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### **New Brunswick Needs a Public Inquiry Into Systemic Racism in the Justice System: Nova Scotia Shows Why**

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## NEW BRUNSWICK NEEDS A PUBLIC INQUIRY INTO SYSTEMIC RACISM IN THE JUSTICE SYSTEM: NOVA SCOTIA SHOWS WHY

**Naiomi Metallic**

First Nations across New Brunswick have been demanding a public inquiry since the deaths of Chantel Moore and Rodney Levy at the hands of police barely a week apart from each other, and less than two months after the failed prosecution of the man alleged to have hit and killed Brady Francis. There are serious problems in the province's justice system.

Mi'gmaq<sup>1</sup> and Wolastoqiyik peoples are demanding more than just an investigation into the police conduct in Moore's and Levy's deaths; what is sought is a full examination of how New Brunswick's justice system fails First Nations peoples in the province. Police operate in and are shaped by the wider justice system within which they work. First Nations recognize that you cannot fix one without fixing the other. The Premier is reluctant to agree to an inquiry and public perception of the need for one is mixed. I believe an inquiry is desperately needed and overdue.

As a Mi'gmaq woman with numerous personal connections to both New Brunswick<sup>2</sup> and Nova Scotia<sup>3</sup> and as a lawyer and an academic who has worked for First Nations in both provinces, I often find myself comparing how they are treated. I have long felt that New Brunswick's treatment of its First Nations people lags decades behind Nova Scotia. A key difference between Nova Scotia and New Brunswick is that in 1989, the *Royal Commission on the Donald Marshall, Jr. Prosecution* laid bare the overt and systemic racism that exists throughout Nova Scotia's justice system. That report has served as a major catalyst for positive change.<sup>4</sup>

In 1971, Donald Marshall Jr., a Mi'kmaq man from the Membertou First Nation in Sydney, Nova Scotia, was convicted of the murder of his friend, Sandy Seale, a young African Nova Scotian man. Seale was in fact killed by Roy Ebsary, an older white man, whose violent and senseless act was motivated by racism.<sup>5</sup> Marshall spent eleven years incarcerated for a crime that he did not commit. The 1989 Royal Commission concluded that the criminal justice system failed Donald Marshall, Jr. at virtually every turn -- from his arrest and wrongful conviction for murder in 1971 up to, and even beyond, his acquittal by the Court of Appeal in 1983. The Royal Commission found that these failures were due, in part, to the fact that Mr. Marshall was a Mi'kmaq person.<sup>6</sup>

To address the numerous failures of Nova Scotia's legal system, the Marshall Report contained eighty-two recommendations calling for changes in a wide number of areas. To address the systemic racism that the Commission identified in so many facets of Nova Scotia's legal system, the report called on various actors in the justice system<sup>7</sup> to implement a variety of measures to (1) increase the representation of racialized and Aboriginal peoples in positions of power in the legal system; (2) increase understanding by all justice system actors of the systemic discrimination issues faced by Mi'kmaq and African Nova Scotian communities in the province; and (3) create policies and committees to further positive race relations.<sup>8</sup>

Elsewhere, I have documented how, in light of its 30<sup>th</sup> anniversary, the Marshall Report has been instrumental in creating meaningful, positive change in Nova Scotia's justice system.<sup>9</sup> Comparing this progress in Nova Scotia to New Brunswick is revealing. As suggested above, New Brunswick lags

behind Nova Scotia, often dramatically, despite having more First Nations communities than Nova Scotia and a larger First Nation population.<sup>10</sup>

Nova Scotia	New Brunswick
<p>The Schulich School of Law at Dalhousie University has an access and support program for Mi'kmaq (the Indigenous Blacks and Mi'kmaq Initiative (IB&amp;M)) and African Nova Scotian students. It has held six dedicated spaces for Mi'kmaq students since 1989 and is supported by the University and the provincial and federal governments. Over thirty years, 200 Black and Aboriginal IB&amp;M students have graduated from Dalhousie Law School.<sup>11</sup></p>	<p>While both New Brunswick universities with law schools have taken some steps to institute supports and programming for Indigenous students, neither the law school at the University of New Brunswick nor l'Université de Moncton have a similar access program and graduate very few Indigenous law students.</p>
<p>The Nova Scotia Barristers' Society counted sixty-four practicing members of the NS Bar who are Mi'kmaq or Aboriginal as of 2018-2019.<sup>12</sup></p>	<p>The Law Society of New Brunswick does not track demographic statistics, but anecdotal evidence suggests that there are only six practicing lawyers of First Nations ancestry who reside within the province.<sup>13</sup></p>
<p>The Nova Scotia Barristers' Society has had at least four Mi'kmaq lawyers sit as members of its governing Bar Council. The incoming president of the Society for 2021-2022, Tuma Young, is a Mi'kmaq man.<sup>14</sup></p>	<p>To the best of my knowledge, the New Brunswick Law Society has never had an Indigenous member sit on its governing body.</p>
<p>There are five Indigenous judges currently appointed to the courts of Nova Scotia.<sup>15</sup></p>	<p>There is only one sitting Indigenous judge in New Brunswick, Justice Troy Sweet.<sup>16</sup> However, there is currently no sitting judge in New Brunswick who is a member of one of the First Nations communities located in the province (to my knowledge, there has only been one, retired Hon. Judge Graydon Nicholas).</p>
<p>There are two courts that sit in First Nations communities in Nova Scotia; the Aboriginal Wellness and Gladue Court in Wagmatcook First Nation and a provincial court judge sits in Eskasoni First Nation.<sup>17</sup></p>	<p>There is one court that sits in a First Nation in New Brunswick: a Healing to Wellness Court sits in Elsipogtog First Nation.<sup>18</sup> The Wellness Court in Elsipogtog, which began operations in 2012, was meant to be a pilot project, that if successful would be expanded to other First Nations.<sup>19</sup> That has yet to materialize.</p>
<p>Nova Scotia's Legal Aid Commission has had a practice for several years of hiring Mi'kmaq and African Nova Scotia lawyers, as well as having a Mi'kmaq representative on its board of directors, and an Aboriginal Justice Committee.<sup>20</sup> It also has dedicated programming, such as in-community visits and dedicated Indigenous Social Workers to assist clients.<sup>21</sup></p>	<p>To my knowledge, the only First Nations lawyer to ever work for New Brunswick Legal Aid brought a human rights complaint against the organization in 2006.<sup>22</sup> It does, however, have an Indigenous member on its Board of Directors.<sup>23</sup> The organization's services appear to be more limited than Nova Scotia.<sup>24</sup> The organization does not have an Indigenous social worker, and it recently eliminated the position of Aboriginal Duty Counsel in Moncton, despite significant need for such a position.<sup>25</sup></p>

<p>The Nova Scotia Department of Justice has a long practice of hiring Mi’kmaq and African Nova Scotian lawyers. Its Public Prosecution Services Division has an Equity and Diversity Committee who, in 2019, developed a policy entitled “Fair Treatment of Indigenous Peoples Prosecution Policy to Direct Crown Attorneys.”<sup>26</sup></p>	<p>To the best of my knowledge, the New Brunswick Department of Justice has no First Nations lawyers, no similar committee, nor any similar policy.<sup>27</sup></p>
<p>The Nova Scotia Human Rights Commission has had several Mi’kmaq commissioners.<sup>28</sup> The current Chair of the Commission since 2019, Cheryl Knockwood, is a Mi’kmaq woman.<sup>29</sup> In addition, the Commission has made efforts in recent years to be more responsive to the needs of Indigenous people in the province, developing a plan for the investigation and resolution of Aboriginal complaints.<sup>30</sup></p>	<p>The New Brunswick Human Rights Commission appears to have had two First Nations commissioners, one serving from 1999 to 2009 and then another from 2009 to 2012.<sup>31</sup> Based on annual reports, it does not appear that a First Nations Commissioner has been appointed since 2012. Nor does it appear that the Commission has recently undertaken any initiatives relating to Indigenous peoples in the province.</p>
<p>Eight out of thirteen First Nations in Nova Scotia are serviced under the First Nations Policing Program, a program cost-shared between the federal and provincial governments, intended to provide more culturally responsive policing to First Nations communities.<sup>32</sup></p>	<p>Only three out of fifteen First Nations communities in the province are serviced by the First Nations Policing Program.<sup>33</sup> In addition, New Brunswick’s 1977 <i>Police Act</i> contains no provisions on accommodating the specific needs and interests of First Nations in the province, unlike some other provinces.<sup>34</sup></p>
<p>The Mi’kmaq Legal Support Network in Nova Scotia has been providing government-funded <i>Gladue</i>-writing services for several years, in addition to court worker, customary law, offender reintegration, and victims’ services programs for Indigenous peoples within the province.<sup>35</sup></p>	<p>New Brunswick does not provide <i>Gladue</i> reports for Indigenous offenders, nor does it have an Indigenous court support worker program or Indigenous victim services.<sup>36</sup></p>

Things in Nova Scotia are far from perfect,<sup>37</sup> but the government and various other justice actors (i.e., the law school in the province, the provincial law society and legal profession, the judiciary, legal aid services and legal information services, the RCMP and municipal police forces, and the provincial human rights commission) are at least *aware* that their decisions and actions (or inaction) *has and can* have negative effects on the lives of First Nations people in the province. The Marshall Report serves as a constant reminder of this in Nova Scotia. With such awareness, justice actors are more likely to see the need for change and act on it. This awareness is sorely missing in New Brunswick. It’s why a public inquiry is imperative.

In advocating for First Nations peoples in New Brunswick, I have seen first-hand examples of persons in authority in the justice system fail to appreciate the circumstances, needs, and rights of Mi’gmaq and Wolastoqiyik. I have been taken aback more than once when I have encountered persons in authority who had no knowledge of important cases, statutes, or reports relating to Indigenous peoples that were vital to their positions. When arguing why law or policy mandates a different approach to addressing First Nations issues, I have been given dismissive answers like “we treat everyone the same and the First Nations are not entitled to any special treatment.” Although not all actors within the New Brunswick justice system espouse this view, it is my perception, bolstered by reports from colleagues and Mi’gmaq and Wolastoqiyik leadership and community members, that this is a relatively pervasive attitude within the province’s justice system.

It bears emphasizing that this notion of formal equality (i.e., “I treat everyone the same,” “I am colour-blind,” etc.) is woefully outdated. From as early as the cases of *O’Malley v Simpson Sears* (1986) and *Andrews v Law Society* (1989), the Supreme Court of Canada has embraced an interpretation of substantive equality over formal equality.<sup>38</sup> In *R v Kapp* (2008), the Supreme Court stated that, “[a]n insistence on substantive equality has remained central to the Court’s approach to equality claims.”<sup>39</sup> The principle of substantive equality respects and celebrates differences, recognizing that all human beings are equally deserving of concern, respect, and consideration.<sup>40</sup> It recognizes that in order to treat certain individuals and groups fairly, their differences must be accommodated. In cases involving services provided to Anglophone and Francophone communities, the Supreme Court has affirmed that substantive equality can mean distinctive content in the provision of similar services.<sup>41</sup>

In the context of First Nations people, the Canadian Human Rights Tribunal has affirmed that substantive equality means accommodating “the distinct needs and circumstances of First Nations children and families living on reserve, including their cultural, historical and geographical needs and circumstances.”<sup>42</sup> To this I would add that Mi’gmaq and Wolastoqiyik peoples’ inherent Aboriginal rights and treaty rights must also be respected and accommodated *as a matter of equality and human rights*, as well as constitutional law and international human rights law.<sup>43</sup>

I have often observed how perverse it is that Donald Marshall Jr. had to experience a travesty of justice necessitating a public inquiry in order for systemic change to occur in Nova Scotia. But, sadly, that is what it seems to take to force governments and the broader public to see the deep-seated racism and problems within their justice systems. Mi’gmaq and Wolastoqiyik in New Brunswick are forced to tolerate a deeply unresponsive justice system in part because they have not yet had their own public inquiry.

Premier Blaine Higgs argues that an inquiry is unnecessary; it would be sufficient to study the recommendations coming out of previous reports like the Royal Commission on Aboriginal Peoples (1996), the Truth and Reconciliation Commission Final Report (2015), and the National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG, 2019).<sup>44</sup> The Premier’s stance is an admission that the province has not made serious efforts to implement any recommendations from these reports to date. Its failure to do so is a reflection of the systemic problems in the province’s justice system. Therefore, it does not inspire any confidence to suggest that the province will now belatedly implement the recommendations from these reports, especially when the reasons why the province has previously ignored them is not going to be examined.

Second, while there are useful recommendations within these reports that all governments must implement, none of these reports conducted an in-depth study of the *specific problems within New Brunswick’s justice system in relation to Mi’gmaq and Wolastoqiyik peoples*. As someone who has read these reports, I can confidently say that their recommendations are generally national in scope. There is very little that is specific to New Brunswick. To address the problems in New Brunswick’s justice system that the deaths of Chantel Moore, Rodney Levi, and the failed prosecution into the killing of Brady Francis have tragically highlighted, there needs to be an in-depth study of the workings of this system and how it is failing Indigenous peoples in the province. This is what Quebec did in response to multiple reports of Indigenous women being abused by police in Val d’Or; it established the Viens Commission.<sup>45</sup> The province did not try to back peddle on its responsibility to address problems within its justice system by saying that it would look to other reports or rely on the outcome of the national MMIWG Inquiry. To frame this as analogy, when you buy a house, you get an

inspection report done on *that* house to understand if it has any structural problems; you would not rely on an inspection report done for your neighbour's house, let alone an inspection on a house in a sub-division on the other side of town.

Holding a public inquiry into how the various justice system actors in New Brunswick are failing Mi'gmaq and Wolastoqiyik peoples is an act of uncovering the truth. This is necessary if the government is truly sincere in its objective of reconciliation with First Nations in the province.<sup>46</sup> As observed by the Truth and Reconciliation Commission, there can be no reconciliation without truth:

Without truth, justice, and healing, there can be no genuine reconciliation. ...We are mindful that knowing the truth ... in and of itself does not necessarily lead to reconciliation. Yet, the importance of truth telling in its own right should not be underestimated; it restores the human dignity of victims of violence and calls governments and citizens to account. Without truth, justice is not served, healing cannot happen, and there can be no genuine reconciliation between Aboriginal and non-Aboriginal peoples in Canada.<sup>47</sup>

What happened to Brady Francis, Chantel Moore, and Rodney Levi, especially when considered cumulatively, suggests that deep systemic problems exist within New Brunswick's justice system, similar to how Donald Marshall Jr.'s wrongful conviction pointed to serious systemic problems in Nova Scotia. New Brunswick desperately needs an inquiry and holding one is imperative if the government is genuine in its commitment to achieving reconciliation with Indigenous peoples in the province. I hope that Premier Higgs reconsiders his position and that the unnecessary and untimely deaths of Brady, Chantel, and Rodney will not have been in vain.

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## Notes

<sup>1</sup> According to the different writing systems in the different provinces, Mi'gmaq is the spelling preferred in New Brunswick and Mi'kmaq is the spelling preferred in Nova Scotia.

<sup>2</sup> I attended school in Campbellton, from kindergarten to grade 12. Some members of my family live in Campbellton. For all these and other reasons, I identify more closely as a New Brunswicker than a Quebecker.

<sup>3</sup> I went to Dalhousie University for my undergrad in 1998, and aside from two years in Ottawa when I attended the University of Ottawa, and then clerked at the Supreme Court of Canada in 2006-2007 for the Hon. Michel Bastarache, my residence has been in Nova Scotia. I worked at Burchells LLP in Halifax as a full-time lawyer for about decade working closely with First Nations in both New Brunswick and Nova Scotia, and I now teach Constitutional law, Aboriginal law, and Indigenous law at the Schulich School of Law at Dalhousie University.

<sup>4</sup> Royal Commission on the Donald Marshall, Jr., Prosecution – Digest of Findings and Recommendations (December 1989) [Marshall Report] [online](#). The ideas in the next two paragraphs are drawn directly from Naiomi Metallic, “Celebrating 30 Years of the Indigenous Blacks & Mi’kmaq Initiative: How the Creation of a Critical Mass of Black and Aboriginal Lawyers is Making a Difference in Nova Scotia” (27 June 2019), Canadian Race Relations Foundation’s *Directions Journal*.

<sup>5</sup> Just before he stabbed Seale, Ebsary shouted, “This is for you, Black Man.” Marshall Report *ibid* at 2.

<sup>6</sup> *Ibid* at p. 1.

<sup>7</sup> The parties that were identified included: (a) the provincial Department of Justice; (b) Dalhousie Law School; (c) the Nova Scotia Barristers’ Society and the legal profession; (d) Judicial Councils and Chiefs Judges; (e) Legal Aid Nova Scotia; (f) the Legal Education Society of Nova Scotia; (g) the RCMP and municipal police forces; and (h) the Nova Scotia Human Rights Commission.

<sup>8</sup> Here are I am summarizing numerous recommendations in the Report including: 9-19, 26-7, and 31-4.

<sup>9</sup> Metallic *supra* note 4.

<sup>10</sup> There are fifteen First Nations communities in New Brunswick compared to only thirteen First Nations communities in Nova Scotia. The 2016 Census found that there were 17,575 individuals of First Nations single identity versus 15, 320 individuals of First Nations single identity in Nova Scotia: see 2016 Census, Focus on Geography Series, Aboriginal Peoples, Province of New Brunswick and Province of Nova Scotia.

<sup>11</sup> I believe that Mi’kmaq and Wolastoqiyik prospective students choose Dalhousie over the law schools in New Brunswick precisely because of the IB&M initiative and the support and sense of community it can offer students. I chose Dalhousie law school for this reason.

<sup>12</sup> These numbers are a combination of self-identification statistics provided by the Nova Scotia Barristers Society for 2018, as well as the author’s knowledge of the Nova Scotia bar.

<sup>13</sup> Based on the author’s knowledge of the New Brunswick bar and consultations with other Indigenous members of the New Brunswick bar.

<sup>14</sup> John Chunn, “Young named to Nova Scotia Barristers’ Society’s executive,” *The Lawyer’s Daily*, 25 February 2019, [online](#).

<sup>15</sup> These are Justices Pierre Meuse (NSSC), Tim Gabriel (NSSC), Cathy Benton (NSPC), Diane Rowe (NSSC), and Aleta Cromwell (NSPC (FD)).

<sup>16</sup> Government of New Brunswick News Release, “Three new provincial court judges appointed,” 12 April 2012, [online](#).

<sup>17</sup> Nova Scotia Press Release, “Grand Opening of Wagmatcook Court,” 21 June 2018, [online](#). On the satellite court in Eskasoni, see the website of the Courts of Nova Scotia, [online](#).

<sup>18</sup> Public Safety Canada, “Healing to Wellness Court – Program Snapshot,” [online](#).

<sup>19</sup> New Brunswick Press Release, “Health to wellness court pilot project to begin on Elsipogtog First Nation,” 20 August 2010, [online](#).

<sup>20</sup> Metallic *supra* note 4 at 6-7.

<sup>21</sup> This is based on personal knowledge as I acted as a commissioner on the Legal Aid Board of Directors from 2012 to 2016.

<sup>22</sup> *Sock v Legal Aid New Brunswick*, 2008 CanLII 5615. The complaint was dismissed.

<sup>23</sup> New Brunswick Legal Aid Services Commission website, “Board of Directors,” [online](#).

<sup>24</sup> For example, a parent whose child is subject to a child welfare apprehension order is represented only when there is an active court matter, not throughout the entire matter as in Nova Scotia. In one matter where I was advocating for a First Nations mother to receive increased services, the Commission exercised discretion to allow its lawyer to offer additional service to the client. Nonetheless, the general rule can have adverse impacts on Indigenous parents who often need significant supports to access services and counselling, beyond just having a lawyer represent them in court.

<sup>25</sup> This is based on anecdotal evidence.

<sup>26</sup> Public Prosecution Service New Release, “Fair Treatment of Indigenous Peoples Prosecution Policy to Direct Crown Attorneys,” 26 February 2019, [online](#).

<sup>27</sup> A review of the New Brunswick Government’s website did not turn up any evidence to contradict this statement. New Brunswick does have an Aboriginal Affairs Department (Nova Scotia has an Office of Aboriginal Affairs), but the focus on both offices is more specific on Aboriginal rights and consultation than justice issues per se.

<sup>28</sup> Based on annual reports available from 2013 onwards, Chief Andrea Paul was a commissioner from 2013 to 2018, and Cheryl Knockwood has been a commissioner since 2015. Other Mi’kmaq people who have held the role prior to this include Daniel N. Paul and Sister Dorothy Moore. Wikipedia, “Nova Scotia Human Rights Commission,” [online](#).

<sup>29</sup> Nova Scotia Human Rights Commission, Press Release, “New Chair Appointed to the Nova Scotia Human Rights Commission,” 22 May 2019, [online](#).

<sup>30</sup> Nova Scotia Human Rights Commission, News Release, “Plan for Investigations and Resolutions of Aboriginal Complaints,” 11 October 2007, [online](#).

<sup>31</sup> I arrived at this conclusion by reviewing the Commission’s annual reports from 1999 to the present.

<sup>32</sup> Expert Panel on Indigenous Communities, *Toward Peace, Harmony, and Well-Being: Policing in Indigenous Communities* (Ottawa: Canadian Council of Academies, April 2019), 85.

<sup>33</sup> *Ibid.*



<sup>34</sup> *Police Act*, SNB 1977, c P-9.2. Section 14.1 of the *Act* recognizes special constables, but it is not clear whether this incorporates constables in First Nations communities. The policing legislation of Manitoba, Ontario, Quebec, Nova Scotia, and Saskatchewan have specific provisions to accommodate First Nations' interests, some more robust than others. For more on this, see Expert Panel *ibid*, 65-6.

<sup>35</sup> L. Jane McMillan, "Living Legal Traditions: Mi'kmaw Justice in Nova Scotia," (2016) 67 *U.N.B.L.J.*, 187.

<sup>36</sup> This is based on anecdotal evidence received from lawyers practising criminal law in the province.

<sup>37</sup> Significant work remains. See, for example, Tripartite Forum Justice Committee, "An Evaluation of the Implementation and Efficacy of the Marshall Inquiry Recommendations in Nova Scotia," by L. Jane McMillan, February 2014.

<sup>38</sup> *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 SCR 536 and *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143.

<sup>39</sup> *R. v. Kapp*, [2008] 2 SCR 483 at para 15.

<sup>40</sup> *Andrews v Law Society of British Columbia*, *supra* note 30 at 166; *R v Beaulac*, [1999] 1 SCR 768 at paras 22-4; *R v Kapp*, *ibid* paras 15-6.

<sup>41</sup> *DesRochers v Canada (Industry)*, [2009] 1 SCR 194, and *Association des parents de l'école Rose-des-vents v British Columbia (Education)*, 2015 SCC 21.

<sup>42</sup> *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 at para. 465. For more on this, see Naomi Metallic, "A Human Right to Self-Government over First Nation Child and Family Services and Beyond: Implications of the Caring Society Case," (2019) *Journal of Law and Social Policy*, Volume 28 (2), article 4.

<sup>43</sup> See *Constitution Act, 1982*, Section 35(1) as well as *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, UN Doc A/RES/61/295 (2007).

<sup>44</sup> "First Nations chiefs and N.B. premier meet to discuss systemic racism," 17 June 2020, [online](#).

<sup>45</sup> Commission d'enquête sur les relations entre les Autochtones et certain services publics [website](#).

<sup>46</sup> Speech from the Throne, Third session of the 59<sup>th</sup> Legislative Assembly of New Brunswick, 19 November 2019.

<sup>47</sup> Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of Truth and Reconciliation Commission of Canada* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015), 12. The statement focuses on residential schools, but it equally applies to other forms of colonial and systemic harms.