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TOWARD A COMMON OMBUDSMAN IDENTITY

Quite often at conferences like these and in Ombudsman literature, we see careful discussions about the difference between "Classical", complaint-driven models of the Ombudsman and so-called "Hybrid" models. Although useful to help us understand the evolution of the Ombudsman concept, I respectfully would like to present the proposition that such attention to the specific *jurisdiction and structure* of each office is a distraction. It is now time for us to turn to what is common amongst us – and that is our *value*.

When we take a long view of Ombudsmanship as a value, then we begin to look through a lens that allows us to learn from each other in more productive ways. As we celebrate 200 years of the modern Ombudsman institution this year, we also celebrate that ours is a unique institution in the canon of governance. Under the broad umbrella of transparency and accountability, each of us can be flexible and adapt to the needs or our respective jurisdictions. Ultimately, we contribute in a practical way to the evolution of democracy.

Let me pause to note that, as we proudly celebrate the 200th year of the constitutional Ombudsman, the concept actually pre-dates 1809. In a 1997 speech to the Austrian Ombudsman Board, the then Swedish Ombudsman, noted that around 1712, the Swedish king Karl XIIth fled to Turkey after

losing a battle against the Russian czar. It is not clear whether he was a guest or a prisoner of the Turkish Court. It appears that he was inspired by a category of officials known as the *Kadis* or *Justices of the Sultan*. As independent officials, separate from the Court, the Kadis had oversight over the military- administrative apparatus and acted as arbiters between the peasants and officials. Thus they brought stability and legitimacy to the Ottoman socio-political structure. King Karl XIIth agreed to establish a similar position to pacify the internal situation in Sweden during this period. This evolved a century later into the constitutional Ombudsman that we celebrate this year.

This is important to note because, while we owe to Sweden the idea of a constitutional mandate, there can be no doubt that the concept and yearning for justice is a universal theme. In a presentation earlier this year, Fiona Creon, the Ombudsman of Toronto, traced the history of the Ouvidor here in Brazil to the mid-sixteenth century. This does not surprise me. I would venture to suggest that we can find in almost every tradition and culture on earth the concept of the Wise Arbiter who gives voice to the ordinary person vis-à-vis the powerful. Perhaps this would explain why the modern Ombudsman concept, in varying forms, has caught fire all over the world. There are approximately 134 national Ombudsmen in addition to the numerous regional, provincial, city and other public sector Ombudsmen.

The research of Professor Linda Reif of Canada indicates that some 60% of Ombudsman around the world have a human rights, corruption or other remit in addition to good governance. A great amount of ink has been spent on distinguishing whether an Ombudsman is “classical” or “hybrid”, and

unfortunately, by implication not as "pure". I am satisfied that as long as an Ombudsman is independent and has fundamental authority, then it is a more productive use of our energies to appreciate our shared principles, objectives, service and value. We cannot insist that other jurisdictions adopt the form or flavour of Ombudsmanship that is most relevant to our own.

The Caribbean and the Central American Ombudsmen have had the bounty of two joint meetings in 2007 and 2008. There was some exploration of the extent to which we are respectively focused on good governance or human rights. I gleaned from those meetings that this is not an either/or proposition. For good reasons related to local conditions, the Central American Ombudsmen focus on the promotion of human rights, *including* good governance. The Caribbean Ombudsmen focus on good governance *based on* human rights principles. This subtle difference may impact the way each office conducts investigations. However, this should not impact our common identity.

As noted by one of the world's leading Ombudsman scholars, Dr. Victor Ayeni, *"so important has the Ombudsman become that it arguably now qualifies as an issue of human rights in its own right…the Ombudsman's emerging role in human rights, and to some extent corruption issues - areas outside its traditional mandate – is inevitable for the future. Given the central attention now paid to these issues, it would be quite indefensible, in any event, to keep the Ombudsman from playing a marked role."*

Whatever our individual structure and focus, we recognize that – together – we are different from tribunals, boards of inquiry and criminal and

administrative review Courts. These other institutions are often limited to legal causes of action or narrow terms of reference or investigatory powers or burden of evidence. As Ombudsman, our animating purpose ultimately is to bring to the attention of our respective legislature the failings in delivery of public service through the independent investigation of the truth.

Mr. Olara Otunnu, the brilliant Ugandan activist and former United Nations official (known as the World's Children's Ombudsman for his work on children victims of war) was the keynote speaker at the 2008 Biennial Conference of the Caribbean Ombudsman Association. His central thesis is that decades have been spent, particularly in the United Nations system and other multilateral contexts, on developing norms, covenants and international standards. Today is the age for implementation – on the ground. In this regard, Mr. Otunnu reminds us that the Ombudsman *"is a critical role in building a genuine architecture of democratic governance and of ensuring that government power is exercised in a manner that is responsive, that is transparent and that is fair…this is a critical role in giving content – not just formality – to democratic governance."*

New comparative research by the team of Brian Thompson, Richard Kirkham and Trevor Buck (University of Sheffield, UK) expands on this idea (largely from developments in Australia). This research, titled: "The Ombudsman Enterprise and Administrative Justice" to be published next year contends: *"Constitutional lawyers have always talked of three distinct and fundamental branches of the constitution - the executive, the legislature and the judiciary. We should add a fourth branch – the integrity or accountability branch. Such a theoretical development is no more than a*

practical recognition of how constitutions have evolved". This concept frames the Ombudsman's identity far beyond the classical / hybrid distinctions that we have been used to.

As part of the "Integrity Branch of Government", we join with other independent and oversight institutions such as the Auditor General, Police Complaints, Human Rights Commissions, Electoral Commissions and so on. Our task is to protect and promote fairness and human dignity in public life. The distinctions between us tend to melt away when we embrace the broad ethical dimensions of our role. As Ombudsman we uphold the moral values that give tangible direction and meaning to our collective existence. Like the Turkish Kadis, we are instruments of public trust in the legitimacy and stability of our respective jurisdictions.

There are two primary tools by which Ombudsmen hold Governments to account: investigations of individual complaints and investigations of systemic injustice.

By the time individuals come to the Ombudsman they usually harbour at least two layers of concerns. First is the underlying bureaucratic matter that the authority should have resolved. The second layer is often an emotional response to how Complainants felt treated by the authority in dealing with that matter. For example, an unreasonable delay in responding translates as "I wasn't taken seriously". A failure to explain a decision translates as "they don't have time for me". Reticence by government officials to acknowledge harm translates as "they don't care about the little people". The tendency to

blame the victim translates as "Government officials think that the public works for them and not the other way around".

In our 2008 Annual Report I expressed my dismay about the Planning Department's attitude toward a complainant. I had informed them that the alleged maladministration affected the complainant in a very hard way as he was a 71 year old retiree. The Director responded that the *"age and employment of the complainant were irrelevant"*. Moreover, he felt that I am allowed to refer to a complainant's situation only if this "*raised some legal incapacity or susceptibility"*. I was frankly astounded.

Baroness Fritchie, former UK Commissioner for Public Appointments, notes: *"whilst we would want excellent service delivered to everyone, the individual circumstances of each complainant means that poor service delivery impacts in a very different way and has a different long lasting effect on each person. If we start to forget the unique and special circumstances of each, we begin to dehumanize the service."*

It is precisely the Ombudsman's job to make complainants visible and to remind the bureaucracy that complainants are not nameless or faceless files, forms and statistics. To put it bluntly – the people's taxes pay all of our salaries. The people must always matter.

In our office, we do not have strict guidelines and procedures. However, there is one guiding principle that informs how we do our work – from merely answering telephone calls to conducting investigations, to making recommendations – we always say 'yes' before we say 'no'. For example, if

a matter is not within our jurisdiction, we try to write referral letters. These letters help complainants articulate their issues and also help authorities understand specifically why the complaints were referred. Even if we have found no maladministration pursuant to an investigation, we usually add value in some way by clarifying the issues that led to the perception of injustice or by recommending better tools for communication by the authorities.

In the course of conducting individual investigations, Ombudsmen do gain special insight. We see clearly the weak links and broad implications that allowed the particular matter to arise. Bermuda's Ombudsman Act of 2004 specifically provides that I may make recommendations not only about the "administrative action that formed the subject of the investigation" but also "generally about ways of improving its administrative practices and procedures". There is a phrase (from the field of the study of knowledge) that describes our function well: *highly contextualized concrete action.*

Whether or not there are individual complaints, many Ombudsman have a public interest mandate to conduct investigations on their "own motion". Such systemic investigations have been done from time to time in a number of countries from Australia to Barbados. The Ombudsman of Ontario has taken this to a new level by creating a special team dedicated to ongoing systemic investigations. Whether with respect to the testing of newborn babies, criminal injuries compensation or the lotteries commission, these investigations have brought about deep and systemic change that probably would not have been achieved through traditional means of organizational reform. Systemic investigations often have broader force than individual

complaint handling because they tend to multiply the Ombudsman's value by fostering enduring structural and operational improvements in the delivery of public services

In Bermuda, despite our small size (20 sq miles; 75,000 population; our staff of only four persons) we took a page from Ontario's book and have conducted two systemic investigation. The first concerned our only hospital and the second our national archives. Both situations were ripe for a systemic investigation as the issues alleged were serious, longstanding, sensitive, had a high public interest component and no alternative mechanism had been able to address the complaints. In both cases we received multiple complaints and it would not have been practical to investigate each sequentially. Each would have involved many of the same interviewees who would likely contract 'investigation-fatigue' by the time of the third investigation.

We are still awaiting the Government's substantive response on the archives but I can report that the 2006 systemic investigation of the hospital has fundamentally transformed procedures there. I emphasize that Bermuda has only one public hospital (there are no private hospitals). Failure of collegiality there affects everyone. Rich or poor, black or white, young or old – we all need the hospital, either on the way in or on the way out.

Early in 2006 three black doctors filed separate complaints with our office alleging racial discrimination amongst colleagues. They said that poor relationships based on stereotypes of education and ability led to disputes about patient management, especially with respect to decisions about

whether or not to approve sending patients abroad for specialist treatment. Further, they complained that the hospital's own discipline and other procedures actually perpetuated toxic discrimination against some doctors.

Very quickly, it became clear that the issues were not just about racial discrimination. Race was often used both as a veil and a sword to ignore or explain away far deeper problems of personalities, competition and competence. There is considerable financial competition, especially amongst specialists, for a small pool of patients. Economic protectionism seemed designed to limit younger, black US trained doctors from entering the profession and thus taking patients away from older, white, UK trained doctors. This competition fueled suspicions, stereotypes and notions of superiority that resulted in a number of disputes about patient management that were based on interpersonal tensions rather than just on medical exigencies.

Whether in discipline, credentialing, scheduling of the operating rooms, recording of critical clinical incidents or patient management decisions, hospital administration used to privilege the unsubstantiated views, versions of events and interests of white doctors. Moreover, the administration appeared to tolerate a troubling level of "non-collegiality" against black doctors by white physicians and nurses. In contrast, reports of "non-collegiality" by black doctors drew almost immediate discipline. "Non-collegiality" is defined in the Bye-laws of the hospital as "*the failure to work well with others, and where uncooperative, uncivil, abusive and disruptive conduct is judged to adversely affect patient care".*

In one particular case that polarized the entire medical community (the subject of one of the original complaints to me), I found a disciplinary process that was consistently inadequate and poorly implemented. There was a rush to judgment, poor investigation and failure of due process. Hospital administration turned a blind eye to conflicts of interest and did little to promote basic standards for learning amongst practitioners. The grievant regarding this maladministration was a black doctor.

Disputes amongst doctors thrived in the absence of clearly articulated and fairly implemented procedures. Notably, the hospital did not have an adequate system to report or follow-up on adverse clinical incidents. Periodic Morbidity and Mortality meetings – routine in hospitals in other parts of the world – were almost non-existent in Bermuda. This fostered a climate in which doctors (black and white) feared being demonized, exposed, targeted and counter-targeted, particularly in the media. Although problems of professional egos and financial competition exist within medical communities the world over, the problem was magnified in Bermuda because of our small size. We conducted 120 interviews, 10 years of Minutes of meetings and 24 patient files.

Ironically, this investigation began as an inquiry into allegations of discrimination but ended as a relatively comprehensive indictment of the failure of hospital administration to ensure appropriate oversight of medical practices. Of the fifteen Recommendations in my Report titled*: "A Tale of Two Hospitals: Who Gets the Benefit of the Doubt?"* – only two explicitly dealt with issues of diversity and race. The remaining recommendations tackled: (a) administrative injustice (e.g. conflicts of interest in disciplinary

matters), (b) inadequacy of procedures (e.g. for clinical incident reports) and (c) the need to establish research resources to educate or arbitrate disputes in the management of patients.

The hospital and Ministry of Health took all of the Recommendations seriously. The hospital has restructured its by-laws, leadership team, the granting of hospital privileges and performance standards based on merit rather than on "old boys" criteria. Further, the hospital signed advice agreements with clinical advisors from top US hospitals to ensure updated medical advice and resolution of disputes in patient management. The standard of care at our single hospital has taken a dramatic leap forward.

Significantly, the hospital now responds as a partner, not an adversary, to our inquiries. Five months ago we received a complaint from a family about the quality of care of a long-term patient. The problems with this family had been brewing for over a year. Within an hour of notifying the Office of Quality and Risk Management that we would be sending a preliminary inquiry letter, the Chief Executive Officer of the hospital telephoned to express the hope that we would be involved. Over the summer we conducted eight multi-party interviews and two 20 person mediation sessions. Just last week, we were able to bring closure to the clinical care problems and have helped to improve relationships all around. It is as important for the Ombudsman to build trust with authorities as it is to have the trust of the people.

Ombudsmen are not merely complaints handlers or problem solvers or even heralds of systemic issues. Rather, we must be instigators and educators. We

must be advocates not only for individual administrative justice but also for a culture of service and fairness in the delivery of public services. The people matter, truth counts and public service must have practical meaning.

To this end, I have begun to use the excellent document produced by the UK Parliamentary Commissioner/Health Services Ombudsman: the Principles of Good Administration. They have also produced equally useful documents on Remedies and Complaints Handling (www.ombudsman.org.uk). These guidelines set out for public bodies the standards that the Ombudsman will use to judge complaints about their performance. The Principles are: Getting it Right (law, etc.); Being Customer Focused; Being Open and Accountable; Acting Fairly and Proportionately; Putting Things Right; Seeking Continuous Improvement.

I see no reason to reinvent the wheel and commend the UK Parliamentary Commissioner because this approach begins the enterprise of creating a culture of service. It is an approach that does not blame or bludgeon public bodies about how they have been wrong. Rather, these Principles aim to articulate and demonstrate what good public service looks like. This is an enterprise that all Ombudsmen can work toward – whether we have a human rights focus, a good governance focus, a corruption focus or other.

I first heard of the Ombudsman when I worked 17 years ago for a summer at the New York Office of the United Nations Center for Human Rights. Each day, letters pour into the United Nations. Some are addressed simply: "Secretary General, UN, New York". The letters come from small villages, forgotten hamlets and crowded cities all over the world. Often people pay

someone more literate to write the letters for them. The letters speak of the private angst and public frustrations of mothers who have spent months seeking information about sons detained by the police or whose daughters were raped as a form of torture by agents of the state. The New York Liaison Office of the UN Centre for Human Rights reads each and every letter and directs them to the competent authorities to investigate. Some issues may even percolate as far up as the Secretary-General for his possible "Good Offices" (personal attention) during consultations with leaders of the relevant governments.

However there were some letters that did not have a clear human rights grievance. These were complaints about less egregious but still vexing matters – for example, about a local land registrar whose inaccurate recording of property boundaries benefit his own relative who happens to own adjoining land. Other letters detail a myriad array of arbitrary decisions and biased actions by local and regional governing officials. I asked the then Under-Secretary General for Human Rights what happens to those complaints which were outside of the jurisdiction of international human rights machinery. Coming from Norway with its long history of the Ombudsman institution, his response was quick – "that's why countries need an Ombudsman".

The concept of administrative justice should not be pigeon-holed into a constrictive definition. Just as the social dynamics of each of our nations are constantly evolving, so too is the institution of the Ombudsman. Our special role has made us an important and enduring part of the governance landscape - the Integrity Branch. Meetings like this are critically important.

This is an opportunity for us to share, learn, grow and encourage each other to safeguard our independence in the quest for fairness for all.

In order to strengthen that exchange, I invite you all to join in with the work of the International Ombudsman Institute (IOI) that brings together many of the national, regional and other Ombudsmen. During this 200th anniversary of the modern Ombudsman, the IOI is, itself, undertaking an important transition which will greatly enhance this exchange at the regional level. As Vice-President for the Latin American and Caribbean region of the IOI, I look forward to working with you over the next three years.