CANADIAN JUDICIAL COUNCIL V. NOVA SCOTIA COURT OF APPEAL: A JUDICIAL REVIEW MORE APPARENT THAN REAL

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The Inquiry Committee Report to the Canadian Judicial Council on the Nova Scotia Court of Appeal's handling of the Donald Marshall, Jr. case[1] is the best evidence yet of the ineptitude and utter inability of Canada's judiciary to review its own conduct. It is no secret that the "disciplinary" arm of the Judicial Council is widely regarded as a toothless animal, owing in part to its curious, but convenient, adherence to the theory that only judges should review judges and they should not have to be held openly accountable to the public they serve.[2]

This Inquiry was a golden opportunity for the Judicial Council to show the public that judges can effectively police their own. Instead, both the majority and minority opinions in the Inquiry Committee's Report are rife with weak excuses, smoke and mirrors. Inconsistencies abound and, as exemplified in the minority opinion of Chief Justice Allan McEachern, the Report is more an apologist for the biases of the legal system. In the end, the golden opportunity was missed, if not purposely rejected.

However, before looking at the Committee's Report in detail, I will briefly go off on one tangent. I am of the opinion that if the members of the Nova Scotia Court of Appeal had respected the institution they represented, it should not have been necessary for this Inquiry to be held. It is my view that judges, particularly those who sit at the highest levels of the judiciary, are under a special and unrivalled obligation to uphold the values and image of an unbiased and intellectually honest court. It is of utmost importance that the judiciary not only be beyond reproach, but also clearly appear to be beyond reproach.

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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*] following the controversial Nova Scotia Court of Appeal decision in *R.* v. *Marshall* (1983), 57 N.S.R. (2d) 286 [hereinafter the *Reference]*.

[2]While two of the five members of this Inquiry Committee were government appointees drawn from the Bar and not from the federal judiciary, I would suggest few members of the public would view this as anything other than the judiciary judging itself. Indeed, one of the two "public" appointees, Rosalie Abella, sat as a judge for a number of years before leaving the Bench to chair the Ontario Law Reform Commission.

Once the *Report* of the Royal Commission[3] investigating the Marshall case had been made public and the authoritative and scathing criticisms of the Court of Appeal had been laid bare, the relevant judges of the Nova Scotia Court of Appeal should have done the honourable thing and resigned. By continuing to sit on the bench, nothing short of a complete retraction of the conclusions in the Report of the Royal Commission could have stemmed the loss of public confidence in the judges of Nova Scotia's highest court. That loss was inevitable and will be irreparable so long as they remain on the Bench.

What member of the public could now be faulted for not having at least a nagging doubt about the quality of justice dispensed in the Court of Appeal? In reality, there may be no cause for concern. Indeed, the Judicial Council's Inquiry Committee concluded so. But a large part of the judiciary's inherent authority is not based on statute, case law or the opinion of peers, but on its public image and reputation. When that is gone, little is left.

This is not to suggest that judges should resign at the slightest hint of criticism. Common sense must prevail and this was clearly a case where the betterment of the institution would have been served by stepping down and removing any public doubt. Some might say this is a ridiculous and unreasonably high standard of conduct to ask of anyone and it is true our justice system is built on the presumption of innocence. But judges are privileged representatives of the justice system and if they are going to continue to stress the need for an independent judiciary, they must also accept that a higher standard of care and behaviour comes with that independence. In this case, the members of the Nova Scotia Court of Appeal apparently decided to try to weather the storm, which brings us to the Inquiry Committee's investigation and concluding opinions.

This was an unusual and unique Inquiry Committee from the start. No one was suggesting the appeal court judges had made the wrong decision; they set Marshall free. What the Inquiry Committee was asked to do was review the way in which the judges set Marshall free. In essence, did any of their statements bring the justice system into such disrepute that the public would lose confidence in their ability to judge cases fairly?

At the crux of the controversy surrounding the Appeal Court's decision were the judges' comments near the end of the ruling. Under the guise of "an opinion," as Nova Scotia Chief Justice Ian MacKeigan later put it, the Court was compelled to state that while Marshall was innocent of the crime for which he was convicted, he was still a liar who had hidden evidence from his lawyers, the police and the Court that he and Sandy Seale had planned a robbery which "triggered

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[3]*Royal Commission on the Donald Marshall, Jr. Prosecution*, Province of Nova Scotia, 1989 [hereinafter the *Royal Commission*].

a series of events" ending in Seale's death. For those reasons, the court declared, in those now infamous words: "Any miscarriage of justice is... more apparent than real."[4]

This was, of course, untrue. Marshall clearly explained in testimony to the Court of Appeal that he had not told anyone of plans to commit a robbery because he was afraid it would worsen his defence. More importantly, there was no "attempted" robbery. He and Sandy Seale had talked about "rolling" someone if they had to, but the record showed no robbery was in progress.

The majority report of the Inquiry Committee agreed, in part, with the findings of the *Royal Commission*, Marshall's lawyer and its own legal counsel that there was no evidence to back up the Court of Appeal's statements that Marshall was largely responsible for his own conviction. Indeed, Inquiry Committee counsel argued that the Appeal Court's evidentiary record showed that this was not the case and was an "incomprehensible" finding and "amounted to serious legal error bordering on grounds for removal." But the majority chose to stop agreeing at that point and headed down a wishy-washy path of reasoning that pointedly illustrates the Judicial Council's impotence when it comes to disciplining its own.

The majority felt that what was at issue here was not whether the judges exhibited some form of bias, but whether the language they used was "inappropriate." "The real question, however," the majority added, "is whether inappropriate language, even grossly inappropriate language, constitutes judicial misconduct in the circumstances of this case.. ."[5] The majority then went on to find that inappropriate language was not grounds for removal from office.

This was pure subterfuge. To frame the issue in this manner ignores the fact that inappropriate language reveals a great deal about the biases of those who speak the words. It is ludicrous to suggest that inappropriate language from the Bench does not bring the justice system into disrepute and cannot constitute judicial misconduct. For example, what if a judge were to say, "I find this nigger not guilty"? Would that kind of language from a judge be tolerated by the public? Absolutely not. There would be immediate calls for his or her removal. Why? Because it is offensive and any justice system allowing that language to go uncensured would fall into disrepute in short order.

In the Marshall case, what the Court of Appeal justices said was also offensive in the eyes of many people. So, why was it not offensive enough to be considered misconduct? I do not know and I do not think the Inquiry Committee knew

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[4]Report of Inquiry Members Richard C.J., Laycraft C.J., Abella and Bellemarre, *supra*, note 1 at 14.

[5]*Ibid.* at 33-34.

either.

The majority agreed to "go so far" as to find that the Appeal Court "so seriously mischaracterized the evidence as to commit legal error." But it refused to consider such a serious "legal error" as grounds for removal.[6] What the majority fails to mention is that this was, to all appearances, an intentional mischaracterization. The Appeal Court knew or ought to have known, based on the evidence before it, that what it was saying was untrue and offensive.

How can any member of the public have faith in a court that does that? Indeed, the *Royal Commission* noted that the gratuitous comments of the Court actually interfered with Marshall's ability to negotiate compensation for his wrongful imprisonment. These were more than just a few ill-chosen words. This was a level of irresponsibility that should be unforgivable for the highest court in the province.

A brief word or two about the minority report of the Inquiry Committee. On its own, it is worthy of separate commentary. Chief Justice Allan McEachern takes the art of splitting hairs to new heights. It is he who decides to take on the *Royal Commission's* 10 scathing criticisms of the Appeal Court. If the majority report manages in any way to take the process of peer review one step forward, McEachern hauls it two steps back. In essence, he finds little to criticize in the Appeal Court's conduct. Inexplicably, for instance, McEachern states that the Court did not blame Marshall for his own conviction and suggests: "What the Court said was that he 'helped secure his own conviction' and that, 'by his untruthfulness... [he] contributed in large measure to his conviction."[7] Others would obviously disagree.

Aside from reviewing the judges' comments, the Inquiry Committee had the chance to examine other suspicious aspects of the case. Sadly, it fell far short of any genuine effort to probe the 10 allegations of judicial misconduct set out by the *Royal Commission*. For example, what of the late Justice Leonard Pace's presence on the tribunal that was hearing the Marshall case? As a former Nova Scotia Attorney General who was involved in the prosecution of Marshall, he clearly should not have sat on the appeal. But the Inquiry Committee steered well clear of such areas. In the case of Pace, the majority put forward the weak excuse that since Pace had retired for health reasons soon after the Inquiry Committee got underway, it had no jurisdiction to review his individual conduct. That is a dodge through which any member of the public can clearly see for Pace's conduct could still have been commented upon.

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[6] *Ibid.* at 35.

[7] Report of McEachern C.J., *supra*, note 1 at 8.

Perhaps the most disturbing element of the Inquiry Committee's findings is the decision that judges cannot be compelled to testify before their peer review body. This is a fundamental flaw that will forever cripple the Judicial Council.

Putting aside the rhetoric of "judicial independence," it is difficult now to understand how the judiciary can in any way claim to be accountable for its decisions or command any respect for its own "policing" powers. In this case, the questions that might have been asked of the Appeal Court judges would have had little or nothing to do with their *ratio decidendi* in the Marshall case. The comments at issue were *obiter*. More to the point, the questions that might have been asked would have gone straight to the issue of bias.

While the Inquiry Committee members declined to chart bold new territory in this case by pursuing the issue of "judges as witnesses," it is only a matter of time before the public will begin demanding some greater form of accountability of judges. As jurists wield increasingly greater powers under instruments such as the *Charter of Rights of Rights and Freedoms*,[8] the public will not be satisfied to see the judiciary using "independence" as a shield to cover inadequacies and bias.

The decision of the Inquiry Committee was not a surprise. Historically, judicial councils in Canada have rarely disciplined rogue judges and even more rarely thrown them off the Bench. This suggests either the judicial appointments process is remarkably thorough in screening out poor candidates for the Bench or something is wrong with the system of conduct review. It is the latter, of course, but there are several reasons for it. First, the *Judges Act*[9] gives the Canadian Judicial Council very little leeway in disciplining judges. If the Council does not find blatant grounds for removal under the vague provisions in section 65 of the *Act*, it can do little more than write a report criticizing the judge's conduct.

But the lack of statutory authority is not a complete defence. Judicial councils, both federally and provincially, are notoriously inept at investigating allegations of bias or improper conduct among their own. In part, this is due to a "There-but-for-the-grace-of-God-go-I" empathy for the offending judge. Judicial councils are also not organized to conduct proper investigations. For example, it is not uncommon for "investigations" to go no further than a letter to the offending judge from the council alerting him or her to the complaint.

Another problem is that judges in Canada have no standards by which to live. That is not the case in the United States where the accountability debate was held some three decades ago. While some might be loathe to point to the United

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[8]Part 1 of the *Constitution Act, 1982* being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

[9]R.S.C. 1985, c. J-1.

States as an example for judicial ideals, it is worthwhile to note that most states are light years ahead of Canada in setting benchmarks for judicial behaviour.

For example, the vast majority of states have adopted the American Bar Association's Code of Judicial Conduct, a thorough, yet open-ended set of standards for judges. Unlike Canada, there is also a considerable body of United States case law on everything from whether a judge should volunteer for charity work to the limits of judicial "free speech." Some United States courts have even developed a "reasonable judge" standard to be applied to situations and the United States Supreme Court has stated that the traditional confidentiality of the judicial disciplinary process is self-defeating and contrary to the concept of openness in government.

There is also no formal system of performance review or evaluation among Canadian judges. If judges are not told how well or poorly they are doing on the job, the standards for behaviour will be all over the map. Finally, formal judicial education, with courses on everything from treatment of minorities to legal updates, is still in its infancy in Canada and many judges' attitudes and ideas are shaped by the environment in which they work.

Until these and other changes occur, the responsibility for monitoring and shaping the conduct of Canada's judiciary will rest with the Canadian Judicial Council. Sadly, based on the Inquiry Committee's review of the conduct of the Nova Scotia Court of Appeal, the Council does not appear to be up for the task. In many ways, it might be said the review of Nova Scotia's highest court was more apparent than real.