

Yukon Ombudsman &
Information and Privacy
Commissioner

Submission on Amendments to the *Ombudsman Act*

September 24, 2010

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A. INTRODUCTION

As Ombudsman, I welcome the opportunity to make submissions to the Members' Services Board and recommend the following amendments to the *Ombudsman Act*.

The amendments proposed here will improve the *Ombudsman Act* by enhancing the operations of the Office of the Ombudsman overall while supporting the ability of the Ombudsman to pursue the mandate to its fullest and to better serve the interests of the people of Yukon.

I have identified issues for this submission that are evident through;

- the operations of the Office of the Ombudsman;
- working daily with the Yukon legislation;
- an examination of the Ombudsman experience in other jurisdictions; and
- a comparison of legislation across jurisdictions.

Previous amendments were proposed by the Yukon's first Ombudsman, Harley Johnson in 1997 and by my predecessor, Hank Moorlag in 2001. While some of those amendments were accepted by the Members' Services Board of the time, none of them have to date been enacted. Some of the issues raised by previous Ombudsmen remain pertinent today and as such are included in this submission.

The proposed amendments are divided into two categories: Substantive and Housekeeping. In general the proposed amendments are designed to strengthen the independence of the Office of the Ombudsman and to address issues that arise during an investigation. The housekeeping amendments are to clarify or correct wording.

Tracy-Anne McPhee
Ombudsman

Whitehorse, Yukon Territory
September 24, 2010

B. SUMMARY OF RECOMMENDATIONS

1. Holding Other Office (Section 3(3))

Section 3(3) be amended to provide that the Commissioner in Executive Council shall, on the recommendation of Members' Services Board, authorize the Ombudsman to hold an office of trust or profit other than the office of the Ombudsman or engage in another occupation for reward outside the duties of the office of the Ombudsman.

2. Ombudsman Remuneration to be put in Legislation (Section 4(1))

To achieve the optimum level of independence, the remuneration standard or formula for the position of the Ombudsman should be provided for in the *Ombudsman Act*, rather than by way of Order in Council as is currently the case.

3. Superannuation and Benefits for Ombudsman (Section 4(1))

The *Ombudsman Act* be amended to provide that the Ombudsman receive pension and other benefits similar to those provided by the Yukon government to its employees.

4. Superannuation for Ombudsman Employees (Section 7)

The *Ombudsman Act* be amended to provide pension benefits to the employees of the Office of the Ombudsman under the ***Public Service Superannuation Act***.

5. Own Motion Investigations (Section 11)

The *Ombudsman Act* be amended to grant the Ombudsman the express authority to initiate an investigation on his or her own motion by amending Section 11(1) to add the words, "or on the Ombudsman's own initiative," and Section 11(2) be amended by removing the words "*on a complaint*".

6. Disclosure of Information (Section 19)

Section 19 of the *Ombudsman Act* be amended to provide that confidentiality or secrecy provisions contained in any other Yukon statutes do not apply to the Ombudsman.

7. Delegation of Report Writing - Conflict of Interest (Section 30)

The *Ombudsman Act* be amended to include a provision for the Ombudsman to delegate any authority, when the Ombudsman is in a conflict of interest, including the authority to make a report.

8. Retaliation for Complainants (Section 32)

Section 32(1) be amended by adding a paragraph (e) as follows:

- e) take retaliatory or reprisal actions or deny any rights, privileges or benefits against anyone who files a complaint or participates in any way in an Ombudsman investigation.

9. Sunset Clause (Section 35)

Section 35 be removed from the *Ombudsman Act*.

10. Authority for Administrative Tribunals to Implement Ombudsman Recommendations (New Provision)

The *Ombudsman Act* be amended to include a provision confirming that an authority has the ability to rehear or reconsider a matter on the recommendation of the Ombudsman, despite its enabling legislation, similar in effect to that provided for in the *Alberta Ombudsman Act*.

11. Administering Oaths (Sections 10 and 16)

Section 10 be amended by adding the following subsection:

10(7) For the purposes of subsection (2) the Ombudsman may administer an oath.

Section 16(2)(d) be amended by adding to it the following phrase; "...and for that purpose, may administer an oath."

12. Confidentiality (Section 10(4))

Section 10 (4) be amended to add the phrase "or quasi-judicial" after the phrase "judicial proceeding".

13. Powers and Duties of Ombudsman (Section 11(1))

Section 11(1) be amended to insert the phrase "a procedure used" after the phrase "any act done or omitted".

C. PROPOSED AMENDMENTS: ISSUES, RATIONALE and RECOMMENDATIONS

I. SUBSTANTIVE AMENDMENTS

1. Holding Other Office (Section 3(3))

Issue:

To ensure the independence of the Ombudsman and protect against conflicts of interest, the Commissioner in Executive Council approval for the Ombudsman to engage in other activities outside the duties of the Office of the Ombudsman should be mandatory on the recommendation of the Members' Services Board.

Rationale:

Currently Section 3(3) permits the Ombudsman to hold an office of trust or profit or engage in another occupation for reward outside the duties of the office of the Ombudsman with the prior approval of the Commissioner in Executive Council.

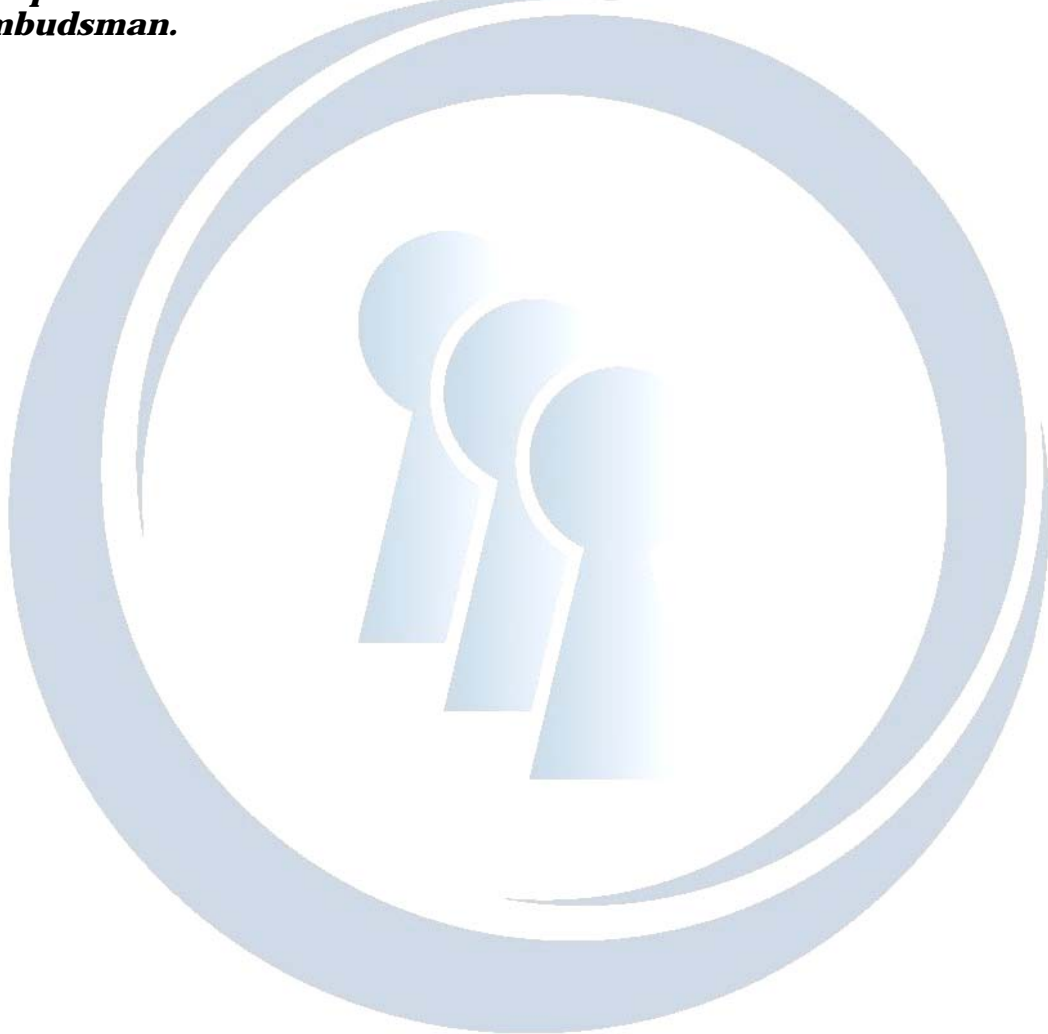
It is understood that the current provision is based on the position of Ombudsman being part-time, and the possibility that an incumbent Ombudsman may want or need to pursue other interests or employment.¹ This provision does not exist in any other Canadian Ombudsman legislation as in those jurisdictions the Ombudsman is a full-time position.

One of the essential elements of an Ombudsman's independence relates to the setting of salary and independence could be compromised when the Commissioner in Executive Council could, indirectly, influence the Ombudsman by withholding approval for additional income. An appropriate alternative would be for the Members' Services Board to consider a request from the Ombudsman, assess its potential for a conflict of interest, and make a recommendation that shall be approved by Commissioner in Executive Council.

¹ Hansard 28th Legislature, Session 2, Wednesday, April 26, 1995

Recommendation #1:

Section 3(3) be amended to provide that the Commissioner in Executive Council shall, on the recommendation of Members' Services Board, authorize the Ombudsman to hold an office of trust or profit other than the office of the Ombudsman or engage in another occupation for reward outside the duties of the office of the Ombudsman.



2. Ombudsman Remuneration to be put in Legislation (Section 4(1))

Issue:

To achieve the optimum level of independence, the remuneration formula or standard for the position of the Ombudsman should be set in legislation.

Current wording:

Remuneration - Section 4

- 4(1) The Ombudsman shall be paid remuneration for services rendered to be fixed by the Commissioner in Executive Council.
- (2) The remuneration of the Ombudsman shall not be reduced except on an address of the Legislative Assembly made by at least two-thirds of the members of the Legislative Assembly.

Rationale:

Currently in Yukon the remuneration for the Ombudsman is determined by the Commissioner in Executive Council. In practice, the Ombudsman's remuneration is benchmarked to an independent position, that being 40 percent of the salary of the Chief Territorial Court Judge. This standard is stated in an Order in Council. Once set, the remuneration cannot be reduced, except on address by the Legislative Assembly made by at least two thirds of the members of the Legislative Assembly.

The matter of the Ombudsman's pay should never be perceived to influence the Ombudsman's decision-making responsibility or duties. In the Yukon the informal practice of benchmarking the remuneration to an independent position goes some way to protecting the independence of the Ombudsman. As well, the statutory restriction on reducing the salary offers some protection. However to achieve optimum independence for the position of the Ombudsman, the best practice of confirming the standard or formula for remuneration in the legislation should be adopted.

One of the essential elements of an Ombudsman's independence relates to the setting of his or her salary. Independence is in jeopardy when the salary level for the position can be set or varied by the very institution the Ombudsman is appointed to investigate, or when the Ombudsman is required to negotiate a salary level with either the executive level of government or a legislative assembly.

An authority in the Ombudsman field expressed his opinion on this topic as follows:

The danger to be avoided in this structuring of the Ombudsman's operation is any suggestion of intrusion by the political arm of the Legislature into the Ombudsman function. Throughout it has been emphasized that it is the independence of the office, from the executive, from the administration, with only general accountability to the Legislature, that is the cornerstone of the Ombudsman concept. As stated by Professor Donald Rowat, the first and most critical characteristic of an Ombudsman is that he is an "independent, non partisan, officer of the Assembly." The office must remain as free of political supervision as the office of the Provincial Auditor or the Chairman of the Public Service Commission. All of which is not to say that the Ombudsman should not be answerable to the Legislature, but the latter, with its power to dismiss the Ombudsman for cause and to determine his budget has all the control over the office necessary.²

Both Harley Johnson, the Alberta Ombudsman appointed as the first Yukon Ombudsman in 1996, and Hank Moorlag, Yukon Ombudsman between 1997-2007, commented on this issue and recommended that remuneration for the Ombudsman be confirmed in legislation:

Currently the salary of the Ombudsman is fixed by the Commissioner in Executive Council. It has been suggested above that this be set by the Members' Services Board. However, consideration should also be given to "benchmarking" the remuneration to an independent position. In such a fashion, the Ombudsman is never in a position of negotiating salary with people he/she may have to deal with on an operational basis. I suggest this be confirmed in legislation.³

² Gottehrer, Dean M. & International Ombudsman Institute. Preliminary Draft of Ombudsman Legislative Resource Document. p. 4 Oct. 30 1999

³ Johnson, Harley. Re: Comments on Legislation. Letter to Speaker of the Assembly. p. 4 March 31, 1997

Examples of Legislative Provisions in Other Jurisdictions:

British Columbia Ombudsman Act

Remuneration

- 4(1) The Ombudsman is entitled to be paid, out of the consolidated revenue fund, a salary equal to the salary paid to the chief judge of the Provincial Court.

Saskatchewan Ombudsman Act

Salary of the Ombudsman

- 6(1) Subject to subsections (2) and (3), the Ombudsman is to be paid a salary equal to the average salary of all the deputy ministers and acting deputy ministers of the Government of Saskatchewan calculated as at April 1 in each year.
- (2) Any benefits or payments that may be characterized as deferred income, retirement allowances, separation allowances, severance allowances or payments in lieu of notice are not to be included in calculating the average salary of all the deputy ministers and acting deputy ministers pursuant to subsection (1).

Recommendation #2:

To achieve the optimum level of independence, the remuneration standard or formula for the position of the Ombudsman should be provided for in the Ombudsman Act, rather than by way of Order in Council as is currently the case.

3. Superannuation and Benefits for Ombudsman (Section 4(1))

Issue:

The Yukon Ombudsman does not have access to superannuation and other benefits similar to those provided by the Yukon government to its employees.

Rationale:

All other Canadian provincial Ombudsmen receive pension and benefits similar to those paid by governments to their employees. A review of the Ombudsman legislation across the country confirms that in most jurisdictions those pension and other benefits are prescribed in the legislation. To protect the independence of the Ombudsman, matters of pension and benefits should not be the subject of negotiation.

To attract a person with the experience, skills and abilities required for the position of Ombudsman it is important to ensure that a pension and benefits are available and commensurate with the position. The lack of pension and benefits is of particular concern given that the term of the Ombudsman is renewable, without limit. Individuals who commit 5, 10 or more years to serve as Ombudsman must currently do so without access to an adequate pension plan or other benefits.

While at present, the Ombudsman is paid a percentage of her salary in lieu of pension and other benefits, the current arrangement is only a small portion of what is available from the Yukon government to its employees and does not provide access to adequate or equivalent pension and benefits.

Examples of Legislative Provisions in Other Jurisdictions:

Ontario Ombudsman Act

Pension

(4) The Ombudsman is a member of the Public Service Pension Plan.

British Columbia Ombudsman Act

Pension

5(1) Subject to subsection (2), the Public Service Pension Plan, continued under the *Public Sector Pension Plans Act*, applies to the Ombudsperson.

(2) When calculating the amount of a pension under the Public Service Pension Plan, each year of service as Ombudsperson must be counted as 1 1/2 years of pensionable service.

(3) [Repealed 2003-62-3.]

Alberta *Ombudsman Act*

8(2) The Ombudsman shall receive similar benefits to those provided to Deputy Ministers.

Manitoba *Ombudsman Act*

Application of *Civil Service Superannuation Act*

9(1) The Ombudsman, and all persons employed under him, are employees within the meaning of *The Civil Service Superannuation Act*.

Manitoba of *The Civil Service Act*

9(2) The Ombudsman is not subject to *The Civil Service Act* except Section 44 thereof which applies to him but he is entitled to the privileges and perquisites of office, including holidays, vacations, sick leave and severance pay, of a member of the civil service who is not covered by a collective agreement.

New Brunswick *Ombudsman Act*

2(11) An Ombudsman to whom the *Public Service Superannuation Act* applies under paragraph (10)(b)

- a) shall contribute to the Superannuation Account in accordance with the *Public Service Superannuation Act*, and
- b) shall be deemed to be a contributor and a deputy head for the purposes of that Act.

Recommendation #3:

The Ombudsman Act be amended to provide that the Ombudsman receive pension and other benefits similar to those provided by the Yukon government to its employees.

4. Superannuation for Ombudsman Employees (Section 7)

Issue:

Employees of the Office of the Ombudsman should have access to a pension similar to the one provided by the Yukon government to its employees.

Rationale:

In 2007, following a six year process initiated by the Ombudsman, the employees of the Office of the Ombudsman were provided extended health and dental benefits under the *Public Service Group Insurance Benefit Plan Act*. Although requested, the employees have to date been denied the opportunity to access the Superannuation Plan under the *Public Service Superannuation Act*.

The three Ombudsman employees have been denied access to the pension plan of Yukon government employees on the basis that such a benefit would somehow compromise the independence of the Office of the Ombudsman. This is simply not the case. Yukon Territorial and Supreme Court Judges and their staff are recipients of pension and benefits similar to those afforded Yukon government employees, without any questions being raised regarding their independence. Providing access to the *Superannuation Plan* will not compromise the Office's independence any more than the fact staff pay and receive current benefits under the *Public Service Group Insurance Benefit Plan Act* from the Government of Yukon.

In every jurisdiction with an Ombudsman office in Canada, staff have access to the same pension and benefit plan as government employees. In those jurisdictions no concerns have arisen that suggest access to a government pension and benefits plan compromises independence.

The Yukon Department of Justice has confirmed in a legal opinion that giving access to pension benefits can be achieved by making a simple amendment to the *Ombudsman Act*, without the necessity of making employees of the Ombudsman members of the public service.

At present, the Ombudsman employees are paid a percentage of their salary in lieu of access to a pension. It is anticipated therefore that any additional cost to the Office of the Ombudsman in order to implement pension benefits for staff would be minimal.

The significant benefit to the Office of being able to provide pension and other benefits to staff is the ability for the Ombudsman to attract and retain well qualified individuals as employees.

Recommendation #4:

The Ombudsman Act be amended to provide pension benefits to the employees of the Office of the Ombudsman under the Public Service Superannuation Act.



5. Own Motion Investigations (Section 11)

Issue:

The Ombudsman's power to investigate should include the authority to investigate on the Ombudsman's own initiative or own motion.

Rationale:

The *Ombudsman Act* currently provides that the Ombudsman may initiate an investigation after receiving a specific complaint, upon a referral from the Legislative Assembly or at the request of a municipality or a First Nation. This proposed amendment would add the authority for the Ombudsman to initiate an investigation under his or her own motion.

This own motion ability is seen as essential to the independence of the Ombudsman.⁴ Every other jurisdiction in Canada gives authority for the Ombudsman to undertake an investigation on the Ombudsman's own motion.

While the Ombudsman's focus is primarily individual complaints, own motion authority is an additional tool to assist in improving the administration of government by granting the Ombudsman the authority to deal with issues before they develop into specific complaints. Carrying out own motion investigations is a preventative measure that can be helpful to authorities because identified deficiencies that might impact the general population can be addressed.

By way of example, own motion authority could be advantageous to the Yukon public in the following circumstances:

- When investigating one or more complaints of the same nature, the Ombudsman could determine that the issues are serious enough to warrant an investigation going beyond the narrow scope of the individual complaints;
- When over time, emerging trends or patterns are identified from individual complaints that could more effectively be dealt with through a systemic investigation initiated by the Ombudsman. The Ombudsman may note that some complaints come up repeatedly. Logically this points to deeper underlying reasons for the problem and indicates that complaints are a symptom of something more serious meriting an investigation of the source of the problem; and

⁴ Marten Oosting Essential Elements of Ombudsmanship, International Ombudsman Institute The Ombudsman Concept at page 18

- When a matter of public interest is identified but no complainant has come forward.

Examples of Legislative Provisions in Other Jurisdictions:

In all Canadian jurisdictions Ombudsman legislation includes the authority for the Ombudsman to investigation on his or her own initiative or own motion. By way of example, the New Brunswick and Alberta provisions are included here.

New Brunswick Ombudsman Act

12(1) Subject to subsection (2), the Ombudsman may, either on a written petition made to him or on his own motion, investigate a decision or recommendation made, an act done or omitted or a procedure used with respect to a matter of administration by an authority or any officer thereof whereby any person is aggrieved or, in the opinion of the Ombudsman, may be aggrieved.

Alberta Ombudsman Act

12(2) Subject to subsection (2.1), the Ombudsman may make an investigation either on a complaint made to the Ombudsman by any person or on the Ombudsman's own motion, and the Ombudsman may commence an investigation notwithstanding that the complaint may not on its face be against a decision, recommendation, act or omission as mentioned in subsection (1).

Recommendation #5:

The Ombudsman Act be amended to grant the Ombudsman the express authority to initiate an investigation on his or her own motion by amending Section 11(1) to add the words, "or on the Ombudsman's own initiative," and Section 11(2) be amended by removing the words "on a complaint".

6. Disclosure of Information to the Ombudsman (Sections 19(2) and 19(4))

Issue:

Sections 19(2) and (4) may be seen to create a limitation on disclosure of information to the Ombudsman in an investigation that affects the Ombudsman's ability to properly carry out a thorough investigation.

Current Wording:

Application of other laws respecting disclosure

19 (2) Subject to Section 18 and to subsection (4), a person who is bound by an enactment to maintain confidentiality in relation to or not to disclose any matter shall not be required to supply any information to or answer any question put by the Ombudsman in relation to that matter, or to produce to the Ombudsman any document or thing relating to it, if compliance with that requirement would be in breach of the obligation of confidentiality or nondisclosure. [*Emphasis added*]

(4) Subject to Section 16, after receiving a complainant's consent in writing, the Ombudsman may require a person described in subsection (2) to, and that person shall, supply information, answer any question or produce any document or thing required by the Ombudsman that relates only to the complainant. [*Emphasis added*]

Rationale:

Investigations lie at the core of Ombudsman work. Thorough investigation will determine the facts of a matter and form the basis of reasoned analysis and effective resolutions. In order to carry out investigations properly, the Ombudsman must have access to any information he or she needs, including confidential and possibly secret information, and co-operation of the government is essential.

Section 16 gives the Ombudsman a general power to obtain information from persons and in the manner he or she considers appropriate but makes it subject to other provisions in the Act including Section 19. Section 19 deals with the application of other laws respecting disclosure of information to the Ombudsman. Read together with Section 16, Sections 19(2) and (4) could be seen to limit information that can be disclosed to the Ombudsman in the course of an investigation.

Section 19(2), deals with “confidential” information that an authority is bound, by an enactment, to protect. It could be argued that this provision prevents the Ombudsman from accessing information that is made confidential by a statute other than the *Public Service Act*. Many statutes, apart from the *Public Service Act*, require confidentiality and information relevant to an investigation under those statutes may not be available to the Ombudsman in the course of an investigation. For example, the *Workers Compensation Health and Safety Act*, the *Public Health and Safety Act*, are just two of many statutes that contain a provision that prohibits the disclosure of confidential or secret information. Given the profusion of statutory confidentiality requirements, the Ombudsman’s investigation function would be significantly impacted if there is no mechanism to access that information.

Section 19(4) may not be sufficient to address this limitation. Section 19(4) authorizes the Ombudsman to obtain information when another Act requires it be kept confidential and secret where the complainant consents and the information relates to the complainant. The problem inherent in this consent provision is that it could be seen to permit the Ombudsman to only obtain information relating to the complainant who has given consent. There are many circumstances in which the consent of the complainant will be inadequate to permit the Ombudsman to obtain the necessary information for an investigation.

For example, a very common issue in Ombudsman investigations is whether a decision, recommendation or an action of an authority was unjust, oppressive or improperly discriminatory; or was related to the application of arbitrary, unreasonable or unfair procedures. It is often impossible to decide such a question without comparing the conduct occurring in one case to that of another, to determine whether there was a consistent and fair application of the law, policies or procedures.

Another example of the difficulty created by Section 19(4) of the *Ombudsman Act* concerns complaints that involve third parties where the information in the file relates to both the complainant and the third party. An example would be a complaint against a government department responsible for property boundaries where the complaint is made by one party concerning the appropriate location of the boundary separating two privately owned pieces of land. The government might argue that it could not disclose the information at all because it relates to both individuals and the third party has not given his or her consent. Moreover consent by the third party would have no legitimacy under the Act because Section 19(4) of the Act only deals with consent given by complainants, not non-complainants.

The practical result of the proposed amendment is to require authorities to provide information, including confidential information, where the Ombudsman determines that it is relevant to a complaint being investigated. The amendment would clear up any ambiguity about the authority of the Ombudsman to obtain whatever information is necessary to conduct an investigation.

The *Ombudsman Act* already addresses any concerns about the privacy or confidentiality of the information about persons other than the complainant in the hands of the Ombudsman. The Act imposes very extensive and strict confidentiality provisions on the Ombudsman. These provisions ensure the secrecy and confidentiality of any information provided to the Ombudsman in the course of carrying out his or her duties under the Act.

The other categories of information that are specifically beyond the reach of the Ombudsman, such as information considered privileged at common law (Section 20) and Executive Council proceedings certified by the Minister of Justice (Section 18) would not be affected by this amendment.

Examples of Legislative Provisions in Other Jurisdictions:

The *Ombudsman Acts* of Manitoba, Saskatchewan, Alberta and New Brunswick all have provisions dealing with disclosure of information to the Ombudsman making clear that no secrecy provisions contained in any other statute apply to the Ombudsman.

The benchmark which Parliamentary Ombudsmen in Canada have adopted as the legislative gold standard in Ombudsman laws is the wording in Section 32 of the Manitoba Act, which provides in relevant part as follows:

...no provision of any Act of the Legislature requiring a person to maintain secrecy in relation to, or not to disclose information relating to, any matter shall apply in respect of an investigation by the Ombudsman; and no person required by the Ombudsman to furnish information or to produce any document, paper or thing or summoned by the Ombudsman to give evidence, shall refuse to furnish the information, produce the document, paper or thing, or to answer questions on the ground of any such provision.

This wording has the great advantage of being clear and unambiguous and ensuring the Ombudsman has access to any information necessary for a thorough investigation.

The Alberta Legislature has clarified this issue in the following manner:

Alberta *Ombudsman Act*

18(4) Any person who is bound by an Act to maintain secrecy in relation to, or not to disclose, any matter may be required by the Ombudsman to supply information or answer any question or produce any document, paper or thing that, in the Ombudsman's opinion, relates to the matter being investigated, and it is the duty of the person to comply with the requirement notwithstanding that person's duty to maintain secrecy or not to disclose the matter.

(5) Repealed 2003 c30 s7.

(6) Every person has the same privileges in relation to the giving of information, the answering of questions and the production of documents, papers and things under this Act as witnesses have in any court.

As a result of the litigation in New Brunswick, the New Brunswick Legislature amended the *Ombudsman Act* to specifically address this situation by including the following provision:

New Brunswick *Ombudsman Act*

19.1(1) Notwithstanding any other Act or claim of privilege, and subject to subsection (3), the Ombudsman has a right to all information and documentation that is necessary to enable the Ombudsman to perform the duties and exercise the powers under this Act.

19.1(2) Subject subsection (3), if the Ombudsman requests a person to provide information relating to a matter being investigated by the Ombudsman and the Ombudsman is of the opinion that the person is able to provide the information, the person shall provide the information and produce any documents or papers that, in the opinion of the Ombudsman, relate to the matter and that may be in the possession or under the control of the person.

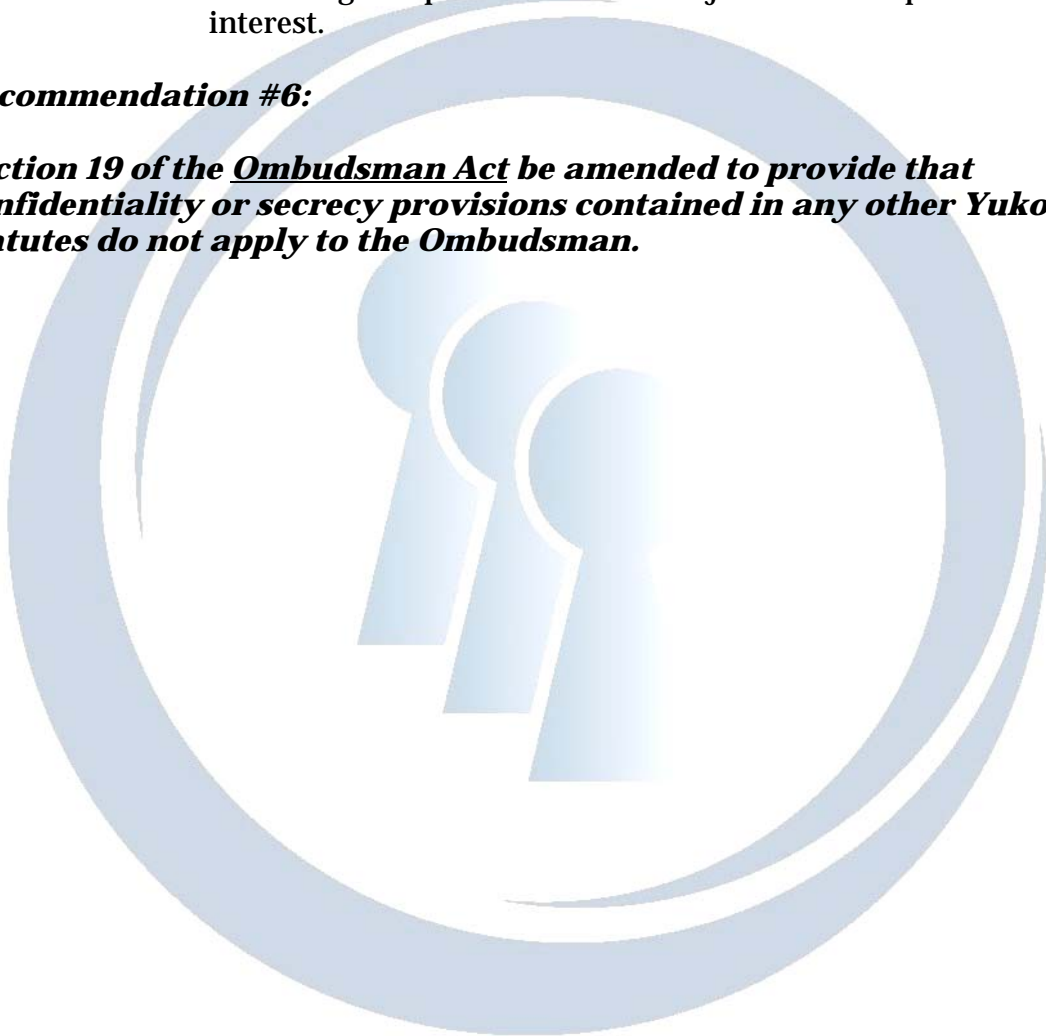
19.1(3) The Ombudsman does not have a right to the following information or documents:

- (a) information or documents protected by a claim of solicitor-client privilege; and
- (b) information or documents certified by the Attorney General as disclosing the following:
 - (i) the deliberations of the Executive Council; or
 - (ii) the proceedings of the Executive Council or a committee of the Executive Council.

- 19.1(4) Subject to subsection (3), a rule of law that authorizes or requires the following does not apply to an investigation by or proceeding before the Ombudsman:
- (a) the withholding of a document, paper or thing on the ground that disclosure of the document, paper or thing would be injurious to the public interest; or
 - (b) the refusal to answer a question on the ground that answering the question would be injurious to the public interest.

Recommendation #6:

Section 19 of the Ombudsman Act be amended to provide that confidentiality or secrecy provisions contained in any other Yukon statutes do not apply to the Ombudsman.



7. Delegation of Report Writing - Conflict of Interest (Section 30)

Issue:

The *Ombudsman Act* permits the Ombudsman to delegate all but a few specific powers or duties under the Act. One notable exception is the authority to make a report following investigation. If the Ombudsman has a conflict of interest and must delegate the conduct of an investigation to another individual, the inability to delegate the writing of a report is problematic.

Rationale:

While the *Ombudsman Act* permits the delegation of many of the Ombudsman duties and responsibilities, it does not permit the delegation of the report writing function. This is of course a reasonable limit on the function of the Ombudsman except in one instance – when the Ombudsman cannot act as a result of a conflict of interest. In such an instance, it is appropriate that the Ombudsman be able to delegate all of the responsibilities for the investigation and reporting of a matter to another individual.

This issue has arisen in the Yukon on one previous occasion. In that case, the Ombudsman delegated the matter to the Ombudsman Office in Alberta, upon agreement of the complainant and the government. The Alberta office conducted the investigation, came to a conclusion and developed recommendations. However because the power to make a report could not be delegated, the Yukon Ombudsman had to issue the report. To avoid a concern about the appearance of a conflict, the Ombudsman accepted the findings, opinions, and recommendations of the Alberta Ombudsman and incorporated them into his report.

A repeat of this situation is not desirable. It only makes good sense that in the case of a conflict of interest that results in the Ombudsman delegating a matter to another, the person that conducts the investigation should have the authority to make a report.

The *Ombudsman Act* should be amended to include a provision that specifically allows for delegation of all functions where the Ombudsman is in a personal conflict of interest.

Examples of Legislative Provisions in Other Jurisdictions:

The New Brunswick *Ombudsman Act* has addressed this issue by including the following wording in the section regarding delegation of authority:

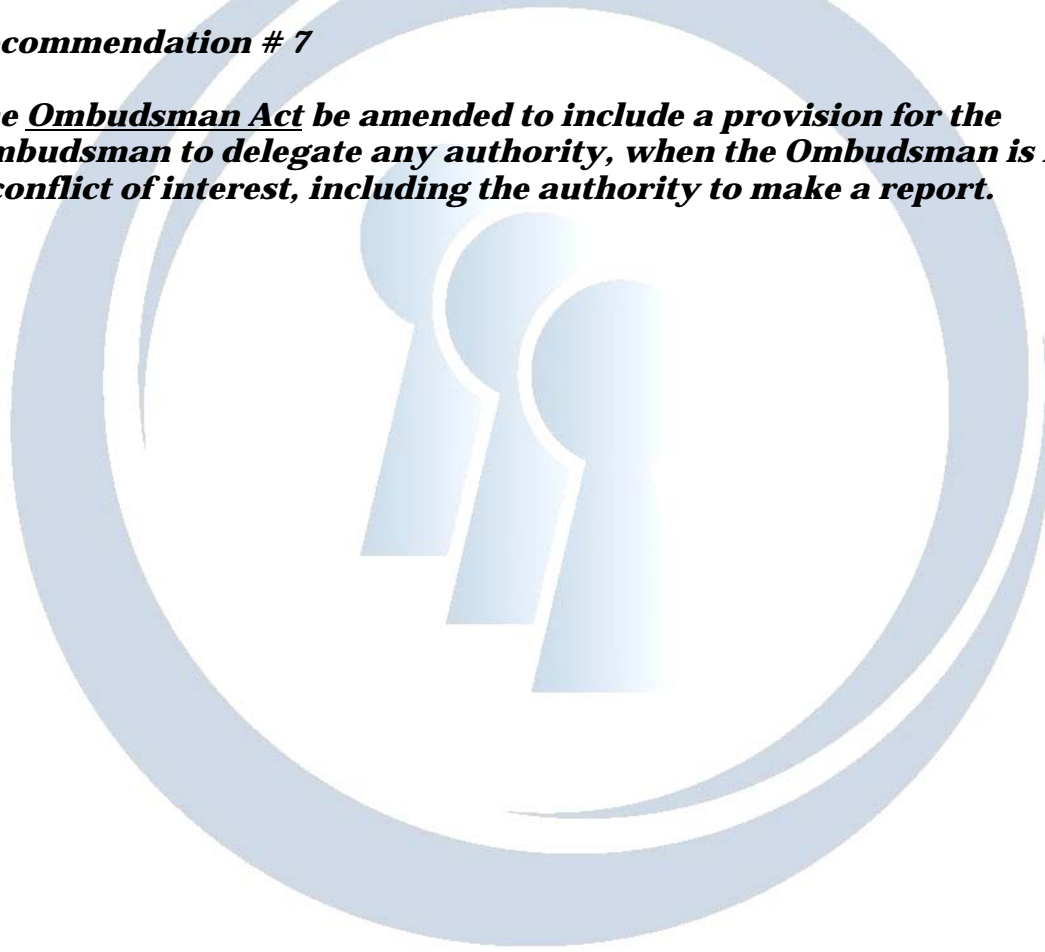
New Brunswick *Ombudsman Act*

9(1) The Ombudsman may, in writing under his signature, delegate to any person any of his powers under this Act except the power of delegation and the power to make a report under this Act.

9(1.1) Notwithstanding subsection (1), if the Ombudsman is in a conflict of interest with respect to a matter referred to the Ombudsman, the Ombudsman may delegate in writing to any person, any power with respect to that matter, including the power to make a report.

Recommendation # 7

The Ombudsman Act be amended to include a provision for the Ombudsman to delegate any authority, when the Ombudsman is in a conflict of interest, including the authority to make a report.



8. Protection from Retaliation for Complainants (Section 32)

Issue:

Individuals who make a complaint to the Ombudsman should be able to do so freely and without fear of any retaliatory measures or reprisals.

Rationale:

This amendment would make it an offence for any retaliatory measure to be taken against a person who made a complaint to the Ombudsman or participated in some way with the investigation. This issue was identified by both Harley Johnson and Hank Moorlag⁵, and is explained this way:

Implicit in the Act is the concept that people who raise issues with the Ombudsman should do so freely and without fear of any retaliatory measures by the subjects of the complaint. It is suggested this be explicitly stated in the Act.

Examples of Legislative Provisions in Other Jurisdictions:

Alberta Ombudsman Act

Offences and penalties

30. Any person who,
- (a) without lawful justification or excuse, willfully obstructs, hinders or resists the Ombudsman or any other person in the exercise of his powers under this Act,
 - (a.1) without lawful justification or excuse, evicts, discharges, suspends, expels, intimidates, coerces, imposes a financial or other penalty on or otherwise discriminates against a person because that person has, in good faith,
 - (i) made or attempted to make a complaint under this Act,
 - (ii) assisted another person in making or attempting to make a complaint under this Act, or
 - (iii) given evidence or otherwise co-operated in an investigation under this Act,
- is guilty of an offence and is liable to a fine of not more than \$1000 and in default of payment to imprisonment for a term not exceeding 3 months.

⁵ Johnson, Harley. Re: Comments on Legislation. Letter to Speaker of the Assembly. p. 2 March 31, 1997

Recommendation # 8:

Section 32(1) be amended by adding a paragraph (e) as follows:

e) take retaliatory or reprisal actions or deny any rights, privileges or benefits against anyone who files a complaint or participates in any way in an Ombudsman investigation.



9. Sunset Clause (Section 35)

Issue:

Section 35 is the “sunset clause” of the Act, limiting its existence to 5 years unless the Legislative Assembly determines it should continue for a further period, not exceeding five years from the time at which it would otherwise expire. This Section should be removed from the Act as over the past 15 years the Office of the Ombudsman has established its value in improving the administration of government in the Yukon.

Rationale:

The time has come to remove the ‘sunset clause” from the legislation. The Office of Ombudsman has become a standard and valued component of the administrative state in Canada since its introduction in the late 1960’s. All of the provinces except for Prince Edward Island and the two territories Nunavut and Northwest Territories have established an Office of the Ombudsman. After more than forty years of experience only once, in Newfoundland and Labrador, has a provincial government abolished an Ombudsman system and even there it has since been restored.⁶

As stated earlier, independence of the office is critical if individuals are to have any confidence in the work of the Ombudsman. In ensuring independence, continuity plays a key role. Once the institution has been well established, guarantees must be given that it cannot be easily abolished. A government should not have the ability to rid itself of its critics. Moreover, the establishment of an Ombudsman generates expectations among the public for whom it is intended. When the Yukon government established the Office it was considered a desirable part of the machinery of democratic government. Removing Section 35 would demonstrate the continuing commitment of the Legislative Assembly to the principles of the Act.

In fact, the “sunset clause” is unnecessary as the Legislative Assembly can repeal the Act at any time, should it determine that the Act ought not continue in force and effect.

To the extent that this clause operates as an opportunity to review the legislation from time to time to ensure it remains current, it would be more appropriate for the legislation to stipulate a time frame specifically for the purpose of review such

⁶ Provincial and Territorial Ombudsman Offices in Canada, University of Toronto Press Inc. 2009

as is found in the *Child and Youth Advocate Act* or the *Access to Information and Protection of Privacy Act* as set out below:

Child and Youth Advocate Act:

30 Within 5 years after this Act comes into force the Members' Services Board must establish a process, including terms of reference, for the review of the operation of this Act.

Access to Information and Protection of Privacy Act:

Review of Act

69(1) At least once every six years , the Minister must cause there to be a comprehensive review of this Act and submit a report respecting the review to the Legislative Assembly within one year after the commencement of the review.

Recommendation #9:

Section 35 be removed from the Ombudsman Act.

10. Authority for Administrative Tribunals to Implement Ombudsman Recommendations (new provision)

Issue:

For greater certainty, the legislation should include a provision that authorizes administrative tribunals to reconsider a decision on the recommendation of the Ombudsman. Without express authority, the legal principle of “functus officio” may have the effect of limiting an authority’s ability to implement recommendations made by the Ombudsman following investigation.

Rationale:

The proposed amendment does not extend the authority of the Ombudsman, but rather clarifies that administrative tribunals have the authority to implement recommendations made by the Ombudsman following an investigation.

The *Ombudsman Act* at subsection 11(3) states that the powers and duties conferred on the Ombudsman may be exercised and performed notwithstanding a provision in an Act to the effect that a decision, recommendation or an act is final, or that no appeal lies in respect of an Act, or that no proceeding or decision of the authority whose decision, recommendation or act it is shall be challenged, review, quashed or called into question. Further under Section 23, the Ombudsman could recommend that a decision or recommendation of an authority be cancelled or varied, or that a matter be reconsidered. Clearly, these provisions do not limit an Ombudsman investigation or the development of recommendations in relation to administrative tribunals subject to the Ombudsman’s jurisdiction. The fact that the administrative tribunal has made a final decision does not take it out of the Ombudsman’s jurisdiction.

Many administrative tribunals operate under statutes which state their decisions are final and binding. In Alberta, some administrative tribunals refused to implement an Ombudsman recommendation to reconsider a decision by relying on the “final and binding” clause. Such a position effectively thwarted the statutory investigative function and duty of the Ombudsman.

In *Re Alberta Ombudsman Act*,⁷ the Alberta Supreme Court considered the jurisdiction of the Ombudsman to investigate a decision of the Provincial Planning Board. In the course of that case Judge Milvain commented on the meaning of a section of the *Alberta Ombudsman Act* similar to Section 11(3) of the *Yukon Act* and at page 59 confirmed that :

⁷ *Re Alberta Ombudsman Act* 1970 10 D.L.R. (3rd) S.C. at page 59

Section 11 makes it clear that s-s. (3) that finality of an administrative decision does not take it out of the Ombudsman's jurisdiction. I wish to emphasize that in mentioning an "administrative decision" it is intended to include that quasi-judicial decision which is an essential ingredient of legislation in the field of administrative law.

More recently, the Alberta Legislature amended the Alberta *Ombudsman Act* to specifically address this situation by including the following provision.

Power to reconsider matters

- 21.1(1) On the recommendation of the Ombudsman under Section 21(3), a department, agency or professional organization may
- (a) rehear a matter or reconsider a decision or recommendation made by the department or agency or professional organization or an officer, employee or member of it, and
 - (b) quash, confirm or vary that decision or recommendation or any part of it.
- (2) If a matter is reheard or reconsidered pursuant to subsection (1), the provisions of the enactment governing the original hearing or consideration apply to the rehearing or reconsideration.
- (3) This Section applies notwithstanding any provision in any Act to the effect that
- (a) any decision, recommendation, act or omission referred to in Section 12(1) or 12.1(2) is final,
 - (b) no appeal lies in respect of it, or
 - (c) no proceeding or decision of the person, department, agency or professional organization whose decision, recommendation, act or omission it is may be challenged, reviewed, quashed or called in question.

Given the current Yukon legislation, it may be open for an authority subject to the Ombudsman's jurisdiction to argue that it cannot give effect to a recommendation by the Ombudsman to cancel or vary or reconsider a matter on the basis that the authority believes it is legally bound by their decision through the principle of "functus officio". Amending the Yukon legislation at this time could avoid unnecessary and time consuming litigation and confirm the Ombudsman authority as contemplated in the legislation.

This problem was identified by Harley Johnson in his March 1997 letter to the Speaker of the Assembly and by Hank Moorlag in 2001:

The *Act* is very clear that the Ombudsman may investigate and may make recommendations. While the argument has not been raised as yet in this jurisdiction about the concept of “functus officio”, given the experience of Ombudsman across Canada, it will. “functus officio” in simplistic terms means that a decision of an adjudicative body once final is final. Therefore, while the investigation is appropriate and recommendations may be valid, they often cannot be implemented. This clearly fetters the role of the office. It is suggested that the *Act* be amended to indicate that based on a recommendation from the Ombudsman, an authority may implement that recommendation including a recommendation to reconsider. [*Emphasis added*]⁸

Recommendation #10:

The Ombudsman Act be amended to include a provision confirming that an authority has the ability to rehear or reconsider a matter on the recommendation of the Ombudsman, despite its enabling legislation, similar in effect to that provided for in the Alberta Ombudsman Act.

⁸ Source: Johnson, Harley. Re: Comments on Legislation. Letter to Speaker of the Assembly. p. 4 March 31, 1997. Correspondence from Ombudsman Moorlag to the Clerk of the Legislative Assembly, June 27, 2001

11. Administering Oaths (Sections 10(2) & 16(2)(d))

Issue:

The Ombudsman does not have express authority in the Act to administer the oaths referred to in the legislation. Section 10(2) requires a person engaged by the Ombudsman to take an oath of confidentiality before the Ombudsman and Section 16(2)(d) gives the Ombudsman authority to summon and examine persons under oath.

Rationale:

Section 10(2) & 16(2)(d) require a person to take an oath before the Ombudsman. There is however, no express authority for the Ombudsman to administer such oaths. While the ability to administer an oath is implied by the words in those sections, for the sake of clarity, the Act should provide express authority for the Ombudsman to administer an oath.

Recommendation #11:

***Section 10 be amended by adding the following subsection:
10(7) For the purposes of subsection (2) the Ombudsman
may administer an oath.***

***Section 16(2)(d) be amended by adding to it the following phrase:
“...and for that purpose, may administer an oath.”***

II. HOUSEKEEPING AMENDMENTS

12. Confidentiality (Section 10(4))

Issue:

Non compellability of Ombudsman and employees should be clearly identified in relation to judicial *and* quasi-judicial proceedings.

Rationale:

Section 10 deals with confidentiality of the Ombudsman process. Section 10(4) specifically protects confidentiality of the Ombudsman process by prohibiting the Ombudsman and those engaged by the Ombudsman from giving or being compelled to give evidence in a court or proceedings of a judicial nature in respect of anything coming to their knowledge in the exercise of their duties. The only exceptions are where the Ombudsman wishes to enforce his or her powers of investigation or compliance with the *Ombudsman Act* or with respect to a trial for perjury.

The purpose of this provision is to ensure that neither the Ombudsman nor her employees can be called as witnesses to give evidence in court or any other judicial proceeding concerning any matter relating to the exercise of the Ombudsman's or a staff members duties under the Act. This allows both complainants and authorities to be absolutely candid in communicating with the Ombudsman and her staff. The office and the function it is designed to serve can only operate effectively in a climate of confidentiality.

A similar provision in the British Columbia *Ombudsman Act* was considered in the case of Levey v. Friedmann⁹ where the Crown attempted to have the Ombudsman called as a witness to explain the details of his investigation. The trial judge made the following statement:

To allow questions concerning the Ombudsman actions as a result of his investigations could for the most part result in a wholesale breach of Section 9¹⁰.

If s.9 is to have any meaning and the Act any purpose and foundation, it is my view that the Section is to be construed as to give the Ombudsman the widest latitude to carry out his legislative duties.

⁹ (1985), 60 B.C.L.R. 101.

¹⁰ Section 9(4) was the non compellability provision in the British Columbia Act in 1985.

The Ombudsman deals in complaints from members of the public who allege governmental abuse. If he is not able to receive and obtain information and material in confidence and not able to give that assurance to the complainant there would be little need of the Office. The confidentiality aspect of the legislation is paramount and fundamental and without it the Ombudsman could not function. Any narrow interpretation of s.9(4) is, in my view contrary to the overall intention of the legislation.

This immunity from being compelled to give evidence only applies to those matters coming into the Ombudsman's knowledge through the exercise of his or her functions under the legislation.

The Ombudsman has jurisdiction over a great number of boards, tribunals commissions, appeal committees and other administrative bodies created by the government, many of which have a quasi-judicial functions. Section 10 of the Yukon *Ombudsman Act* references court and other judicial proceedings. The rules of statutory interpretation provide that the use of both words suggest something other than a court proceeding was contemplated by the inclusion of the words "or other judicial proceeding". As suggested by the Judge in Levey, the Section should be given a broad interpretation. However it is not clear what was intended by the phrase "other judicial proceeding" and whether this would include quasi-judicial boards, tribunals etc. over which the Ombudsman has jurisdiction to investigate. For greater clarity, the *Ombudsman Act* should be amended to include the phrase "or quasi-judicial proceeding" after the phrase "or other judicial proceedings" in section 10(4). This will avoid any future litigation regarding the meaning of that section and serves to ensure the Ombudsman cannot be compelled to give evidence in any matter related to the exercise of his or her functions and duties under the Act.

Recommendation #12:

Section 10 (4) be amended to add the phrase "or quasi-judicial" after the phrase "judicial proceeding".

13. Powers and Duties of Ombudsman (Section 11(1))

Issue:

For greater clarity Section 11(1) should be amended to include the words “a procedure used”.

Rationale:

Section 11(1) says it is the duty of the Ombudsman to investigate any decision or recommendation made or any act done or omitted relating to a matter of administration.

Section 11(2) makes reference to s.11(1) and says that with respect to a matter referred to in subsection (1) the Ombudsman may investigate

- (a) a decision or recommendation made;
- (b) an act done or omitted; or
- (c) a procedure used.

Section 11(1) and (2) are intended to be read together. These two Sections are in a sense a mirror of one other. However, Section 11(1) does not contain the words a “procedure used” found in subsection (2).

This omission appears to be an error that for greater certainty can be corrected by inserting the words “a procedure used” in Section 11(1) after the words “any act done or omitted”.

Recommendation #13:

Section 11(1) be amended to insert the phrase “a procedure used” after the phrase “any act done or omitted”.

ORIGINAL SIGNED BY:

Tracy-Anne McPhee
Ombudsman