IN THE MATTER OF A COMPLAINT UNDER SECTION 12 OF THE *OMBUDSMAN ACT*, R.S.N.B. 1973, c. O-5

BETWEEN:

Jeannot Volpé (Leader of the Official Opposition),
Complainant

AND:

Thomas J. Burke, Q.C. (Attorney General, Minister of Justice and Consumer Affairs)
Respondent

Reasons for Decision

August 24, 2007

Table of Contents

Introduction

1. On April 18, 2007 Jeannot Volpe, Leader of the Opposition, filed a complaint with the Office of the Ombudsman requesting an investigation into comments by the Attorney General. The complaint alleges that the statements of the Attorney General demonstrate that he had pre-judged part of the outcome of investigations he had requested into possible wrongdoing at the Caisse Populaire de Shippagan.

2. On May 1, 2007, I wrote to both the Leader of the Opposition and the Attorney General asking them for clarification regarding how the situation complained of meets the requirements of subsection 12(1) of the *Ombudsman Act*, R.S.N.B. 1973, c.O-5 which gives the Ombudsman authority to investigate a complaint.

3. On May 18, 2007 a submission was filed with the Ombudsman on behalf of the Attorney General and the Office received the submission on behalf of the Leader of the Opposition on June 14, 2007. I would like to thank both parties for their submissions.

4. The purpose of this report, therefore, is to address the issue of the jurisdiction or authority of the Ombudsman to investigate the Leader of the Opposition's complaint, giving particular attention to matters of parliamentary privilege and previously expressed concerns regarding abuse of process or, in other words, attempts to use the Office of the Ombudsman for political purposes.

5. As was the case in the Graham and Vienneau complaints (NBPPIA-2006-01), this complaint is politically charged and has been the subject of much media coverage and public comment. As an officer of the Legislature investigating a complaint involving two Members of the Legislative Assembly regarding comments made in that building, I felt obligated to open the matter fully to public scrutiny. Consequently I have decided to publish this report by posting it on our website.

6. The politicized nature of this complaint is evidenced by allegations both that the Attorney General improperly prejudged investigations, and the possibility that the Leader of the Opposition had failed to use the normal procedures of the House in going to the Ombudsman with his complaint. In addressing the issues of jurisdiction, I have found it necessary to take a look at the substantive allegations raised against the Attorney General. I do so both to weigh substantively the importance of the allegations against my obligation to protect the Ombudsman's Office from any abuse of process, political or otherwise, and also to guard against the risk of appearing to condone or minimize in any way the gravity of the Attorney General's conduct or alleged bias.

Complaint

7. The Volpé complaint , delivered to my office April 18, 2007, read as follows:

> "In accordance with your mandate I am writing to you today to request that you investigate recent comments made by the Minister of Justice. It is my opinion that the Minister has pre-judged the outcome of an investigation, that he has called, into alleged irregularities at the Caisse Populaire de Shippagan.
>
> On April 4, 2007 the Attorney General declared the following in the Legislative Assembly:
>
> > "*As I have indicated in this house, a forensic audit will take place to determine if there is any hint of wrongdoing. An independent firm will undertake this audit and these questions will be answered.*
> >
> > *As of today, I have contacted the Auditor General of New Brunswick to ask for him to carry out a complete investigation and audit into this issue.*
> >
> > *And finally, we had made contact with the White Collar Crime Division of the RCMP to advise on our intentions and seek their assistance in getting to the bottom of this issue*."
>
> Not long after making his statement in the Legislative Assembly, the Minister of Justice went out to a media scrum and made statements that I believe indicate he has already determined part of the outcome of the multiple investigations. Specifically he has stated that the Opposition might not like the outcome of the investigation and in particular, the Member of Lamèque-Shippagan-Miscou and a relative of his who is on the Board of Directors of the Caisse in Shippagan.
>
> For your convenience I have attached a copy of the transcript from the Minister's media scrum on April 4, 2007 and highlighted the comments I have referred to in this letter."

In addition to the transcript provided by the complainant, my Office obtained a taped recording of the media scrum referred to in Mr. Volpé's letter and prepared its own transcript of the Attorney General's comments. Only a few minor discrepancies were noted when compared with the transcript provided by the complainant. I set out below excerpts from the transcript prepared by my office.

Facts

8. The Attorney General's comments which are the basis for Mr. Volpé's complaint or, at the very least, provide the context for the complaint, are as follows:

a) a response to a question asked during Question Period on March 29, 2007:

Hon. Mr. Burke: "Let me just talk a little bit about protecting a few friends. I heard the member talking a little earlier about the Premier sitting on the board of directors of the Rexton Credit Union, and the Premier has not hidden that fact once. When the former Minister of Finance talks about protecting a few friends, let us talk about the fact that the former Minister of Transportation's wife's aunt sat on the board of directors of the Shippagan Credit Union. <Name removed> sat on that board of directors. Let us not talk about protecting a few friends. The fact is, this is a good deal for the credit unions. The former minister sat there silently, protecting his friends, protecting his family, watching a financial institution, the Shippagan Credit Union, go into dire straights. We will not take any lessons from the former minister about protecting friends." (Hansard)

b) a ministerial statement made on April 4, 2007:

Hon. Mr. Burke: "We have always recognized that there were many lingering unanswered questions, about how the situation was allowed to deteriorate to the point of crisis under the previous Conservative government. As I have indicated in this House, a forensic audit will take place to determine if there is any hint of wrongdoing. An independent firm will undertake this audit and these questions will be answered.

"As of today, I have contacted the Auditor General of New Brunswick to ask him to carry out a complete investigation and audit of this issue. Finally, as of this morning, my office and I have made contact with the Commercial Crime Division of the RCMP to advise on our intentions and to seek its assistance in getting to the bottom of this issue." (Hansard)

c) an exchange between the Minister and journalists later that same day (April 4, 2007), material excerpts of which are as follows:

Journalist: "And these irregularities, I guess, may have contributed then to the financial difficulty at the Caisse, is that the point?

Minister: "And that is our cause for concern, if it has, we want to make sure that they're identified clearly. We want to push for the answers that are underlined with respect to this whole transactions and process of transactions that have taken place since 2004. We want

answers for the public, we want answers for the Opposition, but the Opposition might not like the answer that they get."

Journalist: "Why do you think that? What do you mean by that?"

Minister: "Well, the fact of the matter is that I am not going to get in the speculation of rumors or things that have taken place over the last few years but you know as we peel the layers of this onion the smell of it is getting stronger and stronger and I am going to leave it at that."

Journalist: "Is there a connection between the previous Conservative government in any of these improprieties?"

Minister: "At this point in time what I can say is that I have made record, I have made comments in the Legislature that are of public record, there is connections that may be tenuous; they may not be so tenuous with respect to certain Members of the Legislative Assembly and certain relatives that are a part of the Board of Shippagan."

Issues

9. The issue for determination at this stage of the investigation is the jurisdiction of my Office to investigate this complaint. In deciding if this Office has jurisdiction in this case, it is necessary to determine if this complaint falls within s.12 of the *Ombudsman Act*. The *Ombudsman Act* establishes four prerequisites to jurisdiction. There must be:

    (1) A decision or recommendation made; an act done or omitted; or a procedure used;
    (2) by an authority;
    (3) where any person is aggrieved;
    (4) with respect to a matter of administration.

10. Under paragraph 15(1) (a) of the *Ombudsman Act*, the Ombudsman may refuse to investigate a complaint if "an adequate remedy…already exists". I will consider whether this option is appropriate in this case.

11. Finally, I am obligated to consider the issue of jurisdiction in light of the principle of "parliamentary privilege", that is, whether the comments of the Attorney General, both inside the chamber and in the scrum with reporters, provides the Attorney General with absolute freedom of speech, subject only to the Standing Rules of the Legislative Assembly. In the section on discretion below, I will also consider whether the complaint is itself an attempt to draw the Office of the Ombudsman into a dispute that is essentially political in nature.

Complainant's Submission

12. Dale Graham, Deputy Leader of the Opposition, submitted a response on behalf of the Leader of the Opposition. Due to its brevity, I will include verbatim the entirety of the reasons why they feel the Attorney General's actions meet the requirement of section 12(1):

    1. *The Minister stated that "a forensic audit will take place to determine if there is any hint of wrongdoing".*
    2. *The Minister stated that he had "contacted the Auditor General of New Brunswick to ask for him to carry out a complete investigation and audit into this issue".*
    3. *The Minister stated that the government "had made contact with the White Collar Crime Division of the RCMP to advise on our intentions and seek their assistance in getting to the bottom of this issue".*
    4. *The three statements noted above clearly indicate that the Minister made "decisions or recommendations"*
    5. *The Minister has made a series of comments to the House and to the media which suggest that he has pre-determined the outcome of the above noted investigations. The Minister's comments made reference to his belief that the results of the investigations would reflect badly upon the Opposition, and inferred that we were guilty of some form of wrongdoing, thereby calling into question the integrity of the Official Opposition and its members. The Minister's comments also made specific reference to the member for Lameque-Shippagan-Miscou and a member of the Member's family, and inferred that they were guilty of some form of wrongdoing, thereby calling into question their integrity.*
    6. *The comments referred to above clearly indicate that the Minister had also made a "decision" with respect to the facts of this case and the outcome of the investigations before the investigations had even commenced.*
    7. *A suggestion by a Member of the Executive Council of wrongdoing on the part of the Official Opposition collectively, or on the part of a particular MLA and a member of his family specifically, is a serious allegation, and I must add one which is completely without basis in fact. Since we were the targets of these baseless allegations, surely we are in a position to state whether we feel ourselves "aggrieved" or not. We do."*

13. The Office of the Official Opposition did not cite any legislation or case law to support their position.

Respondent's Submission

14. The Office of the Ombudsman received the Attorney General's 21 page brief on May 18, 2007. Due to the length of the submission, I am unable to include it in its entirety but will provide my summary of the key points.

15. After quoting from several sources regarding parliamentary privilege, including the Honourable Stuart G. Stratton's July 21, 2005 FOWLIE REPORT, so called, the Attorney General submitted that the concept of parliamentary privilege extended to the statements made by the Attorney General in the Legislative Assembly and because they are so subject to parliamentary privilege, the Ombudsman has no authority to comment on the matter in the absence of direction from the Assembly to do so.

16. The Attorney General's submission then discusses whether or not parliamentary privilege applies to his statements made outside the Legislature. The Attorney General cited various cases for his submission that parliamentary privilege did indeed attach to the statements made to the media. The Attorney General relied mainly on *Roman Corp. Ltd. Et al* v. *Hudson's Bay Oil* and Gas Co. Ltd. Et al, [1973] S.C.R. 820 for his position.

17. The Attorney General then went on to consider if his statements fall within the jurisdiction of the Ombudsman under section 12 of the *Ombudsman Act*. The Attorney General submitted that any comment is not a 'decision' a 'recommendation', an 'act done or omitted, or 'a procedure used' but merely a statement. The Attorney General did not dispute that he is an authority. The Attorney General submitted that the Leader of the Opposition is not aggrieved nor may he be aggrieved as there was no information provided which would indicate that the complainant will suffer or is threatened with any form of harm prejudicial to his interests as a result of a comment that the Minister made. The Attorney General also submits that his statements were part of the activities of the Legislature and therefore not a 'matter of administration'.

18. The final portion of the Attorney General's brief analyzed the Ombudsman's discretionary authority under section 15 of the Ombudsman Act to refuse to investigate. The Attorney General stated that the Leader of Opposition was attempting to use the Office of the Ombudsman as a means to "harass or oppress a government organization" and felt that the complaint should be considered as frivolous and vexatious. The Attorney General submitted that the Ombudsman should exercise his discretionary authority under paragraphs 15(b), (e) and (f) and refuse to investigate the complaint.

Analysis

(a) A Decision or Recommendation Made; An Act Done or Omitted; or Procedure Used

19. The Ombudsman is a creature of statute and as such it is necessary to examine the meaning of the language of the legislation to determine the ambit of the jurisdiction of the Ombudsman. Section 17 of the *Interpretation Act, R.S.N.B*

1973, c.I-13, provides guidance for the interpretation of provincial legislation such as the *Ombudsman Act*. It states:

Every Act and regulation and every provision thereof shall be deemed remedial, and shall receive such fair, large and liberal construction and interpretation as best ensures the attainment of the object of the Act, regulation or provision.

20. The Supreme Court of Canada considered the meaning of the words "a decision or recommendation made; an act done or omitted; or a procedure used" in the British Columbia *Ombudsman Act* and found that "given their plain and ordinary meaning [these words] encompass virtually everything a governmental authority could do, or not do, that might aggrieve someone. It is difficult to conceive of conduct that would not be caught by these words", *British Columbia Development Corp. v. British Columbia (Ombudsman) [1984] 2 S.C.R. 447 at page 10 (Lexis Nexis version)* This case is cited further below.

21. To review the essentials of the complaint before me: the Attorney General made statements at a media scrum on April 4, 2007 which the Leader of the Opposition believes indicate that the Minister has already determined part of the outcome of the multiple investigations he has requested into the conduct of the Caisse Populaire de Shippagan. The complaint calls into question the conduct of the Minister in allegedly concluding the outcome of an investigation prior to it being held. In my opinion, the complaint calls into question conduct which can correctly be characterized as "an act done or a decision made".

(b) An Authority

22. It is not open to dispute that the Attorney General is an authority as described in Schedule "A" of the *Ombudsman Act*. An authority includes any person appointed by the Lieutenant-Governor in Council or responsible to the Province.

(c) Any Person Aggrieved

23. The Supreme Court of Canada in *British Columbia Development Corp. v. Friedmann,* (1984) 14 DLR (4^{th}) 129 has considered the meaning of the word aggrieved in the context of the British Columbia *Ombudsman Act.* The Court held that a "person is aggrieved or may be aggrieved whenever he genuinely suffers, or is seriously threatened with, any form of harm prejudicial to his interests…" (page 13, Lexis Nexis version).

24. The comments made by the Attorney General are to the effect that the Opposition might not like the outcome of the investigations and in particular,

the Member for Lameque-Shippagan-Miscou and a relative of his who is on the Board of Directors of the Caisse in Shippagan.

25. Although it may be tenuous, the words "may be aggrieved" and the high standards of care and discretion expected of an Attorney General cause me to conclude that, given the potential outcome of an independent and/or a police investigation, the Member for Lameque-Shippagan-Miscou, or members of his extended family may indeed be aggrieved. The harm need not have been suffered by the person making the complaint. This specific criterion of jurisdiction is a deliberately low threshold, as is consistent with the Ombudsman's independent authority to proceed with complaints on this own motion. Specifically, in this case the allegations of harm amount to a possibility of harm that could arise from a decision yet to be made in response to recommendations from an independent audit. However, owing to the nature of the Attorney General's comments and the high standard of care and demonstrated impartiality expected of his office, I am reluctant to refuse jurisdiction on this ground.

(d) A Matter of Administration

26. The Supreme Court of Canada in *Friedmann, supra*, at page 15 (LexisNexis version) interpreting the phrase from the British Columbia Act, which is identical to that in the New Brunswick legislation, wrote:

> *"In my view, the phrase "a matter of administration "encompasses everything done by governmental authorities in the implementation of governmental policy. I would exclude only the activities of the Legislature and the courts from the Ombudsman's scrutiny". (emphasis added)*

27. The question then to be answered is what are activities of the Legislature? There can be no doubt that comments made by a member of the Legislative Assembly during the various functions of such a body (Question Period, Committee of the Whole House, Committee of Supply, Standing or Adhoc Committees) could be properly included in the words "activities of the Legislature". In my view, this would prevent me from considering any of the comments the Attorney General made inside the Chamber of the Legislature. As to comments made by him during the subsequent media scrum, I will discuss these during my examination of parliamentary privilege and its relevance to this complaint. For the time being, I am prepared to conclude, for the purposes of the *Ombudsman Act*, that the issue is a "matter of administration", taking into account the broad definition adopted by the Supreme Court of Canada.

(e) Parliamentary Privilege

28. The Attorney General submits that the comments that are the subject matter of this investigation, both inside and outside the Legislative Assembly, are protected by parliamentary privilege.

29. Parliamentary privilege has been defined by Joseph Maingot in *Parliamentary Privilege in Canada*, (Toronto: Butterworths, 1982) at page 12, as all of the powers necessary for the legislature and its members to perform their legislative work. Maingot states as follows:

> Parliamentary privilege is the necessary immunity that the law provides for members of the legislature of each of the ten provinces and two territories, in order for these legislators to do their legislative work. It is also the necessary immunity that the law provides for anyone while taking part in a proceeding in Parliament or in a legislature. Finally, it is the authority and power of each House of Parliament and of each legislature to enforce that immunity.

30. The principle of parliamentary privilege is a cornerstone of the Westminster Parliamentary system and in New Brunswick the privilege has been enshrined in statute in the *Legislative Assembly Act*, R.S.N.B. 1973, c. L-3. Section 1 of the *Legislative Assembly Act*, reads as follows:

> *1 (1) In all matters and cases not specially provided for by any Statute of the Province, the Legislative Assembly of New Brunswick and the committees thereof respectively, shall hold, enjoy and exercise such and the like privileges, immunities and powers, as are held, enjoyed and exercised by the House of Commons of Canada and by the respective committees and members thereof, and such privileges, immunities and powers of the Legislative Assembly shall be deemed to be and are part of the general and public law of New Brunswick and it shall not be necessary to plead the same, but the same shall in all courts of justice in this Province, and by and before all justices and others, be taken notice of judicially.*
>
> *1 (2) Nothing in this section contained shall be construed to contravene or conflict with any legislation intra vires of the Parliament of Canada.*

31. The parliamentary privilege being claimed in this case is the privilege of freedom of speech. There is no doubt that freedom of speech is a recognized

category of parliamentary privilege. As Lamer C. J. stated in *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 at para.33: "Over time, by virtue of custom and usage, particular categories of privilege came to be recognized in the United Kingdom. These include for example, freedom of speech so that nothing said inside the Assembly may be brought into question elsewhere."

32. Freedom of speech as a parliamentary privilege was asserted as early as 1523 in *Erskine May's Treatise on the Law, Privileges, Proceedings, and Usage of Parliament*, 23rd ed. (London: Buttersworths, 2004) at page 80 and in *Canada (House of Commons) v. Vaid*, [2005] S.C.J. No. 28, Binnie J. at para. 29 enumerated freedom of speech as one of the categories which the courts and parliamentary experts agree enjoy parliamentary privilege.

33. The question for determination is whether the comments made by the Attorney General in the Legislative Assembly were such as to make them absolutely privileged. It is a well established principle of law that anything spoken inside the Legislative Assembly itself cannot be examined in any Court. Article 9 of the *Bill of Rights*, 1689 (U.K.), c.2 states "that the freedom of speech and debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of Parliament." I find, as I did in the *Graham and Vienneau* complaints (NBPPIA-2006-01), that absolute privilege applies to the comments made during the legislative debates and consequently, I cannot comment on the matter, in the absence of any direction from the Assembly to do so.

34. The second question to be answered is whether parliamentary privilege attaches to the statements of the Attorney General outside the Legislative Assembly. The Supreme Court of Canada outlined a two step test in Vaid: (1) has the existence of a general privilege been established by prior authority and (2) can the privilege claimed be supported as a matter of principle under the necessity test. As mentioned above, freedom of speech is a recognized category of parliamentary privilege so I must now turn to the second step, necessity.

35. In Vaid, the Supreme Court stated the necessity test as follows:

> *In order to sustain a claim of parliamentary privilege, the assembly or member seeking its immunity must show that the sphere of activity for which privilege is claimed is so closely and directly connected with the fulfillment by the assembly or its members of their functions as a legislative and deliberative body, including the assembly's work in holding the government to account, that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their work with dignity and efficiency.*

36. Necessity is defined by McLachlin J., in *New Brunswick Broadcasting* [1993] at para.123:

> The test of necessity is not applied as a standard for judging the content of a claimed privilege, but for the purpose of determining the necessary sphere of exclusive or absolute "parliamentary" or "legislative" jurisdiction. If a matter falls within the necessary sphere of matters without which the dignity and efficiency of the House cannot be upheld, courts will not inquire into questions concerning such privilege. All such questions fall to the exclusive jurisdiction of the legislative body.

37. The submission of the Attorney General advances the case of *Roman Corp. Ltd. et al v. Hudson's Bay Oil and Gas Co. Ltd. et al*, [1973] S.C.R 820 affirming the Ontario Court of Appeals decision reported at [1971] 23 D.L.R. (3d) 292 upholding Justice Holden's trial decision reported at [1971] 18 D.L.R. (3d) 134, to support his contention that his comments made to reporters outside the Legislative Assembly enjoy absolute privilege. In *Roman* the court found that a telegram and press release, although not communicated within the walls of the House of Commons, enjoyed the same privilege as if made in that chamber because they were mere extensions of the statements made by the Prime Minister in the House.

38. However, I find that the facts of this case are more closely aligned to *Re Ouellet (No.1)* (1976), 67 D.L.R. (3d) 73. In *Ouellet*, the Minister of Consumer and Corporate Affairs was held in contempt of the Superior Court of Quebec for disparaging remarks about a judge which were widely reported in the press. The facts in this case were that following the dismissal of charges against several corporations brought by the federal government department of which he was the responsible Minister, the Minister was approached by a reporter and the words were spoken in an antechamber of the Commons where journalists are admitted to interview Ministers. The remarks were found not to be privileged since they were not made in the course of proceedings in the Commons.

39. Hugessan A.C.J. concluded at page 11 (*Re Ouellet No. 1*) as follows:

> The purpose of the privilege is to protect freedom of speech and debate in Parliament but <u>not, surely, to allow individual members to say what they will outside the walls of the House</u>, to persons who are not members or even spectators of the proceedings inside. If what goes on in the member's smoking room can be said to be a proceeding in Parliament …then why not every private conversation in the parliamentary restaurant? Or in a member's

> constituency office? Absolute privilege is a drastic denial of the right of every citizen who believes himself wronged to have access to the Courts for redress and should not be lightly or easily extended. It is not the precinct of Parliament that is sacred, but the function and that function has never required that press conferences given by members should be regarded as absolutely protected from legal liability (emphasis added).

40. In the Court of Appeal decision *Re Ouellet (Nos. 1 and 2)* (1976), 72 D.L.R. (3d) 95, Tremblay C.J.Q. found the trial judge correct in his finding that the statement made by the Minister was not privileged. In reaching his conclusion Tremblay C.J.Q. considered that the disparaging remarks were made to a reporter in the lobby outside the Chamber, that the remarks were made by a Minister of the Federal Crown against the judge who dismissed a prosecution brought by his own department, that the Minister was not speaking on behalf of the government or his Ministry but providing a journalist his opinion with respect to a judgment.

41. Similarly in the present case, the Attorney General gave his strong and quite probably ill-advised opinions to journalists outside of the Legislative Assembly that certain members of the Legislative Assembly and certain relatives of members that are part of the Board of the Caisse Populaire de Shippagan may not like the results that would be reached following the investigations he had ordered, as Attorney General, into possible wrongdoing at the Caisse Populaire de Shippagan. In giving his opinion, the Attorney General, was not speaking on behalf of the government or his department. And like *Ouellet*, the personal opinion expressed by the Attorney General concerned activities of his own department, specifically the investigation he himself has ordered regarding possible wrongdoing at the Caisse Populaire de Shippagan.

42. Applying the necessity test to the present case, the question becomes: Do the comments made by the Attorney General at the media scrum attract absolute parliamentary privilege as matters necessary to uphold the dignity and efficiency of the New Brunswick Legislative Assembly? The simple answer is “No”. In fact, the allegation that the Attorney General has prejudged part of the outcome of the investigations into possible wrongdoing at the Caisse Populaire de Shippagan, if proven, would actually diminish the dignity of the New Brunswick Legislative Assembly. Therefore the test of necessity is not met and absolute privilege does not apply to the Attorney General’s comments at the media scrum.

43. The circumstances of this case are very different from the facts of *Roman*. In *Roman* the telegram and press release made outside the House of Commons were found by the Court to be mere extensions of statements made in the

House. In the present case, the Attorney General's comments to the press express a personal opinion and are not made in furtherance of government business or in respect to government policy. In my opinion, the comments of the Attorney General made during the media scrum are not subject to parliamentary privilege.

(f) Discretion

44. The final question for determination is whether, in this case, I should exercise my discretionary authority under section 15 of the *Ombudsman Act*. I have the authority to refuse to investigate or cease to investigate a grievance if one of the conditions listed in subsection (1) exists.

45. Section 15 of the *Ombudsman Act* reads as follows:

> *15(1) The Ombudsman, in his discretion, may refuse to investigate or may cease to investigate a grievance if*
>
> *(a) an adequate remedy or right of appeal already exists whether or not the petitioner has availed himself of the remedy or right of appeal,*
>
> *(b) it is trivial, frivolous, vexatious or not made in good faith,*
>
> *(c) having regard to all the circumstances of the case, further investigation is unnecessary,*
>
> *(d) it relates to any decision, recommendation, act or omission that the petitioner has had knowledge of for more than one year before petitioning,*
>
> *(e) the petitioner does not have a sufficient personal interest in the subject matter of the grievance, or*
>
> *(f) upon a balance of convenience between the public interest and the person aggrieved, the Ombudsman is of the opinion that the grievance should not be investigated.*
>
> *15(2) Where the Ombudsman decides not to investigate or to cease to investigate a grievance he shall inform the petitioner and any other interested person of his decision and may state his reasons therefore.*

46. Under 15 (1) (a) of the *Ombudsman Act*, I may refuse to investigate or cease to investigate this complaint if an adequate remedy already exists. The

complaint of the Leader of the Opposition is that the Attorney General has "already determined part of the outcome of the multiple investigations." If the Leader of the Opposition or other members of the opposition believe that they have been defamed by the comments of the Attorney General they have the opportunity to pursue a remedy for defamation in a court of law under the *Defamation Act*, R.S.N.B. 1973, c.D-5. As Dickson J. said in *British Columbia Development Corp.* at page 13, "The courts, not Ombudsmen have responsibility for remedying violations of legal rights."

47. In addition, the Leader of the Opposition and/or any other member of the opposition may seek a remedy in this case by petitioning the Legislative Assembly to have the complaint reviewed. There is a procedure under section 13 of the *Ombudsman Act* where any committee of the Legislature can refer a matter to the Ombudsman for investigation. Section 13 of the *Ombudsman Act* reads as follows:

> *3(2) Notwithstanding sections 15, 21 and 22, where a matter has been referred to the Ombudsman under subsection (2), the Legislative Assembly may refer any petition that is before the committee for consideration or any matter relating to such a petition to the Ombudsman for investigation and report.*
>
> *13(3) Notwithstanding sections 15, 21,and 22, where a matter has been referred to the Ombudsman under subsection (2), the Ombudsman, subject to any special directions of the committee, shall investigate the matter as far as it is within his jurisdiction and shall make such report to the committee as he thinks fit.*

48. Furthermore, the matter could have been raised as a matter of "Privilege" under Part II of the Standing Rules of the Legislative Assembly. Under that rule, the issue might have been referred to be dealt with by the Standing Committee on Privileges. For reasons unknown to me, the complainant chose not to avail himself of that option.

49. I therefore find that the requirements of section 15 (1) (a) of the *Ombudsman Act* are met in the present case and refuse to investigate the complaint as "an adequate remedy or right of appeal already exists whether or not the petitioner has availed himself of the remedy or right of appeal".

50. Finally, I want to reinforce to all members of the legislature my comments

from my previous decision in Graham and Vienneau at para 50 (NBPPIA-2006-01) "I will be careful in every complaint ….particularly those brought by elected officials or their political rank and file to jealously guard against an abuse of… process." It is important that the Office of the Ombudsman be vigilant to avoid being drawn into political debate of a nature referenced in Graham and Vienneau.

Conclusion

51. After examining the many aspects of this case, from the propriety of the comments of a Minister of the Crown, to the protection afforded such comments by the principle of Parliamentary Privilege, to guarding against the danger of drawing this Office into political debate, to the vital matter of jurisdiction in this matter, I am declining to take jurisdiction and investigate the Leader of the Opposition's complaint. There are a number of concerning aspects of the comments made by the Attorney General in the matter which gave rise to the complaint which the Leader of the Opposition has filed, but in my view, other remedies are and/or were available to him, remedies which for whatever reasons, he has failed to pursue. Although there can be no argument that there is a strong onus on the Attorney-General to exercise reserve in commenting on matters which may be subject to criminal investigation, I am not satisfied that the Office of the Ombudsman is the appropriate venue to conduct and hear a complaint in this matter.

Dated at Fredericton this 24th day of August, 2007.

Bernard Richard
Ombudsman