the past, Ombudsmen in Ontario have taken this to mean that they are simply to provide one, annual report outlining the

investigations made throughout that year. However, Marin has employed a more liberal interpretation of the Act and has taken advantage of what he believes is within the Ombudsman's mandate, making special reports to the Assembly. He has acknowledged the importance of publishing periodic reports as a means of leveraging influence of the government. According to Marin, if he had accepted the position of his predecessors and only published Annual Reports, he would have lost one of his most powerful tools as a watchdog – “the ability to bark publicly.”²⁰ This has worked to increase the Ombudsman's profile as it enables him to get directly involved in pressing issues when they are still on the government's agenda and public radar, as was the case recently with the report on the Ontario Lottery and Gaming Corporation (OLG).

Such a broad and generous interpretation is also supported by court decisions at all levels in Canada, which have confirmed that a large, liberal and expansive interpretation of what falls within the Ombudsman's authority is consistent with the role of the Office.²¹ In addition to publishing special reports, Marin has also made use of this expansive interpretation of his role in undertaking his very first investigation as Ombudsman. This investigation involved parents having to give up custody of their special needs children to the child protection system because families were not being provided with the necessary supports. While the Ontario Ombudsman does not have oversight of child protection agencies, Marin was creative in his analysis of the complaints enabling his Office to investigate the issue. The complaints received, according to Marin, were not necessarily about the agency but rather about the government policy that was responsible for the custody issue.²² Upon investigation, the government accepted the recommendations put forth by the Ombudsman to reverse the custody arrangement in the parents' favour.

As already mentioned, the first Ontario Ombudsman set quite a precedent with respect to the role and high-profile nature of the Office in general. It is rumored that the Trudeau government in 1978 chose not to proceed with the implementation of an Ombudsman at the federal level because they were put off by the bold way in which Arthur Maloney was seen to be battling the Government of Ontario.²³ It is likely the fear of having an ombudsman criticize the government itself that has left Canada without an Ombudsman at the federal level.²⁴ It should be noted however, that while Ottawa has not created an ombudsman in the classical sense, there are several specialized complaint officers at the federal level created for specific purposes. These include the Commissioner of Official Languages, Correctional Investigator, Information Commissioner, Privacy Commissioner, the Public Complaints Commission for the RCMP, and the more recently introduced Veterans Ombudsman and the Federal Ombudsman for Victims of Crime.

As noted by Maloney himself in his address at the First International Ombudsman Conference in 1976, he believed that one of the most important powers available to the Ombudsman is the ability to request additional powers or jurisdiction. This power, also recognized also early on in the Office's life by Stephen Lewis, former Leader of the NDP of Ontario, was fully employed by Maloney. He expressed this intention in his address, adding that he would specifically seek “an enlarged jurisdiction to include authority to

investigate actions or omissions at the municipal level and actions or omissions by authorities that do not fall within the definition of ‘governmental organization’ contained in the *Ontario Act*, yet nevertheless are substantially funded from the public purse.”²⁵ Some thirty years later, we find the current Ombudsman making similar use of this power afforded him by legislation, seeking feverishly to have his jurisdictional authority expanded to include specific areas that are currently excluded from the definition of ‘governmental organization’.

Revamping the Office of the Ombudsman

André Marin took over as the 6th Ombudsman of Ontario in April 2005, after being selected by an all-party committee of the Legislative Assembly of Ontario. Soon after, Marin discovered that the Ombudsman Office was facing possible elimination. As he explains in a speech at the United States Ombudsman Association 27th Annual Conference, in an effort to contain the provincial budget a list of expendable programs had been developed by top government officials at the Premier’s request.²⁶ To Marin’s surprise, “The *Program* listed was Ombudsman, the *Category* was Program Elimination and the *Potential Savings* was [the Office’s] budget of 9.0 million dollars.”²⁷ Marin’s knee-jerk reaction to this threat of elimination was to get to work fast and completely reinvent the Office – and that he did. Over the past two years, Marin has revamped the operations and has as a result improved general opinion of the Office, convincing people of its value.

A new logo has been developed, along with a new motto – “Ontario’s Watchdog” and the Office has been moved to a more functional and efficient workspace. In addition to these relatively small changes, new communications and outreach programs have been established, the intake procedures streamlined, a new early resolution team has been set up in addition to new investigative strategies with a more disciplined approach in identifying trends.²⁸ One of the most significant initiatives undertaken by Marin is the development of the Special Ombudsman Response Team (SORT). As the central investigation team of the Office, SORT has the capacity to conduct investigations into high profile, complex and systemic issues.²⁹ The cases undertaken by SORT have broad systemic implications, often-times including a high level of public interest. Some of Marin’s most high profile reports were the result of investigations done by SORT, the recommendations of which have been positively received and generally implemented by the government.

Fighting for Mandate Modernization

Marin has spent a lot of his energy, since being named Ombudsman of Ontario in 2005, trying to convince the Government of Ontario to “rationalize the mandate” of his Office. In other words, Marin has been fighting to have the Ombudsman’s jurisdictional authority enhanced at every possible opportunity. As it presently stands, his jurisdiction is restricted to what is described in legislation as a “governmental organization”. The reality however, is that a significant amount of what government does and pays for with public dollars is carried out by non-governmental organizations acting as government

agents. Marin simply refuses to accept this restriction, as he does not understand the justification for what he describes as “arbitrarily limiting access to [the Ombudsman’s] inexpensive, informal, unobtrusive methods of problem solving.”³⁰ Some of the government agency bodies that the Ombudsman would like to have authority over include: children’s aid societies, municipalities, universities, school boards, hospitals and long-term care facilities.

Essentially, Marin is arguing for more power for his Office to ensure Ontarians to have the benefits of an effective government watchdog in their contacts with the government. This contact with government often happens when citizens are being educated or cared for in hospitals and long-term care facilities, which are currently outside of the Ombudsman’s scope of investigative abilities. Currently, because of the limit on the Ombudsman’s jurisdiction Marin argues there is not reliable and efficient oversight to ensure quality public services are provided to the citizens of the province is not being provided. Furthermore, he does not understand the logic for such restrictions on the Ombudsman’s authority. “The failure to give the Office of the Ombudsman of Ontario jurisdiction in these vital areas, where the need for humane government is omnipresent, is irrational . . . the failure of government to change the face of oversight to match the changing face of government itself.”³¹ He argues that there is a strong need for bureaucratic oversight, because as was the case over thirty years ago when the Office was first established, the government continues to grow larger and institutions more complex and impersonal.

To date Marin’s campaign for mandate modernization has been unsuccessful. Despite directly lobbying the government in many specific cases over the past two years, the provincial government has not moved in the area of enhanced jurisdictional authority. Marin has been particularly active over the past year with the development of the *Child and Family Services Statute Law Amendment Act, 2006* and the *Independent Police Review Act*. With the former Marin was not awarded oversight over non-government service providers that make the decisions about the protection of children, the welfare of families and the rights of families, as he had proposed to the government. The police review legislation continues to overtly exclude the Ombudsman’s authority, which Marin has not been able to reverse. Having outlined the fundamental components of an Ombudsman generally and specifically the experience in Ontario including the current fight for mandate modernization, this paper will now assess arguments both for and against enhanced jurisdiction.

The Need for Mandate Modernization

The Ombudsman’s authority, as set out in the *Ombudsman Act*, has not been revised since the Office was first created in 1975. Over the past thirty years however, the Government of Ontario has significantly changed. The Office was first created to help deal with the growth of governments, growth which has not ceased but rather continues to expand and has more recently been accompanied by a change in the form of government. The private sector is increasingly playing a more prominent role with respect to the delivery of public services, both directly through responsibility sharing

agreements and indirectly with a focus on private sector values. Many public services are being divested or delegated to different organizations and there is a significant blurring of the private/public sector divide among the professions; many of which are increasingly exhibiting public sector characteristics. The large degree of public subsidy to professional education and facilities, such as courts and hospitals, and also to legal aid and public health services is working to shift the professions toward the public end of the spectrum.³² Since many professional services form a significant part of what is considered public and because there is often market failure in the provision of these services, Ombudsman jurisdiction and oversight of their professional self-governing societies is in principle justified.³³

While these changes have arguably worked to make public services more sophisticated, they have at the same time made the government and interaction with government more complicated and impersonal.³⁴ Public services, whether they are delivered by a public bureaucracy or by a private firm, must meet a level of set standards. The delivery of these services must be accountable to both government and the individual consumer. While private services are held accountable by market forces, public services (even when delivered privately) are not subject to this market control. The Ombudsman is an independent quality control mechanism, providing the public sector with the accountability received in the private sector through the free market.³⁵ Therefore in order to ensure private deliverers of public services are held accountable to the public, contracts negotiated between government and private/independent entities should provide for Ombudsman oversight to ensure quality control. Despite the obvious need for a citizen's protector against arbitrary government authority in such an environment, the Ombudsman's jurisdictional authority has not kept pace with the growth of government, the actions of which the Ombudsman is meant to oversee.

In fiscal year 2005-06 the Office of the Ombudsman received approximately 24,000 complaints, and over 1,850 of these complaints from citizens were regarding issues that are not within Marin's mandate.³⁶ The Ombudsman is unfortunately unable to investigate these complaints because of the limits placed on his authority. Of those 1,850 non-jurisdictional complaints received by the Ombudsman, 50% were regarding municipalities and 23% were complaints about children's aid societies. The remaining 17% of the non-jurisdictional complaints received in fiscal year 2005-06 were about matters relating to hospitals and long-term care facilities, school boards and universities. It is apparent from the magnitude of complaints received by the Office, that there is both a need and the desire among the public to enhance the Ombudsman's investigative powers to include these currently excluded government services.

In addition to not keeping up with bureaucratic growth, Ontario has also fallen behind other jurisdictions in Canada with respect to the extent of the Ombudsman's mandate. When compared to other provinces, the Ontario Ombudsman's authority over non-governmental organizations is severely lagging behind. Appendix II provides a chart that includes seven areas in which that the Ontario Ombudsman does not have oversight, while at the same time revealing which other Canadian Ombudsmen have jurisdiction over these same key areas.³⁷ When examining the columns labeled "public hospitals"

and “child protection services” this disconnect with respect to the authority of Canadian provincial Ombudsmen is most apparent. In all of the other provinces the Ombudsman can receive complaints, seek resolution and launch investigations into issues concerning public hospitals. This is also the case with respect to child protection services, with the small exception of Newfoundland and Labrador where an independent Child and Youth Advocate can investigate complaints about issues relating to child protection matters. Similarly, Ontario and British Columbia are the only two provinces where the Ombudsman does not have oversight of the police complaints review mechanism. In the Yukon, while the Ombudsman does not have authority in this area the only police force operating in the region is the RCMP, which is a federal body. As is apparent from the chart and the brief analysis above, the powers afforded to Ontario’s Ombudsman have not kept pace with the authority exercised by his/her Canadian colleagues.

While the Ombudsman is restricted from investigating many of the already mentioned government agency bodies, the provincial Auditor General has the power to conduct general and value-for-money audits of these same bodies. This means that spending issues in these areas can be investigated but the delivery of the actual services to the public cannot be investigated by the Ombudsman. If the government believes that it is important to ensure proper spending, it should also follow that we must ensure these public services are also properly provided to the people of Ontario. This was highlighted by Marin himself in the speech delivered to the U.S. Ombudsman Association where he said, “He [the Auditor General] can audit whether a child protection agency in Ontario purchased the right kind of photocopier but I can’t investigate allegations that it gave custody of a 5-year-old child to two convicts who ultimately staved him to death, when one of the two had previously been held responsible for the death of her own child.”³⁸

The need for Ombudsman oversight in these areas becomes most apparent when analyzing the provincial budget. A significant percentage of government’s overall yearly spending flows to public sector services that the Ombudsman does not currently have investigative authority over. According to Marin, about 80% of provincial tax dollars is spent in zones that are not within the Ombudsman’s jurisdiction.³⁹ Furthermore, he believes that about 80% of the contact between people and the government is also occurring in these non-jurisdictional zones.⁴⁰ These sectors including health care, education and municipalities have substantial impact on the average citizen’s daily life. While the financial accountability is there because the Auditor General is able to launch accounting investigations in these sectors and the government agencies within, including hospitals, long-term care facilities and school boards. The interests of the average citizen in his/her interaction with government officials, is not being properly served as there is no real effective mechanism available for complaint and hopefully resolution to the concern.

While it is difficult to confirm if in fact 80% of provincial dollars are spent in areas outside the Ombudsman authority or that 80% of contact with people occurs in these areas, even a quick analysis of the Ontario Budget reveals that a significant amount of funding is flowing to these areas. In the 2007 Ontario Budget a list all of the Ministries is provided, including past expenses and expected expenses associated with each Ministry

for fiscal year 2007-08. Not surprisingly, spending in the health care sector represents the most significant numbers on this list of expenses. It is shocking however, in the context of enhancing the Ombudsman's jurisdiction, that such a significant amount of public dollars flows yearly into a sector in which the Ombudsman has very little oversight. In the 2007-08 budgetary plan expenses for health and long-term care, hospitals and health promotion are expected to total just under \$38 billion.⁴¹ With the planned total expenses all Ministries set at \$91 billion for 2007-08, health care spending represents approximately 41% of the provincial budget. Education also represents a significant portion of the budget, with spending on education and school boards expected to total about \$12.5 billion in 2007-08, representing about 13% of the provinces budget.⁴² From the brief budgetary analysis above it is apparent that a substantial amount of public funds are being used to finance government services that are not within the Ombudsman's mandate. While there are arrangements in place to ensure value-for-money, if a member of the public believes that he/she has been mistreated as a result of bureaucratic arbitrary authority, they cannot turn to the Ombudsman for assistance as his jurisdiction does not extend to these critical and costly public services.

Arguments against Mandate Modernization

One of the central arguments used to oppose the implementation of an ombudsman or the increase of his/her jurisdiction, is that other avenues are available for complaint and remedy that are adequate. Furthermore, it is argued that these other avenues, which include the elected representatives themselves, the media and the courts should be better utilized for such purposes rather than simply establishing an Ombudsman or increasing the mandate of such an already established office.

It is argued that Ontario, in addition to the official Ombudsman, has many Ombudsmen at Queen's Park, 103 to be exact.⁴³ In fact, the role of an elected representative in a democracy is to advocate on behalf of their constituents and assist them in finding solutions to their concerns. The reality however, is that elected representatives do not have the time, resources or readily available access to information to allow them to address citizen's concerns in a timely and effective manner with which the Ombudsman can.⁴⁴ The central concern with complaints to elected representatives is that government administrations are simply too large in relation to the number of elected members. It is argued that members simply cannot handle all of the potential complaints against the bureaucracy that they will likely receive.⁴⁵ All citizens should have equal access to effective remedy against administrative unfairness. Depending on their role and status in the Legislature, Members of Provincial Parliament (MPPs) have a range of influence and access to government bureaucracy. If constituents were left only with their MPP as a way to rectify any government injustice, there would develop an unfair system whereby citizen's success would depend on who happened to represent them and their constituency at Queen's Park. Complaints received from the public regarding government services can also involve a variety of possibly conflicting interests, which can raise additional complications for an elected member. Members simply lack the familiarity with the various and complicated organizational structures, policies and

procedures of all government departments, which can impede the resolution of complaints in a fair and timely manner.⁴⁶

The findings of a study done by Mr. Llambias to investigate the ability of elected members at the federal level to deal with “ombudsman type” cases were outlined by Rowat in The Ombudsman Plan. As part of the study, questionnaires were sent out to all members of the House of Commons in the spring of 1964 to determine how many and what kind of complaints Members of Parliament (MPs) receive, how they handle them and if they think an Ombudsman would help. He received eighty replies from MPs who had completed the questionnaire. The results of the study demonstrated that the number of grievances against the federal level of administration is great, and that federal legislatures need the help of an ombudsman.⁴⁷ As concluded by Rowat, “[Members] are too overloaded with work, too inadequately equipped, and not expert enough to handle the kind of case with which an ombudsman should deal.”⁴⁸

While most elected members would likely agree (to some extent) with the above conclusion, they would also likely argue that MPPs do not receive the necessary funding to deal with complaints from the public about the bureaucracy.⁴⁹ In fact, as explained in an article written by Robert Runciman, MPP for Leeds-Grenville, there exists a tension within an elected member in delegating their investigative powers over to the Ombudsman. While members are grateful to receive assistance with the overwhelming constituency caseload, the satisfaction that comes along with finding solutions to constituent problems is important to elected members.⁵⁰ Both opposition members and government backbenchers tend to have very little share of the power, therefore working on constituency issues becomes a central part of an often times frustrating job. As noted by Runciman, the result (at least in Ontario) has been “some jealousy over what members see as the sumptuous resources of the Ombudsman’s Office devoted to rectifying injustices which they themselves might be dealing with.”⁵¹

Assuming elected representatives were adequately funded and therefore had the resources to deal with complaints from the public, the fact remains that they are all members of political parties. Therefore they may be suspected as acting in a partisan nature when advocating for a particular bureaucratic injustice on behalf of a mistreated individual.⁵² Also, because of this partisan nature and the need for MPPs to devote a significant portion of their time to policy and legislative matters, they do not have the time necessary to investigate minor administrative complaints.⁵³ The fear is that elected officials, driven by partisan motives, may choose to respond primarily to complaints that are likely to cast the government of the day in a negative light. Or on the reverse, if the member is in fact a Minister or an MPP for the majority party, they may hesitate to draw attention to complaints against their own government, driven by the tendency to support decisions made by one of their own officials.

Having acknowledged the limitations that elected representatives may face in trying to essentially playing the role of the Ombudsman, the fact remains that receiving and trying to rectify concerns and complaints from constituents or any member of the public is a big part of their job. Members’ offices are bombarded with phone-calls and

letters on a daily basis from people who feel that they have been wronged in one way or another by unfair policies and the faceless bureaucratic machine. While often-times members are able to satisfyingly help these troubled people find solutions to their concerns, they are also forced to refer complainants to the Office of the Ombudsman who will be able to receive and if necessary fully investigate the matter in an effort to solve the specific or sometimes systematic administrative problem. However, as observed by Maloney, this appears to have been the intension of the MPPs when they in 1975 voted to have an Ombudsman put in place in Ontario. If MPPs wished to have full control over the Ombudsman job, they would have extended the powers of the Office unto themselves rather than on the Ombudsman.⁵⁴ Maloney goes on to say that MPPs realized the confusion that would ensue had each MPP been given the rights the Ombudsman enjoys.⁵⁵ Accordingly, these powers (including the power of summons, freedom of information, consultation, etc) are therefore seen as being exercised by the Ombudsman in trust for MPPs, with the citizen's of the province reaping the rewards.

Having thoroughly addressed the limitations of elected members to effectively deal with public administrative complaints, it is necessary to turn to the courts to asses their ability to deal with administrative complaints. To begin, the power of the courts to review administrative decisions is very limited, able primarily to review the fairness of the decision rather than the content and its implications.⁵⁶ Courts are also very costly, and only those who have the financial means can afford to make appeals to the courts. They also represented a significant cost for the government. While the Ombudsman on the other hand, operates on a budget of \$9.5 million per year and is available to all citizens regardless of their income level. Courts are also generally slow, cumbersome and complicated, and therefore do not provide an effective alternative to the Ombudsman's authority.

In addition to elected members and the courts, the press is also a device that can be used to for the public to have their particular complaints and circumstances aired, by what is known as the newspaper ombudsman. Newspapers make use of what is called the action line or the Ombudsman columns, where they try to settle complaints received from the public and then write columns on the most interesting cases. While this avenue can work to settle administrative complaints, there are limitations to what they are able to achieve. Firstly, they would deal with any kind of complaint and not specifically complaints against government administration. Therefore it can be argued that they do not and likely cannot, acquire the expertise needed to launch investigations in any administrative field.⁵⁷ Furthermore, the newspaper ombudsman has no specific legal power to investigate as does the Ombudsman and can therefore often not get at the relevant information. Lastly, because they exist in some areas and not others, their coverage is not thorough but rather spotty. If they are interested in a particular case they may be successful in resolving that issue, but it is not necessarily true that they will deal thoroughly or fairly with all of the complaints they may receive from the public.⁵⁸

In addition to the argument that the public is already properly protected from arbitrary bureaucratic authority by elected representatives, the courts and the media, there is also more generally a resistance to Ombudsman oversight by organizations who feel

they are already subject to a series of checks that ensures they are accountable to the public. It is the natural tendency of any organization to resist change, because of the desire for both the rules and general workings of the structure to remain constant. However, one of the prime purposes of an Ombudsman is to challenge already existing operations if they do not properly take into account the effect that these, often times arbitrary, rules may have on the individual citizen.

Support for Mandate Modernization: Opposition Parties and Media

The analysis of arguments both for and against mandate modernization reveals there is a strong case to be made for enhancing the Ombudsman's authority in public areas currently outside of his investigative scope. Also, in the analysis of alternatives to the Ombudsman it is apparent that MPPs, the courts and the press cannot provide the quality oversight that the Ombudsman can, as he/she is properly equipped with the resources and the independence to remain credible. While it is apparent that mandate modernization makes sense in principle, the fact remains that the government has not taken steps to update the Office's mandate and will likely not do so in the near future. This is certainly not because of a lack of success on the part of the Ombudsman or a lack of support from opposition members and the media; all of which Marin currently enjoys in abundance. On the day that Marin's first report was published, *Between a Rock and a Hard Place*, the government accepted the recommendation to change the unfair practice of parents having to give up custody of their disabled children to receive care, and parents of sixty-three children had their custody rights restored. Marin's fourth and high-profile report, *Getting it Right*, on the Municipal Property Assessment Corporation (MPAC) encouraged the government to immediately suspend all assessments and agree to implement 17 of the 20 recommendations provided by the Ombudsman. These are just two examples of Marin's many successes since being named Ontario Ombudsman. His reports and recommendations have initiated significant change, working to benefit and influence the lives of millions of Ontarians.

Marin has also received the support of many members at Queen's Park, who agree that his investigative scope should be expanded. Andrea Horwath's *Private Member's Bill 92*, proposes to give new powers to the provincial Ombudsman to enable the investigation of health care concerns by his Office. This would be accomplished by amending the Ombudsman Act and adding a section that essentially broadens the scope of 'governmental organization' to include public hospitals, private hospitals, nursing homes, long-term care facilities and mental health facilities. This Bill is part of a package of Bills introduced by the New Democratic Party of Ontario on April 5, 2006, in an attempt to have the Ombudsman's mandate expanded. Bill 88, also introduced by Horwath, proposes to amend the Ombudsman Act in order to allow the Ombudsman to investigate the administration of children's aid societies. Another NDP member at Queen's Park, Rosario Marchese, MPP for Trinity-Spadina, also introduced a *Private Members Bill*, Bill 190, which would provide the Ombudsman with the authority to oversee school boards. On the same lines, Andrea Horwath had this to say about the likelihood of mandate modernization in a letter to the Toronto Star: "To date, the Liberal government of Premier Dalton McGuinty has shown no interest in broadening the scope

of the Ombudsman's independence, which causes one to question its commitment to openness, transparency and accountability from the system that most deeply touch people's lives."⁵⁹ This quote demonstrates very well two key points in this debate. First, in principle mandate modernization not only makes sense but should be implemented immediately to ensure the public is properly protected against arbitrary bureaucratic authority. On the other hand, it also highlights the partisan nature of the debate at Queen's Park.

Marin has also enjoyed wide-spread media attention on his crusade for enhanced powers and also on virtually every report that he has released. In fact he has become a bit of a favourite with media and members of the opposition alike, presenting reports filled with details and colourful descriptions of government inadequacies. In his report of the investigation into the treatment of victims of crime Marin described these individuals as "rats in a maze" and the MPAC regime as "unreasonable, unjust, oppressive and wrong". Many of the headlines in newsletter articles read positively about the work Marin has done and his success in encouraging real and effective change by governments to correct maladministration: "When Ontario Ombudsman shines spotlight, change soon follows" and "Crusading for Change" are just a few.⁶⁰ However, this type of support garnered by media and opposition MPPs, who respond excitingly to Marin's unapologetically and even aggressive use of language, may not provide the type of assistance necessary to ensure mandate modernization remains on the government's agenda.

Conclusion

The question still remains: Will the Ontario Ombudsman's mandate be updated? The Office has been improved and has a great track record in the reports and recommendations released over the past two years, and expanding Marin's authority just simply makes sense. It is fair to say that opposition members would welcome the enhancement of the Ombudsman's powers, especially since supporting it provides another basis upon which to criticize the government for its lack of action on this issue. However, any government despite its political strip, would be at the very least reluctant to ensure the Ombudsman's mandate is increased because of the potential damage that the reports that would follow could do on the government's reputation. This is particularly pressing in the current political climate at Queen's Park, since it is both an election year and the current Ombudsman has (too say the least) a way with words.

In addition to general resistance to increased oversight because of the potentially negative reports that may follow, the government may likely be put off by the Ombudsman's in your face style. Marin's approach may simply be too confrontational, instilling fear in the government and likely working to ensure that resistance to mandate modernization among government members remains intact. According to Marin, in order to successfully effect change the Office must rally public opinion and the best way to do this is to communicate clearly and not hesitate to strongly advocate your point.⁶¹ While his communication style may be working to ensure his success in effecting real change, it still remains that his reports and the language within are particularly scathing of the government. Even Marin admits that he is often treated like the "skunk at the proverbial

garden party”, but argues that if you are doing your job properly as Ombudsman you will not be popular with government.⁶²

André Marin has certainly achieved many successes in the relatively short time as Ombudsman of Ontario. He has improved the operations of the Office and the perception of its value among the government and the public. In his fight for mandate modernization he has managed to expose both the need and importance of increased investigative oversight of key public services, but he has not been able to ensure the expansion of authority. While this is because of resistance from government to enhance the powers of an Office that can cast doubt on their leadership, it is also the result of Marin’s particular high-profile that has worked to ensure his authority remains limited. As long as Marin continues to be successful he will ensure the government quickly implements his recommendations when put forth. At the same time however, the public attention that he garners and the negative impact that his reports have on the government almost entirely ensures he will not obtain an expanded mandate anytime in the near future.

Appendix I⁶³

**Selected Non-Jurisdictional Complaints and Inquiries Received During Fiscal Year
2005-06**

Non-jurisdictional Area	Number of Complaints Received
Municipalities	1,104
Children's Aid Societies	436
Hospitals and Long-term Care Facilities	211
School Boards	87
Universities	28
Total # of Complaints	1866

Appendix II⁶⁴

	Boards of Education	Child Protection Services	Public Hospitals	Nursing Homes and Long-term Care Facilities	Municipalities	Police Complaints Review Mechanism	Universities
Ontario	No	No	No	No	No	No	No
British Columbia	Yes	Yes	Yes ¹	No	Yes	No	Yes
Alberta	No	Yes	Yes, as of September 1, 2006 ²	Yes, as of September 1, 2006 ³	No	Yes	No
Saskatchewan	No	Yes ⁴	Yes	No	No	Yes	No
Manitoba	No	Yes	Yes	No	Yes	Yes ⁵	No
Quebec	No	Yes ⁶	Yes	Yes	No	Yes	No
New Brunswick	Yes	Yes	Yes ⁷	No	Yes	Yes ⁸	No
Newfoundland and Labrador	Yes	No ⁹	Yes	Yes	No	Yes	Yes
Nova Scotia	Yes	Yes	Yes	Yes	Yes	Yes	No
Yukon	Yes	Yes	Yes	Yes	By reference ¹⁰	No ¹¹	No

Amended: October 12, 2006

¹ In British Columbia, the Ombudsman also has jurisdiction over regional health boards and regional hospital districts.

² In Alberta, as of September 1, 2006, the Ombudsman will have authority to investigate complaints about patient concerns resolution processes of hospitals.

³ In Alberta, as of September 1, 2006, the Ombudsman will have authority to investigate complaints about patient concerns resolution processes of long-term care facilities and nursing homes.

⁴ In Saskatchewan, the Ombudsman has jurisdiction over the child protection system, however, generally, the Children's Advocate, a specialized Ombudsman, deals with issues affecting children.

⁵ In Manitoba, the Ombudsman has jurisdiction over the police as the Ombudsman has jurisdiction over municipalities and police are municipal. The Ombudsman also has jurisdiction over the Law Enforcement Review Agency (LERA), which is part of the Justice Department.

⁶ Effective April 1, 2006, the *Protecteur du citoyen* has some jurisdiction over administrative procedural matters relating to child protection services provided by the directors of youth protection.

⁷ In New Brunswick, the Ombudsman has jurisdiction over Regional Health Authorities, which operate, own and dispense all services for hospitals.

⁸ In New Brunswick, the Ombudsman has jurisdiction over the New Brunswick Police Commission. The Commission is not included in the Schedule to the *Ombudsman Act*, but the Ombudsman has a "working agreement" with the Commission allowing them to review Commission files.

⁹ In Newfoundland and Labrador, an independent Child and Youth Advocate can investigate complaints about child protection matters.

¹⁰ A municipality or Yukon First Nation government may at any time refer a matter to the Ombudsman for investigation and report.

¹¹ The only police force operating in the Yukon is the RCMP, a federal body.

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- ¹ International Ombudsman Institute (IOI). “The History and Development of the Public Sector Ombudsman Office,” About the I.O.I. 15 April 2007 <http://www.law.ualberta.ca/centres/ioi/About-the-I.O.I./History-and-Development.php>
- ² Rowat, Don. “Time for a Federal Ombudsman” Canadian Parliamentary Review 18.4 (Winter 1995-96)1
- ³ I.O.I., “History and Development”
- ⁴ International Ombudsman Institute. “The Ombudsman: Variations on the Ombudsman Concept,” About the I.O.I. 15 April 2007 <http://www.law.ualberta.ca/centres/ioi/About-the-I.O.I./Concept-and-Organization.php>
- ⁵ Owen, Stephen. “The Ombudsman: Essential Elements and Common Challenges,” The Ombudsman: Diversity and Development. Eds. L.C. Reif, M. Marshall and C. Ferris. (Alberta: The International Ombudsman Institute, 1993) 2.
- ⁶ Owen 2
- ⁷ Rowat, Don. The Ombudsman Plan (London, England: University Press of America Inc, 1995) 111.
- ⁸ Owen 2
- ⁹ Owen 2
- ¹⁰ Owen 2
- ¹¹ Stacey. “The Provincial Ombudsman in Canada,” Ombudsmen Compared. (London: Oxford University Press) 86.
- ¹² Government of Ontario. Ombudsman Act, R.S.O. 1990, c. 0.6 section 14(1)
- ¹³ Ombudsman Act section 14(2).
- ¹⁴ Ombudsman Act section 14(2).
- ¹⁵ Ombudsman Act section 18(1).
- ¹⁶ Ombudsman Act section 18(3) and 18(4)
- ¹⁷ Ombudsman Act section 21
- ¹⁸ Ombudsman Act section 21
- ¹⁹ Rowat, The Ombudsman Plan 112
- ²⁰ Marin, André. “Innovate or Perish.” Keynote Address by André Marin, Ombudsman of Ontario. The United States Ombudsman Association 27th Annual Conference. Ombudsmen at a Crossroads: Broadening Our Horizons. (Des Moines, Iowa, U.S.A. September 12-15, 2006) paragraph 34.
- ²¹ Marin, André. “Through the Looking Glass: Reflections of the Ombudsman.” Plenary Session Address by Marin, Ombudsman of Ontario. 18th Annual Conference of Ontario Boards and Agencies Administrative Justice: Through the Looking Glass. (Toronto, Ontario, November 2, 2006) 4.
- ²² Marin, “Innovate of Parish” paragraph 30.
- ²³ Rowat, “Time for a Federal Ombudsman” 1.
- ²⁴ Rowat, “Time for a Federal Ombudsman” 1.
- ²⁵ Maloney, Arthur. “The Powers of the Ombudsman and Their Judicious Use.” An Address by Mr. Maloney at the First International Ombudsman Conference. (Edmonton, Alberta September 6-10, 1976) 33.
- ²⁶ Marin, “Innovate or Parish” paragraph 3.
- ²⁷ Marin, “Innovate or Parish” paragraph 3.
- ²⁸ Ombudsman Ontario. Annual Report 2005-2006. (Ontario: Office of the Ombudsman, 2006) 8.
- ²⁹ Annual Report 2005-06 20
- ³⁰ Annual Report 2005-06 12
- ³¹ Annual Report 2005-06 13
- ³² Owen 9
- ³³ Owen 9-10
- ³⁴ Annual Report 2005-06 15.
- ³⁵ Owen 8
- ³⁶ See Appendix I for a breakdown of the number of complaints by public service area
- ³⁷ Chart and information in Appendix II obtained from the Ontario Ombudsman website <<http://www.ombudsman.on.ca/>>
- ³⁸ Marin, “Innovate or Parish” paragraph 54
- ³⁹ Annual Report 2005-06 13
- ⁴⁰ Annual Report 2005-05 13
- ⁴¹ Expenses for Health and Long-term care is expected to be \$20,043,000,000, for Hospitals

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- 17,509,000,000 and for Health Promotion 373,000,000.
- ⁴² Education is to receive \$437,000,000 in funding and school boards are to receive \$11,989,000,000.
- ⁴³ Beginning with the next provincial election, in the fall of 2007, the number of electoral districts will increase to a total of 107.
- ⁴⁴ Owen 3
- ⁴⁵ Rowat, “Time for a Federal Ombudsman” 3
- ⁴⁶ Owen 4
- ⁴⁷ Rowat, The Ombudsman Plan 102
- ⁴⁸ Rowat, The Ombudsman Plan 102
- ⁴⁹ In interviews and informal conversations with MPPs, many suggested that if they were provided with larger budget, as are politicians in other jurisdictions (including the United States), they would be able to more adequately deal with the complaints they receive from the public regarding the government.
- ⁵⁰ Runciman, Robert. “Ombudsman and Legislatures: Allies or Adversaries?” *Canadian Parliamentary Review* 7.3 (Autumn 1984) 3.
- ⁵¹ Runciman 3
- ⁵² Rowat, “Time for a Federal Ombudsman” 3
- ⁵³ Rowat, “Time for a Federal Ombudsman” 3
- ⁵⁴ Maloney 30
- ⁵⁵ Maloney 30
- ⁵⁶ Rowat, “Time for a Federal Ombudsman” 3
- ⁵⁷ Rowat, “Time for a Federal Ombudsman” 3
- ⁵⁸ Rowat, “Time for a Federal Ombudsman” 3
- ⁵⁹ Horwath, Andrea. “Power to Probe Hospitals Urged,” Toronto Star. 8 May 2007.
- ⁶⁰ National Post and CanWest, 28 March 2007
- ⁶¹ Marin, “Innovate or Perish” paragraph 25
- ⁶² Marin, André. “The Ombudsman in the Justice System: as barometer, horsefly, oilcan and safety valve,” Keynote Address by André Marin to the Ontario Bar Association Annual Festival Awards Dinner. (Toronto, December 1, 2006) paragraph 8.
- ⁶³ Data obtained from Annual Report 2005-06, page 16
- ⁶⁴ Chart and information obtained from the Ontario Ombudsman website, in section “Mandate Modernization”: <<http://www.ombudsman.on.ca/UploadFiles/File/PDF/OOJurisdiction-Canada-Oct%2012%202006.pdf>>