# *Independence as a State of Mind*

**by John Reid**

*In recent years there has been a proliferation of Officers federally, provincially and territorially, with responsibilities for conflict of interest, access to information, privacy, protection of whistle-blowers and children. In every case one of the essential issues is whether the Official will have the necessary independence to carry out the responsibilities provided in the legislation. In this article the federal Access to Information Commissioner outlines some obstacles that must be overcome to enable a culture and spirit of independence to flourish.*

If you only read newspapers and listened to the Ottawa rumour-mill, it might seem that the Information Commissioner is a pretty cranky, crabby guy, who issues subpoenas, grills mandarins under oath, fights court cases against the Prime Minister and makes enemies. This could hardly be farther from the truth.

The Information Commissioner is an ombudsman appointed by Parliament to investigate complaints that the government has denied rights under the *Access to Information Act*. The Commissioner is duty bound to investigate all complaints fully and to satisfy himself that the Act has been respected. The Commissioner has strong investigative powers but, in the end, he may not order a complaint resolved in a particular way; he can only make recommendations.

Consequently, Information Commissioners and their officials rely on informal techniques of gathering evidence and on persuasion, negotiation and mediation to achieve resolutions of complaints. It is extremely rare for subpoenas to be issued and no one receives a subpoena unless he or she refuses a polite invitation to cooperate voluntarily. It is even more rare for the Information Commissioner to ask for a Federal Court review of a government institution's refusal to disclose documents. The courts are only resorted to if the Information Commissioner believes an individual has been improperly denied access and a negotiated solution has proven impossible.

To show how rare this is, I note that in fiscal year 1999-2000, 99.9% of complaints to us were resolved without me initiating a Federal Court review. Only three reviews were begun. Again, in fiscal 2000-2001, 99.9% of complaints were resolved without going to court. In that year, only two reviews were brought to court. These figures paint a picture of the process that is far different from the image of a power-mad Commissioner and his minions, hell-bent on beating government institutions and bureaucrats into submission.

But, the fact remains that every investigation is an investigation into some action or decision of a government institution or official. Every recommendation is directed towards the head of the appropriate government institution.

This, then, is the type of office where independence is essential to avoid both the appearance and actuality of bias either for or against government. Not only do the duties demand it, but so, too, does the subject matter. The public's right to know cuts across every substantive issue in which government is involved. The courts have called the right "quasi-constitutional". The very vibrancy of our democracy, rests, in part, on this right to know. All of this caused Parliament to use a variety of design devices to encourage independence as a characteristic of the Information Commissioner.

*John Reid is the Information Commissioner of Canada. This is a revised version of his address to the Conference on Independence and Responsibilities of Officers of Parliament held in Saskatoon on November 2, 2001.*

First, Parliament chose to highlight the importance of independence in the Act's purpose clause, subsection 2(1) of the Act, which states:

> The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exemptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

Parliament also decided that the Information Commissioner, like the Privacy Commissioner, Commissioner of Official Languages and Chief Electoral Officer, may be appointed by the Governor in Council only after approval by the House and Senate. That is an effort to give a special measure of independence to our positions. That is why the members of this group, along with the Auditor General who reports to his own committee, have come to be called "officers of Parliament." The length of my term, seven years, with the possibility of renewal, is another independence-serving attribute—unless, of course, you are near the end of your term and are hoping for a renewal.

As a parenthetical note here on the appointment process, I should mention a bit about the process followed when I was appointed in 1998. When my predecessor, John Grace finished his term as Information Commissioner, he urged the government not to proceed with its plan to replace him with a public service insider. What followed showed how determined parliamentarians are to have a fiercely independent Information Commissioner. They made it clear that the government's first nominee, a long-time senior bureaucrat, did not have sufficient distance from government to satisfy the requirement of independence. To the first nominee's credit, she was sensitive to these concerns and voluntarily withdrew her name.

Further, members of both houses of Parliament insisted on having the opportunity of putting questions to me before my nomination was finalized. This pre-nomination scrutiny was a first for the House of Commons and the Senate and was a healthy development in the appointment process for Officers of Parliament. There may be arguments against such a process for other appointees, but it seems eminently well-suited for Officers of Parliament.

Other items in our statute which go towards ensuring independence are the protection against criminal and civil proceedings against me or any of my staff for anything done in the good faith exercise of my duties, including libel and slander; the power, while investigating complaints, to summon and enforce the appearance of persons to come before me and to compel them to give oral or written evidence under oath and to produce documents and other things; the power to enter any premises occupied by any government institution and to examine or obtain copies of any records found on the premises and the power to make annual and special reports directly to Parliament on any matter within the scope of my powers, duties and functions.

All of these statutory provisions are powerful institutional incentives for independence to me and my office, but, alone, they are not guarantees of independence. What keeps Information Commissioners from becoming too pro-complainant is his or her need to convince, not order, government to do the right thing. No Commissioner can accomplish the mission if he is perceived as biased in favour of complainants.

On the other hand, Information Commissioners are kept from being too pro-government by a provision, in the statute, allowing complainants to seek redress in the courts if they are dissatisfied with the outcome of investigations. No Commissioner can accomplish the mission if he is perceived as having a bias in favour of government.

> ***My predecessor, John Grace, has said that he felt he was getting the independence balance just right when he was getting criticized from both sides!***

In 2000, the Federal Court of Canada had occasion to consider whether or not these design elements I have described were sufficient to enable my office to try, and if necessary punish, a person for contempt. I refer you to a decision of the Trial Division of the Federal Court in the case of William Rowat and the Information Commissioner of Canada and the Deputy Information Commissioner of Canada. This case gave the Federal Court an opportunity to give what it viewed as the indicia of independence and to measure my office against them.

Mr. Rowat was, at the time of my investigation, a senior Advisor to the Privy Council Office (PCO) who had been Deputy Minister of the Department of Fisheries and Oceans (FO). In 1997 he was seconded from the Government of Canada to the Government of Newfoundland as a negotiator for the Voisey's Bay mining project. In 1998, my office received a complaint against the heads of PCO and FO alleging that an access requester's identity had been improperly disclosed to Mr. Rowat during the processing of access to information requests regarding

Mr. Rowat's secondment and his work-related expense claims in 1996 and 1997.

During the course of the investigation, it was determined that, prior to the access requester being answered, Mr. Rowat wrote a letter to the access requester demanding to know what was being collected about him and why. My office wanted to know the circumstances giving rise to Mr. Rowat's decision to write the letter, including the name of any person who had told Mr. Rowat that the person to whom he wrote was collecting information about him. Mr. Rowat refused to disclose the identity of his source, he was cited for contempt and arrangements were made to proceed with the contempt hearing. Mr. Rowat then filed the Federal Court action for judicial review wherein he challenged the constitutionality of the provision in the *Access to Information Act* which authorizes the Information Commissioner to enforce his investigative orders.

This challenge was based on the argument that the Information Commissioner is neither independent nor impartial. In finding in favour of the Information Commissioner, Mr. Justice Campbell first set out what he saw as the tests for independence and impartiality, which he saw as similar. He quoted Chief Justice Lamer of the Supreme Court of Canada in *R. v. Généreux*.

> I emphasize that an individual who wishes to challenge the independence of a tribunal for the purposes of s. 11(d) [of the *Charter*] needs not prove an actual lack of independence. Instead, the test for this purpose is the same as the test for determining whether a decision-maker is biased. The question is whether an informed and reasonable person would perceive the tribunal as independent. ... It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception. The perception must, however, as I have suggested, be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees.

Chief Justice Lamer, in *Généreux*, went on to list what he viewed as the essential objective conditions or guarantees necessary for a public official to be considered independent. The first is security of tenure, which must include that the decision-maker be removable only for cause. This security of tenure can be until retirement, for a fixed term, or for a specific adjudicative task, as long as it is "secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner."

The second condition, or guarantee, is that a decision-maker must have a basic degree of financial security. The Court said that the "...essence of such security is the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive in a manner that could affect judicial independence." Within these parameters, the government still has the authority to design specific plans of remuneration suitable to different levels or types of tribunals, agencies or individuals.

The third essential condition of independence is institutional independence with regard to administrative matters, specifically those that relate to the exercise of the tribunal or individual's judicial function. "It is unacceptable that an external force be in a position to interfere in matters that are directly and immediately relevant to the adjudicative function." While there are always some relations between decision-makers and the Executive, "...such relations must not interfere with the judiciary's liberty in adjudicating individual disputes and in upholding the law and values of the Constitution."

The Federal Court applied these three conditions to the Information Commissioner. It began by agreeing with the description of the Commissioner as "...a neutral and independent ombudsofficer charged with supervising the administration of the *Access to Information Act* ... and is limited to making recommendations to government institutions or to Parliament regarding the disclosure of government information...."

The Court then scrutinized the *Access to Information Act* for evidence of the presence of the three conditions noted above. It found evidence of security of tenure in sections 54 and 55, of financial independence in sections 55 and 66 and of institutional independence in sections 34, 58 and 59, the details of which were mentioned earlier in this paper. The Court therefore found that an informed and reasonable person would perceive the Commissioner as independent.

Similarly, the Court found that Mr. Rowat's allegations that the Information Commissioner lacked impartiality were without merit. The two components of impartiality are "state of mind" and "institutional or structural makeup." The Court stated that "...there is no evidence whatsoever that the Commissioner has any personal interest in the outcome of the investigation being conducted in the present case ...[and] there is no evidence that the Commissioner has any institutional interest in a particular answer [from Mr. Rowat]. In my opinion, all the Commissioner is attempting to do is comply with the mandatory requirements of the Act through the application of s.30(1)(f) and the use of s.36(1)(a). This does not make him partial." The Court found that an informed and reasonable person would perceive the Commissioner as impartial.

Consequently, the Court ruled that the Commissioner could proceed to try Mr. Rowat on the contempt charge notwithstanding that there could be penal consequences for him.

Another design attribute of being independent not dealt with by the Court, but which I consider important, is a large measure of independence in administration to compliment the independence of action. As Officers of Parliament, we need to be in control of our organizations and staff. In the *Access to Information Act*, sections 54 through 59 set up the Office of the Information Commissioner, with the Information Commissioner having the rank and powers of a deputy head of department, along with staff and premises. Unfortunately, there is something missing in our statute, something which, in my view, is essential. That is, financial independence, not from Parliament, but from the government. Our budget is submitted to Treasury Board through the Minister of Justice, two of the very departments with which I must periodically do battle.

This relationship is unfortunate as it undermines both the actual and apparent independence of the Information Commissioner. After all, the Minster of Justice is also the adversary in all litigation undertaken by my office. The Minster of Justice has even been a party to litigation seeking to limit the scope of the Information Commissioner's jurisdiction. One must also bear in mind, too, that the Minister of Justice is the legal advisor to all departments against whom complaints to the Information Commissioner are made by the public.

This is not the kind of relationship where the Minister should have, as she does, control over the submission to Treasury Board of the Information Commissioner's requests for resources. However careful the Minister may be not to interfere, as long as there is the possibility of holding the Information Commissioner's resources to ransom, the appearance of independence is undermined.

Because of the appearance of political control and potential for improper interference, I have long called for the Office of the Information Commissioner to be moved out of the Justice portfolio. There are other, more comfortable, "homes" for it, which do not find themselves, on any regular basis, in an adversarial position vis-à-vis the Commissioner. Either the Deputy Prime Minister or the Government House Leader or, perhaps, the President of the Treasury Board – the Minster responsible for the *Access to Information Act* – could take the responsibility of being the cabinet member in whose portfolio the Office of the Information Commissioner falls.

I began by stating that independence is a state of mind and spent much of my time discussing the design elements that legislators have used to demonstrate and encourage independence. Now, in closing I return to the beginning: despite all the design protections in statutes, independence is elusive.

It is my contention that you cannot have true independence without the specific factors outlined above. That is, of course, not just my contention, but is the contention of the Federal and Supreme Courts of Canada as well. But, even if the nuts and bolts are in place and all the indicia of independence are present, an Officer of Parliament must still strive and fight actually to be independent. We must not worry about reappointment, about being in the dog house with senior bureaucrats and politicians, about being the most popular person in town. To be truly independent, both on paper and in actuality, we must be free of such concerns and not worry about losing friends or influence in high places.

I conclude with the words of R.S. Abella, before her appointment to the Ontario Court of Appeal. She stated:

> At the heart of ... independence is the capacity to make courageous judgment calls without fear of political consequences. It takes Herculean feistiness for tribunal adjudicators to develop decisions [or recommendations] of a potentially controversial kind – and in our respective sensitive areas these are often the only kind that we can make – when they know that at the end of the political telescope through which they are observed is a person with the power to renew or not renew a three or five-year appointment.

These words ring true to me as capturing the essence of what Officers of Parliament must do to achieve the goal of independence.