

## Promoting fairer government

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Ombudsman Saskatchewan

### Introduction

Ombudsman Saskatchewan is celebrating its 40th anniversary in 2013. Saskatchewan's first ombudsman, Ernest C. Boychuk, opened the office on May 3, 1973, taking over 300 complaints in the first eight months. Janet Mirwaldt was appointed acting ombudsman effective July 1, 2013, when Kevin Fenwick, QC, who had held the office since 2004, was appointed Deputy Minister of Justice and Deputy Attorney General for Saskatchewan. With a staff of 25 working from Regina and Saskatoon offices, Ombudsman Saskatchewan now receives about 2,500 complaints per year about matters within its jurisdiction.

The ombudsman's mandate under *The Ombudsman Act, 2012* and the approach that Ombudsman Saskatchewan takes in carrying it out, provide unique opportunities for citizens to access the administrative justice system.

### Ombudsman 101

#### Entities in and out of the ombudsman's jurisdiction

The Ombudsman for Saskatchewan is an officer of the Legislative Assembly with broad powers to investigate decisions, acts, omissions and recommendations of provincial ministries, agencies of the government and publicly-funded health entities (collectively, "government"). Agencies of the government include the commercial and Treasury Board Crowns, and other boards and agencies whose members or directors are appointed by the Lieutenant Governor in Council or are otherwise responsible to the Crown in carrying out their work. Publicly-funded health entities include the regional health authorities, the Saskatchewan Cancer Agency, and health care organizations as defined in The Regional Health Services Act and its regulations.

Ombudsman Saskatchewan does not have jurisdiction over federal, municipal or private entities. It is not authorized to investigate decisions, orders or omissions of the courts, judges, or justices of the peace made in any action or proceeding before them. Nor is it authorized to investigate decisions, recommendations, acts or omissions of lawyers for the Crown in relation to proceedings. It may, however, review any matter pertaining to any person at the special request of that person.

#### Mandate to promote fairness in government

Ombudsman Saskatchewan's authority is to investigate government "in the exercise of any power, duty or function conferred or imposed...by an Act" with "respect to a matter

of administration affecting any person or body of persons in their personal capacity" that "aggrieves or may aggrieve any person" [ss. 14(2)]. Ombudsman Saskatchewan responds to individual complaints, but may also investigate on the ombudsman's own initiative.



Complaining to the ombudsman is an avenue of last resort. The office does not automatically have jurisdiction over matters for "which there is pursuant to an Act a right of appeal or objection or a right to apply for a review of the merits of the case to any court or tribunal" [p. 18(1)(c)]. Though, if the ombudsman is satisfied that it would have been unreasonable to expect a complainant to resort to the court or tribunal, the office may conduct an investigation after the time for the

exercise of the right to appeal, object or apply has expired.

At the end of an investigation, the ombudsman is obligated to report to the head of the entity under review if of the opinion that:

- (a) a decision, recommendation, act or omission appears: contrary to law; unreasonable, unjust, oppressive, improperly discriminatory or in accordance with a rule of law, a provision of an Act, or a practice that is or may be unreasonable, unjust, oppressive or improperly discriminatory; based in whole or in part on a mistake of law or fact; or wrong;
- (b) in making a decision or recommendation, or in acting or omitting to act, a power or right has been exercised: for an improper purpose; on irrelevant grounds; or on the taking into account of irrelevant considerations; or
- (c) reasons should have been given for a decision, recommendation, act or omission that was the subject-matter of the investigation.

These criteria are the administrative fairness principles to which Ombudsman Saskatchewan holds government accountable, and about which it educates public servants about fairness.

#### Training the Fairness Triangle

Ombudsman Saskatchewan trains public servants – not about what to do when the ombudsman calls – but about what to do so the ombudsman doesn't call. It teaches three aspects of fairness – procedural, substantive and relational fairness – using its Fairness Triangle.

Generally, procedural fairness requires giving the person

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affected by a decision reasonable notice that it will be made, a meaningful opportunity to state his or her case, access to the information being considered, and an opportunity to challenge information being used against him or her. Decision-makers must be thorough, impartial and honest, and give meaningful and understandable reasons. Substantively fair decisions are reasonable and made with proper legal authority. They are not discriminatory or oppressive. Relational fairness is about being courteous, timely, and direct. It is about taking the time to listen, being approachable and respecting confidentiality. It is about being honest, forthright and clear about what the decision-maker can and cannot do. Sometimes, relational fairness is about apologizing. Many complaints to the ombudsman are about relational fairness.

## Gathering information and maintaining confidentiality

The ombudsman may require any person to furnish information or produce any document, paper or thing related to a matter being investigated. The ombudsman may hold formal hearings to which witnesses may be summoned to give evidence under oath or affirmation, but no ombudsman has ever done so. Typically, ombudsman investigators carry out an investigative plan that includes interviewing the complainant,

public servants and anyone else with probative evidence, and gathering emails, reports and other documents.

Rules of law about withholding information that, if disclosed, would be injurious to the public interest, and statutes requiring secrecy or creating duties to not to disclose information, do not apply to Ombudsman Saskatchewan. People who provide information to investigators are protected from prosecution. Statements made and evidence given are not admissible in court or other proceedings. As well, the ombudsman and staff must not, and must swear or affirm that they will not, divulge information obtained in the course of their work. They are also neither compellable nor competent to give evidence in other proceedings. That said, the ombudsman may report about any matter that he or she considers necessary to establish grounds for a conclusion and recommendation in the report.

## Making recommendations

The ombudsman may recommend: (a) that a matter should be referred to the appropriate authority for further consideration; (b) that an omission should be rectified; (c) that a decision should be cancelled or varied; (d) that any practice on which a decision, recommendation, act or omission was based should be altered or reviewed; (e) that any law on which a decision, recommendation, act or omission was based should be reconsidered; (f) that reasons should be given for any decision, recommendation, act or omission; or (g) that any other steps should be taken.

If accepted, ombudsman recommendations can be the basis for remedies that are not otherwise available. For example, if the ombudsman recommends it, the government may rehear a matter or reconsider a decision or recommendation, and quash, confirm or vary it – even if it is subject to statutory provisions to the effect that no appeal lies with respect to it, or that it may not be challenged, reviewed, quashed or called in question.

## The Saskatchewan approach

### Appropriate case resolution

Initially focused only on formal investigations and determining whether complaints were substantiated, over the years, Ombudsman Saskatchewan has explored non-adversarial ways to resolve complaints. In 1998, it introduced alternative dispute resolution. Today – along with formal investigations – coaching, facilitated communication, negotiation and mediation are fully integrated into the office's range of services. The ombudsman now chooses the most appropriate dispute resolution method based on the circumstances of each complaint.

### Standard of review

Courts and tribunals review administrative decisions to a standard that ensures minimally acceptable levels of substantive and procedural fairness are met with due deference to decision makers' expertise and mandate. Because

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ombudsman recommendations are not binding, Ombudsman Saskatchewan does not have to defer to minimum legal standards. It can and does strive to raise the bar of fairness in government. Though it pays close attention to administrative law and always considers decision-makers' expertise, Ombudsman Saskatchewan may ask the government to do something it believes is more fair than current legal standards require. To be successful with this approach, Ombudsman Saskatchewan must treat government entities with same substantive, procedural and relational fairness for which it advocates.

### Coercion vs. Cooperation

The ombudsman can exercise coercive influence over government by using the power to issue reports – reporting to the minister in charge, to the Legislative Assembly or to the public. While this might assure a quick, favourable result in a specific case, it does not typically create lasting change. Further, it can harm the office's image with the government. Managing Ombudsman Saskatchewan's image among civil servants is not necessary to carry out its mandate. But a negative image has the potential to make investigations less efficient and non-adversarial approaches more difficult as interactions between investigators and civil servants become less convivial and more formal. Instead, Ombudsman Saskatchewan endeavours to influence the government cooperatively. When Ombudsman Saskatchewan does issue public reports, it endeavours to provide appropriate notice to the government entities involved, and, depending on the subject matter, to members of the Legislative Assembly.

By engendering openness and mutual respect, showing willingness to learn, and encouraging the government to take a lead role in solving the complaints about it, Ombudsman Saskatchewan aims for changes that are long lasting and more far-reaching. This model of cooperative influence generally takes more time and effort to build a respectful, trusting relationship, but it creates lasting efficiency as government is willing to work with investigators informally. Ultimately, there are fewer complaints to the ombudsman as government incorporates the principles of fairness into its decisions and interactions with citizens.

### Access to justice

Seeking greater "access to justice" typically means providing money and finding creative ways to increase citizens' to access to the justice system – to lawyers, to judges and to administrative decision-makers. The ombudsman's legislative mandate is to promote justice itself – to encourage just decisions and behaviour in government. By providing a range of free, appropriate complaint resolution services, Ombudsman Saskatchewan enhances access to justice for complainants who have exercised all other available, reasonable options. Because the ombudsman advocates for fair interactions, fair processes and fair results instead of for individual positions, citizens and government are assured just treatment. By using the cooperative influence model of review and striving to raise the bar of administrative fairness in government, the ombudsman promotes lasting positive enhancements to justice in the delivery of government services. 

Greg is General Counsel at Ombudsman Saskatchewan. He is grateful to Janet Mirwaldt, Acting Ombudsman, and Jaime Carlson, Assistant Ombudsman, for their contributions to this article.

All references are to *The Ombudsman Act, 2012* unless otherwise stated.

Despite appearances, "ombudsman" is not gender-specific. It has its roots in the Swedish ombudsman from the Old Norse umboðsmaðr, meaning "representative".

#### Bar Judicial Council

Members are invited to contact **George Green** or **Bonnie Missens** regarding issues of concern that could be raised at future Provincial Court Bar Judicial Council Meetings.

##### George Green

■ **Phone:** 306.664.1283  
 ■ **Email:** g.green@mckercher.ca

##### Bonnie Missens

■ **Phone:** 306.477.7539  
 ■ **Email:** bonnie.missens@sig.sk.ca

## ISC Representatives

Getting the legal community's perspective on policy issues, amendments to legislation and the expansion of new services from Information Services Corporation (ISC) are the main objectives of the ISC Legal Advisory Committee. The CBA has been a key contributor to the success of the ISC Legal Advisory Committee by appointing four representatives:

- **James Camplin**, Harvard Developments Inc., Regina (306.777.0600 // jcamplin@harvard.ca)
- **Bernard Duchin**, Duchin Bayda & Kroczyński LLP, Regina (306.359.3131 // bernard.duchin@dbklaw.com)
- **Cindy Haynes**, Cindy M. Haynes Law Office, Regina (306.789.2242 // cindym.haynes@sasktel.net)
- **David Leland**, Leland Kimpinski LLP, Saskatoon (306.244.6686 // info@lelandlaw.ca)

These individuals meet four times a year with representatives from ISC. Members are invited to contact one of the above representatives regarding issues of concern or ideas for new services that could be raised at future ISC Legal Advisory Committee Meetings.