

**“Alberta’s Ombudsman: Following Responsibility in an Era of Outsourcing”  
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**By Lorna Stefanick**

**Athabasca University, [lornas@athabascau.ca](mailto:lornas@athabascau.ca)**

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In 1967, Alberta became the first jurisdiction in North America and the tenth in the world<sup>1</sup> to create an ombudsoffice. As part of the early wave of “ombudsmania,” Alberta ombudsmen<sup>2</sup> have received visitors from all over the world who are interested in learning about or developing a mechanism for addressing maladministration. In 1976, Alberta hosted the first International Ombudsman conference at Government House in Edmonton. Shortly thereafter, the International Ombudsman Institute (IOI) was established at the University of Alberta. Over the years, the IOI has grown to include many newly emerging democracies (some of which have sent personnel to serve internships in Alberta), but its administrative home office remains at its original location in Edmonton. With funding from the Alberta Law Foundation, Edmonton also hosted one of the world’s first ombudsman, Sir Guy Powell of New Zealand, as a scholar in residence. Alberta assisted in the development of Human Rights Commissions and ombudsoffices in other jurisdictions, most recently in Yukon where the Alberta ombudsman served as the first commissioner. The concept and the practice of an administrative ombudsman have a long history in Alberta and over the years this institution has made an important contribution to democratic processes in Alberta and beyond.

As in other jurisdictions, Alberta has seen a dramatic drop in the number of complaints made to its ombudsman. This could be attributed to a number of factors, including the suggestion that the Office has been so effective dealing with maladministration over the years that it is “doing itself out of a job.” It could be, however, that decreasing complaints are a reflection of an increasingly complex and confusing administrative environment. As the first jurisdiction in Canada to establish such an office, the Alberta government played a leadership role in ensuring administrative fairness. Today it enjoys a good working relationship with the “watchdog” that it created. Yet in recent years, the province of Alberta has also lead the way in initiating major changes to the way governments “do business.” Downsizing departments through outsourcing the provision of public services is a well-known theme in Alberta. But by outsourcing, the Alberta government may also be credited with blurring the lines of accountability that are so critical to ensuring administrative fairness. Forty years after its creation, Alberta’s ombudsoffice continues its quest to ensure administrative fairness in an era of government restructuring and outsourcing that has produced an increasingly complex administrative environment.

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<sup>1</sup> Other early ombudsmen offices at the national level include: Sweden (1809), Finland (1919), Denmark (1955), New Zealand (1962), Norway (1962), Tanzania (1966), Guyana (1966), Mauritius (1970), United Kingdom (1967), New Brunswick (1967), Hawaii (1969), Fiji (1970). In Canada, a seven year period beginning in 1968 saw the establishment of offices in Quebec, Manitoba, Nova Scotia, Saskatchewan, Newfoundland and Ontario.

<sup>2</sup> The use of the term “ombudsmen” in the Alberta context is deliberate: to date only men have held this position.

That Alberta became a North American leader in the adoption of the ombudsman concept should not be a huge surprise to those who are familiar with provincial politics. Albertans have a long history of giving huge, back-to-back electoral victories to governing parties, leaving scant opposition.<sup>3</sup> In 1953, C.B. MacPherson noted the virtual absence of opposition within Alberta's Social Credit dominated legislature. At that time Social Credit had reigned 27 years and was in possession of 59 of the 63 seats.<sup>4</sup> Given the virtual absence of opposition, there was no systematic scrutiny of government activities. By 1963, Alberta Conservatives, Liberals, NDP and even some Social Credit MLAs had endorsed the idea of an Office of the Ombudsman. In the words of a commentator for the *Edmonton Journal* in 1963, an ombudsman would "do some of the chores ordinarily reserved for the House Opposition."<sup>5</sup>

Fifty years later, the governing party is different, but the number of opposition seats continues to be so low that the Government tends to treat legislative debate as irrelevant. While efficiency in government is doubtlessly encouraged by the lack of vigorous debate within the legislative assembly, there has been and continues to be serious concerns raised by many Albertans who understand that a vigorous democracy benefits tremendously by opposition "watchdogs" who ensure that government mistakes, corruption, or incompetence are brought to light. As one commentator who is not known to be a friend of the provincial opposition observed in November of 2005, "(f)or there to be effective accountability, the opposition must be able to scrutinize and publicize government actions on an ongoing basis, even if we don't particularly like what the opposition has in mind."<sup>6</sup> Despite questions surrounding the Premier's leadership in 2006, the ruling Conservative Party not only continues to completely dominate the legislature, it is in the process of amending provincial access and privacy laws to enable the government to shroud many of its activities in secrecy.<sup>7</sup> Given these conditions, an Office of the Ombudsman is critical to ensure that at least with respect to its administrative branch, government is held accountable.

By 2006, five officers of the Alberta Legislature had been established to ensure government accountability and fair practices. These officers - the Auditor General, Chief Electoral Officer, Ethics Commissioner, Information and Privacy Commissioner, and the Ombudsman - all provide independent reviews of government activities. They are appointed on recommendation of the Legislative Assembly and report to this same body. While the origins of the Auditor General's Office dates back to 1905, the modern version of the office was established in 1978, making the Office of the Ombudsman the oldest Office of the Legislature in Alberta.

But of more importance than being an established office is the effectiveness of the ombudsman in ensuring administrative accountability. Donald Rowat's classic book, *The Ombudsman Plan*, outlines five key requirements for success which include that the office: be independent from those being investigated, have strong but not binding powers,

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<sup>3</sup> The ruling dynasties in Alberta include: United Farmers of Alberta, 1921-1935; Social Credit, 1935-1971; Conservative, 1971-present.

<sup>4</sup> C.B. MacPherson, *Democracy in Alberta: the theory and practice of a quasi-party system*, (Toronto: University of Toronto Press, 1953).

<sup>5</sup> *Edmonton Journal*, 19 June, 1963, p. 1.

<sup>6</sup> *Edmonton Journal*, 16 Nov. 2005, p. A19.

<sup>7</sup> James Baxter, "NDP leader sounds alarm over privacy law changes," in *Edmonton Journal*, 9 May 2006, p. A6.

have a broad scope, be well known to the public and be directly accessible to complainants.<sup>8</sup> To this I would add that the office must have sufficient resources to carry out its mandate, be publicly accountable, and be perceived to be fair.

Using these criteria for determining effectiveness, Alberta's ombudsman scores highly. The first and foremost is that the ombudsmen be independent from those whom they investigate and as such they must be shielded from partisan influence and executive interference. As mentioned, this is the case for all Officers of the Legislature in Alberta. The ombudsman is appointed for five years by the Lieutenant Governor in Council on the recommendation of the Legislative Assembly and can only be removed from office through disability, neglect of duty, misconduct or bankruptcy. The ombudsman reports to the a legislative standing committee, which also sets his salary. When the legislature is not sitting, this standing committee can temporarily suspend the ombudsman for the reasons outlined previously, but this suspension is only valid until the next session of the Legislature.

In Alberta, the independence of the ombudsman was asserted in the infamous Philipzyk case. While the details of the case are not important, its significance is that it resulted in a government appointed Commission of Inquiry subpoenaing Alberta's first ombudsman, George B. McClellan, to provide testimony. Further, the Commission demanded that McClellan provide documents relating to his investigation into the Philipzyk complaint. While the ombudsman did appear at the hearing, he refused to produce the documents and was severely criticized by the inquiry's commissioner. Making no headway in resolving the dispute through the usual public service channels, the ombudsman eventually tabled his recommendations in the Legislature. When the government still failed to take action, Philipzyk took his case to court and won.

The refusal of the ombudsman to provide testimony and documents to the Commission reiterated the dual principles that this Legislative Officer could only be called to account by the legislature, and that all information divulged to him as part of a complaint is privileged.<sup>9</sup> Karl Frideman's 1977 survey of attitudes to the Alberta ombudsoffice suggest that refusing to violate these basic principles resulted in increased public respect for the role the ombudsman played in promoting administrative fairness.<sup>10</sup> Indeed, his actions even garnered respect from legislators and public servants. In 1972 the *Ombudsman Act* was amended to reaffirm the Office's independence and it is noteworthy that this is the only instance in Alberta's history that the ombudsman felt it necessary to table recommendations in the Legislature in order to rectify maladministration.<sup>11</sup> While this case was of importance for the ombudsman in Alberta, its reach went beyond provincial borders. Only a dozen ombudsoffices had been established worldwide at this point, and the operationalization of this fledgling concept was a matter of keen interest to observers outside Canada.

In the classic model, ombudsmen do not have order making power; they rely on the

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<sup>8</sup> Donald Rowat, *The Ombudsman Plan: The Worldwide Spread of an Idea* (Lanham: University Press of America, 1985, p. 183-185).

<sup>9</sup> Alex B. Weir, "The Legislative ombudsmen," *Alberta Law Review*, Vol XIV (1976) pp. 256-265.

<sup>10</sup> Karl A. Friedmann, "The Public and the Ombudsman: Perceptions and Attitudes in Britain and Alberta," *Canadian Journal of Political Science*, X:3 (September 1977), .

<sup>11</sup> Alex B. Weir, "The Legislative ombudsmen," *Alberta Law Review*, Vol XIV (1976) pp. 256-265.

power of “moral suasion.” ombudsmen can take vastly different approaches to effect moral suasion: which approach they take has much to do with the environment that they work within, and specifically, how others in governing circles perceive the importance of their function. In some respects, ombudsmen will be open to criticism no matter what they do. A confrontational approach may bring issues to the forefront of the public agenda, increasing public awareness of the issue and of the existence of an Office through which administrative problems can be resolved. For ombudsmen who work in a hostile environment, this may be the only method available to them to affect any type of change. Yet this approach will also serve to alienate the subject of an investigation, namely public servants who may become uncooperative and obstructionist in resolving administrative issues. Ombudsmen who are working in a more receptive environment may choose to work quietly behind the scenes with, as opposed to against, public servants. Yet the non-confrontational ombudsmen can be accused of being “captured” by those they are supposed to be investigating. According to his own assessment of his working style, the current ombudsman of Alberta prefers to work behind the scenes using “quiet persuasion” as opposed to publicly embarrassing or pressuring the government.<sup>12</sup> Like the institutionalized pressure groups described by A. Paul Pross, the Alberta ombudsman is rarely in the news, especially when compared to other Alberta legislative officers such as the Access and Privacy Commissioner.<sup>13</sup> While personalities may play a role in explaining this difference, this difference in profile also can be explained by the fact that unlike the Ombudsman, the Access and Privacy Commissioner has the power to compel the government to accept his recommendations and coercion makes a more interesting news story than does persuasion.

A critical factor in ensuring that ombudsmen can conduct a meaningful investigation is their access to relevant files and information. It is with respect to this point that Alberta’s first ombudsman made another important contribution. A former RCMP Commissioner who served from 1967 to 1974, Ombudsman McClellan was successful in convincing the Legislative Assembly that a thorough investigation could only occur if the ombudsoffice had complete access to all necessary departmental and agency file documentation.<sup>14</sup> While the Office’s power is limited to “recommendations” for improvements to remedy maladministration, he does have the ability to compel anyone to turn over anything that is deemed to be of relevance to the investigation, irrespective of whether or not that person is a member of the organization that is being investigated. The only significant restriction to the Alberta ombudsman’s access to information is that he cannot compel a pre-sentence report, nor can he compel information related to confidential proceedings of the Executive Council or its committees that could harm the public interest.<sup>15</sup> While Section 16(1) of the *Ombudsman Act* requires the ombudsman to notify the administrative head of an organization that an investigation under the Act that an investigation will be undertaken, it does not require the ombudsman to provide a timetable for the conduct of the investigation. Ombudsman

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<sup>12</sup> Interview with Ombudsman Gordon Button, 10 March 2006.

<sup>13</sup> A. Paul Pross, *Group Politics and Public Policy*, Toronto: Oxford University Press, 1986.

<sup>14</sup> This was accomplished through amending the Act in 1972. See Alberta Ombudsman, *Annual Report 1972*, p. 3.

<sup>15</sup> Wendy Bernt and Stephen Owen, “The Ombudsman in Canada,” in Roy Gregory and Philip Giddings, 2000, “Righting Wrongs,” *The Ombudsman in Six Continents*, (Amsterdam: IOS Press, p. 134).

McClellan made a middle of the night visit to the “drunk tank” at the Calgary Remand Centre, and in later years, ombudsoffice investigators have visited correction facilities during mealtime to sample institution food that had been the subject of complaints.<sup>16</sup> Like the Philipzyk case, the publication of the details of the Remand Centre visit in a special report enhanced the credibility of the ombudsoffice of being dedicated to seeking the truth surrounding administrative practices.

In order to consider an ombudsoffice accessible, citizens should not face prohibitive service fees, nor should they be required to go through a third party who in effect acts as a gatekeeper. In Alberta, complainants can approach the ombudsoffice directly and there is no fee to lodge a complaint. While all complaints must be made in writing, intake officers perform this function for those who are illiterate or for whom this requirement might pose a barrier. The *Ombudsman Act* stipulates that complaints written by inmates in prisons or patients in mental institutions must be immediately forwarded unopened to the ombudsman by the person in charge of the institution. ombudsoffice staff are not permitted to disclose information that they are privy to through the exercise of their duties, and obligations for the storage and access to files are clearly spelled out in the Sections 20, 30, and 31 of the Act. A ruling in 1997 by the Freedom of Information and Privacy Commissioner reaffirmed this confidentiality; he ruled that filed departmental copies of the ombudsman’s records could not be obtained using Access to Information legislation.<sup>17</sup> Written complaints create a documented paper trail that conforms to a basic administrative principle of accountability but this is balanced against the privacy rights of the complainant.

To ensure administrative transparency and to improve public visibility, the Office’s activities are publicized through annual reports. Occasionally the ombudsoffice publishes reports for public consumption on issues deemed to be of relevance to the exercise of its Office’s functions or to a particular case; these were more common in the early years of its existence. The motivation to issue a special report appears to be related to the profile of the issue. For example, the ombudsoffice issued its last special report in 1984; it concerned the investigation of complaints made by the Lubicon Indian band.<sup>18</sup> When Treaty 8 was signed in 1899, this indigenous nation of 500 people was overlooked and in 1939 an agreement was promised. This was still not achieved by the 1970s at which time massive oil and gas development began on unceded territory, resulting in severe health and social problems among the Lubicon people. The Lubicon complaint alleged that Crown officials deliberately: set fires on disputed territory; allowed companies to bulldoze traplines and scared off game; mislead band members about the Land Tenure Program and their right to occupy lands; and acted improperly with respect to building a school. In his Special Report, the ombudsman found most of these claims unsupported; however, he concluded that more strained relations could be expected until the land claim issue was resolved.

In 1988, the Lubicons hoisted the issue onto the international stage when they

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<sup>16</sup> Ombudsman of Alberta, “Special Report by the Ombudsman and Investigation Dealing with the Calgary Remand and Detention Centre,” 1976, p. 4; telephone conversation with Pamela McHugh, Senior Counsel to the Ombudsman, 15 May 2006.

<sup>17</sup> Alberta Ombudsman, *Annual Report 1997*, p. 6.

<sup>18</sup> See Ombudsman of Alberta, “Special Report of the Ombudsman for Alberta Re: Complaints of the Lubicon Lake Indian Band,” 1984.

called for a boycott of the Calgary Winter Olympics on the grounds that Canada was violating their basic human rights. Since that time, Canada's continued exploitation of resources on this disputed territory Canada has been severely criticized by a number of groups, including the United Nations Human Rights Commission (UNHRC), Amnesty International, and the World Council of Churches. Indeed, a number of groups are attempting to block Canada's efforts to secure a seat on the UNHRC because of this issue. Yet in the six months since the last UNHRC rebuke of Canada, the provincial government has sold oil leases and exploration licenses to over 65,000 hectares of unceded Lubicon traditional territory, approved 50 new oil and gas wells and approved almost 50 new pipelines.<sup>19</sup> Despite international concern over the plight of the Lubicons, they rarely make the news in Alberta. While the issue is complex because negotiating treaties is federal jurisdiction and the selling of leases and licenses is provincial jurisdiction, the lack of political will at both levels of government to resolve this dispute is a stain on Alberta's record of promoting just and fair treatment of all its citizens.

An important power the ombudsman's office has is the ability to table a report in the legislature if it becomes apparent that a Deputy Minister has no intention of acting on the ombudsman's recommendations to address administrative maladministration. This was done only once in the early years of the office in Alberta. The "power to publish," however, remains an important power, even if it is not one that is used regularly.<sup>20</sup> Over the years, ombudsmen have reported good working relations with the public service and deputy ministers have accepted the vast majority of recommendations. Indeed, there have been only four instances in 40 years where ombudsmen have gone over the head of a deputy to speak to the minister.<sup>21</sup> Typically recommendations that have not been adopted are not deemed to be significant enough to warrant this action.

The ombudsoffice in Alberta has the power to investigate any decision made by a provincial government department, agency, board, commission, and some professional organizations. With respect to jurisdiction, Alberta once again was first off the blocks with respect to a dispute over what exactly came under the purview of the ombudsman. In 1970, the Honourable Chief Justice J.V. H. Milvain of the Alberta Supreme Court Trial Division determined that the ombudsman had the authority to investigate the formal decisions handed down by the Provincial Planning Board. He also affirmed the important role of the office when he noted "the Ombudsman is also a fallible human being and is not necessarily right. However he can bring the lamp of scrutiny to otherwise dark places, even over the resistance of others who would draw the blinds."<sup>22</sup>

The Office can respond to confidential individual complaints insofar as the complaint relates to the bodies mentioned previously. The only restrictions to what can be investigated are that all rights of appeal as outlined in other Acts must first be exhausted, solicitors and counsel for the Crown are exempt, and any issue related to the Mental Health Patient Advocate is exempt. The latter exemption has been a contentious point and will be discussed later in the paper. The ombudsman can also investigate a

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<sup>19</sup>submission to the Member States of the UN-General Assembly by Prof. Heinz Lippuner, Board of Directors, The International Committee for the Indians of the Americas, 1 May 2006.

<sup>20</sup>Conversation with Pamela McHugh, Senior Counsel to the Ombudsman, 15 May 2006.

<sup>21</sup>Information provided by Pamela McHugh, Senior Counsel to the Ombudsman in an email 17 May 2006.

<sup>22</sup>Alberta Ombudsman, Special Report No.1, 1970, quoted in Alex B. Weir, "The Legislative ombudsmen," *Alberta Law Review*, Vol XIV (1976) p. 260-261.

matter referred to it by a Minister, or by any committee of the Legislative Assembly. More importantly, however, it can also investigate on the basis of its own motion, which means that it can look into an administrative issue even if no complaint has been laid. This is an important power, as the ombudsman does not have to wait for a reported administrative failure in order to investigate an issue where there is perceived to be a flawed administrative process. So, for example, because the Department of Family and Social Services was receiving twice the administrative complaints as other departments in the early 1990s, the ombudsman initiated a review of the department's complaint investigation practices for registered daycares. The findings of this 1993 investigation resulted in 56 recommendations for improvement, 52 of which were accepted.<sup>23</sup> That said, the "own motion" power is another that is rarely used, as an in-depth investigation of a particular complaint (one that goes well beyond what is needed to resolve the complaint) can serve the same purpose.

An ongoing source of friction with respect to administrative justice in Alberta is the ability of those with mental health issues to have instances of maladministration addressed. The treatment of those with mental illness, and in particular those confined to mental hospitals, has been a contentious issue in Alberta since the passing of the Sexual Sterilization Act in 1928 for the purposes of preventing mental "defectives" from reproducing. Until the abolition of this Act in 1972, almost 3,000 Albertans were sterilized, many without their consent and for reasons that were not based on genetics but rather on social class, ethnicity, and gender.<sup>24</sup> A few years before the abolition of this eugenics policy, the ombudsman raised another mental health issue: the practice of indefinitely incarcerating individuals in mental institutions at the pleasure and order of the Lieutenant Governor of Alberta. These inmates had been found "not guilty" of criminal charges by virtue of insanity or were deemed not fit to stand trial. Some of these individuals had been confined for over 20 years (one as long as 27) and had never had a review of their mental state. As a result of the ombudsman's intervention, inmates in mental institutions now must have their cases reviewed at regular intervals.<sup>25</sup>

Brian Sawyer, Alberta's third ombudsman who served from 1984 to 1987, repeatedly asked for the creation of a mental health advocate.<sup>26</sup> The Act was amended in 1988 and a Mental Health Advocate was established. The actions of the advocate, however, were removed from the ombudsoffice's jurisdiction, as was oversight of psychiatric hospitals. Additionally, those patients who voluntarily sought help or involuntary patients who were under a provision outside the Health Act were not able to seek redress using the Mental Health Advocate. Along with the Alberta Mental Health Association, the next Ombudsman, Aleck Trawick, identified this as problematic.<sup>27</sup>

It was not until 2003 that the ombudsman's jurisdiction was finally extended to include the complaint resolution processes of the Alberta Mental Health Board. In this amendment of the legislation, jurisdiction was also extended to the regional health authorities, Alberta Cancer Board, and some professional associations outside

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<sup>23</sup> Alberta Ombudsman, *Annual Report 1994*, p.1.

<sup>24</sup> See *Sexual Sterilization Act, S.A. 1928, c.37*. Adolph Hitler would later use a similar model of eugenics to sterilize undesirables. BC enacted a similar law, but in that province a judge had to be involved in the decision as well as the Eugenics Board. In BC between 1933 and 1973, 400 people were sterilized.

<sup>25</sup> Alberta Ombudsman, *Annual Report 1971*, p. 20.

<sup>26</sup> Alberta Ombudsman, *Annual Report 1984-1987*

<sup>27</sup> Alberta Ombudsman, *Annual Report 1984-1987*, and Alberta Ombudsman, *Annual Report 1989 or 1988*

government.<sup>28</sup> These include Chartered Accountants, Certified General Accountants, Certified Management Accountants, Veterinarians, the Profession of Registered Professional Foresters and Profession of Registered Professional Forest Technologists. The Health Professions Act also provides the inclusion of 28 health professions including chiropractors, dental assistants, nurses, doctors, psychologists, and physical therapists. As of 2005, however, schedules had been passed for only 11 of the 28 health profession colleges that allow the ombudsman to provide independent investigations.<sup>29</sup> Nonetheless, the inclusion of these professions vastly increases the jurisdiction of Alberta's ombudsman.

While all ombudsoffices could undoubtedly use more funds, the Alberta ombudsman has sufficient resources to maintain offices in both of the province's two largest urban centres. Having a presence in both cities is crucial to putting a "face" on the Office and being accessible to citizens. With a budget of almost two million dollars per annum, the Office has a staff of twenty, including twelve investigative officers split evenly between the north and south, a deputy ombudsman, senior counsel, and another dozen administrative officers and support personnel.<sup>30</sup> Investigators come from a wide range of backgrounds, including political science, journalism, legal, public service, immigration, social work and policing. Because of the complexity of the issues, a rookie investigator requires about two years of training to become fully competent in the investigative role.<sup>31</sup>

Possessing sufficient mandate and resources are clearly important to the effectiveness of an ombudsoffice; however, this is a doubled edge sword. If it has a wide-ranging jurisdiction but limited resources, the end result will be many complaints and a very slow response time. As Alberta's first ombudsman George McClellan observed in 1973 with respect to response times of government administrators:

Probably the greatest single source of public irritation with government administration I have encountered, stems from delays in answering correspondence from the public – or worse yet not reply at all ... I can imagine no single decisions which would improve the image of the Government Service more, than a firm insistence on speedy replies to mail received, and prompt attention to complaints. The present situation can only help to justify a fairly common impression, that the Government is inaccessible to the public."<sup>32</sup>

Ombudsman Sawyer identified response times as being critical to democratic accountability, and in particular, he was concerned with the response time to complaints made to his office. Under Sawyer's watch, the Alberta ombudsoffice's investigative system was decentralized, allowing investigators to pursue the informal resolution of

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<sup>28</sup> Alberta Ombudsman, *Annual Report 2003*, p. 6.

<sup>29</sup> Alberta Ombudsman, *Annual Report 2005*, p. 4.

<sup>30</sup> Alberta Ombudsman, *Annual Report 2005*, p. 40. See also, Office of the Ombudsman, Organizational Chart, October 26, 2005, downloaded 14 May 2006 from Alberta Ombudsman, <http://www.ombudsman.ab.ca/pdfs/organizational-chart.pdf>

<sup>31</sup> Interview with Pamela McHugh, Senior Counsel to the Ombudsman, 10 March 2006.

<sup>32</sup> Alberta Ombudsman, *Annual Report 1973*, p. 15.

complaints wherever possible in order to deliver more timely responses.<sup>33</sup> This issue was also addressed in the *2005-2008 Strategic Business Plan*, which delineated performance standards to shorten timeframes for investigations,<sup>34</sup> and in the adoption of an Alternative Complaint Resolution Process for single issue, non-systemic complaints.<sup>35</sup> So while most ombudsmen welcome an expansive jurisdictional reach, they must be careful that their jurisdiction is closely related to the funds provided to them to carry out their mandate.

The possibility of a gap between resources and mandate is particularly obvious in Alberta with respect to the ombudsoffice's inability to investigate municipal government maladministration. Unlike some other Canadian provinces, the ombudsoffice in Alberta has no authority to investigate complaints made about municipal governments. While the need for a municipal ombudsman is acknowledged, there is little appetite within the Alberta ombudsoffice for jurisdiction as it is felt that the additional responsibility for investigating municipal maladministration would stretch the Office's current resources to the breaking point. This point is of particular saliency in 2006 as the ombudsoffice has recently gone through a significant turnover in personnel. In fact, the recent addition of Health Professionals to the purview of the ombudsman was initiated by government and was not the result of lobbying for expanded jurisdiction by the ombudsoffice.<sup>36</sup> Given aging population and the profile of health care issues in Alberta, the ombudsman's office will undoubtedly become more and more involved with issues in this sector. Demand, however, must be met with adequate resources.

The issue of mandate and resources has particular relevance for Alberta's ombudsoffice. In the mid 1990s, the Alberta government was leading the country once again: this time with respect to the administrative and service cut backs which were implemented to address a budget deficit. The ombudsoffice saw a 20% reduction in its budget resulting in a reduction of 20% of its staff during this period.<sup>37</sup> Alberta embraced the tenets of New Public Management, specifically, that the government should emulate the private sector with respect to management activities. New ways of delivering services, such as decentralizing service provision and contracting out were adopted with the goal of gaining efficiencies and saving money. Many functions that historically were performed by departments were transferred to regional authorities, community boards and contracted to private agencies.

The cuts to the ombudsoffice were coupled with a reduction in jurisdictional authority; the ombudsman had no authority to investigate complaints regarding government services that now were being delivered by private contractors. Moreover, citizens became confused as to whom to turn to in order to resolve issues. Indeed, given the rapid rate of reorganization and the change of the roles of government departments in the mid 1990s (specifically, from providing services to overseeing the provision of services), the ombudsman's office itself often had trouble figuring out who had responsibility for what. Ombudsman Johnson noted in 1995 that:

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<sup>33</sup> Alberta Ombudsman, *Annual Report 1984-87*. The average time it takes to resolve an issue is about five months.

<sup>34</sup> Alberta Ombudsman, *2005-2008 Strategic Business Plan*, 2005.

<sup>35</sup> Alberta Ombudsman, "Directive 11: Alternative Complaint Resolution and Informal Resolution by Ombudsman Investigators," 24 May 2005.

<sup>36</sup> Interview with Pamela McHugh, Senior Counsel to the Ombudsman, 10 March 2006.

<sup>37</sup> Alberta Ombudsman, *Annual Report 1996*, p. 1.

...my investigative staff have had some difficulty in pinning down who can deal with issues when they arise. The question must be obvious – if internally, departmental staff do not know how or what to advise and the Ombudsman staff have difficulties chasing down who is responsible, how can the average citizen know or find out how to address any problems they (sic) might have.<sup>38</sup>

The erosion of clearly demarcated lines of responsibility meant more time-consuming and complex complaint investigations. To make matters worse, the training of public servants in how to function in this dramatically changed environment did not keep pace with the change in the way things were done. At best this situation was annoying, but more worrisome is the effect that the blurring of the lines of responsibility had on accountability. Johnson concluded that “The privatization of government services is occurring without protective measures such as appeal mechanisms and/or ombudsman services. The lack of safeguards in the system erodes accountability.”<sup>39</sup>

The lack of accountability with respect to privatized services was being felt worldwide. A former New Zealand ombudsman, Sir John Robertson, observed that privatization of service delivery changes both the context and nature of the service providers, making it difficult for them to be profitable and efficient if they remain under the jurisdiction of an ombudsoffice. Specifically, the private sector provider focuses on making a profit as opposed to providing a service to the public, and the cost of responding to an investigation will cut into a provider’s profit margin.<sup>40</sup> One possible approach to the question of jurisdiction over privatized service delivery functions suggests that jurisdiction should “follow the dollar;” that is, that the ombudsoffices should have jurisdiction over anything this government funded, even if service decisions are made in the private sector.<sup>41</sup>

The concern for ensuring accountability for outsourced services remained paramount throughout the 1990s. Some departments addressed this issue by providing special training to encourage public servants to take responsibility for decisions and to foster better service for the public. But in other departments and agencies, the lack of accountability appeared to become institutionalized. In his 2000 Annual Report, Ombudsman Sutton remarked that investigation of complaints revealed a trend toward correspondence being sent that was not signed or that did not identify the author in some other way. He concluded that:

There are some departments and agencies that appear to have adopted an administrative model where no specific service provider is responsible for a particular file. When this occurs, a member of the public seeking assistance or clarification is more often than not met with a “faceless bureaucracy” this is unable to respond effectively.”<sup>42</sup>

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<sup>38</sup> Alberta Ombudsman, *Annual Report 1995*, p. 2.

<sup>39</sup> Alberta Ombudsman, *Annual Report 1995*, p. 1.

<sup>40</sup> Roy Gregory and Philip Giddings, “Ombudsman and the New Public Management,” in Roy Gregory and Philip Giddings, eds., “Righting Wrongs,” *The Ombudsman in Six Continents*, (Amsterdam: IOS Press, 2000, p. 427).

<sup>41</sup> Gregory and Giddings, “Ombudsman and the New Public Management,” p. 428.

<sup>42</sup> Alberta Ombudsman, *Annual Report 2000*, p. 3.

An additional problem was the growing trend toward service provision across ministries. Gone are the days when a particular program is clearly identified with and delivered by one department: programs now typically involve multiple partners. As such, there can be poor communication between departments and nobody takes ownership of the program when a problem arises. Moreover, complaints have evolved from being relatively simple service delivery issues to increasingly complex systemic issues, with multiple issues of complaint being contained in one file. As Ombudsman Button observed, these files contain “a thousand shades of grey” and are very resource intensive to resolve. When an issue of maladministration was discovered, traditional statistical tracking methods would note that this file was “supported” by the ombudsoffice. This obscured the fact that with respect to a dozen other issues contained within the file, the administrative body may have been found to have acted properly.<sup>43</sup> While administration has been immeasurably complicated by cross-departmental service delivery, downsizing, outsourcing, and reorganization, the problems that arise from complex administrative arrangements are nothing new. In a 1971 annual report Ombudsman McClellan referred to New Zealand’s first ombudsman when he quoted “Powells’ Law:”

The time factor in delays rises in geometric proportion to the number of departments involved. That is, if two departments come into the case, it takes four times as long. And for the purposes of law, a board counts as a department. So if there are two departments and one board, negotiations will take nine times as long.<sup>44</sup>

Combining cross-departmental service delivery with unsigned administrative documents immeasurably complicates the job of determining the source of maladministration.

In the mid 1990s, concern was not confined to the privatization of programs that had previously been delivered by government. The ombudsman was requested by the Premier to investigate how the Government of Alberta awarded construction contracts. His major finding was that there is no overall government corporate philosophy that guides how the government interfaces with the private sector when it enters into construction contracts. Given the government’s commitment to privatization, restructuring, and outsourcing, a corporate philosophy is critical to ensure that all contractors are working within a consistent and equitable rule set. The investigation resulted in four major findings and 24 recommendations, all of which were accepted.<sup>45</sup>

The installation of a new ombudsman in 1998 saw a continuation of concern over privatization and outsourcing. In his first annual report, Scott Sutton wrote:

It is difficult to stay abreast of who is doing what function in government, and whether responsibility for the action or decision complained about has been assumed by a different government department or agency, a contracted service provider, a newly created government authority or board

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<sup>43</sup> Alberta Ombudsman, *Annual Report 2005*, p. 2-3.

<sup>44</sup> This “law” is named after Sir Guy Powles, the first Chief Ombudsman of New Zealand. See Alberta Ombudsman, *Annual Report 1970*, p. 12.

<sup>45</sup> Alberta Ombudsman, *Annual Report 1995*, p. 1.

or its contracted service or to a private entity outside government altogether.<sup>46</sup>

Other issues relating to government reorganization emerged, such as the severance packages offered to government employees and position classification in a restructured organization. Interestingly, the mid 1990s saw a new source of complaint emerging: contracted agencies were now complaining about the manner in which government departments tendered and terminated contracts. It became apparent that departmental training in the area of awarding contracts, assessing performance, and terminating contracts was inadequate and as such, department personnel were unfamiliar with how to supervise those whom they hired on contract.

After eight years of raising concerns over outsourcing, the *Ombudsman Act* was finally amended in 2003. The amendments allowed for the possibility of the ombudsoffice investigating complaints about government services provided by the private sector under contract, a victory for administrative accountability in Alberta. Section 34 gives the ombudsman the flexibility to go to Cabinet with an individual request for jurisdiction – this most likely would occur with respect to entities that the ombudsoffice has lost jurisdiction over through outsourcing. Another important change was the amendment that cleared up any ambiguities regarding ombudsoffice jurisdiction over a board, tribunal or any other body whose decision is considered final. Section 21.1(1)

...allows departments, agencies and professional organizations on a recommendation from the ombudsman to rehear or reconsider a matter or decision and quash, confirm or vary that decision, notwithstanding any provision in any other act that a decision, act or omission is final and binding. The provision allows and encourages departments, agencies and professional organizations to work with this Office to right the wrong when it is appropriate and necessary to ensure citizens are treated fairly.<sup>47</sup>

This enabling legislation gives organizations the ability to reconsider decisions that the ombudsoffice might feel are unjust.

In amending the *Ombudsman Act* to take into account the challenges to accountability posed by outsourcing, Alberta is addressing an administrative issue that is garnering international attention. Outsourcing is proving to be the Trojan horse of public administration: witness the recent furor over the responsibility for the protection of personal data that is collected by governments but managed by private companies on contract.<sup>48</sup> Unlike some other provinces and territories, the Alberta ombudsoffice does not have responsibility for the protection of data; this resides with the Access and Privacy Commissioner. Following the lead of British Columbia, Alberta is amending its Privacy Acts to address the issue of outsourcing as it pertains to data protection. And true to Alberta tradition of leading the charge for both positive and negative change simultaneously, the legislative changes also contain draconian provisions that will

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<sup>46</sup> Alberta Ombudsman, *Annual Report 1998*, p. 6.

<sup>47</sup> Alberta Ombudsman, *Annual Report 2004*, p. 4.

<sup>48</sup> See Lorna Stefanick, "New Public Management and Outsourcing: Protecting Personal Privacy under the Shadow of the USA Patriot Act," presented at the BCPSA annual general meeting in Naniamo, May 2006.

decrease the transparency of government. As Conservative caucus unity decreases in anticipation of the selection of a new leader, the reflexive impulse of the government appears to be to circle the wagons.

Outsourcing has also created huge problems at the federal level as is evidenced by the Adscam debacle which caused a government to fall that previously had appeared to be virtually unstoppable as it marched to yet another election landslide. Fundamentally, this scandal was over the issuing of government contracts, a point that was not lost on Alberta's ombudsman. In their submission to the Gomery Inquiry on behalf of the Board of Directors of the Forum of Canadian ombudsmen and the Canadian Council of Parliamentary Ombudsmen, Ombudsman Button and Bernard Richard pointed out that there exists a gap in the democratic infrastructure at the federal level. Because there is no federal ombudsoffice, those who may have been in a position to observe maladministration in action were unable to report it through this channel. What is interesting is that while the federal government has spent millions on the Gomery inquiry and on subsequent remedial action, the notion of instituting an ombudsoffice at the federal level has not garnered much attention.<sup>49</sup>

Over the years complaints in Alberta have been consistently directed toward the same departments and service providers, despite huge changes to the governance model as a result of government budget cuts and outsourcing. The highest volume of complaints are directed at the Assured Income for the Severely Handicapped program, Correctional Services Division, Workers' Compensation Board, the Appeals Commission for Alberta Workers' Compensation, the Maintenance Enforcement Program and child protection issues under the Department of Children's Services. Because of the significant redistribution of programs among departments and amalgamations and realignments of Ministries since 2004, comparison of complaints among departments across years does not reveal meaningful data.

Since reaching a record high of 10,349 in 1993, the number of complaints to the ombudsman has steadily decreased. By 2005, complaints were half of what they were in 1993.<sup>50</sup> This is a trend that has been reported in many other jurisdictions and a variety of reasons have been suggested as to why this is the case. Some argue this is yet another example of declining social capital.<sup>51</sup> As is the case with decreasing rates of participation in elections, the electorate is said to have become increasingly disengaged with and apathetic to not only the electoral process, but to all things related to government. In this line of thinking, the citizens do not bother to complain because they figure nothing will be accomplished in doing so.

But other factors may explain this trend. Since the mid 1990s, Alberta's economy has steadily improved and by the middle point of the first decade in 2000 could be described as "red hot." As the economy improves, fewer Albertans rely on government services. The less government "does," the less chance there is for maladministration. The decrease in size of government since the 1990s due to budgetary restraint resulted in less government service provision, both through outsourcing and the privatization of many

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<sup>49</sup> Bernard Richard and Gordon Button, submission to the Gomery Inquiry into the Sponsorship Program and Advertising Activities, 28 October 2005.

<sup>50</sup> Alberta Ombudsman, *Annual Report 1996*, p. 5.

<sup>51</sup> Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community*, (New York: Simon and Schuster, 2000).

services. But as noted previously, the complexity of service provision and the subsequent complexity of complaints laid against an authority may obscure the actual volume of work that the ombudsman's office actually performs. One file may contain multiple issues, each requiring its own investigations. The current ombudsman's perception of the primary constituency of his office is revealing. According to Ombudsman Button, when he first took office he perceived that his work would be directed primarily at two constituencies: jurisdictional entities and individual complainants. He now believes that the work he does with jurisdictional entities will have the biggest impact on achieving administrative fairness. As only 35% of complaints are either supported or partially supported, the resolution of individual complaints will impact a very few people. In contrast, the complexity of programs and service delivery can result in a seemingly small change in a program having an impact on a large number of people "downstream." Thus an important component of the current workload of the ombudsoffice involves the identification of systemic issues that result in administrative injustice.<sup>52</sup>

Technology is another factor that could account for the decrease in complaints to the ombudsoffice. An Environics Research group survey conducted in November 2003 showed that 80% of Albertans had access to the internet, undoubtedly in part due to large government initiatives such as the "Let's Get Wired" and the Alberta SuperNet projects.<sup>53</sup> A fifteen-year veteran of the ombudsoffice notes that the proliferation of information technologies has had a major impact on the ability of citizens to gather information for themselves that assist them with pursuing complaints on their own. Sophisticated telephone systems and web information gives complainants channels to acquire administrative information for which they might previously have turned to the ombudsman's office. Moreover, many of the routine complaints that derived from such things as delayed or missing government cheques have been virtually eliminated with the advent of such technologies as direct deposit banking.<sup>54</sup>

A final factor that may account for the decrease in complaints to the ombudsman is a lack of awareness of the Office among Albertans. As noted earlier, in recent years the ombudsmen in Alberta have taken a "behind the scenes" approach to conflict resolution. Rarely does an issue hit the newspapers, and the current ombudsman reports enjoying an excellent working relationship with Alberta's civil service. Ombudsman Sutton reports that in the two and a half years he has been in office, virtually all of his recommendations have been accepted by the administration, and only once during his tenure has he had to go beyond a deputy minister to seek resolution to a problem.<sup>55</sup> Unfortunately, while the low-key approach undoubtedly does much to foster a positive and collaborative working relationship with government, it does not increase public awareness of the office. In February 2005, Ipsos Reid conducted a random survey of 800 Albertans. Sixty-five per cent of those surveyed had heard of the ombudsman, but only 21% could identify what the ombudsman did. The survey showed that those who were

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<sup>52</sup> Interview with Ombudsman Gordon Button, 10 March 2006.

<sup>53</sup> The goal of the SuperNet project was to connect to the internet schools, hospitals, libraries and provincial government buildings. In all, 4,700 facilities in 422 communities were provided with access to high-speed broadband Internet and network services. Rural Albertans were also provided with internet connections for comparable prices to their urban counterparts.

[http://www.albertasupernet.ca/The+Project/news/environics\\_excerpt\\_internet\\_stats\(nov-03\).pdf](http://www.albertasupernet.ca/The+Project/news/environics_excerpt_internet_stats(nov-03).pdf)

<sup>54</sup> Interview with Pamela McHugh, Senior Counsel to the Ombudsman, 10 March 2006.

<sup>55</sup> Interview with Ombudsman Gordon Button, 10 March 2006

least likely in need of the services of the ombudsman (over the age of 34, high education, and an income over \$70,000) were the most likely to be aware of the office. Clearly this is an area of concern, as those Albertans who are most likely to be dependent on government services (Indigenous peoples, immigrants, the poor and the marginalized) are also the least likely to know that there exists an avenue to resolve issues that may arise in the delivery of those services. The Ombudsman's Office recognizes this dilemma; in its 2005 Business Plan's SWOT analysis "lack of public awareness" is identified as a threat.<sup>56</sup>

Alberta's ombudsoffice celebrates its first 40 years in existence in 2007. In those four decades, the nature of governance has changed dramatically. The post-war growth in the administrative state has been replaced by the "lean" state, one in which government provides services to customers as opposed to citizens, and where ever possible, the government sets the policy course but contracts out the provision of services. Technological advances have helped to create a sophisticated citizen consumer as customer. The cross-functional nature of most policy issues and the outsourcing of service delivery have not only lead to acute administrative complexity but also obscured administrative accountability. This has made the job of the ombudsoffice infinitely more challenging as it seeks to clarify administrative procedures and assign responsibility for maladministration. But while the nature of the issues has changed, the basic premise of the ombudsoffice has changed little. It remains the "conscience" of government, seeking to ensure administrative justice for the citizens of Alberta.

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<sup>56</sup> Alberta Ombudsman, *Strategic Business Plan 2005-2008*, 2005.