We speak up for fairness
Au service de l'équité

Northwest Territories Ombud
Protecteur du citoyen des Territoires du nord-ouest

Recommendations for Amendments to the *Ombud Act*

Recommandations pour la modification de la *Loi sur le protecteur du citoyen*

Special Report to the Legislative Assembly
Rapport special à l'Assemblée législative
1-2024

Le présent document contient la traduction française du sommaire et du message de la protectrice du citoyen.

Northwest Territories
Ombud

We speak up for fairness

February 2, 2024

HONOURABLE SHANE THOMPSON
SPEAKER
LEGISLATIVE ASSEMBLY

Dear Mr. Speaker:

It is my duty and privilege to submit the attached special report to the Legislative Assembly *Recommendations for Amendments to the* Ombud Act, pursuant to subsection 43(3) of the *Ombud Act,* being of the opinion that it is in the public interest to do so.

Sincerely,

Colette Langlois
Ombud

nwtombud.ca

info@nwtombud.ca
Toll Free: 1-844-686-6283

#5-6 Courtoreille Street
P.O. Box 4297
Hay River NT X0E 1G5

Protecteur du citoyen
Territoires du nord-ouest

Au service de l'équité

2 février 2024

L'HONORABLE SHANE THOMPSON
PRÉSIDENT
ASSEMBLÉE LÉGISLATIVE

Monsieur le président,

J'ai le devoir et le privilège de soumettre le rapport spécial ci-joint *Recommandations pour la modification de la Loi sur le protecteur du citoyen de l'Assemblée législative*, conformément au paragraphe 43(3) de la *Loi sur le protecteur du citoyen,* étant d'avis qu'il est dans l'intérêt public de le faire.

Cordialement,

Colette Langlois
Protectrice du citoyen

nwtombud.ca
info@nwtombud.ca
Sans frais 1-844-686-6283
6 rue Courtoreille, bureau 5
C. P. 4297
Hay River NT X0E 1G5

From the Ombud

In my first annual report, for the year 2019/2020, I made 14 recommendations for changes to the *Ombud Act*. Several of these recommendations were implemented by Bill 61, *An Act to Amend the Ombud Act*, which came into force on July 1, 2023.

In preparing this list of updated recommendations, I have again relied heavily on comparisons with provincial/territorial ombuds legislation, in particular Saskatchewan's *Ombudsman Act*, which was substantially rewritten in 2012, and Prince Edward Island's new *Ombudsperson Act*[1], texts on administrative law and ombuds law and practice, advice and discussions with our counterpart offices across Canada and with experts in Canadian ombudsmanship, and my own experience. Many of the recommendations in this report are the same or similar to those made in 2019/2020 and/or in my submission to the Standing Committee of Government Operations on Bill 61.

As in my 2019/2020 report, it is with the intent of ensuring that my office is fully enabled to fulfill the purpose and vision with which the Legislative Assembly created it that I respectfully submit the following recommendations for amendments to the *Ombud Act.*

Message de la protectrice du citoyen

Dans mon premier rapport annuel, pour l'année 2019-2020, j'ai formulé 14 recommandations pour la modification de la *Loi sur le protecteur du citoyen*. Plusieurs de ces recommandations ont été mises en œuvre par le projet de loi 61, *Loi modifiant la Loi sur le protecteur du citoyen*, qui est entré en vigueur le 1er juillet 2023.

Pour préparer cette liste de recommandations actualisées, je me suis à nouveau largement appuyée sur ma propre expérience et sur des comparaisons avec les législations provinciales et territoriales sur la protection du citoyen, en particulier l'*Ombudsman Act* de la Saskatchewan, qui a été réécrite en profondeur en 2012, et la nouvelle *Ombudsperson Act* de l'Île-du-Prince-Édouard[2]. J'ai également consulté des textes sur le droit administratif et sur la pratique des protecteurs du citoyen et le droit les régissant, en plus des conseils et des discussions avec nos bureaux homologues dans tout le Canada et avec des experts canadiens de la protection du citoyen. De nombreuses recommandations de ce rapport sont identiques ou similaires à celles formulées en 2019-2020 ou dans ma présentation au Comité permanent des opérations gouvernementales sur le projet de loi 61.

[1] S.S. 2012, c. O-32; S.P.E.I. 2021, c. 23.
[2] S.S. 2012, c. O-32; S.P.E.I. 2021, c. 23.

Comme dans mon rapport 2019-2020, c'est dans l'intention de veiller à ce que mon bureau soit pleinement en mesure de réaliser l'objectif et les ambitions avec lesquels l'Assemblée législative l'a créé que je soumets respectueusement les recommandations suivantes pour des modifications à la *Loi sur le protecteur du citoyen.*

Contents

Executive Summary

The following 10 changes to the *Ombud Act* are recommended:

1. It is recommended that the Ombud's jurisdiction be extended to hamlets, cities, towns, and villages.

2. It is recommended that the provision restricting the Ombud from investigating human rights matters where there is overlap with administrative fairness be amended or removed.

3. It is recommended that the Ombud's jurisdiction be extended to complaints about the human rights offices.

4. It is recommended that references to "judicial review" be removed in section 17, and that consideration be given to instead including wording similar to what is used in other Canadian jurisdictions.

5. It is recommended that the Ombud's power to obtain information from authorities during an investigation be strengthened and clarified.

6. It is recommended that the Act be amended to include a new provision assuring public servants and authorities that they can provide information to the Ombud voluntarily.

7. It is recommended that the definition of "administrative head" be amended to be more inclusive of heads who do not have the title of "Deputy Minister" or "Chief Executive Officer".

8. It is recommended that a provision be added to protect the confidentiality of evidence obtained in the course of Ombuds processes similar to provisions found in other Canadian legislation.

9. It is recommended that the wording "and any administrative policies of the Clerk" be removed from subsection 42(2).

10. It is recommended that the French title "Protecteur du citoyen" be replaced with the title "Ombud".

Sommaire

Il est recommandé d'apporter les dix modifications suivantes à la *Loi sur le protecteur du citoyen :*

1. Il est recommandé d'étendre la compétence du protecteur du citoyen aux administrations des cités, villes, villages et hameaux.

2. Il est recommandé de modifier ou de supprimer la disposition qui empêche le protecteur du citoyen d'enquêter sur des questions relatives aux droits de la personne lorsqu'il y a chevauchement avec l'équité administrative.

3. Il est recommandé d'étendre la compétence du protecteur du citoyen aux plaintes concernant les bureaux des droits de la personne.

4. Il est recommandé de supprimer les références au « contrôle judiciaire » dans l'article 17 et d'envisager à la place une formulation similaire à celle utilisée dans d'autres administrations canadiennes.

5. Il est recommandé de renforcer et de clarifier les pouvoirs du protecteur du citoyen concernant l'obtention d'informations de la part des autorités au cours d'une enquête.

6. Il est recommandé de modifier la Loi afin d'y inclure une nouvelle disposition garantissant aux fonctionnaires et aux autorités le droit de fournir volontairement des informations au protecteur du citoyen.

7. Il est recommandé de modifier la définition de « responsable administratif » afin d'inclure davantage les responsables qui n'ont pas le titre de « sous-ministre » ou de « premier dirigeant ».

8. Il est recommandé d'ajouter une disposition visant à protéger la confidentialité des preuves obtenues dans le cadre des procédures du protecteur du citoyen, à l'instar des dispositions figurant dans d'autres législations canadiennes.

9. Il est recommandé de supprimer la formulation « et de toute politique administrative du greffier » du paragraphe 42(2).

10. Il est recommandé de remplacer le titre français « Protecteur du citoyen » par le titre « Ombud ».

Recommendations

A. Jurisdictional Issues

1. Complaints About Municipal Governments

It is recommended that the Ombud's jurisdiction be extended to hamlets, cities, towns and villages.

WHAT THE *OMBUD ACT* SAYS NOW

The Ombud does not have jurisdiction to accept complaints about or investigate municipal governments. Municipal governments can refer matters to the Ombud under s. 16 of the Act.

HOW IT COMPARES TO OTHER CANADIAN LEGISLATION

All provincial legislative ombuds, except for those in Québec and Newfoundland and Labrador, have jurisdiction over municipal governments. In Québec, several cities have their own ombuds. The Yukon has similar provisions to the NWT, and the Ombudsman has publicly recommended that his Office's jurisdiction be extended to municipal governments.

WHY IT'S A PROBLEM

Since opening, the Office has received on average 5 complaints a year about municipal governments. There is no one we can refer those complaints onto. The number of complaints would likely be higher if the Ombud had jurisdiction to accept them: the experience of provincial offices suggests they might amount to 10-15% of complaints. This should not be surprising given the amount of interaction and impact on day-to-day life that municipal governments have on residents. Administrative fairness is equally important in delivery of municipal programs and services.

The referral option has never been used by any NWT municipal government or, to our knowledge, a Yukon municipal government.

2. Complaints About Human Rights Matters – section 23

It is recommended that paragraphs (c), (d), and (e) of section 23 be repealed, or that section 23 be repealed altogether, to remove the restriction on the Ombud investigating human rights matters where there is overlap with administrative fairness.

WHAT THE *OMBUD ACT* SAYS NOW

Section 23 provides that the Ombud "shall not investigate any matter **that falls within the mandate** of" the Chief Electoral Officer, the Equal Pay Commissioner, the Human Rights Commission, the Executive Director of the Human Rights Commission, the Human Rights Adjudication Panel, the Information and Privacy Commissioner, the Integrity Commissioner or the Languages Commissioner without the agreement of that Office. [emphasis added]

HOW IT COMPARES TO OTHER CANADIAN LEGISLATION

Most Canadian provincial/territorial ombuds legislation is silent on what happens when a matter could be dealt with by more than one office. A few jurisdictions address overlapping mandates, but in a much narrower manner, and of those only one addresses human rights matters:

> New Brunswick: the Ombud shall not investigate "a matter that is being or has been investigated or reviewed by the Office of the Child, Youth and Senior Advocate or the New Brunswick Human Rights Commission".[3]

WHY IT'S A PROBLEM

Paragraphs (c), (d) and (e) of section 23 create uncertainty about when the Ombud can investigate matters that could be framed as both administrative fairness and human rights matters depending on how they are described. They also unfairly take away complainants' choice of which of these two very different processes to use to bring their concerns forward. This is a choice that is available to complainants in the Yukon and every Canadian province.[4]

The remaining paragraphs of section 23 are unnecessary but do not create uncertainty or unfairness. There is no overlap between the mandate of the Ombud and those of the Chief Electoral Officer and the Integrity Commissioner. The remaining officers have very specific mandates that can be easily distinguished from administrative fairness.

---

[3] *Ombud Act* R.S.N.B. 1973, c. O-5, ss. 12(2).

[4] Nunavut does not have an ombud.

As a matter of best practice, the NWT Ombud, like other Canadian ombuds, regularly refers complainants to other offices that have more specialized expertise in the complainant's matter and/or can provide different remedies or types of assistance that are more suited to the outcomes the complainant is seeking (e.g., legally binding orders, financial aid, and/or advocacy). This includes other Legislative Assembly statutory offices, and also many offices not listed in s. 23, such as the Workers' Advisor, Jordan's Principle, the Rental Office, collective agreement grievance processes, and the recently created NWT Health and Social Services Authority Office of Client Experience. This approach will continue with or without s. 23 as it represents not only the best assistance to clients, but also the best use of limited resources.

The intent of section 23 seems to be to prevent the Ombud from investigating complaints that could be addressed by other officers. However, the wording is ambiguous and has also been interpreted as preventing the Ombud from investigating complaints *about* other offices. These are two distinct issues that should be addressed separately in the Act.

Section 23 was discussed at length by the Committee and in witness submissions during the review of Bill 61, *An Act to Amend the Ombud Act* in 2022-2023. Appendix A to this report provides further background for this recommendation, including an overview of the mandate of the Ombud, and responses to specific issues raised in witness submissions on Bill 61.

3. Complaints About Human Rights Offices

It is recommended that the Ombud's jurisdiction be extended to complaints about the human rights offices.

This would also require amendments to clarify who would act as Minister and administrative head for the purposes of the Act.

WHAT THE *OMBUD ACT* SAYS NOW

"Authorities" are the organizations and agencies the Ombud can investigate under the Act. None of the independent legislative offices are included in the definition of "authorities".

HOW IT COMPARES TO OTHER CANADIAN LEGISLATION

All provincial and territorial ombuds other than Quebec have jurisdiction over human rights authorities.

WHY IT'S A PROBLEM

The Ombud office hears fairness concerns about the human rights offices from members of the public a few times a year. These are concerns that, while not substantiated, we would have followed up on if they were about authorities within our jurisdiction. These offices provide an important public service. People should have somewhere to go to have their concerns looked into if they are unable to resolve them directly with the human rights offices.

The Ombud office receives less than one inquiry a year about all other independent legislative offices combined.

4. Complaints Where Judicial Review Available – section 17

It is recommended that references to "judicial review" be removed in section 17, and that consideration be given to instead including wording similar to what is used in other Canadian jurisdictions.

WHAT THE *OMBUD ACT* SAYS NOW

Subsection 17(1)(d) provides that the Ombud does not have jurisdiction to investigate "where there is a right of appeal or objection, or a right to apply for a judicial review, until after that right of appeal, objection or application has been exercised…"

HOW IT COMPARES TO OTHER CANADIAN LEGISLATION

Other Canadian provincial and territorial ombuds legislation include wording similar to 17(1)(d) for rights of appeal or objection, however none of them refer to "judicial review". Some provincial statutes also refer to "a right to apply for a review of the merits of the case to any court or tribunal constituted by or pursuant to an Act".[5]

WHY IT'S A PROBLEM

"Judicial review" is not the same as an appeal. It usually refers to the power of superior courts to determine whether a public authority has acted within or outside of its jurisdiction.[6] In the NWT, the procedure for judicial review is addressed in the *Rules of the Supreme Court of the Northwest Territories,* and requires that the application be made within 30 days of the order or omission giving rise to the matter unless the Court grants an extension.

[5] Para. 18(1)(c).
[6] D. Jones and A. de Villars *Principles of Administrative Law,* 6th ed. (Toronto: Carswell, 2014) at 6-7 and 255-257.

The use of “judicial review” in section 17 is confusing. Although rarely used, an application for judicial review could conceivably be brought with respect to nearly any administrative decision, action or omission. Section 17 as currently written could be interpreted as requiring that the Ombud always wait until 30 days have passed following a decision, action, or omission before deciding whether to investigate a matter. This would cause significant delays in resolving complaints.

B. Investigations

5. Application of other laws respecting disclosure and confidentiality – s. 29

It is recommended that the Ombud's power to obtain information from authorities during an investigation be strengthened and clarified by replacing current wording with language found in Saskatchewan and Prince Edward Island ombuds legislation.

WHAT THE *OMBUD ACT* SAYS NOW

Subsection 29(2) provides that the Ombud cannot require a person to provide information about a matter if the person is bound by the provisions of an Act to maintain confidentiality. Subsection 29(4) creates an exception where the complainant provides written consent to the release of their information, however, that relates only to the complainant's own information, not to information about third parties.

Examples of Acts that have specific confidentiality provisions include the *Child and Family Services Act,* the *Social Assistance Act*, and the *Maintenance Orders Enforcement Act.*

HOW IT COMPARES TO OTHER CANADIAN LEGISLATION

Most Canadian jurisdictions have a provision similar to s. 29. Recent case law from Nova Scotia and Yukon suggests the courts might find that the Ombud can require authorities to produce information covered by the confidentiality provisions of these and other Acts even under the existing NWT provisions.[7] However, the NWT Ombud's powers to compel evidence will remain uncertain until they are tested in court here, or until the legislation is changed to resolve the uncertainty.

Ss. 25(7) of both the Saskatchewan and PEI statutes is a legislative solution that avoids this uncertainty as well as potential delays and barriers to investigations. [8]

---

[7] *Nova Scotia Office of the Ombudsman* v. *Attorney General of Nova Scotia (Department of Health and Wellness and Minister of Health and Wellness)* [2019] CA 475210 (NSCA); *Re: The Yukon Ombudsman*, 2023 YKSC 26.

[8] [Saskatchewan] 25(7) Subject to section 26:

a) a rule of law that authorizes or requires the withholding of any document, paper or thing or the refusal to answer any question on the ground that the disclosure or answer would be injurious to the public interest does not apply with respect to any investigation by or proceedings before the Ombudsman;

b) a provision of an Act requiring a person to maintain secrecy in relation to, or not to disclose information relating to, any matter shall not apply with respect to an investigation by the Ombudsman;

c) no person who is required by the Ombudsman to furnish any information or to produce any document, paper, or thing or who is 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 a provision of an Act mentioned in clause (b);

WHY IT'S A PROBLEM

The following are examples of situations where s. 29 could create barriers to investigations:

- an income assistance client does not have access to a printer or fax in order to provide a timely signed consent for the release of their own information;
- the complaint is being made on behalf of a person who does not have the capacity to provide signed consent (e.g., a child, a person who is seriously ill or disabled, a deceased person);
- the information of a third party is needed to determine whether the authority acted reasonably (e.g., a maintenance enforcement matter);
- the investigation has been initiated by the Ombud and there is no complainant to provide consent.

IMPACT OF RECOMMENDATION ON PRIVACY OF COMPLAINANTS AND THIRD PARTIES

In balancing privacy rights and the right to administrative fairness, it may be helpful to keep in mind that the *Ombud Act* itself includes strong protections for privacy and the confidentiality of information received in the course of an investigation.

Producing information during an investigation by the Ombud is not equivalent to disclosing it publicly or handing it over to another party. While the Ombud is required to inform complainants of the outcome of an investigation, this does not mean that the Office provides them with copies of confidential documents or other evidence that led to that outcome. The accountability for how confidential information received during the course of an investigation is handled rests with the Ombud.

First, investigations are conducted in private unless the Ombud is satisfied that special circumstances exist in which public knowledge is essential to further an investigation (section 25).

Second, the Ombud, as well as employees and contractors of the Office are required to take an oath and to maintain confidentiality in respect of all matters that come to their knowledge through the Office. The only exception is where a matter needs to be disclosed to establish grounds for conclusions and recommendations made in a report under the Act. In drafting investigation reports, care is taken to avoid identifying information about individuals and to limit information about personal circumstances to what is necessary to justify findings and recommendations (section13 and 18).

---

d) nothing in subsection (4) permits the Ombudsman to require questions to be answered, or to require the production of any information, report, statement, recommendation, memorandum, data or record that would be the subject of a privilege pursuant to …[]

Last, the Ombud, employees and contractors of the Office are not competent or compellable to give evidence in court or other proceedings about information they have as a result of their work for the Office (section 39).

6. Voluntary disclosure of information to the Ombud - NEW

It is recommended that the Act be amended to include a new provision assuring public servants and authorities that they can provide information to the Ombud voluntarily.

WHAT THE *OMBUD ACT* SAYS NOW

Section 30 of the Act provides that no person is liable for prosecution for an offence for complying with a *requirement* of the Ombud. [Emphasis added.]

HOW IT COMPARES TO OTHER CANADIAN LEGISLATION

Both Saskatchewan and PEI have the following provision:[9]

> *At the request of the Ombudsman, an [authority] may provide information … respecting any person who is receiving services from or dealing with [the authority] to the Ombudsman if it is satisfied that providing the information will assist the Ombudsman in fulfilling any of the Ombudsman's duties or in exercising any of the Ombudsman's powers pursuant to this Act.*

The provision provides an assurance to public servants that they can voluntarily disclose information to the Ombud.

WHY IT'S A PROBLEM

Like both Saskatchewan and PEI, the NWT gives the Ombud explicit powers to resolve complaints informally (subsection 15(4)). This is also called "early resolution". Other jurisdictions have read early resolution powers into their investigation powers. However, in the NWT, Saskatchewan and PEI, early resolution powers are separate from investigation powers.

Section 30 of the Ombud Act protects persons from prosecution under other legislation if they are complying with a *requirement* of the Ombud. However, it could be argued that public servants who provide information in the course of an early resolution process are complying with a *request* rather than a *requirement.* That means that the protection for

[9] S. 34 in Saskatchewan.

public servants who participate in investigations might not apply to early resolution processes.

It is generally to everyone's advantage to resolve complaints through early resolutions, rather than formal investigations, wherever possible. Early resolutions often come about through a few phone calls or email exchanges. Formal investigations can require extensive interviews, documentation and correspondence at every stage which is less efficient and more time consuming for all parties.

It is also to everyone's advantage that public servants feel comfortable working with the Ombud Office. Some public servants who want to cooperate with our inquiries have rightly raised questions and concerns about their authority to disclose information to our Office. In most cases, the concerns could be addressed by confirming that the complainant has signed a consent form for our inquiries. On a few occasions, the complaint resolution process has been delayed, or the Ombud has felt it necessary to proceed with a formal investigation where an informal process would likely have resolved the problem.

7. Definition of "administrative head"

It is recommended that the definition of "administrative head" *be amended to be more inclusive of heads who do not have the title of* "Deputy Minister" *or* "Chief Executive Officer".

WHAT THE *OMBUD ACT* SAYS NOW

The definition of "administrative head" in the current Act includes only Deputy Ministers and Chief Executive Officers. If an authority has neither, the responsible Minister must designate the administrative head.

HOW IT COMPARES TO OTHER CANADIAN LEGISLATION

Some legislation does not define "administrative head" at all and leaves it up to the Ombud to determine that. Some, including Saskatchewan and PEI, does not define "administrative head", but indicates that notices of investigation are to be sent to deputy ministers of government departments, and administrative or executive heads of other agencies. There is no provision requiring the Minister to designate the administrative head if they do not have a specific title.

WHY IT'S A PROBLEM

It is important to be able to clearly determine who is the administrative head is for every authority that falls under the Act. For example, the administrative head is the person the

Ombud must notify of an investigation, and along with the Minister, is the person who receives the Ombud's reports.

While it has only been necessary to make a few requests to Ministers to designate administrative heads up to now, this could come up more often with the increase in the number of authorities under the Act following Bill 61. This could in turn lead to delays in following up on some complaints while awaiting responses from Ministers.

C. Protections for the Ombud Process

8. Protection from disclosure of evidence - NEW

It is recommended that a provision be added to protect the confidentiality of evidence obtained in the course of Ombuds processes similar to provisions found in other Canadian legislation.

WHAT THE *OMBUD ACT* SAYS NOW

The Act is silent on the admissibility of statements and evidence gathered in the course of Ombud processes in the courts and other proceedings.

HOW IT COMPARES TO OTHER CANADIAN LEGISLATION

All other Canadian legislation includes a provision protecting the confidentiality of statements and evidence provided in the course of ombud processes. For example, ss. 25(8) of the Prince Edward Island *Ombudsperson Act* reads:

> *Except on the trial of a person in respect of a contravention of this Act,*
> *(a) no statement made by the person or any other person in the course of an investigation by, or any proceedings before, the Ombudsperson is admissible in evidence against any person in any court, at any inquiry or in any other proceedings; and*
> *(b) no evidence with respect to proceedings before the Ombudsperson is admissible against any person.*

WHY IT'S A PROBLEM.

Confidentiality is one of the pillars of ombudsmanship. For example, the Ombud takes an oath not to disclose information except where needed to support findings and recommendations. Investigations are conducted in private. The Ombud, employees, and contractors are not competent or compellable to give evidence in court or other proceedings. The absence of a provision addressing the inadmissibility of Ombud information in other proceedings is a gap in protecting the confidentiality that should be addressed to avoid potential misuse of information and loss of trust in the Ombud process.

9. Ombud's power to establish policies and procedures – ss. 42(2)

It is recommended that the wording "and any administrative policies of the Clerk" be removed from subsection 42(2).

WHAT THE *OMBUD ACT* SAYS NOW

Subsection 42(2) states that "Subject to this Act, any rules made under subsection (1), **and any administrative policies of the Clerk**, the Ombud (a) shall establish policies and procedures for the fair and transparent handling of complaints and conduct of investigations and hearings; and (b) may determine policies and procedures for the Ombud and the Ombud's employees in exercising the powers conferred and performing the duties imposed by this Act.

HOW IT COMPARES TO OTHER CANADIAN LEGISLATION

The possibility of policies of the Clerk overriding the Ombud's policies and procedures is not found in any other NWT independent legislative officer legislation, or any other Canadian provincial/territorial ombuds legislation.

WHY IT'S A PROBLEM.

Subsection 42(2) suggests a possibility that the Clerk could interfere in how the Ombud carries out their mandate, including complaints handling, investigations, and public education. Regardless of whether this actually happens, the threat that it could puts the independence of the Ombud at risk.

D. Nom français du Bureau

10. Nom français du Bureau

Il est recommandé de remplacer le titre français « Protecteur du citoyen » par le titre « Ombud ».

CE QUE DIT LA LOI SUR LE PROTECTEUR DU CITOYEN EN CE MOMENT

L'équivalent français du terme « Ombud » utilisé dans la loi est « Protecteur du citoyen ». La traduction littérale inverse est « Citizen Protector ».

COMPARAISON AVEC LES AUTRES LOIS CANADIENNES

L'ombud provincial du Québec porte le titre de « Protecteur du citoyen ». Cependant, plusieurs ombudsmans municipaux de la province portent le titre d'« Ombudsman ». Au Nouveau-Brunswick, le titre est « Ombud » dans les deux langues. Au Manitoba et en Ontario, le titre est « Ombudsman » dans les deux langues.

POURQUOI EST-CE PROBLÉMATIQUE?

Plus d'une fois, des membres francophones du public ont demandé à l'Ombud si le Bureau était accessible aux personnes qui ne sont pas des citoyens canadiens. Le Bureau est à la disposition de tous les membres du public, quel que soit leur statut de résident ou de citoyen. On ne sait pas combien de personnes ont pu être dissuadées de contacter le Bureau à cause de ce malentendu.

Le terme « Protecteur du citoyen » peut également donner l'impression que l'Ombud est un défenseur des membres du public. Les ombuds sont des défenseurs impartiaux de l'équité, ce qui représente une distinction importante. Si le mandat consiste souvent à plaider en faveur d'un meilleur résultat pour un plaignant individuel, il repose sur des principes d'équité et non sur la défense des intérêts d'un plaignant en tant que tel.

D. French Title of the Office

10. French title of the Office

It is recommended that the French title "Protecteur du citoyen" be replaced with the title "Ombud".

WHAT THE *OMBUD ACT* SAYS NOW

The French equivalent of “Ombud” used in the Act is “Protecteur du citoyen”. The literal reverse translation is “Citizen Protector”.

HOW IT COMPARES TO OTHER CANADIAN LEGISLATION

The provincial ombud in Québec has the title “Protecteur du citoyen”. However, several city ombuds within the province have the title “Ombudsman”. In New Brunswick the title is “Ombud” in both languages. In Manitoba and Ontario, the title is “Ombudsman” in both languages.

WHY IT’S A PROBLEM.

The Ombud has been asked on more than one occasion by francophone members of the public whether the Office is available to people who are not Canadian citizens. The Office is available to all members of the public, regardless of residency or citizenship status. It is not known how many people might have been deterred from contacting the Office because of this misunderstanding.

The term “Protecteur du citoyen” can also create the impression that the Ombud is an advocate for members of the public. Ombuds are impartial advocates for fairness, which is an important distinction. While the mandate often involves advocating for a better result for an individual complainant, this is based on principles of fairness, not on championing a complainant’s interests per se.

APPENDIX A

Further Background to Recommendation 2[10]

Mandate of the NWT Ombud

The mandate of the NWT Ombud, like that of other Canadian provincial/territorial legislative ombuds, is the protection and promotion of administrative fairness. Administrative unfairness or "maladministration" is a broad concept that is not completely defined in legislation and has been equated to "basic standards of government decency".[11] It includes specific matters, many of which could also be considered by the courts, such as unreasonable delays, lack of adequate and appropriate reasons for decisions, negligence, mistakes of law, and illegality. It also includes decisions, recommendations, actions and omissions that are in the opinion of the Ombud "unjust, unreasonable, oppressive or improperly discriminatory" or "otherwise wrong".

A basic standard of administrative fairness is legality. Ombuds therefore do routinely consider applicable territorial and federal laws, case law, and the *Canadian Charter of Right and Freedoms* [the *Charter*]. However, ombuds are not limited to considering how the law applies to a given situation; they can and do also consider extralegal sources such as international norms and best practices, as well as nonjusticiable issues such as whether a person was treated courteously, or whether an authority acted oppressively in pursuing a legal right. It is an important principle of administrative fairness that an action or decision may be lawful and still unfair or "wrong". While ombuds are guided by shared principles and practices in how to apply and interpret administrative unfairness, it is not a closed category. The open and evolving nature of our mandate is one of the strengths of general jurisdiction ombuds and allows for timely and innovative responses to novel and emerging issues as well as matters for which there is no other recourse.

The range of recommendations ombuds may make to remedy unfairness is similarly broad and open. It includes specific categories, such as recommending that a decision or practice be changed, that reasons be provided, or that an enactment be reconsidered. Ombuds are also empowered to recommend "any other steps be taken". The open-ended extent of ombuds' recommendation powers invites a flexible and creative approach to problem-solving that is not available through most other processes.

---

[10] The contents of this appendix were provided to then Standing Committee on Government Operations and Minister of Justice, and copied to independent Legislative Assembly officers by letter dated August 1, 2023.

[11] S. 33 of the *Ombud Act* sets out the conclusions and recommendations the Ombud may make following an investigation, and essentially defines what can be considered "unfair" or "maladministration". Other Canadian provincial/territorial ombuds legislation includes language similar to s. 33. Quoted phrase is from BC Ombudsperson, *Misfire: The 2012 Ministry of Health Employment Terminations and Related Matters* (2015), p. 10. https://bcombudsperson.ca/assets/media/Referral-Report-Misfire.pdf

To summarize, ombuds have wide discretion to interpret "maladministration" and to devise corrective actions. Further, the exercise of this discretion is not subject to review by the courts, except on the ground of lack of jurisdiction.[12] This is consistent with the remedial nature of ombuds legislation, affirmed by the Supreme Court of Canada in *BCDC* v. *Friedmann,* which allows us "to address administrative problems that the courts, the legislature and the executive cannot effectively resolve"[13] and necessitates "a broad, purposive interpretation consistent with the unique role the Ombudsman is intended to fulfil."[14] As the Court wrote:

> *[s]ince the emergence of the modern welfare state the intrusion of government into the lives and livelihood of individuals has increased exponentially. … As a side effect of these changes, and the profusion of boards, agencies and public corporations necessary to achieve them, has come the increased exposure to maladministration, abuse of authority and official insensitivity. And the growth of a distant, impersonal, professionalized structure of government has tended to dehumanize interaction between citizens and those who serve them.*[15]

Thus the role of ombuds is ultimately one of upholding the dignity, equality, liberty and respect for autonomy of individual citizens, as well as the accountability and transparency that is fundamental to our democracy.

Lack of certainty on application of s. 23

Although access to information, privacy, and official languages issues could be considered "matters of administration", it is relatively easy to identify them in complaints and to refer them to the appropriate, and more specialized, offices. Elections and integrity matters are entirely outside of the scope of administrative fairness and do not overlap with the Ombud's mandate.

Human rights matters where the respondent is an authority subject to the *Ombud Act* are more difficult to distinguish from administrative fairness matters. One of the challenges of drawing a clear line between human rights matters and administrative fairness matters in principle is that administrative fairness is itself a human right that includes, but is not limited to, freedom from discrimination, and ombud institutions are human rights institutions.[16]

In practice, much depends on how the complainant describes the situation to us. If a complainant tells us they believe they have been discriminated against on the basis of their

---

[12] *Ombud Act*, ss. 39(1).
[13] [1984] 2 SCR 447 at 461.
[14] At 473.
[15] At 459.
[16] This has been recognized by the United Nations General Assembly: UN General Assembly, *The role of Ombudsman and mediator institutions in the promotion and protection of human rights, good governance and the rule of law, A/RES/75/186.* See also the recent submission of the International Ombudsman Institute President to the Chair of the Review of the Statutory Offices of the House of Assembly of Newfoundland and Labrador: available for download at: https://www.rsonl.ca/files/International-Ombudsman-Institute.pdf

race, or disability, or another prohibited ground in a hiring process, we would recommend they speak with the Human Rights Office (HRO). If they tell us they believe they were discriminated against during the hiring process, and are also concerned that they did not get a reasonable explanation for why they were screened out of the competition, we would refer them to the HRO about the alleged discrimination, and we would look into the fairness of the explanation they were given for the screening decision and possibly whether other aspects of the competition were done fairly (e.g., were they advised of their appeal rights?; were policies applied consistently and correctly?; did candidates receive clear information throughout the process?; was there any personal bias against the candidate?)

However, if a complainant does not mention discrimination, how far should the Ombud office go to infer a possible human rights matter? For example, nearly any complaint about public housing or the income assistance program could be reframed as potential discrimination on the basis of social condition. It would be absurd and unfair for the Ombud Office to refer anyone with a complaint about those programs to the HRO and to wait for the outcome of that process before considering any further action.

Part of the problem lies in the vagueness of the wording "a matter that falls within the mandate of". The only other province or territory to restrict the authority of the Ombud with respect to human rights matters is New Brunswick. Subsection 12(2) of the New Brunswick *Ombud Act* restricts the Ombud from investigating a matter "that is being or has been investigated or reviewed" by the provincial Human Rights Commission. Provided that the complainant discloses to the Ombud's office that they also have a matter pending with the Commission, this wording can at least be applied with some certainty: a matter either is or is not being investigated or reviewed by the Commission. This wording is not only clearer than s. 23, it also preserves the choice of complainants to decide which process best fits their circumstances, which leads to a second concern with section 23.

Impact on Complainants

As noted above, we frequently refer people who contact us to the HRO.[17] Many people accept the referral and follow up afterward to let us know we sent them to the right place. Some people express initial reservations, because they have had a previous experience with the HRO that did not go well for them, or because they are reluctant to cold call an Office where they do not know anyone (this happens most often during our in-person outreach events), or because the process seems intimidating. When that happens, we provide information and reassurance about the human rights process and restorative approach to encourage them to at least try it, because it is in their interest to get the most information possible about their rights. We point out that every complaint is considered separately, and that just because they were not successful with a previous complaint does not mean the outcome will be the same this time. We highlight things they have told us that could be relevant to their complaint and that they should make sure to tell the human rights officer. For example, many people who want to make

[17] We made 9 referrals to the HRO in 22/23.

complaints about workplace harassment do not realize that the employer also has a duty to accommodate any disabilities, such as stress disorders, so that they can return to work. We make sure they know to talk to the human rights officer about that as well as the harassment if it is relevant to their situation. If their complaint is dismissed by the Executive Director and they come back to talk to us about it, we remind them that there is an appeal process and encourage them to try it.

In many cases, the HRO is the right place to go for a person who feels they have been subjected to discrimination by the GNWT or other territorial public service or authority. However, some complainants do not accept our referrals to the HRO or do not want to proceed with a human rights complaint once they find out what is involved. This usually comes down to the difference between the ombuds process, which is also the basis for the Languages Commissioner and Information and Privacy Commissioner offices, and the human rights process, which demands more active involvement from complainants.

The ombuds process is inquisitorial. This means that once we have received a complaint, the Office takes on the responsibility of identifying which if any of the matters raised might be maladministration, deciding which issues to raise with the authority (these may go beyond the issues initially raised by the complainant), and gathering information and evidence needed to determine whether there is unfairness and what to do about it. We typically speak separately with the authority and the complainant, often going back and forth several times to seek clarification and test out possible solutions. Although facilitated conversations are possible, they are not our usual process. We do not share the complaint form with the authority, and in some cases, we can also withhold the complainant's identity. We require very little in writing from complainants apart from what is needed to confirm that they consent to us sharing and receiving personal information about them with the authority complained about (although they are free to submit as much in writing as they would like). If we have follow-up questions for them that will help us understand what happened, we ask rather than waiting for them to volunteer information. The Ombud process is by default confidential and investigations are private. The Ombud has the discretion of whether or not to publish investigation reports and how much information to include in them. Where a public report is made following an investigation, pseudonyms are used to protect complainants' privacy as much as possible.

The human rights process is adversarial. The onus is on the complainant to make their case against the respondent. The process begins with a written complaint form, which must include detailed information about the basis of the alleged violation of human rights to give the respondent a fair opportunity to answer. The process relies heavily on exchanges of written submissions from both sides. Several changes have been made in recent years to make the human rights process more accessible, in particular the restorative justice-based early resolution process, carriage of complaints by the Human Rights Commission, and the possibility of active adjudication, which adopts some characteristics of inquisitorial models. However, the process still requires the complainant's active participation in setting out their complaint and follow-up arguments and evidence in writing, dispute resolution meetings with respondents, and/or if that process fails, in an investigation and adjudication. Adjudication hearings are public

by default, unless the adjudicator orders otherwise, and reasons and decisions are on the public record.

The ombud process does not provide the same procedural rights or outcomes as the human rights process: for example, there is are no hearings as of right, there are no opportunities for cross-examination of witnesses, and there is no judicial review or appeal of a decision or recommendation by the Ombud, including decisions to dismiss or cease investigating a complaint.[18] The ombud process does not result in findings of legal liability, or provide for binding orders for compensation or other mandatory remedial action. Instead, the Ombud Office resolves complaints and brings about change through negotiation, persuasion and, occasionally, reporting.

For some complainants the greater time, mental and emotional effort, and/or public exposure required for the human rights process outweighs the benefits to them. Only the complainant can know where that balance lies. For example, a person might complain about a human resources practice they believe discriminates against a group of employees on a prohibited ground. They think it is important that someone look into the practice, but do not want their employer to know that they are the one raising the issue or to participate in a meeting with the employer, and are not seeking any compensation. An unsuccessful candidate for a public service job might question whether the process was discriminatory, but might not want to disclose their identity for fear of being penalized in future competitions. Another person might feel too overwhelmed to tell their story again, let alone to put it in writing, and/or to participate in meetings and hearings.

In those cases, in our experience, the person is more likely to drop the matter altogether rather than proceed with a human rights complaint. This not only deprives the individual of a recourse that would be available to them in any province or Yukon through an ombud, but also deprives the public of the possibility that a situation or policy or practice that is improperly discriminatory and/or contrary to law will be discovered and remedied for everyone.

Ombuds are not in competition with human rights offices: these are services that both contribute to fairness and equity between public services and individuals. Ombuds do however offer a unique approach to identifying problems and righting wrongs. Considering the different requirements and potential outcomes of the human rights and ombuds processes, I strongly believe that individual complainants should be allowed to make informed choices about which one better meets their needs. This is in keeping with the trauma-informed approach the Ombud Office promotes, which values, among other things, clients' cultural and emotional safety, maximizing clients' choice and control through the process, collaborative decision-making, and sharing of power.

Issues raised in Bill 61 submissions to the Committee

[18] Except on the ground of lack of jurisdiction. *Ombud Act*, ss. 39(1).

In their January 11, 2023 joint submission to the Committee on Bill 61, the Human Rights Commission, the Adjudication Panel, and the Executive Director of Human Rights raised a number of specific questions that I respond to below.

"Would such an amendment [to s. 23] create concurrent jurisdiction over human rights matters involving administrative fairness applied by a government agency?"

The proposed amendment to s. 23 would not give the Ombud "concurrent jurisdiction" with the HRO in human rights matters any more than it has "concurrent jurisdiction" with the courts over matters that may involve negligence, *Charter* rights violations, failures to act in accordance with the law or that are otherwise justiciable; with the Rental Office over landlord/tenant issues involving housing authorities; or with the Workers' Safety and Compensation Commission (WSCC) over safety issues in public service workplaces. This is because the Ombud does not make binding orders and cannot enforce legal rights.

"Would the Commission or the Ombud be required to defer their complaint process if the complainant has already filed a complaint with the other statutory body? If not, is it fair for the respondent to be engaged in two different forums at the same time on the same human rights related matter?"

The Ombud has authority to cease investigating a matter where it appears to the Ombud that the complainant has an adequate alternate remedy or process. If the Ombud Office is made aware that the complainant is pursuing another process, it has been our practice to use that authority to refuse to intervene or investigate. However, we may continue to look into issues raised by the same situation that are not part of the other complaint.

It is not unreasonable or unfair to expect public service authorities to engage in more than one process at once concerning the same events or situation, and in fact this happens all the time. Two recent examples are provincial ombuds investigations into the use of segregated custody in correctional facilities, and into COVID 19 outbreaks in long term care facilities. Both situations have also given or could give rise to *Charter* challenges, civil litigation, human rights complaints, coroners inquests, and/or investigations by various regulatory bodies and health and safety authorities. The public interest benefits from all of these perspectives. The Ombud Office takes responsibility for clearly defining the scope of its investigations to authorities so that they understand the distinction from other processes.

"If the parties find resolution through the Ombud's process, has the complainant given up their inherit [*sic*.] right to pursue their human rights protections under the *Human Rights Act?*"

No. In the same way, nothing prevents a complainant from pursuing litigation against an authority for negligence, violations of *Charter* rights, contractual obligations, etc. even if these matters are the subject of an informal resolution. This is made clear in s. 41 of the *Ombud Act*.

"Can a respondent rely on a resolution or finding of no discrimination through the Ombud's process as grounds to seek the dismissal of the complainant's human rights complaint?"

This is up to the body who receives the respondent's submission to decide, however our view would be "no".

Although some ombuds, including the NWT Ombud, use the term "findings" in their reports, strictly speaking the Ombud's decisions on how to resolve complaints and what if any recommendations to make to authorities are based on "opinions about the facts."[19] They are not findings in the same legal sense as trial courts and other adjudicative bodies make them. Further, the Ombud and staff are not competent or compellable witnesses in other proceedings, which would make it impossible for parties to a court or human rights proceeding to examine them on any of the Ombud's conclusions or recommendations.[20]

"Is the Commission or Panel bound by the findings of fact of the Ombud [determining an act was 'improperly discriminatory']?"

No. (See above).

"If not, there is risk of having two statutory regimes coming to different determinations of fact on the same allegations of human rights violations. Is this fair to either party?"

The risk of this happening in reality is minimal. As stated above, the Ombud does not make legally determinative findings of fact or binding orders, and instead seeks to effect remedial action and/or change through negotiation and persuasion. We are clear with complainants that we cannot "make" authorities do anything or enforce our recommendations. A complainant who wanted compensation and/or a binding order would likely start with the HRO in the first place.

It is important to note that the Ombud resolves and investigates complaints about authorities, not about individuals. If the Ombud forms an opinion that there is evidence of a breach of duty or misconduct on the part of an officer or employee of an authority, the Ombud is required to refer that matter to the administrative head of that authority.[21] For this reason, allegations of harassment or discrimination that primarily involve the conduct of specific officers or employees are unlikely to be accepted as complaints by the Ombud, although the Ombud might still look at what steps the authority took to prevent and/or address the situations that gave rise to the allegations. The Ombud would be more likely to accept complaints about discrimination

[19] See, for example, ss. 33(1) of the *Ombud Act.* Gregory Levine makes this observation in *Ombudsman Legislation in Canada: An Annotation and Appraisal.* Toronto: Carswell, 2013, at 137-138.
[20] Ss. 39(3). See Levine, *ibid.* at 127-128 for a discussion of how courts have responded to attempts to use ombuds opinions and reports in proceedings.
[21] S. 24. Allegations against administrative heads are to be referred to "such other person as the Ombud deems appropriate".

that involve policies and practices and other systemic issues where individuals' conduct is not in question.

Although the meaning of discrimination in the *Human Rights Act* (HRA) informs the meaning of "improperly discriminatory" they are not the same thing. Discrimination under the HRA is more narrowly defined. Ombuds consider not only human rights legislation and case law, but also the *Charter* and international treaties and norms whether or not they have force of law in the Northwest Territories. An opinion that something was "improperly discriminatory" would not equate to a finding by the Adjudication Panel that a particular provision of the HRA was violated.

In any case, the same risk of different outcomes exists for any matter considered by the Ombud that a complainant could later take to the courts or another adjudicative body, such as matters involving negligence or failure to comply with the law.