

CHAPTER 7

REFLECTIONS ON PROCESS

Because this inquiry is the first to be conducted in response to the decision of the Supreme Court of Canada in the *PEI Reference Case*, we have spent considerable time in our own deliberations focusing on issues of process. There are no “hard and fast rules” for how the inquiry we have conducted should be undertaken. Successor Commissioners will develop their own procedures and any procedures we have adopted, while possibly helpful, are not binding as precedents. We believe, nonetheless, that it may assist successor Commissioners if we record the way in which we dealt with many of the process and procedural issues we considered. This Chapter does that, and also puts forward some suggestions as to how the process might be improved in future.

7.1 Relations with the Parties

Although the mandate and authority of this Commission is found in section 26 of the *Judges Act*, the Commission is also rooted in the constitutional framework that assures the independence of the Judiciary and the determination of the remuneration of the Judiciary by Parliament, and in the interpretation of that framework enunciated by Chief Justice Lamer in the *PEI Reference Case*. Among the consequences that flow from this is the recognition that the Government must respond promptly to the recommendations of the Commission, and that the Government must be prepared to justify, if necessary in a court of law, any decision not to implement the Commission's recommendations:

What judicial independence requires is that the executive or the legislature, whichever is vested with the authority to set judicial remuneration under provincial legislation, must formally respond to the contents of the commission's report within a specified period of time. ...

Furthermore, if after turning its mind to the report of the commission, the executive or the legislature, as applicable, chooses not to accept one or more of the recommendations in that report, it must be prepared to justify this decision, if necessary in a court of law. ... An unjustified decision could potentially lead to a finding of unconstitutionality.¹

This obligation on the Government to respond and justify its decision has altered the relationship of the Government to this Commission compared to its relationship with past Triennial Commissions. For example, we understand that this is the first Commission on judges' salaries and benefits where the Government has chosen to be represented throughout by counsel. This has tended to make the process and the work of the Commission somewhat more formal compared to the way in which we understand the previous Triennial Commissions to have functioned.

In considering our process, we reached the following conclusions:

- i) the Commissioners should have no direct contact with either the Judiciary or the Government on any matter before the Commission, other than through counsel to the parties. When we made requests to either the Government or the Judiciary, we ensured that the other party was made aware of the request, and, in cases where third parties had expressed a particular interest in the issue that concerned us, we endeavoured to ensure that they were also made aware of such requests;
- ii) since the *Judges Act* mandates us to submit our report to the Minister of Justice, it places the Commission in the position where, by statute, we are required to submit our report to a representative of one of the parties in proceedings before us. We concluded that fairness required that we make our report available to all parties at the same time, to the extent that logistics would allow;
- iii) our Commission decided that we should be as open and informal as possible. Our web site provided an opportunity to ensure that all parties, and other interested persons, could follow the submissions and arguments made to the Commission, and could contact us easily by e-mail if they wished to make comments. We provided three opportunities for written submissions: an original submission, a reply submission and a final submission. This process seems to have worked well; and
- iv) we endeavored to make our public hearings as informal as possible. Counsel representing parties submitted that formal rules of evidence did not apply

¹ *Supra*, Chapter 1, fn. 4, at paras. 179 to 180.

and we agreed. We structured our hearings in a way that would maximize information exchange, rather than the reiteration of formal positions that had already been made in written submissions. We also allowed questions of clarification of any party by all parties in attendance at the public hearing. Again, we believe that this process served the Commission and the parties well.

7.2 Organizational and Administrative Issues

In the early days of this Commission we received valuable administrative and logistical support from the Commissioner for Federal Judicial Affairs and his staff. We established our own offices that are associated with those of the Commissioner in order to achieve economies, but function independently. We suggest that the Commission, as a permanent entity separate from the Government and the Judiciary, should maintain its own offices and its own files. These should be physically separate from and independent of the Office of the Commissioner for Federal Judicial Affairs, although we believe that it is helpful and efficient to maintain close administrative ties with that office.

With regard to composition and staffing, we urge the Judiciary and the Government to nominate their representatives on the Commission in future in a time frame that will allow the Commission to be constituted and fully ready to function as of the September 1 date at which the quadrennial inquiry must be commenced. Nine months in which to conduct an inquiry of this scope and importance is not a long time.

In considering the timing of nominations, note must be taken of the manner in which the Commission is constituted. Each of the Judiciary and the Government nominates a Commissioner and the two nominees are charged with identifying and recruiting a Chair. In the case of this Commission, the nominees did not seek and were not provided with any assistance from the parties with regard to potential chairs of the Commission. We believe that the timelines around the appointments of the nominees were such that we were indeed fortunate to be able to commence our work, as required, in early September 1999. It took many additional weeks to recruit staff and put in place the necessary logistical and support measures that allowed us to function effectively. We believe that it is desirable for the next

Commissioners, whose inquiry will commence on September 1, 2003, to be appointed well in advance of that date, so that staffing and logistical arrangements can be made and a fully functioning Commission can have nine full months to complete the mandate that is set out for it in the *Judges Act*.

7.3 The Role of Experts and Research

We benefited greatly from the advice that we obtained from experts who examined difficult compensation, constitutional and other legal issues for us. We suggest that future Commissioners may wish to consider engaging such experts early in their inquiry.

One area where we felt the process might be improved concerned the matter of research. Our initial view was that the Commission might play a helpful role in working with the Judiciary and Government to identify an agreed research agenda, and that we might then contract such research on behalf of the parties and the Commission. In the event, this idea became a casualty of our not being fully staffed and ready to commence an in-depth review of the issues as of September 1. We simply had too many other administrative and logistical issues to deal with first. We continue to believe that it is a concept that makes good sense and one worthy of pursuit by future Commissioners. There are several benefits: increased understanding of the issues considered relevant by each party; economic use of research resources; and, hopefully, an accepted data base that would be common to the Commission, the Judiciary and Government.

As we indicated in Chapter 2, our deliberations on salary levels were informed by considerable information provided to us by both the Conference and Council, and Government. However, we did not have full or current information on the incomes of lawyers in private practice, the group that is likely to continue to yield most of the outstanding candidates for appointment to the Bench. Information from tax returns, provided to us by the Conference and Council, was a helpful proxy. We believe, however, that the Commission should develop, as best it can, a relevant income measure for lawyers in private practice that would allow it to track over time, in

a consistent way, the relationship between judges' compensation and a compensation measure for the private bar.

We believe that the Commission should be resourced to conduct a survey of private practitioner incomes on a regular basis.