Overhauling Oversight

Ombudsman White Paper

André Marin

Ombudsman
National Defence and Canadian Forces
Défense nationale et Forces canadiennes

Canada

March 30, 2005

Rt. Hon. Paul Martin, P.C., M.P.
Prime Minister of Canada
Office of the Prime Minister
Room 309-S, Centre Block
Ottawa, Ontario K1A 0A2

Hon. Bill Graham, P.C., M.P.
Minister of National Defence
NDHQ
13th Floor, North Tower
101 Colonel By Drive
Ottawa, Ontario K1A 0K2

Hon. Albina Guarnieri, P.C., M.P.
Minister of Veterans Affairs
460 Confederation Building
House of Commons
Ottawa, Ontario K1A 0A6

Dear Sirs and Madam,

I am pleased to provide you with a copy of my Ombudsman "White Paper" which outlines my vision of effective military oversight.

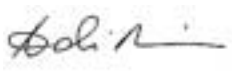
It has been both an honour and a pleasure to serve as Canada's first Ombudsman for the Department of National Defence and Canadian Forces (DND/CF). During my seven years of service, I have had the opportunity to acquire a wealth of knowledge and insight into the workings of the Department and Canada's military. I have been uniquely positioned to observe from an outside yet informed perspective, both DND/CF's shortcomings and weaknesses as well as its successes and strengths.

Prior to concluding my service as Canada's first military Ombudsman, I feel it is incumbent upon me to share with you my experience and my views regarding the future of oversight for the defence community.

During my tenure as Ombudsman, I have had the privilege of working with DND/CF leaders in order to achieve significant improvements to the welfare of the members of Canada's military and their families. I have seen first hand their exemplary accomplishments both in Canada and abroad. I have witnessed their sacrifices and struggles. I have also observed the distinct challenges that they face on a daily basis. It is from this perspective that I am offering my views on what is required to provide them with fair, efficient and effective mechanisms to address their complaints and to ensure they are treated with respect.

As I leave the Office of Ombudsman, it is my sincere hope that this "White Paper" will serve as a vehicle to pave the way forward for effective military oversight in Canada. Our CF members who give the ultimate in service to their country deserve no less.

Yours truly,



André Marin
Ombudsman

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Executive Summary

Canadian history shows that civilian oversight of the military is required. This became clear under the intense light of the Somalia affair at a time when increased attention to the Canadian military revealed an institution that was suffering from leadership and morale problems, a failed grievance process, an increase in reported incidents of sexual harassment, and a culture that gave insufficient attention to the quality of life of its soldiers. Recent history in this country has also shown that the most efficient and effective way to deliver that oversight in a manner compatible with the need for ultimate military authority is by an ombudsman's office. Moreover, it has become abundantly clear that there is a burning need to rationalize the dispute settlement agencies of the Canadian Forces. Based on any performance measure the way to do that is evident:

(1) There is no need for a separate dispute settlement regime for military police complaints. These matters can be handled more effectively and far less expensively by an ombudsman's office.

(2) In the interests of efficiency and fairness, Veterans Affairs matters should be referable to the same ombudsman's office, which deals with veterans' complaints about Department of National Defence (DND) and Canadian Forces (CF) issues.

(3) Resistance to permitting an ombudsman's office to complement and improve the grievance process should be put aside. Where a matter can be resolved without grievance adjudication through the intercession of an ombudsman, it should be encouraged.

As effective as an ombudsman has been in resolving complaints and addressing systemic issues within the Canadian Forces, an ombudsman's office will not achieve its full potential or make its optimum contribution as long as there are pockets of resistance within the military. Attitudes must change in the interests of the institution. In order to accomplish this, the Government of Canada must show the way by making a commitment to the Office by entrenching it in legislation so that it will have permanence, the tools it needs, and indisputable legitimacy.

New pages are unfolding as I leave the Office of the Ombudsman. Now is the time to make sure that those pages turn forward and not back.

Introduction

Ombudsman André Marin releasing a Special Report at the National Press Theatre, October 2003.

I will be the DND/CF Ombudsman for only a few more days. I have learned many things during my time in the job. It would be remiss of me not to share those lessons with you before my departure. They are important to the welfare of DND/CF members, and therefore to the welfare of all Canadians.

The first thing I learned as DND/CF Ombudsman may seem trite but it is anything but. I learned just how important civilian oversight of the military is. I of course knew that having civilian oversight was important before I took on the responsibility of this Office. With the benefit of hindsight and experience, I appreciate it more intensely now. In the past seven years, we in the Office of the Ombudsman have met members of DND/CF who have been variously frustrated, jaded, angry, and even desperately unhappy as a result of their experiences within the military. We have spoken to family members tormented by the fallout of misjudgement. We have seen how problems can undermine morale, commitment, and ultimately careers. And we have seen first hand, almost on a daily basis, through the work that has been done in the Office, how a modicum of distance, an outside perspective and a relationship of trust can defuse situations, solve problems, and reduce acrimony. Civilian oversight, if exercised well, quite simply improves not only the lives of those who are in the Canadian Forces, but also the institution itself.

We have also observed how we were able, using civilian oversight and proactive investigative practices, to identify and provide meaningful solutions to broad-based and long-entrenched problems. We have provided proactive strategies and solutions for tackling systemic problems. It should come as a surprise to no one, then, that I am leaving this position as a strong advocate for entrenching and improving the Office of the Ombudsman.

I appreciate that my vista is from the driver's seat, and that consequently these observations will appear to some to be self-congratulatory and perhaps a bit harsh. I also appreciate that there are many others within the military equally committed to improvement. The record of this Office, however, catalogued in annual and public reports and in countless media pieces speaks for itself. No one can credibly deny the impact that this Office has had. In the last seven years, we have processed more than 9,000 complaints, released 18 special reports to the Minister of National Defence, and conducted dozens of major investigations, each of which has resulted in meaningful improvement to the Canadian Forces. We have done so expeditiously, and under budget. And we have done so without the cost and acrimony of litigation. We have left a vapour trail of satisfaction, save perhaps among those few who would prefer to bury problems rather than learning from them and moving forward. The brief history of this Office shows that civilian oversight of the military works. I am not being smug about this. An ombudsman's office could do even better. As I will explain in this "White Paper", it could do better if it is given the tools it needs and a mandate that permits it to solve a full range of problems.

It is because of the heightened understanding that I now have of the importance of what the Office of the Ombudsman does, and my resolve to see an ombudsman's office with the tools it needs to maximize its potential, that I am presenting this "White Paper." I have decided that I must do it even though it will not be a flattering portrayal of the DND/CF problem-solving approach to date, of the other dispute settlement institutions that have been created within DND/CF, or of the culture that continues to prevail within pockets of DND. I am presenting this "White Paper" because I care intensely about the welfare of the DND/CF members. I have said it before, and I am fully aware that it may sound hackneyed and melodramatic, but it is a truth that does not become less so in the repeating: Canadians owe more than a debt of gratitude to our military personnel and simply must treat them well.

The men and women who serve this country work for modest wages, sacrificing personal control over their own lives even when that lack of control requires difficult compromises not only by them but also by their families. These men and women do not just serve this country in the laudable fashion that other civil servants do – they make a pact with us that they will put their lives on the line for Canada. The pages of history show that many have fallen, tragically some during the very time that I have held this Office. It is easy to care deeply about the welfare of people who do so much. It should therefore be easy to understand that I could not leave this job with a clear conscience unless I did all that I could to help make the military experience as positive and rewarding as it possibly can be. In the days ahead, I will not be able to offer my advice. What I am left to offer now that I am leaving is my candour and my vision for the future – a vision that has not been dreamed up in the abstract in some boardroom. It has been hewn, a stroke at a time, from the real wood of experience. In the hope that they will help those in power to make the right decisions, I therefore offer the lessons that I have learned. I am certain that those with open minds who are well intentioned will benefit from what I have to say.

Those lessons lead to the following conclusions:

(1) The legislative complaint mechanisms grounded in the *National Defence Act,* the Military Police Complaints Commission (MPCC) and the grievance process, are failing. They are failing because they are not allowed to be sufficiently independent and because they are premised on adversarial models, administered by bloated bureaucracies. They are expensive and ineffective.

(2) There are pockets of resistance to civilian oversight that have been bred in a military culture that is at times self-protecting and resentful of effective oversight. When a critical report is issued, a damning "you made us look bad" is the response most often heard from the CF leadership, instead of a reaction that lends itself to fixing the underlying problem identified in our findings.

(3) The way forward requires:

  (i) rationalizing the confusing network of dispute settlement mechanisms within DND/CF. This can be done by expanding the use of the ombudsman model to include resolution of military police and Veterans Affairs matters and by welcoming the ombudsman's contribution to the military grievance process; and

  (ii) entrenching a military ombudsman's office in legislation and giving it the permanence, tools, and legitimacy it needs to maximize its potential.

The Need for Oversight

Attack periscope onboard VICTORIA class long-range patrol submarine.

Credit: Combat camera, Department of National Defence and Canadian Forces

Every institution has its share of problems and challenges, but there are special ones endemic in a military organization like the Canadian Forces. Necessarily, military organizations have daunting power over their members. Those members are called upon to undertake work that is both physically and mentally taxing—at times even physically and mentally debilitating. This generates inordinate levels of stress that not only take a human toll but also can impede the effectiveness of military institutions that are dependent on positive morale. Retention, recruitment, focus and effort all suffer.

Problems and challenges can also be acute in a military institution because of the "military culture" with its traditions of blind unquestioning obedience, of closed access to information, and of a highly regimented command structure that relies on layers of fixed orders and directives. This creates a bureaucratization unparalleled in civilian life.

It is within this kind of organization that the chain of command is taxed with work that is so crucial that it engages national security and international peace and justice. Officers given this kind of responsibility acquire an understandable zeal to do their job well. Unfortunately, some of those who take on commitments of this magnitude can become single-minded, even blinkered, in extreme cases treating human beings as mere troops or military tools—abstracting them and forgetting their humanity. Administration can become wooden, rule bound and order-obsessed, even when those rules and orders reveal themselves as problematic and there are means of remedy available. In a misguided effort to maintain the authority they need to do their job, military institutions can become closed and resistant to change.

It is also notorious that military organizations tend to be conservative. In its report on *Achieving Administrative Efficiency,* a Minister's Advisory Committee spoke of a "cultural aversion to programmatic risk" that feeds "resistance to all but the most incremental change."[1]

[1] Advisory Committee on Administrative Efficiency, *Achieving Administrative Efficiency: Report to the Minister of National Defence,* August 21, 2003, p. iv.

When change is advocated in a conservative institution, an entrenched "no can do" attitude can too easily undermine initiative and progress. This can put a premium on keeping problems from the public eye so that meddlesome political interference or public criticism does not undermine the mission. In the faith that they are internal matters best handled within the command structure, military organizations are often apt, in the face of criticism, to circle the wagons.

So, when soldiers have real problems and are treated unfairly they can run into unreasonably rigid administrators working within a closed, highly bureaucratic, conservative, and at times, even insensitive institution. They can run into bias and stereotype. What makes the problems so intransigent is that those who give short shrift to these problems do so with the authority of their own consciences.

The contributions that an impartial, outside agency can make are obvious given that problems often emerge from a widespread culture of defensiveness within a largely closed society.

Establishment of Civilian Oversight and the Office of the Ombudsman

Then Minister of National Defence, the Honourable Art Eggleton with Ombudsman André Marin mark the first 100 days of the Office's operation in September 1999.

The choice to establish civilian oversight of the Canadian military was the product of experience. It was June 9, 1998, when I was asked to set up an ombudsman's office for DND/CF. That initiative occurred in the wake of several highly publicized reports on sexual harassment and sexual assault within the military. While that was the immediate context, the idea that there should be an oversight agency had been several years in the making and was borne of a series of scandals and a growing appreciation that there were profound problems in the Canadian military.

The most dramatic impetus for change was the Somalia affair. Canadian troops were deployed to that war-torn country in 1993 to assist in peacekeeping and the delivery of aid. Just as a similar assignment for American soldiers would ultimately shake American foreign policy, Somalia would change the face of military government in Canada. The catalyst for change was the discovery that military commanders failed to "halt, destructive murderous events,"[2] including the tormenting and killing of Shidane Arone, a teenage Somali caught stealing from a Canadian compound. In the many months that followed the Somalia deployment, whistle blowers began to open the door to the secret vault that hid the Canadian military, painting an unflattering picture that caused great public anguish. The diminishing stature of the military, coupled with downsizing and restructuring, were dashing military morale and problems of leadership were emerging. Grievances and complaints were mounting but they were not being dealt with in a timely, fair and equitable fashion. Something had to be done. Old systems were not working.

In November 1995, Brigadier-General (retired) Larry T. Doshen was retained by DND/CF to study the issue. While he considered "a classical Ombudsman would be the most effective mechanism of complaint resolution," he decided not to recommend it because he believed this would be prohibitively expensive.[3] That belief, unsubstantiated at the time, has proven wrong. Instead he recommended improvements to the grievance process. This contributed ultimately to legislative initiatives that I will discuss on the next page.

[2] D.J. Bercuson, Ph.D, FRSC, *A Paper Prepared for the Minister of National Defence,* University of Calgary, March 25, 1997.

[3] Larry T. Doshen, *Report on the Study of Mechanisms of Voice/Complaint Resolution in the Canadian Forces,* November 30, 1995, p. ii.

In 1996, BGen (ret'd) Doshen was asked to submit a follow-up paper.[4] As its name suggests, this second paper – an implementation plan for an "organizational ombudsman"[5] – proposed an ombudsman. The suggestion met with immediate resistance within the military chain of command, who were concerned that the informal mediation efforts of even an organizational ombudsman would erode military authority and leadership.[6] For this reason, the Armed Forces Council, one of the highest military advisory boards, decided to shelve the proposal.[7]

When the decision whether to have an ombudsman was left within the military, it is not surprising that the idea was scuttled. This is not the last time this boogeyman of resistance—preserving the integrity of military command—would growl louder than it should. While that concern has its place, giving it exaggerated and misplaced emphasis has proven to be a discouraging impediment to the accomplishment of fully effective civilian oversight of the military.

In 1996, sparked in part by the Somalia affair and catapulted forward by the leak of embarrassing video recordings of degrading and racist hazing rituals occurring in the Canadian Airborne Regiment,[8] Minister of National Defence Doug Young resolved to undertake a complete review of leadership and management of the Canadian Forces. The former Chief Justice of Canada, The Right Honourable Brian Dickson, chaired a committee whose report, on March 14, 1997, recommended a military ombudsman who would report to the Minister of National Defence.[9] He identified the need for "CF members [to] be given a voice, consistent with the appropriate authority of the chain of command so that their concerns can be independently investigated and if necessary dealt with." He made two critically important points. First, that the needs of military oversight go beyond the military justice system and the military police; they must embrace a myriad individual issues in which members of the Canadian Forces need a voice to obtain redress. Second, Chief Justice Dickson, a war hero and jurist, balked at the suggestion that an ombudsman's office would undermine military authority. "Such a mechanism," he said, "would strengthen the chain of command."[10]

A few weeks later, on March 25, 1997, Minister Young submitted "The Young Report" to the Prime Minister. He recommended the establishment of an ombudsman's office. No doubt influenced by "chain of command authority" objections from within the military, he compromised on the Dickson recommendation, suggesting that the ombudsman report to the Chief of the Defence Staff.[11]

On June 30, 1997, several weeks after the Young Report was tabled, the Commission of Inquiry submitted its final report into the Somalia affair, sparking renewed attention to problems in the military. The Commission of Inquiry did not puppet the watered-down Young Report recommendation. Indeed, appreciating the urgency of the task, it even "one-upped" Chief Justice Dickson, calling for the establishment of an Inspector

4 Larry T. Doshen, *Canadian Forces Organizational Ombudsman Implementation Plan,* July 10, 1996.

5 An organizational ombudsman is generally understood to mean someone who works within an organization to assist people with resolving problem, by referral and mediation. The classical or legislative ombudsman is an independent agent who investigates complaints and makes findings and non-binding recommendations aimed at rectifying maladministration and ameliorating systemic problems.

6 Organizational Ombudsman Implementation Plan, *Briefing Notes* to Personnel Policy Board (PPB) October 9, 1996, p. 7.

7 Karol W.J. Wenek, Internal document provided to my office, dated January 14, 1997.

8 Controversially, the Canadian Airborne Regiment, a storied unit of the Canadian Forces, was disbanded as though the problem was confined to that unit.

9 *Recommendations of the Special Advisory Group on Military Justice and Military Police Investigation Services,* March 14, 1997.

10 *Ibid.,* pp. 65-66.

11 The Ombudsman was also to report to the Deputy Minister of National Defence, rather than to the Minister. Together these suggestions would have deprived the Office of not only its independence but also much of its stature.

General, reporting to Parliament. The Somalia Commission, in the interests of Canada and its international reputation, stressed the need for a truly independent, impartial, transparent and objective officer. To secure that goal it eschewed having that officer report to the Chief of the Defence Staff, or even solely to the Minister of National Defence.[12]

In the meantime, the Government of Canada had begun drafting Bill C-25, *An Act to Amend the National Defence Act*. Preparations were well advanced, and by September 1997, the Bill was introduced into Parliament. No provision was made in that Bill for either an Inspector General or an Ombudsman. Ignoring the advice that was coming in, policy makers, no doubt in close consultation with Canadian Forces leaders, rested content to restructure the grievance process and set up the Military Police Complaints Commission.

Yet, events conspired to overcome that reticence. In the months that followed the release of the Somalia Commission of Inquiry report, public concern about the military was mounting with new leaks about the sexual harassment of female soldiers. The Government of Canada, embattled over the matter, decided to respond. It did not wait for the passage of the *National Defence Act* amendments; it decided to announce an additional initiative. It promised to create an Ombudsman's office. On June 9, 1998, Minister of National Defence Art Eggleton appointed me as DND/CF Ombudsman to operate independently of the chain of command in fulfilling this role, and to report directly to him. I was tasked with designing the office and presenting to the Minister a proposal for its functioning. I spent much of the next several months studying what authority and structure this Office would need to become an effective oversight mechanism. On January 20, 1999, I presented *The Way Forward – An Action Plan for the Office of the Ombudsman* to the Minister of National Defence. The report contained 67 recommendations for the establishment of an effective and independent Ombudsman's Office.

[12] *Dishonoured Legacy: The Lessons of the Somalia Affair, Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia,* Public Works and Government Services of Canada, Ottawa, 1997, p. ES-1.

The Ombudsman's Model

Israeli Defence Forces Ombudsman, Brigadier General (Res) Uzi Levtzur in discussion with the Judge Advocate General, Brigadier General J. Pitzul while visiting Ottawa, October 2001.

The central theme in *The Way Forward* is that the Office of the Ombudsman should not be a mere "organizational ombudsman" – someone who is seen as an employee of the organization performing the soft tasks of assisting complainants resolve their own problems by pointing out appropriate procedures and options, and in some cases by mediating. My main concern, which experience has shown to be well founded, was that many complainants are frightened or intimidated and feel as though they are out of options. They do not have the means to gather the information they often require to get to the truth. There is fear of reprisal and repression or stigma for those who break ranks. At the same time that my office was being built, an alternative dispute resolution program was being formed internal to DND/CF to assist members in informal dispute resolution. I knew that what was required to fill the needs of military members was not merely an "organizational ombudsman" who might simply duplicate this kind of service. What was required was someone who could command the trust of those members who feel too betrayed by events to trust "the system," and who could cut to the heart of problems with proactive investigation.

Instead, following on precedents adopted in other countries, including Israel, Germany and Australia, I recommended a "classical ombudsman" model, which in addition to the kinds of tasks performed by an organizational ombudsman would receive complaints, gather the necessary facts, and recommend solutions unconstrained by developed protocols and systems. I wanted the Office to be several things. I wanted it to be independent and impartial, able to assure confidentiality and to protect complainants. I wanted it to have credible review and investigative powers so it could get the information required for fair and effective resolutions. I wanted it to be able to make meaningful recommendations and to court the public opinion that is often necessary to achieve the moral suasion I knew would be required to have an impact on serious issues. I wanted the kind of full-service mechanism that could assist in resolving the full panoply of problems that Chief Justice Dickson identified as arising in the military, without getting bogged down in jurisdictional battles with other dispute settlement bodies or with objections by the chain of command that I was acting outside of my mandate. And I wanted the Office to have the stature and permanence needed to enable it to gain the trust of soldiers and the respect of the chain of command – I wanted it to be created by law. In short, I didn't want the Office to be window dressing or a cheering section for all things coming from the chain of command. I wanted the Office to make a difference in the lives of soldiers, sailors and air men and women.

Limiting Principle for Civilian Oversight

One thing I was extremely mindful of from the outset was the need to avoid intruding inappropriately on military governance. Within the sphere of military matters, the Chief of the Defence Staff must be in a position to make ultimate decisions, and those in the chain of command must answer to the Chief of the Defence Staff, not to an ombudsman or any other kind of civilian authority. This is a principle that cannot be breached; civilians cannot direct military commanders how to run the military.

What civilian oversight can do, however, is offer an outside perspective, untinctured by military culture, unrestrained by command responsibilities and thereby capable of seeing the whole picture from a different and important angle. By mediating, making recommendations and using moral suasion, civilian oversight can cause those in positions of military responsibility to sit back and re-evaluate things, profiting from the fresh view that civilian oversight can bring. If the civilian overseer is right, those in positions of military responsibility are apt to do the right thing. They will do the right thing not because anyone is telling them to, as there is no one purporting to have that authority. They will do what is right because they will reflect on the problem with a new orientation and come to appreciate that things should have been handled differently, or because public disapproval will convince those in ultimate authority that an error has been made and correction should be ordered. It is the use of moral suasion, reason and public pressure that enable improvement to occur without authorizing the civilian oversight body to interfere in the management of the military.

So, when I put forward the blueprint for an effective office, I wanted an office that would not undermine the chain of command but rather do as Chief Justice Dickson had predicted – "strengthen the chain of command"[13] by assisting in resolving those problems that can undermine the faith in the institution by those who serve in it. Giving members a voice and a quick, efficient means to solve problems reduces dissatisfaction, improves morale, and thereby reinforces the commitment of soldiers. After all, it is easier to take direction from a chain of command that is perceived to act fairly and reasonably than it is to blindly obey those who direct matters in a rigid or narrow-minded way by virtue solely of the force of their authority. It is a truism that obedience can be forced but respect must be earned, and with respect comes not only obedience but also loyalty.

[13] *Ibid.*, pp. 65-66.

A Compromised Mandate

Revised mandate for the Office of the Ombudsman, issued on September 5, 2001.

This Office has yet to succeed entirely in getting the mandate it should have. In large measure, this is because of an exaggerated fear within the Canadian Forces of outside interference with military autonomy. The original mandate was revised in 2001, and this improved our ability to help. Still, in spite of our persistent and repeated efforts to implement a full service program, there remain people who wish to make use of an ombudsman but who cannot do so because of jurisdictional limitations on the Office, most notably those who have complaints relating to Veterans Affairs Canada, the Military Police as well as many CF members who are forced into the grievance process.

There is unfortunately little appetite by senior leaders to find solutions to technical jurisdictional issues involving our mandate. The Judge Advocate General (JAG), who is the key legal advisor to the chain of command, showed us his hand when he bluntly declared to us months after my appointment in 1998 that "the field was occupied" and that there was no room for the kind of independent oversight we were pursuing. The last seven years have shown that, in fact, not only was the field unoccupied but it proved to be fertile and ready to accommodate an office to truly serve the needs of the troops. Unfortunately, all too often, senior leadership has not been able to divorce itself from the JAG mindset and help us work the field and provide the Office with the tools for it to really flourish.

In many ways, and despite our successes, the Ombudsman's Office is still a work in progress. We are short of information-gathering tools. But most significantly, the Office of the Ombudsman is not entrenched in law. It has been the progeny of orders crafted in internal administrative documents and Ministerial Directives. This Office can be wiped out with the stroke of a Minister's pen or crippled by the reversal of a directive. While we have enjoyed the independence that we have insisted on, our independence is the product of goodwill or political reality and therefore knows no security. If an ombudsman's office, confined in these ways, had been created for good reason it would be tolerable. Unfortunately, our constrained mandate and our vulnerability are each the product of jurisdictional infighting, the lethargy of bureaucracy, and an indefensible resistance to civilian oversight.

I will discuss these matters in detail later, but for now there is a critically important point that needs to be made. Having observed the work that this Office has done during the few years of its operation, I am more persuaded now than ever that the ombudsman model is capable of improving not only the lives of those who serve within DND/CF, but also the institution itself, including its credibility and status. Even with its compromised mandate, the Office of the DND/CF Ombudsman has already demonstrated the value of civilian oversight. Any discussion of the future of this Office in particular, and the fortunes of civilian oversight of the military in general, has to begin with that appreciation.

Demonstrating Value

Ombudsman André Marin releases his Annual Report at the National Press Club in June 2003.

The past seven years have produced a crush of success stories, touching the lives of many. There is little need to describe any of those success stories in detail. They are illustrated in the vignettes captured in the Annual Reports that the Office of the Ombudsman has filed since its inception. A quick tour of the past seven years is enough to make the point. That tour shows the use of ombudsmanship to obtain necessary medical attention and counselling for members. It shows ombudsmanship being used to secure compassionate leaves for members as well as pensions, and benefits, and moving allowances, and *ex gratia* payments for those whose entitlements are ensnared in bureaucracy or challenged by delay or denial. A quick tour shows the use of ombudsmanship to achieve the relocation of members so that they are nearer their families, or ailing parents or medical facilities required by their family members. It shows ombudsmanship complementing the grievance process by helping to overcome delay and serving as a channel for information. And on and on, case after case. Literally thousands of members have found redress by resorting to the services of the Office of the Ombudsman for problems that would not have been solved as expeditiously or at all without that intercession. Over the past seven years, responding to individual complaints, the Office has made an unquestionable contribution to the quality of life of CF members and their families, fulfilling Chief Justice Dickson's hopes for such an office.

While much of the office's work has been on the individual level, ombudsmanship has also tackled systemic challenges through major investigations. Hundreds of recommendations arising out of dozens of investigations have resolved long-standing problems and contributed to an improved military. Ombudsmanship has helped move the Canadian Forces closer to a more humane and effective approach to operational stress injuries, including post-traumatic stress disorder. It has served as a catalyst to improve Boards of Inquiry and the investigation of training deaths and accidents. Ombudsmanship has provided measures to improve the treatment of the families of soldiers killed in the line of duty. It has addressed problems of environmental exposure. It has secured apologies to help close the book on long-standing grievances like the Suffield experiments, in which soldiers were intentionally exposed to chemical warfare agents including mustard gas, the unfortunate Poulin affair,[14] or the tragic and avoidable Lapeyre-Wheeler debacle.[15] It has helped to flush away decades of bureaucratic obstacles, thereby securing compensation for the Suffield victims and repayment for

[14] *Final Report, Allegations Against the Canadian Forces, Complainant: Captain Bruce Poulin.* Special Report of the DND/CF Ombudsman, August 13, 2001.

[15] *When a Soldier Falls: Reviewing the Response to MCpl Wheeler's Accidental Death.* Special Report of the DND/CF Ombudsman, December 20, 2004.

claw-backs taken from the Richmond Military Automated Air Traffic System trainees. And, in the days before our mandate was so limited, we secured procedures to ensure the sensitive treatment of sexual offence victims by the Military Police.

For those who are paying attention, ombudsmanship has also done its part to encourage appropriate attitudes. It has done so by challenging the fictitious stereotype that expects John Wayne resilience in the face of brutality or tragedy, and that writes off more human responses as weakness or cowardice; by tackling discrimination against women and aboriginal members, and deploring wherever it has been identified, the insensitive ethos of the disposable soldier; by exposing cases of unthinking bureaucracy or the rule-based mentality that too often prevent the resolution of human problems that could otherwise be resolved with imagination and motivation.

The impact that all of this has had on the quality of life of the members, on their morale, on *esprit de corps,* or on retention of soldiers at a time of critical staff shortages, cannot be underestimated. To be sure, these gains have at times come at the cost of embarrassment on the part of some of those carrying the weighty responsibilities of command, and I know this has been painful. Where the Canadian Forces has endorsed solutions or accepted criticism as constructive, however, and where it has worked for improvement, the repute of the Canadian Forces has not suffered; it has been enhanced and leadership strengthened.

Without question, the value of civilian oversight in the form of ombudsmanship has been amply demonstrated. The question is not whether it is a wise and appropriate tool, but whether it is being used as widely and wisely as it should be.

A Gap in Oversight – Veterans Affairs

Wreath laid at Winnipeg's Remembrance Day ceremony honouring the veterans who were tested with chemical agents during World War II. These soldiers finally received recognition in 2004 after the Ombudsman investigated their plight.

Denying to veterans access to the Ombudsman to address all of their issues, makes little practical sense. The door should not close on them once the scope of their problem reaches into the realm of Veterans Affairs Canada. The stereotype of a veteran may well be the wizened, elderly gentleman giving a shaky but dignified salute beside a memorial—someone who is far removed in time and life-experience from his military days—but the reality is that Veterans Affairs Canada administers benefits for those who only hours or days before, were members of the Canadian Forces. All former members, even those who have been discharged for decades, maintain a close connection to the institution, not only because their military experiences are etched in their character but also because their personal welfare remains tethered to the government they served. Their financial security, their mental and physical health, and their sense of belonging are all inextricably linked to the military.

Since the inception of this Office, there have been more than 250 occasions when we have had to turn veterans away because of restrictions on our mandate; the complaints relate to everything from delays in pension applications because of inadequate documentation, pension appeal problems, benefit denials, delays in receiving health information, long-term care crises to operational stress injuries and debilitating service-related maladies. The Suffield episode, one of the few cases where the Office of the Ombudsman was able to assist a group of veterans, shows how serious veterans' problems can be. Veterans were being refused pensions because of moribund national security concerns and lost documentation. All of this was tragic, pitiful and preventable, but for decades nothing was done. Nothing was done until the victims were permitted resort to an ombudsman.

Canada's veterans do not have a classical ombudsman of their own. Instead, they rely upon those who work within government for Veterans Affairs, or they depend on the intercession of the Canadian Legion. To be sure, the Canadian Legion is a magnificent organization that has done its best to establish committees and to liaise with government administrators, often with great effect, but it is not an institutionalized ombudsman. It does not have the powers of proactive investigation, the resources, nor the professional staff, nor does it have the power to report officially to the government and the public. It was inevitable that veterans would call, as they have, for the creation of an ombudsman's office or an inspector general to assist them.[16] It is a call that must be answered.

[16] See "Modern veterans say they are forgotten, need ombudsman." Stephen Thorne, Canadian Press Ottawa, 2004; May 5, 2004, 3:30 p.m., Proceedings of the House of Commons Subcommittee on Veterans Affairs of the Standing Committee on National Defence and Veterans Affairs.

So what answer does the Office of the Ombudsman receive when it asks for the mandate needed to help these people to whom we all owe so much? It is not a response based in compelling reason or principle. The answer is that the Office of the Ombudsman is a product of an internal directive from the Minister of National Defence, while veterans' matters fall within the jurisdiction of the Minister of Veterans Affairs. Technically this is true, but it is no adequate answer to those who could use the assistance of the Office. Access to the Office of the Ombudsman could be granted simply by the Minister of Veterans Affairs signing a Ministerial Directive. Or, more appropriately, a Canadian Forces/Veterans Affairs Ombudsman's office having co-ordinate jurisdiction could be entrenched in statute, with the Ombudsman reporting to the Minister of National Defence on DND/CF issues, and to the Minister of Veterans Affairs on issues related to Veterans Affairs Canada. The truth is that departmental organization is a technical obstacle, not an impediment to doing the right thing, and it is a maxim of good government that technical obstacles never be allowed to impede doing the right thing. Instead, technical obstacles should be managed and overcome.

Wasteful or Inefficient Oversight

If civilian oversight is not undertaken properly, it can be unproductive, even counterproductive. I say this with respect to those working with the Military Police Complaints Commission or the CF Grievance Board or the grievance process generally. These institutions have come to epitomize how ineffective and overly bureaucratic complaints mechanisms can become.

The Military Police Complaints Commission

The Military Police Complaints Commission (MPCC) was created because of concern that as military members, military police officers were subject to a chain of command that could exert influence over investigations and policing activities. The hope was that the creation of an independent MPCC would discourage interference with military police investigations and improve transparency, accessibility and fairness in the handling of military police complaints.[17] This is a laudable and important objective. Experience has shown, however, that it is a task that does not require a separate institution like the MPCC. Everything the Commission does could be handled more efficiently, and for tremendously less cost, by an ombudsman's office.

Created in December 1998, and established by statute,[18] the MPCC has two primary functions. The first relates to "conduct complaints" about the performance of the military police. In fact, conduct complaints typically go directly to the Canadian Forces Provost Marshal, who inquires into and disposes of them. For the overwhelming bulk of conduct complaints, the MPCC does not investigate or evaluate but simply monitors the Provost Marshal's handling of the complaints. The MPCC will only go beyond the role of monitor if it is asked to review a decision made by the Provost Marshal about a complaint, or if the Chair of the MPCC considers it in the public interest to take over a complaint from the Provost Marshal. The second function of the MPCC is its exclusive authority to deal with complaints that someone in authority has interfered with or obstructed a military police investigation ("interference complaints").[19]

These functions produce a minimal caseload for the MPCC. In the words of the Right Honourable Antonio Lamer, the former Chief Justice of Canada who conducted the five-year review of Bill C-25, the MPCC has had "very few" complaints. Specifically, in the three years from 2000 to 2002, it was involved in a total of 212 complaints,[20] 184 of which were "conduct complaints," in which the sole role of the MPCC was to monitor the Provost Marshal's response. Only 21 times in those three years was the MPCC called upon to review a decision by the Provost Marshal, and there were only three occasions where the MPCC took over a conduct complaint on its own in the public interest. Only two public reports were released.

The low use of the MPCC is not the result of its relative newness. Its work has lessened over time. There were only 34 complaints in 2003 compared to 65 in 2002. Between April 1, 2003, and March 31, 2004, the MPCC monitored 36 complaints, received five review requests, and one interference complaint.[21] In its report on plans and priorities for 2004–2005, the MPCC acknowledges that "the number of complaints received by the

[17] The Right Hon. Antonio Lamer, *The First Independent Review of the Provisions and Operation of Bill C-25,* September 3, 2003, p. 77.

[18] *An Act to Amend the National Defence Act,* S.C. 1998, c.35, ss.250.1–250.53.

[19] Although the jurisdiction is exclusive, the Chair has authority to refer interference complaints to the Provost Marshal (ss.250.34(2)).

[20] This does not include three cases where the action reported by the MPCC was in receiving requests to withdraw complaints. These statistics ended in 2002. In its 2003 annual report, the MPCC disclosed that there had been a total of 218 conduct complaints, only 19 reviews, and six as opposed to three public interest complaints.

[21] Departmental Performance Report 2004, *http://www.mpcc-cppm.gc.ca/300/3300/2003-2004_e.html*

Complaints Commission is generally somewhat smaller than that received by other agencies providing civilian oversight of law enforcement in Canada."[22] I do not point this out to suggest that the number of complaints is indicative of problems with competence; I point it out to show that there is not a significant enough demand for this kind of oversight to warrant a separate agency.

In 2000–2001, the MPCC's budget was $3.66 million. In 2001–2002, it was $4.1 million. In 2002–2003, it was $4.34 million. The Minister's Advisory Committee on Administrative Efficiency found that in 2002, the average annual cost per file opened was $38,000. Once files that were no more than general requests or matters falling outside the jurisdiction of the MPCC were removed, the annual cost per file was a staggering $56,000. The Advisory Committee on Administrative Efficiency concluded that "[c]onsidering that the CF Deputy Provost Marshal initially investigates all cases referred to the Commission, and that only a small percentage of these require actual investigation by the Complaints Commission, the Committee assesses the costs as excessively high."[23] By comparison to the MPCC, the RCMP Public Complaints Commission handled 1176 complaints in 2002 on a budget that was only $400,000 more.[24] That translates to 10 times the caseload with only 10% more money. The Toronto Police Service Professional Standards Unit, has an operating budget of approximately $4 million, and handles approximately 1,000 complaints and internal affairs investigations per year.[25]

Not surprisingly, during the Five Year Review, Chief Justice Lamer called for "an exhaustive internal audit" to confirm his impression that there was a "need to reconsider the financial and personnel resources earmarked for the MPCC considering its caseload over the past four years."[26] The Minister's Advisory Committee, for its part, recommended a budget cut of up to 30%.[27] The then-Minister of National Defence accepted the recommendation, but the reductions for the 2003–2004 fiscal year were far less than that. The budget was still $3.56 million. Then an organizational review was conducted by Consulting and Audit Canada. That review led to a significant reorganization. In February 2004, 10 full-time equivalent positions and four vacant positions were eliminated.[28] In spite of this, the business plan for 2004–2005 calls for a budget of $4.2 million, although it does note that a 30% budget cut is expected over the next three years.[29] Even if actualized, the budget would remain at more than $3 million for a body that can be expected to deal with a few dozen complaints.

Even with the downsizing and its lower than expected workload, the MPCC continues to be inefficient. When the Public Service Commission of Canada conducted an audit in 2004 as a result of complaints and issues raised in the 2002–2003 Departmental Staff Accountability Report,[30] it found that there were "serious deficiencies

[22] MPCC *2004–2005 Estimates: Report on Plans and Priorities,* Section 3.2.1.

[23] Advisory Committee on Administrative Efficiency, *Achieving Administrative Efficiency,* August 21, 2003, p. 76.

[24] *Ibid.*

[25] Telephone conversation with Staff Superintendent Rick Gauthier, January 19, 2005.

[26] The Right Hon. Antonio Lamer, *The First Independent Review of the Provisions and Operation of Bill C-25,* September 3, 2003, p. 79.

[27] Public Service Commission Audit of the Military Police Complaints Commission, Her Majesty the Queen in Right of Canada, 2004, p. 4.

[28] *Ibid.,* p. 5.

[29] *Report on Priorities MPCC 2004-2005 Estimates,* Section 1 (Chairman's Message). The caveat is expressed that these are estimates alone, left uncertain because of reorganization that is being undertaken.

[30] Public Service Commission Audit of the Military Police Complaints Commission, Her Majesty the Queen in Right of Canada, 2004, p. 1.

in the implementation of the management framework for the Military Police Complaints Commission's (MPCC) staffing and recruitment activities."[31] Management was found to have "failed to resolve a number of problems, including those related to communication, fear of reprisal and alleged harassment."[32]

In spite of the financial dressing down that has occurred, the MPCC, in its own projections, continues to estimate that the cost of an extensive public interest investigation can exceed $200,000.[33] These kinds of investigations are exceedingly rare for the MPCC, the bulk of whose work is relatively straightforward. Summaries of the review cases posted on the MPCC website show that the cases are important to those involved, but do not tend to require protracted or complex investigation. Few witnesses are involved in many of the cases, and, given the nature of the complaints, one would expect little documentation to be involved. Allegations of MP members disobeying traffic laws, improperly demanding documents, rudeness, officers failing to identify themselves or show a badge when serving documents – these are important, but do not need massive resources, particularly considering that by the time the MPCC gets the case, the Provost Marshal has already investigated.

There are also problems with the nature of the MPCC's mandate. One of the more serious interference complaints, an allegation that the chain of command impeded Military Police Officers who were attempting to interview unit members who had been involved in an accident, had to be declined because the complainant had "neither conducted nor directly supervised the investigation."[34] Moreover, while it does its best to address systemic issues,[35] the MPCC is not well equipped to do so. It deals only with "complaints" and does not possess the kind of authority a classical ombudsman has to conduct own-motion or systemic investigations. Its primary focus is necessarily on adjudicating whether a complaint has merit.

Moreover, neither the Provost Marshal, the first level of review for conduct complaints, nor the MPCC, has produced its results quickly. Because of delay, Chief Justice Lamer had to recommend a one-year closure system for conduct complaints by the Provost Marshal. He found an average MPCC review took 15 months.[36]

It is evident, therefore, that while oversight of the military police is essential, the MPCC has been a white elephant. Its pending financial diet will take it from being morbidly obese to simply obese.

Solution: Integrate the MPCC into the Ombudsman's Office

The efficiency review went so far as to recommend that the MPCC be disbanded, and folded into the independent and external RCMP Public Complaints Commission. However, recommendations that place military matters outside the control of the chain of command tend not to be embraced. So it was not surprising to see a proposal to export military issues to a non-military body was rejected. The result has been tinkering with a budget, when the problem is an infrastructure and bureaucracy disproportionate to the number of cases it is called on to investigate. I can offer a sensible alternative. The jurisdiction of the MPCC should be folded into the Office of the Ombudsman. This can be done without reinventing the wheel. It keeps military matters in an institution that deals with military matters. Moreover, it is both fiscally responsible and entirely feasible, given that it is compatible with the mandate of the Office. Neither self-interested objection nor any instinctive impulse to hamper civilian oversight should prevent this from happening. Let the Ombudsman for the Canadian Forces take care of the important function of oversight of the military police.

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[31] *Ibid.,* p. 42.

[32] *Ibid.,* p. 3.

[33] *Report on Priorities MPCC 2004-2005 Estimates,* section 3.2.1.

[34] MPCC summary of MPCC-003-Interference, online at *http://www.mpcc-cppm.gc.ca/300/3200/3203_e.html*

[35] The MPCC, 2004–2005 *Estimates: A Report on Plans and Priorities,* notes in section 3.1 that the Chairperson's recommendations have led to improvement in policies and procedures for surveillance operations conducted by the military police and to enhanced training for members of the military police in [diverse] areas."

[36] The Right Hon. Antonio Lamer, *The First Independent Review of the Provisions and Operation of Bill C-25,* September 3, 2003, pp. 83, 78.

Canadian Forces Grievance System

The military grievance process is complex. A member who has a grievance must make the complaint to an "initial authority." This will be an officer superior in authority to the grievor who has the power to grant the redress sought.[37] If the grievor is not satisfied with the result arrived at by the initial authority, or if the grievance is not resolved within 60 days, the grievor can take it to the second and final level of authority, the Chief of the Defence Staff (CDS). At this level, the grievance will take either one of two roads. If the grievance is not of a specified kind, it is referred to the CDS' delegate, the Director General Canadian Forces Grievance Administration who will administer the grievance and exercise the role of the CDS. If the grievance is of a specified kind, the CDS is obliged to refer it to the Canadian Forces Grievance Board (Grievance Board).[38] The Grievance Board will then review the file and make recommendations to the CDS. The CDS customarily accepts those recommendations, but has the authority to reject the recommendations after providing reasons for doing so.

Like the MPCC, the grievance process has been deeply troubled. Chief Justice Lamer found during the conduct of his Five Year Review that "it became increasingly clear... that the Canadian Forces grievance process is not working properly."[39]

Delay

One of the primary concerns was delay. My Office has reported in successive annual reports on systemic delays through all levels of the grievance system. Chief Justice Lamer identified problems of delay at the CDS, the Grievance Board, and the CF Grievance Administration levels. As the former Chief Justice noted, cases have been known to languish in the grievance process for more than a decade, and two or more years was the norm for grievances arriving at the CDS level. The delay in resolving grievances produced a backlog that former Chief Justice Lamer described as growing exponentially even under the revised grievance system. His report did not catch anyone off guard. Delay in the resolution of grievances was widely known in the Canadian Forces. We have fielded many complaints about delay in the grievance process. While there was a modest reduction in complaints in 2002, an average of 70 redress of grievance complaints, mainly related to delay, continue to arrive at our door each year.

This is a serious matter. Delay in processing grievances will invariably be distressing for grievors and even respondents. Grievors, in particular, have identified what they perceive to be a problem serious enough to invoke formal processes. To leave the matter dormant because that process cannot handle it only creates suspicions that complaints are being buried or not taken seriously. As the former Chief Justice noted, the morale problems this can create are exacerbated because the grievor cannot turn to the Ombudsman's Office to deal with the substance of the complaint while the grievance is within the grievance process.[40] All that the grievor can do is complain to our Office about the delay, and as I will describe later, there are limits on what we can do.

[37] This will be the grievor's commanding officer provided the commanding officer has the authority to grant the redress sought. Failing that, the initial authority is either the commanding officer's next superior officer or an officer holding the post of Director General or above at National Defence Headquarters.

[38] Matters that must be referred to the Grievance Board include grievances relating to pay or financial benefits like medical and dental care; matters of demotion or release; the application of CF policies bearing upon free speech, political activities, civil employment, conflict of interest, "post-employment compliance measures," and harassment or racist conduct. Additionally, if a complaint involves a decision by the CDS it must be referred to the Grievance Board.

[39] The Right Hon. Antonio Lamer, *The First Independent Review of the Provisions and Operation of Bill C-25,* September 3, 2003, p. 86.

[40] *Ibid.,* p. 86.

Bureaucracy

Former Chief Justice Lamer was highly critical of the bureaucracy of the grievance process. He noted that grievances that proceed to the Grievance Board and the CDS have been estimated to cost taxpayers as much as $100,000.[41] Not surprisingly, he lamented the fact that more grievances were not settled earlier in the process by the initial authority.

Conflicts of Interest

Not only is the grievance process complex, it has been plagued by conflicts of interest and a lack of independence that would not be tolerated in any other context. There are three such deficiencies worth noting. The first is that the CDS is empowered to be the final decision-maker on grievances involving his own decisions. This is lamentable but defensible given that the CDS must have ultimate authority.

The second kind of deficiency is far less defensible. When the position of Director General of the CF Grievance Administration was established, it was set up to function under the authority of the Judge Advocate General (JAG). It is the JAG, of course, who provides legal advice to the chain of command on matters that may end up being grieved. It is also the JAG who provides advice to the initial grievance authority on how to respond to grievances. In effect, the very body that assists in making decisions that may be grieved, or the grievance decisions under appeal, was given command over the body that would ultimately and finally be deciding the grievances that remain unsettled. This was a spectacular and obvious conflict. The simple fact that this system was adopted reveals a deficit in understanding about the importance and nature of independent oversight. Indeed, it smacks of the kind of "trust us" attitude that is resistant to oversight. It was only because of the intercession of Chief Justice Lamer, who pointed out the conflict, that this system was changed. The CF Grievance Administration now falls under the command of the Vice Chief of the Defence Staff.

Still, this deficiency has not been remedied effectively. As its website reveals, the JAG continues to provide legal advice to the CF Grievance Administration. Indeed a former JAG lawyer continues to hold the Director General Grievance Administration position. The same body that may have advised the chain of command on matters leading to grievances, or have advised the initial authority on how to respond, advises the CF Grievance Administration and ultimately the CDS on what to do about it. Unfortunately, the "correction" that took place after the Five Year Review was half-hearted and superficial. It is evident that the CF Grievance Administration needs independence from JAG influence and access to independent legal advice in deciding grievances.

The third deficiency in the grievance process is less notorious, but equally concerning. When a grievance goes to the second level authority, the decision-maker will often consult "subject-matter experts." This occurs both when the Director CF Grievance Administration decides a grievance as the CDS' delegate and after a grievance has been the subject of study and recommendation by the CF Grievance Board. In the latter case, the grievance file and the Board's findings and recommendations are separately analysed and reviewed by subject matter experts before the CDS can make a decision. As the name implies, "subject-matter experts" are persons who have special experience above and beyond that of the decision-maker who they are called upon to assist. We have observed a number of cases where the "subject matter expert" that gets consulted by the second level authority is the initial authority that decided the grievance in the first place. Remarkably, the initial authority whose decision was unsatisfactory to the grievor, thereby prompting a second level grievance, not only participates in the second level process but also is invited to do so with the cachet and stature of an "expert." This happens in many of the career-related grievances for which the Director, Military Careers and Resource Management acts in both capacities. There is simply no excuse for this. It again signals a failure within pockets of the military culture to appreciate the importance of effective, integral and independent review of complaints.

[41] *Ibid.*, p. 104.

Solution: Let the Ombudsman Complement the Grievance Process

Former Chief Justice Lamer offered solutions for the problems that beset the grievance process. As indicated, he recommended removing the authority of the JAG over the CFGA, an obvious step. He also recommended that the delay be tackled by putting more resources into the grievance process and by establishing a schedule for processing claims. Finally, he recommended access to Federal Court after one year of delay.

With respect, while these recommendations are understandable, they are incomplete and the last of them is ill fitting. Sending grievors off to Federal Court is far from the optimal way to reduce delay, expense and formality. Court applications will do as much to exacerbate as solve these problems. A sensible and effective way to address the full range of problems—delay, expense and formality—is to allow the Office of the Ombudsman to complement and contribute to the improvement of the grievance process.[42]

Give the Ombudsman's Office Parallel Authority to Address Complaints

A grievance process fills an important need. It provides for the formal resolution of entrenched conflict when matters cannot be settled without adjudication. When a grievance process is well designed and operated efficiently, it is cheaper and faster than rushing off to court. Still, as necessary as grievance processes are, it is beyond reasonable to contest that it is desirable to limit even this kind of litigation. It is far better to have as many complaints as possible settled without grievance adjudication. First, there is the impact that filing a grievance has on morale and the *esprit de corps* within the military. After all, a grievance is inherently adversarial in nature. It sets the grievor and the respondents, typically members of the chain of command, in opposition to each other in a formalized complaints process. Appropriately, Chief Justice Lamer recognized that it would be preferable to use cooperative problem solving techniques, but, given his limited mandate, he could do no more than implore those who are involved in the grievance process to approach grievances in a cooperative manner. This is fine advice, but with the adversarial, bureaucratic and formalized nature of the process, there are inherent limits on how cooperative things can be.

One way to reduce that adversarial posture is to reduce the number of cases that go to grievance. Before grievances occur there should be an attempt to resolve a problem using informal, flexible, less confrontational methods. This can be done by accessing internal alternative dispute resolution mechanisms or by appealing for help to an ombudsman. A Conflict Management Programme exists for the DND/CF community, and is being employed in an increasing number of cases. This type of resource works well with interpersonal issues, when the parties can agree to work through their problems. However, there are some kinds of issues that do not lend themselves to this approach. In addition, some members have expressed reluctance to use internal dispute resolution resources, believing that they are controlled by management or the chain of command. In some instances, where the potential grievor or complainant already mistrusts the system, there is a need for an independent body with robust fact-finding powers and the ability to make recommendations to the appropriate level of authority. These are the kinds of cases that could benefit from the tools and methods available to an ombudsman.

Altogether apart from preventing unnecessary grievances, diverting possible cases to resolution – according to the issues involved and who is best placed to address them – is an intelligent way to reduce backlog. Problems of delay in the grievance process are linked not only to the system itself, but also to the volume within the system. That volume can be reduced by hiving off as many complaints as possible for alternative dispute settlement outside of the grievance process, leaving the formal grievance process better able to deal with those matters that fit the grievance model.

[42] I am not intending any criticism of the former Chief Justice for not having arrived at what is an obvious solution. He was directed specifically that the Office of the Ombudsman for DND/CF should not to be considered as part of the Five Year Review, a decision that is deeply troubling and which I will address later. The point, though, is that he would have been hard pressed to turn to this Office as part of the solution given that he was advised it was outside of his mandate.

Chief Justice Lamer, again given his limited mandate, tried to achieve informal resolutions by recommending that initial authorities be trained in alternative dispute settlement techniques. This is fine, but that body of expertise already exists within the Canadian Forces in the Office of the Ombudsman. Moreover, those who are initial authorities are part of the chain of command. They cannot bring the kind of distance and unique perspective to the problem that civilians can. Nor can they avoid the perception that they are under the influence of the chain of command in the way that civilian overseers do. The fact is that as internal decision-makers, the ability of the initial authority to participate in mediation is seriously constrained by institutional realities.

As I say, the solution is simple. The Ombudsman should be permitted to receive and attempt to resolve complaints on their merits before a grievance has been filed. Indeed, the Ombudsman should be permitted to attempt to use informal problem solving techniques and even proactive investigation at the request of either party to a grievance even where a grievance is already in the system. Every case that is settled is one less for the grievance process to have to adjudicate. Every case settled is one more that is resolved by compromise and agreement rather than by imposing outcomes that may prove to be divisive and dispiriting. Every case settled is money saved, delay avoided, and trust restored.

Currently there are significant restrictions on the ability of the Office of the Ombudsman to play the kind of role described here. The Ministerial Directives provide that except in compelling circumstances,[43] this Office is not to deal with a complaint unless the complainant has first used "one or more of the ...existing mechanisms [including] the CF redress of grievance process."[44] This of course prevents the Office of the Ombudsman, in most cases, from taking a complaint before it has been grieved or from dealing with the merits of a complaint once a grievance is underway.

Preventing the Ombudsman from accepting complaints on matters that can be grieved before they have been grieved cannot be based on sensible policy. It is manifestly a recipe for inefficiency. It can only be explained as the result of a turf-war in which the Grievance Board has sought to protect its territory, and in which pockets within the Canadian Forces have sought to limit civilian oversight. The impact of this limitation is to force cases into a formalized, overtaxed, delayed labyrinth of proscribed procedure and complexity when many of those cases could be mediated, negotiated, investigated proactively and settled. The fact that we have achieved success in dealing with cases where "compelling circumstances" exist shows that this can be done without undermining anyone's authority.

In contrast to the prohibition on dealing with matters until they have been forced into the grievance system, the prohibition against the Ombudsman dealing with matters that are at the time under grievance is at least based on rational concerns – fear of duplication of services, and concern that the Ombudsman's work and position could conflict with and thereby disrupt grievance work or discredit grievance decisions. Reflection shows, however, that each of these objections is insufficient to override the gains that could be made by letting an ombudsman in.

First, consider the duplication argument. If an ombudsman can resolve a problem that is stagnating in the grievance process, there is no inefficiency through duplication. Instead there is increased efficiency though brokered solutions. The intercession of an official from an ombudsman's office in a pending grievance would be no different than the widespread civil litigation practice of encouraging litigating parties to use the services of mediators or pre-trial judges to try to avoid trial. This kind of intercession can take place right up until judgment is rendered because the legal system has come to recognize that it is a more efficient way to resolve disputes, and tends to produce outcomes that the parties can accept. In the military, where most often the grievor and the respondents must continue to live and work together after the dispute is settled, the value in reaching a settlement by consensus rather than decision cannot be over-estimated.

[43] Compelling circumstances are defined to include cases where access to the grievance process would cause undue hardship to a complainant, or the complaint raises systemic issues, or the complainant *and* the competent authority agree to refer the matter to the Ombudsman: Ministerial Directives, s.13(2).

[44] *Ministerial Directives,* 13(1)(*a*).

Recently, attention has been focussed on significant problems of retention in the military. Common sense dictates that we find ways to limit lingering animosity to reduce discharges that are motivated by the acrimony that remains after decisions are imposed. The Ombudsman should be allowed to support the dispute resolution process, either before matters are referred to grievance or after it happens.

As for the concerns that the involvement of the Ombudsman would somehow clash with work being done by grievance officials, or discredit the grievance process, there is little to them. There is no reason why information gathered by either settlement mechanism cannot be shared cooperatively. This would enrich any grievance decisions that may have to be made by increasing the field of information. As for discrediting grievance decisions, where the Ombudsman achieves settlement using intercession, there will be no grievance decision to discredit. In those worst-case scenarios where agreements cannot be brokered, an Ombudsman's investigation may indeed produce a recommendation that could differ from the ultimate grievance outcome. Even if this happens, there is no reason to worry about jurisdiction or even credibility. The key is that no one is bound by the Ombudsman's recommendations. If there are credible reasons for refusing those recommendations, no one can fairly be criticized for doing so. Just as the authority of the CDS to reject Grievance Board recommendations does not undermine the integrity of either that CDS or the Board, the risk that those within the grievance process may disagree with an ombudsman is no basis for rejecting the assistance an ombudsman can offer.

At the end of the day, the question is a simple one. Other than protecting turf, why would anyone require a matter to slouch its way through the kind of processes that grievances require without first seeing whether it can be whisked through an informal settlement model, or resolved with the benefit of an outside perspective?

Give the Ombudsman's Office Indisputable Authority Over Process Matters

The current mandate of the Ombudsman provides, "[I]f a complaint is made to the Ombudsman about the handling of a complaint or complaints by or under an existing mechanism referred to in subsection 13(1), the Ombudsman may review the process only, to ensure that the individual or individuals are treated in a fair and equitable manner."[45] This jurisdiction enables the Ombudsman to make recommendations about, for example, instances where grievances lay inert in a backlogged system, or where grievors are not being kept informed of progress. The right of the Ombudsman to perform process reviews was hard-fought even though, prototypically, reviewing procedural matters like this is what an ombudsman does. Despite the compromise in the Ministerial Directives, stiff resistance to process review continues. There are those who still believe that the Office of the Ombudsman, not being a creature of statute, cannot purport to exercise oversight over a statutorily created body, and this reduces the cooperation we receive when we deal with grievance-related matters.

The Grievance Board, for its part, has objected to this Office having any role in monitoring their processes or trying to offer its assistance or recommendations because the Ombudsman is a delegate of the Minister of National Defence and the Grievance Board does not consider itself part of the Canadian Forces. Former Minister of Defence Art Eggleton rejected these objections unequivocally, but the concept that the Ombudsman should be shut out of the grievance process continues to be strongly advocated by those within the system.

Clearly, the Office of the Ombudsman should face no lingering attitudes about the legitimacy of this important work. The authority to conduct process reviews at every stage of the grievance process must be re-affirmed and entrenched in legislation.

[45] *Ministerial Directives,* 2(3).

Pockets and Moments of Resistance

If fully effective civilian oversight is to be achieved, more needs to be done than merely removing jurisdictional impediments preventing ombudsmanship from addressing the full panoply of problems that arise within the Canadian Forces. What is also required is the support of those within the military. There has to be a culture of cooperation and an acceptance of the wisdom of civilian oversight. There has to be a willingness to change and improve and to accept criticism. For the most part, there has been sufficient cooperation to enable the Office of the Ombudsman to do its work and I am grateful for the support I have typically received. Still, as I have noted on many occasions, there remain pockets of resistance from key and powerful senior leaders. There have also been moments of resistance from quarters where support can normally be counted on. The history of this office has been one long, continuing struggle for acceptance.

Resistance and the Mandate

Discomfort and at times hostility within the Canadian Forces to the Ombudsman performing a role of civilian oversight has been evident at every stage in the development of the Office's mandate. As described above, immediately upon assuming the post, I began to craft a blueprint for what the Office required. I studied ombudsmanship intently, identifying the basic principles required for it to be effective in carrying out its role of working to improve the welfare of the members of DND/CF and of the institution as a whole. I reviewed military oversight in other countries and discussed with other military ombudsman the experiences they have had and the pitfalls they have encountered. I tapped their wisdom to identify what a recipe for success would look like. On January 20, 1999, I presented my report, *The Way Forward – An Action Plan for the Office of the Ombudsman,* to the Minister of National Defence. This was when I first encountered the kind of resistance that has periodically compromised the ability of the Office to be as effective as it can be.

In spite of the case that I made, Departmental legal advisers, after consultation with Canadian Forces lawyers and commanders, prepared a mandate that bore no relationship to the principles I had identified. The initial draft mandate I was offered crafted an ineffective, feeble authority for the Office. The proposed mandate would have cast the Ombudsman, as a senior JAG lawyer once put it to me, as a "consigliere"-type backroom intervener gently offering the chain of command non-intrusive nuggets of advice from time to time. The mandate would have prevented the Ombudsman from conducting investigations. The Ombudsman was to be confined to making informal inquiries, and was to refer matters back to the chain of command with a recommendation for a board of inquiry or summary investigation. This was not civilian oversight. The Office was treated as if it was to be cosmetic, a mere pretence of civilian involvement while the military would continue to decide military matters, without accountability or real input. To make matters worse, in spite of what was widely understood at the time to be a military culture that was resistant to oversight and change, the mandate was not to be supported by any directive to members and the chain of command to co-operate with the Office. Instead, only a platitudinous promise in a directive from the Minister that CF authorities would be collegial and collaborative was included.

I could not accept this. Faced with our hopelessly conflicting positions, the Minister of National Defence asked that we enter into negotiations with military and departmental lawyers about the mandate for the Office.

Negotiation is not only frequently, but also typically, an appropriate choice for resolving issues. The problem with requiring an ombudsman to negotiate his mandate, however, is obvious. Negotiations are about compromise. Instead of producing decisions based on what authorities and tools will make the office as effective as possible, everything gets sawed off. Worse still, the exercise I was assigned was to achieve compromise with representatives of an institution who did not believe in the need for, or desirability of, civilian oversight. Philosophically, they just did not want an ombudsman. That had been made plain when the Canadian Forces rejected the Doshen recommendation for an organizational ombudsman because of concerns that even this

kind of watered down oversight would undermine the authority of the chain of command. It was confirmed when the Judge Advocate General informed my Office that "the field was occupied" with respect to military justice. I was asked to negotiate with people who did not want an ombudsman. I was asked to have my authority and powers agreed to by the very people I should be overseeing.

Given that dynamic, I was not surprised to see the military and departmental lawyers who were representing the chain of command take negotiating positions that would have left the Office of the Ombudsman as little more than a public relations exercise. Military lawyers argued, for example, that I should have no powers of investigation, claiming untenably that giving the office powers of investigation would cause a conflict with the military police. They made this argument even though I never asked for the power to investigate offences. There was no air of reality to the claimed conflict. The argument was a contrived effort to render the office impotent.

Even at the end of this process, I knew that the authority and tools I was to be left with were simply too circumscribed to meet the needs of an ombudsman's office, but we had to get on with it. The Minister decreed that we would begin with an imperfect mandate and that based on experience gained over the next six months, the mandate would be reviewed, revised, and incorporated into a regulation giving it force of law. For the next six months, I studied the operation of the Office, identifying gaps in authority and the tools that we required. At the end of the six months, I furnished a report and draft regulations that addressed the deficiencies in the Directives.

The draft regulations I prepared were circulated by DND lawyers to a wide range of "interested parties" for their input. Seeking input is of course unobjectionable. What was dispiriting is that this was done without notice to our Office, and without enabling us to make our case. Meanwhile, the Chain of Command and its legal advisors, including the Judge Advocate General, were fully aware of our efforts, and they were able to marshal resistance. Officers in the Canadian Forces posed operational objections. Protests about undermining the authority of the chain of command were voiced in response to a number of the powers that I sought, even though none enabled me to direct or interfere with military decisions. The JAG, for its part, wanted all military justice matters to be strictly off-limits, and argued for an aggressive form of privilege that would keep reams of information from the Ombudsman. The MPCC and Grievance Board wrote a joint letter arguing that we should not be authorized to deal with military police complaints or grievance matters, or to review their processes. The Grievance Board argued that my Office should be restricted from becoming involved in any issue that could become the subject of a grievance.

The Provost Marshal wanted us to have no jurisdiction relating to military police, even though our Office was created in part because of concerns about how unsatisfactorily military police had been dealing with sexual offence complaints and even though we had already issued a report that had led to constructive changes in the treatment of victims during investigations. The Provost Marshal also wanted us to stay away from all issues that could become criminal investigations. The list of self-interested objections to a process that would increase the accountability of everyone affected forced us back to the negotiating table.

While this time only Departmental legal advisers sat across from us during the negotiations, their function was not simply to listen to our pitch and decide on behalf of the Minister whether we had made out our case for the jurisdiction and tools we had identified. Instead they attempted shuttle diplomacy, running each and every item back to the military lawyers who represented the chain of command, or to the newly appointed officials from the MPCC and the Grievance Board. Resistance to our mandate was heavy. In the end, agreement could not be reached, and the Minister retained an independent third party. He did an admirable job but his function was not to identify the tools the Office would require to optimize its performance. He adopted the role of mediator between what were presented as conflicting interests. We made gains. Most notably the Minister endorsed the right of the Ombudsman to issue public reports and to accept complaints from applicants to the CF. But there were also losses, most notably the imposition of the serious restrictions on our jurisdiction relative to the MPCC and the grievance process.

Sadly, resistance to oversight did not end with the settlement of the mandate.

Canadian Forces Grievance Board

During negotiations for our mandate, the MPCC and Grievance Board wrote a joint letter claiming that the Minister of National Defence did not have lawful authority to give the Ombudsman any role relating to grievances or the grievance process, or with respect to Military Police complaints. They claimed that giving the Ombudsman such authority contradicted their statutory jurisdiction and authority. The Minister referred the matter to Department of Justice lawyers who disagreed, and we ultimately secured limited authority in the Ministerial Directives to deal with complaints that are eligible for grievance if there are compelling circumstances for doing so, and we were empowered to review the grievance process and the military police complaints process to ensure that they were operating effectively.

In spite of this, and in spite of a clear subsequent rebuke by the Minister of their position when they reasserted it, the CF Grievance Board continued to maintain that it was immune from even the limited process-based oversight that we were provided with, arguing that, as an independent agency, its employees are not DND/CF employees and therefore are not bound by a Minister's directives relating to our jurisdiction. This position has impeded investigations. We have also experienced problems from the Grievance Board in accessing information. We have been told these problems are the product of a "communications challenge." I was not convinced of this. These are problems of resistance, based on the persisting belief that we do not have legitimate jurisdiction over Grievance Board issues. I felt obliged to raise this as a problem in my Office's 2002–2003 Annual Report.

Technical Objections

Far too often, the Ombudsman's authority to investigate matters is challenged by JAG lawyers. Instead of taking an approach that will assist in resolving complaints, they periodically subject the Ministerial Directives to strict, narrow and at times unrealistic construction. For example, during the Smith investigation[46] we were investigating a public statement about a pending criminal investigation and learned that the statement may have been made after legal advice was received. When we inquired further, we were met with the objection that we do not have jurisdiction to investigate the work of military legal advisers. In fact, we were not investigating the work of the military legal advisers. We were investigating whether making a public statement about a pending criminal investigation was problematic.

There is an unflattering irony when an ombudsman is met with a highly technical objection to his authority. An ombudsman is meant to overcome technicality and narrow-minded rule-driven thinking, but at times the mandate for the Ombudsman is being subjected to this very kind of treatment, thereby impeding the Ombudsman's work. This would not happen in a culture of support.

Solicitor-client Privilege

Claims of solicitor-client privilege have also impeded the Office. While it is settled that solicitor-client privilege does apply to government legal advisers advising government agencies, an aggressive approach to privilege can unnecessarily and inappropriately undermine investigations. A moment's reflection shows why. Few decisions of consequence are made in the military without legal advice. For example, my Office recently referred a case dealing with complaints of harassment and unfair treatment to the Assistant Deputy Minister (Human Resources – Military) for an attempted resolution. Officials in that office immediately turned the file over their lawyers and refuse to meet with my investigators to discuss resolving the case until lawyers for the military have reviewed it and given an opinion on its merits. Our role is to review decision-making. If a military ombudsman is met with solicitor-client objections when exploring the basis for decisions or the development of policies, practices and regulations, access to a good deal of useful and necessary information would be lost.

[46] *Complaint of inappropriate public comment during ongoing CFNIS investigation by the chain of command to protect the integrity of the investigation.* Special Report of the DND/CF Ombudsman December 7, 1999.

The fact is that the Canadian Forces are using solicitor-client privilege in a self-serving way. When members or the chain of command consult with JAG in the course of their duties before acting, the human being doing the consulting is not the client. The Canadian Forces is. While it is true that legal privilege does exist even between government lawyers and the departments being advised, the Ombudsman is not an outsider. The Office of the Ombudsman is independent of the chain of command but is part of the military apparatus. In a very real sense, to invoke privilege against a DND Ombudsman is like one arm of an organization invoking it against another arm of the same organization. Moreover, the Ombudsman is the delegate of the Minister of National Defence. Invoking solicitor-client privilege against the Ombudsman is like invoking that privilege against the Minister himself. Can you imagine a general saying, "Sorry Minister, but I cannot answer your question because we acted on legal advice from the JAG." In truth, use of solicitor-client privilege to shield information from the Ombudsman where the client is the Canadian Forces is an opportunistic subterfuge calculated to hide information, but it is a subterfuge we are being met with.

To illustrate this, we can return to the complaint in the *Smith* investigation concerning the public release of information relating to a criminal investigation. The person who released that information claimed that he relied on legal advice when he was explaining why he felt it was appropriate to make the statement he did. When the Office tried to verify that the member had indeed relied on legal advice, the legal adviser who gave the relevant advice invoked solicitor-client privilege in the name of the member to deny us access to it. This should not have happened. First, the privilege belonged to the Canadian Forces, not the member. Second, and in any event, it is well settled that where a person relies on legal advice to justify his actions, he is deemed to waive his privilege because a person cannot at that same time rely on and shield advice. This is what the member had done. Third, the legal officer who made the decision that privilege applied was hopelessly conflicted. He was the one who gave the relevant advice in the first place. The information should have been handed over.

After meeting with this objection we appealed to the JAG for the information we needed for our investigation and for the release of the names of others who received relevant advice. Although we knew the relevant information was not privileged we thought the most efficient way to secure it against objection was to obtain waivers from these individuals. We needed their names to do so. Yet we were told that the names of those who the advice was given to were themselves privileged. If these persons had been the real clients in the relevant legal relationships, there may have been something to the argument. These people had secured the advice, however, not in their own right but in the course of carrying out their duties as members of the Canadian Forces, for the purpose of carrying on those duties. The real client was the Canadian Forces itself. Not only were the names not privileged but no waivers were forthcoming from the Canadian Forces, even though we expressed the need for this information. Instead we were met with a dismissive response informing us that in the view of the JAG office we had sufficient information to complete our investigation within our mandate.

As a result of the risks that trumped up applications of solicitor-client privilege pose to investigations, we negotiated a protocol during the last round of negotiations with the intercession of the mediator. It calls for the Canadian Forces to conduct a balancing exercise between competing interests before claiming privilege. Since then, however, nothing has changed. Solicitor-client privilege continues to be used at every conceivable opportunity to impede cooperation.

Privacy Legislation

The most novel and creative technical impediment being manufactured to deny us access to information is the improper use of the *Privacy Act*. When we were conducting the Lapeyre-Wheeler investigation[47] relating to the investigation of the death of a soldier during a training exercise, we were initially denied information by the Director Land Personnel, citing privacy legislation. We had to elicit the support of the then-Director Access to Information and Privacy, who agreed that the Ombudsman was entitled to the information in unedited and unsealed form as he was acting as a delegate of the Minister when conducting an investigation.

[47] *Ibid.*

Notwithstanding that this principle has been established, at the time of writing this White Paper the Office of the Ombudsman is being stonewalled in another investigation it is undertaking. Ironically, the investigation is at the request of the Chief of the Defence Staff, and relates to the treatment within the Canadian Forces of six snipers who had been attached to the American armed forces in Afghanistan in 2002. The Office has been told that transcripts of testimony from a Board of Inquiry relating to the complaint cannot be furnished to the Office without being screened and edited as if the Ombudsman had made a request under the *Access to Information Act*. We were surprised to learn this, after someone in DND/CF sent us a completely unedited copy of the Board of Inquiry Report and an extremely personal and confidential psychiatric report on one of the snipers, without his consent. The Office has since been receiving heavily edited transcripts at a snail's pace and at great expense to the military. The context of edited information has left the investigators wondering whether some of the information being protected is even truly personal information.

The Office has also been attempting to obtain copies of the snipers' unit's War Diaries (official records generated for historical purposes during deployment). Initially the Office was told that it could not access them for privacy reasons. Then it was told it could. Then the investigator discovered that some of the documents are in the possession of the CF National Investigation Service (CFNIS). The CFNIS is now once again telling the Office that the War Diaries must be reviewed for privacy reasons, and, at one point, they suggested that the Ombudsman identify the information the investigator wants, which they would furnish to us if they believed it to be relevant.

All of this is intensely frustrating. As indicated, while the Ombudsman is independent from the chain of command, the Ombudsman is not an outsider. The Ombudsman is the delegate of the Minister. Would the Minister be given edited documents based on privacy concerns? As indicated, the Office is an arm of the institution, working for its betterment. National security and operational issues aside, it should have access to institution records. I have unsuccessfully appealed to the highest levels of DND/CF for assistance and support on this issue. Unfortunately, my efforts have fallen on deaf ears. I have recently met and written to the Privacy Commissioner to alert her of my concerns regarding DND/CF's abuse of the *Privacy Act*.

Reaction to Reports

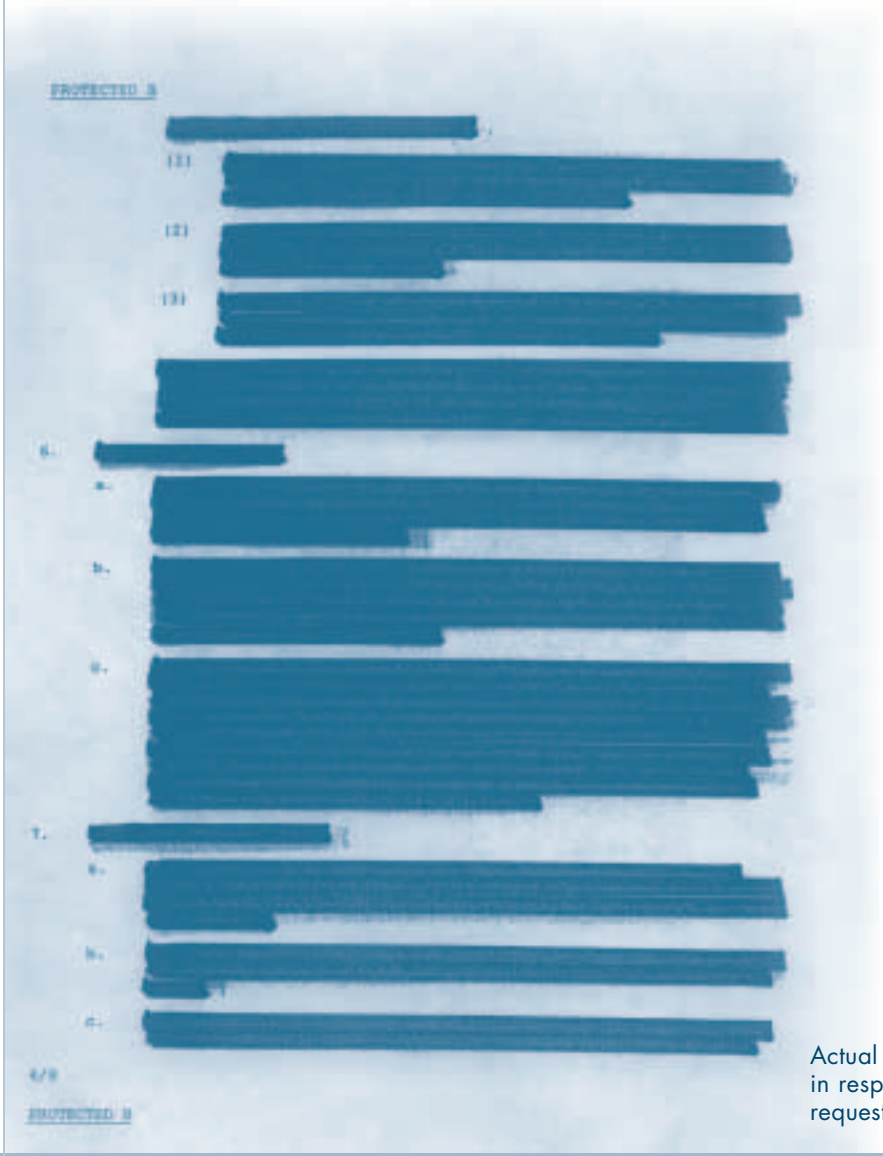
For the most part the recommendations the Office has made in its reports have been well received. By far, most of those recommendations have been accepted and implemented. Typically the Office has enjoyed the co-operation of the highest levels of the chain of command. The Office has not, however, gained easy or universal acceptance and at times its support is softer than it should be. This is understandable at a human level. The support tends to become soft when the Ombudsman releases reports that criticize or embarrass. This is not a pleasant part of the job, but when problems are identified, the Ombudsman has a duty to report them. Progress depends on acceptance of the process of exposing errors, faults and inappropriate procedure, as painful as this can be.

For this reason, it is always discouraging to find those within the chain of command who do not accept the Ombudsman's role. I do not want to dredge up old examples and risk re-opening old wounds to illustrate. There is no gain to be made by doing so. I understand that there will unquestionably be peaks and valleys as the Office works its way into the consciousness of the entire institution. Still, until those in all positions of authority truly come to accept not only the wisdom in having civilian oversight but the value of constructive criticism, the ombudsman's contributions will be less than they can be and opportunities will be lost.

Part of the buy-in needed to achieve optimal results requires a "can-do" attitude. I have spoken about military culture and its penchant for a rule mentality, and I have spoken about the complications that bureaucracy can pose. There have been occasions where we have been advised that our recommendations cannot be implemented because they would set an unwanted precedent, or that they would be contrary to military regulations, or that they are precluded by Treasury Board rules and regulations, or that further study is needed. If there were truly buy-in, these kinds of objections would largely wash away.

First, there should be no fear of precedent if the precedent is a wise one. Precedents can mark the path for positive change. As for military regulations standing in the way, this is the weakest of rationales for inaction. Military regulations are within the control of the military. If they stand in the way of appropriate solutions, modify them. As for Treasury Board regulations, we do extensive research to ensure recommendations can be implemented before making them. In any event, while the Canadian Forces must respect Treasury Board guidelines, it has an important role to play in making sure those guidelines do not become administrative hurdles to wise decisions. Where those guidelines present a problem, the proper course of action is for the Canadian Forces to go to the Treasury Board for exemption or modification of those rules, not to rely on them as a basis for inaction. As for further study, it is certainly prudent before important decisions are made to get the facts, but rare will be the occasion where Ombudsman's investigations are too incomplete to support decision-making. Further study is all too often a euphemism for tactical delay.

In truth, for these reasons, few of these explanations for rejecting or delaying recommendations are credible on their own. They can too easily become excuses. What are needed are two things—an honest appraisal and response to the wisdom of ideas, and a can-do attitude where change is warranted. In the end, it is all a question of attitude and buy-in. The Office of the Ombudsman cannot fulfill its mission without more buy-in within the Canadian Forces.



Actual document received from DND in response to the Ombudsman's request for information.

Securing Credibility and Needed Authority

Staff take an Oath of Service to preserve the confidentiality of information provided to the Ombusdman's Office, February 2000.

Credit: Cpl P. MacGregor

So, a fully effective ombudsman's office has to be independent. It has to be able to operate without having to clear jurisdictional obstacles that are thrown opportunistically in the way of effective resolution. And a fully effective ombudsman's office has to be credible, both to the members who rely upon it and to those who are subject to its oversight. The best way, the only way, to achieve this fully is by entrenching a military ombudsman's office in statute. The military ombudsman should be provided for in the *National Defence Act* and the *Department of Veterans Affairs Act*.

I will deal first with why independence requires the Ombudsman's powers to be based on statutory authority. To be sure, the Office of the Ombudsman has been able to function effectively as a delegate of the Minister of National Defence, even though its authority depends on administrative directives and a standing order for co-operation issued by the CDS. Still, not having the security of independent tenure is inappropriate. A military ombudsman must be critical not only of decisions and actions taken under the watch of the CDS, but also under the watch and at times, with the approval of, the Minister. Having an ombudsman so dependent on the goodwill of those who may take offence to what must be said in the interests of the institution is simply unhealthy. To be truly effective and worthwhile, independence cannot exist from moment to moment as a matter of indulgence. It must exist as a legislated entitlement. The Office of the Ombudsman must be created by statute.

Then there is the question of jurisdiction. As I have recounted in the many preceding pages, even the overly constrained authority given to the Office has been unstable, precisely because the Office is not supported by statute. Both the MPCC and, more notoriously, the CF Grievance Board have sought from time to time to exploit their statutory standing in order to resist the operation of the Ministerial Directives. They have argued that an Ombudsman whose authority is based on delegated authority is incapable in law of reviewing anything that is touched on by statute, or that involves oversight of statutorily created bodies. They also rely on their own legislated frameworks and independence from the department to contend that having a delegate of the Minister intrude on their territory creates the aura of political interference. Placing the Office in a statute will remove any possibility for this kind of objection.

I have also urged that it makes no practical sense to deprive former CF members of access to an ombudsman to inquire into matters related to Veterans Affairs, given that the Office of the Ombudsman DND/CF is already up and running and entirely capable of serving their needs. Yet because the Office of the Ombudsman is the delegate of the Minister of National Defence while veterans' benefits are administered by Veterans Affairs Canada, the Ombudsman cannot assist with these matters. This lamentable situation is caused by a jurisdictional problem that can be overcome by putting the Office in a statute. Giving the Office of the Ombudsman statutory authority will enable it to fulfill the kind of full service role that it should have and it will meet a pressing need.

Then there is the related issue of credibility. Whether grounded in statute or not, an ombudsman depends on the buy-in both of complainants and of those subject to oversight. I have always believed that the performance of an ombudsman's office can break down resistance, but the reality is that performance alone cannot eliminate resistance. This is because, while ombudsmanship can avoid the acrimony of litigation, there are those who are embarrassed by recommendations made or who are so conservative that they resent any vehicle of change. Getting buy-in from these people is difficult enough without having to do it in the face of a lingering sense on their part that the Ombudsman is some kind of illegitimate intruder, poking around where he does not belong. Housing the Office in statute would give the Ombudsman the unequivocal support of law, which can only reduce the penchant for resentment and resistance.

Finally, there is the need to ensure that the Ombudsman has the tools required. These things can be provided for by statute, including and most pressingly, a clear declaration that while the Office of the Ombudsman is independent of the chain of command it is still part of the Department of National Defence and Canadian Forces, and therefore should never be denied information on the basis of claims of privilege and privacy legislation.

There are therefore compelling reasons for entrenching the Office of the Ombudsman DND/CF in statute. Paradoxically, its exclusion from the statutory regime developed in Bill C-25 was the direct result of the very kind of resistance to civilian oversight that makes civilian oversight necessary. This kind of objection should be swept aside, not rewarded. When the statute was being drafted, accumulating recommendations for an ombudsman or Inspector General were ignored because of the "bogeyman" of interference with the chain of command. But for that opposition, the Office of the Ombudsman would already have been in the statute. Moreover, there is no legal reason why the Office cannot be so included. In every other jurisdiction that has a military ombudsman, the authority is provided for by statute. But perhaps most significantly, since the Minister of National Defence initially created the Office, it has demonstrated its value. It has shown that it can resolve problems expeditiously. It can save money. It can improve the quality of life for members, and it can aid in the improvement of the institution. The office has earned its wings. It should be institutionalized as a matter of merit. Reliance on the MPCC and giving exclusive jurisdiction to the grievance process is wasteful in a cash-craving and important institution. Canadians deserve better and even though not everyone in the chain of command agrees, so too does the Canadian Forces.

Then there is the delicate matter of honouring broken promises. One of the key things that prompted us to agree to an enfeebled mandate during the last round of negotiations was the promise that the mandate we did have, as imperfect as it was, would be entrenched in legislation. That promise was made to fulfill the undertaking given to me in 1999 that the Office would be included in regulations after the initial six-month review. Because the mandate was not settled after six months, that deadline was not met and hence we waited while negotiations dragged on for many months. At the end of that process when agreement was reached the matter was left with the legal advisor we had negotiated with to consult department drafters. The only remaining issues appeared to be technical. Shortly after, a change in the head departmental legal advisors, and an abrupt change of minister, derailed the process. When we continued to push for a mandate in law, we were told the matter would be revisited during the Five Year Review provided for in Bill C-25, in 2003. We prepared the case. Then, when the Five Year Review got underway, we were excluded from the process.

The decision to exclude the Office of the Ombudsman DND/CF from the Five Year Review was based on a perplexingly narrow legal interpretation of the review provisions in s.96(2) of Bill C-25. While it is true that Bill C-25 does not mention the Office of the Ombudsman (for the obvious reason that the Office was created outside of the Bill after it was drafted), the purpose in providing for the Five Year Review was to examine the effectiveness of oversight within the military. There is no way to do that rationally or effectively without considering the role of the body that is responsible for the lion's share of dispute settlement – the Office of the Ombudsman. There is no way to consider the effectiveness of the MPCC and the CF Grievance Board without looking at the role the Office of the Ombudsman plays in process review and in supporting dispute settlement. The exclusion of the Office from the review was an irrational, hyper-technical choice that confounded Chief Justice Lamer, but he was obliged to respect his mandate. The effect was that he had to attempt to craft solutions to the problems that beset the statutory organizations without considering the contribution the Office of the Ombudsman could play. Sadly, the narrow mandate for the Five Year Review harmed both its credibility and its utility. And all of this happened because of legal advice furnished to the Minister on behalf of persons who are opposed to civilian oversight. There is unflattering irony in this regrettable story. A comprehensive and credible evaluation of the state of military oversight did not happen during the Five Year Review because of the same kind of narrow, legalistic, technical "no can do" attitude that has created a legacy of problems within the Canadian Forces.

Conclusion

Notwithstanding the trials and tribulations and the occasional disappointments, it has been a privilege to serve the last seven years as the DND/CF Ombudsman. Indeed, it was a distinct honour to have been the first such Ombudsman, and to have been involved in the development of the Office. It has been an even greater privilege to work with so many committed and talented colleagues whose efforts enabled me to sign my name to so many success stories. Of course, I am disappointed that I did not secure a statutory mandate during my tenure, but unless self-interested or insecure resistance can trump reason indefinitely, this will happen sooner or later. It should, of course, be done imminently so that the Office of the Ombudsman for DND/CF can fulfill its full potential, not in its own interests, but in the interests of the institution and its members.

It is the importance of the mission of the Office of the Ombudsman that has caused me to speak frankly here and in the past. I know it will upset many. I take no pleasure in it. My responsibility to do so is, however, a matter of trust. In the same way, it is the importance of that mission and the trust reposed that should motivate political and military leaders to support unequivocally the changes I now call for. The shape and authority of an ombudsman's office should not be a question of negotiation or of trade-offs. It should be a matter of doing what is right.

As I say, new pages are turning as I leave this Office. It will be up to others to ensure that those pages turn forward and not back.

Canadian Forces personnel in action.

Credits: MCpl Jeff D. de Molitor, Sgt David Snashall, Corporal Shawn M. Kent

Appendix – Draft Statute

Part XXX
National Defence and Canadian Forces Ombudsman

1. (1) There shall be an Ombudsman for the Department of National Defence and Canadian Forces who shall be appointed by the Governor in Council to hold office for a term not exceeding five years, and is removable only for cause.

   (2) The Ombudsman is eligible to be reappointed on the expiry of the first term to a second term not exceeding five years.

   (3) The Ombudsman shall have the powers and perform the duties and functions as set out below.

   (4) The Ombudsman shall have the rank and status of a deputy head of a department and as such shall exercise and perform such powers, duties and functions as specified below and otherwise as the Minister may specify.

Ombudsman's Mandate—General Duties and Functions

2. (1) The Ombudsman shall

   (a) act as a neutral and objective sounding board, mediator, investigator and reporter on matters related to the DND and CF;

   (b) act as a direct source of information, referral and education to assist individuals in accessing existing channels of assistance and redress within the DND and CF; and

   (c) serve to contribute to substantial and long-lasting improvements in the welfare of employees and members of the DND and CF community.

   (2) In the performance of those duties and functions, the Ombudsman shall be independent from the management and chain of command of the DND and CF and shall report directly to and be accountable to the Minister.

   (3) The Ombudsman has the powers to receive, investigate and hear complaints given to the MPCC under Part IV of this Act.

   (4) The Ombudsman shall exercise such powers and shall perform such duties and functions as are conferred or imposed on it by or pursuant to any other Act of Parliament or any order of the Governor in Council.

   (5) The powers conferred on the Ombudsman may be exercised despite any provision in any Act to the effect that any such decision, recommendation, act or omission is final, or that no appeal lies in respect thereof, or that no proceeding or decision of the person or organization whose decision, recommendation, act or omission it is shall be challenged, reviewed, quashed or called in question.

3. (1) The Ombudsman

   (a) shall investigate any matter referred to the Ombudsman by written direction of the Minister; and

   (b) may, subject to these provisions, on the Ombudsman's own motion after advising the Minister, investigate any matter concerning the DND or CF.

Administration of the Ombudsman's Office

4. The Ombudsman may employ such employees as the Ombudsman considers necessary for the efficient operations of his or her office, and such employees shall be appointed in accordance with the *Public Service Employment Act*.

5. All members of the Ombudsman's staff shall, on appointment, swear an oath of secrecy.

6. Except as otherwise provided or the context otherwise requires, these provisions that apply to or in respect of the Ombudsman apply to or in respect of the representative of the Ombudsman and the staff of the Ombudsman while performing duties or functions on behalf of the Ombudsman.

7. The Ombudsman shall have complete authority for the administration of the Ombudsman's Office, work and employees.

8. The Ombudsman shall be responsible for the Ombudsman's own communications and media relations and shall have his or her own legal counsel.

9. DND/CF shall provide assistance to the Ombudsman with respect to administrative, human resource, and communications matters, upon the Ombudsman's request.

10. The Ombudsman may engage such technical and professional advisers as the Ombudsman considers necessary for the proper conduct of the Ombudsman's activities.

Delegation

11. Any of the powers, duties or functions of the Ombudsman under these provisions, other than the power of delegation and the duty or power of submitting or publishing reports under section xx, may be delegated by the Ombudsman to any member of the Ombudsman's staff.

Budget

12. The Ombudsman has complete authority over the budget for the office of the Ombudsman and is accountable only to the Minister with respect to the budget of the Office.

13. The budget for the office of the Ombudsman shall be reported as a separate line item in the DND's estimates and shall be set out in the annual report that is prepared by the Ombudsman in accordance with subsection 39(1)(*a*)(i).

Right to Complain

14. Any of the following persons may bring a complaint to the Ombudsman, directly and free of charge, where the matter complained about relates directly to DND or the CF:

    (1) a member or former member;

    (2) a member or former member of the Cadets;

    (3) an employee or former employee;

    (4) an employee or former employee of the Staff of Non-Public Funds, CF;

    (5) a person who applies to become a member;

(6) a third-party contractor, supplying services to DND/CF in the same manner as DND employees or CF members;

(7) a member of the immediate family of a person referred to in paragraphs (1) to (6); or

(8) a person who, pursuant to law or pursuant to an agreement between Canada and the state in whose armed forces the person is serving, attached or seconded as an officer or non-commissioned member to the CF.

Existing Mechanisms

15. (1) Where the complainant has not, within the applicable time limit, first availed himself or herself of one of more of the following existing mechanisms available to the complainant, the Ombudsman has the discretion to refuse to deal with the complaint

(a) the CF Redress of Grievance System, including the Canadian Forces Grievance Board;

(b) the Public service grievance and complaints system; or

(c) the Security Intelligence Review Committee.

(2) For the purpose of paragraph (1)(*b*), the public service grievance and complaints process includes formal complaints mechanisms and rights of appeal under the *Public Service Employment Act,* rights of grievance and appeal under the *Public Service Staff Relations Act,* the *Public Service Modernization Act,* review and appeal procedures in relation to workers compensation under the *Government Employees Compensation Act* and rights of appeal to Management Review Boards of the public service health and dental plans.

Limitations

16. The Ombudsman shall not investigate any complaint or matter relating to

(1) a military judge, court martial or summary trial;

(2) the exercise of discretion in laying charges by the chain of command or the CF National Investigation Service or in preferring charges by the Director of Military Prosecutions;

(3) matters which are within the exclusive jurisdiction of the Treasury Board as the employer and within the exclusive jurisdiction of the bargaining agent, under the *Public Service Staff Relations Act*;

(4) the review of the foreign signals intelligence and information technology security activities of the Communications Security Establishment;

(5) occurrences prior to June 15, 1998, unless the Minister considers that it is in the public interest, including the interest of employees or members of the DND or the CF as a whole, for the Ombudsman to deal with the matter;

(6) any legal advice to DND or the CF, employees of DND, members of the CF or the Crown, by a person acting as legal counsel in relation to any matters or any proceeding; or

(7) professional conduct and professional standards under the jurisdiction of a Bar of a province.

17. The Ombudsman will not purport to perform the function of the Military Police in investigating any matter in which there may be an allegation of criminal activity.

Disposal and Investigation of Complaints

18. The Ombudsman shall attempt to resolve problems at the level at which they can most efficiently and effectively be resolved and shall make recommendations to the lowest level of authority that can effect the change considered necessary by the Ombudsman.

19. (1) The Ombudsman may refuse to deal with a complaint or may discontinue dealing with a complaint at any stage if the Ombudsman considers that it is in the public interest to do so.

    (2) In exercising the discretion under subsection (1), the Ombudsman shall consider the following factors:

    (a) whether the complaint is frivolous or vexatious;

    (b) whether the complainant lacks sufficient personal interest in the matter;

    (c) the age of the complaint;

    (d) the amount of time between when the complaint became aware of the matters giving rise to the complaint and when the complaint is received by the Ombudsman;

    (e) the need for a judicious and efficient use of the Ombudsman's resources; and

    (f) the extent to which the complainant has utilized existing complaint mechanism.

20. (1) Subject to sections 16 and 17, the Ombudsman may report complaints of abuse or delay related to the administration of

    (a) the Code of Service Discipline to the competent authority including the Chief of the Defence Staff (CDS), the Judge Advocate General, the Provost Marshal; and

    (b) the public service discipline processes to the competent authority including the Deputy Minister.

    (2) The competent authority should inform the Ombudsman of any steps that are taken to remedy the abuse or delay.

21. If an investigation is necessary to carry out the Ombudsman's mandate, the Ombudsman shall thoroughly investigate the complaint in an independent and objective manner.

Units Deployed on International Operations

22. (1) If the investigation of a matter by the Ombudsman involves a unit that has been deployed in international operations, the Ombudsman shall normally

    (a) inform the contingent commander of the investigation prior to its commencement;

    (b) keep the contingent commander or the commander's designate informed about the progress of the investigation;

    (c) request from the contingent commander or the commander's designate that a liaison person be assigned to represent the contingent commander and provide advice to the Ombudsman on any impact the investigation may have on the operational mission;

    (d) carry out the investigation while being sensitive to the need to minimize the impact on the operational effectiveness of the contingent; and

    (e) where appropriate, seek the advice of the contingent commander or the commander's designate concerning the matter referred to in paragraph (*d*).

    (2) Investigations by the Ombudsman must not impede the operational mission of contingent commanders, but not withstanding that aim, must be completed in a credible, responsive, independent and professional manner.

(3) If the matter of the Ombudsman being effectively able to carry out an investigation without impeding the operational mission of a contingent commander cannot be resolved to the satisfaction of the Ombudsman and the contingent commander, the contingent commander shall refer the matter to the CDS for direction.

(4) If the investigation of a matter by the Ombudsman involves a unit that has been deployed in domestic operations, subsections (1) to (3) also apply in respect of the investigation but a reference to a commander in any of those provisions shall be read as a reference to the joint force commander.

Criminal Act or Breach of the Code of Service Discipline

23. (1) If at any time during the course of dealing with a matter, the Ombudsman is of the opinion that there is evidence of

(a) a criminal act or a breach of the Code of Service Discipline committed by any employee or member of the DND or CF, the Ombudsman may report the matter to the Provost Marshal; or

(b) a criminal act committed by a person who is not subject to the Code of Service Discipline, the Ombudsman may report the matter to the competent authority.

(2) When the Ombudsman investigates a matter that is related to a Military Police investigation into an alleged criminal or Code of Service Discipline offence,

(a) the Provost Marshal has priority in the interviewing of witnesses; and

(b) the Military Police shall, on the request of the Ombudsman, provide the Ombudsman with copies of documents and information relating to the investigation carried out by the Military Police in connection with the matter.

Access to Documents

24. (1) The Ombudsman may be denied access to information for reasons of security in accordance with government security policy.

(2) The Ombudsman may be denied access to facilities, employees, members or information for only as long as it is justified for operational requirements.

(3) If any person objects to providing access to facilities, employees, members or information to the Ombudsman on the basis of compelling operational or security requirements, the Ombudsman may request a review of the objection by the competent authority

(a) up to the CDS when the objection is based on operational requirements; or

(b) up to the CDS or Deputy Minister when the objection is based on security requirements.

(4) If the Ombudsman is not satisfied with the explanations provided by the competent authority for not providing access to the Ombudsman to facilities, employees, members or information, the Ombudsman may, after reasonable notice to the Minister, submit a report under section xx relating the Ombudsman's concerns on the denial of access.

25. Communications between the Ombudsman and any person shall not be covered by or counted against any restrictions on that person's right to send letters, documents or correspondence or to receive or make telephone calls.

26. (1) The office of the Ombudsman shall be operated in a confidential and secure manner so as to protect the information received by the office in the course of its operations.

(2) Except as otherwise authorized by law,

(a) no communication to the Ombudsman or information provided to the Ombudsman in any form shall be disclosed by the Ombudsman, except where it is, in the opinion of the Ombudsman, subject to these provisions, necessary for an investigation, report or other authorized purpose; and

(b) communications between the Ombudsman and any person in relation to the duties and functions of the Ombudsman are private and confidential.

Assistance to the Ombudsman

27. The Ombudsman may hear or obtain information from such persons as he or she thinks fit, and may make such inquiries as he or she thinks fit and it is not necessary for the Ombudsman to hold any hearing and no person is entitled as of right to be heard by the Ombudsman.

28. (1) The DND and CF as institutions, and the CFGB, and all levels of authority within them, shall provide the Ombudsman, in accordance with the law and consistent with operational and security requirements, with all the support, assistance and cooperation required by the Ombudsman to perform the duties and functions of the Ombudsman.

(2) Employees and members of the DND and CF and the CFGB shall facilitate the work of the Ombudsman unless legal requirements or compelling operational or security priorities dictate otherwise.

(3) For the purpose of this section, cooperating fully with and facilitating the work of the Ombudsman includes providing, in connection with the Ombudsman's duties and functions, within a time that is reasonable in the circumstances having regard to any legal requirements or compelling operational or security priorities that dictate otherwise

(a) direct access to the employees and members of the DND and CF, CFGB and facilities;

(b) information; and

(c) copies of documents or other things.

(4) If a request for information or assistance directly from the Ombudsman cannot be accommodated, the person responsible for giving effect to the request shall report the circumstances to the environmental commander, group principal or senior manager as appropriate as soon as is reasonable in the circumstances.

(5) An employee or member of the DND or CF, or CFGB, who receives a request for information or assistance directly from the Ombudsman may consult his or her manager or commanding officer within such time as is reasonable in the circumstances so as not to cause undue delay in permitting the duties and functions of the Ombudsman to be exercised in relation to the matter.

29. To the extent that operational requirements permit, the DND/CF, and CFGB shall make personnel available as requested by the Ombudsman in order to provide specialized knowledge or expertise to assist the Ombudsman in the exercise of his or her mandate.

30. (1) The Military Police shall, on request of the Ombudsman, provide the Ombudsman with copies of documentation and information relating to the investigation that has been or is being carried out by the Military Police in connection with a matter where

(a) the investigation has been completed; or

(b) providing access to the Ombudsman would not impede or compromise the investigation.

(2) Where access is denied, the Provost Marshal shall provide the Ombudsman with a report explaining why the provision of access to the Ombudsman would impede or compromise the investigation.

31. (1) If the Ombudsman deems necessary, the Ombudsman may from time to time require any employee or member of the DND and CF and the CFGB who in his or her opinion is able to give any information relating to any matter that is being investigated by the Ombudsman to furnish to him or her any such information, and to produce any documents or things which in the Ombudsman's opinion relate to any such matter and which may be in the possession or under the control of that person.

(2) The Ombudsman may summon before him or her and examine on oath,

(a) any complainant;

(b) any person who is an employee or member of the DND/CF, CFGB and who, in the Ombudsman's opinion, is able to give any information mentioned in subsection (1); or

(c) any other person who, in the Ombudsman's opinion, is able to give any information mentioned in subsection (1),

and for that purpose may administer an oath.

(3) Except in a prosecution of a person for an offence under section 131 of the *Criminal Code* (perjury) in respect of a statement made under this Part, in a prosecution for an offence under this Part, evidence given by a person in proceedings under this Part and evidence of the existence of the proceedings is inadmissible against that person in a court or in any other proceedings.

32. (1) The Ombudsman may at any time enter upon any premises occupied by DND/CF and CFGB and inspect the premises and carry out therein any investigation within his or her jurisdiction.

(2) Before entering any premises under subsection (1), the Ombudsman shall notify the manager or commanding officer occupying the premises of his or her purpose.

(3) The Minister may by notice to the Ombudsman exclude the application of subsection (1) to any specified premises or class of premises if he or she is satisfied that the exercise of the powers mentioned in subsection (1) might be prejudicial to the public interest.

Refusal or Failure to Assist the Ombudsman

33. (1) No employee or member of the DND/CF, CFGB shall wilfully and without lawful reason,

(a) refuse or fail to comply with any lawful request of the Ombudsman made in connection with the performance of the Ombudsman's duties and functions;

(b) make any false statement or attempt to mislead the Ombudsman in the performance of the Ombudsman's duties and functions;

(c) fail to forward immediately to the Ombudsman's office, unopened and unread, communications directed to the Ombudsman from any person who

(i) resides on any CF base or is with any Wing or Formation or who is deployed by the CF or is a member of the person's family, or

(ii) is in detention, incarceration or is hospitalized;

(d) fail to forward immediately, unopened and unread, communications from the Ombudsman to any person referred to in paragraph (*c*);

(e) intercept by electronic or other means communications between the Ombudsman and any person in relation to the duties and functions of the Ombudsman;

(f) obtain access to records of the Ombudsman of internal or external communications to or from the Ombudsman;

(g) obtain access to the electronic or other data storage facilities used in connection with the Ombudsman's duties and functions that are separate from the electronic or other data storage system provided to the Ombudsman's offices by the DND or CF;

(h) take steps to breach the confidentiality or privacy of any communication made to or information in the possession of the Ombudsman;

(i) discriminate, retaliate or take an adverse action against, or impose an adverse consequence on, any person as retribution or reprisal for bringing in good faith a complaint forward to or lawfully cooperating with the Ombudsman in relation to the Ombudsman's duties and functions; or

(j) make comments that a reasonable person would know are likely to compromise or prejudice the integrity of a review or an investigation being carried out by the Ombudsman.

(2) A person who contravenes subsection (1) shall be considered to have obstructed, impeded or interfered with the Ombudsman in the execution of the duties and functions that the Ombudsman is required to perform.

34. (1) No person shall obstruct the Ombudsman or any person acting on behalf or under the direction of the Ombudsman in the performance of the Ombudsman's duties and functions under this Part.

(2) Every person who contravenes this section is guilty of an offence and liable on summary conviction to a fine not exceeding one thousand dollars.

35. (1) If, in connection with any investigation, the Ombudsman is of the opinion that the powers of investigation of the Ombudsman have substantially been frustrated and not supported by persons or processes to the extent that the mandate of the Ombudsman cannot be properly exercised during the investigation, the Ombudsman may

(a) make a report of the matter to the Minister; and

(b) publish a report about the matter if the Ombudsman considers that it is in the public interest to do so in order to preserve the respect and cooperation that is to be accorded to the office of the Ombudsman and to prevent occurrences of similar situations.

Information to Complainants and Other Parties

36. The Ombudsman shall in each case, inform the complainant and other parties involved in the case in such manner and at such time as the Ombudsman deems appropriate, as to the progress of the case and of the disposition of the complaint and provide the complainant and parties with a copy of any opinion or recommendation that the Ombudsman has rendered in connection with the complaint together with such comments as the Ombudsman considers appropriate.

37. (1) If a report by the Ombudsman under section 38 will contain an adverse comment about any employee or member of the DND or CF or CFGB, the Ombudsman shall inform the employee or member of the nature of the intended comment and allow the employee or member 14 days to submit representations in response.

(2) The Ombudsman may, on application by any person who is unable to submit representations pursuant to subsection (1) within the 14 days, extend the person's time for submitting representations, if it is in the public interest to do so.

(3) Representations referred to in subsection (1) shall be in writing unless the Ombudsman, on application, considers it appropriate in the circumstances to allow oral representations to be made.

(4) A copy of all written representations received under this section shall be appended to any report made pursuant to section 38.

Report to Competent Authorities

38. (1) The Ombudsman shall send a report, including any recommendations, opinions, and reasons, to the appropriate DND or CF authority, if on completing an investigation of any matter, the Ombudsman is of the opinion that

(a) the matter should be referred to an appropriate DND or CF authority further consideration;

(b) an omission should be rectified;

(c) a decision or recommendation should be quashed or substituted;

(d) findings and recommendations, or a decision of an existing mechanism referred to in subsection 15 should be reconsidered, quashed or substituted;

(e) a law, policy or practice on which a decision, recommendation, act or omission was based should be reviewed;

(f) reasons should have been given for a decision or recommendation;

(g) a delay should be rectified; or

(h) other steps should be taken to achieve substantial and long-lasting improvements to the welfare of employees and members of the DND or CF.

39. (1) An authority that receives a report under section 38 shall inform the Ombudsman within a reasonable time, as determined by the Ombudsman, of all steps taken or proposed to be taken in response to recommendations in the report, including reasons for not following any recommendation.

(2) If, in the opinion of the Ombudsman, the response to a report received from the appropriate DND or CF authority is insufficient or no response is received, the Ombudsman may send a copy the report to the Deputy Minister or CDS, as appropriate, and in such case the Deputy Minister or CDS shall inform the Ombudsman within a reasonable time, as determined by the Ombudsman, of all steps taken or proposed to be taken in response to recommendations in the report, including reasons for not following any recommendation.

(3) If, in the opinion of the Ombudsman, the response to a report received from the Deputy Minister or CDS is insufficient or no response is received, the Ombudsman may send a copy of the report to the Minister.

(4) If the Deputy Minister or CDS is directly involved in the subject-matter of the Ombudsman's report, the Ombudsman shall report the matter directly to the Minister instead of sending a copy of the report to the Deputy Minister or CDS as the case may be under subsection (2).

Annual and Other Reports

40. (1) The Ombudsman

(a) shall

(i) submit an annual report to the Minister within three months after the termination of each financial year, on the activities of the Ombudsman and at such other times as the Minister may require, and

(ii) submit reports to the Minister on the implementation of any recommendations made by the Ombudsman when required by the Minister; and

(b) may issue reports concerning any investigation or other matter within the mandate of the Ombudsman, if the Ombudsman considers that it is in the public interest to do so.

(2) The Ombudsman shall

(a) publish a report issued under subsection(1)(*a*) on the expiration of 28 days after it has been submitted to the Minister, and the report shall be laid before each House of Parliament on any of the first fifteen days on which that House is sitting after the Minister receives it; and

(b) submit a report issued under subsection (1)(*b*) to the Minister and, may publish the report on the expiration of 28 days after it has been submitted to the Minister, if the Ombudsman considers that it is in the public interest to do so.

(3) No person other than the Ombudsman shall alter a report referred to in subsection (2) except when necessary to conform to the requirements of the *Privacy Act*.

Ombudsman's Advisory Committee

41. (1) The Ombudsman shall establish a DND/CF Ombudsman's Advisory Committee.

(2) The representation on the Committee shall be determined by the Ombudsman having regard to the need to ensure a broad based representation from the DND and CF, and VAC.

(3) The Committee shall meet on a regular basis to provide the Ombudsman with advice on issues within the context of the DND and CF and concerns that have arisen in relation to the activities of the Ombudsman's office.

Proceedings Privileged

42. Except on the ground of lack of jurisdiction, nothing done by the Ombudsman, including the making of any report or recommendation is liable to be challenged, reviewed, quashed or called into question in any court.

43. No criminal or civil proceedings lie against the Ombudsman, or against any person acting on behalf or under the direction of the Ombudsman, for anything done, reported or said in good faith in the course of the exercise or performance or purported exercise or performance of any function, power or duty of the Ombudsman.

44. The Ombudsman or any person acting on behalf or under the direction of the Ombudsman is not a competent or compellable witness in respect of any matter coming to the knowledge of the Ombudsman or that person in the course of the exercise or performance or purported exercise or performance of any function, power or duty of the Ombudsman.

45. For the purposes of any law relating to libel or slander,

(a) anything said, any information furnished or any document, paper or thing produced in good faith in the course of an investigation by or on behalf of the Ombudsman is privileged; and

(b) any report made in good faith by the Ombudsman and any fair and accurate account of the report made in good faith in a newspaper or any other periodical publication or in a broadcast is privileged.

Department of Veterans Affairs Act (RSC 1985, V-1)

1. There shall be an Ombudsman for the Department of Veterans Affairs.

2. The Ombudsman for the Department of National Defence and Canadian Forces shall also hold the position as Ombudsman for the Department of Veterans Affairs.

3. The Ombudsman shall have the duties and functions as set out in Part XXX of the *National Defence Act* concerning Veterans Affairs matters.

4. In performing these functions, the Ombudsman shall be independent from the management of VAC and shall report directly to and be accountable to the Minister of Veterans Affairs.

5. The Ombudsman shall have the power to receive complaints on matters falling within the jurisdiction of the Veterans Review and Appeal Board.

Art Direction ADM(PA) DMCS / Direction artistique SMA(AP) DMSC CS04-0435