Open government in New Zealand

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The idea of open government has grown strongly in the last twenty five years. It has overturned the general principle which favoured secrecy in government, and official information is now to be available unless there is good reason for withholding it. The idea has had its effects in many areas of government including foreign affairs and even security intelligence. Sir Guy Powles, especially as Ombudsman, has had a major part to play in many of the recent developments.

1962 is a good year in which to begin this tribute to Sir Guy Powles.[1] On 1 October twenty-five years ago the Parliamentary Commissioner (Ombudsman) Act 1962 came into force and Sir Guy took his oath as the first Ombudsman not just in New Zealand but also in the Commonwealth. That Act both in its provisions and in its subsequent operation contributed in important ways to openness in government. It was not just Parliament and a remarkable man who contributed in that year to open government. So too did a Royal Commission (supported soon after by the State Services Commission) and the courts.

The Royal Commission on the State Services proposed an important departure from

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1 Sir Guy's involvement in open processes of government can be taken back much earlier. Thus, as High Commissioner in Western Samoa in the 1950s when that country was under New Zealand administration, he participated in the process of New Zealand reporting to the Trusteeship Council of the United Nations as required by the Charter of the United Nations. That process of public accountability to the international community, building on the mandate practice of the League of Nations, was a reversal of the earlier position that states owed no international obligation in respect of their colonies. For an excellent account of the trusteeship see Mary Boyd "The Record of Western Samoa Since 1945" in Angus Ross (ed) *New Zealand's Record in the Pacific Islands in the Twentieth Century* (Longman Paul Ltd., Auckland, 1969) 189.

It is perhaps curious that international law has in various ways placed greater emphasis on openness than national law. Thus while President Woodrow Wilson's principle of "open covenants openly arrived at" put private negotiation too easily to one side, the first half of the principle is now reflected in article 102 of the Charter and in many thousands of treaties published in the League of Nations and United Nations Treaty Series. And an often forgotten convention on the International Right of Correction, 31 March 1953, 435 U.N. Treaty Series 192, begins with preambular language incorporating a theory like those of the information statutes of 30 years later:

> The Contracting States
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> Desiring to implement the right of their peoples to be fully and reliably informed,
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> Desiring to improve understanding between their peoples through the free flow of information and opinion,
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> Desiring thereby to protect mankind from the scourge of war, to prevent the recurrence of aggression from any source, and to combat all propaganda which is either designed or likely to provoke or encourage any threat to the peace, breach of the peace, or act of aggression,
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> Considering the danger to the maintenance of friendly relations between peoples and to the preservation of peace, arising from the publication of inaccurate reports, . . .

The convention accordingly gives a right to states to seek publicity for a correction of news they consider false.

See also Hiding Eek, *Freedom of Information as a Project of International Legislation* (A. B. Lundequistska Bokhandeln, Uppsala, 1953).

the underlying principle of the Official Secrets Act which had been enacted almost in a fit of post colonial absentmindedness — at least so far as public commentary was concerned — in 1951. The principle of that Act was that official information, whether sensitive or completely innocuous, was to be withheld unless there was authority to the Queen's information — for example restricted in its distribution to her Privy Council. The opposite view, the American view, was to see the government and council. The opposite view, the American view, was to see the government and information held by the government as the people's.[2] It was in essence this second view that the Royal Commission stated. "Government administration is the public's business, and the people are entitled to know more than they do of what is being done, and why."[3]

The State Services Commission, constituted under the legislation proposed by the Royal Commission's report, directed in 1964 that the rule should be that information should be withheld only if there is good reason for doing so.[4] Administrative directives or understandings, without any change in legislation, can sometimes bring about major changes in the real constitutional position. The Supreme Court of Canada put that point in a very neat formula: "... constitutional conventions plus constitutional law equal the total constitution of the country."[5] But in this case the administrative direction had little effect and legislation was required to bring about the new approach. That is considered later.

In 1962 the Court of Appeal also entered the fray. It held that it was for the courts and not for the executive government to decide whether a claim of public interest immunity (then called Crown privilege) was to be upheld.[6] Among the reasons for that view were ones that were relevant in the later debates about official information legislation — the intrusion of the state into commercial and other fields of enterprise (such as railways, coalmines, forestry, and the activities of the Departments of Works and Electricity) and the possible extent and abuse of unreviewable claims based on candour of communication within government departments.

Sir Richard Wild was the Solicitor-General at that time. He failed to persuade the Court of Appeal that a certificate by the relevant minister that release of the information would damage a public interest should be conclusive. He also failed in the same attempt in respect of the Ombudsman Bill which was being prepared in 1961 and 1962.[7] The legislation accordingly gives the Ombudsmen wide rights of access to departmental files and expressly provides that any rule of law which authorises or requires the withholding

2 Mr. F. H. Corner, then the Secretary of Foreign Affairs, put the matter in these terms in an early meeting of the Committee on Official Information (the Danks Committee). At that stage the New Zealand Official Secrets Act 1951 could be contrasted in that way with the United States Freedom of Information Act 1967.

3 The State Services in New Zealand, *Report of the Royal Commission of Inquiry* (Government Printer, Wellington, 1962) The Chairman was Mr. Justice McCarthy.

4 E.g. *Committee on Official Information, Towards Open Government: General Report* (Government Printer, Wellington, 1980) para. 55.

5 *Reference re Amendment of the Constitution of Canada* (1981) 125 D.L.R. (3d) 1.

6 *Corbett* v. *Social Security Commission* [1962] N.Z.L.R. 878.

7 See J. L. Robson, *Sacred Cows and Rogue Elephants* (Government Printer, Wellington, 1987) 218-221 for an insider's account of this process.

of any information on the ground that disclosure would be injurious to the public interest does not apply to the Ombudsman's investigations. One early commentator on the new institution indeed saw that right of access as the most important characteristic of the office.[8]

The Ombudsman legislation emphasises open government in other ways as well. Thus one of the grounds on which an Ombudsman can intervene is the failure of a public agency to give reasons for a decision and in practice many complaints are resolved by the Ombudsman's explanations to those affected by the decision in question. If the Ombudsman considers that a complaint is established and that no satisfactory remedy is provided a public report to the House of Representatives is the final sanction. And the Ombudsmen report on a regular basis to the House.

A valuable review five years ago of the practice of the Ombudsman indicates how information of a general kind about the operation of government and information about particular decisions or actions is made available and how complaints about refusals of access to information are handled.[9] One example is enough to emphasise the argument made there. A crackdown on illegal immigrants ten years ago led to the establishment of an informal procedure with their cases being dealt with by a committee. Many of them complained about aspects of the whole process to the Ombudsman who, without on the whole dealing with particular complaints, achieved three important general procedural improvements — (1) The criteria for decisions were published, particularly through the relevant immigrant communities; the applicants were then better able to make their cases to the committee. (2) The processes for getting the relevant information to the committee were enhanced. And (3) the quality of the material going to the minister when the matter was one for decision at that level was improved.[10]

These actions — by Parliament, the courts, the executive, the Royal Commission, and the Ombudsmen — are to be seen in wider context. In the 1950s in New Zealand, as elsewhere in the Common Law world, attitudes to public power and in particular in favour of the introduction of greater controls over its exercise were developing. Ideas were on the move — and there were those who were catching and even getting ahead of them. For example the National Party in the 1960 election not only made the proposal which led to the introduction of the Ombudsman. It also, in the context of introducing greater controls over governmental power, proposed a Bill of Rights on the model of the just enacted Canadian one,[11] and greater controls over the making of regulations[12]

8 C. C. Aikman "The New Zealand Ombudsman" (1964) 42 Can. Bar Rev. 399, 407.

9 D. J. Shelton "The Ombudsmen and Information" (1982) 12 V.U.W.L.R. 233 (one of a series of articles including one by Sir Guy discussing the first 20 years of the office of the Ombudsman).

10 *Report of the Ombudsmen for year ended 31 March 1978* (Government Printer, Wellington, 1978) 9.

11 As Sir Guy noted in his contribution to the May 1985 I.C.J. seminar on the Bill of Rights some of us have changed our minds on that matter.

12 Some of the subsequent steps relating to regulations are in the direction of greater openness — for instance through consultation before certain regulations are made and the giving of a hearing before certain powers under them are exercised, see e.g. the Reports of the Statutes Revision Committee relating to the New Zealand Forest Products and civil aviation regulations, 1980 A.J.H.R. I 5. A significant number of safety statutes now also provide for notice and comment procedures in the making of codes of practice which may precede the making of regulations.

—both matters which are again on the national agenda a generation later. Parliament was beginning to exert some influence over administration particularly through the then recently established and strengthened Public Expenditure Committee under the chairmanship of a vigorous new backbencher, Mr R. D. Muldoon.[13] And, as the Canadian reference indicates, the movement was not just in New Zealand. Thus, the report of the Franks Committee in the United Kingdom had not long before brought some control and order to tribunals and inquiries, in part by reference to the principle of openness.[14] In addition the International Commission of Jurists at major meetings in the late 1950s and 1960s was developing the application of the principle of the rule of law to the exercise of administrative power.[15]

The courts, especially the House of Lords, were also moving to the beat of a drum which, if not yet denying the state great powers over the economy and in support of the welfare of the people, was calling for greater controls over the exercise of such power. So in the 1960s the House of Lords followed other Commonwealth courts and asserted its power to decide on claims by the state of privilege in respect of the disclosure of information;[16] and it indicated a strong reluctance to recognise that a statutory discretion was unfettered;[17] an immediate consequence being a greater incentive for those challenging government decisions to seek evidence of the reasons for them. The most significant court decision though, both generally and for open government, was *Ridge* v. *Baldwin*[18] in which the House of Lords, and especially Lord Reid in one of the great Common Law judgments, firmly reinstated the principle of natural justice in the law that those exercising public power which might affect the rights and legal interests of particular individuals were in general to give them a fair hearing.

These pressures towards greater openness did not relate just to government decision-making affecting particular individuals. In the second half of the 1960s debates about the environment (consider the Manapouri campaign and the related Commission of Inquiry) and the economy (consider the National Development Conference) and foreign affairs led to the development of new processes which generally involved a greater disclosure of information and exchange of opinion. In the foreign affairs area, for instance, the disputes about New Zealand's policy towards South East Asia and its military involvement in Vietnam brought the specialists in the government and outside and those with a more general interest into fruitful contact and public debate in a way unknown before. Sir Guy was very much involved in that process through his senior

13 E.g. Von Tunzelmann, *The Public Expenditure Committee: the Process of Change 1972-1977,* (Legal writing requirement, Victoria University of Wellington, 1977).

14 *Report of the Committee on Tribunals and Inquiries,* Cmnd 218 (1958).

15 See especially the 1959 Declaration of Delhi and the other documents included in the Commissions publication, *The Rule of Law and Human Rights — Principles and Definitions* (1966).

16 *Conway* v. *Rimmer* [1968] A.C. 910.

17 *Padfield* v. *Minister of Agriculture and Fisheries* [1966] A.C. 997.

18 [1964] A.C. 40.

positions in the New Zealand Institute of International Affairs, a body which prospered under his presidency.[19]

Of all the many developments relating to open government in the 1970s an inquiry into the New Zealand Security Intelligence Service is not on first impression the most promising. But that inquiry, undertaken by Sir Guy Powles as Chief Ombudsman, is relevant in at least two important ways. In the first place the report itself argues the value of openness even within the relatively cloistered world of security intelligence.[20] It takes John Milton as its guide "Let [Truth] and Falsehood grapple, whoever knew Truth put to the worse in a free and open encounter."[21] There is nothing, said the report, like having to justify one's opinion and emotional reactions to other people to ensure that one thinks these through as fully as possible.

Accordingly, Sir Guy recommended that those affected by the security vetting process should be more fully informed, that an unclassified document setting out the manner of vetting should be issued within the State Services, that those subject to name checking and ordinary vetting should normally be informed of this fact, that where possible the service should disclose to the department the reasons for qualified and negative clearance, and, with one narrow exception, that any person who is the subject of vetting should be told of the opinion reached and, if it is negative or qualified, of the reasons for that opinion. In the latter case the person is also to be told of the rights of appeal. The report also proposed, in the interests of greater ministerial responsibility and control, a more open relationship between the minister and the director with more matters going to the minister for decision and comment, and with the minister having the opportunity to determine guidelines and priorities.

The report had a second important relevance to the growing debate about open government. It proposed that the principles and practice of classification of information for security purposes be examined. That recommendation led to the establishment of the Committee on Official Information (the Danks Committee) and in turn to the enactment of the Official Information Act 1982, a process in which Sir Guy, by then retired as Chief Ombudsman, played a significant part as a leading member of the Coalition for Open Government.[22] That group was one of the many influences in the late 1970s and early 1980s towards open government. Thus in Parliament, Mr Minogue, a National member, and Mr Prebble, a Labour one, promoted the arguments, the latter with private member's bills. Scientific groups argued for government science to be

19 See e.g. the 15 or more books and pamphlets published by the Institute between 1967 and 1970 including the book edited by Angus Ross (supra n. 1), G. J. Thompson *New Zealand's International Aid* (1967) and *New Zealand Foreign Policy with Special Reference to South East Asia — Report of a Study Group* (1968) to mention just three in which Sir Guy was involved.

20 Report of the Chief Ombudsman, *Security Intelligence Service 1976* A.J.H.R. A.A.

21 *Areopagitica* (1644).

22 In addition to preparing pamphlets and reports, the coalition held a widely attended conference on freedom of information in December 1980 as the Danks Committee was completing its first report. See Sir Guy Powles, *"Freedom of Information and the State — a Discussion Paper"* (Coalition for Open Government, Wellington, 1980), and also *Proceedings of the 1980 Conference on Freedom of Information and the State* (New Zealand Association of scientists, Wellington, 1981).

more open. Many were concerned about the environmental and economic aspects of the government's "think big" energy projects. And there were major international influences arising from the contemporaneous debates in Australia, Canada (including an excellent Ontario inquiry) and the United Kingdom.[23]

The Danks Committee began its argument for greater openness in the following way:[24]

> 20. The case for more openness in government is compelling. It rests on the democratic principles of encouraging participation in public affairs and ensuring the accountability of those in office; it also derives from concern for the interests of individuals. A no less important consideration is that the Government requires public understanding and support to get its policies carried out. This can come only from an informed public. These are recognised arguments and are well represented in the literature on the subject. There is in addition a special feature of the New Zealand setting for these arguments to which we wish to draw attention.
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> 21. New Zealand is a small country. The government has a pervasive involvement in our every day national life. This involvement is not only felt, but is also sought, by New Zealanders, who have tended to view successive governments as their agents, and have expected them to act as such. The government is a principal agency in deploying the resources required to undertake many large scale projects, and there is considerable pressure for it to sustain its role as a major developer, particularly as an alternative to overseas ownership and control. No less striking is the extent to which government is involved in economic direction, regulation, and intervention. Along with the impact of the State budget and expenditures, there are important controls on, for example, wages, prices, the use of labour, transport, banking, and overseas investment. Our social support systems also rely heavily on central government. History and circumstances give New Zealanders special reason for wanting to know what their government is doing and why.

The arguments of participation, accountability, effective government and the interests of individuals are directly incorporated in section 4 of the Official Information Act 1982 —

> 4. **Purposes** — The purposes of this Act are, consistently with the principle of the Executive Government's responsibility to Parliament, —
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> (a) To increase, progressively the availability of official information to the people of New Zealand in order —
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> (i) to enable their more effective participation in the making and administration of laws and policies; and
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> (ii) to promote the accountability of Ministers of the Crown and officials — and thereby to enhance respect for the law and to promote the good government of New Zealand:
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> (b) To provide for proper access by each person to official information relating to that person:
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> (c) To protect official information to the extent consistent with the public interest and the preservation of personal privacy.

23 See e.g. the accounts in R. J. Gregory (ed) *The Official Information Act: A Beginning* (New Zealand Institute of Public Administration, Wellington, 1984) and also Palmer *Unbridled Power* (Oxford University Press, Auckland, 2d. ed., 1987) ch. 16 and pp. 318-320.

24 Committee on Official Information, *Towards Open Government: General Report* (Government Printer, Wellington 1980) paras 20 and 21.

It followed that the principle of the Official Secrets Act 1951 had to be reversed and to be reversed by statute. As section 5 of the 1982 Act puts it, "the principle" now is that "official information shall be made available unless there is good reason for withholding it". The political and legislative process has continued in the direction of greater openness for public information — especially by the extension of the legislation to local government and other public bodies, the redefinition and in part the narrowing of the criteria for withholding information, and the repeal of a large number of statutory provisions which protected official information in particular areas of public administration. This work was greatly facilitated by the Information Authority. And the legislation has of course been tested and developed in practice by departments, other public bodies and Ministers, those requesting information, and the Ombudsmen. This is not the occasion for a review of that practice, but the overall purpose of greater openness is clearly being achieved.[25] The opinion of Mr. J. K. McLay, the minister responsible for the Bill, that the Act is of major constitutional significance is being borne out.

The Official Information Act answers the question of access to information in a general way. Particular statutory provisions sometimes answer the question — although much less so with the repeal of many of them in 1987.[26] The question of access can also arise outside the scope of the legislation — general or particular. Thus courts in New Zealand and Australia have recently considered the impact, if any, of general official information legislation on the law of public interest immunity and the obligation of a tribunal to give reasons, matters not directly affected by the legislation. The New Zealand Court of Appeal in the public interest immunity area moved the balance of the law further in the direction of the litigant seeking discovery of the government document in part by reference to the 1982 Act. Woodhouse P mentioned[27]

> . . . the contemporary movement towards open government in New Zealand. This has found statutory expression in the Official Information Act 1982 which states as the first of the purposes expressed in its long title that it is "an Act to make information more freely available.

He referred as well to the wholesale extensions in the last forty years of public sector activity into areas that were the field of private enterprise. This had brought increasing and often justified pressure upon the Executive Council for information about economic policies. Richardson J made much the same points about the important social policies underlying the 1982 Act by mentioning the title to the Act and the principle of

25 See the annual reports of the Information Authority and of the Ombudsman, the case notes of the Ombudsman on official information matters, and the Report of Mr. G. R. Laking, Chief Ombudsman, on leaving office. See also the bibliography in Palmer, supra n. 23, 318-320 and Michael Taggart "Freedom of Information in New Zealand" in Norman Marsh (ed) *Public Access to Government Held Information* (1987). So far only one case about the Act has been decided by the courts: *Commissioner of Police* v. *Ombudsman* [1985] 1 N.Z.L.R. 578 (appeal pending).

26 See the Third Schedule to the Official Information Amendment Act 1987.

27 *Fletcher Timber Ltd* v. *Attorney-General* [1984] 1 N.Z.L.R. 290, 296.

availability stated in section 5, and by quoting from the Danks report the second of the paragraphs set out earlier in this paper. The fact that the Act by its own express terms did not apply to public interest immunity questions did not mean that the social policies evident in the new legislation and the principle of availability which it expresses were to be ignored. McMullin J also took account of the fact that the Act had effected a significant shift from the approach to the availability of official information reflected in the Official Secrets Act 1951. He mentioned the principle of availability in the new Act and the reversal of the thrust of the 1951 statute. The judges here were finding relevant principle or public policy in the declarations of Parliament — although Parliament has not spoken directly in point.[28]

The High Court of Australia, reversing the New South Wales Court of Appeal, saw this matter rather differently in deciding that the Public Service Board of New South Wales was not obliged to give reasons in dismissing a promotions appeal by a senior public servant.[29] Kirby P, a fellow member with Sir Guy of the International Commission of Jurists, was one of the majority in the Court of Appeal to hold that the board was obliged to give reasons. He wrote on a broad canvass. The central question was whether the Common Law imposed the obligation on the board in the absence of an express statutory duty. The question was to be answered "... against the background of substantial developments in administrative law, both in the common law and by statute."[30] Kirby P considered the development by the courts in Australia and elsewhere of the law of national justice. That showed, he said, that[31]

> ... there has been a growing body of precedent and other support for the desirability of, and sometimes the obligation upon, public administrative tribunal, (sic) at least, to state reasons for their decisions affecting seriously the interests of the person seeking those reasons. Sometimes this is expressed to be based on the requirements of natural justice and fairness. Sometimes it is articulated in terms of the inherent necessities of the proper operation of the judicial process, the duty of persons exercising public power to justify that exercise by the giving of reasons.

He continued, under the heading *Policy considerations,* as follows:[32]

> The foregoing analysis of legal authority illustrates the way in which the common law in many countries has developed and is developing appropriate responses to the large growth of administrative tribunals following the Second World War. The development of the common law is continuing and this Court has contributed to it. There is scope to exercise judgment in giving content to the obligations, variously expressed as the requirements of "natural justice" or in the "duty to act fairly".... That content will itself vary over time....

28 For other instances of the use of what has been referred to as the equity of the statute see K. J. Keith "The Courts and the Constitution" (1985) 15 V.U.W.L.R. 29, 37.

29 *Public Service Board of New South Wales* v. *Osmond* (1986) 63 A.L.R. 559 reversing [1984] 3 N.S.W.L.R. 447. See Kelly "The Osmond Case: Common Law and Statute Law" (1986) 60 A.L.J. 513.

30 (1984) 3 N.S.W.L.R. 447, 450.

31 Ibid., 462.

32 Ibid., 462-463.

> There are opportunities for judicial restraint and for judicial development of the law. Nowadays these opportunities are more openly acknowledged than in times gone by. But the consequence of this acknowledgement is an obligation to consider relevant policy considerations which, consistent with legal authority, may properly be taken into account in determining whether, as in the present case, to take the next small step in the elaboration of the common law or to hold back.

He rehearsed the reasons for requiring reasons and the difficulties arising from the imposition of that burden. He recorded legislative acceptances of the arguments for imposing a reasons obligation at the federal level, in Victoria and in New Zealand. The passage of that legislation, he argued,[33]

> . . . far from suggesting that the common law should stay its hand in those jurisdictions (including New South Wales) where no such general legislative entitlement has been enacted, may simply reflect the same social changes and expectations that may also be evidenced in the common law. The legislature reacts to the same growth in the number and importance of administrative decisions of a discretionary character. So too may the courts. Particularly may they do so in an area where the common law has proved so creative and adaptable. The existence and prospect of further legislative developments in administrative law reform has not, for example, caused the High Court of Australia to stay its hand in a number of important and innovative developments of the common law affecting public administration.
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> . . . [W]here a number of relevant Parliaments have enacted laws elaborating modern conceptions of administrative justice and fairness, it is appropriate for the judiciary in development of the common law in those fields left to it, to take reflection from the legislative changes and to proceed upon a parallel course.

The High Court was not impressed either by the conclusion that there was an obligation to give reasons or by the reasoning in support of that conclusion. The Chief Justice (with whom the other four members of the Court, in two cases with some additional comment, agreed) said the conclusion of the Court of Appeal was opposed to overwhelming authority. The policy arguments, he suggested, were arguments to be addressed to the legislature. Such legislation is usually preceded by careful preparation, and usually contains limitations so that it does not apply to those decisions to which, as a matter of policy, application is not appropriate. Such attention to the particular characteristics of legislation is taken up in a different way in the concurring judgment of Wilson J. The specific statute creating rights of appeal for public servants expressly required reasons for a category of decisions distinct from that in issue in this case. For him it was clear that the legislature deliberately refrained from creating a right to reasons in the particular case, the more so since the statute was enacted at a time of extraordinary executive and legislative activity directed to the improvement of administrative efficiency and procedural fairness. Wilson J then mentioned Commonwealth, Victorian and New South Wales inquiries and statutes. This appears, with respect, to be an interesting and more sophisticated use of the context — legislative and other — to the particular issue: the other provisions of the specific Act are to be

33 Ibid., 465.

considered (the Act, that is, is to be read as a whole), and it is to be read in its wider context, which may run beyond other legislation and beyond the particular jurisdiction. That use of non-legislative material and non local legislative material does distinguish the judgment of Wilson J from that of the Chief Justice.

Such a broad and yet specific approach to interpretation of an administrative law statute is to be seen in fuller application in a recent outstanding judgment of the Supreme Court of Canada relating to the powers of Ombudsmen.[34] The Court rejected a challenge to the power of the British Columbia Ombudsman. It held that the Ombudsman could investigate a refusal by the British Columbia Development Corporation to renew a business lease. It began with the British Columbia equivalent of section 5(j) of the Acts Interpretation Act 1924:[35]

> Every enactment shall be construed as being remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

The Court's examination of the objects of the Ombudsman legislation traced the historical development starting with the Roman tribune and the control yuan of the dynastic Chinese and moved to the recent extensive growth of the office (including reference to a lecture given in Canada by Sir Guy on aspects of the search for administrative justice).[36] That enabled a general conclusion in the following terms which once again emphasise the open scrutiny of the exercise of public power.[37]

> The Ombudsman represents society's response to these problems of potential abuse and of supervision. His unique characteristics render him capable of addressing many of the concerns left untouched by the traditional bureaucratic control devices. He is impartial. His services are free, and available to all. Because he often operates informally, his investigations do not impede the normal processes of government. Most importantly, his powers of investigation can bring to light cases of bureaucratic maladministration that would otherwise pass unnoticed. The Ombudsman "can bring the lamp of scrutiny to otherwise dark places, even over the resistance of those who would draw the blinds."[38] On the other hand, he may find the complaint groundless, not a rare occurrence, in which event his impartial and independent report, absolving the public authority, may well serve to enhance the morale and restore the self-confidence of the public employees impugned.

The Court, against that general background and conclusion, only then turned to the statute and at that point only to the general legislative scheme, rather than to the particular provisions. The legislative scheme, as in the New Zealand case, contained important information elements. The provisions conferring power to recommend, to report to the cabinet, and to report publicly[39]

34 *British Columbia Development Corporation* v. *Friedmann* (1984) 14 D.L.R. (4th) 129, applied in *Ombudsman of Ontario* v. *Ontario Labour Relations Board* (1987) 23 Admin L.R. 71 (Ont. C. A.).

35 Interpretation Act R.S.B.C. 1979, c.206, s.8.

36 (1966) 9 Can. Pub. Admin. 133.

37 (1984) 14 D.L.R. (4th) 129, 139-140.

38 *Re Alberta Ombudsman Act* (1970), 72 W.W.R. 176 (Alta. S.C.) per Milvain CJ at 192-193.

39 (1984) 14 D.L.R. (4th) 141.

> . . . ultimately give persuasive force to the Ombudsman's conclusions: they create the possibility of dialogue between governmental authorities and the Ombudsman; they facilitate legislative oversight of the workings of various government departments and other subordinate bodies; and they allow the Ombudsman to marshal public opinion behind appropriate causes.
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> Read as a whole, the *Ombudsman Act* of British Columbia provides an efficient procedure through which complaints may be investigated, bureaucratic errors and abuses brought to light and corrective action initiated. It represents the paradigm of remedial legislation. It should therefore receive a broad, purposive interpretation consistent with the unique role the Ombudsman is intended to fulfil. There is an abundance of authority to this effect.

The Court finally moved to the particular words on which the challenge to the Ombudsman's powers were based — in particular the argument that commercial or business dealings between the corporation and the tenant were not "with respect to a matter of administration". The Court, against the earlier background, refused to read "administration" narrowly. There was nothing in the word to exclude proprietary or business decisions. The inclusion of Crown corporations within the scope of the Ombudsman legislation and decisions in other Canadian courts giving parallel provisions a wide reading also supported that broad view. The phrase "a matter of administration", in the opinion of the Court, encompassed everything done by governmental authorities in the implementation of governmental policy. Earlier the judgment also includes within the scope of "administration" the adoption and formulation of general public policy in particular situations. Only the activities of the legislature and the courts would be excluded.[40]

In this judgment the Supreme Court of Canada reminds us that openness in public administration is not an end in itself. Information is made available for some purposes, as Parliament in the Official Information Act and the courts in public interest immunity cases also stress, to allow public participation in policy making, to enhance the accountability of those exercising public power, to explain decisions and policies, to help correct them . . .

And such use of information, Milton and many others teach us, should improve our lot. T. S. Eliot gives us a warning with which, I think, Sir Guy would agree:[41]

> Where is the wisdom we have lost in knowledge?
> Where is the knowledge we have lost in information?

Jesus of Nazareth put it more positively:[42] "You shall know the truth, and the truth will set you free".

40 The approach of the court fits closely with that adopted by other Canadian courts, e.g. Keith "Judicial Control of the Ombudsmen?" (1982) 12 V.U.W.L.R. 299, 306-319. The approach of the Victorian courts provides a striking contrast.

41 "Choruses from 'The Rock'", 1934, I in *The Complete Poems and Plays* (Faber, London, 1969) 147.

42 St John 8: 32.