JUDICIAL INDEPENDENCE AND IMPARTIALITY IN THE AFTERMATH OF THE MARSHALL CASE

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A critical review of the Canadian Judicial Council's Inquiry Committee Report[1] on Justices Hart, Jones and Macdonald of the Nova Scotia Court of Appeal cannot fault the unanimous conclusion of the committee members that the three judges in question should not be removed from office. Nor can the Supreme Court of Canada be faulted for its conclusion in *Hickman* v. *MacKeigan*[2] that it is a violation of the principle of judicial independence to require judges to disclose information about their deliberations. Yet, the results of these two correct conclusions have limited our ability to draw lessons from the *Royal Commission on the Donald Marshall, Jr., Prosecution*;[3] lessons crucial to the understanding and development of concepts of judicial independence and impartiality in Canada.

It is ironic that the Inquiry Committee Report, reprinted in this *Journal*, is one of the most important official responses to follow the publication of the Royal Commission Report, since the circumstances surrounding the work of the Inquiry Committee prevented it from considering some of the Royal Commission's most serious criticisms of the judiciary. In fact, none of the three judges, who were the objects of the Inquiry, were even mentioned by name in the Royal Commission Report, with the exception of a one sentence reference to a 1961 letter written long before the murder of Sandy Seale and the events that followed by Mr. Justice Malachi Jones while he was Senior Solicitor in the Nova Scotia Attorney General's Department.[4] The two judges who were criticized by name, Chief Justice Ian MacKeigan and Justice Leonard Pace, both sat on the controversial *R.* v. *Marshall* decision,[5] but their conduct was not examined by the Inquiry Committee. The reason is straightforward enough. While the Canadian Judicial Council was asked by the Nova Scotia Attorney General on February 9, 1990, to hold an Inquiry, Pace's resignation "due to ill health" was accepted on April 5 and MacKeigan retired on April 11 having reached the compulsory retirement age of 75, well

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[1]*Report to the Canadian Judicial Council of the Inquiry Committee established Pursuant to subsection 63(1) of the Judges Act at the Request of the Attorney General of Nova Scotia*, August 1990 [hereinafter the *Inquiry Committee Report*].

[2][1989] 2 S.C.R. 796.

[3]*Commissioners' Report: Findings and Recommendations*, vol. 1, Province of Nova Scotia, 1989 [hereinafter the *Royal Commission*].

[4]*Ibid.* at 72.

[5](1983), 57 N.S.R. (2d) 286 [hereinafter the *Reference*].

before the Inquiry Committee began its hearings on June 4 in Halifax.[6]

Compounding the irony is the fact that while the Inquiry Committee focused on the internal deliberations of the Court of Appeal panel that heard and decided the Marshall Reference between December 1982 and May 1983, the criticisms of Pace and MacKeigan by name did not. Pace was criticized *inter alia* for having sat on the Reference while MacKeigan was criticized for not properly using his administrative authority over judicial assignments to exclude Pace from the Reference panel.[7] These fundamental and important issues were therefore beyond the scope of the Inquiry Committee.

Thus, the Marshall affair and its aftermath have left unanswered, and in some cases unexamined, a number of important questions about both the independence and impartiality of the judiciary; at the individual level of the particular judge as well as at the administrative level of the court as a public institution. The present comment can only make initial assertions and urge their wider consideration.

Discussions With Government

The five judges who sat on the Reference were not immune from scrutiny as to whether they had discussed the Marshall case with executive officials from either the Provincial or Federal Government, or both. While this dimension of *Hickman* v. *MacKeigan* was touched on by Mr. Justice Cory in the Supreme Court of Canada,[8] it appears that neither the Royal Commission nor various counsel distinguished between asking judges what they discussed among themselves and asking judges what they discussed with government officials. Since discussions between judges and government officials about the merits of a pending case are inappropriate and violate judicial independence when they take place outside the courtroom and not in the presence of opposing counsel, it would have been difficult for the five judges to invoke the principle of judicial independence as a basis for refusing to answer questions about any such discussions.

Even if it is successfully argued that the principle of judicial independence cannot be used to shield judges from questions concerning actions that violate the principle, such as discussing the merits of a pending case with government officials, those questions cannot be asked indiscriminately. If the Royal Commission had no reason to believe that any of the five judges had discussed the Marshall case with government officials outside the courtroom without the presence of opposing

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[6]Report of Inquiry Members Richard C.J., Laycraft, C.J., Abella and Bellemare, *supra*, note 1 at 1 [hereinafter the *Majority Report*].

[7]*Ibid.* at 16.

[8]*Supra*, note 2, reasons of Cory J. at 836-847.

counsel, asking them to appear and put their denials on the record would constitute a form of inquisition inconsistent with the presumption of innocence. In the present case, however, evidence before the Royal Commission was sufficient to allow questions to be put to Justice Pace and Chief Justice MacKeigan.

Testimony showed that the Chief Justice was advised "as a matter of courtesy" by Jacques Demers, Executive Assistant to then Minister of Justice, Jean Chrétien, that the proposed Reference would be forthcoming.[9] While the initial contact may be seen as a normal part of the administrative procedures that flow from MacKeigan's responsibilities as Chief Justice, the Royal Commission Report accepts as fact the federal official's testimony that MacKeigan raised legal issues "in later conversation" that led the federal Justice Department to alter the basis on which the Reference was requested.[10] The Royal Commission Report contains no evidence that MacKeigan was motivated by anything other than a desire to be helpful, but the Royal Commission concluded that it was "regrettable that officials in the Department of Justice were influenced by the views of the Chief Justice in determining the final form of the Reference."[11] Whatever the merits of the Chief Justice's views, it is inappropriate for a judge to offer advice to government in private on how to litigate a matter in the judge's court. Given this evidence, MacKeigan could have been required to appear before the Royal Commission to respond to questions about these and other discussions he had with government officials respecting the Marshall case.

Mr. Justice Pace was Nova Scotia's Attorney General in 1971 at the time of Marshall's original conviction and appeal. It is hard to imagine that he would not have discussed the merits of the case at that time and formed an opinion. Testimony before the Royal Commission indicates that he had quite likely done so. A provincial Government lawyer noted that in a private conversation he had with Pace "that he [Pace] knew from the time that poor old Mr. Ebsary [the man ultimately convicted in Sandy Seale's death] was charged that he could not be guilty."[12] The lawyer, "a solicitor with the Halifax office of the [Nova Scotia] Department of Attorney General...was summoned to Justice Pace's office, where he was severely admonished for having raised the issue of bias" in a subsequent appeal arising from Ebsary's third trial.[13] Given this evidence, Pace could, and should, have been required to appear before the Royal Commission and asked about any discussions that he may have had with government officials about the Marshall case following his appointment to the bench. The implications of his

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[9] *Royal Commission, supra,* note 3 at 114.

[10] *Ibid.* at 114-115.

[11] *Ibid.* at 115.

[12] *Ibid.* at 126, quoting the testimony of Dana Giovanetti.

[13] *Ibid.*

behaviour for public confidence in the impartiality of the judiciary are particularly serious.

None of these issues were dealt with by the Inquiry Committee, since neither of the judges were still on the bench at the time it began its work. As a result, the Inquiry Committee limited its conclusions in Part III to questions that "would go specifically into the decisional process of an appellate court," and into "private deliberations about, and composition of, Reasons for Judgment."[14] These questions, the Inquiry Committee rightly concluded, "would strike at the very heart of judicial independence."[15] But what about questions regarding private discussions of a case between judges and government officials? Avoiding these questions could undermine judicial independence as surely as asking improper ones.

Fiscal Independence

The lack of administrative independence for the judiciary threatens to compound the appearance of bias in matters such as the Reference, since one of the most important effects of the Court of Appeal's reasons was on the financial liability of the Nova Scotia Government.

Throughout the commentaries on the Nova Scotia Court of Appeals judgment in the Reference, the statement that any "miscarriage of justice is, however, more apparent than real" has been subject to the strongest criticism.[16] The Royal Commission found:

> that the Court's gratuitous comments in the last pages of its decision created serious difficulties for Donald Marshall, Jr., both in terms of his ability to negotiate compensation for his wrongful conviction and also in terms of public acceptance of his acquittal.[17]

In support of its conclusion, the *Royal Commission* quoted from two judgments of the Supreme Court of Canada in *Hickman*. First, Justice Cory, dissenting in part, stated:

> Upon his acquittal, Marshall was eventually paid some $250,000 by the Province of Nova Scotia and in return he executed a complete release of all claims he might have had against the government. Not unexpectedly it appears that the derogatory comments made by the Court of Appeal quoted above had an adverse impact on

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[14] *Majority Report, supra*, note 1 at 22.

[15] *Ibid.* at 23.

[16] The *Reference, supra*, note 5 at 321-322.

[17] *Royal Commission*, vol. 1, *supra*, note 3 at 116.

the quantum of compensation which was paid to Marshall.[18]

Second, Madame Justice McLachlin, speaking for the majority in *Hickman* stated that "[i]t is evident from the materials before the Court, however, that the comments of the Court of Appeal had an impact on the *quantum* of that payment."[19] Chief Justice McEachern, the Inquiry Committee Chair agreed with these conclusions. "I have no doubt that the consequences just quoted from the Royal Commission Report were accurate," McEachern wrote, even though he disagreed with both the Royal Commission and the majority of the Inquiry Committee about the validity of their criticisms of the Appeal Court's written reasons.

The unanimous linkage of the Court of Appeal's *dicta* in the Reference to the reduced quantum of Marshall's compensation, open that Court's action to a public perception of bias that stems from the way our courts are funded and administered. The cost of administering the superior courts of Nova Scotia (save the salaries and travel expenses of the judges) is part of the budget of the provincial Department of the Attorney General. Thus, provision for support personnel, supplies and equipment is dependent on internal financial priorities of that Department, and on recommendations made to Cabinet by the Attorney General following consultation with the Deputy Attorney General and senior staff of the Department. Even though there is no evidence that superior court judges ever allow financial considerations to affect their judgment on the merits of a case,[20] we should not be surprised if the public were to conclude otherwise. How much confidence would a private litigant suing a provincial government have if the court's judgment could cost the province a great deal of money? If private litigants and other members of the public were aware of the courts' lack of fiscal independence, the legitimacy of judgments supporting a government's position would be undermined.

The Royal Commission Report emphasized the need for an independent prosecutor, "similar to the one adopted in the Commonwealth of Australia," to restore "the public's belief that their criminal justice system is being administered properly and with fairness to all."[21] It is unfortunate that the Royal Commission did not also take the opportunity to spell out the need for independent administration of the courts. The budget processes of the High Court of Australia, the State of South Australia or even domestically the statutory scheme in British Columbia or current administrative charges in Manitoba could have been cited as examples.

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[18]*Ibid.* at 118.

[19]*Ibid.*

[20]Superior court judges in every province, except those in British Columbia, are subject to similar departmental controls.

[21]*Royal Commission*, vol. 1, *supra*, note 3 at 230, also see surrounding discussion at 223-231.

Impartiality and Disqualification

The two previous sections linked independence and impartiality by raising issues to which contact between executive and judiciary, or dependence of the courts on the executive, could affect impartiality or the appearance of impartiality. The Marshall Case also raises questions about impartiality that focus directly on the way individual judges decide cases.

The Majority of the Inquiry Committee premised its argument on what it called the "crucial difference between an empty mind and an open one."[22]

> True impartiality is not so much not holding views and having opinions, but the capacity to prevent them from interfering with a willingness to entertain and act on different points of view. Whether or not a judge was biased, in our view, thus becomes less instructive an exercise than whether or not the judge's decision or conduct reflected an incapacity to hear and decide a case with an open mind.[23]

Professional judges are thus expected to do what lay jurors are not: remain impartial in the face of prior knowledge.

In reality, this is what the public would expect of its judges. Members of the Bench in Nova Scotia who had not read, heard or talked about the Marshall case by 1982 would have displayed a grave lack of concern about the administration of justice in their home Province. At the same time, how can one assume that individuals can set aside their previously held views on so emotional and pressing an issue?

In other instances, this is not as difficult, because the policy preferences of a judge are one step removed from the case at hand. A judge may give higher priority to the rights of an accused than the needs of law enforcement, but must still consider whether the case at hand is an appropriate one for that response. Likewise, a judge may believe that the regulatory aims of the state should not hinder the conduct of private business, but must still consider whether the case at hand exemplifies overzealous state intervention or prudent and necessary regulation. The Marshall case was different. It threatened to bring preconceived views more directly into the process, because interested citizens and judges were more likely to have developed opinions about the case itself, beyond their general views about police practices and the treatment of native people. In this case, the need to consider removing oneself from participation in the case is therefore, even more important.

It is likely that Canadian appellate judges have long given quiet and careful

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[22] *Majority Report, supra*, note 1 at 26.

[23] *Ibid.* at 26-27.

consideration to whether they should sit on particular cases. However, since appellate courts usually sit in panels and rarely *en banc*, their due care often goes unnoticed. It is rare to take note of a judge's non–participation. In contrast, the absence of a justice of the United States Supreme Court is always noted in that Court's official reports. Justice Thurgood Marshall was even considered to be too circumspect when he first went on the Supreme Court in 1967 and refused to sit on numerous cases in which the United States was a party because he had previously served as Solicitor General.[24]

At this point, Canadian practice becomes especially worrisome. In contrast to the more frequent motions made in United States courts, it is extremely rare for a Canadian lawyer to ask that a judge remove him or herself from a case. It maybe is that the very rarity of this step in Canada has made it virtually anathema to the judiciary in this country. Justice Pace's admonition to the Government solicitor cited by the Royal Commission[25] may not be an unusual reaction to a lawyer's intervention. Previous research into efforts by counsel to disqualify Supreme Court of Canada judges from sitting on appeals has uncovered only two instances in the history of the Court. The first, in 1957, resulted in a lawyer being cited for contempt amid implications about his mental health.[26] The second, in 1974, occurred during Dr. Henry Morgentaler's first appeal to the Court, when his lawyer sought to disqualify Mr. Justice de Grandpré.[27] The other eight justices unanimously ruled that their colleague did not have to step aside.[28]

These examples, though without the force of precedent, suggest that counsel in an appeal would be unlikely ever to seek the removal of a judge from a panel because of real or perceived bias. Canadian appellate judges have made it clear that on matters of impartiality, that it is their personal call. A judge may decline to sit, or a chief judge may decline to assign a judge to a particular panel, but the judges who do sit will have the protection and support of their colleagues.

Note that this discussion is limited to appellate judges. Issues surrounding the impartiality or bias of trial judges do not unfold in the same way. The discretion of a chief judge or senior judge over assignment of trial judges usually reduces the

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[24]The same care, however, was not always exhibited by Justice William Rehnquist (as he then was) after he was appointed to the United States Supreme Court. For example, see his reasons for sitting in *Tatum* v. *Laird* which was reopened for debate in 1986 at the time of his elevation to Chief Justice.

[25]*Royal Commission*, *supra*, note 3 at 126.

[26]*In the Matter of Lewis Duncan*, [1958] S.C.R. 41.

[27]*Morgentaler* v. *R.* (2 October 1974), S.C.C., No. 13504. J. Weber has reproduced the unanimous decision of the Court in his 1984 article, "The Limits to Judges' Free Speech: A Comment on the Report of the Committee of Investigation into the Conduct of the Hon. Mr. Justice Berger" 29 McGill L.J. 369, Appendix A at 405.

[28]*Ibid.* at 406.

likelihood that a judge perceived by colleagues as less able to handle particular legal issues or proceedings will sit on those matters. Assignment authority is more likely to be exercised in terms of a judge's subject matter expertise or previous experience rather than potential bias, but concern over public perception of bias could be a factor as well. It is not unusual for a trial judge visiting from out of town to find himself assigned to a case of some sensitivity in that community.

In turn, trial counsel have a more varied array of strategies to avoid trial judges deemed less sympathetic than their colleagues. Adjournments or elections then become inoffensive, albeit also inefficient, techniques to achieve the same result as a request for disqualification.

Given the difficulties of counsel moving to disqualify a member of an appeal court panel, it becomes all the more pressing for the appellate judiciary itself to articulate standards to govern when one ought to sit, and when one ought not to sit. Furthermore, it could prove a worthwhile exercise for appellate judges to articulate for the general public how they go about maintaining their impartiality.

These considerations are especially important since appellate judges frequently and legitimately base their decisions on factual premises not part of sworn evidence. The use of "legislative facts" in Charter[29] cases is the most recent and dramatic manifestation of an appellate judge's discretion to do research beyond the submissions of counsel, or bring to an appeal factual knowledge from outside the four corners of the case.

Chief Justice McEachern's reasons, appended to the Inquiry Committee Report, question some of the Royal Commission's criticisms because he feels they were "based upon views of law and practice that do not accord with principles of appellate procedure generally accepted in the common law world."[30] McEachern's criticism of the three experienced trial judges who made up the Royal Commission underlines the need to give special consideration to how appellate judges make decisions: how they incorporate non–legal findings, how they maintain an open mind, how they structure their deliberations and how they decide what to include and exclude from their written reasons.

These are questions no judge in Canada can be required to answer. They allow a range of acceptable conduct so wide that no judge need reasonably fear discipline or removal. The Inquiry Committee's test for determining inappropriate judicial conduct was to ask whether the alleged conduct is of a nature or type that

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[29]The *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982* being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

[30]Report of McEachern C.J., *supra*, note 1 at 14.

is "manifestly and profoundly destructive."[31] However, this broad discretion carries with it a strong requirement for sensitive and responsible exercise of judicial power.

Limitations on Learning From the Past

Researchers are restricted at present in their ability to help appellate judges develop informed approaches to the exercise of judicial power. Not only are current deliberations kept secret, but so are deliberations of the past. When the papers of former United States Supreme Court justices have been archived and made available, scholars have found fascinating records of judicial strategy[32] and judicial deliberations.[33] But the public papers of former Supreme Court of Canada justices contain no evidence whatsoever of the Court's deliberative enterprise.

Ironically, the result has been quite the opposite of what the justices might have hoped. If former justices expected that shielding the Court's deliberations from public view in perpetuity would enhance public respect for the judiciary, they are wrong. When David Ricardo Williams wrote his excellent and sympathetic biography of Chief Justice Lyman Duff, he was able to draw on Duff's extensive correspondence with Ottawa politicians, in which he offered unsolicited advice about how they should conduct their business. However, Williams was unable to tell us how the historic judgments of Duff's tenure came to be made and written. As Professor William Kaplan writes the first biography of Justice Ivan Rand, he will have access to a wide variety of archival material dealing with Rand's activities off the Bench, but nothing about his influence over some of the Supreme Court's greatest civil liberties judgments. What a shame that today's appellate judges cannot draw on the lessons their predecessors could teach. We place so many burdens on our judiciary and give them so much latitude within which to work that they deserve more opportunities to learn than they have been given. One can only hope that a newly–retired generation of justices will be more helpful.

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[31] *Majority Report, supra*, note 1 at 27.

[32] See W.Murphy, *Elements of Judicial Strategy* (Chicago: University of Chicago Press, 1964).

[33] Many judicial biographies have been written that have looked at a particular judge's deliberative processes. For an interesting look at judicial strategizing see Howard J. Woodford, Jr., *Mr. Justice Murphy: A Political Biography* (Princeton: Princeton University Press, 1968). For a similar example in an intermediate court of appeal, see Marvin Schick's history of the Second Circuit, *Learned Hand's Court* (Baltimore: John Hopkins Press, 1970).