

FUTURE DIRECTIONS FOR OMBUDSMAN OFFICES – FOUR TRENDS, TWO REFLECTIONS

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This paper provides an important opportunity to reflect on the work, achievements and future direction of ombudsman offices in Australia and New Zealand. The large number of government and industry ombudsmen and staff signifies the rich ombudsman culture and the strong collaboration that exists in our region.

This paper focuses on the challenges facing ombudsman offices in the next ten years. I will do so by drawing from both my earlier seven years' experience as Commonwealth Ombudsman, and my present four years' experience as Australian Information Commissioner. The paper takes a high level look at the future, noting four possible trends, and offering two reflections on current ombudsman challenges.

Trend 1 – complaints, complaints, complaints: maintaining five decades of achievement

The surest point about ombudsman work is that it will still be vibrant in ten years, twenty years, and indeed for so long as our constitutional systems endure. Over the last fifty years in our region of the world the ombudsman has grown from obscurity to be a highly respected and effective organisation in our institutional arrangements.

It occupies a central place in administrative law, in the government accountability system, in the consumer redress system, in the civil justice system and in our national integrity framework. However we describe relations between the individual and government, or between the individual and business, the office of ombudsman plays a prominent role.

In a ceremony in Wellington in 2012 to mark fifty years of the New Zealand Ombudsman, the Speaker of the House of Representatives commented that the office 'provides a vital check within our democratic system', with a methodology that is distinctive.¹ In a ceremony the following year in Melbourne to mark the fortieth anniversary of the Victorian Ombudsman, the New Zealand Chief Ombudsman commented that the office 'has stood the test of time as a mechanism for resolving citizens' complaints – providing a fair and impartial assessment of grievances and their underlying causes and effecting changes ... which strengthen administrative justice, procedural fairness and trust in government, in industry organisations and in other facets of our lives where fair and equitable treatment is critical to harmony in the political, social and economic environment'.² In another ceremony in Melbourne this year to mark the twentieth anniversary of the Telecommunications Industry Ombudsman (TIO), the Australian Minister for Communications described the office as 'a world first' that has 'worked so diligently over two decades to deliver a highly professional dispute resolution service for Australia's phone and internet users' and is now 'synonymous with the liberalisation of the telecommunications industry'.³

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Those achievements of ombudsman offices were recognised in a draft report in April 2014 by the Australian Productivity Commission on *Access to Justice Arrangements*. One of the Commission's ten Key Points in its distillation of over 700 pages of analysis, is that 'helping people connect with less formal mechanisms, such as ombudsmen, could significantly reduce the level of unmet legal need'.⁴

The Commission identified as many as 73 Commonwealth, State and industry organisations in Australia that are either called an ombudsman or have a similar function (and, pleasingly, adopted the ANZOA statement of six 'Essential Criteria for Describing a Body as an Ombudsman'⁵). Between them, industry and government ombudsmen in Australia resolved 773,000 civil complaints in 2012-3, which was higher than the 373,000 matters finalised by tribunals and the 673,000 civil, criminal, probate and family matters finalised by courts.⁶

The Commission referred to many ombudsman strengths – the offices are independent and impartial, they address a wide range of disputes, they employ a variety of dispute resolution methods, they overcome the power imbalance between the individual and big organisations, they are simple for people to access, and they identify and address systemic issues.

The established but growing popularity and effectiveness of ombudsman offices in resolving grievances is illustrated by caseload trends. Some offices reported a marked increase in complaints in the past year, including a 45% increase for the Energy and Water Ombudsman NSW (EWON), 23% for the Public Transport Ombudsman, 10% for the NSW Ombudsman, and 29% for the New Zealand Ombudsman. Other offices that reported a decrease were able to explain convincingly that this followed steps taken by the office to address systemic issues in industry and government. For example, the TIO explained that an 18% decrease in complaints in 2012-13 followed 'a clear commitment from telcos to do better by their customers, an improved industry code and a focus on compliance';⁷ while the Commonwealth Ombudsman pointed to 'efforts over several years to encourage client agencies to improve and promote internal complaint handling services' to explain a 34% reduction.⁸

Trend 2 – Adapting, evolving and re-inventing the office

Why do ombudsman offices continue to grow in strength and reputation? There are many factors, but undoubtedly a key factor is their adaptation to the environment in which they work. This can be seen in many ways.

Ombudsman offices now come in many forms. Joining the parliamentary or government ombudsmen that date back many decades are the specialist industry ombudsman that oversee banking, insurance, energy supply, public transport and telecommunications. Some of those offices have grown from other ombudsman offices – such as the TIO evolving from a function discharged by the Commonwealth Ombudsman. Others, such as the Financial Ombudsman Service, have arisen from a merger of separate complaint bodies that dealt with banking, financial and insurance complaints. Some ombudsman offices span lines that divide others – such as the offices that handle both government and energy complaints or that discharge an information commissioner role that in other jurisdictions is handled by a separate office.

The range of ombudsman oversight functions has flourished. Individual complaint handling remains the core function, but greater prominence is nowadays given by most offices to systemic and own motion investigations. Other specialist functions taken on by offices include whistleblower protection, compliance auditing, records inspection, inspection of places of detention, review of child deaths, review of critical policing incidents, monitoring use of surveillance devices, decision-making training and publication of manuals and guides.

An example from my own period as Commonwealth Ombudsman is that we evolved to hold a number of different statutory hats – Taxation Ombudsman, Defence Force Ombudsman, Immigration Ombudsman, Law Enforcement Ombudsman, Postal Industry Ombudsman, Overseas Student Ombudsman and Norfolk Island Ombudsman. Though a quaint or peculiar arrangement at one level, this transposition was a deliberate strategy to combat a discernible risk that government would hive off some functions to specialist offices. The multiple hats demonstrated that a single ombudsman office could valuably combine both a general jurisdiction and specialist expertise and profile in sensitive areas of government administration.

The internet age has also stimulated a creative phase in ombudsman offices that is relatively new but refreshing. A survey of current ombudsman websites portrays considerable dynamism and cultural awakening as to how the offices represent themselves, describe their work, allow people to complain, elicit customer feedback, and the advice and guidance they publish for organisations and the community.

The lesson for the future is clear. Ombudsman offices must aim to evolve, adapt and remodel themselves as needed to keep pace with changes in government, business and the community. Some pressures are foreseeable, others less predictable. A strong theme in many ombudsman speeches and annual reports is that the offices must constantly respond to demographic changes in their client group, to the emergence of new vulnerable groups in society, to changes in government and industry service delivery methods that adversely affect clients, and to the impact of natural disasters, market events, new government and business programs, and government austerity measures that can have unanticipated consequences.

A current example from Australia of adaptation at work is changed complaint handling arrangements in response to privacy law amendments that impose new obligations on industry regarding the handling of personal credit information.⁹ There is now a greater chance that a dispute about financial lending, energy supply or a telecommunications service will have a privacy dimension. Accordingly, the Office of the Australian Information Commissioner (OAIC) can now accredit an industry ombudsman as an external dispute resolution service to which complaints will go in the first instance, before they come to the OAIC. There is likely to be a need for similar hybrid arrangements between privacy and health services commissioners to ensure privacy compliance in the handling of personal health information.

Another example where adaptation and remodelling by ombudsman offices may be required is in response to the popular use of social media channels and portable devices to conduct transactions with government and business. A person using a downloadable app to undertake a simple business transaction with an energy supplier may potentially fall within the jurisdiction of an energy ombudsman, a telecommunications ombudsman, a privacy commissioner and, if there is alleged dishonesty, an ombudsman with police jurisdiction.

Trend 3 – Maintaining relevance and effectiveness in a digital age

The impact of the digital age on ombudsman work warrants a separate heading. Here it is not a question of adapting to and incorporating change, but of being prepared to rethink the role, functions, style and method of the office.

Technology, digitisation, the internet and social media are transformative, in more ways than we can imagine, and at an astonishing pace. Technology is fast changing. Long established patterns in how people relate to government and business are changing – how they purchase goods, do banking, access public transport, change utility service plans, enrol to

vote, lodge forms, obtain a passport, conduct research, apply for a benefit, and make a complaint.

We are entering a world called ‘the internet of things’ – a world in which everything is connected to or represented in the internet, and all devices, systems and services are linked. It is an open and networked world in which connectivity and intelligence are woven into all interactions. Digital will be the new business DNA.¹⁰

How will this affect ombudsman offices? I will start with examples from my own office, the OAIC. Naturally we now work on a technological platform: most complaints and freedom of information reviews are received by email or through a web portal, communication with applicants and agencies is mostly by email, all records are digitised, and considerably more material is now published on the web (such as minutes of meetings, office plans and quarterly statistical reports).

Yet the impact of technology goes much further. If people can email an FOI request to an agency or a complaint to the OAIC, they can do so anonymously or by pseudonym, which is essentially what an email address is. No longer do we know with whom we are dealing, and investigatory protocols have had to adapt. Some agencies initially resisted this change but now accept that it is unavoidable.

In a world of online interaction it is also harder to control the complaint and investigation process. A community organisation has created a website called ‘Right to Know’, through which any person can anonymously make an FOI request to any agency (including the OAIC).¹¹ The entire interchange between the applicant and the agency is published on the web. The OAIC must keep abreast of what is happening in that space and work constructively but at arms’ length with the organisers of the website (including by inviting them to speak at seminars we organise).

Increasingly, too, as FOI disputes are played out live in the media, the OAIC is drawn into but has no control over how an issue will unfold. On occasions we intervene in Twitter conversations to correct, refine or supplement a message. Google is another resource that can be used to check whether documents that an agency claims are exempt from disclosure are not already in the public domain.

We also look for ways to use these developments to reinforce our philosophical goals – to suggest, for example, that if a person can lodge their tax return online they should equally be able to use the same medium to find out how their money is being spent by government. Open government and open data are a natural corollary of online service delivery.

Another dimension of technology is that it may stretch the capability of oversight bodies and their ability to meet client expectations. The community now has the option of conducting many routine business transactions online, such as lodging returns and benefit claims, checking on the progress of a matter, and cross-matching information for multiple purposes. Plans are well advanced in some agencies to move to the next phase, of facilitating transactions through downloadable apps on portable devices, including document lodgment, document sharing, voice authentication and video conferencing and client interviews.¹² These are sophisticated service delivery changes that require considerable resources and expertise to implement.

Will ombudsman clients expect the same innovative service options? An underlying maxim of ombudsman work is that the office should be at least as accessible, competent and responsive as the agencies that are being oversighted. Unless this expectation can be met there is a risk that ombudsman services will be regarded as antiquated and inefficient. A

brief web survey suggests that most ombudsman offices internationally still rely on more traditional means to receive complaints, and only one accepts complaints by SMS.¹³ Only a few have adapted their websites for different functional presentation on desktops, tablets and smartphones.

In summary, technology will impact on ombudsman offices from every direction – on business methods, communication with complainants and agencies, the expectations of stakeholders, and the options available to the community to either evaluate ombudsman performance or choose an alternative strategy to resolve a grievance.

The steps taken by ombudsman offices to adapt to the digital and cyber world will influence their effectiveness and stature. But it can also be an important market differentiator. A major reason why ombudsman offices have become more popular as dispute resolution mechanisms than tribunals and courts is that they have been able to adapt more easily and embrace flexible and informal methods that align with community expectations.¹⁴ A challenge for ombudsman offices is to respond to the digital age as an opportunity rather than a threat.

Trend 4 – Building profile and refining the message in a crowded market

Forty years ago Ombudsman offices stood alone in the administrative justice landscape as the alternative forum to courts and tribunals. Now there is a plethora of independent ombudsmen, commissioners, inspectors-general and so-called ‘watchdog’ bodies. New options and mechanisms are flourishing in the internet age. Ombudsman offices now work in a crowded market.

This luxuriant growth of complaint and dispute options is a welcome development, and aligns with the ombudsman philosophy that people have a right to complain and should have accessible options for doing so. But it also poses a new challenge for ombudsman offices to maintain and lift their stature and convey an understanding of their distinctive role and achievements. This challenge must be addressed in many quarters and at many levels.

The foremost need, in a crowded market, is for ombudsman offices to be visible, understood and accessible. A university research report in the United Kingdom has commented that five decades of ombudsman development in that country have led to a landscape that is ‘diverse, fragmented and incoherent’, a cluttered dispute resolution landscape that is ‘equally incoherent, muddled and confusing to consumers’.¹⁵ The report called on ombudsmen to ‘emerg[e] from the shadows of the justice system’, including by increasing consumer awareness and accessibility, being proactive and influential in the policy environment and creating a stronger Ombudsman Association.¹⁶

The Australian Productivity Commission draft report contains similar recommendations for ombudsman offices to be more visible to consumers, particularly disadvantaged and vulnerable client groups who can benefit most from ombudsman services. Confusion surrounding complaint avenues can also be costly for ombudsman offices in dealing with a large volume of enquiries and complaints that are out-of-jurisdiction.

Ombudsman offices must ask whether they are seizing the opportunity to publicise their brand – to the extent, for example, that human rights agencies have been doing. This does not mean that the story should be cast in sensational or attention-grabbing terms – ‘watchdog savages agency’. Doubtless that is the media preference, and the greater preparedness of human rights advocates to adopt that stance may explain their high media profile. There is nevertheless interest in story telling that illustrates how ombudsman offices can quietly go about providing redress to complainants and building on human interest

problems to trigger organisational change. Conflict need not be a measure of success. It is important that ombudsman offices are not muffled in a crowded and noisy environment.

Another way the ombudsman profile and image must be addressed is to ensure that influential reports of bodies like the Productivity Commission accurately understand and represent what ombudsman offices can do. While the Commission's draft report contains a pleasing endorsement of ombudsman work, it is troubling that a major theme, to quote a heading from the report, is that 'Ombudsmen provide a mechanism for resolving low value disputes'.¹⁷ Undoubtedly they do, but equally there are countless examples in Australia and New Zealand of ombudsman reports prompting major reform of administrative and legislative systems on issues as diverse as policing, customer billing, ticketing, immigration detention, freedom of information, payment of compensation, complaint handling and benefit and grant administration.¹⁸

Moving up a level, it must be asked whether the ombudsman role and success is well understood (in Australia at least) in organisational theory and teaching. At a time when judicial review of administrative action is declining in significance as a practical dispute resolution option, there is an outpouring of articles that focus on the judicial role in administrative law and justice. Only a few Australian legal academics or practitioners have ever written about ombudsman theory and practice.¹⁹ By contrast, far more is written about ombudsman themes by British academics²⁰ and leading jurists and practitioners in New Zealand.²¹

Interestingly, a recent ambitious endeavour in Australia to reposition the ombudsman and similar bodies in legal doctrine by proposing the notion of a fourth or integrity branch of government²² was assailed by a leading Australian jurist. The Chief Justice of Western Australia, the Hon Wayne Martin, trenchantly criticised this notion, and rejected any suggestion that ombudsman and like bodies could be elevated to the same constitutional plane as courts.²³ While recognising that integrity agencies have an important role to play, he commented that 'they are and must remain firmly with the executive branch of government ... and apply standards of conduct stipulated in the statutes which create them, rather than possibly idiosyncratic notions of public purposes and values'.

This criticism misconstrues that 'integrity branch' and 'fourth branch' theories are put forward as a way of stimulating debate on the need to update our constitutional thinking to take account of the profound changes in the dispute resolution landscape that have evolved over the past fifty years. Courts no longer stand alone in checking and curbing government and business power, and arguably have a dwindling practical influence. Ombudsman and similar bodies perform a major role in reviewing and scrutinising decision making and service delivery, cementing legal values in government and business processes, and meeting public expectations by providing an accessible forum to which grievances can be taken and resolved.

Finally, while theory is important it should not obscure the need to distil simple messages that convey the purpose and value of ombudsman work. To draw from the OAIC experience, we decided when established that thirty years of FOI and open government must be captured in a few memorable phrases. They are: 'government information is a national resource to be used for public purposes'; government information is better described as 'public sector information'; and access to information laws embody a 'presumption in favour of disclosure'. Those simple messages have been a powerful tool in shaping the culture of government and projecting the work of the OAIC. Similarly, in privacy regulatory work we echo the simple messages that have been fashioned by the privacy advocacy community – 'personal privacy is an individual and human right to be respected by government and

industry'; 'privacy protection is good business sense and a business enabler'; and privacy safeguards are best implemented through 'privacy by design' in all business processes.

Have ombudsman messages been as simply distilled? There is general recognition of a couple of catch-phrases – 'you have a right to complain' and a 'complaint is a gift'. But what comes next? Is there an equally catchy phrase – or rather a more discursive statement about the need for fairness, propriety and respect in government and business processes?

I now turn to make two brief reflections on ombudsman work.

Reflection 1 – Safeguard the reputation of the office against personal information data breaches

Ombudsman offices are always aware that their reputation can be tarnished. Organisations that throw stones are likely to have them thrown back if the opportunity arises.

The risks are many, but none more acute than the risk that personal information will be mishandled, misused or wrongly disclosed. Probably every case file in an ombudsman office contains identifying personal information, often sensitive information about a person's health, finances, relationships or predicament. The community relies on ombudsman offices to safeguard that personal information, and indeed there is a legal duty to do so under privacy and other laws. Ombudsman offices usually take special precautions to meet that expectation – for example, anonymising case studies in published reports, and ensuring that people purporting to represent complainants have proper authority to do so.

However, data breaches now pose a threat to all organisations, locally and globally. Organisations that have the most to lose from a publicised data breach have not been immune from lapses or targeted cyber breaches. Painful episodes that have recently been given extensive public coverage include Sony Playstation exposing up to 100 million client files; the retailer Target exposing the credit records of upward of 40 million customers; Google street view cameras vacuuming up personal information from unsecured home wifi networks; the Accident Compensation Commission in New Zealand accidentally attaching a spreadsheet containing information on 6700 clients to an email sent to a customer; the Immigration Department in Australia publishing a graph that inadvertently allowed access to source data that contained personal information on thousands of immigration detainees; and Telstra in Australia exposing the personal information of over 15,000 customers to unauthorised internet access.

Lest we think that any of us can be complacent, two publicised data breaches this year affected the Australian Competition and Consumer Commission, when personal subscriber data could be collected by the Commission's website;²⁴ and the Canadian federal privacy commissioner, which did not properly secure sensitive personal information on 800 current and former employees.²⁵ The response of the Privacy Commissioner contains a warning to all oversight bodies – the data breach was 'humbling'.

The challenge is unambiguous. A data breach can come in many forms – a file left in a coffee shop; a lost USB stick; a rushed and unedited email; a slip of the tongue; a shared password; an error in publishing data; a lax security system; a website design problem; or a sophisticated and targeted cyber attack. Whatever form a personal information data breach takes can pose a major reputational risk for an ombudsman office. The threat and the challenge are likely to grow over time as digitisation makes it easier both to enlarge and to attack personal information data systems.

Reflection 2 – Customise the office in a constructive way

Ombudsman offices are a mixture of many parts – the constitutive document, strategic plan, customer service charter, governance arrangements, staff, business processes, IT systems, published reports, and stakeholder relationships.

Yet there is of course another key element – the Ombudsman. Almost unique among executive and oversight bodies, the title of the office is the same as that of the head of the office – Commonwealth Ombudsman, New Zealand Ombudsman, Western Australian Ombudsman, Public Transport Ombudsman, Banking and Insurance Ombudsman, Energy and Water Ombudsman.

I was reminded of this unique arrangement soon after I started as Commonwealth Ombudsman and decided to be hands-on and work in the customer call centre once a month. Most people who rang in said ‘I’d like to speak to the Ombudsman’. ‘You can’t; he’s unavailable’, I’d have to say. Therein ended that experiment.

The message nevertheless remains. The personality and philosophy of the Ombudsman can be an important element in the style and profile of the office. This has current relevance in Australia and New Zealand as four high profile ombudsman in the region move on in the next year or so – Dame Beverley Wakem in New Zealand, Bruce Barbour in NSW, Clare Petre from EWON and George Brouwer has already left in Victoria.

I would not like to follow in the footsteps of any of them. Each has been a towering figure in the ombudsman community and has placed a personal stamp on their office that is distinctive and will endure. However, their departure can also be taken up as a new opportunity to grow and develop each office. I often reflect that I was fortunate to follow two very different Ombudsmen – one who came from the community sector and was innovative and publicly assertive, and another with a long and respected career in government who cemented relations with agencies and placed the office on a sound financial footing. This provided an ideal platform for a new ombudsman to develop a different style that drew from both examples.

Over time the influence and durability of an ombudsman office can draw from the fact that each ombudsman will be different. The capacity and flexibility of the institution to accommodate different styles should be embraced as a strength rather than a transitional worry. There should be a vibrant and ongoing debate within all offices and with stakeholders about the direction and philosophy of the office. The departure of one ombudsman and the arrival of another can be an occasion to undertake that debate in a constructive way.

This point should not be mistaken as suggesting that an ombudsman should uniquely personalise the office or necessarily chase a high media profile. It can be as damaging to the reputation and effectiveness of an office if its approach at any particular time is regarded merely as reflecting the idiosyncrasies of the current occupant.

The point rather is that the profile, commitment and energy of the ombudsman can supplement the other enduring strengths of the office. This is a distinctive feature of the ombudsman role that should be utilised.

The ANZOA community provides an ideal forum for fostering debate on these issues and enabling the institution of ombudsman to build on fifty years of success in the Australian-New Zealand region.

Endnotes

- 1 The Right Hon Lockwood Smith, Speaker of the House of Representatives, '50 Years of the Ombudsman in New Zealand', 2 October 2012.
- 2 Dame Beverley Wakem, 'The Ombudsman at Large', 12 November 2013.
- 3 The Hon Malcolm Turnbull, 'Telecommunications Industry Ombudsman 20th Anniversary Reception', 3 April 2014.
- 4 Productivity Commission Draft Report, *Access to Justice Arrangements: Overview* (2014) at 2; see also Ch 9.
- 5 www.anzoa.com.au.
- 6 Productivity Commission Draft Report at 4.
- 7 www.tio.com.au/publications/media/consumer-complaints-to-telco-ombudsman-at-a-five-year-low.
- 8 Commonwealth Ombudsman, *Annual Report 2012-13*, Foreword.
- 9 *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth), discussed at www.oaic.gov.au.
- 10 See C Yiu & S Fink, 'Smaller, Better, Faster, Stronger: Remaking Government for the Digital Age' (2013, Policy Exchange).
- 11 www.righttoknow.org.au.
- 12 See G Hurley, 'Privacy by Design: Delivering Government Services using Mobile Applications' (2014) 76 *AIAL Forum* 68; and www.humanservices.gov.au/customer/services/express-plus-mobile-apps.
- 13 Namely, the UK Ombudsman Service: www.ombudsman-services.org. An example of an innovative Australian office is the Energy and Water Ombudsman NSW, 'Social Media Policy, Strategy and Guidelines' (March 2013).
- 14 See J McMillan, 'The Impact of Technology on the Administrative Justice System' (2013) 75 *AIAL Forum* 11.
- 15 C Gill, J Williams, C Brennan & N O'Brien, 'The Future of Ombudsman Schemes: Drivers for Change and Strategic Responses' (Queen Margaret University, July 2013) at 6, 11, 13.
- 16 Gill, Williams, Brennan & O'Brien at 3, 61.
- 17 Productivity Commission Draft Report, *Access to Justice Arrangements* (2014) at 278. I note the excellent ANZOA submission in response to the Commission's draft report: www.anzoa.com.au.
- 18 Eg J McMillan, 'Can Administrative Law Foster Good Administration?', Whitmore Lecture 2009.
- 19 The only consistent Australian academic writer has been Anita Stumhcke – eg "Each for themselves" or "One for All"? The Changing Emphasis of the Commonwealth Ombudsman' (2010) 38 *Federal Law Review* 143; 'The Evolution of the Classical Ombudsman: A View from the Antipodes' (2012) *International Journal of Public Law and Policy* 83.
- 20 See the bibliography to the report by Gill et al, note 15 above.
- 21 Eg Dame Sian Elias, 'The Place of the Ombudsman in the Justice System', Keynote speech to the 2010 ANZOA conference; Mai Chen, 'New Zealand's Ombudsmen Legislation: The Need for Amendments after almost 50 years' (2010) 41 *Victoria University of Wellington Law Review* 723.
- 22 See the essays in (2012) 70 *AIAL Forum*.
- 23 The Hon Wayne Martin AC, 'Forewarned and Four-Armed – Administrative Law Values and the Fourth Arm of Government', Whitmore Lecture 2013.
- 24 'ACCC statement regarding its websites', 11 April 2014, Media Release 85/14.
- 25 'Privacy watchdog awaits report on data loss in own office', *Montreal Gazette*, 24 April 2014.