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Reflections on Recommendation 12

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Reflections on Recommendation 12

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Reflections on Recommendation 12

Naiomi Metallic
Burchell Hayman Parish

This article focuses on the Marshall Commission Report's specific recommendation for increased representation of racialized persons within the judiciary. Recommendation 12 of the Report states as follows:

We recommend that Governments consider the needs of visible minorities by appointing qualified visible minority judges and administrative board members wherever possible.

At the time this recommendation was made in 1989, of the 1,200 lawyers called to the Bar, about a dozen were African Nova Scotian and there were no Mi'kmaq lawyers in the province. There was only one African Nova Scotian judge (Judge Corrine Sparks, of the Nova Scotia Family Court) and no Mi'kmaq judges.[1]

While the Commission felt compelled to make the specific recommendation for increased representation within the judiciary, it also made it clear that the problem of under-representation within the judiciary could not be addressed until the far more immediate problem of under-representation of racialized persons entering and graduating from law school was rectified.[2]

And so, here we are in 2009, 20 years later. Thanks in part to efforts to increase access to legal education for racialized persons through such measures as the Indigenous Blacks & Mi'kmaq Initiative, nearly 100 members of the Nova Scotia Bar now self-identify as being either Aboriginal or racially visible. Yet this significant increase in representation within the Bar has yet to lead to any appreciable change in Nova Scotia's judiciary in terms of reflecting the province's two most historically disadvantaged groups. As noted elsewhere in this series, in the 20 years since the Report, there has been there has only been one African Nova Scotian judge appointed (Judge Jean Whalen in 2009) and no Mi'kmaq appointments.[3]

Does having a judiciary that is representative of Nova Scotia's historically disadvantaged communities matter?

It could be argued that in a perfect world, where people are not influenced, consciously or not, by their biases and socio-economic backgrounds, having a representative judiciary would not matter. But it was not a perfect world at the time of Donald Marshall's wrongful conviction, and while progress has been made in the intervening years, some members of Nova Scotia's historically disadvantaged communities might still say that some prejudice remains today.

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1 Royal Commission on the Donald Marshall Jr., Prosecution, Commissioners' Report, Volume 1, Findings and Recommendations, 1989, p. 154.

2 Ibid.

3 The only other racially visible lawyer appointed on the bench was Judge Castor Williams, who is Carribean Canadian, appointed to the Provincial Court in 1996. Judge Williams has since retired.

If the problem is truly one of lack of sensitivity to, and lack of knowledge of, the experiences of Mi'kmaq and African Nova Scotian populations within the province, then it could, in theory, be entirely solved through education and sensitivity training for lawyers and judges, without the need for increased representation of racialized persons within the judiciary. There is no question that such training is necessary and important and, indeed, was the focus of several other recommendations within the Commission's Report. But even if such training could be successfully provided to all judges and lawyers in the Province, would it still be acceptable for all of the faces within the judiciary to be White ones?

I would respond by citing one of the guiding principles of our legal system: *"Not only must justice be done; it must also be seen to be done.*" In order to feel that the justice system, embodied in its highest form by judges, is truly capable of rendering justice to them, Mi'kmaq and African Nova Scotian people must see themselves reflected within the judiciary. All the sensitivity training in the world cannot answer the basic need of Mi'kmaq and African Nova Scotian people, who are just as much a part of the fabric of this province as those whose ancestors came here in boats from Europe[4], to see themselves represented within the major institutions of this province.

That is not to suggest that the only benefit to having more Mi'kmaq and African Nova Scotian judges would be to the members of those communities. Unquestionably, there would be a large benefit to those communities, seeing themselves as having a voice within one of our most important institutions, but there would also be benefits to the larger Nova Scotian society as well. In the words of the Commissioners:

> [T]he presence of more non-White faces in these important and respected institutions will be of value not only to minority group members. It may also help the general population develop increased sensitivity to—and tolerance for—the needs and aspirations of visible minorities. Their presence will remind us on a daily basis that minorities are members of our society too, and that that society is not—and never has been—completely White.[5]

For the general population, seeing African Nova Scotian or Mi'kmaq judges presiding on the Bench will counteract negative stereotypes they might hold of people from these communities, while at the same time foster a greater appreciation of the commonalities our communities share, such as our pride in this province we call home and our desire to see it prosper.

Why has there not been more progress in the appointment of African Nova Scotian and Mi'kmaq lawyers to the judiciary in the last 20 years?

Having now established that a representative judiciary matters, we must scrutinize why we are not there yet. We have already seen that the problem is no longer one of numbers *per se*, since there are nearly 100 lawyers in the province who self-identify as Aboriginal or racially visible.

Does the problem lie with qualifications? Lawyers appointed to the Bench must possess a reputation for integrity, fairness, independence and impartiality, and a demonstrated knowledge of the law.

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4 The Mi'kmaq would point out that as the original people of this land, they are the origin fabric of the place we now call Nova Scotia.

5 Supra note 1 at p. 153.

Surely, as within any sampling of 100 lawyers, there must be a certain percentage of the lawyers who self-identify as Aboriginal or racially visible who embody the above qualities. I would argue that the problem lies not with these lawyers lacking the qualities for judicial appointment but rather, with the criteria we use to measure these qualities.

One criterion that we can see most readily as presenting barriers to greater appointment of Mi'kmaq and African Nova Scotian lawyers to the Bench is years of standing at the Bar. The majority of Aboriginal and racialized lawyers in Nova Scotia are graduates of Dalhousie Law School's Indigenous Blacks & Mi'kmaq Initiative, created in 1989 in response to the Marshall Inquiry. Consequently, the majority of these lawyers are generally newer members of the Bar.

The Federal Guidelines on Judicial Appointment require candidates to possess a minimum of 10 years at the Bar. The Provincial Guidelines were recently amended in April 2009 to increase the minimum requirement of years of practice from 10 to 15 years at the Bar (though it should be noted that both the *Provincial Court Act*, R.S.N.S. 1989, c. 238, s. 5 and *Family Court Act*, R.S.N.S. 1989, c. 159 , s. 5 set the minimum at five years). The adverse impact resulting from setting the minimum years at the Bar too high becomes obvious when we compare the number of Aboriginal and racialized lawyers eligible to compete at each of these minimums:

Eligible lawyers from Aboriginal and racialized communities in Nova Scotia

5-year minimum as per Provincial Court Act - 72
10-year minimum as per Federal Guidelines - 45
15-year minimum as per Provincial Guidelines - 12

I am not suggesting that it is wrong to require a minimum number of years within the profession as a measure of qualification for judicial appointment. However, if we recognize the importance of having Mi'kmaq and African Nova Scotian judges, we may have to consider being more flexible. This might include selecting a minimum that does not exclude the majority of eligible candidates from these communities (such as five or 10 years, as opposed to 15 years), or allowing knowledge of the law to be measured by a combination of years of practice with some other criteria that demonstrates a candidate's qualifications.

Another criterion for judicial appointment that can tend to create barriers for African Nova Scotian and Mi'kmaq candidates is service to the profession. Traditionally this would include writing of scholarly texts and articles on the law, teaching and presenting on the law, participating in law reform committees and sitting on Bar Council. Lawyers from historically disadvantaged communities may feel compelled invest their volunteer hours in ways that serve the particular communities they come from. Such service may not always be legal in nature. Even when it is legal in nature, such work may not be valued as highly as service that can be characterized as benefiting a particular area of the law, or a legal institution.

While not a requirement for judicial appointment, there is a general tendency to prefer lawyers in private practice, subject perhaps to the occasional appointment of law professors to the Bench. This presents particular problems for Mi'kmaq lawyers. Many of the Mi'kmaq lawyers I know work as in-house counsel for Aboriginal organizations or First Nation governments. In some cases, this is because the lawyer first tried private practice and had negative experiences, and found Aboriginal organizations to be a more welcoming environment. In other cases, some Mi'kmaq lawyers simply

see working at the grassroots level as the best way to achieve positive change for Aboriginal people. There are more than 30 Mi'kmaq lawyers working in the province, yet only one in private practice, one with the Crown's office and two with Legal Aid. If we want more Mi'kmaq judges, the tendency to appoint lawyers from private practice may have to be reconsidered. At a minimum, the lack of retention of Mi'kmaq lawyers within private practice should be seriously studied by the profession.

Finally, there may also be a tendency to view a specialization in an area of law related to a minority community differently. This can hinder a candidate from that community's chances for judicial appointment. For example, I believe that a perception exists that specializations like Aboriginal law are "soft law" and not on par with more traditional areas like tort or commercial law. A candidate for judicial appointment who specializes in Aboriginal law may be viewed as less knowledgeable than a candidate who specializes in corporate commercial litigation. First, such a perception may not be warranted. During my time as a law clerk at the Supreme Court of Canada, I recall one judge exclaiming that Aboriginal law was one of the most difficult areas of law he had ever encountered. Second, if we believe that appointment of racially visible judges matters, we will have to become educated about, and accord greater value to, areas of non-traditional practice in which some candidates may work.

Conclusion

The above are some of the reasons why I believe there has been a lack of progress in appointing more Mi'kmaq and African Nova Scotian lawyers to the judiciary in Nova Scotia in the 20 years since Recommendation 12 was made. I would characterize the problem generally as a failure of the existing evaluation criteria to account for the particular circumstances and needs of Mi'kmaq and African Nova Scotian lawyers in the province. If we believe that having a judiciary that is representative of our Mi'kmaq and African Nova Scotian communities matters, then such criteria should be reviewed to ensure they are sufficiently flexible to meet the needs and circumstances of all lawyers in the province. This would not result in "a lowering of standards" for judicial appointment. There are many different ways to measure the qualities we seek in a judge. It is high time we start exploring these alternatives.