

Défense nationale  
et Forces canadiennes

# Canada

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## OMBUDSMAN MESSAGE

The Office of the Ombudsman for the Department of National Defence and the Canadian Armed Forces has a governance problem that needs fixing. After eighteen years of existence and five incumbents to the position of Ombudsman, it is time to take a step back to look at the mandate of this office in order to determine what works, what does not work, and why.

The office of the Ombudsman was created by Ministerial Directive<sup>1</sup> to be an independent and neutral investigator of issues brought by its constituents, members of the defence community, who have exhausted existing avenues of redress within the system. The Ministerial Directives stipulate that the Ombudsman reports directly to the Minister of National Defence and is independent from the management and the chain of command of the Department of National Defence (the Department or DND) and the Canadian Armed Forces (CAF). When the office was established, it was set up within the administrative framework of the Department of National Defence from which it received its delegations, budget, and other operating authorities. The intention was to review the mandate and regulate the office of the Ombudsman within six months of its creation. This review never happened and the office of the Ombudsman has been functioning since then with a governance structure that does not meet its operational needs.

The pursuit of a legislated mandate has been a constant for this office and has been repeatedly documented in public statements, Parliamentary Committee testimony and Annual Reports.<sup>2</sup> When I was appointed to the position of DND-CAF Ombudsman in April of 2014, I held the view that it was possible to work collaboratively within the departmental framework to deliver the mandate and bring positive change to the defence community. Regrettably, after almost three full years in office, I have reached the same conclusion as my predecessors, all of whom believed that a legislated mandate was necessary.

A review of the historical file suggests that the initial struggles to obtain a legislated mandate were motivated by a concern that the newly created office, which had its detractors, could be 'eliminated by a stroke of the Minister's pen'. Further debate focussed on consistency with classical ombudsman theory and political promises to regulate the office. Yet more ink was spilled on the call for legislation when there appeared to be a lack of cooperation with, and even obstruction of, our investigations. At the core of all of these discussions was the issue of the independence of the Ombudsman's office and, most importantly, its ability to serve its constituents.

The reasons underlying the initial bids for a legislated mandate, however valid, did not result in legislation. I believe that the bid for legislation gained no traction for two main reasons: first, because the office produced good work in spite of the challenges and, second, because the arguments presented were largely theoretical or in response to distinct incidents of administrative frustration.

Now, with eighteen years of operations and documentation, my office has undertaken a comprehensive review of the matter. The findings and supporting evidence presented in this

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1 Canada, Minister of National Defence, Ministerial Directives *Respecting the Ombudsman for the Department of National Defence and the Canadian Forces*, (Ottawa: 2001).

2 See Annex A for a list of public statements regarding legislating the mandate of the DND-CAF Ombudsman.

report are premised on two assumptions: First, that there is still a need for the office of the Ombudsman to continue serving its constituents and, second, that the office should have the necessary authorities to operate effectively and efficiently.

It is my conclusion that the dysfunction that has preoccupied every incumbent to this Office is inherent in the governance structure. The sole recommendation in this report is to legislate the office of the Ombudsman. This will give the office permanence and functional independence, neither of which it currently has.

## A BIT OF HISTORY

### Creation of the Office of the DND-CAF Ombudsman

In the mid to late 1990s, the reputation of the Canadian Armed Forces was at an all-time low with pervasive media coverage of the scandal in Somalia and the ill-treatment of female soldiers, particularly with respect to sexual assault and harassment. These incidents made evident a number of weaknesses in administration, accountability, and complaint resolution mechanisms within the Canadian Armed Forces. A public inquiry was called.

The Report of the Somalia Commission of Inquiry (June 1997) recommended that the *National Defence Act*<sup>3</sup> be amended to establish an independent civilian review body (called an Inspector General) with a well-defined and independent jurisdiction, comprehensive powers, and reporting directly to Parliament.<sup>4</sup> The Somalia Commission requested that the Department of National Defence be accountable for implementing its recommendations and report to Parliament within a year regarding its progress. In October of 1997, the Department of National Defence rejected the recommendation to appoint an Inspector General in favour of creating an independent ombudsman based on the classical ombudsman model.

### The Ombudsman Model

The Ombudsman represents society's response to these problems of potential abuse and of supervision. His unique characteristics render him capable of addressing many of the concerns left untouched by the traditional bureaucratic control devices. He is impartial. His services are free, and available to all. Because he often operates informally, his investigations do not impede the normal processes of

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<sup>3</sup> *National Defence Act*, RSC 1985, c N-5.

<sup>4</sup> Canada, Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured legacy: the lessons of the Somalia Affair: report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, vol 1 to 5 (Ottawa: 1997) Gilles Létourneau.

government. Most importantly, his powers of investigation can bring to light cases of bureaucratic maladministration that would otherwise pass unnoticed. The Ombudsman 'can bring the lamp of scrutiny to otherwise dark places, even over the resistance of those who would draw the blinds. On the other hand, he may find the complaint groundless, not a rare occurrence, in which event his impartial and independent report, absolving the public authority, may well serve to enhance the morale and restore the self-confidence of the public employees impugned.'<sup>5</sup>

The concept of an ombudsman who addresses issues brought by the people regarding their dealings with government administration can be traced to 19<sup>th</sup> century Sweden. The criteria of the classical ombudsman model are:

- independence from the organization that is subject to oversight;
- impartiality with respect to all dealings;
- fairness of the investigative process based on the rules of natural justice; and
- confidentiality of constituent information.

These principles may overlap, may exist to a greater or lesser degree, and may be configured differently depending on the context. The concept has been tailored to different legal systems and adapted to societal changes, all while retaining the core characteristics that are considered necessary for an ombudsman to operate effectively.<sup>6</sup>

Internationally, the creation of ombudsman offices has been tied to development, democratization, and human rights. In the years after WWII, specialized military ombudsman offices were established in a number of countries as one way of ensuring that the military remained accountable to and controlled by the elected civilian legislatures. Additionally, military ombudsman offices were seen as a means of giving redress to rank and file military members who operate within a closed and highly hierarchical system and who have fewer individual freedoms and employment rights than the regular civilian population.

## Operational Framework for the Ombudsman's Office

The first DND-CAF Ombudsman was appointed in June 1998 with the initial task of developing and proposing an operational framework for the office based on the classical ombudsman model. Research and consultations, both international and domestic, resulted in the report entitled *The Way Forward – Action Plan for the Office of the Ombudsman* in January 1999.<sup>7</sup> The Ministerial

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<sup>5</sup> *British Columbia Development Corporation v. Friedmann (Ombudsman)*, [1984] 2 SCR 447 at 461.

<sup>6</sup> See Annex B for an elaboration of the principles of ombudsmanship.

<sup>7</sup> Canada, Office of the National Defence and Canadian Forces Ombudsman, *The Way Forward: Action Plan for the Office of the Ombudsman* (Ottawa: communication group incorporated, 1999) (author: André Marin).

Directives for the Office, signed in June 1999, contained a footnote that the Ministerial Directives would guide the operation of the Ombudsman's Office for a period of six months, after which they would be reviewed, amended as required and subsequently incorporated into a regulation.

The Ministerial Directives incorporate the principles of the classical ombudsman. Apart from the unambiguous provision that the office would be independent from the departmental administration and the chain of command, other hallmarks of an independent organization were written in.<sup>8</sup> For instance, the Ombudsman is responsible for his or her own communications and media relations and may engage technical and professional advisers considered necessary for the proper conduct of the Ombudsman's activities.<sup>9</sup>

When the office was being established, it was understood that additional measures beyond the provisions of the Ministerial Directives and delegated authorities would be necessary to ensure the independence of the office. For instance, the Ombudsman's internal organizational structure included Legal Counsel directly accountable to the Ombudsman.<sup>10</sup> The organizational structure also included a Director of Human Resources to deal with all human resource and labour relations matters separately from the Department. In addition to the standard departmental delegation, a separate delegation instrument was signed to delegate the Ombudsman as the final level of authority to hear the labour relations grievances of his own staff.<sup>11</sup>

Provisions were also made, at that time, to allow the Ombudsman to deal directly with other government institutions without involvement of the Department. The rationale was deference to the independence of the Ombudsman and respect of the principle of confidentiality. From a pragmatic standpoint, the Department would not, in any case, be able to address substantive issues with other government institutions without access to the Ombudsman's operational files and the confidential information of constituents. Consequently, authorities were given to the Ombudsman to manage all matters relating to access to information and privacy.<sup>12</sup> Similarly, delegations were given to allow the Ombudsman's office to address human rights issues related to the office.<sup>13</sup> Further, arrangements were made with the Deputy Minister of Justice for authorization to allow the Ombudsman to contract directly with private sector legal counsel.<sup>14</sup>

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8 *Supra* note 1 at ss 3(2), 27.

9 *Supra* note 1 at ss 6, 10.

10 Most government departments and agencies have departmental legal services units, staffed by lawyers working for Justice Canada.

11 See Annex C for the 2001 and 2010 delegation for hearing final level grievances for employees of the Ombudsman and the designation to address Human Rights issues.

12 See Annex D for the Access to Information and Privacy delegation order.

13 *Supra* note 11.

14 See Annex E for the Deputy Minister of Justice and Deputy Attorney General of Canada's authority to contract directly with private sector legal counsel in order to ensure the independence of the Ombudsman's office.

## **Failure to Regulate**

After the issuance of the Ministerial Directives, consultations and negotiations regarding legislation continued between stakeholders until the summer of 2001 when they broke down with the larger governance issue being put on the back burner without a full and viable resolution. The unfortunate consequence is that this office continues to operate with a deficient, and sometimes unworkable, governance structure.

Since the establishment of the office in 1998, the logic underlying the initial delegation of authorities and administrative arrangements has not consistently been applied to new responsibilities resulting from legislative or policy changes. Further, long standing authorities delegated by former Deputy Ministers have been eroded over the eighteen years of operations.

## **GOVERNANCE STRUCTURE**

### **The Problem in a Nutshell**

The problem with the governance structure is that the Ombudsman, who reports and is accountable to the Minister of National Defence and is independent from the administration of the department and the military chain of command, actually falls within the governance structure of the Department of National Defence and the legislated responsibilities of the deputy head.

The problem stems from the mechanics of governance and continuous attempts to force-fit incompatible concepts together.

### **Governance in the Canadian Federal System**

In the federal public service, all activities necessary for the functioning of government organizations are carried out based on legislative authority. Some authorities are vested in ministers of the Crown, chief executive officers or deputy heads of departments and agencies. Other authorities and functions are given to central agencies which then delegate to deputy heads. In order to get the work done, deputy heads delegate or sub-delegate those authorities to officers within their reporting structures. To ensure that the delegated authorities are appropriately exercised, and the delegate is accountable, policies and internal control procedures are generally established. The ultimate responsibility for the proper exercise of the authorities remains with the head of the organization.

The Ombudsman is a Governor in Council appointee who operates by Ministerial Directive supported by a Defence Administrative Order and Directive (DAOD).<sup>15</sup> These instruments do not have the force of legislation and do not impart either the financial or the human-resource authorities required to manage a government organization. In order to have those authorities, the Ombudsman would have to be established in legislation and have deputy head status. Therein lies the rub!

The bottom line is that while the Ministerial Directives specify both independence of office and direct reporting to the Minister of National Defence, not the Deputy Minister, the current governance structure places the Ombudsman within the departmental framework. Therefore, notwithstanding the historical intention to legislate the office, the current reality is that the Ombudsman cannot operate without the financial and human-resource authorities delegated by the Deputy Minister.

## **FINDINGS – PRACTICAL CHALLENGES OF THE GOVERNANCE STRUCTURE**

For any ombudsman to be effective the principles of independence, impartiality, fairness, and confidentiality are critical. Many of the practical challenges for the office of the Ombudsman are a direct result of the governance structure butting up against one or more of the principles of ombudsmanship, particularly those of independence and confidentiality.

Still further frustration is caused by being part of an administrative machine designed for the largest department of the Government of Canada. Every re-structuring or procedural change by the Department carries with it a complexity and an implementation cost for the Ombudsman's office. Procedures intended to make a 100,000-strong organization effective may not be optimal for an organization of approximately 60, which could otherwise be more nimble with customized business processes.

The findings that follow are specific examples of how the governance structure, with its delegations and administrative arrangements, has affected the operational effectiveness of the Ombudsman. These examples are not exhaustive, but have been chosen to illustrate the extent to which being part of the governance framework of the Department impacts the actual operations of the office of the Ombudsman in the delivery of its core mandate and service to its constituents.

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<sup>15</sup> Canada, Deputy Minister and Chief of the Defence Staff, *Defence Administrative Orders and Directives 5047-1* (Office of the Ombudsman), (np: 2001).



## Issuance of Delegations

Because delegations are issued by the Deputy Minister, the Ombudsman is reliant upon the decisions of each individual who is appointed to that position. The consequence is that the Ombudsman has no guarantee of constant functional authorities necessary to manage the office.

In point of fact, each incumbent to the office of Ombudsman has experienced delays in receiving the full suite of delegated authorities. Moreover, these delegated authorities have changed over the eighteen years that the office has existed. They have changed from one Deputy Minister to another, and have even changed during the tenure of a single Deputy Minister. There are numerous instances where the delegations have been delayed, truncated or removed entirely, often without notice or discussion with the Ombudsman.

## Human Resources

Critical decisions about how work is planned and structured to deliver, what positions and levels are necessary to get the work done, and who is the best fit for a given position must be made by the person who is responsible for the organization and the delivery of its services.

The Ombudsman has been sub-delegated many, though not all, of the human resource authorities needed to run an organization.<sup>16</sup> Prior to 2016, the Ombudsman did not have authority to staff executive level positions. By letter dated July 2016, the Deputy Minister advised that sub-delegations were being granted in this regard and would remain in force until further notice. Less than a month later, the Deputy Minister signed the departmental matrix in which this authority was not included.<sup>17</sup> This begs the question of whether this is an oversight or whether it constitutes 'further notice'. In any event, it constitutes a lack of clarity.

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<sup>16</sup> In the federal public service, staffing is governed by the *Public Service Employment Act* which vests the authority to make appointments to and within the public service in the Public Service Commission. The President of the Public Service Commission can delegate this authority to deputy heads in the Appointment Delegation and Accountability Instruments. Deputy heads can in turn sub-delegate to employees and other individuals who report directly to them. Since the Ombudsman's functions do not fall within the jurisdiction of the deputy head, a request must be made to the Public Service Commission for a specific arrangement for sub-delegation.

<sup>17</sup> See *Instrument of Delegation of Human Resources Authorities for Civilian Public Service Employees of National Defence* (the matrix) Section 2 (Management of Executive Services), line 8.

## **Staffing**

Until recently, the office of the Ombudsman has always included an in-house Director of Human Resources. Shortly after taking office in 2014 and assessing the organization's capacity to deliver, the current Ombudsman saw potential for economies of scale by working more closely with the Department and having access to their extensive subject matter expertise in all areas of human resource management. The Ombudsman approached the Department to negotiate a service level agreement. The agreement, signed in February 2015 for a one-year renewable term, included a provision that any amendment required the mutual written consent of both parties.<sup>18</sup> The agreement also included the transfer from the Ombudsman to the Department of three indeterminate employee positions and the corresponding salary dollars.

In January 2016, the Ombudsman discovered that the Department had cancelled all service level agreements related to human resource management. Attempts were made to obtain clarification with respect to whether this included the agreement signed with the Ombudsman. This clarification was never provided.

The office of the Ombudsman now potentially finds itself in the position of being without any specific agreement with the Department, no full-time dedicated in-house subject matter expert, and no means of addressing the very serious issue of poor service from the Department. There are numerous examples of delays in processing staffing requests that have had a direct and negative impact on work plans and deliverables of the office. Sadly, individual employees are also feeling the personal impact of unacceptable departmental delays in staffing.

## **Labour Relations**

In the federal public service, matters relating to how employers and employees interact to create a fair and productive workplace are governed by the *Public Service Labour Relations Act*<sup>19</sup> and the collective agreements in force.

The authority to fully address labour relations issues within one's organization is critical to its proper functioning. The Ombudsman's authorities in the area of labour relations are inconsistent and vary depending on who has been appointed to the position of Deputy Minister. They have varied even within the term of individual Deputy Ministers. The reasoning that informed the original

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18 Transfer and Service Level Agreement between Office of the Ombudsman and Assistant Deputy Minister (Human Resources-Civilian) Concerning the Integration of Civilian Human Resources Planning, Programs and Operational Services signed 13 February 2015.

19 *Public Service Labour Relations Act*, SC 2003, c 22, s 2.

architects of the office has not been reflected in the more recent issuance of delegations.

The three main avenues of redress available to public servants with work-related issues are: harassment complaint, formal grievance, and access to the informal conflict management system. The Ombudsman's delegations related to these key aspects of managing an organization illustrate the inconsistent approach underlying their issuance.

### ***Harassment Prevention and Resolution***

The Ombudsman has the necessary delegations for responding to harassment complaints.<sup>20</sup> In compliance with Treasury Board and departmental policies, the Ombudsman has appointed a harassment advisor and has six workplace relations officers, all of whom have been formally trained and accredited.

### ***Authority to Hear Grievances at the Final Level***

Grievances usually concern the interpretation of the terms and conditions of employment, including provisions of the collective agreement. The grievance process<sup>21</sup> ordinarily has three levels, the first being the employee's immediate supervisor, the final level often being the deputy head of the organization. Deputy heads may designate another position within their organizations to act as the final level; this is the case for the Department of National Defence.<sup>22</sup> In recognition of the Ombudsman's independent status, a separate designation was issued to the Ombudsman as the final level in the grievance process for grievances by employees of this office.<sup>23</sup>

The designation to the Ombudsman was in place until 2015 when the then Deputy Minister advised that it was being removed.<sup>24</sup> The Deputy Minister acknowledged that the designation to the Ombudsman, in place for 14 years, was completely consistent with the legislative framework,

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20 See Instrument of Delegation of Labour Relations, Human Rights, and Political Authorities, dated 25 August 2016 at line 11.

21 See *Public Service Labour Relations Act*, SC 2003, c22, Part II. The grievance process is set out in the applicable collective agreement.

22 The Deputy Minister has designated the Director General Workplace Management as the final level in the grievance process.

23 *Supra* note 11.

24 Letter from Deputy Minister Richard Fadden to Ombudsman Gary Walbourne (24 November 2015).

but was being changed to align the process for employees of the office of the Ombudsman with that in place for all other Department of National Defence employees.<sup>25</sup>

The concerns of the Ombudsman regarding the implications of the unilateral decision were outlined in correspondence sent to the Deputy Minister and the Minister. The effect of removing the Ombudsman's authority to hear grievances is three-fold:

- First, having labour relations issues internal to the office of the Ombudsman default to the Deputy Minister's designate undermines the Ombudsman's leadership in the day to day management of his staff and the independent status of the Ombudsman.
- Second, the involvement of the Deputy Minister's designate in any of the internal business of the Ombudsman is inconsistent with the Ombudsman's direct reporting and accountability to the Minister of National Defence.
- Third, because final level authority defaults to the Deputy Minister's designate, a potential conflict of interest is created where the independent organization established to investigate complaints against the Department would itself be subject to review and decision by an officer of that same department. This compromises the independence and neutrality of Ombudsman investigations.

The exchange of correspondence on the matter of the delegations to hear final level grievances spanned the tenure of two Deputy Ministers and two Ministers and took two years and five months from the appointment of the current Ombudsman for the Deputy Minister to issue a truncated delegation.<sup>26</sup>

### ***Informal conflict management***

Under the *Public Service Labour Relations Act*, deputy heads are required to consult with their employee bargaining agents and establish an informal conflict management system (ICMS).

When the *Public Service Labour Relations Act* was enacted in 2003, the then Ombudsman took the initiative and consulted with the relevant union to establish a system for the office, separate

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25 The Deputy Minister rationalizes the decision based on concerns raised by the union and in the Auditor General's report, that the small size of the organization allowed for possible conflicts of interest, particularly in cases where the matter grieved is a decision of the Ombudsman. While this point has merit, it is the case for every small organization within the federal public service. Additionally, the *Public Service Labour Relations Act* gives employees the right to refer certain types of grievances that have been decided at the final departmental level for adjudication to the Public Service Employment and Labour Relations Board, and independent administrative tribunal (section 209).

26 *Supra* note 17, at line 5, which refers to note 19: "Final level grievance decision will be rendered by [Director General Workplace Management] either at the request of the grievor (bargaining agent in the case of a group or policy grievance), or if the Ombudsman was directly involved in the matter giving rise to the grievance."

from the Department. The Ombudsman looked for an appropriate subject matter expert to provide the services for the office because it was recognized that the small size of the office would make it difficult to ensure a confidential and safe environment for employees to address their workplace issues. Further, it was understood that the principles of independence and confidentiality required the Ombudsman to find a neutral third party service provider so that workplace issues internal to the office of the Ombudsman would not default to the Department for resolution.

A memorandum of understanding was concluded with the Department of Justice. This was accomplished without a formal delegation and was tacitly accepted.

In 2015 and 2016 fiscal years, the current Ombudsman re-negotiated the MOU with the Department of Justice.<sup>27</sup>

## **Finance and Corporate Administration**

Independence, real or perceived, is not possible where someone else holds the purse strings.

Not only is the allocation of the Ombudsman's budget determined by the Department, but spending limits are imposed and justifications demanded regarding certain expenditure choices. While this may be seen by some as routine administration by the Department carried out conscientiously by public servants, it has a direct impact on the Ombudsman's operational decisions.

For example, the Ombudsman cannot determine, independently from the Department, how much of its overall budget to allocate to travel for the purpose of engaging constituents on the military bases and wings where they work and live.

The overall spending thresholds for financial delegations have meanwhile been reduced over the past eighteen years. They are lower today than when the office was first opened.

Prior to 2015, the Ombudsman had his own financial matrix delegated by the Deputy Minister. Since 2015, the office has been incorporated in the larger departmental matrix for officers who report directly to the Deputy Minister. While this is arguably a small administrative change intended to consolidate departmental delegations, it is another example of the erosion of the

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<sup>27</sup> Aware and respectful of the framework for delegations, the Ombudsman informed the Minister and the Deputy Minister of his intentions to renegotiate with the Department of Justice and provided a draft memorandum of understanding. No response regarding this action was forthcoming and the MOU was signed in 2015, renewed for the 2016-17 fiscal year, with the intention of renewing for the 2017-18 fiscal year.

Ombudsman's administrative independence contrary to the principle specifically set out in the Ministerial Directives.

Another small but telling change is that the Department no longer reports the budget for the office of the Ombudsman as a separate line item in the Department estimates as is clearly required by the Ministerial Directives.<sup>28</sup> The financial data provided by the Ombudsman is rolled up and lost in the overall reporting by the Department. While the operating budget of this office is insignificant, a mere 0.031 percent of the overall departmental budget, it is important for the public and for Parliamentarians to know the cost of the Ombudsman's office to the public purse.<sup>29</sup>

With regard to issues of corporate administration, it would be excessive to list every effort made by this office to request and justify exceptions to administrative procedures. However, the effort is necessary because the credibility of the work that the office does is compromised if it is seen to be another arm of the Department of National Defence or the Canadian Armed Forces. Consequently, the office of the Ombudsman continuously seeks to have its independent nature recognized. For example, the office has been approved by the Privy Council Office for a separate unit display for e-mail and an exemption for an arms-length website in order to emphasize the distinction between the office of the Ombudsman, the Department and the Canadian Armed Forces. The Ombudsman also petitioned Shared Services Canada for client status on our internal network in order to protect the confidentiality of constituent information. The office of the Ombudsman often prevails in its justifications and obtains the necessary exemptions or adjustments, but the need to do so diverts energies that could be used more productively.

## **Ombudsman Dealings with Other Government Organizations**

When the office was established, full autonomy was given to allow the Ombudsman to act under several laws that have government-wide application. The Ombudsman manages all matters relating to access to information and privacy and interacts directly with the offices of the Privacy Commissioner and the Information Commissioner.<sup>30</sup> The reasoning for granting full autonomy was to protect the confidential information of constituents and the operational integrity of investigative files, neither of which would be possible if the Department were responsible for processing information requests.

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28 *Supra* note 1 at s 11.

29 The Ombudsman's budget for 2015-16 was just under six million dollars, compared to the reported 19 billion dollar budget for the Department of National Defence.

30 *Supra* note 12.

Full authority was also granted to the Ombudsman to address human rights complaints relating to the office and to interact directly with the Human Rights Commission.<sup>31</sup> This was considered important to provide the Ombudsman with the ability to address complaints without intervention or involvement by the Department in the substance of confidential files.

The necessary arrangements and delegations were made pursuant to the legislation, policies, and business models in place when the office was established. Since then, new legislation has been enacted, the Department has seen some re-structuring, and changes have been made with respect to business models. Because the Ombudsman is not a deputy head, newly enacted legislation and departmental decisions can sometimes have serious impact on the operations of the office.

### ***Management of Disclosures under the PSDPA and the Office of the Integrity Commissioner***

In 2005 the *Public Servants Disclosure Protection Act* was enacted to protect federal public servants who disclose incidents of wrongdoing in the Public Service. The Deputy Minister designated a senior departmental officer to be responsible for the implementation of the legislation and, more specifically, as the Internal Disclosure Office for civilian public servants of the department. Under the current departmental designation, a disclosure of wrongdoing by an employee of the office of the Ombudsman would be directed to the Internal Disclosure Office and would follow the established procedure, including potential investigation of the office of the Ombudsman by the departmental designate.

This situation of in-built conflict went from theoretical to concrete in 2011 when allegations of wrongdoing on the part of the then Ombudsman were made. The departmental designate was tasked with investigating the allegations. While there was a finding of no wrongdoing, the incident and the workplace assessment that followed prompted a debate about the propriety of mutual investigations and governance.

It is never a good time to wait for a crisis to address an issue.

This could have been resolved through memoranda of understanding delineating roles and responsibilities in these specific circumstances. This is not what transpired in 2011 and it is not the present situation despite attempts by the current Ombudsman to propose a solution before a potential future file reignites the debate.

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<sup>31</sup> *Supra* note 11.

After significant correspondence, the relevant Defence Administrative Order and Directive (DAOD) was amended. The amended DAOD, however, does not address all of the substantive issues inasmuch as it leaves remedial measure in the hands of the Department's designate thereby compromising both the independence of the Ombudsman's office and the direct reporting lines and accountability to the Minister.<sup>32</sup> Further meetings and negotiations aimed at resolving the outstanding issues are ongoing.

### ***Human Rights – Canadian Human Rights Commission***

The same rationale – confidentiality of file information and independence of operations – was originally applied for delegations in the area of human rights complaints management.<sup>33</sup> The authority to address human rights issues was comprehensive when initially granted by one Deputy Minister and then renewed by another Deputy Minister. The current Deputy Minister, in the delegation instrument of 26 May 2015, removed the authority entirely without notification to the Ombudsman or justification.

As with other changes in the delegations, the Ombudsman sent correspondence explaining why this delegation was critical and objecting to its unilateral removal. The latest instrument of delegation dated 25 August 2016,<sup>34</sup> while partially reinstating the previously held delegations for addressing human rights issues, diminishes those authorities in a manner that impedes the operational independence of this office and threatens the potential confidentiality of constituent files. Having authorities removed entirely and reinstated with limitations only after persistent petitioning is destabilizing even for the strongest leaders.

Until November 2016, the debate was largely theoretical because there was no actual file that required the exercise of these delegations. However, a human rights complaint has now been filed against the Department of National Defence notwithstanding that the matter relates to the investigation by the office of the Ombudsman related to the actions of the Canadian Armed Forces. The Department and the Ombudsman are now faced with responding to a complaint filed with a third party organization, where the delegation is insufficient, ambiguous and impracticable.

The challenges encountered in the actual file management, particularly a lack of clarity with respect to lines of communication with the Canadian Human Rights Commission, have been negotiated with the various internal players, as well as the Canadian Human Rights Commission,

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32 See Defence Administrative Order and Directive 7024-1, *Internal Procedures for Disclosure by DND Employees of Wrongdoings in the Workplace*, last modified on 24 August 2016.

33 *Supra* note 11.

34 *Supra*, note 21 at line 10.



to ensure that the substance of the complaint is not derailed by the governance issue. However, it is untenable for an organization to have to manage around insufficient and unworkable delegations.

## **Implications of Departmental and CAF Decisions**

Both the Department and the Canadian Armed Forces have recently made decisions specific to their businesses that have consequences, albeit incidental, on how the office of the Ombudsman serves its constituents.

### ***Outsourcing services***

Increasingly, government departments are looking for economies of scale by centralizing and/or outsourcing their administrative services. Outsourcing, whether to a private sector contractor or to another government department has an impact on the extent to which the Ombudsman can intervene and assist constituents. The Ministerial Directives, which require the cooperation of the Department and the Canadian Armed Forces with the investigations of the Ombudsman, do not extend to governmental or non-governmental individuals or institutions.<sup>35</sup> Therefore, where a service previously offered by the Department or the Canadian Armed Forces is transferred to another government institution, there is no legal requirement for that other institution to cooperate in the course of the Ombudsman's investigation or other intervention aimed at assisting a constituent with an issue. In other words, the Ombudsman does not have the legal tools required to assist its constituents with matters that the office was set up to deal with.

For example, the Department of National Defence has recently moved the administration of Canadian Armed Forces pension plans to Public Services and Procurement Canada. This includes the administration of pension plans for active members and payments for retired members and their survivors and/or children.

The Ombudsman could rely on the voluntary cooperation of the Public Services and Procurement Canada, or another organization to which another service is outsourced. There are possible work-arounds to ensure that the Ombudsman's influence is not restrained. However, the best solution to address the possible impact of continued restructuring and outsourcing would be for the Ombudsman to be able to require cooperation from any organization that provides a direct service

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<sup>35</sup> *Supra* note 1 at s 28(1).

to a constituent on behalf of the Department or the Canadian Armed Forces. Otherwise, the reach and the ability of the Ombudsman to achieve results for constituents are minimized.

### ***Canadian Armed Forces initiatives***

The office of the Ombudsman is an office of last resort, a safety net of sorts, for those who have fallen through the system and its existing redress mechanisms. In fact, in the absence of compelling circumstances, the Ombudsman will not deal with a complaint unless the constituent has first availed himself or herself of the existing mechanisms.<sup>36</sup>

No effective organization is static, and constant systemic improvement is expected. Recent initiatives of the Canadian Armed Forces aimed at operational efficiencies and early conflict resolution are important and praiseworthy. However, the creation of new mechanisms internal to the chain of command will, necessarily, have implications for the work of the Ombudsman. This is particularly so when the new mechanisms duplicate services that already exist outside of the chain of command and that would otherwise fall to the Ombudsman to address.<sup>37</sup>

## **RECOMMENDATION**

The above findings illustrate some of the implications related to the unworkable governance concepts. This report and its recommendation are premised on the assumption that the office of the Ombudsman is not going anywhere, that the ombudsman-model will not change, and that the fundamental mandate of being an investigator, educator, and reporter contributing to lasting improvements for the defence community remains a desirable objective. Accordingly, the sole recommendation of this report is to fix the governance problem by following through on the initial intent to legislate the office.

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36 *Supra* note 1 at s 13.

37 This is the case with the re-engineering of the Canadian Armed Forces Integrated Complaints/Conflict Management project (IC2M), the stand-up of the sexual misconduct response strategy, and the recent internal investigation into the issues at the Royal Military College. This is an illustration that decisions may not take into account the full spectrum of conflict resolution and redress options available to members. The decisions appear not to consider that the Ombudsman's mandate is sufficiently broad to deal with these matters.

***The recommendation is simple.***

It is recommend that the Minister of National Defence support the enactment of legislation aimed at giving the office of the defence Ombudsman organizational permanence and independence from the Department of National Defence with respect to all functional authorities.

***The advantages are measurable.***

Legislating the office of the Ombudsman and giving the Ombudsman deputy head status will eliminate all governance issues outlined in this report, by eliminating the need to rely on the Deputy Minister of National Defence for administrative authorities.

Legislating the office of the Ombudsman will relieve the Deputy Minister of National Defence from having to delegate, engineer complicated administrative work-arounds, and/or find ways to monitor administrative compliance without impeding the independence of the Ombudsman.

Legislating the office of the Ombudsman will eliminate the possibility of conflict of interest and compromised investigations where two bodies within the same organizational structure have the authority to investigate each other.

Legislating the office of the Ombudsman will ensure that the Ombudsman has the tools required to continue to serve its constituents, regardless of whether the issue can be resolved within the Department of National Defence and Canadian Armed Forces, or with an outside service provider.

Legislating the office of the Ombudsman will end the indefensible waste of time and energy needed for senior bureaucrats to engage in the governance debate and allow them to focus on more pressing issues related to the defence of this country.

Legislating the office of the Ombudsman will be cost-neutral. The office of the Ombudsman is already complying with all government-wide obligations by providing data sets to the Department for inclusion in its reporting to central agencies.<sup>38</sup>

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38 Cost neutrality is based on the recovery of monies transferred to the Department over the years, including salary dollars for human resource expertise and the budget for facilities. These funds are currently controlled by the Department.

## OPTIONS FOR IMPLEMENTATION

There are two options for Parliament to implement this recommendation:

- 1) Enact stand-alone legislation with the Ombudsman accountable to Parliament.
- 2) Incorporate the office into the *National Defence Act*.

### Stand-alone legislation

Both options address the basic governance issue outlined in this report.

However, there are additional considerations that favour the enactment of stand-alone legislation with the military ombudsman being directly accountable to Parliament.

The concept of ministerial responsibility is a constitutional convention that holds ministers personally responsible to Parliament – and through Parliament to the Canadian public – for everything that comes under their authority. With most federal government departments, ministerial responsibility is an appropriate and sufficient means of Parliamentary and public scrutiny. However, ministerial responsibility alone does not fully reflect the role of Parliament in relation to the armed forces. The fundamental principle of democratic control of the armed forces and ultimate accountability to the elected legislature suggests that oversight of the administration of national defence is a concern for all Parliamentarians. An independent, impartial and non-partisan defence ombudsman directly accountable to Parliament is a vehicle to give effect that oversight.

Opportunity also exists for individual Parliamentarians whose concerns include the wellbeing of all individuals in their ridings. Current and former members of the Canadian Armed Forces and their families, as well as all other constituents of the Ombudsman's office reside somewhere in the 338 federal electoral districts across Canada.

## Incorporation into the *National Defence Act*

The second option is to incorporate the office of the Ombudsman into the *National Defence Act*. There are already a number of independent organizations incorporated into the *National Defence Act* whose chief executive officers have deputy head status.<sup>39</sup>

This option is consistent with the original plan to legislate the office of the DND-CAF Ombudsman.

## Proposed draft

Attached at Annex F is a proposed draft-legislation modelled on the existing mandate, the structure of other independent organizations that serve the defence community, and other governmental ombudsman organizations. The draft-legislation can easily be adapted to either of the above options.

## CONCLUSION

Similar issues were faced by the Correctional Investigator, who was first created under the *Inquiries Act* in 1973. The *Inquiries Act* is usually used for short-term investigations and inquiries, and not as a vehicle for the creation of a permanent office. Eventually, in 1992 the Correctional Investigator was granted permanence and independence by legislation. Members of the Canadian Armed Forces and all other constituents of the larger defence community deserve an ombudsman with the same institutional permanence and independence as have those incarcerated in our correctional institutions.

This report on governance may not have the cachet of other Ombudsman reports that focus on more compelling human interest stories. However, the issues of governance directly relate to how this office functions and how we are positioned to serve our constituents. I believe that we have moved beyond the concern that the office will be 'eliminated by a stroke of the Minister's pen,' but the current governance structure for the office of the Ombudsman is not sustainable.

The Auditor General of Canada recently conducted a performance audit and looked at the sufficiency of the administrative controls in place for the office of the Ombudsman, reporting the

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39 The heads of the Military Police Complaints Commission and the Military Grievance External Review Committee have deputy head status by virtue of paragraph 11(1)(b) of the *Financial Administration Act*, being chief executive officers of portions of the federal public administration listed in the schedule IV to the *Financial Administration Act*.

findings in its 2015 spring reports.<sup>40</sup> As part of the performance audit, the Auditor General found that the governance framework for the office of the Ombudsman has been problematic from its inception. The Report recommended that the Ombudsman and the Deputy Minister, without impeding the operational independence of the Ombudsman, define and document roles and responsibilities, delegated authorities, internal controls and monitoring of administrative functions.

The current Ombudsman took all measures to ensure that the management practices and system of internal controls were improved, documented and implemented.

Both the current Deputy Minister and the current Ombudsman have acknowledged the complexity of this governance relationship yet have been unable, despite best efforts, to respond to all of the Auditor General's recommendation. No real solution has yet been found to ensure that delegated authorities are functioning as intended and the operational independence of the Ombudsman is not impeded.

This unworkable situation is not the fault of either the Ombudsman or the Deputy Minister; the governance structure pits one against the other with the result that the debate, posturing, and strategic power struggle persists to everyone's disadvantage. It defies logic and all measure of good management to continue force-fitting incompatible governance concepts. The fix is straightforward and can be accomplished by Parliament with a legislated mandate for this office.

After eighteen years of operations and a robust system of administrative procedures and controls, the office of the Ombudsman has the organizational maturity to determine the most efficient ways to administer the office.

It is time to give office of the Ombudsman organizational permanence and actual administrative independence from the management of the department it is mandate to review.

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40 Auditor General of Canada, 2015 Spring Reports of the Auditor General of Canada, *Report 7 – Office of the Ombudsman for the Department of National Defence and the Canadian Forces*.

## ANNEX A – PUBLIC STATEMENTS RE LEGISLATED MANDATE

**Table 1 Mandate issues as raised in appearances before parliamentary committees**

	COMMITTEE DATE	WITNESS	EXCERPT	PAGE
36th Parliament (Liberal)	SCONDVA <sup>41</sup>  2 Dec. 1999	André Marin (Ombudsman)	“We’ve produced that in our report, called <i>The Way Forward</i> , which I will gladly make available to the member after today’s proceedings. But to answer the question of the moment, an inspector general is a much broader institution. It usually encompasses auditing functions, it encompasses ombudsman functions, and it’s also a public complaints function, so it has a much broader function. Some inspectors general have the authority to test the combat readiness of their armed forces. So it fulfils a whole bunch of functions that I don’t fulfil.”	5
			“I think members of DND CF want to see consistency. They want to see permanence, a sense that the office is not a fly-by-night thing. Our position was that we need a regulation, that a regulation would achieve a lot of the objectives we want to achieve, without the need for statute. I think the statutory route is probably inevitable, and it’s probably desirable, but I think before we talk statute we should focus on getting the regulation off the ground.”	11
			“I think round two will be very important, the transition to a solid regulation as opposed to a ministerial directive. The ministerial directive did its job, and it did its job well. But now it’s time to move to the second phase, and they want to see that. They want to see at least a regulation. It may not, in the minds of some, be the entire solution, but as far as I’m concerned it comes from cabinet and it has kind of a legal taste to it that a ministerial directive doesn’t have.”	21
	SCONDVA  9 May 2000	André Marin (Ombudsman)	“As you know, the office is still very much in its formative stage, as the mandate is due to be enshrined in regulations under the National Defence Act. This is the window of opportunity we now have to benefit from the experience and wisdom of the first 11 months to improve on our ability to serve the DND/CF community and to continue to serve them effectively if we encounter resistance from areas within the department.”	16

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41 Standing Committee on National Defence and Veterans Affairs

	COMMITTEE DATE	WITNESS	EXCERPT	PAGE
38th Parliament (Liberal)	SCONDVA 7 April 2005	André Marin (in his capacity as former Ombudsman)	<p>"The fourth recommendation, which ties in with what we presented last week, calls for the Ombudsman's mandate to be enshrined in legislation."</p> <p>"We need to improve the vehicle of the office and put it in a statute, whether it's the National Defence Act or another statute. When the office was created, it was a pilot project: we don't know whether the whole chain of command will crumble, so let's start off with this ministerial directive and see where it leads us. That was seven years ago, and the chain of command still operates with the same kind of authority. In fact, I think it's strengthened by the ombudsman's office. I think the time has come to use the opportunity to clean up the mandate along those lines that I've suggested, as well as giving it proper legal foundation."</p> <p>"In so doing, expand the mandate to cover Veterans Affairs. I have in the room today two Gulf War veterans who have supported the committee's work and have come here to lend their support this morning to the ombudsman's office. They have been strongly advocating that there's no logic to someone taking his uniform off and losing access to the ombudsman's office. I bring those two distinguished former members to your attention, and I think there's a strong case to fix that."</p>	3-4
			<p>"On the objection to putting in legislation, the one we've been hearing the most is that if we're doing all this great work, we don't need a statute. My answer is that there's a lot of really good work that we haven't tapped. We have objections and obstructions in cases. It's like pulling hair to do cases. The Privacy Act is used as a shield when it shouldn't be. The solicitor-client privilege is used as a shield when it shouldn't be. And there are all of these artificial constrictions on our mandate, one of them being that I'm a delegate of the minister. When we try to probe things that are more sensitive, we're being told, 'You are a delegate of the minister. You're part of the executive. How could you be involved here if you're representing a political entity?' So a statute is required to fix all those problems."</p> <p>"We've succeeded not because of our mandate; we've succeeded in spite of our mandate, because we've been prepared to go to bat for members who have problems. We've succeeded because we've had the support of parliamentarians. We've succeeded because we have enormous public support. We've had support from the media. That's why we've succeeded. But we need to be able to do things not by the back door; we need to be able to do them by the front door."</p> <p>"I believe that, fundamentally, the military also believes we are still a punishment for Somalia. But we are new and improved. We're not the old crowd, we're not the old issues. Without legislation, hopefully our office will disappear one day because we'll be so good at doing our jobs."</p>	11, 32



	COMMITTEE DATE	WITNESS	EXCERPT	PAGE
			<p>“Another objection we hear is, ‘Why should we be singled out? You don’t have that kind of an ombudsman in other departments. Why should we be singled out once again for torture?’ My answer to that is, ‘You’re not being singled out. You have a particular culture that lends itself to particular problems. No other departments issue orders. No other departments control the lives of individuals the way you do.’”</p> <p>“Finally, there is a lack of support from legal advisers. Many root causes for problems come from the legal offices at NDHQ, and that’s the office that I think should take the lead on the ombudsman. They should be testifying here, telling you that the ombudsman needs a statute, but you never hear that because the mentality over there is that if there’s a military justice issue, it should be resolved by military lawyers, not by a civilian ombudsman outside the system.”</p> <p>“So that’s the hierarchy of objections and why we’re no further toward getting that statute than we were seven years ago.”</p>	16
	SCONDVA 7 April 2005	Barbara Finlay (in her capacity as acting Ombudsman)	<p>“I would just say that I totally agree with that. Mr. Marin talked about how the whole culture and attitude—and we hear this quite often—is that the office is somehow a punishment for what happened during Somalia, and that eventually the system will improve to the point that they’ll get things right and they won’t need the ombudsman any more, instead of accepting that the ombudsman is here to stay, that it strengthens the chain of command, and that it contributes to the organization in a positive way.”</p> <p>“The military works under laws, regulations, and orders. That’s what they’re used to. If you put the office in legislation, you’re going to have an acceptance that it’s here to stay. Right now, you have some—and I’m not saying this is characteristic at all—who feel that if they keep fighting it hard enough and long enough, maybe eventually it’s going to disappear. Or they think that if they fight it so much, the soldiers will think it doesn’t have credibility and they won’t come to the office.”</p> <p>“So if it’s in legislation, there will be a sense that it’s here to stay and that they have to accept and work with it.”</p>	32-33

	COMMITTEE DATE	WITNESS	EXCERPT	PAGE
	NDDN 25 Feb. 2009	Mary McFadyen (in capacity as General Counsel)	<p>Witness is asked whether the Ombudsman's office would benefit from being incorporated into the <i>National Defence Act</i>, she replied:</p> <p>"The two former Ombudsman, Mr. Côté and Mr. Marin were both of the opinion that we needed a statute. We should be in the <i>National Defence Act</i>. During my time as Interim Ombudsman, we were able to conduct our abilities and do our work and our investigations under the ministerial directives. I think we did a pretty good job, so they do work. Even if we were in a statute, an Ombudsman's role is only to make recommendations, not issue directives. So we would still have the same role, even if there were a legislative provision to this effect ... Our role, like every Ombudsman that exists, is to review administrative actions and to use public</p> <p>pressure, by appearing before committees like this, to force the organization to do the right thing."</p>	21-23
40th Parliament (Conservative)	NDDN 4 Feb. 2013	Pierre Daigle (Ombudsman)	<p>"Well, as I said, we're not cited in the <i>National Defence Act</i>. Obviously, since 1998, the year we were created, my predecessors have made many attempts to legislate the office of the ombudsman. We are fully independent from the administration of DND and the Canadian Forces chain of command."</p> <p>"Within my ministerial directive, I might be called on to review the process of the Canadian Forces grievance process, and I might be called on to review the process of the Military Police Complaints Commission. Both bodies are part of the <i>National Defence Act</i>, but at this stage the office of the ombudsman is not part of the act."</p>	6

	COMMITTEE DATE	WITNESS	EXCERPT	PAGE
	LCJC <sup>42</sup> 30 May 2013	Pierre Daigle (Ombudsman)	<p>“The second important point is that our experience shows that the Office of the Canadian Forces Ombudsman is in a unique position to help members of the Canadian Forces — mostly the military ones in our case, but also the Department’s civilian employees — to resolve problems of unfairness or injustice at the lowest levels. As I said at the outset:</p> <p>Our office is not in the National Defence Act. In many cases, Canadian Forces members are unsure which existing avenues of recourse are open to them. They come to us and we direct them to the right one.”</p> <p>“To tie in with your question about whether it would be in the best interests of Canadian Forces members to also include a reference in the act-</p> <p>... that the ombudsman has a recourse to help the members navigate the grievance process and any other avenue.”</p> <p>“We are not there yet. I am reviewing the processes that come out of the grievance system, but the Office of the Ombudsman is not recognized in legislation. When I look at the service that we provide to all the members of the Canadian Forces who come to see us, it would be good if they could see that service in the legislation and that the service is completely dedicated to helping them to resolve the injustices that they are experiencing.”</p>	73-74

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42 Legal and Constitutional Affairs

**Table 2 Mandate Issues as Raised in the Ombudsman's Annual Reports and Public Statements**

SOURCE	OMBUDSMAN	EXCERPT	PAGE
Annual Report 1998-1999	André Marin	"... the latest document, Ministerial directives, sets out the Office's mandate .... It is anticipated that these directives will be incorporated into regulations under the <i>National Defence Act</i> as soon as possible."	5, 8
Annual Report 1999-2000	André Marin	<p>"It is my hope that the negotiations currently under way will achieve a speedy resolution, leading to incorporation of our mandate into regulations and resulting in enhanced efficacy and greater permanency for the Office of the Ombudsman."</p> <p>"When the Office was established under Ministerial Directives, it was on the understanding that the directives would be reviewed at the six-month mark and then incorporated into regulations."</p>	1-11
Annual Report 2000-2001	André Marin	"Negotiations on transforming the Ministerial Directives outlining my Office's mandate into regulations under the <i>National Defence Act</i> have reached agreement in principle. I have been eager for some time to see this process finalized, since the lack of legal framework leaves the Office vulnerable to the very people it is charged to oversee."	4, 7, 9, 14
Annual Report 2001-2002	André Marin	"The current mandate is not perfect, but it is just that, the "current mandate," something we see as a work in process."	4
Annual Report 2002-2003	André Marin	"Yet, this Office does not have the kind of security of tenure that it should. I therefore intend to take steps to strengthen the independence of this Office. When my mandate was originally being negotiated, DND proposed that the Office of the Ombudsman be given departmental status, and that the Ombudsman be designated a Deputy Head position. These two designations have yet to be finalized. I intend to pursue them, as it would better reflect my operational independence from DND management and the CF chain of command. There are also gaps in the mandate."	4
Annual Report 2003-2004	André Marin	"As many of you know, even though the Office of the Ombudsman was created at the time of the Bill C-25 initiative, it is not a creature of legislation. It is effectively the product of a memo, a set of Ministerial Directives from the Minister of National Defence that can be removed with a simple stroke of a pen. In spite of all we have accomplished and all our efforts, the informal, impermanent nature of our mandate still causes some to doubt our jurisdiction and our legitimacy. I have expressed this concern annually, but I particularly regret having to so again."	8-13

SOURCE	OMBUDSMAN	EXCERPT	PAGE
Annual Report 2004-2005	André Marin	"... [T]he Office is created by Ministerial Directives that can be deleted with the stroke of a pen. The absence of a legislative foundation has caused jurisdictional problems, and undermined the authority of the Office in the eyes of some. The one regret I have is that I could not achieve a legislative mandate. Some say that in this regard, we have been a victim of our own success – that give all we have done, it is evident that this Office does not need a legislative mandate. I reject this view."	5-8
Annual Report 2006-2007	Yves Côté	In the context of facing considerable resistance in obtaining information during the 'sniper investigation': "It is clear that the only appropriate and acceptable way in which to ensure that this type of situation does not occur again in the future is for our office to be provided with the same powers as other federally and provincially appointed Ombudsmen. Over the coming year, I will be working to get full investigative powers under legislation."	4-5, 19
Annual Report 2007-2008	Mary McFadyen	In the context of the Sniper's Battle Report: "The Ombudsman recommended that the office be provided with the same legislated investigative powers as other federally and provincially appointed Ombudsmen."	13
Annual Report 2010-2011	Pierre Daigle	"I intend to initiate, with the Minister of National Defence, the process to bring the Office of the Ombudsman under legislation. I now firmly believe the only way we will be able to fulfill our duties properly and effectively is to have a legislated mandate, which includes the financial and administrative authority to conduct our operations fully independent of National Defence and the Canadian Forces."	4, 14
Annual Report 2011-2012	Pierre Daigle	"... we also intend to pursue a fully independent mandate under the <i>National Defence Act</i> by conducting a thorough review of the Ministerial Directives with a view to producing a critical analysis of the operational challenges inherent in these directives ...."	3, 22
Annual Report 2012-2013	Pierre Daigle	"While a fully independent mandate under the <i>National Defence Act</i> would best remove practical hindrances to fulfilling our responsibilities to both constituents and the Minister of National Defence, our intent in the near term is to pursue achievable improvements to the way we carry out our mandate."	3
Annual Report 2014-2015	Gary Walbourne	"The focus of the audit was to determine the sufficiency of administrative controls and audit mechanisms internal to the Ombudsman's Office. Since taking office in April 2014, the Ombudsman has conducted a gap analysis of the Office's system of internal controls and is in the process of strengthening and/or refining those controls as necessary. Furthermore, the Ombudsman is working with senior officials at the Department of National Defence to define mechanisms that will ensure that the delegated authorities by which the Ombudsman operates are appropriately exercised while ensuring that the operational independence of the Office is not compromised."	18

SOURCE	OMBUDSMAN	EXCERPT	PAGE
Press Release 28 May 2015	Gary Walbourne	<p>“... the first Ombudsman, the Department of National Defence and the government of the day negotiated a mandate that excluded the powers necessary to look into individual sexual harassment and assault issues.</p> <p>Since then, every appointed Ombudsman has urged that the Office’s mandate be legislated to allow for broader powers beyond those currently granted by the Minister of National Defence. Maybe it is time.”</p>	Online

## ANNEX B – PRINCIPLES OF OMBUDSMANRY

The principles of the classical ombudsman have been developed, studied, and tested since the concept was introduced in the 19<sup>th</sup> century. These principles overlap and sometimes have different names in the academic literature, but remain consistent in terms of their underlying reasoning and component features. Entrenchment of these principles in ombudsman legislation is important, as is strict adherence to them in practice. Without these foundational principles, the ombudsman's credibility and operational effectiveness are at risk.

The principles are:

- Independence
- Impartiality
- Fairness
- Confidentiality

*Independence from the organization that is subject to oversight*

Following the classical ombudsman model, the principle of independence includes the following features:

- legislated mandate
- independence from the political and administrative authorities under scrutiny
- tenure with a fixed salary
- immunity from prosecution
- appropriate funding
- control over communications
- control over staffing and administration

Independence from the organization subject to review must be entrenched in legislation. Otherwise, the ombudsman is at risk of repercussions following an unfavourable review or recommendation, including the shutdown of the office. The ombudsman must be, and must be seen to be, free to conduct reviews, make recommendations and be unfettered in its decisions by the organization it oversees.

The perception of independence, in the eyes of constituents and the public, is also critical. To be credible, the ombudsman must not be perceived as an extension of, or answerable to, the organization it is mandated to review.

Similar to judicial independence, tenure of office and a sufficient salary are necessary for the ombudsman to be independent. Tenure insulates the ombudsman and its decisions from the potential consequences of political displeasure. Sufficient compensation ensures that financial incentives would not be perceived to influence decisions.

Another standard feature of the classical ombudsman model is immunity from liability for acts performed in good faith within the scope of mandated duties. This type of protection allows the ombudsman, and staff, to carry out their normal duties without the fear that they will be subject to disciplinary or other proceedings. Legislation, therefore, generally includes a specific provision for immunity from defamation for public communication provided the statements are appropriate and made in the context of the ombudsman's duties.

Responsibility for the ombudsman's own communications and media relations is an essential aspect of the ombudsman's tool kit. The ombudsman must be free to publish findings and make recommendations autonomously, and to communicate the same through media when it is in the public interest to do so. This goes directly to the credibility and effectiveness of the ombudsman.

Appropriate funding and control of administration are also hallmarks of independence for ombudsman offices. Without administrative and budgetary control, critical operational decisions could be impacted. True independence is not possible when the organization under review holds the purse strings of the organization mandated to conduct the review.

### *Impartiality With Respect to All Dealings and All Persons*

Following the classical ombudsman model, the concept of impartiality includes the following features:

- actual and perceived impartiality
- evidence based investigations
- fair appointment process
- non-partisan appointee

The ombudsman must carry out its mandate in a manner that ensures impartiality of its investigations and decisions. Investigations are evidence-based and are concluded without prejudging any outcome, advocating for any point of view, or being influence by organizational favour or political partisanship.

The ombudsman is impartial – neither an advocate for a complainant nor for the organization subject to oversight. The ombudsman must gather and consider all facts objectively, giving all parties the opportunity to present and respond to evidence before conclusions are drawn and



recommendations are made. Credibility and acceptance of recommendations depend on the stakeholder's conviction that ombudsman findings are unaffected by real or perceived bias.

The process of choosing an ombudsman is also generally entrenched in legislation because the appointee must be an individual in whom all stakeholders have confidence. The critical element is that the appointment process should be decided based on the qualifications of the person, as opposed to his or her political views or affiliations.

### *Fairness of the Review Process Based on the Rules of Natural Justice*

Following the classical ombudsman model, the concept of fairness includes the following features:

- processes consistent with the rules of procedural fairness and natural justice
- direct and free access for constituents
- defined jurisdiction
- investigations may be initiated without a complaint
- cooperation from the organization subject to investigation
- access to records and premises
- Power to compel witnesses
- Findings are not reviewable
- Power to make recommendations but no order making power
- Power to report (communications)

The principle of fairness is an overarching operational goal related to all aspects of the ombudsman's work. The ombudsman must carry out its mandate ensuring that its investigations and review processes are credible, consistent with the rules of procedural fairness, and accessible to all.

In order to ensure credibility, the ombudsman's investigative process must be consistent with the rules of procedural fairness and natural justice as developed by the court systems. This includes having an impartial decision maker who considers all evidence and allows all parties to present and respond to evidence before making findings and recommendations.

Most ombudsman work is conducted informally and issues are generally resolved with quiet diplomacy and without public notice. However, cooperation of the organization under review is not always forthcoming. Consequently, ombudsman legislation provides the necessary authorities to facilitate investigations and discourage obstruction. Authorities generally include the ability to access information held by the organization, whether access to records, individuals, or premises.

Disciplinary action for non-cooperation with, or obstruction of, the ombudsman is standard. Most ombudsman legislation also includes the power to subpoena and to compel witnesses. Whether or not these authorities are used is less important than the strong incentive they provide to secure cooperation.

Informality and resolution at the lowest levels of the administration is the ombudsman primary approach to dealing with complaints. However, the ombudsman may escalate matters to the highest level within the organization if its recommendations are ignored or receive an insufficient response at lower levels. The ombudsman may also make public its findings and recommendations where it is in the public interest to do so.

The classical ombudsman model does not include order-making authority. Ombudsman offices can generally only make recommendations based on the findings of their investigations and cannot order corrective action. Recently, however, the Service Complaints Ombudsman for the Armed Forces in United Kingdom has been granted the authority to overturn decisions made by the military chain of command on certain matters.<sup>43</sup>

The concept of fairness is also understood to mean equal access for all constituents free of charge. Consequently, the ombudsman has authority to maintain information programs and use other means to inform constituents about its existence and the services available. Without ability to communicate freely with constituents, access to the ombudsman becomes limited.

### *Confidentiality of Constituent Information*

Following the classical ombudsman model, the concept of confidentiality includes the following features:

- investigations are conducted in private
- information remains confidential
- confidentiality protects from fear of reprisal
- ombudsman and staff are not compellable witnesses

An ombudsman must ensure that the information of constituents is kept confidential. Adherence to the principle of confidentiality is essential to retain the trust and confidence of the constituency.

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<sup>43</sup>UK, Service Complaints Ombudsman for the Armed Forces, *Nicola Williams appointed as service complaints ombudsman with significant new powers* by James Gondelle (London: 2016); UK, Ministry of Defence, *Redress of Individual Grievances: Service Complaints part 1: directives* (np: 2016).

More specifically, individual complainants must have the confidence that they can bring issues of maladministration to the attention of the ombudsman without of fear of reprisal.

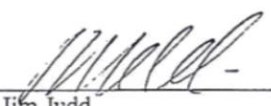
Most ombudsman legislation includes a protection for the incumbent ombudsman and staff from being compelled to testify regarding any matter within their knowledge as a result of the performance of duties. This is an important element of confidentiality that is intended to protect private exchanges of information between the ombudsman and a constituent.

## ANNEX C – 2001 AND 2010 DELEGATIONS FOR HEARING GRIEVANCES AND ADDRESSING HUMAN RIGHTS COMPLAINTS

### MINUTE

1. I, Jim Judd, Deputy Minister of National Defence, pursuant to the authority given to me in the Treasury Board Policy on Claims and Ex gratia Payments:
  - (a) designate the General Counsel of the Office of the National Defence and Canadian Forces Ombudsman to be the Human Rights Coordinator (Office of the National Defence and Canadian Forces Ombudsman ) to:
    - (i) negotiate and pay settlements under the *Canadian Human Rights Act* and in respect of Human Rights Tribunal orders under the Act which are not made orders of the Federal Court where such settlements involve complaints by civilian employees of the Office of the National Defence and Canadian Forces Ombudsman or complaints by members of the public against civilian employees of the Office of the National Defence and Canadian Forces Ombudsman, in accordance with the procedures and monetary limits set out in the Treasury Board Policy on Claims and Ex gratia Payments, as if payment were a liability payment for a tort with the related funding provisions; and
    - (ii) record and report all payment to the Public Accounts.
2. I designate the Ombudsman of the Office of the National Defence and Canadian Forces Ombudsman as the final level grievance representative under the *Public Service Staff Relations Act* and CPAO 7.07 for grievances by employees of the Office of the National Defence and Canadian Forces Ombudsman.

2/12/07  
(Date)


  
Jim Judd  
Deputy Minister

## MINUTE

1. I, Robert Fonberg, Deputy Minister of National Defence, pursuant to the Authority given to me in the Treasury Board Directive on Claims and EX gratia Payments:
  - (a) designate the General Counsel of the Office of the National Defence and Canadian Forces Ombudsman to be the Human Rights Coordinator (Office of the National defence and Canadian Forces Ombudsman ) to:
    - (i) negotiate and pay settlements under the *Canadian Human Rights Act* and in respect of Human Rights Tribunal orders under the Act which are not made orders of the Federal Court where such settlements involve complaints by civilian employees of the Office of the National Defence and Canadian Forces Ombudsman or complaints by members of the public against civilian employees of the Office of National Defence and Canadian Forces Ombudsman, in accordance with the procedures and monetary limits set out in the Treasury Board Policy on Claims and Ex gratia Payments, as if payment were a liability payment for a tort with the related funding provisions; and
    - (ii) record and report all payment to the Public Accounts.
2. I, Robert Fonberg, Deputy Minister of National Defence, designate the Ombudsman of the Office of the National Defence and Canadian Forces Ombudsman as the final level grievances representative under the *Public Service Labour Relations Act* and DAOD 5026-0 for grievances by employees of the Office of the National Defence and Canadian Forces Ombudsman. The Ombudsman will conform to the Labour Relations monitoring framework and will use HRMS CG 8.9, Civilian Human Resources Management System.
3. This minute supersedes the minute signed by the Deputy Minister of National Defence on 12 February 2001.

JUL 14 2010

(Date)

  
Robert Fonberg  
Deputy Minister

## ANNEX D – ATIP DELEGATION ORDER

### Copy of Delegation Order

Minister  
of National Defence



Ministre  
de la Défense nationale

Ottawa, Canada K1A 0K2

SEP: 0 5 2002

Mr. André Marin  
Department of National Defence  
and Canadian Forces Ombudsman  
12th Floor, 100 Metcalfe Street  
Ottawa ON K1P 5M1

Dear Mr. Marin:

I would like to acknowledge and thank you for your letter, received on August 1, 2002, concerning the Designation Order for the *Access to Information Act* and the *Privacy Act*.

I concur with your request and have signed the enclosed English and French copies of the Designation Order.

Once again, thank you for bringing this information to my attention.

Yours sincerely,



The Honourable John McCallum, P.C., M.P.

Enclosures: 2

Canada

Designation Order

Access to Information and Privacy Act

The Minister of National Defence, pursuant to section 73 of the *Access to Information Act* and the *Privacy Act*, hereby designates the person holding the position of Access to Information and Privacy Coordinator, Office of the Ombudsman, National Defence and Canadian Forces, to exercise all powers and perform the duties and functions of the Minister as the head of the Department of National Defence and the Canadian Forces under the Acts, concerning the Office of the Ombudsman, National Defence and Canadian Forces.

In the absence of the Access to Information and Privacy Coordinator, Office of the Ombudsman, National Defence and Canadian Forces, the Minister, pursuant to section 73 of the Acts, hereby designates the person acting as Access to Information and Privacy Coordinator for the Office of the Ombudsman, National Defence and Canadian Forces, to exercise the powers and perform the duties and functions of the Minister under the Acts, concerning the Office of the Ombudsman, National Defence and Canadian Forces.

Date: \_\_\_\_\_



The Honourable John McCallum, P.C., M.P.  
Minister of National Defence



## ANNEX E – AUTHORITY TO CONTRACT FOR LEGAL SERVICES



Deputy Minister of Justice and  
Deputy Attorney General of Canada

Ottawa, Canada  
K1A 0H6

Sous-ministre de la Justice et  
sous-procureur général du Canada

30 2001

Mr. André Marin  
Office of the Ombudsman  
Carriageway Building  
Fifth Floor  
55 Murray Street  
Ottawa, Ontario K1N 5M3

Dear Mr. Marin:

At our meeting of November 7, 2000, we discussed your requirement to engage private sector legal counsel in order to ensure your office's independence from the government and its legal advisors. This issue was also the subject of subsequent discussions between our respective officials.

As you are aware, in accordance with the *Department of Justice Canada Act* and the Government Contract Regulations, contracts for the provision of legal services may be entered into only by or under the authority of the Minister of Justice of Canada. Where circumstances warrant, pursuant to the provisions of the Government Contract Regulations, the Minister of Justice may authorize or permit other government departments and agencies to directly enter into such contracts.

I am satisfied that your office's responsibilities require that it be able to contract directly with private sector legal counsel and therefore I hereby authorize your office to do so as may be required from time to time.

As you may be aware, the hourly rates at which Minister of Justice legal agents are remunerated are negotiated in accordance with established hourly rate guidelines. The appropriate rate of remuneration is determined by taking into consideration the nature of the work in question as well as the requisite level of counsel to render the services. While these rates will not be binding on your office, we strongly encourage compliance where possible.

For more information on hourly rates, sample letters of appointment and other relevant matters, please contact Ms. Karen Beasleigh, Agent Affairs Unit at 946-7642.

Yours sincerely,

Morris Rosenberg

Canada



### An Act to Establish the Office of the Defence Ombudsman

#### PREAMBLE

Preamble

Recognizing that

a principle of Canada's democratic form of government is that the military is accountable to the elected civilian legislature;

it is in the public interest to maintain and enhance public confidence in the integrity of the Department of National Defence and the Canadian Forces, which includes ensuring the welfare of individual members of the defence community;

the welfare of those members requires fair and transparent treatment in their administrative dealings, including redress for possible mal-administration;

Now, therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

#### SHORT TITLE

Short title

1 This Act may be cited as the *Defence Ombudsman Act*.

#### INTERPRETATION

Definitions

2 The definitions in this section apply in this Act.

**Cadets** means participants of the Cadet Organizations referred to in section 46 of the *National Defence Act*

**Canadian Forces** means the armed forces referred to in section 14 of the *National Defence Act*

**Code of Service Discipline** means the provisions of Part III of the *National Defence Act*

**Department** means the Department of National Defence

**Minister** means the Minister of National Defence

**Staff of Non-Public Funds** means persons appointed to the Staff of Non-Public Funds by the Minister pursuant to section 3 of the *Non-Public Funds Staff Regulations*

**Office** means the Office of the Defence Ombudsman

**Ombudsman** means the person appointed under section 4 of this Act

**Provost Marshal** means the person appointed under section 18.3 (1) of the *National Defence Act*

## OFFICE OF DEFENCE OMBUDSMAN

### The Office

Office  
established

**3** There is hereby established the Office of the Defence Ombudsman.

Appointment

**4 (1)** The Governor in Council shall appoint a Defence Ombudsman.

Term

**(2)** The Ombudsman holds office during good behaviour for a non-renewable term of five years, but may be removed for cause at any time by the Governor in Council.

Rank

**5** The Ombudsman shall have the rank and powers of a deputy head of a department.

Reports to  
Parliament

**6** The Ombudsman shall report to Parliament.

### Salary and Benefits

Salary

**7 (1)** The Ombudsman shall receive such salary as may be fixed by the Governor in Council and is entitled to be paid reasonable travel and living expenses incurred in the performance of duties under this Act.

Other benefits

**(2)** The Ombudsman is deemed to be employed in the public service of Canada for the purposes of the *Public Service Superannuation Act*, and to be employed in the federal public administration for the purposes of the *Government Employees Compensation Act* and any regulations made under section 9 of the *Aeronautics Act*.

## Administration of the Office

- |                                      |   |
|--------------------------------------|---|
| Management and control of the Office | <b>8</b> The Ombudsman has the control and management of all matters relating to the Office of the Ombudsman.   |
| Staff                                | <b>9</b> The Ombudsman may employ such employees as the Ombudsman considers necessary for the efficient operations of the Office, and such employees shall be appointed in accordance with the <i>Public Service Employment Act</i> .   |
| Absence or incapacity                | <b>10 (1)</b> The Ombudsman shall designate, from among the employees of the Office, a Deputy Ombudsman.<br><br><b>(2)</b> In the event of the absence or incapacity of the Ombudsman, the Deputy Ombudsman shall exercise the full powers and perform the functions of the Ombudsman.  |
| Legal counsel                        | <b>11</b> The Ombudsman shall have his or her own legal counsel.<br><br><b>12</b> 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. |

## Delegation

- |            |  |
|------------|--|
| Delegation | <b>13</b> 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 54, may be delegated by the Ombudsman to any member of the Ombudsman's staff. |
|------------|--|

## Technical Advisors and Advisory Committee

- |                       |  |
|-----------------------|--|
| Advisors              | <b>14</b> The Ombudsman may engage such technical and professional advisers as the Ombudsman considers necessary for the proper conduct of the Ombudsman's activities.   |
| Specialized knowledge | <b>15</b> To the extent that operational requirements permit, the Department and Canadian Forces 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 duties and functions. |
| Advisory Committee    | <b>16 (1)</b> The Ombudsman may establish an Advisory Committee to provide advice to the Ombudsman on matters relating to the activities of the Office.  |

**(2)** The representation on the Committee shall be determined by the Ombudsman having regard to the need to ensure a broad based representation.

### **Oath**

Oath

**17** All members of the Ombudsman's staff, on appointment, and any other person performing any duty or function under this Act shall swear or affirm an oath of secrecy.

## **DUTIES AND FUNCTIONS**

Duties and  
functions

**18** The Ombudsman shall

**(1)** act as a neutral and objective sounding board, mediator, investigator and reporter on matters related to the Department and Canadian Forces;

**(2)** act as a direct source of information, referral and education to assist individuals in accessing existing channels of assistance and redress; and

**(3)** serve to contribute to substantial and long-lasting improvements to the welfare of members of the Defence community.

Media relations  
and  
communications

**19** The Ombudsman has control of his or her own media relations and communications.

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

Exercise of  
powers

**21** 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.

Initiation of  
investigations

**22** The Ombudsman

**(1)** shall investigate any matter referred to the Ombudsman by written direction of the Minister or any Order in Council; and

**(2)** may, subject to these provisions, on the Ombudsman's own motion after advising the Minister, investigate any matter concerning the Department or Canadian Forces.

## Confidentiality

Office operated  
in a confidential  
manner

**23 (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.

Information  
protected

**(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.

## Proceedings Privileged

Proceedings  
Privileged

**24** Except on the ground of lack of jurisdiction, no finding, report or recommendation by the Ombudsman is liable to be challenged, reviewed, quashed or called into question in any court.

Immunity

**25** 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 of any function, power or duty of the Ombudsman.

Libel and  
slander

**26** For the purposes of any law relating to libel, slander or defamation

**(1)** 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

**(2)** any report made in good faith by the Ombudsman, and any fair and accurate media account of the report made in good faith, is privileged.

Not compellable

**27** 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 of any function, power or duty of the Ombudsman.

## JURISDICTION

### Right to Complain

Right to  
complain

**28** Any of the following persons may bring a complaint to the Ombudsman, directly and free of charge, where the matter complained about relates to the Department or the Canadian Forces

**(1)** a member or former member of the Canadian Forces;

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

**(3)** an employee or former employee of the Department;

**(4)** an employee or former employee of the staff of Non-Public Funds, Canadian Forces;

**(5)** a person who applies to become a member of the Canadian Forces;

**(6)** a member of the immediate family of a person referred to in paragraphs (1) to (5);

**(7)** 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 Canadian Forces; or

**(8)** a person supplying services to the Department or Canadian Forces.

### Discretion

Existing  
mechanism

**29** The Ombudsman has the discretion to refuse to deal with a complaint where the complainant has not, within the applicable time limit, first availed himself or herself of an existing mechanism available to the complainant, including:

**(a)** the Canadian Forces Redress of Grievance System, including the Military Grievances External Review Committee;

**(b)** the Public Service grievance and complaints system; and

**(c)** the review mechanisms set out under Part IV of the *National Defence Act*.

Discontinuance

**30 (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 complainant 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;
- (f)** the extent to which the complainant has utilized existing complaint mechanism; and
- (g)** the existence of a more appropriate mechanism.

### Limitations

#### Limitations

**31** The Ombudsman shall not investigate any complaint or matter relating to

- (1)** a decision or an order of a military judge, a court martial or a summary trial;
- (2)** the exercise of discretion in laying charges by the chain of command or the Canadian Forces 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 Labour Relations Act*;
- (4)** Military Police that is being dealt with under Part IV of the *National Defence Act*;
- (5)** occurrences prior to June 15, 1998, unless the Minister considers that it is in the public interest, including the interest of employees of the Department or members of the Canadian Forces as a whole, for the Ombudsman to deal with the matter;
- (6)** any legal advice to the Department or the Canadian Forces, employees of the Department, members of the Canadian Forces 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 professional standards organization acting pursuant to a Canadian statute.

## COMPLAINTS AND INVESTIGATIONS

### Complaints Resolution

- |                            |   |
|----------------------------|---|
| Resolution at lowest level | <b>32</b> The Ombudsman shall attempt to resolve complaints at the level at which they can be resolved and shall make recommendations to the lowest level of authority that can effect the change considered necessary by the Ombudsman.  |
| Investigation              | <b>33</b> 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.   |
| Process review             | <b>34</b> If a complaint is made to the Ombudsman about the handling of a complaint or complaints by or under an existing mechanism referred to in section 29, the Ombudsman may review the process only, to ensure that the individual or individuals were treated in a fair and equitable manner. |

### Obligation to Assist

- |                             |   |
|-----------------------------|---|
| Assistance to the Ombudsman | <p><b>35 (1)</b> Any person shall fully cooperate with the Ombudsman and facilitate the work of the Ombudsman, upon the Ombudsman's request.</p> <p><b>(2)</b> For the purpose of this section, co-operating fully with and facilitating the work of the Ombudsman includes providing the Ombudsman within a reasonable time</p> <ul style="list-style-type: none"><li><b>(a)</b> direct access to the facilities, employees and members;</li><li><b>(b)</b> information; and</li><li><b>(c)</b> copies of documents or other things.</li></ul> |
|-----------------------------|---|

### Operational and Security Priorities

- |                                     |   |
|-------------------------------------|---|
| Operational and security priorities | <p><b>36 (1)</b> Access pursuant to subsection 35(1) by the Ombudsman is subject to compelling operational or security priorities.</p> <p><b>(2)</b> Where access is denied pursuant to subsection (1), the Chief of the Defence Staff shall provide the Ombudsman with written confirmation of the existence of compelling operational or security priorities.</p> |
|-------------------------------------|---|



## Military Police Investigations

Military Police investigations

**37 (1)** The Military Police shall, on request of the Ombudsman, provide the Ombudsman with copies of documentation and information relating to an 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.

## Investigation Powers

Power to compel

**38** In the course of an investigation, the Ombudsman may require any person

(a) to furnish any information that, in the opinion of the Ombudsman, the person may be able to furnish in relation to the matter being investigated;

(b) to produce, for examination by the Ombudsman, any document, paper or thing that, in the opinion of the Ombudsman relates to the matter being investigated and that may be in the possession or under the control of that person; and

(c) to facilitate access or entry to a facility.

Hearings

**39** In the course of an investigation, the Ombudsman may hold any hearing and make such inquiries as the Ombudsman considers appropriate, but no person is entitled as of right to be heard by the Ombudsman.

Administration of oaths

**40** The Ombudsman may summon before him or her and examine on oath or solemn affirmation any person and for that purpose may administer an oath or solemn affirmation.

Evidence inadmissible in other proceedings

**41** Except in a prosecution of a person for the offence of perjury in respect of a statement made to the Ombudsman under oath or solemn affirmation, evidence given by a person in hearings held by the Ombudsman and evidence of the existence of the proceedings is inadmissible against that person in a court or in any other proceedings.

## Reports to Relevant Authorities

Report to  
authorities

**42** The Ombudsman shall send a report, including any recommendations, opinions, and reasons, to the relevant authority, if on completing an investigation of any matter, the Ombudsman is of the opinion that

(1) the matter should be referred to the relevant authority for further consideration;

(2) an omission should be rectified;

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

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

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

(6) a delay should be rectified; or

(7) other steps should be taken to achieve improvements to the welfare of members of the Defence community.

Insufficient  
response

**43** (1) An authority that receives a report under section 42 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 authority is insufficient or no response is received, the Ombudsman may send a copy of the report to a higher authority up to and including the relevant minister, and in such case higher authority 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.

## Refusal or Failure to Assist the Ombudsman

Failure to assist

**44** No person shall willfully 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 Canadian Forces base or is with any Wing or Formation or who is deployed by the Canadian Forces 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 of 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 Ombudsman's dedicated electronic or other data storage facilities used in connection with the Ombudsman's duties and functions;
- (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.

Infractions

**45 (1)** A person who contravenes section 44 shall be considered to have obstructed, impeded or interfered with the Ombudsman and committed an infraction.

Fines

**(2)** Every person who commits an infraction under this Act is liable to a fine not exceeding \$1,000 for a first offence and to a fine not exceeding \$5,000 in the case of a second or subsequent offence.

**46** 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.

## Information to Complainants and Other Parties

Information regarding progress

**47** 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.

Adverse comments

**48 (1)** If a report by the Ombudsman under section 42 will contain an adverse comment about any person, the Ombudsman shall inform the person of the nature of the intended comment and allow the person 14 days to submit representations in response.

Submission of representations

**(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.

Representations in writing only

**(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 42.

## Criminal Act or Breach of the Code of Service Discipline

Criminal acts or breach of the Code of Service Discipline

**49** 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 Department or Canadian Forces, 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.

## Complaints of Abuse or Delay

Complaints of  
abuse or delay

- 50** (1) Subject to sections 30 and 31, 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, 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.
- 51** When the Ombudsman investigates a matter that is related to a Military Police investigation into an alleged criminal or Code of Service Discipline offence
- (1) the Provost Marshal has priority in the interviewing of witnesses; and
  - (2) 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.

## Units Deployed on International Operations

International  
operations

- 52** (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 subsection (d).
- (2) Investigations by the Ombudsman must not impede the operational mission of contingent commanders, but notwithstanding 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 Chief of the Defence Staff 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.

## REPORTS

### 53 (1) The Ombudsman

- |                 |   |
|-----------------|---|
| Annual report   | <b>(a)</b> shall submit an annual report to the Minister on the activities of the Office, which shall be tabled in Parliament no later than 30 days after receipt of the report;      |
| Special Reports | <b>(b)</b> may submit reports to the minister of the relevant government department on the implementation of any recommendations made by the Ombudsman; and                           |
| <i>idem</i>     | <b>(c)</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. |

Publication of  
reports

### **(2)** The Ombudsman shall

- (a)** publish a report issued under subparagraph (1)(a) within 60 days of submitting it to the Minister; and
- (b)** submit a report issued under subparagraphs (1)(b) and (c) to the relevant minister, and may publish the report on the expiration of 28 days after it has been submitted to the relevant 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 except when necessary to conform with the requirements of the *Privacy Act*.

## REVIEW OF ACT

- 54** At the start of the fifth year after the day on which this Act receives royal assent, this Act is to be referred to Parliament or a committee thereof for review.

## CONSEQUENTIAL AMENDMENTS

Schedule IV of the *Financial Administration Act* should be amended to include Office of the Defence Ombudsman, for the Ombudsman to be able to meet the definition of “deputy head” in section 11 (1) of the *Financial Administration Act*, and be eligible for delegation of the powers discussed in the report.

The *Contraventions Regulations* should be amended to list the fines set out in section 45, to ensure that fines issued under the Act are considered a statutory offence, and do not result in a criminal record.

## ANNEX G – MINISTERIAL RESPONSE

28 March 2017

Mr. Gary Walbourne

National Defence and

Canadian Armed Forces Ombudsman

100 Metcalfe Street, 12<sup>th</sup> Floor

Ottawa, ON K1P 5M1

Dear Mr. Walbourne:

Thank you for your letter of February 20, 2017 and the accompanying report, *The Case for a Permanent and Independent Ombudsman Office*.

I value the mandate and operational independence of the Ombudsman's Office. That is why you have a direct reporting relationship to me outside the military and civilian chains of command of the Department of National Defence and the Canadian Armed Forces. However, financial and human resources authorities are delegated to you through the Deputy Minister by virtue of the *Financial Administration Act*.

In his Spring 2015 report, the Auditor General found issues with past exercise of financial and human resource authorities in the Ombudsman's Office and the need for better oversight by the Department. The Auditor General also highlighted the need for both the Department and the Ombudsman's Office to work together on matters to administrative functions. I understand that you and the Deputy Minister have been working to address the concerns of the Auditor General.

The Office of the Ombudsman is delegated financial, human resources, and administrative authorities consistent with the *Financial Administration Act*. In my view, both the provision of administrative services and the delegated authorities that accompany them, support the requirements of your office. In addition, this model mirrors almost all other similar offices across government and meets the test of proper stewardship of resources.



The perspectives you share within your report are important, especially where they concern the independence of your function and the quality of advice you provide to me as a result. If ever you feel that your ability to carry out your duties is being constrained by the Department of National Defence or the Canadian Armed Forces, I would encourage you to make full use of your direct reporting relationship to make the situation known to me.

I am fully confident that you, the Deputy Minister, and other senior managers within the Department will continue to build and improve upon the processes in place to ensure the sound stewardship and efficient use of public resources.

I thank you for sharing this report with me and look forward to our future discussions.

Yours sincerely,

The Hon. Harjit S. Sajjan, PC, OMM, MSM, CD, MP