DISPENSING JUSTICE IN CANADA: EXAGGERATING THE VALUES OF JUDICIAL INDEPENDENCE

A. Wayne MacKay*

My first reaction to the Inquiry Committee's Report to the Judicial Council[1] was a deafening silence. The majority view was preferable to the traditional and technical analysis in Chief Justice McEachern's dissent but the whole exercise seemed unsatisfactory. As I re-read the Inquiry Committee Report and thought more about the matter, I still had difficulty articulating my response. There was a growing sense that once again the system had failed Donald Marshall, Jr. but also that it had failed the judges who were subject to the inquiry and all Canadians concerned about the dispensing of justice. As the heart of the Donald Marshall, Jr. case is a human tragedy of major proportions. A young black man, Sandy Seale, is stabbed to death in a Sydney, Nova Scotia park and a young Micmac spends more than a decade in jail for a crime he did not commit. Any legal response to this tragedy is doomed to fall short of dispensing real justice.

There were many surprises when the *Report of the Royal Commission on the Donald Marshall, Jr. Prosecution* was released in 1989.[2] Not the least of these surprises was the stinging criticism for the Appeal Divison of the Nova Scotia Supreme Court, which heard a Reference in 1982 into the murder conviction of Donald Marshall, Jr. and acquitted him of the charge.[3] The Royal Commission had no quarrel with the conclusion of the Appeal Division but rather with the way in which it acquitted Donald Marshall, Jr. In particular, the Royal Commission's criticism was directed to the gratuitous comments included in the final six paragraphs of the judgment, which reads as follows:

> Donald Marshall, Jr. was convicted of murder and served a lengthy period of incarceration. That conviction is now to be set aside. Any miscarriage of justice is, however, more apparent than real.
>
> In attempting to defend himself against the charge of murder Mr. Marshall admittedly committed a perjury for which he still could be charged.
>
> By lying he helped secure his own conviction. He misled his lawyers and presented

---

*Faculty of Law, Dalhousie University.

[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 *Inquiry Committee Report]*.

[2]*Commissioners' Report*, Province of Nova Scotia, 1989 [hereinafter the *Royal Commission*].

[3]*R.* v. *Marshall* (1983), 57 N.S.R. (2d) 286 (C.A.) [hereafter *Reference Court*].

> to the jury a version of the facts he now says is false, a version that was so far-fetched as to be incapable of belief.
>
> By planning a robbery with the aid of Mr. Seale he triggered a series of events which unfortunately ended in the death of Mr. Seale.
>
> By hiding the facts from his lawyers and the police Mr. Marshall effectively prevented development of the only defence available to him, namely, that during a robbery Seale was stabbed by one of the intended victims. He now says that he knew approximately where the man lived who stabbed Seale and had a pretty good description of him. With this information the truth of the matter might well have been uncovered by the police.
>
> Even at the time of taking the fresh evidence, although he had little more to lose and much to gain if he could obtain his acquittal, Mr. Marshall was far from being straightforward on the stand. He continued to be evasive about the robbery and assault and even refused to answer questions until the court ordered him to do so. There can be no doubt that Donald Marshall's untruthfulness through this whole affair contributed in large measure to his conviction.[4]

In light of what we now know about the Donald Marshall, Jr. tragedy, the above opinion of the Reference Court seems disturbingly unfair. However, in a legal culture which treats judges with great deference, unfair judicial comment has often escaped significant criticism. It was widely anticipated that the Royal Commission would be critical of the police, defence lawyers and prosecutors but what it would say about judges was more in doubt. After all, the Royal Commission itself was composed of three judges – two practising and one retired. Accordingly, the vigour with which the Report of the Royal Commission attacked the Reference Court came as a surprise to many – including the Attorney General of Nova Scotia. It was the Attorney General who put the matter of the conduct of the five Reference Court judges before the Canadian Judicial Council. The Judicial Council responded in a somewhat novel fashion by setting up an Inquiry Committee to report to the Council.

One novel aspect of this process was the presence of two lawyers, Rosalie Abella and Daniel Bellemare.[5] These people were appointed by the federal Minister of Justice to accompany three chief justices who sit on the Canadian Judicial Council – Allan McEachern (Chair of the Inquiry Committee), Guy A. Richard and James Laycraft. This break with the past was significant because it lessens the concern about judges assessing the conduct of judges. It is interesting to speculate about the impact of Abella and Bellemare on the decision of the

[4]See Inquiry Committee Report, *supra*, note 1 at 14-15.

[5]Rosalie Abella had been a family court judge but relinquished that post to go to the Ontario Labour Board and ultimately to the Ontario Law Reform Commission.

majority and whether either Richard or Laycraft might have been persuaded to McEachern's dissenting view, if it had been a three person committee. Even with this change of personnel, a judicial view still pervades the majority as well as the minority opinions put forward by the Inquiry Committee.

Another novel aspect of this process is that meetings of the Inquiry Committee were to be open to the public unless they voted to go *in camera* for a specific purpose. In the past, investigations of judicial conduct by the Canadian Judicial Council and its provincial counterparts have been *in camera*. While some argue that such secrecy is needed to encourage frank discussion and avoid damaging the reputations of innocent judges, I think that confidence in the process would be enhanced if openness were the rule rather than the exception. The combination of self–policing and closed door hearings is likely to engender suspicion rather than confidence.

The importance of the Inquiry Committee's hearings being open were further emphasized by the failure of the Royal Commission to have the Reference Court judges appear before it to answer questions about their acquittal of Donald Marshall, Jr.[6] In fact, the judges did not testify before the Inquiry Committee but they did have an opportunity to do so and did instruct counsel who made presentations on their behalf. When Gordon Henderson defended Justices Hart, Jones and Macdonald by attacking the conclusions of the Royal Commission, it became apparent that Mr. Marshall's interests would have to be represented yet again. While Mr. Henderson's tactics sparked some controversy and an allegation of conflict of interest, it would appear to have had some impact on the dissenting view of Chief Justice McEachern. McEachern, C.J. does not assert that the findings of the Royal Commission on vital questions – such as whether Seale was stabbed in the course of a robbery – were wrong; however, he does argue that the contrary view adopted by the Reference Court was also plausible and supportable on the evidence. Indeed, he rebuts each of the ten criticisms of the Reference Court set out in the Attorney General's letter calling for a judicial inquiry.

In his February 9, 1990 letter, Nova Scotia Attorney General, Tom McInnis, not only itemized the criticisms identified by the Royal Commission but expressed his concern about what impact these comments had on public confidence in the Nova Scotia judiciary.
He wrote:

> It is absolutely essential that Nova Scotians have faith and confidence in the highest court in this Province. If that faith has been shaken by the findings of the Royal Commission as I believe it has been, it must be restored.

---

[6] *Hickman* v. *McKeigan*, [1989] 2 S.C.R. 796, The Supreme Court of Canada held that it would be a violation of the important principle of judicial independence to have the judges testify before a government appointed Royal Commission.

> I believe public confidence in the Appeal Division of the Supreme Court of Nova Scotia was shaken by the findings of the Royal Commission. That confidence can be restored by the knowledge that there is a forum for review of judicial conduct, and by the completion of that review by distinguished jurists. In the course of its inquiry, the Committee will have the opportunity to identify which of the reasons, if any, set out in paragraphs 65(2)(a) to (d) of the *Judges Act* (Canada) are applicable in the circumstances.[7]

Coupled with the recognition of the broad nature of the problem was an indication of the limits of such an investigation under the *Judges Act*.[8] The relevant sections of the *Judges Act* read as follows:

> 65(2) Where in the opinion of the Council, the judge in respect of whom an inquiry or investigation has been made has become incapacitated or disabled from the due execution of the office of judge by reason of
>
> (a) age or infirmity,
> (b) having been guilty of misconduct,
> (c) having failed in the due execution of that office, or
> (d) having been placed by his conduct or otherwise, in a position incompatible with the due execution of that office
>
> The Council, in its report to the Minister under subsection (1), may recommend that the judge be removed from office... .

The limits of the *Judges Act* and how it has been applied by the Judicial Council are apparent in the inquiry into the decision of the Reference Court. Prior to the deliberations of the Inquiry Committee, two of the justices who sat on the Reference Court retired. Former Chief Justice MacKeigan, who had been outspoken in his response to the critique of the Royal Commission,[9] retired after reaching the mandatory age. Mr. Justice Leonard Pace, who served as Attorney General of Nova Scotia at the time Donald Marshall, Jr. was convicted and later sat on the Reference Court, retired due to ill health and died in April, 1991. Because the Royal Commission had sharp criticism for both MacKeigan, C.J. and Pace, J.A. – the former for putting Pace on the Reference Court and the latter for

---

[7] Inquiry Committee Report, *supra*, note 1 at 17-19.

[8] *Judges Act*, R.S.C. 1985, c.J-1.

[9] MacKeigan, C.J. not only launched a complaint with the Nova Scotia Bar Society against commission counsel for their comments about the performance of the Reference Court, but also gave a press conference to refute the Marshall Committee allegations. The Bar Society complaint was dismissed and the widely reported response to the media came close to an *ex. cehedra* explanation of the Court's conduct.

agreeing to sit – it is unfortunate that the Inquiry Committee was not willing to stretch its mandate under the *Judges Act* to make *obiter* comments about the conduct of these two judges. The reasonable apprehension of bias created by Mr. Justice Pace sitting on the Reference Court attracted negative comment not only from the Royal Commission, but also the dissenting judges in *MacKeigan* v. *Hickman*.[10] Since the heart of the mandate of the Inquiry Committee was to restore confidence in the Nova Scotia judiciary by a thorough investigation of the conduct of the judges involved on the Reference Court, it was a significant limitation that it refused to make any comments about the conduct of MacKeigan, C.J. and Pace, J.A.,[11] whose conduct the Royal Commission found to produce a reasonable apprehension of bias and thus a threat to the Reference Court's perception of objectivity.

The Inquiry Committee's failure of will in respect to MacKeigan, C.J. and Pace, J.A. is explained by the limited remedy of removal available to the Judicial Council under the *Judges Act*.[12] Judges who have already retired cannot be removed from the Bench and thus the Inquiry Committee ruled that they only have jurisdiction over the three judges who continue to sit on the Appeal Division of the Nova Scotia Supreme Court. This is a correct ruling in respect to the remedy available but I do not see why the Inquiry Committee was precluded from making some *obiter* comments on issues that were clearly relevant to restoring confidence in the Nova Scotia judiciary. Chief Justice McEachern, in his dissent took a legalistic approach to the mandate of the Inquiry Committee and thus his failure to comment on MacKeigan, C.J. and Pace, J.A. at least has the virtue of consistency. The majority members of the Inquiry Committee were bold enough to criticize the conduct of the sitting Reference Court judges even though they concluded that their conduct fell short of requiring removal. There is nothing in the *Judges Act* that expressly permits this kind of judicial reprimand yet they were bold enough to do it.[13] This same courage should have produced a commentary on the conduct of the retired judges.

Judicial independence is an important constitutional value and the perceived objectivity of judges is an important ingredient in creating and maintaining public confidence in the judiciary. This does not mean that we should make an icon of

---

[10]*A.G. Nova Scotia* v. *Nova Scotia (Royal Commission into Donald Marshall Jr. Prosecution)* (1989), 50 C.C.C. (3d) 486 (S.C.C.).

[11]This view is shared by my colleague Professor Kaiser, "Legitimation and Relative Autonomy: The Donald Marshall, Jr. Case In Retrospect" (1991) *Windsor Yearbook of Access to Justice* (forthcoming).

[12]The *bill Charles Task Force on Court Reform* has recommendations on Judicial Councils.

[13]In the 1983 Judicial Council investigation of Mr. Justice Thomas Berger, the net effect was to produce a reprimand short of removal, so the approach of the Inquiry Committee on this point was not without some precedent. In fairness, there is probably no precedent for examining the conduct of retired judges.

judicial independence and thereby render judges immune from critical comment.[14] In *MacKeigan* v. *Hickman*[15] the Supreme Court was unwilling to recognize the unique facts of the Marshall case as justifying an exception to the general rule of judicial immunity from testifying before government bodies. This ruling left the Judicial Council, or its designate in the form of the Inquiry Committee, as the only body who could inquire into the conduct of the judges who sat on the Reference Court. It is thus frustrating that a rather exaggerated version of judicial independence pervades the judgments of the Inquiry Committee as well. Objectivity as an ideal and judicial independence as a means to that ideal are important but we should not confuse ideals with reality. It was a failure of objectivity that characterizes the last six paragraphs of the judgment of the Reference Court when it places the blame for the "apparent miscarriage of justice" in the Marshall case largely on the shoulders of the victim – Donald Marshall, Jr.[16] Frank comment by judges is a virtue of judicial independence and sets judges apart from other decision-makers in our society. However, with the power to make such frank comments and remain immune from censure, goes a heavy responsibility to not use this power against powerless people whose lives are in the hands of the judges.[17] In this vital respect, I applaud the majority decision of the Inquiry Committee but feel it should have gone even further. Chief Justice McEachern in his dissenting opinion, placed too high a value on frank judicial comment without fully assessing its impact in the tragic context of the Donald Marshall, Jr. case. Judicial independence should not provide a shield for injustice.

At their Halifax hearings, the Inquiry Committee refused to allow counsel for Donald Marshall, Jr. to question the judges, and by so ruling, it guaranteed that the Reference Court would not have to answer for its conduct in any forum. The majority of the Committee also adopted a test for judicial misconduct which made removal of the judges unlikely.

> Is the conduct alleged so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of

---

[14]The Supreme Court of Canada has explored the importance of judicial independence in a series of cases. *Valente* v. *R.*, [1985] 2 S.C.R. 673; *R.* v. *Beauregard*, [1986] 2 S.C.R. 56 and most recently in *MacKeigan* v. *Hickman*, *supra* , note 10.

[15]*Ibid.*

[16]I do not suggest that Donald Marshall, Jr. was an angel throughout the many stages of this drama but he certainly was not the author of his own misfortune. Notwithstanding McEachern, C.J.'s legalistic arguments to the contrary, Marshall should not have been singled out for blame when the criminal justice system, which failed him at every stage, escaped negative comment.

[17]When one tries to imagine what it must have been like for Donald Marshall, Jr. to face a foreign court environment, hostile police, racial prejudice and speaking in his second language, his vulnerability becomes all the more obvious.

executing the judicial office.[18]

In the final analysis, I agree with the conclusion reached by all the members of the Inquiry Committee that the conduct of the judges under investigation did not require removal. Indeed, to have removed them from judicial office would have been a kind of scapegoating. The unfair and discriminatory aspects of the criminal justice system in Nova Scotia are more systemic than we care to admit. Furthermore, these same problems exists in other provinces as well.[19] Even the Royal Commission failed to acknowledge fully that the Marshall case is only the manifestation of much larger and more pervasive problems in the criminal justice system. People from the First Nations have not been treated justly in Canada and this is true at the judicial level as well as the political one. The comments of the majority of the Inquiry Committee would have been more powerful had they been put in this broader context of systemic injustice. Seen in this larger context, the dissenting approach of Chief Justice McEachern mistakes legalism for justice.

In my view, the majority of the Inquiry Committee were on the right road to rendering a fair resolution of the judicial aspect of the Marshall affair, but it did not travel the road far enough. Chief Justice McEachern by defending the conduct of the Reference Court and by inference casting doubt on the conclusions of the Royal Commission, compounded the sense of injustice that pervades all aspects of the Marshall case. In the end, the effect of the Inquiry Committee is to legitimate the *status quo* and preserve in an exaggerated form the values of judicial independence and frankness of judicial comment. What is not squarely acknowledged is that Nova Scotia's judiciary, like those elsewhere in the country, is not objective. Objectivity is at best an ideal and one worth pursuing at the judicial level, but it has not been achieved in respect to dispensing justice to the First Nations. The conduct of the judges under investigation should not be treated as an aberration in an otherwise healthy justice system, but rather as a symptom of a much deeper and pervasive problem.

Nothing that the Inquiry Committee could have done would bring Sandy Seale back to life or remove the pain inflicted on Donald Marshall, Jr. by his wrongful conviction. The removal of three judges would not have done this and Donald Marshall, Jr., to his credit, was perceptive enough to realize this.[20] The depth of

---

[18]Inquiry Committee, majority opinion at 28.

[19]The tendency of the national media to paint Nova Scotia as a political and judicial backwater as a result of the Marshall case and other matters is superficial. There are systemic problems of racism in many provinces as is evidenced by the *Report of the Aboriginal Justice Inquiry: The Justice System and Aboriginal People* (Winnipeg, Manitoba: Queen's Printer, 1991) (Commissioners: A.C. Hamilton and C.M. Sinclair), as just one example.

[20]Donald Marshall, Jr. instructed his counsel to not seek the removal of the judges under investigation. It was an act of generosity that the justice system had not shown him.

the problems facing Canada in respect to its treatment of First Nations people was dramatized by the summer of 1990 events at Oka, Quebec, and presumably will be explored by the Royal Commission that has just been established by the Federal government in April, 1991. I hope that this Commission will be able to pick up where the Inquiry Committee left off in analyzing the Canadian Judiciary and its role in dispensing justice to the First Nations. If Canadians do not start delivering real justice to peoples of the First Nations, we will indeed be the authors of our own misfortune.