



**Through the Looking Glass:
Reflections of the Ombudsman©**

**Plenary Session Address by
André Marin, Ombudsman of Ontario**

**18th Annual Conference of Ontario Boards and Agencies
Administrative Justice: Through the Looking Glass
Toronto, Ontario
November 2, 2006**

- 1 It is truly a pleasure to be invited to speak at the 2006 Conference of Ontario Boards and Agencies. I'd like to thank the Planning Committee of COBA and its sponsor, the Society of Ontario Adjudicators and Regulators, for inviting me to be your plenary speaker. I am well aware that your annual conference provides a significant learning opportunity for adjudicators, regulators and senior staff in Ontario's administrative system. As Ombudsman of Ontario, and as an overseer of Ontario's administrative justice system, I am particularly struck by the theme of the 2006 COBA conference. I want to commend COBA for inviting participants to step Through the Looking Glass, to look from the outside in at your roles in the administrative justice system. The choice of such a perspective, that of the outsider, the skeptic, the challenger even, underscores your desire to reflect upon how you may enhance your roles within the larger community you serve.

- 2 I can assure you that I understand how daunting that process of turning the mirror on one's own organization and one's own role within it can be. I was appointed as the 6th Ombudsman of Ontario on April 1, 2005, after having been selected by an all-party committee of the Legislative Assembly of Ontario in December 2004. You will be aware that it is the mandate of the Ombudsman to ensure accountability of government through effective oversight of the administration of government services in the province. You may be somewhat less aware that upon my appointment as Ombudsman, I immediately launched my office into a comprehensive overview of the way it was doing business, the way it was attempting to fulfill its mandate. I'd like to emphasize to you that the purpose of holding the Ombudsman's Office up to this mirror of scrutiny was to reflect upon what was working well but, more importantly, to determine what in that image needed to be entirely re-visioned, and reinvented. I and my staff met immediately to ask ourselves: What can we do to return the Ombudsman's Office to its rightful place as Ontario's watchdog and as a main player in provincial administration? Thus began a process in which we have challenged ourselves to rethink every aspect of our business, and to unflinchingly examine how we deliver service to Ontarians. In the process, we have given a great deal of thought to how we may purposefully and strategically speak out on behalf of Ontarians about injustice. We have asked ourselves how we may get at the root causes of systemic issues underlying the roughly 24000 complaints that we receive every year. With this end in sight, we re-articulated our mission: to concentrate our resources on issues that resonate with the citizens of Ontario. And to meet the operational challenges of our mission, we completely revamped our case

- management system. The end result is a focus on systemic investigations into high profile, sensitive issues when there is a prima facie case in favour of intervention and when shuttle diplomacy has failed to resolve the issue. We have conducted seven such systemic investigations in the one and a half years since I became Ombudsman.
- 3** In speaking with you today, I do so from the perspective of someone who has a unique insight into the kinds of complaints that Ontarians have about the administration of government service, including about the agencies, boards and commissions that affect many aspects of their lives. I am hopeful that my reflections on the insight I have gained in my oversight capacity may assist you as you think not only today but on an ongoing basis about perceptions of the administrative law community from the outside.
- 4** The theme of this year's COBA conference truly resonates with someone as passionate as I am about assisting those citizens who have become lost in a maze of bureaucracy. In Through the Looking Glass, Alice embarks on what is an exceedingly disorienting journey. In a wrong-way-round world, the language and the rules simply do not make sense to her. Early in the novel, Alice questions a rule imposed upon her by the Red Queen, a rule that essentially disentitles Alice to a benefit. Alice is told that the rule is "Jam tomorrow and jam yesterday." When Alice challenges the rule, she is told, and expected to accept, there is "never jam today." Needless to say, Alice isn't satisfied that the denial of jam makes sense, and she is not satisfied that no reason for the rule is ever given. As I see it, your conference planners were on to something when they thought Lewis Carroll's novel might provide a useful template to think about an individual's encounter with administrative law.
- 5** Later in the novel, when Alice finally gets to be a Queen herself, and actually attains a Crown, she decides to ask the Red Queen and the White Queen a few questions. Alice is immediately and forcefully interrupted. The Red Queen barks at Alice: "Speak when you're spoken to."

"But if everybody obeyed that rule," said Alice, who was always ready for a little argument, and if you only spoke when you were spoken to, and the other person always waited for you to begin, you see nobody would ever say anything, . . ."

- 6 Like Alice, I am always ready for a little argument, and do not see the sense of speaking only when spoken to. Like Alice, I like to think about why we have rules, whether the rules make sense, and whether the rules need to be changed. And like Alice, I think there should be jam today. Fortunately, as the 6th Ombudsman of Ontario, I am in a unique position to speak up on behalf of those Ontarians who feel very much like Alice when their lives suddenly intersect with the administrative justice system, but who don't get to be Queen by the end of their journey.
- 7 I am well aware that my forceful criticisms of a variety of government programmes will be familiar to you. The 7 major investigations that I have conducted since my tenure began, and the cogent recommendations for change that I have made in relation to each, have been widely publicized. These include matters from my first investigation into complaints that parents of severely disabled children were being forced to place their children into the custody of Children's Aid Societies to obtain necessary care for them, to my investigation of the Ministry of Health and Long Term Care's failure to provide adequate newborn screening tests, to my investigation into the lack of transparency and procedural fairness at the Municipal Property Assessment Corporation. I am also cognizant of the fact that there is some trepidation among parliamentarians, senior bureaucrats, government employees, adjudicators and regulators when my office contacts them on my behalf. Having said that, it is nevertheless my considered view that over the past year and a half many within the administrative justice system have come to welcome our involvement. It is a given that we all want the system to work well, and to work well within the system.
- 8 It is my strong suspicion that each of you agrees not only with the principles behind the creation of an effective oversight mechanism within the administrative justice system, but also with the premise that our functions within the system complement each other to the advantage of Ontarians. Thirty years ago, in the 1975 Speech from the Throne, the intention of the government to create an Ombudsman's Office was articulated in this way:

“As a safeguard against the growing complexity of government and its relationship with the individual citizen, the government will establish the Office of the Provincial Ombudsman to ensure the protection of our citizens against arbitrary judgments and practices.”

- 9** In a 1970 Supreme Court of Alberta decision, that court spoke eloquently about the way in which the Ombudsman can act as an indispensable tool for parliamentarians who strive for good government and administrative efficiency. The court said that:
- “ . . . as an ultimate objective, the Ombudsman can bring to the Legislature his observations on the misworkings of administrative legislation. He can also focus the light of publicity on his concerns as to injustices and needed change.”
- 10** By way of example, among this audience today there will be members who wish that their empowering legislation gave them the leeway to reconsider a decision in appropriate circumstances, or allowed them to award costs to individuals who have been subjected to some governmental malfeasance along the way to their appearance before an adjudicator within the administrative system. My mandate allows me to publicly recommend legislative changes that may assist you to better assist those who appear before you, whereas you may face some very real limitations in your ability to speak out publicly in this realm.
- 11** All levels of Canadian courts have confirmed that a large, liberal and expansive interpretation of what may fall under the gaze of the Ombudsman is consistent with the role of Ombudsman. In the 1984 Supreme Court case of B.C. Development Corporation and Friedmann, Mr. Justice Dickson, writing for a unanimous court, and using powerful language that is as relevant today as it was then, had this to say about the pressing need for an Ombudsman to check bureaucratic power:
- “The factors which have led to the rise of the institution of the Ombudsman are well-known. Within the last generation or two the size and complexity of government has increased immeasurably, in both qualitative and quantitative terms. Since the emergence of the modern welfare state the intrusion of government into the lives and livelihood of individuals has increased exponentially. Government now provides services and benefits, intervenes actively in the marketplace, and engages in proprietary functions that fifty years ago would have been unthinkable.

“As a side effect of these changes, and the profusion of boards, agencies and public corporations necessary to achieve them, has come the increased exposure to maladministration, abuse of authority and official insensitivity. And the growth of a distant, impersonal, professionalized structure of government has tended to dehumanize interaction between citizens and those who serve them.”

- 12** Many of you in this room constitute the boards, agencies and public corporations that make the kinds of decisions that Mr. Justice Dickson is talking about, decisions that profoundly affect ordinary citizens on a daily basis. The following point made in a 1962 article by Professor Donald Rowat, was quoted with approval by Mr. Justice Dickson in *B.C. Development Corporation*:

“It is quite possible nowadays for a citizen’s right to be accidentally crushed by the vast juggernaut of the government’s administrative machine.”

- 13** Think about that. An individual may literally be crushed in the process of your decision-making. That fact is a driving factor behind what my office does. My office is a last resort for ordinary citizens who feel crushed by their interaction with an administrative system.
- 14** You may be thinking to yourself right now something along the lines of, “Well that’s not me. I’m not crushing anyone. I always strive for fairness in my decision-making.” But the point Professor Rowat makes, the point Mr. Justice Dickson confirms, and the point I adopt is not made to single you out individually. It is made to you and to everyone in the administrative justice system collectively, so that each of you will consider the implications of the very real power you wield.
- 15** I am quite confident that the part-time and full-time members of Ontario’s agencies, boards and commissions, our ABCs, share a commitment to public service and a desire to add value to Ontario society. Those of you with part-time appointments may well have other full-time positions, and all of you will be struggling with what are often very heavy workloads, and very pressing demands for timely decision-making, and timely decision-writing. In this regard, I can advise you that I was invited to speak at the March 2, 2006 Breakfast Meeting of the Circle of Chairs, a meeting of the Chairs of Ontario’s ABCs. My topic was “What’s New at the Ombudsman’s Office.” At that meeting I advised the Circle

of Chairs that I was planning to review the appointment process and remuneration of Order in Council appointments to the ABCs. I planned to further explore a concern that I shared with many in the administrative justice system. Specifically, there is a negative effect on your ability as adjudicators and regulators to function effectively when your terms of appointment interfere with your ability to sustain employment, and when your rates of remuneration, benefits and expenses are out of sync with case volume, case complexity, required levels of expertise, and pressures around timely decision-writing. Much as I'd like my office to be able to take credit for the June 2006 Government Appointments Directive that addressed these issues, I cannot. What I can say is that my office will continue to monitor how your tenure and your remuneration affect your ability to function as effectively as I know you want to, and as effectively as the Ontario public needs you to. To that end, your concerns may always be addressed to my office.

- 16** The kinds of principles that govern effective oversight are principles that inform what a government must provide in order to ensure that all players in the administrative system can actually perform well. When there is insufficient funding for a board or a tribunal to be able to meet its mandate, no one is well served. Attracting and maintaining experienced board members is difficult at best when terms of tenure and compensation are not sufficient. Members are not supported to take the time to write careful decisions when time constraints arise in backlogged systems. Nor are they encouraged to participate in ongoing education when it is too costly for the budget. Levels of expertise may become an issue. The result is a greater likelihood of insufficient reasons, procedural irregularities, and delay, all of which cause malaise within the system, and impact negatively on the public.
- 17** Whether it is this type of lack of resources or another issue that is the breeding ground for the complaints to my office about maladministration, complaints there are, and complaints there will continue to be. Some of the most common complaints I receive include that government officials get it wrong or are arbitrary when they apply regulations and laws, that they fail to provide sufficient or proper notice, that they don't apply procedures uniformly, and that they provide inadequate reasons, in an untimely way. I also receive broader based complaints that the government has mismanaged an agency, or that an agency has failed to take into account a broader adverse impact or discriminatory consequence of its decision-making in a particular case.

- 18** Obviously this spectrum of complaints does not apply only to conduct of adjudicators and regulators. In fact, the vast majority of complaints to my office about board and tribunal decisions have historically been closed. In most cases my office has determined that the complaint was unsubstantiated, or was one for which an adequate remedy was available through existing administrative practice. In other cases, an informal resolution was eventually reached. These are the cases where shuttle diplomacy works. Then there are the situations that call out for systemic investigation, public reporting, and strongly worded recommendations by the Ombudsman for overhaul of an organization. I imagine that even without prompting, a few examples may spring to your mind.
- 19** There are ways to avoid being one of those examples. There are steps you may take to work more effectively with our office, to work towards a common goal of resolving substantiated complaints by Ontarians. To place these suggestions in context, it may be helpful first if you understand the set-up of my office.
- 20** I have approximately 84 employees, made up of corporate and administrative, communications and legal staff, and of intake workers and investigators. Our intake workers are called the Early Resolutions Team, or the EROs. These are the people who take the calls from concerned Ontarians, and start the process of finding out why someone is concerned, what's gone wrong, and whether we may be able to help. Our Investigators are divided into the more general Investigations Team, and the very specialized Special Ombudsman Response Team, known as SORT. The Investigation Team takes over from the EROs when we need to move up the food chain to attempt resolution of an issue. Finally, SORT is the dedicated investigations team that deals with the high profile, serious, systemic issues that I have already mentioned to you are the *raison d'être* of our newly focused office. These systemic investigations are focused, time driven, and evidence based. SORT prepares and implements an investigation plan, gathers large volumes of evidence including through tape-recorded interviews, analyzes the results, and helps to determine whether moving on to a recommendatory phase is necessary. SORT remains involved when we go public with our findings through reports to the Legislature.

- 21** The bottom line for us is that we prefer to resolve issues. Everyone wins the lottery when this happens. How an agency responds to our EROs when they make a first contact may set the course for how a file will proceed. The timely provision of candid information to an ERO helps to eliminate files that our mandate does not include. For those files that are within our jurisdiction, they may be obviously unsubstantiated. File sharing at this time is helpful. Even if a case is substantiated, if you work with the ERO without a formal investigation, you'll at best be a good result story in our annual report. This is true even where an Investigator has become involved. Agencies, boards and commissions can take many steps to work with Investigators to address our concerns. They can deal with a complainant directly to address an issue, provide information to a complainant and/or to us, revisit protocols, or undertake to address deadlines to expedite cases. They can suggest to us what they think will achieve a fair result. Some examples spring to my mind, but unlike my SORT investigations into deficiencies in newborn screening, the necessity for retroactivity for ODSP payments, or the operations of MPAC, they won't spring to yours.
- 22** I'll start with a good results story from my 2005/2006 annual report. It's an example of a positive outcome in an Assessment Review Board case. We'd received a complaint from a property owner that he had never received a notice of a new hearing date about his property taxes, and that in the interim his appeal of his property tax assessment was dismissed. When one of our Investigators followed up, the ARB acknowledged in a straightforward way that the file had been closed in error. The board promised there would be a new hearing, and that it would be scheduled on a priority basis. Case closed. This case, as unassuming as it may appear, is a textbook example of the kinds of simple but effective steps that an agency, board or tribunal can take when the Ombudsman calls. 1. The ARB cooperated with our office. 2. They examined their file without forcing us to serve them a notice of investigation. 3. They acknowledged their errors. And, 4. The ARB proposed a workable solution.
- 23** These four effective strategies were used to similar good effect by the Ontario Rental Housing Tribunal in a 2003 case in which we were asked to intervene. A family complained to us that they had not received a notice of hearing about arrears, that they were not granted an expected extension of time, and that they did not receive a default order. The family lost its home, and had to pay a higher rent at its new location. The Tribunal reviewed its file and determined that there had been a number of errors in the file, including around the issuance of the

- default order and the failure to follow through on the extension of time that had been granted. Ultimately the tribunal agreed to compensate the family for some of its higher rental costs. Again the board cooperated with us, followed through to investigate itself, acknowledged a mistake, and fashioned a fair remedy. These basic steps allowed us together to effectively address the very real consequences for a low-income family that was accidentally crushed in an encounter with the system.
- 24** It is perhaps more difficult to acknowledge a mistake within the context of a completed case. Yet there are times when a hearing has occurred, a decision has been made, and our initial review suggests the decision is unfair. In such cases, many of you have the legislative ability to reconsider a decision. Some of you for some reason rarely use it. In one of our files the Ontario Rental Housing Tribunal chose to reconsider a decision that initially an adjudicator was quite tenacious about. A tenant had been ordered to pay arrears of rent for a time period following the delivery to him of two very different types of notices by his landlord. The adjudicator had given a decision that may have been in accordance with the legislation about the one type of notice, but was very arguably not 'on' at all in relation to the second notice. In addition, the adjudicator disbelieved the tenant on a couple of key points, but did so despite documentary evidence that supported the tenant's version of events. The tenant was a relatively young man, and it was his father who contacted us. He very strongly felt that his son had been treated unfairly. One of our employees was also tenacious in her view that this fellow deserved a new adjudication, and the good news from our perspective is that he got it. The Tribunal reviewed the file again, and decided that this was a case for reconsideration. Again, a win/win result.
- 25** The choice to change procedures is also open to a board, and can be an effective solution to a problem in the delivery of its services. It's a choice that allows a board to work with us in the public interest. It's a choice that was made by the Ontario Labour Relations Board in response to a complaint to us about them. In that case, the Ontario Labour Relations Board chose to update Information Bulletins relating to the duty of fair representation complaints made under the *Labour Relations Act, 1995*. Essentially, the Labour Relations Board clarified its procedures and the roles and responsibilities of the Labour Relations Officers as they conduct mediation efforts. Despite the fact that there was only one complaint, the Board accepted our suggestion that its resolution called for public education, and provided it. The context of the acceptance of that suggestion is

- one I'd like to highlight: The other aspects of the initial complaint were not matters that actually warranted our intervention. Nevertheless, the review suggested steps the Board could take to assist the broader public, and the Board chose to deliver.
- 26** The Alcohol & Gaming Commission also chose to work with the Office of the Ombudsman towards a broader solution than an initial complaint may have suggested. The complaint arose in June 2005. Without going too much into the details, what we had was a complaint about how the Commission reviewed the constitutions of bingo sponsor's associations. We learned that the constitution of one of the bingo sponsor's associations was not consistent with its license terms and conditions. In our conversations with the Alcohol & Gaming Commission they could demonstrate that they did have procedures in place in respect of this issue, and that theoretically those procedures were workable on a wide basis. Despite this, the Commission undertook to review all of the constitutions in order to avoid a similar situation to the one we had brought to their attention. That's a can-do attitude at work.
- 27** Just as we have criticized others for instances of "no can do" attitudes, we have had to ask ourselves if our past practices have unduly limited the numbers of people we can assist. Looking to the future, I can share with you that my office is right now in the process of re-examining how we deal with complaints about boards and tribunals. We want our office to work effectively in relation to the key agencies that deal most frequently with Ontario's citizens. To this end, we are in the process of ensuring that we understand how you work.
- 28** Not surprisingly, when we receive a complaint about a board or tribunal, we ask first whether it has followed its legislative mandate and, if it has, whether there are facts before it that would make possible whatever decision it made. We have, of course, always been alert to issues of procedural fairness in the overall process. While there is nothing *per se* wrong with this approach, for me it begs the question of whether we could be more effective in fulfilling our mandate in this area. I strongly suspect that the answer is yes. That yes speaks volumes about the new way we are doing business at the office of the Ombudsman. The real question to ask is whether a complaint underscores a systemic problem, a systemic unfairness. If it does, we have to reframe the complaint to get at that systemic problem.

- 29** I have found that the more we understand each other's procedures, the more we learn from one another, the better all of us can serve the public. I am encouraged that our internal learning process is mirrored back by other administrative justice players. For example, our office is routinely invited to present to a variety of groups about who we are and what we do. We are pleased to share how our office works generally, and how we conduct investigations. Participants have conveyed to us that this assists them to ensure a good working relationship with our office, and to improve customer service. And customer service is what it is all about.
- 30** Before I close, I'd like to suggest to you that even in those cases where I have determined that a full-fledged investigation is appropriate, the Office of the Ombudsman wants to work as cooperatively as possible with an organization. In relation to our Report "Getting It Right," we asked MPAC to report back to us about the implementation of our recommendations. Not only did MPAC advise the public that they were accepting all of our recommendations, they also reported back to us in a timely way about their progress in actually implementing those recommendations. Recently we announced an investigation into the Criminal Injuries Compensation Board. While it would be inappropriate for me to comment about the investigation itself, I think it is entirely appropriate to share with you that the CICB has been overwhelmingly cooperative in delivering a massive volume of material to us for our review. I would mention too that more than one final report has been cut off at the pass, because someone in a senior position has become involved to find a creative solution to a problem when a s. 18(1) Notice of Investigation has been served by me.
- 31** In the final analysis, our office is all about humanizing government, and I dare to say to you, so should your office be. If each of us keeps in mind the human beings who can from time to time be crushed by our administrative justice system, then justice concerns will be allowed to prevail over administration concerns. And perhaps we will all get jam today.



ONTARIO'S WATCHDOG · CHIEN DE GARDE DE L'ONTARIO

©2006, Office of the Ombudsman of Ontario