

S U B M I S S I O N

by

THE INTERNATIONAL OMBUDSMAN INSTITUTE

to

THE SPECIAL JOINT COMMITTEE OF THE  
SENATE AND OF THE HOUSE OF COMMONS ON  
THE CONSTITUTION OF CANADA

December 31, 1980

(100)

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December 31, 1980

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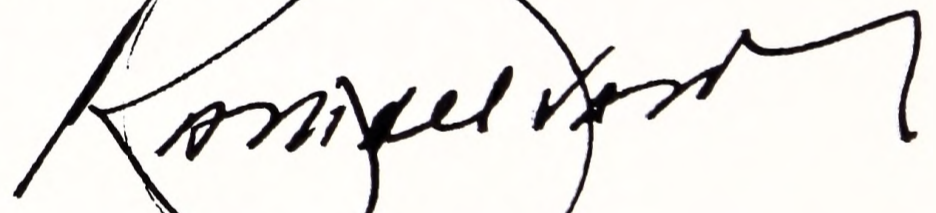
Senator Harry William Hays  
Mr. Serge Joyal, M.P.  
Co-Chairmen of Special  
Joint Committee

Gentlemen:

It is my privilege to forward to you this submission on the constitution pursuant to instructions given to me by the Board of Directors of the International Ombudsman Institute.

I look forward to the opportunity of appearing before you and the other members of your Special Joint Committee to discuss constitutional matters of concern to the International Ombudsman Institute and to respond to questions relating to this submission.

Yours very truly,



Randall Ivany  
Executive Director

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## INTRODUCTION

### BACKGROUND OF THE INTERNATIONAL OMBUDSMAN INSTITUTE

The International Ombudsman Institute was established in 1978 to promote and support the Ombudsman institution throughout the world. Incorporated as a non-profit organization under the Canada Corporation Act, it has a growing membership, presently totalling 335, including 77 Ombudsmen from 25 countries. The members of its Board of Directors reside in Australia, Canada, England, Fiji, Sweden, Switzerland, and the United States of America.<sup>1</sup>

### CANADIAN OMBUDSMAN SCENE

Canada's endorsement of the Ombudsman institution as an additional means to protect individual rights began with the appointment in 1967 of legislative Ombudsmen in Alberta and New Brunswick, respectively. There are presently nine provincial legislative Ombudsmen in Canada and additionally three federal specialist Ombudsmen.<sup>2</sup> With this growth in the number of Ombudsmen offices has evolved a greater public awareness of the institution. Viewed from a judicial perspective, the Ombudsman has been seen as "a watchdog, designed to look into the entire workings of administrative laws".<sup>3</sup>

### PURPOSE OF THE BRIEF

There has been considerable attention given to the substantive aspects of the Constitution Act, 1980. It has been proposed there should be a Charter of Rights and Freedoms. The International Ombudsman Institute welcomes the opportunity to present this submission before this Special Joint Committee to focus attention to the existing presence of the Ombudsman institution within Canada and its potential for inclusion within the constitution.

This submission is based on the assumption that there will be a Charter of Rights and Freedoms forming part of Canada's Constitution Act, 1980.

### PROPOSAL

Every person has the right to complain about alleged injustice caused by government to:

- (a) A Parliamentary Ombudsman in regard to the federal government, and
- (b) A Legislative Ombudsman in regard to each provincial government.

### DISCUSSION OF THE PROPOSAL

#### DEFINING THE TYPE OF OMBUDSMAN BEING PROPOSED

The phenomenal growth of the Ombudsman institution, particularly during the last decade, has been accompanied by the emergence of many complaint-handling organizations having no real similarity with the classical Ombudsman institution promoted and supported by the International Ombudsman Institute. For that reason, there is attached to this submission Appendix 4 being the BRIEF ON THE OFFICE OF THE OMBUDSMAN prepared by the Ombudsman Committee of the International Bar Association and Appendix 5 being the federal REPORT OF THE COMMITTEE ON THE CONCEPT OF THE OMBUDSMAN. These definitive reports are incorporated as part of this submission because they have been widely supported by classical Ombudsmen throughout the world.

There are few concise statements defining the classical Ombudsman concept in a manner accepted by the Ombudsman community. Most practising Ombudsmen recognized as meeting all the classical tests, have responded by stating that they certainly recognize their legitimate colleagues. Nevertheless, one Ombudsman definition that appears to have been generally accepted was established by the Council of the International Bar Association in 1974 during its biennial conference held in Vancouver, British Columbia. That definition of the Ombudsman institution states as follows:

"BE IT RESOLVED, that the International Bar Association recommends that the Office of the Ombudsman so established should be in accordance with the following definition:

An office provided for by the constitution or by action of the legislature or parliament and headed by an independent, high-level public official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies, officials, and employees or who acts on his own motion, and who has the power to investigate, recommend corrective action, and issue reports."

WHY ENTRENCHMENT OF THE OMBUDSMAN INSTITUTION WITHIN CANADA'S CONSTITUTION

One major factor contributing to the public support and encouragement given to the Ombudsman institution for rectifying injustice is the close link between the Ombudsman and individual complainants. The Ombudsman has become an integral part of democracy by means of which the concerns of individual complainants can be independently investigated and ultimately given a chance to influence government administration.

During the First International Ombudsman Conference, Dr. I. E. Nebenzahl, Ombudsman and State Comptroller for the State of Israel, spoke about the democratic nature of the Ombudsman:

"Today's Ombudsman is a profoundly democratic institution. With the right to complain, the individual citizen is given a means of directly influencing the administration, more specifically and, in its own time and place, more powerfully, than by casting his vote as one of many in an election. This element of direct democracy may account for some of the appeal of the Ombudsman idea."

As with democracy itself, continuing effort and vigilance is required to preserve the necessary independence of the Ombudsman.

No level of government should be allowed to cancel the Ombudsman institution unilaterally. By means of the Ombudsman institution, a new innovative means was created in Canada to further protect the individual confronting government officials. The individual has traditionally been expected to obey the law. There has recently emerged a greater emphasis on a similar obligation on the part of government officials. Mr. Joseph Berube, Legislative Ombudsman for New Brunswick, formerly a member of the Provincial Court in New Brunswick, enunciated this result of Ombudsmanship as follows:

"The office is designed to ensure that the citizen's



obligation to obey the spirit and letter of the law is balanced by the corresponding obligation on the part of civil servants."

The International Ombudsman Institute firmly believes that the Ombudsman institution has become an essential safeguard available to the individual and has noted that it dramatically flourishes within democratic systems of government. Canada has already achieved significant progress in this regard, particularly on the provincial scene.

It is to be noted that legislation was introduced in the House of Commons to establish a Parliamentary Ombudsman with general jurisdiction, yet it was not passed. Additionally, Prince Edward Island does not have a legislative Ombudsman.

By means of entrenchment of the Ombudsman institution within the constitution, there would inevitably result the necessary legislative initiatives to provide the access of an Ombudsman both at the federal government level and all provincial governments.

#### HISTORICAL SUPPORT

There is impressive support historically for the entrenchment of the Ombudsman institution within a constitution. Research conducted for this submission has revealed constitutional entrenchment of the Ombudsman institution in many countries. As Sweden was the first to establish the Ombudsman institution in its modern form in 1809, there is attached as Appendix 7 the relevant provisions of its constitution translated into English. Comparable constitutional provisions are reported as existing in Denmark, Finland, and Norway.



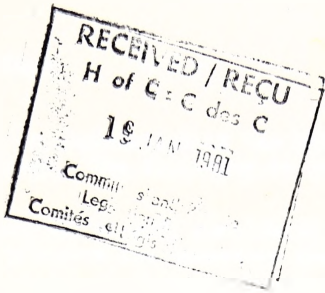
Such constitutional entrenchment of the Ombudsman institution was created by some of the developing countries of the Commonwealth including:

- Dominica
- Fiji
- Ghana
- Guyana
- Mauritius
- Nigeria
- Papua New Guinea<sup>8</sup>
- Solomon Islands
- St. Lucia
- Tanzania
- Trinidad and Tobago
- Vanuatu
- Zambia

These constitutional provisions, being Appendixes 7 and 8, are not intended as a suitable model for Canada's proposed constitution. However, they do provide historical support to the proposal contained in this submission. The International Ombudsman Institute takes the position it would be inappropriate to specify the scope of Ombudsman jurisdiction within Canada's proposed constitution as that would appear best determined by the respective level of government regarding its own classical Ombudsman.

1977 Annual Report of the New Brunswick Ombudsman, page 6.

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January 12, 1981

Senator Harry William Hays  
Mr. Serge Joyal, M.P.  
Co-Chairmen of Special  
Joint Committee

Gentlemen:

I have received a copy of a submission by the International Ombudsman Institute addressed to the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada.

In case the Special Joint Committee should be under the impression that the International Ombudsman Institute is speaking for all Canadian Legislative Ombudsmen, I wish to correct that impression. I do not support the submission of the International Ombudsman Institute.

I have the following comments.

On page 1 under the heading 'Purpose of the Brief' the following is stated;

"There has been considerable attention given to the substantive aspects of the Constitution Act, 1980. It has been proposed there should be a Charter of Rights and Freedoms. The International Ombudsman Institute welcomes the opportunity to present this submission before this Special Joint Committee to focus attention to the existing presence of the Ombudsman institution within Canada and its potential for inclusion within the constitution.

This submission is based on the assumption that there will be a Charter of Rights and Freedoms forming part of Canada's Constitution Act, 1980." (Emphasis added.)

Under the subheading 'Proposal' on page 2 the following is stated;

"Every person has the right to complain about alleged injustice caused by government to:

- (a) A Parliamentary Ombudsman in regard to the federal government, and
- (b) A Legislative Ombudsman in regard to each provincial government."

On page 4 the following subheading appears;

"WHY ENTRENCHMENT OF THE OMBUDSMAN INSTITUTION WITHIN CANADA'S CONSTITUTION".

Then follows an explanation of the Ombudsman idea, its development and relevance to democracy. The following is quoted from page 4 of the submission;

"As with democracy itself, continuing effort and vigilance is required to preserve the necessary independence of the Ombudsman. No level of government should be allowed to cancel the Ombudsman institution unilaterally."

(A most unlikely event.)

Paragraph 3 of page 5 reads as follows;

"By means of entrenchment of the Ombudsman institution within the constitution, there would inevitably result the necessary legislative initiatives to provide the access of an Ombudsman both at the federal government level and all provincial governments."

It is therefore clear that the International Ombudsman Institute is recommending that the Institution of the Ombudsman at Federal and Provincial level be entrenched with the Canadian Constitution.

Nine of the Canadian provinces have passed Ombudsman Acts and have appointed Provincial Ombudsmen. The provinces have led the way in this regard. It is the Federal Government which is dragging behind. It therefore strikes me as ironic that the International Ombudsman Institute should be recommending there be a provision in the Canadian Constitution requiring provinces to enact Ombudsman Legislation when nine of the ten provinces have already done so. But the Federal Government is found wanting.

I support the proposition that the Federal Government enact Ombudsman Legislation and appoint an Ombudsman. Whether that office be entrenched within the Constitution is immaterial to me.

I do not support the proposition that the Canadian Constitution contain a provision requiring the provinces to enact Ombudsman Legislation.

The Provincial Ombudsman statutes, the appointment of an Ombudsman, his jurisdiction and accountability are matters within the jurisdiction of the Provincial Legislatures. Any compulsion within the Canadian Constitution would be an intrusion into Provincial jurisdiction. It is on that basis I oppose the submission of the International Ombudsman Institute.

On page 5 of the brief, the International Ombudsman Institute sets out 'Historical Support' for its proposal for its entrenchment of the Ombudsman institution within the Constitution.

The following countries are quoted as having Ombudsman provisions entrenched within the respective Constitutions; Sweden, Denmark, Finland and Norway. Within the Commonwealth the following developing countries are quoted as having. . ."constitutional entrenchment of the Ombudsman institution,

January 12, 1981

Dominica, Fiji, Ghana, Guyana, Mauritius, Nigeria, Papua New Guinea, Solomon Islands, St. Lucia, Tanzania, Trinidad and Tobago, Vanuatu, Zambia.

To the best of my knowledge the above countries do not have a Federal system of government similar to that of Canada. If that is so, the Historical Support in favour of entrenchment of the Ombudsman institution within the Canadian Constitution is weak and meaningless so far as Canada is concerned.

Australia, one of the largest and senior members of the Commonwealth has a Federal system of government, not identical with but similar to that of Canada. A Federal Ombudsman and State Ombudsmen have been appointed in the following jurisdictions, New South Wales, Queensland, South Australia, Victoria, Western Australia, Northern Territory Government and Tasmania. All are appointed by Federal or State Acts of Parliament. It is significant that Australia is not mentioned in the International Ombudsman Institute brief.

The submission concludes by stating that it would be inappropriate to specify the scope of Ombudsman jurisdiction within the Canadian Constitution as that would appear best determined by the respective level of government regarding its own classical Ombudsman.

Precisely! And the question as to whether or not to enact Ombudsman Legislation is best left to the jurisdiction of the Provincial Legislature.

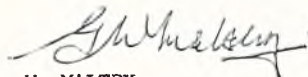
In his covering letter, the Executive Director states that the submission is forwarded pursuant to instructions given by the Board of Directors of the International Ombudsman Institute.

I am aware that the public notice inviting submissions to the Special Joint Committee refers to submissions from "individuals and organizations". The public notice does not specifically call for submissions from individual Canadians or Canadian organizations. But I think that was self-evident.

The International Ombudsman Institute is, as its name implies, an international organization. It just happens that its headquarters is in Canada. The Board of Directors is made up of persons from the following countries, Canada, Australia, U.S.A., Sweden, Fiji, England and Switzerland.

If it is true that the submission is on the instructions of the Board of Directors of the International Ombudsman Institute, we have a submission from a body of persons, some of whom are foreigners, to a Committee of the Parliament of Canada making a proposal about the Canadian Constitution.

Respectfully submitted,



G. W. MALTBY,  
OMBUDSMAN.

cc: All Canadian Legislative  
GWM/ks Ombudsmen