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Comments

H. Archibald Kaiser*

The Aftermath of the
Marshall Commission:
A Preliminary Opinion

I. *Prolegomena to the Cure or the Beginning of the Epitaph:*

“Look, Doctor, try to see things my way. All the diagnoses have been made and the treatment has been prescribed, but somehow . . . I just don’t feel quite right. Sometimes I think I’ll never get well. Is there something you haven’t told me?”

The Doctor’s skeptical but still deferential patient echoes the sentiments of many who have keenly observed the unfolding of the Donald Marshall, Jr. saga. A monstrous injustice was perpetrated and then sustained over a period of fifteen years in the conviction and ongoing persecution of an innocent person. Finally, by October 1986, even a government which had been blind to the need for reform in the criminal justice system could no longer resist the pent up provincial and national demand for a full inquiry into the circumstances of Mr. Marshall’s conviction. The Nova Scotia Government also asked the Royal Commission to “make recommendations” to help such tragedies from happening in the future”.¹ On January 26, 1990, after extensive public hearings, several separate research projects, and a forum on Native rights, racism, and the role of the Attorney General, the Commission published its seven volume study. “The report came in one fell swoop with a catastrophic effect.”²

Many of its findings and recommendations were startling to a community which had been extraordinarily complacent when dealing with issues touching upon criminal justice. Within days of the release of the Report, the news media were deluged with apparently sincere apologies and promises from institutions that had previously been either somnolent or hostile. The appalling state of criminal justice in Nova Scotia as exemplified by the Marshall case had been explored and exposed. Things were now, according to the new breed of confessor, on the mend. However, the body and soul of justice may not be cured. At

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1. *The Royal Commission on the Donald Marshall Jr., Prosecution, Digest of Findings and Recommendations 1989*, p. 1.

2. Attorney General Tom McInnis, as reported in the *Micmac News*, March 1990, at p. 15.

best, the symptoms may be treated. At worst the whole exercise may be an illustration of the limits and false promises of a professed treatment process which is merely palliative.

In this comment, some of the main findings and recommendations of the Commission will be discussed summarily. Next, several of the better publicized institutional and personal responses will be surveyed. Finally, some assessment of the potential of the Commission's recommendations and the corresponding undertakings will be attempted. Overall, the intention of this short article is to promptly initiate debate on these crucial problems in the criminal justice system.

II. *The Principal Findings and Recommendations: Has a Silk Purse Been Fashioned?*

It is obviously not possible to comprehensively address the many important findings and recommendations of such a massive Report in an article of this length. Indeed the reader is probably best advised to obtain the *Digest* for an introduction, which has been relied upon in preparing this summary.³ However, some issues should be mentioned, particularly as in part they generated the responses to the Report which will next be addressed.

Basically, the Commission found that the criminal justice system consistently failed Donald Marshall, Jr. In the Commission's view, he had told the truth to the police originally and had not been engaged in a robbery. Rather Mr. Sandy Seale was slain as a result of Mr. Roy Ebsary's violent and unpredictable behaviour. The police response to the stabbing was inadequate, incompetent, and unprofessional, and Mr. Marshall became a suspect in part because he was a Native.

The Commission determined that the trial judge and Crown and defence counsel all failed to discharge their obligations, effectively denying Mr. Marshall a fair trial. A 1971 review by the R.C.M.P. was incompetent and the basis for this reinvestigation was never properly revealed to the accused's lawyers. The first appeal was a further example of neglect by the Crown, defence and Court. A mid-1970's review of the case founded again and the 1982 reinvestigation, while flawed, did finally lead to a decision by the Minister of Justice to refer the case to the Supreme Court of Nova Scotia, Appeal Division.

The Court in this second appeal was excoriated by the Commission for, among other things, blaming Mr. Marshall for his wrongful conviction, its unfounded accusations of robbery and perjury, its defence of a faulty criminal justice system, and its refusal to admit that a

3. *Supra*, note 1.

miscarriage of justice had occurred. According to the Commission, the Attorney General's Department did not treat Mr. Marshall properly during the 1982 appeal or subsequently, in its mean and unprincipled handling of his claim for compensation.

The 82 recommendations of the Commission which are intended to prevent future judicial nightmares cover several major fields. They begin with a section on how to better handle alleged cases of wrongful conviction and applications for compensation. Next, there is extensive advice on how to sensitize the criminal justice system to the discrimination faced by visible minorities, by engaging everyone from the Attorney General and Solicitor General (who would become members of a Cabinet Committee on Race Relations) to lawyers and police (who should be more appropriately trained with respect to minority concerns) to correctional workers (who should be disciplined for discriminatory conduct and tutored on the needs of Natives and Black inmates).

Nova Scotia Micmacs would, according to the Report, benefit from the establishment of a Native Criminal Court (with very limited powers), a Native Justice Institute, (to undertake research, train court workers and liaise with Government and the Bar, among other things) and a tripartite forum on outstanding issues between Natives and the federal and provincial governments. Natives should be brought closer to the criminal justice system, through consultation in Native Justice Committees, better connections with the Bar, and more Native personnel in the system. Blacks should see changes in the Human Rights Act, better funding for the Human Rights Commission and more legal aid resources, all in an atmosphere where the various Chief Justices and Judges have a responsibility to ensure fair treatment of minorities.

The Commission suggests that the criminal justice system ought to be changed at many levels. A Director of Public Prosecutions should be added. There should be better policy guidelines for laying charges and staying prosecutions. Crown disclosure standards should be more liberal and there should be revisions in the policy governing plea and sentence bargaining.

The final 36 recommendations deal with policing. Departments are encouraged to be independent, to recruit minorities, to develop policies on interviewing vulnerable people, to establish codes of ethics, to set standards for policing and to plan and manage better at the departmental level.

III. *The Responses to Date: Do They Deserve the Benefit of the Doubt?*

A vigil must be maintained over those institutions which have responded to the Royal Commission. After the press warmly received the Report,

the major protagonists would have found it difficult to resist jumping off the reform bandwagon that had been launched. With nothing to boast of, other than years of recalcitrance and insensitivity, it was hard to take seriously the sincere apologies and the promises of a new dawn which peppered the evening news. After all, why should it have required three justices, millions of dollars (much of the money of course received by lawyers), 16,390 pages of transcript, and 93 days of hearings to say that Donald Marshall, Jr., was wrongfully convicted by an uncaring, racist, incompetent, and self-satisfied criminal justice system? Surely anyone whose critical faculties had not been deadened by the bludgeoning of mass culture would have been able to say the same thing. Such arguments had previously been advanced, particularly by Native and Black spokespersons, but was anyone listening? As it stands, Nova Scotians in particular, and Canadians in general, did follow the Royal Commission hearings and were subjected to the outpouring which followed the Report. The individuals who responded for their constituencies must be given some credence. Perhaps they were so moved by the thoroughness and legitimacy of the Commission's critique that they really have become born again devotees of justice. Maybe the *mea culpas* were real and not just the stuff of the public relations mentality which surrounds so many similar solemn declarations of "I accept responsibility for" Let's put aside skepticism and take them at their word for the time being. What did they say after all? From the other, more credible side of the fence, what was the reaction of Mr. Marshall and his community and of Black organizations?

1. *The Government of Nova Scotia*

(a) *The Press Release:* The Attorney-General's press conference, about ten days after the release of the Report (and following that of the Bar Society), was the stuff of electoral dreams: a young Minister offering "a sincere and heartfelt apology", commending the "excellence" of the recommendations of the Report, recognizing that the justice system was being presented with "an opportunity to lift itself up" and accepting "all the recommendations within [the Government's] mandate."⁴

Much of the rest of his prepared statement dealt with initiatives which would be taken to change discriminatory attitudes and to deal with systemic discrimination, which were mainly responsive to the Commission's Report. More intriguing was the determination to request

4. The Attorney-General of Nova Scotia read from a seventeen page press release which is available from the Minister's Office. The quotations in this section are drawn from that document.

the Canadian Judicial Council “to consider the conduct of the five judges” in the 1982 Reference to the Court of Appeal, on the foundation that “it is absolutely essential that Nova Scotians have faith and confidence in this, the highest court in the Province”. After that little bombshell, the Attorney General went on to pronounce the end of “a two-tiered justice system in Nova Scotia”, supported by an immediate letter to all police chiefs “stressing the critical principle of fair and equal treatment before the law”.

The Minister closed with a declaration that the Report is “the blueprint for the future of justice”, which “excited” him and the Bar Society. “The change has begun. The old ways have been thrown out.” The Attorney General had made it all seem so easy.

(b) *The Government of Nova Scotia Response to the Recommendations:* Contemporaneously, the Government released a 58 page report indicating its acceptance of “all recommendations, that are the responsibility of the Government” (p. 1) and its endorsement of every other recommendation.⁵ The Government noted that it had already taken action on many aspects of “the massive job of renewing the portions of the justice system within its jurisdiction” (p. 2) and later gives itself credit for having “initiated change, not resisted it”. (p. 3).

The Government accepted the need to discuss an independent review mechanism for purported wrongful convictions and for new structures for compensating the wrongfully convicted. It committed itself to the several anti-racist programs discussed in the Report. To its credit, the Government recognized the Commission’s point that many of the difficulties the “Micmac encounter with the justice system are rooted in social, political and economic structures outside the justice system” (p. 5) and that the dominant culture has caused harm to Micmac community life.

The Government also reassured the citizenry that it recognized the “widespread public perception that there is a separate system of justice — with special treatment and special advantages — for those occupying positions of political power and influence”.⁶ It noted its previous appointment of a D.P.P. as step in the right direction (p. 6). It highlighted

5. *The Government of Nova Scotia Response to the Recommendations of the Royal Commission on the Donald Marshall, Jr. Prosecution*, February 7, 1990. All the page references in this section refer to the *Summary* at the end of this Government publication. The Government of Canada had not responded by the time this article went to press, but the Federal Minister of Justice recently stated that there are “plans to issue a formal reply.” *The Chronicle-Herald*, April 3, 1990, p. A8.

6. *The Royal Commission on the Donald Marshall, Jr., Prosecution*, Volume 1, Commissioners’ Report, Findings and Recommendations 1989, p. 228.

its acceptance of the police right to lay charges and trumpeted its leading role on the matter of disclosure (p. 6). Finally, it reviewed its strategy for asserting “greater leadership in law enforcement”, particularly in “ensuring that an appropriate standard of law enforcement is provided to all Nova Scotians.” The Government statement appeared to be wholly receptive to the Report.

2. *The Nova Scotia Barrister’s Society*

The Bar Society was able to present its response only five days after the release of the Report, in a sense upstaging the Government and perhaps making more inevitable the tenor of the Government’s reply.⁷ The President of the Bar Society announced that it would “comprehensively review those members of the Society who were found wanting by the Report” (p. 2). It “wholeheartedly” agreed with suggestions for improved disclosure being entrenched in the Criminal Code. It encouraged the Judicial Council examination of the judges of the Court of Appeal and it expressed its confidence that the new D.P.P. would review the Report.

The Bar too felt bound to review its previous and anticipated achievements, which would in aggregate amount to acceptance of every recommendation touching upon the Bar. It emphasized its new outreach program “into the high schools of the Black and Micmac Communities”, noted its support of the Indigenous Black and Micmac program at Dalhousie Law School, cited its Bar Admissions Course innovations in respect of systemic discrimination, and pointed to the steps taken in other areas (continuing education, Crown disclosure, judicial appointments and minority representation) (pp. 4-5).

In closing, the Bar lamented that “Until recently, the administration of justice had not been a high priority for most Nova Scotians” and that people must literally pay now for this historic neglect by “committing further dollars for reform”. The Bar “is prepared to do its part to restore” confidence: it saw the Report as giving “an unusual opportunity to effect meaningful reform”. (pp. 6-7) The Bar seemed to want to start off on the right foot in the post-Marshall era, having been mainly inert previously.

3. *The Royal Canadian Mounted Police*

About six weeks after the publication of the Report, the R.C.M.P. issued a News Release concerning the Marshall Commission.⁸ It began with the

7. The Nova Scotia Barristers’ Society issued a seven page News Release on January 31, 1990. The quotations herein appear in that statement.

8. The eight page Royal Canadian Mounted Police News Release (in English and French) which was circulated on March 8, 1990 is quoted liberally in this section.

expression of “sincere regrets for what has happened to Donald Marshall, Jr.” (p. 1) and accepted “unreservedly any criticism of those members of the R.C.M.P. who may have contributed to this injustice”. (p. 1).

The R.C.M.P. offered to share its expertise “in the development of policies on aboriginal or Minority policing matters” (p. 2) and indicated its endorsement of police control of laying charges. Much of the rest of the communiqué (pp. 3-6) was taken up with a reiteration of the Commissioner’s recent policy statement on “Aboriginal and Canadian Visible Minorities”, which noted the need for affirmative action, special needs recognition, introspection and multiculturalism.

The local division also stated its intention to establish community advisory groups, special training programs, and a Native advisory committee. It concluded its public statement with a disavowal of the lack of responsiveness of the criminal justice system being “a policing problem alone” and a declaration that “The R.C.M.P. must be part of the solution”. (p. 8). The Force was not about to be left at the starting gate in the apology and promise stakes.

4. *The Nova Scotia Legislature*

On February 23, 1990, the House of Assembly of the Province of Nova Scotia ended its long institutional silence on the Marshall affair. It too was obviously trying to make up for lost ground when it passed the following supportive motion:

Whereas the public institutions Nova Scotians must trust to find truth and dispense justice equally failed Donald Marshall Jr. at every turn; and

Whereas the tragic injustice originally dealt Donald Marshall Jr. in 1971 was compounded and prolonged for almost two decades by a system bent on exonerating itself, rather than righting its wrong; and

Whereas Donald Marshall Jr. and his family were victims of public institutions mindlessly engaged by racism and blinded by self interest;

Therefore be it resolved that this Legislature, representing every Nova Scotian, does, on behalf of every Nova Scotian, offer to Donald Marshall Jr., to his mother, his father and every member of his family, our most sincere apology for the grievous injustice dealt him by every public institution he encountered during that tragic 19 year period.⁹

5. *The Micmac Response*

Having heard so far in this paper only from those institutions which were in one way or another responsible for Mr. Marshall’s fate, it is heartening

9. Assembly Debates, Friday, February 23, 1990, Resolution No. 5, p. 48.

indeed to read the response of the Micmac¹⁰ which was addressed “to general principles”. (p. 1). The Micmac were at pains to assert immediately that Micmac “participation *by itself* will not fully address the aspirations of our communities”. (p.2). The Micmac want to harness their own concepts of justice and develop an acceptable and effective justice system, “that will grow and expand with the community it serves” (p.5). They maintained that “existing socio-economic conditions must dramatically improve” (p. 4) but say that progress should be made immediately on the development of a community-based justice system. The Micmacs urge the same approach with respect to policing; they maintain that police services must be Micmac-controlled.

They end their report with a reiteration of their desire to work as partners with the two governments, “in building a society that knows no barriers because of inequality and injustice”. The Micmac want all to be inspired “to search for new ways to promote the dignity of man — be it black, white or Mi’kmaq.” The restraint of the Micmac response is quite remarkable, given that they could have gloated over the fall of so many individuals and the tremors shaking so many institutions. The Micmac, at least, had urged the same themes before and after the Commission Report.

Further Micmac reaction can be gleaned from the Micmac News, a fine publication ironically threatened by recent Federal budget cuts. In a realistic lead editorial, considerable irritation is expressed at the Commission’s silence on whether charges should be laid. The Commission is also criticized for having failed to set guidelines for increasing compensation and for having opted to criticize senior civil servants rather than ministers. “By not making recommendations in these specific areas is the major failure of the Marshall report. The sad reality is that action may never be taken.”¹¹

6. *The Black Community*

The Afro-Canadian Caucus of Nova Scotia reacted to the Commission Report within a week of its release, indicating that they believed it essential to conduct “an inquiry into racism in the education system because that’s where it all began in the first place”.¹² A leader of the Caucus also maintained that the Report was “the first time that those

10. *Mi’kmaq Response to the Report of the Royal Commission on the Donald Marshall, Jr., Prosecution*, February 21, 1990, Union of Nova Scotia Indians, 8 pages.

11. *Micmac News*, February 1990: Vol. 20, No. 2, p. 2. this was a special edition of the paper, devoted to the Marshall case.

12. For an account of the news release from which these extracts are drawn see *The Halifax Chronicle-Herald*, Thursday, February 1, 1990, at p. A3.

who represent power and influence have acknowledged the extent of racism in this province”.

The group called for the creation of a special committee of Blacks and Micmacs to monitor the government’s efforts to put the recommendations into force. They supported the strengthening of the Human Rights Commission and made additional suggestions for the creation of new rights for victims of discrimination. Finally, the Caucus called on the government to compensate the family of Mr. Sandy Seale who was stabbed by Mr. Roy Ebsary, given that there was no statutory criminal injuries compensation scheme in force at the time of the incident.

7. *Donald Marshall, Jr. and His Family*

The man who spent 11 years in the penitentiary and thereafter was further stigmatized by the criminal justice system in spite of having been found not guilty issued a short press release on the day of the publication of the Report through his lawyer. Mr. Marshall’s counsel said that it was a “monumental consequence that the Royal Commission found that he was not engaged in a robbery” and “that, as he has maintained, he told the truth . . . when he was first interviewed by police”. Mr. Marshall was “of the view that the findings of this Commission mean that the tables have turned and that blame is now being laid at the feet of those to whom it properly belongs.”

Mr. Marshall thought it significant that racism was identified as playing a part in his conviction and was further heartened by the condemnation of the Court of Appeal. He asked for a re-examination of the compensation issue and thanked “all those people who have written to him, supported him and cared about him through this dreadful ordeal”.

A later extensive interview in the Micmac News indicated that Mr. Marshall pitied the discredited former police chief, Mr. John MacIntyre, although he still wanted him to be charged. He said that the Report “took a load off [his] back . . . I am trying to straighten out my life in some way or another. My battle is over . . . Nature is my style, my style is in the woods, hunting and fishing. I will travel a bit, here and there. Sitting in prison all my life, you have the urge to travel.¹³ In the same edition of the Micmac News, Mr. Marshall’s parents also blamed former Chief MacIntyre, but felt that “all the judges, politicians, crown prosecutor and even the jury were altogether on it.” In discriminating against Indians, “Junior didn’t have a chance because all these people thought he was

13. *Supra*, note 11, at p. 5,7.

guilty”.¹⁴ Mr. Donald Marshall, Sr., maintained: “From the first morning I knew his day would come and we always knew he was innocent.”¹⁵

The issue of compensation for Donald Marshall, Jr. is currently being re-examined by a further Royal Commission, with one of the judges who formed the original Commission, Mr. Justice Gregory Evans, sitting as the sole Commissioner. The decision by this forum will be one of the first opportunities to test the depth of the learning experience presented by the Marshall case.

IV. *Will it all be worth it?*

Thus far, the Report and responses have been conveyed with little evaluative commentary. Perhaps it is best to let the reader provide his or her own assessment of the specific findings, recommendations and responses. None the less, is there any real potential for progressive change in all this well-intentioned reformist activity? Or, to return to the medical metaphor, has the patient been unknowingly condemned by a fatal disease which has long inhabited the judicial corpus?

Most of the analysis by the Commission and the first three respondents discussed above, proceeds in a theoretical vacuum. Not that the Report should have been a grand jurisprudential treatise. This may have made an intelligible work suddenly inaccessible to the general reader. On the other hand, the failure to state clearly what model of law and society the Report is founded upon can lead one to have unrealistic expectations and produce a reformist myopia. The Report seems to concentrate on procedural justice and formal equality. These are no doubt important aspirations for a criminal justice system that heralds its dedication to the avoidance of wrongful conviction. Closer adherence to these ideals could have preserved Donald Marshall, Jr. from his terrible ordeal. Yet, is this ever enough? Or can satisfaction with this level of change permit, to paraphrase an old saw, the rich and poor alike to be subject to equal treatment on the charge of sleeping under bridges. In fairness, the Report is not devoid of reference to the socio-economic context and the Commissioners obviously felt constrained by their Order-in-Council. For example, the Report does include a brief but pointed recognition of the metastatic nature of discrimination beyond the criminal law. “We recognize that the root cause of much of the discrimination Blacks and Natives complain about can be traced to social, political and economic structures, institutions and values that are not part of the criminal justice system.”¹⁶

14. *Id.*, at p. 8.

15. *Id.*, at p. 9.

16. *Supra*, note 6, at p. 150.

However, beyond this variety of curt, although poignant comment in its interstices, the Report largely avoids any confrontation with the dilemmas presented by a highly stratified society. Substantive equality and real social justice, outside the formalistic and ideologically bound world of the courts, are thereby early casualties. The suffering of Natives, Blacks and other visible minorities and of the poor in general does not start with the laying of a baseless charge or the faulty conduct of a trial. These juridical events merely heighten the pain and increase the penalty for powerlessness.

The rule of law and equality before the law are still worth striving for, but they are not concepts which should be considered in the depoliticized atmosphere which the authors of the Commission Report seem to prefer. These are highly charged symbols the meaning of which can be manipulated for good and evil in a society which is much in need of change, as seen from the perspective of the Marshall debacle. There is grave danger in letting the beneficent liberal idealism of the Report overcome the visceral sense of revulsion stimulated by the Marshall case. Worship at the feet of a rule of law icon is encouraged by the Report, but there are strong reasons for not being satisfied with isolated or formalistic changes contained within the criminal justice system. As the Commission quoted from one of its researchers with apparent approval:

Is there a different law for the poor and for the rich? For the minorities and the rich? Most minority groups are poor. They get it in the neck because they are young. They get it in the neck because they are racial minorities.¹⁷

Again, will it all be worth it? Yes, to the extent that the goal of treating people fairly *within* the criminal justice system is important and independently valuable. Yes, to the extent that the Marshall case may instill in all actors in the criminal justice system a determination to be more careful and perhaps more respectful. Yes, to the extent that the Marshall Report presents a paradigm of injustice that will have received national recognition. Yes, to the extent that an innocent man who was villified for nearly twenty years was finally vindicated.

However, beyond these gains there are pitfalls. Firstly, there is the illusion of final accomplishment, leading to complacency and a more polished ideological veneer. Secondly, there is the "it could never happen again" delusion. While it may be true that such epic injustices are rare, similar less dramatic wrongful convictions are likely to continue to occur daily, in a system which can barely manage to deliver even on its

17. Dr. Wilson Head's statement, an extract of which was reproduced by the Commission, *ibid.*, appears in its full version in Volume Seven, Consultative Conference, November 24-26, 1988, Royal Commission on the Donald Marshall, Jr., Prosecution, pp. 48-49.

promises of formal procedural justice. Thirdly, there is the false sense that this kind of sin could only occur in Nova Scotia, which, to its detractors, is the mid-1950's Selma of Canadian criminal justice. Although the Donald Marshall, Jr. story has properly put Nova Scotia in a most uncomfortable spotlight, this remains a self-congratulatory and ethnocentric notion which belies the basic structural similarity among all the Provinces and Territories. Fourthly, one must fight off the fantasy of wish-fulfillment. That is, having seen an evil, we will now pronounce it extinct as if a simple declaration turns sandstone into precious metal. Finally, there is the safety-valve problem: a major case is used to let pressure off the system, but the conditions causing the build-up are still extant.

So far the process has produced many worthwhile effects, but now is the time to start monitoring the promissors and measuring the proclaimed achievements. It was right to be condemnatory of a system that recklessly and mercilessly preyed on an innocent person. It remains right to be skeptical of the declarations by the same criminal justice system that a cure has been found. A thorough yearly check by examiners who have no interest in the status quo is recommended. There must at least be progress at the level addressed by the Commission, whose suggestions were so quickly adopted by the Government, the Bar, and the R.C.M.P., and there must also be a clear recognition that this will never be good enough. The quest for real justice should not be diverted by a partial diagnosis. ". . . I see this as being simply the beginning process that ought to take place over a number of years to try to come up with some real changes that will make law and justice meaningful terms in modern society".¹⁸

18. *Ibid.*