MANITOBA OMBUDSMAN

2005 Annual Report
Administrative Accountability

Rapport Annuel 2005
Responsabilité administrative

Ombudsman Manitoba

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March 31, 2006

The Honourable George Hickes
Speaker of the Legislative Assembly
Province of Manitoba
Room 244 Legislative Building
Winnipeg MB R3C 0V8

Dear Mr. Speaker:

In accordance with Section 42 of *The Ombudsman Act,* I am pleased to submit the thirty-sixth Annual Report of the Ombudsman for the calendar year January 1, 2005 to December 31, 2005.

Yours truly,

Irene A. Hamilton
Manitoba Ombudsman

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A MESSAGE FROM THE OMBUDSMAN

It is my pleasure to report on the activities of the office for the year 2005. Since my appointment as Ombudsman effective March 31, 2005, my colleagues and I have been making significant changes within our office. I am confident that these changes will allow us to improve our service and be of greater assistance to those who interact with us.

We know that external communication is vital to the work that we do. In order for the public to seek the assistance of the Ombudsman, they need to know about us, what we do and where we are. This annual report is a first step in communicating more effectively with the public. The report is designed to demonstrate what the outcome of our work is and how it relates to the legislative mandate that we have. We are printing a significantly reduced number of copies of the annual report but are distributing it widely in CD format so that we may reach as many people as possible, while keeping costs and paper use to a minimum. We have an annual report committee always on the look out for new and different ideas about the report, including how to make it more informative and accessible. We would appreciate your feedback.

I believe that it is important to meet face-to-face with the individuals responsible for decision making in government. By the end of the year, I had met with each departmental executive management committee in the Manitoba government, but one. I also met with senior officials of the City of Winnipeg. I hope to expand this contact to include municipal officials across the province in order to develop a better understanding of our roles in the democratic exercise in which we are all involved.

The office itself is undergoing change. A challenge commented on in the past was the need for additional resources to do the work. We have made changes that will allow for an assessment of what is needed to complete our work effectively and within reasonable time frames. We have also reallocated management positions within the office to enhance our investigation, and research and education capacity. The organizational chart included in this report demonstrates where our resources were allocated on December 31, 2005.

Internal communication is important in any organization and this has been formalized in our office through regularly scheduled meetings for all staff, the two divisions of the office, the management team and the operational teams. An administrative manual had been drafted and was finalized and published before the summer. It is an excellent tool to confirm office policies and procedures, and also serves as a valuable education piece for new employees joining the office. To enhance the vitality of the document, it is updated and amended by regular newsletters containing new information.

Readers may notice a change in the way we report statistics in the upcoming year. We have changed our definitions of file openings and will no longer report inquiries that do not result in full investigations. This may provide a clearer picture of our work, and the nature of the complaints received by the office.

On a personal note I would like to thank the dedicated people with whom I work for their tremendous assistance to me over the past months, and their dedication to the important work that they do for the people of Manitoba.

THE OFFICE OF THE OMBUDSMAN

ABOUT THE OMBUDSMAN'S OFFICE

The Ombudsman is an independent officer of the Legislative Assembly with broad powers to conduct investigations under *The Ombudsman Act*, and *The Freedom of Information and Protection of Privacy Act* and *The Personal Health Information Act*.

The structure of the Office reflects its two operational divisions:

Ombudsman Division, which investigates complaints under *The Ombudsman Act* concerning any act, decision, recommendation or omission related to a matter of administration, by any department or agency of the provincial government or a municipal government.

Access and Privacy Division, which investigates access to information and protection of privacy complaints and reviews compliance under *The Freedom of Information and Protection of Privacy Act* and *The Personal Health Information Act*.

More information about the Ombudsman's Office can be found on our web site at www.ombudsman.mb.ca.

A copy of the Acts mentioned above can be found on the statutory publications web site at www.gov.mb.ca/chc/statpub/.

BUDGET AND STAFFING

Budget for 2005/2006

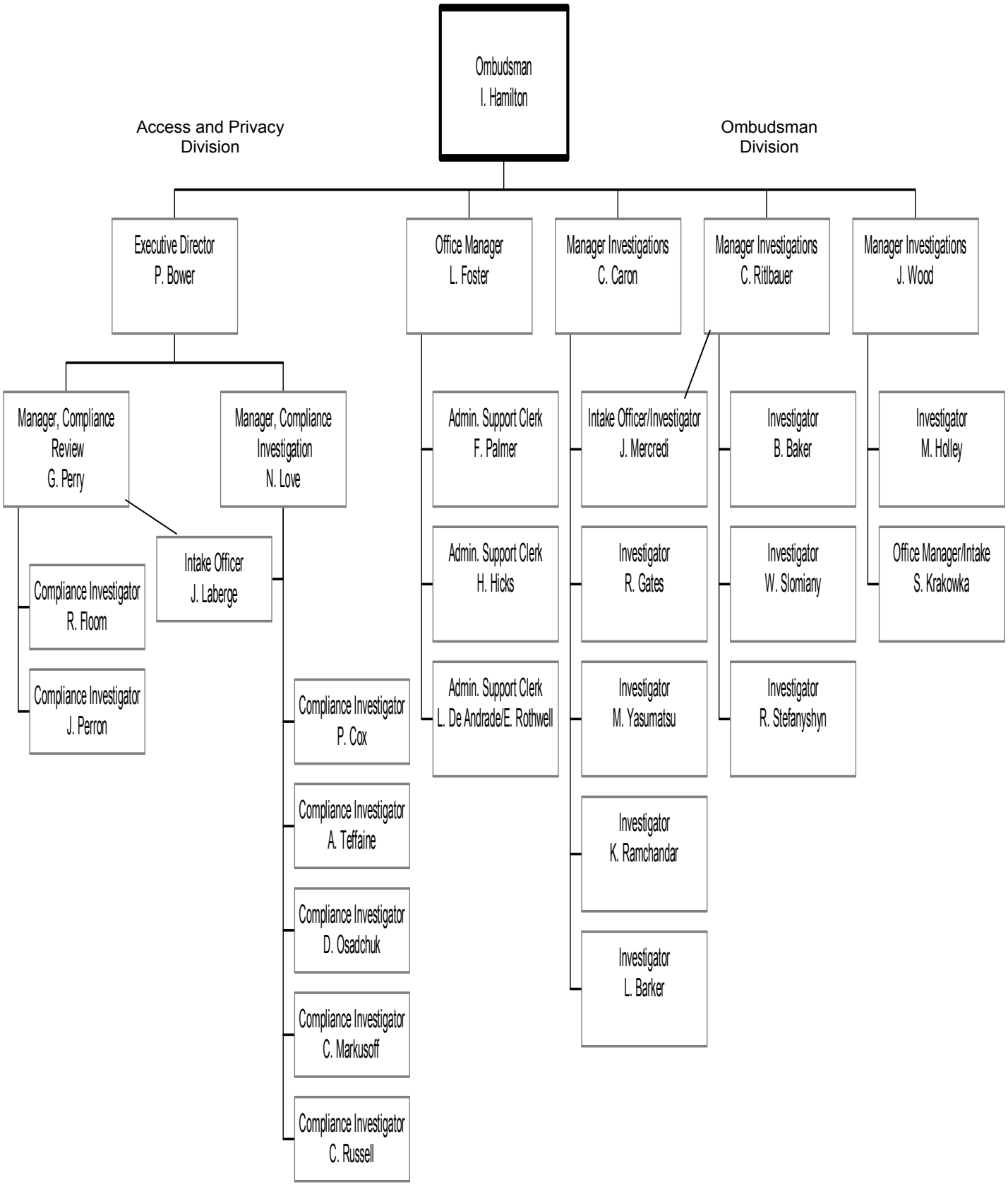
Our budget of $2,476,900 for salaries and other expenditures is broken down as follows:

Total salaries and employee benefits for 29.5 positions (the following are the positions allocated by division)	$2,019,700
- 13 Ombudsman Division	
- 11 Access and Privacy Division	
- 4.5 Administration	
Other expenditures	$457,200

Staffing

Please see the organizational chart on the following page.

ORGANIZATIONAL CHART



ROLE AND FUNCTION OF THE OMBUDSMAN

The Ombudsman investigates complaints from people who feel that they have been treated unfairly by government. She is not a part of any government department or agency, and reports directly to the Legislative Assembly.

The Ombudsman can investigate the actions and decisions of municipal and provincial civil servants, and others who implement and administer government programs and policies, but cannot investigate decisions made by the Legislative Assembly, Executive Council, the Courts or by by-law.

The Ombudsman is responsible for reporting her findings, after conducting a thorough and impartial investigation, to both the government and the complainant. Elected officials are responsible for accepting or rejecting those findings and are accountable to the public. There must be a balance between the power given the Ombudsman to investigate a complaint thoroughly and at arms-length, and the right and responsibility of government to enact and administer laws and policies of its choosing. That balance has been achieved in *The Ombudsman Act* by giving the Ombudsman the power to make recommendations, but not to issue orders.

Because the Ombudsman is an independent officer of the Legislative Assembly, and accountable to the Assembly, people can be assured that her investigations will be neutral. Broad and substantial powers of investigation ensure that her investigations will be thorough.

The Ombudsman's investigative powers include the authority to require people to provide information or documents upon request, to require people to give evidence under oath, and to enter into any premises, with notice, for the purpose of conducting an investigation. Provincial laws governing privacy and the release of information do not apply to Ombudsman investigations. It is against the law to interfere with an Ombudsman investigation.

The Ombudsman has a wide range of options available to her in crafting a recommendation the government may use to correct a problem. After completing an investigation, the Ombudsman can find that the action or decision complained about is contrary to law, unreasonable, unjust, oppressive, improperly discriminatory, or wrong. She can find that something has been done for an improper reason, or based on irrelevant considerations. If she makes such a finding, she can recommend that a decision be reconsidered, cancelled, or varied, that a practice be changed or reviewed, that reasons for a decision be given, or that an error or omission be corrected.

In addition to investigating complaints from the public, the Ombudsman can start her own investigations. She can investigate system wide issues to identify underlying problems that need to be corrected by government, with the hope of eliminating or reducing the public's need to complain about those issues.

JURISDICTION

AGENCY OF GOVERNMENT

The Ombudsman can investigate complaints about any **agency of government**. This includes provincial government departments, crown corporations, and other government entities such as regional health authorities, planning districts and conservation districts. As well, the Ombudsman has jurisdiction over all municipalities.

MATTER OF ADMINISTRATION

The Ombudsman may investigate any **matter of administration.** While *The Ombudsman Act* does not say what "matter of administration" means, the Supreme Court of Canada has defined it as " . . . everything done by governmental authorities in the implementation of government policy . . .".

Most citizens' everyday interaction with government will be with its administrative departments and agencies, rather than with the legislative or judicial branches. Experience tells us that it is in the administration of government programs and benefits and in the enforcement of laws, policies, and rules that most citizens encounter problems or face decisions they feel are unfair or unreasonable. These are the "matters of administration" that a person who feels aggrieved can complain about to the Ombudsman.

RESTRICTIONS ON JURISDICTION

The Ombudsman Act prohibits investigations of decisions by the Legislature and the Courts, imposes restrictions on accepting complaints when there is an existing right of review or appeal, and gives the Ombudsman the power to decline complaints for certain reasons.

The Ombudsman cannot investigate a complaint about an act or a decision for which a complainant has an existing right of appeal or review, unless she concludes that it would be unreasonable to expect the complainant to pursue such an appeal. This can occur in situations when the appeal is not available in an appropriate time frame, or when the cost of an appeal would outweigh any possible benefit.

The Ombudsman may decline to investigate complaints which the complainant has known about for more than one year, complaints that are frivolous or vexatious or not made in good faith, and complaints that are not in the public interest or do not require investigation.

BREADTH OF ACTIVITY

OFFICE OF LAST RESORT

The Office of the Ombudsman may be the last resort for people unhappy with the administration of government. For example, if the law permits an action or a decision that a person finds unfair or unreasonable, redress through the courts may not be an option, or may be cost prohibitive. A person may have exhausted all administrative review or appeal processes without being satisfied that they have been heard or treated fairly. In some cases a complainant may not understand the reasoning behind a decision or the process that has resulted in a decision.

Even in circumstances where the Ombudsman investigates and does not support a complaint, every complainant is given an opportunity to have his or her concerns heard and thoroughly reviewed, and to receive a response. Our goal is to provide every complainant with clear and sufficient information so that they understand the decision or process that has affected them. This may involve reviewing and explaining the legislation, regulation, or policy that underlies a government decision or action or clarifying the process followed or the facts relied upon in making the decision.

FOSTERING BETTER COMMUNICATION

Sometimes the Ombudsman may agree with a decision of government but conclude that the complainant has not been given an adequate explanation for the decision. In such cases the Ombudsman may simply recommend government provide an explanation of the reasons for a decision.

Frequently, the problem at the heart of a complaint can be a simple mistake made by someone in government, or a misunderstanding or poor communication between the parties. In cases such as these our office will try to help the complainant understand a government decision, help the parties come to a mutual understanding or simply bring parties together to deal with the difficult issue.

A case in which we were able to help the parties work jointly to resolve a problem began when a southwestern Manitoba municipality complained about an Order of the Public Utilities Board setting municipal water rates. After the municipality applied for a rate change the Board set rates it determined were appropriate and in the best interests of maintaining the financial health of the utility. The municipality felt that the Board's decision was unreasonable in light of historical billing practices. The municipality said that although it could ask a court to review the Board's decision, this would be too expensive.

In discussions, we learned that the municipality had not taken its concerns directly to the Board. Our office made inquiries on behalf of the municipality and as a result, the Board initiated further discussions with the municipality. The Board subsequently reconsidered the water rate application and issued a new decision, noting that the matter had been brought to its attention after the municipality complained to the Ombudsman.

EXPLAINING A DECISION

An opportunity to assist a complainant understand the legal and policy bases of a decision arose when a woman wrote to our office with questions regarding a school division's obligation to provide students with transportation to school. Although we do not have jurisdiction over school divisions, we noted the complainant had already contacted the provincial education department asking questions about both *The Public Schools Act* and departmental policy. It was clear the complainant was not satisfied with the responses she had received from either the school division or the province.

We obtained information from both the province and the school division clarifying the transportation obligations imposed upon divisions by provincial statute and policy, explained those requirements, and advised the complainant that the school division's practices were consistent with provincial requirements.

Beyond assisting the complainant to achieve a better understanding of the basis for a government decision affecting her, we were able to offer the complainant a neutral and independent perspective on the decision.

REVIEW OF DISCRETIONARY POWERS

Some of the most significant decisions affecting citizens are made not by government employees implementing a policy or program, but by administrative and quasi-judicial boards and tribunals that have been given the power to hear evidence and render decisions upon appeals from members of the public. Such bodies include the Workers Compensation Appeal Commission, the Public Utilities Board, the Residential Tenancies Commission, the Automobile Injury Compensation Appeal Commission, the Taxicab Board, and the Social Services Appeal Board.

There is a difference between a complaint about whether a rule or policy has been followed and a complaint about the exercise of judgment by a decision-making body given the power to exercise its own discretion. The *Act* deals with this difference by imposing a higher threshold test on the Ombudsman when reviewing discretionary decisions.

When considering complaints about administrative or quasi-judicial tribunals, the Ombudsman must first determine if the decision, act, or omission complained about is **clearly wrong or unreasonable**. If the Ombudsman determines that the action ***is*** clearly wrong or unreasonable, the investigation continues. If the Ombudsman determines that the action ***is not*** clearly wrong or unreasonable, she shall stop the investigation.

The fact that a complainant disagrees with a decision by a board or tribunal is not sufficient to warrant an investigation by the Ombudsman. The complaint must allege some procedural defect or flaw in the information before the tribunal.

When asked to investigate complaints about administrative tribunal decisions, the Ombudsman will look first at the administrative process leading up to the tribunal hearing. Investigation will be limited to making inquiries sufficient to determine that participants have been given proper notice; that they have had an opportunity to present their case, or to meet the case against them; and that the tribunal has been impartial. Set out below are some examples of how our office responds to complaints about the decisions of administrative tribunals.

Some administrative tribunal decisions speak for themselves. If we can determine from the decision itself that the tribunal has given proper notice and considered all of the relevant evidence put before it in reaching a decision, it may not be necessary to contact the tribunal. In a case involving the Workers Compensation Board Appeal Commission, a worker disagreed with the Commission's decision but did not allege he had been treated unfairly or denied an opportunity to make his case. He supplied our office with a copy of the Commission's reasons for decision, along with a complete package of the information before the Commission when it made the decision.

From our review of that information, we concluded that he had received proper notice of the hearing and had been afforded a full opportunity to make a case in support of his appeal. We advised the complainant that based on the information he had submitted and in light of our limited authority to review the decisions of administrative tribunals, there would be no further investigation.

In another complaint about the Workers Compensation Appeal Commission, the complainant took issue with the fact that the Commission had attached greater weight to the findings of the WCB medical advisor than to the opinion of his own specialist. He was also concerned that the Commission preferred the WCB advisor's opinion to that of his regular physician, whom he felt would better understand his medical history and condition than a medical advisor who had examined him only once.

In the course of our investigation, we learned that medical advisors frequently provide opinions on various medical matters based on a review of a worker's file. When a WCB medical advisor examines a patient, he or she will thoroughly review all of the information on the file prior to the examination. While a medical advisor may only physically examine a worker once, he or she will have the benefit of reviewing all of the medical reports prior to expressing an opinion.

Our investigation confirmed that the Appeal Commission panel was aware of the differing views of the complainant and the Board's physicians and considered them both before reaching its decision. The panel's decision was that the evidence, on the whole, favoured the

position of the Board. There was no question in this case that while the Commission attached greater weight to the medical advisor's opinion, it did review and consider all of the opinions.

The weighting of evidence is clearly a matter within the sole discretion of the tribunal. We advised the complainant we were satisfied that he had been given an opportunity to present his case, and therefore we were unable to conclude that the decision was clearly wrong or unreasonable.

Administrative and quasi-judicial tribunals are not intended to be courts of law. The formal rules of evidence followed in the courts are frequently relaxed and citizens often represent themselves. Presenters, applicants, and objectors alike often have to speak to legal questions and deal with technical or expert evidence. Many citizens invest significant time and effort in researching both the hearing process and the specific issues to be addressed at a hearing. The result can often benefit both the presenter and the tribunal. At the same time, presenters can develop strong opinions about the merits of evidence and about questions of legal interpretation.

Such was the case when a City of Winnipeg committee held a hearing to consider a zoning variance allowing an applicant to build a pigeon aviary. A neighbour of the applicant complained to our office that the committee had not followed proper procedure. He first raised the threshold issue of whether there had been a quorum. A section in the appeal committee's procedural by-law set out how many committee members were needed to constitute a quorum. It also set out the reasons member could be absent and the meeting could still go on. The complainant disagreed with the appeal committee's interpretation of this section, arguing it meant something different.

Although two members of the three-person committee had been present, the complainant felt that the committee should not have proceeded because the absent member was away for a reason not specified in the by-law. We noted, however, that a specific provision in the same by-law stated that a quorum consisted of the majority of the members of any committee. On that basis we supported the position taken by the City.

The complainant also took issue with the City's interpretation of the word "premises" in its Pigeon Control by-law. This by-law states how far from any premises one can build a pigeon aviary. Based on our own review of the City's interpretation, and the express wording of the by-law, we again agreed with the City's position. Part of the difficulty with the complainant's position was that he had found support for his interpretation of the word "premises" in another City by-law, one that was not relevant to his issue but which enhanced his belief he was correct.

Finally, the complainant felt the appeal committee had not considered the impact the aviary might have on his health. The complainant felt he had made a strong presentation about the danger arising from airborne diseases that can be transmitted by pigeons. However, there was an opinion from the Medical Officer of Health for the Winnipeg Regional Health Authority stating that the aviary did not pose a health risk to any area residents. The complainant disagreed with this expert medical opinion, based on information from his own doctor and because of information from the Internet. Having confirmed that the appeal committee had considered all of the information before it we advised the complainant that, despite evidence supporting his position and his strong belief in that evidence, there was no basis for the Ombudsman to conclude that the committee's decision was clearly wrong or unreasonable.

In another case a complainant alleged that the Residential Tenancies Commission failed to consider evidence submitted in support of his position at an appeal hearing. The basis for his assertion was that this evidence was not mentioned in the Commission's written decision. This is an issue which our office has considered in the past. The fact that a decision does not specifically respond to or comment upon evidence a complainant believes is important does not mean the tribunal did not consider it. Rather, the tribunal did not find the evidence sufficiently persuasive to form the basis of its decision.

A tribunal decision does not have to reflect or comment on all of the evidence tendered. It is not unusual for decisions to reflect only, or primarily, the evidence relied upon to reach a conclusion. We found that the complainant had been given a full opportunity to present his position and supporting evidence. We advised him that we could not conclude that the decision was clearly wrong or unreasonable.

CASES OF INTEREST

PLACE OF SAFETY DESIGNATION

In previous annual reports our office has commented on the provincial practice of designating the Manitoba Youth Centre as a "place of safety" for youth under *The Child and Family Services Act*. We have consistently taken the position that the utilization of jail and police cells to house children who need assistance because of child welfare concerns is not acceptable and correctional facilities are not suitable as designated places of safety.

We understood that the designation of the Manitoba Youth Centre as a place of safety was a last resort after careful consideration of available options. Nevertheless, our position remained that designating any correctional facility as a place of safety for youth was unacceptable.

In 2004 we advised the department that our office believed this practice infringed or denied individual rights guaranteed under sections 7, 9 and 10 of *The Canadian Charter of Rights and Freedoms,* and was contrary to provisions of *the United Nations Convention on the Rights of the Child* and the *Convention Against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment.*

In 2005, the province ended the practice, based on concerns raised by our office, and on the advice of legal counsel.

When advising child welfare agencies that the practice was to cease the Child Protection Branch noted that "The Ombudsman's concern is that the use of correctional facilities violates… the Charter of Rights and Freedoms, and … the United Nations Convention On The Rights Of The Child. The Act [The Child and Family Services Act] does not contain criteria for designating correctional facilities places of safety nor does it have procedures for placing a child in need of protection in such a facility. Therefore it does not provide the necessary statutory authority to designate a correctional facility as a place of safety".

The province must be commended for taking this step to improve the treatment of children who, through no fault of their own, find themselves in need of protection.

USE OF RESTRAINT CHAIR

An inmate at the Winnipeg Remand Centre (WRC) complained to our office after he was held naked in a restraint chair for approximately six hours. Our investigation revealed that the observation log used by correctional officers to confirm periodic checks of the restrained inmate's well being was not fully completed. Because of the lack of documentation, we were unable to conclude that the correctional facility had followed its own policy. While the WRC suggested that the inmate was held for this continuous period of time due to his non-compliant behavior, the observation log contained no description of behavior demonstrating the ongoing need to use the restraint chair for the extended period.

The WRC was advised of our findings and subsequently informed us that institutional policy would be revised and non-compliant behavior by an inmate would be documented on the prescribed form. Further, future use of the restraint chair will be reviewed by a Review Panel in order to promote policy compliance and to serve as a quality assurance measure. Finally, training on the use of the restraint chair will continue to be offered to the staff. It is hoped that this initiative may prevent instances of correctional staff failing to meet policy requirements in the future.

UNJUSTIFIED ARREST

A woman complained to our office that she had been arrested by a municipal police officer because of a complaint made by her ex-husband, an officer in the same police service.

The facts giving rise to the charge were not in dispute. Subsequent to a separation and a Consent Final Order of the Court of Queens Bench, the woman's ex-husband deposited money into an account jointly held with her. Sometime after that she transferred the money from that account to an account in her name. Upon learning of the transaction the complainant's ex-husband contacted his lawyer who wrote the woman's lawyer advising that unless the money was returned he would commence legal action. While negotiations between counsel were ongoing about the source of the money and the woman's entitlement to it, her ex-husband filed a complaint with police service for which he worked, alleging theft.

Upon learning of the complaint, the woman's lawyer advised the investigating officer that the removal of the money could not have been theft as it was removed from a joint account. The

investigating police officer felt however that the charge was warranted because the Consent Final Order stipulated that all assets in possession of either party be free from claim by the other.

Our investigation disclosed that the money had not been in the ex-husband's possession when the woman took it. Undisputed evidence demonstrated that after the separation was final, the ex-husband deposited it into a joint account from which the woman was entitled to withdraw it without his consent. There was no theft and therefore no basis for a charge of theft. Ultimately, the Crown Attorney stayed the charge.

The woman felt particularly aggrieved by the fact that the police had fingerprinted and photographed her, which she felt was unnecessary and humiliating. As well, the day the woman was arrested, her lawyer advised the arresting officer that, as a result of negotiations, the money would be returned. Nonetheless, even after learning this, the officer arrested the woman at her workplace. The arresting officer, an experienced sergeant, did not discuss the case with a Crown Attorney before laying the charge, nor did he consult with any higher-ranking officer within the police service. This seemed imprudent under the circumstances.

Upon being advised of our investigative findings, the Chief of Police agreed that the woman should not have been charged and apologized to her in writing. In light of the written apology we considered the matter resolved successfully.

PROVINCIAL STATUTE ENFORCEMENT

Two lengthy investigations that concluded in 2005 demonstrated the difficulty people can have when seeking enforcement of provincial statutes, and the significant consequences that can result from the government's failure to enforce its own laws.

In a case we reported previously, Manitoba Conservation failed to take appropriate action in response to complaints about unlicensed drainage. The complainants felt the province was aware of the drainage, and in two instances had either condoned or participated in projects which damaged their property. The complainants first took their concerns to Conservation in 1997 and to our office at the end of 1999.

In 2003, the department (now Water Stewardship) accepted an Ombudsman recommendation to compensate the complainants, and at the end of 2005 the parties were actively negotiating the amount of that compensation.

In 1997, the complainants had expected that there would be prompt investigation by the authorities, followed by appropriate intervention to prevent further harm and orders for remedial action. This was not an unreasonable expectation. However, the department failed to investigate the complainants' concerns adequately or to take enforcement action in a prompt and appropriate manner. The result is that the government of Manitoba is now negotiating a compensation package based in large part on its failure to adequately respond to a request for enforcement and to exercise the statutory authority that it had in law under *The Water Rights Act*.

It is unfortunate that the department did not compel the people primarily responsible for illegally flooding the complainants' lands to cease the flooding or to undertake the necessary remedial works. That failure resulted in further damage and necessitated an Ombudsman recommendation for compensation, payment for which has now become the responsibility of all Manitobans.

A second Manitoba Conservation case involved a complaint by a neighbour about a fellow cottage owner adding buildings to privately owned property in a provincial park, without having the necessary permission or following the rules about how and where cottagers are allowed to build. The proposed buildings interfered with the neighbour's ability to enjoy his own property.

In May of 2001, Conservation asked the owner to voluntarily stop building. The owner refused and, after all available appeals had been exhausted, Conservation issued an Order in February of 2002 pursuant to *The Provincial Parks Act* for the removal of the unauthorized development (construction) which impacted upon the neighbour's property. A site visit by Conservation staff in November of 2002 showed that while the owner had taken some remedial measures, there had not been full compliance with the Order. As well, the visit revealed that there had been further unauthorized development.

Conservation wrote to the owner stating that there must be full compliance with the Order by December 31, 2002 and that failure to comply would result in Conservation doing the required work at the owner's expense. From January 2003 until June 2004 the department made efforts to resolve this matter through legal counsel. However, it was not until January 2005 that Conservation confirmed the owner had finally complied with the February 2002 Order.

The further unauthorized work Conservation had found in November of 2002 still remained. In July of 2005, Conservation issued an Order requiring its removal. The owner did not comply with this second Order and Conservation staff had to undertake the necessary work (removing a deck and sheds) in September 2005.

Conservation stated that among the factors contributing to "…what might be perceived as an extraordinary amount of time for enforcement actions required…" were:

- the expectation of voluntary compliance;
- decisions to provide every opportunity and more than reasonable time frames for voluntary compliance;
- staff changes leading to a loss of historical knowledge and delay;
- the involvement of legal counsel; and,
- additional due diligence required by staff when dealing with private property.

It took four and one-half years to achieve enforcement in this case. While it would be inappropriate, in hindsight, to offer critical comment on the factors guiding the department's approach, it is appropriate to expect that such matters will be handled more efficiently and expeditiously in future.

These two cases demonstrate the importance of having clear and enforceable provisions to deal with breaches of statute law, and a department willing to use them. It is essential that the Province takes violations of provincial statutes seriously and, moreover, has the means, the staff, and the will to do what is necessary to ensure compliance. The Province's response in these two cases was inadequate. In both cases the results were frustrating for the complainants and costly for Manitobans.

PUBLIC AWARENESS

When investigating specific complaints our office frequently identifies information that we believe should be brought to the attention of the public. While this information may already be available from or distributed by a department or agency, highlighting this information can only enhance public understanding. In 2005 information of general interest arose in several files involving Manitoba Public Insurance (MPI). Each year MPI provides automobile insurance to hundreds of thousands of Manitobans.

OBLIGATION TO DISCLOSE INFORMATION

In two files, MPI denied the claims of customers, stating that they were not entitled to coverage because they were not residents of Manitoba at the time they purchased insurance. There was no dispute that at the time of the accidents the individuals were not residents of Manitoba. The issue under consideration was the extent to which MPI was responsible for the actions of its agents. In both cases it appeared that the Autopac agents knew, or should have known, that the individuals were not eligible to purchase automobile insurance from MPI.

In one case, MPI acknowledged that "the brokers actions were far outside accepted practice and outside the operating agreement that is in place between brokers and Manitoba Public Insurance. There is sufficient evidence that the broker knew, or should have known, that [the complainant] was not a Manitoba resident and chose to renew his registration and insurance regardless. As such Manitoba Public Insurance is not bound by the actions of the broker."

In the second, case MPI documentation indicated it was aware that "the broker clearly failed to follow established procedures. It was clear as well that the information provided to the broker should have resulted in further inquiries being made to determine whether or not the policy should have been sold."

In both cases, MPI acknowledged that if the agents had been more diligent and further investigated the information provided, the actual circumstances of the claimants' residencies may have surfaced when they applied for Manitoba registration and insurance rather than when their claims were reported and then investigated. MPI asserted, however, that any deficiencies on the part of its agents did not change the fact that the complainants were not Manitoba residents and not entitled to register in Manitoba.

MPI also noted that both the Autopac program and Manitoba vehicle registration procedures place the responsibility on the applicant to tell the truth. Applicants are expected to be forthright and honest when providing information. In both cases there were differing opinions about whether the complainants had been sufficiently forthcoming or had deceived intentionally in order to obtain coverage.

While the Ombudsman did not necessarily agree with MPI's assessment of the complainants' intent, the evidence did demonstrate that neither the agents nor the complainants had fulfilled their obligations. There was merit to MPI's position that any errors by its agents should be referred to the agents' insurers, not MPI, as all agents must have insurance for errors or omissions. As to the complainants, MPI maintained that their failure to make the required complete disclosure rendered them ineligible for coverage.

These cases demonstrate two critical points for people who want to maintain their coverage while out of the province. Firstly, it is essential that applicants give MPI complete and accurate information. Secondly, the fact that an MPI authorized agent has issued a policy does not mean necessarily that MPI will provide coverage for an accident.

OUT OF PROVINCE CHARGES

A Manitoba driver was charged in another province with violating that province's *Highway Traffic Act*. For a number of reasons, including the fact that the violation carried a relatively insignificant penalty in that province, the driver did not contest the charge. However, when the conviction was registered in Manitoba, it resulted in a significant number of demerit points on his licence and an increased licence fee. At this point it was too late to appeal the conviction. The driver contacted our office after he had grown frustrated in his efforts to obtain either relief or satisfactory explanation from anyone in Manitoba.

The central point of the complaint was that the conviction resulted in significantly more points in Manitoba than it would have in the province that convicted him. The driver felt this was unfair. We had several discussions with Manitoba Public Insurance and also did our own research into the authority for importing convictions from other jurisdictions.

Highway traffic laws are not the same in every province. When importing a conviction the Registrar must identify an equivalent section from *The Highway Traffic Act* of Manitoba. The number of demerit points assessed is based upon that equivalent section. In this case we reviewed the two relevant statutory provisions from the different provincial Highway Traffic Acts and found that the section used to assign demerits in Manitoba was in fact very similar to the section under which the individual was convicted in the other province. The difference arose in that Manitoba chose to impose significantly more demerit points for such a conviction.

While the complainant felt the penalty was too harsh, we understood that this was a clear public policy choice made by our government and set out in Regulation. The driver had not been treated differently than any other motorist in similar circumstances, nor had the Regulation been applied improperly. We provided the driver with an explanation of the authority for importing convictions from other jurisdictions and awarding demerit points based on those convictions. We reported our findings and analysis and advised him that the Ombudsman would not make a recommendation in respect of his complaint.

STANDARD OF PROOF

A driver involved in a two-vehicle accident at an intersection was charged with Disobeying a Traffic Control Device and Driving Imprudently under *The Highway Traffic Act*. Manitoba Public Insurance found the driver fully responsible for the accident, based on a witness' statement that the complainant "was running a red light". The driver appealed the assessment of liability to an independent adjudicator but lost.

The driver contested the charges under *The Highway Traffic Act* and the charges were stayed. In light of the stay of proceedings, the driver requested a second adjudication. He provided, as further information, the transcript of evidence from the court hearing that resulted in the charge being stayed. Again, the adjudicator upheld MPI's assessment of liability. At that point the driver complained to our office.

In response to our inquiries Manitoba Public Insurance explained that the standard of proof used by the courts with respect to *Highway Traffic Act* charges is "beyond a reasonable doubt", the standard for criminal cases. The standard used to determine liability is a "balance of probabilities", the civil standard. MPI's position was that because of these different standards

of proof, a stay of proceedings or a finding that someone is not guilty of a *Highway Traffic Act* charge does not mean that the person will not be held liable for an accident.

In this case, there was enough evidence for MPI to have reasonably concluded that, on a balance of probabilities, the complainant was responsible for the accident. Our office declined to make a recommendation in respect of this complaint.

EMERGING ISSUES

UNLICENSED DRAINAGE

Unlicensed drainage issues remain a significant concern in western Manitoba. Recent investigations confirm that the provincial response to these concerns has not always been adequate. In response to ongoing demands from the public for better enforcement the department has announced that it will amend legislation to strengthen enforcement powers in 2006.

In a pilot project in western Manitoba, the province transferred much of the responsibility for drainage to a conservation district. This project worked well for licensing because the conservation district was able to quickly meet with all affected parties and bring local knowledge to bear when considering drainage applications. It broke down when enforcement was necessary and neither the conservation district nor the province was able to assign the staff necessary to carry our enforcement action.

In 2005 many conservation districts began developing the Watershed Management Plans that will be required by *The Water Protection Act*. Some districts have identified enforcement against unlicensed drainage as a priority but have taken the position that this remains a provincial responsibility.

In December of 2005 the Minister of Water Stewardship announced amendments to *The Water Rights Act* to enhance existing enforcement powers for dealing with unlicensed drainage, including increased fines for breaches of the *Act*.

The adequacy of the proposed changes and the extent to which Water Stewardship can coordinate its efforts with those of conservation districts is an emerging issue that we will monitor in 2006.

MUNICIPAL PLANNING

A number of complaints investigated in 2005 raised concerns about the relationship between municipal governments and planning districts.

Municipal councils share and rely upon staff from planning districts for technical support and expertise. In one case, citizens concerned about a proposed nearby hog barn complained to our office that they were denied the opportunity to participate in a municipal hearing because of inadequate notice given by a planning district. In the same case there was a clear indication of conflict of interest when a municipal councillor voted on a matter from which he should have excused himself.

In a second case both a reeve and councillor engaged in inspection and enforcement activity that should have been left to planning district staff, whose enforcement decisions may be appealed to the municipal council on which the reeve and councillor sit.

These cases indicate that there needs to be a better understanding of the different responsibilities of planning districts and municipal councils when dealing with matters in which they are both involved, but have clearly distinct functions. In both cases, municipal and planning district staff had access to provincial planning staff from Manitoba Inter-governmental Affairs. It is essential that these three levels of government be clear about the role and function of each, and better coordinate their activities.

Amendments to *The Planning Act* took effect on January 1, 2006. Some of the proposed changes should improve the planning process, but improvements in procedural fairness and administrative efficiency may depend more on provincial efforts to coordinate activities and educate municipal participants than on changes to the law itself.

2005 STATSTICAL SUMMARY

Set out above has been a description of the role and function of the Ombudsman, and some selected case summaries along with other information and issues of interest demonstrating the work we do.

The statistical table that follows provides an overall picture of the work done by our office in 2005 in terms of cases opened and the disposition of cases closed.

The contacts with our office were as follows:

Carried over into 2005	303
New cases in 2005	718
Total cases in 2005	1021
Total cases closed 2005	774
Pending at December 31, 2005	247

Of the 774 cases closed in 2005

20% were resolved;

5% were partially resolved;

5% were concluded after assistance was given;

27% were concluded after information was supplied;

28% were not supported;

13% were discontinued either by the Ombudsman (5%) or the client (8%);

2% were declined.

CASES OPEN IN 2005 AND DISPOSITION OF CLOSED CASES

Department or Category	Carried over into 2005	New cases in 2005	Total cases in 2005	Pending at Dec. 31, 2005	Asst. Rendered	Declined	Discont'd (Client)	Discont'd (Omb.)	Info. Supplied	Not Supported	Partly Resolved	Resolved	Recomm.
PROVINCIAL GOVERNMENT DEPARTMENTS	**185**	**498**	**683**	**178**									
Aboriginal & Northern Affairs	**-**	**3**	**3**	**3**									
General	-	2	2	2	-	-	-	-	-	-	-	-	-
Ombudsman's Own Initiative-OOI	-	1	1	1	-	-	-	-	-	-	-	-	-
Advanced Education & Training	**1**	**5**	**6**	**3**									
General	1	4	5	2	1	-	-	-	1	1	-	-	-
Ombudsman's Own Initiative-OOI	-	1	1	1	-	-	-	-	-	-	-	-	-
Agriculture, Food & Rural Initiatives	**5**	**4**	**9**	**3**									
General	4	-	4	-	-	-	1	-	-	3	-	-	-
Manitoba Crop Insur. Corp.	1	4	5	3	-	-	-	-	-	1	1	-	-
Civil Service Commission	**1**	**2**	**3**	**1**	-	-	-	-	1	1	-	-	-
Conservation	**27**	**21**	**48**	**25**									-
General	21	11	32	17	-	1	1	-	4	5	1	3	-
Water Stewardship	6	10	16	8	-	1	-	-	4	3	-	-	-
Culture, Heritage & Tourism	**2**	**2**	**4**	**2**	-	-	1	-	-	-	-	1	-
Education, Citizenship & Youth	**4**	**5**	**9**	**2**									
General	2	4	6	1	-	-	1	1	-	1	-	2	-
Ombudsman's Own Initiative-OOI	2	1	3	1	-	-	-	-	-	-	-	2	-
Family Services & Housing	**27**	**92**	**119**	**29**									
General	1	6	7	3	-	-	-	-	2	1	-	1	-
Child & Family Services	13	21	34	8	2	-	5	2	10	3	3	1	-
Employment & Income Assistance	5	42	47	9	-	-	5	2	9	12	2	8	-
Manitoba Housing Authority	3	17	20	4	-	-	1	-	5	4	1	5	-
Social Services Advisory Brd.	-	5	5	1	-	-	-	-	1	2	-	1	-
Ombudsman's Own Initiative-OOI	5	1	6	4	-	-	-	1	-	-	-	1	-
Finance	**11**	**32**	**43**	**9**									
General	2	6	8	1	-	-	-	2	3	1	-	1	-
Automobile Injury Compensation Appeal Com.	2	5	7	2	1	-	-	-	1	3	-	-	-
Residential Tenancies Br.	4	15	19	5	-	-	-	-	10	4	-	-	-
Residential Tenancies Com.	2	5	7	-	-	2	-	-	3	2	-	-	-
Securities Commission	1	1	2	1	-	-	-	-	-	1	-	-	-
Health	**20**	**51**	**71**	**22**									
General	8	13	21	5	-	-	2	-	6	4	2	2	-
Mental Health	5	23	28	2	-	-	5	1	6	12	-	2	-
Regional Health Authority	2	11	13	3	2	-	-	-	3	2	2	1	-
Ombudsman's Own Initiative-OOI	5	4	9	5	1	-	-	-	-	-	-	3	-

Department or Category	Carried over into 2005	New cases in 2005	Total cases in 2005	Pending at Dec. 31, 2005	Asst. Rendered	Declined	Discont'd (Client)	Discont'd (Omb.)	Info. Supplied	Not Supported	Partly Resolved	Resolved	Recomm.
Intergovernmental Affairs & Trade	**2**	**2**	**4**	**2**									
General	1	2	3	1	-	-	-	1	1	-	-	-	-
Ombudsman's Own Initiative-OOI	1	-	1	1	-	-	-	-	-	-	-	-	-
Justice	**72**	**260**	**332**	**75**									
General	6	14	20	9	-	-	2	1	5	1	-	2	-
Agassiz Youth Centre	-	3	3	-	1	-	1	-	-	1	-	-	-
Brandon Correctional Centre	2	51	53	13	-	-	2	1	9	21	1	6	-
Dauphin Correctional Centre	-	2	2	-	-	-	1	-	1	-	-	-	-
Headingley Correctional Ctr	11	46	57	8	2	-	3	-	6	11	1	26	-
Milner Ridge Correctional Ctr	2	11	13	-	-	-	1	-	-	2	2	8	-
The Pas Correctional Centre	-	9	9	4	-	-	-	-	-	2	-	3	-
Portage Correctional Centre	1	15	16	3	-	-	-	-	2	8	1	2	-
Winnipeg Remand Centre	7	41	48	3	1	-	11	-	10	8	2	13	-
Maintenance Enforcement	9	15	24	7	1	-	3	-	3	6	2	2	-
Human Rights Commission	3	10	13	4	-	-	1	2	2	3	-	1	-
Legal Aid Manitoba	-	5	5	-	1	-	-	1	1	2	-	-	-
Public Trustee	11	19	30	3	-	-	4	3	4	5	8	3	-
Manitoba Youth Centre	-	6	6	4	1	-	-	-	-	-	-	1	-
Ombudsman's Own Initiative-OOI	20	13	33	17	1	-	-	1	1	1	-	12	-
Labour & Immigration	**6**	**8**	**14**	**3**									
General	1	4	5	2	-	-	-	-	-	1	-	2	-
Manitoba Labour Board	3	3	6	-	-	-	-	-	3	3	-	-	-
Ombudsman's Own Initiative-OOI	2	1	3	1	-	-	-	-	-	-	-	2	-
Legislative Assembly	**-**	**1**	**1**	-	-	-	-	-	1	-	-	-	-
Transportation & Government Services	**7**	**10**	**17**	**6**									
General	7	9	16	5	1	-	1	-	4	4	1	-	-
Ombudsman's Own Initiative-OOI	-	1	1	1	-	-	-	-	-	-	-	-	-
BOARDS & CORPORATIONS	**64**	**109**	**173**	**37**									
Workers Compensation Board	**9**	**14**	**23**	**7**	1	-	2	2	7	2	-	2	-
WCB Appeal Commission	**2**	**15**	**17**	**5**	1	-	-	-	4	7	-	-	-
Corp. & Extra Departmental	**53**	**80**	**133**	**25**									
General	1	3	4	-	-	-	-	-	-	2	-	2	-
Manitoba Hydro	9	6	15	1	6	-	1	1	1	3	-	2	-
Manitoba Lotteries Corp.	1	-	1	-	-	-	-	-	1	-	-	-	-
Manitoba Public Insurance	42	71	113										
General	39	67	106	23	4	2	3	11	24	24	4	9	2
Driver & Vehicle Licencing	3	4	7	1	-	-	-	1	1	4	-	-	-

Department or Category	Carried over into 2005	New cases in 2005	Total cases in 2005	Pending at Dec. 31, 2005	Asst. Rendered	Declined	Discont'd (Client)	Discont'd (Omb.)	Info. Supplied	Not Supported	Partly Resolved	Resolved	Recomm.
MUNICIPALITIES	**53**	**75**	**128**	**30**									
City of Winnipeg	**27**	**26**	**53**	**12**									
General	1	2	3	2	-	1	-	-	-	-	-	-	-
Community Services	2	2	4	-	-	-	-	-	1	2	-	1	-
Corporate Finance	6	5	11	3	2	-	-	-	1	2	-	3	-
The Board of Trustees of the Wpg Civic Employees' Benefits Program	-	1	1	1	-	-	-	-	-	-	-	-	-
Fire Paramedic Service	1	-	1	-	-	-	-	-	1	-	-	-	-
Planning, Property & Dev.	7	7	14	2	-	-	-	-	6	6	-	-	-
Property Assessment	1	2	3	-	-	-	-	1	2	-	-	-	-
Public Works	1	1	2	-	-	-	-	-	1	-	1	-	-
Water & Waste	1	3	4	1	1	-	-	-	-	1	-	1	-
Winnipeg Police Service	3	1	4	-	1	-	-	-	2	-	-	1	-
Ombudsman's Own Initiative-OOI	4	2	6	3	-	-	-	-	-	-	-	3	-
Other Municipalities	**26**	**49**	**75**	**18**	4	3	3	5	11	16	1	14	-
NON-JURISDICTIONAL	**1**	**36**	**37**	**2**									
Federal Departments & Agencies	-	8	8	2	-	-	1	-	5	-	-	-	-
Private Matters	1	27	28	-	1	4	-	-	21	1	-	1	-
Revenue Canada	-	1	1	-	-	-	-	-	1	-	-	-	-
TOTAL CASES	**303**	**718**	**1021**	**247**	**37**	**14**	**62**	**40**	**212**	**215**	**36**	**156**	**2**

At December 31, 2004 there were 303 cases still pending:

- 215 cases were carried into 2005 from 2004
- 52 originated in 2003
- 18 originated in 2002
- 7 originated in 2001
- 9 originated in 2000
- 2 originated in 1999

We closed 245 or 81% in the year 2005. At December 31, 2005 there were 58 cases still pending:

- 32 originated in 2004
- 11 originated in 2003
- 5 originated in 2002
- 5 originated in 2001
- 4 originated in 2000
- 1 originated in 1999

The categories used in this table are explained on the following pages.

CASES AND THEIR DISPOSITIONS

Assistance Rendered – Provided assistance to the complainant by giving appropriate referrals.

Declined – No action has been undertaken. The complaint may be clearly outside the Ombudsman's jurisdiction and no referral appears possible or appropriate. The Ombudsman may also decline because the complaint relates to a matter concerning which the complainant has had knowledge for more than one year before bringing it to the Ombudsman; or because the complaint is frivolous, trivial, vexatious or not made in good faith; or because upon a balance between the public interest and the person aggrieved it should not be investigated; or because, in the Ombudsman's opinion, the circumstances of the case do not require investigation. When a complaint is declined, the function of the office is usually clarified for the complainant.

Discontinued (Client) – Here some action has been commenced and at some point the complainant abandons the case or requests that we not investigate further.

Discontinued (Ombudsman) – In this situation some action has also been undertaken and at some point the Ombudsman decides not to proceed with the matter. If the Ombudsman learns, after commencing an investigation, that the complaint relates to a matter concerning which the complainant has had knowledge for more than one year before contacting the office, she may cease to investigate. Also, the Ombudsman may cease to investigate if, during an investigation, it becomes clear that a complaint is frivolous, trivial, vexatious, or not made in good faith; or if, during an investigation, it is obvious that upon a balance between the public interest and the person aggrieved the investigation should not be continued; or if, after some enquiries, the Ombudsman is of the opinion that the circumstances of the case do not require further investigation. As in the situation where a case is declined from the outset, when a case is discontinued by the Ombudsman, the complainant is usually advised of the reason for this decision.

Information Supplied – This disposition may be utilized for complaints spanning the full range of investigation. Whether or not the matter brought to our attention falls within our jurisdiction, we may, at any point of our involvement, provide the complainant with information relevant to

his/her concern, as well as information about our office and its function. Usually, the information provided would be helpful in clarifying a situation, thereby possibly bringing the complainant closer to a solution to the problem.

Not Supported – Here a complaint has been fully investigated and, on the strength of the evidence reviewed, we are not able to support that the department or agency complained about has, in fact, caused the grievance. In such a case, we have found no evidence of maladministration in or by any department or agency of the government, or by any officer, employee or member thereof whereby the complainant is or may be aggrieved, and both the complainant and the department or agency are notified accordingly.

Resolved – In some cases, the disposition "resolved" means that the complaint has been thoroughly investigated with the evidence reviewed supporting that the department or agency has in fact caused the grievance. A report and recommendation(s) was submitted to the department or agency and the recommendation(s) accepted and implemented to resolve the problem.

In other cases where the disposition "resolved" appears, the investigation may not have had to reach the stage of a formal report and recommendation, but the problem may have been resolved at some earlier stage of the investigation as a result of a department or agency reviewing the matter with our office, or at the suggestion of our office.

A third category of cases marked "resolved" are those matters which may be resolved after they have been submitted to our office, but not necessarily because of any direct action by our office. These complaints are sometimes resolved by independent action of the department or agency itself, or by action of a third party or some other means. In any event, from our point of view, the important thing is that the problem which the complainant brought to our attention no longer exists and therefore we show these matters as resolved. The amount of investigation in these cases could vary from very little to a lot depending upon the circumstances of the case and at what point the resolution takes place.

Partly Resolved – This disposition is similar to the "resolved" disposition and the three categories of cases described for "resolved" would be applicable here as well. A "partly resolved" disposition would come about because a complaint may require more than one course of action in order to fully resolve the problem or problems (as there may be many problem areas in the one complaint). Sometimes a department is able to redress only a part of the total problem and for various reasons may be unable or unwilling to correct the entire situation. Sometimes there is no solution possible, feasible or appropriate to completely resolve a particular complaint and in such cases the matter may end up being partially resolved.

Recommendation – This disposition means that the complaint has been thoroughly investigated with the evidence reviewed supporting that the department or agency has caused the grievance. A report and recommendation(s) has been submitted to the department (or agency) but the recommendation(s) have not been accepted. Under *The Ombudsman Act*, when recommendations are not accepted, the Ombudsman may report further on his recommendations to the Lieutenant Governor in Council, and may thereafter mention the report in his next annual report to the assembly. If the recommendations are acted upon as a result of this further reporting, then the case would eventually be concluded as resolved. Hence, the disposition "recommendation" would be used for any case where the Ombudsman has made a recommendation which has not been accepted and implemented, whether or not the recommendation has been reported to the Lieutenant Governor in Council or the Legislative Assembly.

Pending – Complaint still under investigation as of January 1, 2006.