

# THE NEW PRIVATE-SECTOR OMBUDSMEN

Donald C. Rowat

One of the ways of dealing with complaints against corporations, while avoiding lengthy and costly litigation, is through private-sector ombudsmen. This is a growing trend in self-regulation, using the governmental ombudsman model of an independent official who does not charge for his services, and whose rulings are usually binding. Placing the Canadian experience in a global context, Donald Rowat finds that corporate Canada, especially the financial services industry, is increasingly looking to ombudsmen as a means of improving corporate governance.

L'un des moyens de traiter les plaintes contre les entreprises, tout en évitant les procès longs et coûteux, consiste à recourir à un médiateur privé. Cette tendance s'inspire du modèle gouvernemental du protecteur du citoyen selon laquelle un représentant officiel non rétribué rend des décisions généralement exécutoires. En étudiant la situation du Canada dans une perspective mondiale, Donald Rowat a découvert que nos grandes sociétés, celles notamment du secteur des services financiers, envisagent de plus en plus cette forme de médiation pour améliorer leur gouvernance d'entreprise.



**T**he ombudsman is mainly known as an independent official who handles complaints from the public against government administration. But in recent years the ombudsman idea has been spreading rapidly in the private sector. There are now several kinds of private-sector ombudsmen, the most popular in the United States and Canada being corporate ombudsmen appointed by business corporations to handle complaints from their employees. There are also corporate ombudsmen who handle complaints from customers, and media ombudsmen for complaints against a newspaper or broadcasting station or network, as well as university or school ombudsmen for students, and hospital ombudsmen for patients.

The newest and most rapidly growing type in the private sector is an ombudsman scheme created by a whole association of business firms to investigate complaints from customers against member firms. The first such industry-wide ombudsman in Canada was the Canadian Banking Ombudsman, an office created by the banking industry in March 1996. The second was Ontario's Insurance Ombudsman, provided by legislation for the province's insurance companies, in November 1996.

Even some years before this, the daily newspaper industry in Canada had provided itself with independent ombudsman-like press councils, with representatives from the public, the papers and their employees, to decide on complaints against individual papers from their readers and employees. The first

press councils were set up in Alberta and Ontario in 1972 and in Quebec in 1973. Newspapers in the other provinces followed suit in the 1980s, with those in the Atlantic provinces forming a single Atlantic press council. These press councils have been important in helping to preserve freedom of the press by self-regulation, without state control.

The creation of industry-wide ombudsmen is interesting because of their great similarity to the classical governmental ombudsmen. Unlike corporate ombudsmen, they are set up as independent appeal bodies for a whole industry such as banking, or a whole profession such as lawyers. In this sense they meet the most important requirement of the classical system: independence from the organization or professional person being complained against. They are usually set up by the industry itself but may also be created by law, as were Ontario's Insurance Ombudsman and the ombudsmen in England and Scotland for complaints against lawyers. They are so similar to the classical ombudsmen that the British and Irish Ombudsman Association, originally made up only of ombudsmen for complaints against government, has admitted the new ones in Britain and Ireland to its membership.

Although often called industrial ombudsmen, it may be better to call them association ombudsmen, because each is created for a whole association of business corporations or of professional individuals such as lawyers or doctors. In this way we can avoid confusing them with corporate ombudsmen,

which are appointed by and for single corporations, and whose independence and neutrality may be suspect. At the same time we can include ombudsmen for professional associations.

So far, association ombudsman schemes have been created mainly for complaints against financial firms, where money is almost always involved and yet where taking a case to court can be costly, stressful and time-consuming. As with the classical ombudsmen, their services are informal and free. So they represent a great advance over suing in court, and may be thought of as part of the alternative dispute resolution ombudsmen for banking, insurance, building societies, investment companies, credit unions, pension funds, estate agents, lawyers and even funeral directors.

The most popular industries for ombudsmen are banking and insurance, where they exist not only in Britain but also in Australia, New Zealand and several European countries. So it is not surprising that Canadian banking was the first industry in North America to create an ombudsman system. It included all of the leading banks, which jointly created a buffer organization, Canadian Banking Ombudsman Inc., to ensure the ombudsman's independence. The buffer's board of directors had five members from the banks and six non-bank members to represent customers, with the chairperson being a non-bank member. It was made responsible for appointing the ombudsman, determining his terms of reference and funding the office. It appointed as ombudsman a person who was a partner in a consulting firm not connected with the banking industry, Michael Lauber, and he could be removed only by the unanimous consent of the non-bank directors.

Each of the participating banks has also appointed its own ombudsman for initial complaints, so it is only appeals that go to the association ombudsman. Like the classical ombudsmen, he only

makes a recommendation to the bank concerned, not a binding decision. But if the bank doesn't accept his recommendation, he must make the information public, identifying the bank. And he issues a public annual report on his cases, including their number, disposition and the number from each bank. As with the classical ombuds-

Association ombudsman schemes have been created mainly for complaints against financial firms, where money is almost always involved and yet where taking a case to court can be costly, stressful and time-consuming. As with the classical ombudsmen, their services are informal and free.

men, publicity is a powerful sanction. To date, all of his recommendations have been accepted by the banks concerned, including large financial payments, one of which involved a mediated settlement of \$500,000.

In his fiscal year 2001 he completed nearly 200 formal investigations and concluded in favour of the customers in about a sixth of them. These numbers may seem small, but this is because the complaints have already been appealed through a three-state process: to the unit from where the complained-of decision was made, from there to a bank's complaint-handling unit or customer service group, and then to the bank's internal ombudsman. So the vast majority of complaints are resolved to the customer's satisfaction at one of these stages. In fiscal 2001 the internal ombudsmen completed over 1500 investigations and decided in favour of the customer in a majority of cases. So only the most complicated ones were appealed to the Banking Ombudsman. It is interesting that there has been a downward trend in the proportion of his decisions favouring the customer and in the number of complaints appealed to the internal ombudsmen. This suggests that the creation of a right of appeal to an independent association ombudsman has caused the banks to improve their internal complaint processes.

Ontario's first Insurance Ombudsman, Lea Algar, was appointed by the provincial government in April 1997 as part of an overall regulatory reform of

the insurance industry because of dissatisfaction with decisions by insurance companies on claims, especially for automobile insurance, which is compulsory. She was formerly Director of Market Conduct for the Ontario Insurance Commission, the body that regulated the province's insurance industry, and handled complaints in that role.

Under the reform legislation all insurance companies in the province were required to have a formal system to review complaints internally, and the ombudsman only handled appeals. In 1998 the Ontario Insurance Commission was merged with an expanded Financial Services Commission.

Because of inadequate provisions for handling complaints in the rest of Canada's financial sector, in June 2001 the federal government announced its intention to introduce legislation to create an industry-wide financial services ombudsman, who would replace the banking ombudsman and be independent of both industry and government. Meanwhile, however, the main financial associations decided either to join the banking scheme or to set up a similar one of their own, and to create an industry-wide complaint referral service to ensure that complaints got to their proper destinations. At the end of the year, the government, satisfied with the progress being made in the private sector, announced that it would not proceed with the legislation.

Consequently, in August 2002, three of the main financial associations, the Investment Dealers Association, the Mutual Fund Dealers Association and the Investment Funds Institute of Canada, announced that they were setting up new complaint procedures and joining the bank scheme for appeals. Also, nearly all

foreign-owned banks and most trust and loan companies have joined the scheme. As a result, these services are now represented on the ombudsman board, but the members from outside have been increased so as to still hold a majority of votes. And Michael Lauber has now become the Ombudsman for Banking Services and Investments, and his staff, with offices in Toronto, Edmonton and Montreal, has been expanded.

Also in August 2002, Canada's life and health insurance companies announced that they were setting up their own Canadian Life and Health Insurance Ombudservice, with an independent board having a majority of its members from outside the industry. And the Insurance Bureau of Canada announced that it was creating a General Insurance Ombudservice for home, and general insurance customers. It has a board of two industry directors and five non-insurance directors, including Lea Algar, Ontario's former Insurance Ombudsman, as chairperson. The new service has regional offices across Canada and will make use of mediators from the ADR Institute of Canada and le Barreau du Quebec. All of these complaint services are members of a new Centre for the Financial Services OmbudsNetwork, an umbrella organization that co-ordinates the ombudsman and dispute resolution systems for all financial services.

In the United States, though the idea of industry-wide association ombudsmen has not yet caught on, in 1996 the National Association of Securities Dealers added an ombudsman to its Office of Internal Review. This office appears to be more like a traffic policeman, referring complaints to the Association's members, than a body hearing appeals from its members. However, it adheres to The Ombudsman Association's code of ethics, which includes independence and neutrality. So it may become independent and influential enough to be classed as the first American association ombudsman.

Most of the association ombudsmen elsewhere in the Commonwealth don't meet one of the main requirements of the classical system — that of making only recommendations. Instead, they have the power to make financial awards to customers that are binding on the member associations. Hence they are a kind of arbitrator or administrative court. The advocates of binding decisions argue that the imbalance of power between an individual client and a giant corporation is so great that association ombudsmen need this power. The alternative of a court case involves the complainant in high costs, stress and long delays. And in the private sector there are no cheap, informal administrative courts, as there are in areas of

The good feature of association ombudsmen, like the classical ones for government, is that they are independent of the firm or professional being complained against and hence can't be accused of bias. Like the courts, they are, and are seen to be, impartial in their conclusions.

high-volume decisions in the public sector. However, most association ombudsmen in Western Europe, like the Canadian ones, can't make binding decisions. This may be because of Europe's Napoleonic code: if they did so they would be regarded as usurping the functions of the courts.

A variation of association ombudsmen in Western Europe has been the development of private-sector complaints commission in the Netherlands. It has such commissions for an impressive number of private-sector activities, such as banking, public transport, utilities, telecommunications, travel agencies and even garages. Set up by private-sector associations in cooperation with the Netherlands Consumers Organization, they have members from both the association and the consumers organization and are united in a Foundation of Complaints Commissions. They perform functions similar to the

association ombudsmen and, like the Commonwealth ones other than Canada's, their decisions are binding. Denmark has an arbitration board for banking complaints that is similar.

A comparative survey of association ombudsman schemes in the developed democracies reveals that there are now over thirty of them in at least twelve countries. Most schemes are for banking and insurance, but there are also schemes in at least eight other industries or professions. Next to the UK, the Commonwealth country with the most schemes is Australia, which has them for banking, credit unions, investment, telecommunications, and two for insurance. The Netherlands, in addition to the complaints commissions, has them for pensions, insurance and funerals.

The experience of other countries confirms that the areas in greatest need of industry-wide ombudsmen in Canada are banking and insurance. But it also indicates that there is a need in other areas, including the professions. The good feature of association ombudsmen, like the classical ones for government, is that they are independent of the firm or professional being complained against and hence can't be accused of bias. Like the courts, they are, and are seen to be, impartial in their conclusions. And because they are cheaper, faster, less complicated and more effective than courts, they are an important new development that ought to be promoted for other important segments of the private sector in democratic countries.

*Donald C. Rowat is a professor emeritus of political science at Carleton University, Ottawa and author of The Ombudsman Plan (Lanham, MD: University Press of America, 2nd ed., 1985). This article is an update of a section in his "A Worldwide Survey of Ombudsmen," published by the International Ombudsman Institute, Edmonton, as Occasional Paper no. 60, in March 1997.*