

**The judgment of wider courts:
ombuds as producers of governance**

Gilles Paquet
www.gouvernance.ca

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« Je laisse à d'autres le soin d'inquiéter, de terroriser et de continuer de tout confondre »

René Magritte

Preamble

This is a think piece. It is not meant to provide a definitive answer to the question of how justice will be ensured, how the role of ombuds and other less formal agents should evolve, and how ombudsing and other forms of less formal agents of justice might differ from place to place. On such matters, practitioners should have the final say. This paper aims only at provoking reflection on these questions, with a view to breaking out of the box of conventional thinking.

The paper is dealing with two separate problems: first, the need to broaden the concept of justice; two, the broadening of the role of ombuds in this new territory.

The first part is an examination of the problem of access to justice in a world that is becoming more diverse, complex and turbulent. It has been argued explicitly in the last decade that the formal justice system may not serve the community well, and that a more distributed, multiple-access, and open-source system of justice should be put in place.

The second part argues for a more creative role for ombuds and seeks to enlarge the portfolio of governance mechanisms by factoring in ombuds as producers of governance and particularly important agents of the governance of justice through their mediation work.

The judgment of wider courts

The expression “wider courts” may not be elegant, but it serves in drawing attention to the fact that the notion of access to justice does not connote only access to the courts and to the formal legal apparatus. The problem was raised in the year 2000 in a symposium organized by Justice Canada on the theme of *Expanding Horizons: Rethinking Access to Justice in Canada*. It was an invitation by the legal establishment to use lateral thinking in developing strategies for better ways to provide access to justice for Canadians.

At that 2000 meeting, many experts acknowledged the acuteness of the problem: a message of anxiety on the part of Justice Turpel-Lafond with regards to the way the justice system treats Aboriginal groups; a message of disconnection between the formal system of lawyers and courts and the real living law of everyday interaction from Roderick Macdonald, and a plea for more opportunities for citizens to participate more fully in the lawmaking process; a message de denunciation by philosopher Jacques

Dufresne, who claimed that the formal judicial institution – the fortress is preventing the normal carrying of justice and is the source of injustice because of the lack of preventive justice – and argued for a *justice douce* (Paquet 2000).

Whether what is needed is more prevention, better connection, or more restorative justice or something else, it was noted that there were already alternative processes providing justice outside the formal system, and there was a need for more of it, and of a more ambitious sort.

New mechanisms for a paradoxical world

The search for new mechanisms for access to justice has emerged from the diversity of contexts, principles and circumstances. But if one-size-fits-all would appear not to be satisfactory, it has been felt that there is a need (in the name of fairness) for some agreement on some *basic principles* – a sort of Magna Carta – that would guide the exploration of the new initiatives, and some focus on “*local justice*” – an effort to work at the level of the different groups, disputes, issues, etc. where one can expect to fine-tune better practices – and not through broad-ranging accords (Elster 1992).

Finding workable arrangements may not be easy in our paradoxical world.

Two paradoxes need to be resolved: (1) the one pitching local justice against substantive equality, and (2) the one pitching inclusion and participation in the justice process against representative democracy.

Equal but different would appear to be the foundation of the new flexible system based on local justice and on the acceptance that there might be various windows to give access to justice. To resolve this paradox, one needs an agreement on principles at the meta-level: general principles defining the corridor of acceptable differences and permissible variety. This is a challenge for jurists to generate such foundational meta-solutions.

The inclusion of the citizen more directly (upstream through alternative avenues to the formal legal process or downstream in the case of restorative law) challenges indeed the democratic method of choosing officials and allowing them to take decisions for the collectivity. These new ways short-circuit what is regarded as due process. This will require a major re-interpretation of the very notion of representative democracy, and represents another significant challenge for jurists.

In the short run, nothing less than a Magna Carta of basic principles will be required as a guide to the necessary exploration: defining what is the corridor of permissible variations within the corridor of justice. What is also required is much more experimentation and a better knowledge of what has worked or not.

In the longer run, first, what one might hope for is *a refurbishment of our philosophy of justice* that might be rooted in what Amartya Sen (1999) has put at the center of the whole process of social, economic and political development – the freedom from

different servitudes or the elimination of unfreedoms due to the lack of political margins of maneuverability, of social opportunities, of economic possibilities, and of transparency and security guarantees. Second, one has to strive for the establishment of a *distributed and open-source justice system* – a system where justice is available in a variety of forms, from a variety of sources, and through a variety of channels so as to ensure that the citizen a true access to justice.

But this cannot be tackled at a general level. Too many forces of dynamic conservatism are at work to maintain the status quo. The problem must be tackled piecemeal by developing segmented experimentations with already existing tools or instrumentations that are promising but have been underused and are under-developed. This is the road of least resistance: experimentation in many loci according to different ways of widening the “existing courts” through experimentation designed not only to open new trails but to establish new ways of producing governance. One such front that is among the most promising is to experiment with the burden of office of ombudspersons as producers of governance.

Ombuds as producers of governance

Fifty years ago, the very word ombudsman and the institution attached to it meant nothing to most people outside of Scandinavia. Now it is common currency in some one hundred countries. The main reason for this phenomenal growth has been the emergence of big government, and the consequent need for someone to protect the citizen from unfair decisions by Big G government. The same rationale holds for the private and social sectors, where potentates have also been felt to require a watchdog. Ombudsing activities have contributed significantly to remedying the damages caused by the abusive powers of agents of these diverse potentates.

But in recent times, the context has changed: decentralized organizations have become the new world of work, so governing systems have become more complex, and the problems of coordination more ‘wicked’.

Most issues faced by citizens are now the results of a multiplicity of interwoven multi-sectoral forces, agents, groups, and organizations more or less consciously shaping the context in concert (Gregory & Giddings 2000). We have moved in all sectors from Big G government to small g governance – from a world of command-and-control to a world of coordinate-and-cultivate (Paquet 1999, 2005a; Malone 2004).

The role of ombudspersons has changed in this new world: i.e., a world where no one is completely in charge; where abuse emerges not from a single source but from a constellation of actors from all sectors who each have a piece of the information, of the power and of the resources; where the source of abuse is diffuse, polycentric and systemic; where consensus is often unattainable; where conflict resolution can only be arrived at by creative compromise, negotiation, and organization redesign; where issues need clarification, bargaining needs to be more effective, and new arrangements need to be experimented and played with; and when the modern democratic ethos seems to encourage failure to confront and political correctness, and therefore to discourage

creative conflict, at a time when creative conflict resolution is becoming crucially important in our bargaining society (Johansen 1979).

In this new context where there are multiple principals and multiple rightholders (Grandori 2004), it is no longer sufficient for the ombuds to act as a shield: to assuage individual mistreatments, and to try to poke at elusive scapegoats. One must also, and more importantly, work to attenuate the malefits of what can only be called the *systemic governance failures* caused by multiple forces through dealing explicitly with their systemic sources. This does not reduce the importance of protecting widows and orphans, and of ensuring that individual wounds are taken care of, but it underlines that the burden of office of ombuds goes beyond these duties. What is required is the capacity to detect governance flaws at the origin of these mishaps, and to help launch the process that will ensure that the governance apparatus is appropriately repaired. The trigger may still be personal damage and complaints, but the answer can no longer be only personal reparation; it must also entail eliciting what might be a plausible and reasonable appreciation of the nature of the dysfunction, and some promising organizational redesign and architectural repairs to the governance apparatus.

The independence, accessibility, informality, cheapness, and speed of the ombudsing process, together with the powers of investigation (*inquiry* may be a better word), and some form of statutory base of operation – all these features make ombudsing better suited to appreciate the new fluid realities, and better prepared to deal with governance failures than the more traditional legal (more rigid) and political (less reliable) processes. This explains why the ombudsing process would appear to be an instrument of choice in the small g governance world.

But all institutions are mortgaged to their past. Righting the wrongs done to citizens by public authorities (or by other potentates) by obtaining reparation, case by case, through meek interventions, has long been the main focus of ombuds' activities. This may explain why, in general, the ombuds have often been slow in recognizing the shift from Big G to small g, and therefore have failed, in many cases, to acknowledge the new important challenges facing them, and have not taken the necessary steps to transform the nature of their capabilities and practice so as to prepare them to perform such a task well.

In the rest of the paper, we first sketch the features of the new environment faced by ombuds, underline the new importance the pathologies of governance at the root of the mishaps they observe daily, surmise that there have been costs attached to the reluctance to delve into these pathologies as forcefully as one might like, and reflect on the inefficiency of the ombuds process as a result of it. Second, this state of affairs suggests that some effort at reinventing the burden of office of ombuds is in order, so we are led to suggest what needs to be done, and in what way, to make bargaining less inefficient, rationality more ecological, and experimentation more likely to be undertaken and to succeed. Some guideposts for this voyal are provided.

From Big G to small g: a tectonic change

We live in an era when the ground is in motion, and on-going interacting economic, financial, technological, social, political and legal change is the key driver. Turbulence is the outcome of this mix of interacting transformational forces. Rosenau has proposed a label to convey the basic nature of this new epoch – *fragemegration*. It draws attention to the joint dynamics of centralization and decentralization, of localizing and globalizing, of fragmentation and integration, that are unleashed in this new world (Rosenau 2003).

(i) *fragemegration*

This is an era of organization-breaking, of weak and failed states, of distributed stewardship: the nation-state and other potentates are losing their dominance. This does not mean that nations disappear or states vanish. But the state is less prominent, and is called upon to play some new, different, and somewhat attenuated roles. Organizational refurbishing is therefore most important (Fukuyama 2004). The institutional tsunami in progress has not yet, however, fully revealed its emergent outcome – the shape of the new type of public sector *en émergence*, for instance.

One thing is sure, however: the boundaries between the private, public, and social (civic) spheres – never well-defined either conceptually or statistically in the former era – do not correspond to a rigid frontier. In the world of governance, they are becoming a wavering and evolving zone of fracture between subsets of organizations and institutions that are characterized by different integrating mechanisms (Paquet 1996-97). Power, resources, and information are being distributed increasingly widely throughout the terrain of private, public, and civic organizations. One of the main challenges for societal governance is to engineer the requisite coordination through *networked ecologies of governance* (Paquet 1995).

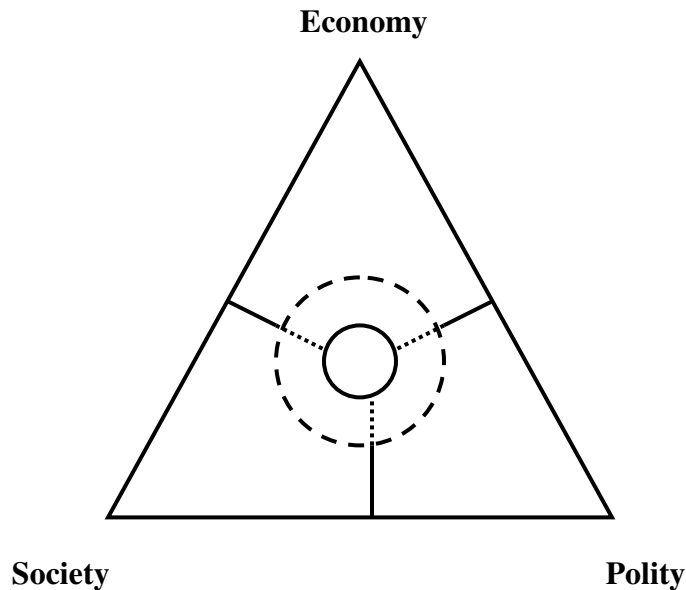
This new fluid institutional reality is made up of three generic ensembles of organizations, dominated by different integrating mechanisms – *quid pro quo exchange* (market economy), *coercion* (polity), and *gift or solidarity or reciprocity* (community and society).

Kenneth Boulding (1970) used a simple triangle as a mapping device – with each of these families of integrating mechanisms in its purest form at one of the apexes, and all the inner territory representing organizations and institutions embodying different mixes of these integrative mechanisms.

There has been a tendency for the new socio-economy to trigger the development of an ever larger number of *mixed* institutions, blending these different mechanisms to some extent (e.g., market-based public regulation, public-private-social partnering, corporate social responsibility etc.) in order to provide the necessary signposts and orientation maps in a new confused and confusing world. This has translated into a much denser filling of of the Boulding triangle: mixed institutions capable of providing the basis for mediation, cooperation, harmonization, *concertation*, and even co-decisions involving agents or

organizations from the three sectors (Laurent et Paquet 1998). One can stylize this development via a series of emerging concentric circles within which there are different degrees of *institutional and organizational métissage* (Hubbard and Paquet 2002). This is depicted in Figure 1.

Figure 1. The Adapted Boulding Triangle



At any one time, a more or less integrated governance pattern coheres people, architecture, routines, and cultures into an arrangement that generates good performance. Such a coherent pattern is rarely unique and permanent as circumstances evolve. Two centrally important characteristics of this process of co-evolution (of the system and its environment) and joint evolution (economy, society, polity) are *resilience* (the capacity for the economy-polity-society nexus to spring back undamaged from the pressure or shock emerging from the environment, through some slight rearrangements that do not modify the nature of the overall system), and *learning* (the capacity to improve current performance, as a result of experience, through a redefinition of the overall objectives; and a modification of behaviour and structures as a result of new circumstances).

These characteristics are in creative tension, since resilience calls for preservation, while learning means change. They must be kept in balance. Managing this tension well demands a capacity to switch to a greater or lesser dependence on one family of integrative mechanisms or another as circumstances change. To cope with an environment that is turbulent and generates surprises, organizations and societies must use their environment strategically in much the same way as the surfer uses the wave to adapt more quickly. This calls for non-centralization for two reasons.

First, because the game of learning is going to generate more innovation if component parts of a system, when confronted with local challenges, are empowered to take decisions on the spot (Naisbitt 1994). In fact, the best learning experience in this kind of world can be carried out through highly decentralized and flexible teams, woven by moral contracts and reciprocal obligations, negotiated in the context of evolving partnerships (Lester and Piore 2004).

Second, because, faced with this type of turbulent environment, organizations can only govern themselves effectively by experimenting, by becoming capable of learning both what their goals are, and the means to reach them *as they proceed*. To do so, as many of the relevant stakeholders as possible must take part in the *conversation*, and bring forward each bit of knowledge and wisdom that each person has, that has a bearing on the issue (Piore 1995).

This is a world in which creative mediation is required, not only to do remedial work for the maligned party *ex post*, but ever more importantly to contribute creatively to identifying the coordination failures at the core of the governance mishaps, and to suggest the sort of organization redesign necessary to prevent such occurrences *ex ante*. The ombuds is ideally located to do this work and to become a genuine producer of governance.

(ii) *coordination: the optimal amount of confrontation is not zero*

The passage from a fully-integrated, command-and-control, hierarchical, someone-in-charge pattern of governance to a more fragmented, horizontal, collaborative no-one-fully-in-charge pattern obviously entails major coordination challenges.

Governance is often defined as effective coordination when power, resources, and information are vastly distributed in many different hands.

While there has been a tendency to search for coordination by shared values and consensus, and to presume that such conciliation might emerge by ‘immaculate conception’, this is a somewhat naïve and romantic point of view. Effective coordination does not emerge organically, or without tension, except in some rare cases. Most of the time, agents and groups have quite different views of the good, and one cannot avoid confrontation in the process of mediation. Indeed, confrontation is a healthy first step in any process of change, and a steady diet of conflicts somewhat happily resolved is more likely to generate trust and better coordination (Hirschman 1995) than the distillation of *consensus mous* (i.e., vague and empty agreements).

This latter route – *consensus mous* – built on a congenital failure to confront, is most likely to generate resentment, misunderstanding and frustration, and to destroy the social capital of trust. One may easily presume that there is something like a quantity theory of angst in any organization or social system (in the way Will Self (1991) suggested that there is a quantity theory of insanity in them), and that if one suppresses much of it in the open field, it is bound to re-emerge in other loci of the organization. So there is a great danger that, in failing to confront as a result of excessive civility or political correctness, ombuds may simply shift the problem to another locus in the organization.

Yet a long tradition of soft mediation has made confrontation somewhat unnatural for many ombuds. Indeed, there has even been a palpable culture of fear to confront, and a reluctance to proceed confrontationally with *inquiries* (a Deweyan word much preferable to the police-sounding word ‘investigations’) aiming at revealing unwarranted assumptions, reprehensible routines, and deep-rooted dysfunctions of organizations.

It is easy to understand why people fear to confront. One naturally fears rejection, ridicule, or potential embarrassment. Indeed, there is a social stigma attached to bullies, or persons regarded as rude, because, like Erasmus, they dare to call a fig a fig and a spade a spade. And this fear to confront is bound to grow when confrontation in a governance context is tantamount to a *remise en question* of many of the parties responsible for or connected with the organizational dysfunction, and not just one.

The result of this failure to confront is more often than not a degeneracy of the inquiry into an irrational commitment to find a ‘quiet resolution at all costs’, and the consequent development of *langue de bois* and *langue de coton* – meaningless discourses aimed at making the problem disappear rather than trying to identify its source clearly, and dealing frontally with it.

Failure to confront entails some form of complicity with and encouragement of improprieties and it is quite destructive. It ensures that bad situations endure, and that social learning is stunted. It might be defended as expedient in terms of costs of transaction in the very short term, but the opportunity costs of such an approach in the long run are enormous, for it allows the root causes of the mishaps to remain unrevealed and the governance repairs not to be done. In a social context where political correctness has become a new civic religion, meek ombudsmanship may lack an appetite to proceed beyond the surface issues to the roots of the problems.

(iii) *inefficiency of bargaining*

Underlining the crucial importance of conflict does not deny that conflict needs to be contained and resolved if it is to generate social learning. This can be done in various ways. But to contain and resolve conflicts, one must understand – as Geoffrey Vickers so aptly says – that “human conflict is an exercise in communication” (Vickers 1973: 146). The challenge is therefore to find the conditions which favor dialogue and deliberation if we want resolution and containment of conflict.

It is naive to hope that such containment will arise as a mechanical result of the restraints and assurances of membership: as the result of an objective appreciation of the common situation, of an objective assessment of the expectations of others, and of an objective gauge of what individuals have learned to expect of themselves as members of the organization or society. This postulates an unbounded omniscience and a pattern of loyalty and mutual trust among the disputants that are unlikely to materialize in a world where not all disputants are hyper-rational, and where they have different notions of the good, and multiple incompatible loyalties (148).

This explains the temptation to confront the issues head on (when one is forced to) by mimicking the game playing of the courts of law, and it is equally naïve. Wallowing in the futile search for a wholly unattainable consensus, on the basis of hard juridical principles, simply kills the urge to craft creative political compromises in response to conflicts at the very time when such creative ombudsing is what is needed.

As Frank Ankersmit put it: “much if not all that is, (from a political point of view) new, unexpected, unforeseen, and unforeseeable will initially present itself in terms of interests not in terms of rights and legal cases. Sometimes it is only thanks to the existence of conflicts that we may become aware that something is awry and needs to be remedied” (2002: 43). The search for “compromises stimulates political creativity, consensus kills it” (39). So, provocatively, Ankersmith argues for “principled unprincipledness” as a way to achieve peaceful coexistence in a society deeply divided on principles (28). Ankersmith’s discussion is consequential for ombuds for it debunks the seductiveness of the juridical model: he reminds his readers that a society attempting to settle juridically issues that are essentially political “may be expected to blind itself to its most urgent problems” (43).

The inescapable road between the equally dead-endish organic emergence of consensus and juridical adjudication is bargaining. In the new world of small g governance, there has been an increasing role for bargaining. But bargaining as a process is particularly diffuse, unstructured, and inefficient, as a result of “the lack of convincing equilibrium solutions and ... the incentives concerning the presentation of claims and the exploitation of power positions” (Johansen 1979: 515).

There is always imperfect information, and incentives to supply biased information. So bargaining is often an inefficient procedure that wastes resources in the process, and fails to realize the potential gains (519). Ombuds can do a lot to attenuate this governance failure.

The ensuing challenges for the ombuds: some hypothetical ways forward

Ombudsmanship is an old and venerable profession, and over the last few centuries it has been value-adding. But in the new small g world, the reduction of the burden of office of ombuds to curative personalized case work, or to quasi-judicial adjudication, can only lead to a trivialization of the ombuds’ work – (1) either through its becoming totally ineffective as a mediation process, and incapable of creatively eradicating the sources of

mishaps or even interested in doing so, or (2) through becoming a mechanical process not unlike human rights commissions – claiming to speak for those who cannot speak for themselves but *de facto* agreeing to uncritically become the defenders of the indefensible by accepting all claims as equally valid, putting them in a garb of rights, and thereby becoming the source of problems rather than solutions..

In both cases, the credibility of the ombuds is under threat.

The only way out of this quandary is greater depth in the inquiry process: accepting the need to tackle the issues *revealed* by the cases head on with an explicit intention to unearth and expose the source of the problem, and to become the architect of better governance arrangements capable of eradicating the causes of the difficulties.

(i) *what needs to be done*

This entails the ombuds becoming less passive and more active, more of an animateur than a moderator, a master of critical thinking, yearning to smoke out the symptoms of dysfunction and capable of tracking down their sources and causes in a confrontational way if necessary. The core concern of ombuds should be to force both the plaintiff and the organization to face assumptions they may not be aware they are making, to contribute, through the ombudsing process, to the emergence of a *super-vision* (Innerarity 2006: 194) that defines and clarifies the nature of the problem in a manner that makes all parties see things that they could or would not be able to see by themselves – thereby teaching both the plaintiff and the organization the value of conflict.

To do so requires the ombuds to be trouble-makers, persons who from the very beginning ask permission to confront, and are allowed to scheme virtuously in order to help the organization evolve (Paquet 2009b). This is the only way for ombuds to avoid being totally absorbed in the particular complaint and its idiosyncrasies, and to get at core underlying issues – what one might regard as the nature of *what the complaint reveals*. This *révélateur* dimension is what should guide the inquiry.

It might reveal nothing more than the emptiness of the charge against the organization: the misconception of a misguided complainant who has confused his/her preferences with a right or a wrong. But it may also reveal a major flaw in the governance of the organization. This revelatory work requires confronting both parties in order to generate an escape from the mental prisons that are preventing both parties from seeing the issue in its totality.

Such bringing forth of a new awareness and a new frame of reference is unlikely to emerge without much critical thinking and some confrontation. Indeed, if mediation were to be banning such confrontation, it would flounder and be incapable (most of the time) of accomplishing anything but myopic and expedient obfuscation – even if the parties were happy with it. In a culture and ethos that loath confrontation and deter it, ombudmanship may find it difficult to generate this sort of value-adding. But if it is not done, the usefulness of the ombuds is certainly likely to be questioned.

(ii) *in what way*

It is quite presumptuous for a layman to suggest to professionals how to do their work. So it should be clear that this is not what is intended here. The intent is only to draw attention to *the perils of over-focalizing on the particulars of cases, without an appreciation of the context*. One can become absorbed in the minutiae and details of the idiosyncratic event as in a black hole. Escaping from this black hole is the central challenge. This can only be done by bringing both the future and the past to bear on the issue: the shadow of the future impact of the sort of resolution of the issue under consideration, and the forces of inertia buried in the history of the organization that must be considered to understand what have been the ‘real’ and fundamental sources of the difficulties.

This is difficult work.

On the prospective side, one wants to ensure that the future is not merrily discounted as pliable, with the unfortunate consequences of the future impact of the impending decision being disregarded in an irresponsible way. *Catastrophisme éclairé* is the name given by Jean-Pierre Dupuy (2002) to the effort to escape from this myopic and triumphalist belief that any unfortunate future consequence can be ignored because it can be corrected in due time. Making the consequences of an impending decision stark and inexorable has an extraordinarily sound impact on the generation of the *super-vision*.

On the retrospective side, one must decipher how some inexorability has grafted itself onto the organization’s experience. What one is after is an historical comprehension of the dynamics of the situation. This calls for a process of reconstruction of the past that has been illustrated by Jean-Marc Ferry (1996) with the use of a novel by Arturo Pèrez-Reverte (The Flanders Panel).

This novel is developed around a painting showing a seigneur and a knight playing chess in full view of the chessboard – a painting produced two years after the death of the knight – on which the painter has inscribed “Who has taken the knight?”. A restoration artist secures the help of a chess master to reconstruct the game from the positions of the pieces on the board in the painting. By a process of elimination of impossible moves, the chess master logically reconstructs the game, and comes to the conclusion that the black queen has taken the knight.

This dual operation of making more visible the inexorabilities of the future, and of reconstructing the processes that have generated the crisis, is crucial if one is to identify what is centrally important for the issue to be resolved, and what it requires in terms of modification to the governance arrangements.

(iii) *in aid of what? – efficient bargaining, ecological rationality, and experimentalism*

The new turbulent context and the new world of work generate a need for evolving arrangements if collaborative governance is to succeed. But such arrangements are unlikely to emerge unless (1) the inefficiency of bargaining is corrected; (2) some standards of ecological rationality (reasonableness, speed, domain-specific fit, matching the context) are ensured in the deliberations carried out; and (3) the requisite amount of experimentation is initiated and underwritten – by agents like ombuds who have the opportunity and the capacity to do so.

The ombuds is, through inquiries, able to correct the problems of incomplete and distorted information, of escalation of threats, and the like. Indeed, this is one of his fundamental contributions to the development of the *super-vision* that will allow all parties to see things they could not or would not see by themselves.

The ombuds is also, through mediation and negotiation, able to guide the process of discussion, not with the view of finding the ‘optimal’ general solution to domain-general problems, but rather of arriving at a plausible domain-specific resolution that meets the minimal requirements of passing the test of reasonableness and matching the circumstances and environment.

At the risk of hurting the sensitivity of ombuds, I would compare them (using an analogy proposed by Gerd Gigerenzer (2001) to explain ecological rationality) to the backwoods mechanic who “has no general-purpose tool nor all spare parts available to him. He must fiddle with various imperfect and short-range tools, a process known as ‘vicarious functioning’ ...He will have to try one thing, and if it does not work, another one, and with step-by-step adjustments will produce serviceable solutions to almost any problem with just the things at hand” (43).

In so doing, the ombuds have ample opportunities to experiment. Their mandates vary considerably, and often remain relatively much more fluid and open than those of other organizational agents. Yet their function has both moral authority and legitimacy, and the office holders are held in high social esteem. The office and office holders are also better equipped than most other officials to inquire in a bold fashion, and to suggest creative ways of dealing with the issues at hand. This is immensely more promising than the two alternative avenues that have tended to be in good currency of late: quasi-judicialization and problem-elimination by empty talks.

As hinted at earlier, ombuds have much to lose by becoming too closely associated with the formal justice system, and its propensity to fall into the manichean habit of seeing everything in black and white, in terms of guilt or innocence, and not at all in terms of organizational redesign and social architecture. It equally has much to lose by becoming known as the locus where problems are simply dissolved, made to disappear, drowned in a sea of talk.

The third way between judicializing and sanitizing palavers focuses on the exploitation of the reconstructive work as a launching pad for the exploration of novel solutions by experimentation: prudent new ways to experiment with new collaborative mechanisms, and to improve the capacity for social learning. This calls for the ombuds to play a key role in smoothing the process of collaborative governance through: (1) the bringing forth of contingent moral contracts as a way to make less intangible the relationships involved in collaborative governance; and (2) the learning-by-doing and doing-by-learning through which these moral contracts are continually modified as problem-handling reveals the need to do so.

Ombudsing is in the business of generating collaborative governance. Collaboration is always contingent: it is built on the tentative premise “I will if you will”, and it does not crystallize instantaneously – it develops in stages. After a period of frustration, when it becomes obvious that one cannot do whatever has to be done alone, a period of experimentation driven by costs-benefits considerations becomes possible. In the second stage, building relations and close monitoring are the order of the day; joint action is tentatively experimented with. In the third stage, increased confidence prevails, organizational memory is built, and the possibility of extending the scope of collaboration is envisaged. Demanding formal arrangements prematurely kills confidence. What is required is the development of loose, flexible, and non-legally-enforceable instruments in the nature of moral contracts (e.g., memoranda of understanding, and the like).

These modifiable moral contracts (Paquet 1992) serve many purposes. First, they embody some mechanism of coordination, some basis for defining agreed-upon representations, some grounds for justification, and some elements to help shape interpretation when some is needed. Second, they serve as a way to anchor, ever so loosely, the basis for monitoring and sanctioning as a foundation for social learning.

Moral contracts and conventions are deliberately elusive and flexible because they need to serve as guideposts only as long as certain circumstances prevail, and to evolve as circumstances change. This calls for reflexive governance – governance that constantly calls into question its own foundations in the light of changing circumstances, triggers constant problem re-definition as experience is accumulated, and even a re-configuration of the very approach to governance. It does not pertain only to the process of self-steering, self-regulation, or self-organization, but it aims at disclosing the process of continual self-renewal and self-creation of the organization (Voß and Kemp 2006: 4; Paquet 2005b: ch.v; Paquet 2009b).

(iv) *by what means? prototyping and serious play*

This is obviously a risky operation as one is entering *terra incognita*, but it would appear to be a risk worth taking, because it provides mediation with a creative and forward-looking edge.

For the time being, there is a vacuum in the whole area of organization design: little time is spent on it, and, when it is done, it is often a job performed with extraordinary incompetence because of the poor understanding of the process of prototyping, and serious play with prototypes that are at the core of social learning (Paquet 2007).

The ombuds accumulates a great deal of experience through the normal activities of responding to complaints, probing different terrains, and experiencing dysfunctions of different sorts. It is possible, through such experience (and those of colleagues worldwide) to identify the characteristics of various issues domains, of the different communities of meaning or communities of fate (i.e., assemblages of people united in their common concern for shared problems, or a shared passion for a topic or set of issues). This is enough to develop a capacity to come up with idiosyncratic workable prototypes to deal with new situations at hand.

A general template likely to be of use across the board may not be available yet, but it does not mean that a workable one cannot be elicited in the face of precise issues (Sabel 2001, 2004).

Prototyping would appear to be the main activity underpinning social learning:

- identifying some top requirements as quickly as possible;
- putting in place a provisional medium of co-development,
- allowing as many interested parties as possible to get involved as partners in improving the arrangement,
- encouraging iterative prototyping, and
- thereby encouraging all, through serious play with prototypes, to get a better understanding of the problems, of their priorities, and of themselves (Schrage 2000: 199ff).

The purpose of the exercise is to create a dialogue (creative interaction) between people and prototypes. This may be more important than creating a dialogue between people alone. It is predicated on a culture of active participation that would need to be nurtured. The sort of playfulness and adventure that is required for serious play with prototypes is essential for the process to succeed (March 1988; Paquet 2009a: 159ff).

Yet one should not underestimate the great deal of reluctance to experiment, to innovate, and to play with prototypes that inhabits most organizations and institutions. Most organizations have considerable capital invested in routine: any transformation is bound to expropriate the privileged positions or advantages of a number of parties.

As a result, change is too often seen as a zero-sum game where everyone presumes that the only possible gains will be to the detriment of other parties. Thus, it is easy to understand why the dice are loaded against change. Very often the potential gains as a result of change remain only potentialities, while the losses are mostly obvious and measurable. What is required is for ombuds to become agents dedicated to break out of this mental prison, and to transform the view of change from a zero-sum game into a positive-sum game perspective.

This opens the way to collaborative exploration and, through experimentalism, rekindles a new form of dynamic solidarity and the emergence of “experimentalist accountability”, (Sabel) through mechanisms of performance monitoring, comparative benchmarking, the pooled experiences of diverse and often rivalrous groups, and practical deliberations focused on the need to respond to urgent problems that call for the mobilizing of some discovery procedure (Sabel 2001).

Conclusion

For the wide-ranging family of ombuds around the world (from the one-person office already under threat, to well-established offices with a robust mandate) this invitation to subversion, and to the production of governance, is bound to be received quite differently.

Some will gauge the gamble too ambitious and dangerous; others will simply state that they are already engaged in this sort of business. Our suggestions are threatening to some and superfluous to others. The central reason for arguing in favor of such action by ombuds at this time is that there is a lack of agents of change engaged in such work in the new world of small g governance. A second reason is that there is a goodness of fit between the ombuds and this sort of job.

There is obviously a need to think through this shift of the profession’s center of gravity very carefully, for, without adequate preparation, an overly aggressive stance or an imprudent invasion of this new realm of activities could be disastrous.

The charge must be led by the more robust agencies, after careful development of their capacities as social engineers. Following that, the executive development activities, and the R&D of the professional bodies of ombuds must be altered in such a way as to help the smaller offices to gain enough capacities to enter this realm of activities with some confidence. Finally, there must be a broad-based communications strategy to prepare partners and clients to accept this broader role. In particular, there will be a need to explain that this in no way threatens the conventional role of ombuds, but rather, bolsters and strengthens it by providing much additional value-adding.

The Forum of Canadian Ombuds could provide the basis for the cumulative collective intelligence and collective memory that is bound to emerge from these experiments: the experiments recorded, and their success or failures acknowledged. This would soon help all ombuds to have access to a pool of innovative experimental technologies of collaboration, prototyped and played with around the globe. Not all of those experiments will be exportable outside of their cultural ethos, but the very process of sharing knowledge about these experiments should inspire imaginative playing with the prototypes experimented elsewhere. In practice, humans learn by refining and extending prototypes: a young child learns the word bird (by being exposed, say, to a robin) and learns to identify other non-prototypical birds by adding flats and sharps to the basic prototype. In the same manner, organizational design prototypes may be imaginatively

extended to be of use in quite different and changing milieux (Johnson 1993; Paquet 2005b: ch vii).

This transsubstantiation of the ombuds entails nothing less than a change in paradigm. Consequently, it is bound to require a revolution in the mind of practitioners: what is proposed is a change in the nature of the ombudsing business as fundamental as the revolution that carried biology from the time when animals were classified by the number of legs, to the world of DNA. For biology, this transition took a long time; in the case of ombuds, what is proposed is that it be attempted in one generation – i.e., a few decades.

For the governance aficionados, *le jeu en vaut la chandelle*. It remains to be seen if the professional ombuds will agree.

Some may regard this sort of facilitation and education mission on the road to collaborative governance as a mission impossible. They have a point. Sigmund Freud used to say that there were three impossible professions – to educate, to cure, and to govern – because they require the collaboration, the complicity of those who are supposed to be on the receiving end of the professional work. One cannot educate without explaining, cure by simple application of recipes, or govern by decree. It can only work as processes of co-production (Innerarity 2006: 193)..

But ombuds have no choice.

Ombudsing is clearly also an impossible profession. Its contribution to collaborative governance cannot be anything less than accompanying the participants in a process of discovery where they could conjure up new perspectives and identify directions that they were previously unable to see. This professional work must start, as Saul Alinsky put it, from where the world is, as it is, not as we would like it to be, working inside the system, getting people to “let go of the past and chance the future”, to take a new step. It is quite difficult for “Dostoevski said that taking a new step is what people fear most” (Alinsky 1972: xix).

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Gilles Paquet is Professor Emeritus at the Telfer School of Management of the University of Ottawa, a Senior Research Fellow at the Centre on Governance and is associated with the Graduate School of Public and International Affairs at the same institution. This is a revised version of the keynote address he delivered at the Joint Ombudsman Conference of the Association of Canadian College and University Ombudspersons (ACCUO), the Forum of Canadian Ombudsman (FCO), and the International Ombudsman Association (IOA) held at Le Reine Elizabeth in Montreal in April 2009.