

October 28, 2005

Commissioner John H. Gomery  
Commission of Inquiry into the Sponsorship Program and Advertising Activities  
P.O. Box 1388, Station "B"  
Ottawa, Ontario K1P 5R4

Dear Mr. Commissioner,

This letter is submitted on behalf of the Board of Directors of the Forum of Canadian Ombudsman (FCO) as well as the Canadian Council of Parliamentary Ombudsman (CCPO), formerly known as the Canadian Ombudsman Association. It is in response to the letter of invitation dated September 9, 2005 from Ms. Sheila-Marie Cook, Executive Director of the Commission of Inquiry, and received by Dr. Dyane Adam in her former capacity as Chair of the Forum of Canadian Ombudsman.

For your information, the FCO is a diverse group whose individual members play the role of ombudsman within their respective organizations. Its members are drawn from the public and private sectors. Members of the CCPO are provincially and territorially appointed ombudsman who are independent officers of their respective provincial and territorial legislative assemblies.

We are grateful for the invitation to assist the Commission in its significant work. We know that your advice is keenly awaited by Canadians across this country representing all walks and stations of life. The opportunity to give advice in circumstances such as these is a privilege. Because many Canadians expect so much from your report, we recognize that the privilege of giving advice is also a great responsibility.

### **The Nexus Between Us**

We see a connection between our mission and yours. While our vantage points and responsibilities are different, we both share a desire to make government work better. We both respect and appreciate the men and women who are elected to office as well as those who are appointed to public service. We both appreciate the difficulty and complexity of the jobs they do. And we both understand that the institutions of government, in all of their variety and complexity, from time to time, require adjustments and alignments if they are to remain open and accountable.

## **Our Understanding of Your Mandate and Process**

As Commissioner, you have many things to consider and weigh. What you recommend, matters and your advice will be widely disseminated and discussed.

The challenge you face comes partly from the interpretation you have given to your mandate. We are pleased that your discussion paper does not narrowly focus on sponsorship and advertising but also asks important questions about the wider role of Ministers and senior public servants, about the executive branch and Parliament and about MPs and citizens. The questions posed in your discussion paper go beyond sponsorship and advertising. The questions seem to imply a need to recalibrate at least some of the roles and relationships of elected and appointed officials and the institutions they inhabit. Every role and relationship may not require recalibration, but a series of adjustments and refinements are likely in order.

In preparing this paper we have tried to be mindful of the following statements in your discussion paper:

*“Sponsorship initiatives may not constitute the only sign that institutions are not living up to expectations and that accountability mechanisms need to be updated. ... Accountability is a broad, all encompassing concept. To strengthen it could mean [among other things] a review of the role and **mechanisms** [emphasis added] of parliament ....”*

As ombudsman, we do not have answers to all your questions but we believe we have something useful to say about one particular mechanism for improving accountability and transparency. We do not believe that our advice, if accepted, would be the only reform required to address the issues raised by the “sponsorship scandal”. However, we do believe that our advice could well be an important part of the overall reform measures to be recommended by your Commission.

## **Evolution of the Ombudsman: Concept, Scope and Variety of Models**

The concept of the ombudsman has been an element of democratic theory for many years. In fact, the first ombudsman office was created in Sweden in 1809 (an ombudsman for justice). However, the concept did not spread further until the early to mid twentieth century when it began to be adopted by governments in other Scandinavian countries. The ombudsman institution made its debut in Canada in 1967 in Alberta and New Brunswick and, over the next decade or so, was adopted by most other provinces. Over the same period of time, the concept took root in many democracies around the world, so much so, that there are now ombudsman operations at the national and/or sub-national level in more than 120 countries.

As the concept began to flourish in the public sector of many countries, it also began to migrate into quasi-public and private sector institutions in Canada. So much so, that outside of government ombudsman, Canadians can now seek the assistance of an ombudsman in institutions as diverse as banks, power companies, colleges and universities. Clearly, the idea of the ombudsman is gaining wide acceptance in Canadian society.

Academics, practitioners and complainants describe an impressive list of benefits that derive from having an ombudsman in place. Among these benefits are:

- 1) balancing the power of the citizen with that of the bureaucracy;
- 2) correcting mistakes that would otherwise remain uncorrected;
- 3) finding and fixing systemic problems in an institution;
- 4) improving the attitude of the institution toward customers and taxpayers;
- 5) bringing a healthy transparency to the operations of institutions that do not require secrecy in order to work properly; and
- 6) improving governance (regulations, policies and practices) in an institution by providing a check on authority; that is, by improving accountability.

There are many ombudsman and ombudsman-like models. Within the public sector, there are three models that warrant particular mention:

- 1) the “classical” parliamentary ombudsman (see next two sections);
- 2) the “specialty” ombudsman: an ombudsman covering one area but ranging across all or most government departments; ex. the federal language commissioner; and
- 3) the “executive” ombudsman: an ombudsman working and reporting within the structure of a single government department.

In a recent paper prepared for the International Ombudsman Institute (world headquarters in Edmonton, Alberta), Catherine Morris describes the range of ombudsman models this way:

*“In a ‘classical ombudsman’ model, the ombuds office is separate from the executive body or administration, and reports directly to the governing body of the institution. Another common model, particularly within corporations, is an ‘executive ombudsman’ who reports directly to the chief executive officer of the institution. Corporate ombuds offices often follow the executive ombudsman model. University ombudspersons (sic) may be ‘executive’ ombudspersons if they report to the University President or ‘classical’ if they report to the Universities governing board.*”

*“An institutional or corporate ombudsman has been defined as an ‘impartial manager within the organization who may provide informal and confidential assistance to managers and employees in resolving work-related concerns; who may serve as a counselor, informal go-between and facilitator, formal mediator, informal fact-finder, upward feedback mechanism, consultant, problem prevention device and change agent and whose office is located outside ordinary line management structure’.*”

*“Whether classical or executive, ombudspersons share the characteristics of impartiality, investigative authority and recommendatory powers. Some ombuds offices use mediation and conciliation; others focus exclusively on investigation and recommendation.”*

### **A Gap in our Democratic Infrastructure**

While we collectively endorse and promote the value and viability of ombudsman style positions within the framework of many different organizations, our focus, for purpose of this submission, is on the importance of establishing a federal ombudsman office with general jurisdiction who reports to parliament. We will strive to make the case that such an office would serve the principles that animate the work of your Commission of Inquiry, especially the principles of transparency and accountability.

In so doing, we will draw upon several well-known (to us) documents and articles. A short bibliography is attached to assist your staff should they want to explore our advice more thoroughly.

In large complex democracies such as Canada, where there are millions of interactions annually between citizens and public servants, there are bound to be occasions when citizens feel aggrieved and believe they have been treated unfairly. Experience in other jurisdictions reveals that it is simply not practical or effective in many of these situations to seek resolution or redress through MPs or through tribunals and courts. Another avenue is needed. In many jurisdictions around the world, citizens in circumstances such as these, have an ombudsman to whom they can turn. Indeed, more than 98% of Canadians having issues with provincial governments have recourse to an ombudsman.

On the federal stage, there are language, information and privacy ombudsman, with their own statutes, who are often referred to as “specialty ombudsman”. The Correctional Investigator is also sometimes referred to as a specialty ombudsman. As well, there are “executive ombudsman” working within departments and agencies such as National Defense and Canadian Heritage.

However, a significant gap remains and many Canadians find that they have no place to turn to with complaints about their experience at the hands of federal officials. In fact, we know that provincial ombudsmen receive many complaints every year that pertain to the federal system and they are frustrated that there is no appropriate federal institution to which the complaints can be referred. With great respect Mr. Commissioner, we believe this significant gap in our democratic institutional infrastructure needs to be addressed. We further believe that this gap, which undermines the transparency and accountability you are striving to address, can be remedied by the creation of an independent parliamentary ombudsman office of general jurisdiction with full investigatory powers.

Among the objections that this proposal sometimes encounters is that a federal ombudsman would undermine the role of Members of Parliament in solving the problems of their constituents. Aside from the fact that this has not proven to be the case in ten of the thirteen provinces and territories of Canada that have ombudsmen, there is the daunting reality that elected members, for the most part, simply do not have the time nor the resources to address the many complaints that are out there and that have no effective place to go. The federal executive branch is vast and complex and exceedingly difficult for an MP to navigate in order to obtain timely responses from officials who are responsible for the decision about which there is a complaint. The powers, expertise and resources of an ombudsman office are designed and intended for just such situations.

Another frequent objection is that individuals, in certain cases, can seek redress through the courts or through administrative tribunals. This is a formal, expensive and time-consuming avenue which is often out of proportion to the complaint of the citizen.

There is also a perception that there may be a significant cost to the establishment of a federal ombudsman of general jurisdiction as well as a related concern that there are already a number of ombudsmen on the federal stage. In our view, the challenge is how to design the office of a general jurisdiction ombudsman so that the current substantial gap is effectively filled without incurring an excessive cost and without conflicting with other offices. We believe this challenge can be met.

If the principle of this proposal were accepted, it would be important that the various stakeholders, experts and interested parties be consulted while the detailed design of such an operation was being developed either by your Commission or subsequently by the government should it act on your advice.

### **The Characteristics and Demeanor of a Classical Parliamentary Ombudsman**

There is a well established consensus that classical parliamentary ombudsman:

- 1) are independent of the executive branch; that is, they are appointed by Parliament as provided for in the legislation that establishes the ombudsman operation;
- 2) receive complaints directly from citizens and generally act as a last resort for individuals who have tried to resolve their issues using other established channels and means;
- 3) have authority to investigate complaints and have the required access to relevant information;
- 4) have authority to initiate investigations “on their own motion”;
- 5) make their recommendations public and report to Parliament;
- 6) have adequate resources to receive, investigate, resolve and report on complaints.

This consensus also holds that an ombudsman ought not to be an advocate for complainants. Likewise, an ombudsman does well to remember that s/he is not a substitute or parallel governmental authority nor is s/he an appeal court or tribunal. The demeanor and skills of an ombudsman are critical to the credibility and success of his/her office. Complainants must experience an ombudsman as accessible, prompt in the investigation of their complaint and fair in its disposition. On the other end of the complaint, public servants must experience the ombudsman as impartial, open-minded, sensitive to the difficulties of service delivery, and focused on correcting a mistake or an omission rather than on censuring the official(s).

Effective Parliamentary ombudsman treat complainants and government officials with respect and impartiality. They are guided by evidence, by precedent, by a keen sense of fairness and by a conviction that there is no contradiction in believing that when institutions take remedial action they grow stronger in fact as well as in the perception of those who were once aggrieved.

Ombudsman shine their institutional lights on situations that require remediation. In so doing, they often bring transparency where there was little or none before. When they reconcile government bureaucracy with those who have complained, they bring enhanced accountability to our system of government. When a complaint is successfully resolved, balance is restored between the citizen and the executive branch. By extension, this resolution also reflects well on the legislative branch that appoints and provides resources to the ombudsman.

In *B.C.D.C. v. Friedmann (1984)*, Mr. Justice Brian Dickson eloquently described the role of the ombudsman in democratic systems of government:

*“The Ombudsman represents society’s response to ... 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 government. Most importantly, his powers of investigation can bring to light cases of bureaucratic maladministration that would otherwise pass unnoticed. [ ...] On the other hand, he may find the*

*complaint groundless, not a rare occurrence, in which 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. In short, the powers granted to the Ombudsman allow him to address administrative problems that the courts, the legislature and the executive cannot effectively resolve.”*

### **Improving Accountability in the Federal System**

Your mandate and discussion paper specifically refer to the clarification of and potential adjustments to the roles of ministers and senior officials (principally Deputy Ministers); adjustments that clarify responsibility and thereby improve the opportunities to hold the right people accountable. A decision to create a statutory federal ombudsman with general jurisdiction would present an opportunity to explicitly assign responsibility to each federal Deputy Minister whose department or agency was covered by the statute, for accounting to Parliament on the disposition of complaints reported by the federal ombudsman related to their department or agency. For purposes of comparison, we note that **Section 29** of the **Public Administration Act** of the Province of Quebec creates an arrangement of this nature.

When appearing before a Parliamentary committee, a Deputy Minister would be expected, if asked by a MP, to account for the disposition of complaints related to his or her department or agency. Since these are administrative matters, a Deputy Minister would be operationally responsible and accountable unless directed otherwise, in writing, by the Minister. This approach would square with the convention of Ministerial responsibility, namely that the Minister provides the policy direction while the Deputy, through the staff of the department, carries out the Minister’s direction taking care to remain within parameters of relevant statutes, within the boundaries of related policies and, finally, within the budget allocation approved by Parliament.

We also believe that this development would be consistent with the “accounting officer” designation for Deputy Ministers that is in place in other Westminster systems and which is briefly described in your discussion paper. We hasten to add that such a designation would be in addition to the accounting officer designation that, as we understand it, largely if not exclusively pertains to the financial management of the affairs of a department or agency.

Mr. Commissioner, we believe that the addition to our democratic infrastructure of a federal ombudsman with general jurisdiction will improve parliament’s ability to hold the executive branch to account in a constructive way. As one of a series of measures, it also has the potential to improve the relationship between Parliament and the executive branch. The key ingredients are that the federal ombudsman be endowed with the classical powers of an ombudsman and that s/he conducts the affairs of his/her office along the lines described in this brief submission. A well designed office led by an ombudsman who carries out his/her duties with intelligence, energy, integrity and tact, would assist in reducing the “democratic deficit” that separates so many Canadians from their political leaders.

### **Conclusion**

Mr. Commissioner, we thank you for the opportunity to present our collective views to you. We know that your assignment is immensely complex and that you are receiving advice from many quarters. While we cannot help you with all of the questions and issues you are tackling, we believe we are

advancing one measure that will stand up well under examination and hope that it proves to be a good fit with the other reform measures that you may be considering.

Should you regard our submission as having merit, representatives of the FCO and the CCPO would welcome an opportunity to meet with you and/or your representatives. It is evident that we deeply believe the institution of the ombudsman is an important part of a healthy democracy. It would be an honour for us to work with you in developing this proposal so that it becomes part of your final report.

Thank you again for the invitation to submit our views and for your careful and respectful consideration of this submission. Please accept our best wishes for the successful completion of the important work you have undertaken.

Sincerely,

Bernard Richard  
President  
Forum of Canadian Ombudsman

Gord Button  
President  
Canadian Council of Parliamentary Ombudsman

**A Short List of Recommended Readings  
Regarding  
The Office of the Ombudsman**

1. British Columbia Development Corporation et al. v. Friedmann et al. (1984) 14 D.L.R. (4<sup>th</sup>) 129, (sub nom. British Columbia Development Corporation v. British Columbia (Ombudsman), [1984] 2 S.C.R. 447 [BCDC cited to S.C.R.].
2. Rowat, Donald C., “Time for a Federal Ombudsman”, pp 22-24, Canadian Parliamentary Review, Winter, 1995-96.
3. Rowat, Donald C., “Federal Ombudsman Would Reduce Democratic Deficit”, pp 46-47, Options, May 2004.
4. Owen, Stephen; “The Ombudsman: Essential Elements and Common Challenges”, pp 5-15; The Ombudsman: Diversity and Development; L. Reif, M. Marshall & C. Ferris, eds. (Edmonton: International Ombudsman Institute, 1993).
5. Canadian Ombudsman Association; “A Federal Ombudsman for Canada: A Discussion Paper”, 1999.
6. Morris, Catherine; “Definitions in the Field of Dispute Resolution and Conflict Transformation”, an occasional paper prepared for the International Ombudsman Institute, 2005.

**Websites of Interest**

International Ombudsman Institute, <http://www.theioi.com>

Forum of Canadian Ombudsman, <http://www.ombudsmanforum.ca/>