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FAX COVER SHEET

DATE: February 24/89

OUR FILE: I-1816

TO: (Name) Mr David Orsborn

(Firm) Royal Commission

(City) Halifax

(Telecopier) 424-2709

FROM: W. Wylie Spicer's office

COMMENTS:

We are transmitting 15 pages (including this cover sheet).

If you [illegible]e all pages, PLEASE CALL [illegible]
Tele[illegible]6-6500. Thank you.

Gowling & Henderson

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HENRY S. BROWN

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February 24, 1989

BY TELECOPIER

Mr. W. Wylie Spicer
McInnes, Cooper & Robertson
Barristers & Solicitors
Cornwallis Place
1601 Lower Water Street
P.O. Box 730
Halifax, Nova Scotia
B3J 2V1

Dear Mr. Spicer:

Re: Donald Marshall, Jr., Inquiry - Leave to Appeal

Enclosed please find copies of the notice of appeal, notice of motion, draft order, letter to the Ottawa agents for the respondents and for the Attorney General of Nova Scotia, and a draft Agreement as to Contents of Case for your information.

Yours truly,

Henry S. Brown

HSB:md
Enclosures

21315

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA APPEAL DIVISION)

BETWEEN:

T. ALEXANDER HICKMAN, LAWRENCE A. POITRAS and GREGORY THOMAS EVANS

Appellants
(Defendants)

AND:

IAN M. MacKEIGAN, GORDON L.S. HART, MALACHI C. JONES, ANGUS L. MacDONALD and LEONARD L. PACE

Respondents
(Plaintiffs)

AND:

THE ATTORNEY GENERAL OF NOVA SCOTIA and DONALD MARSHALL JR.

Intervenors
in the courts below

NOTICE OF APPEAL

TAKE NOTICE that the appellants hereby appeal to the Supreme Court of Canada from the judgment of the Nova Scotia Supreme Court, Appeal Division, pronounced December 8, 1988 pursuant to leave granted by the Supreme Court of Canada February 23, 1989.

DATED AT Ottawa, this 24th day of February, 1989.

GOWLING & HENDERSON
Barristers & Solicitors
160 Elgin Street
Ottawa, Ontario
K1N 8S3

Ottawa agents for the
solicitors for the
appellants

TO: **THE REGISTRAR**

AND TO: **GRACE, NEVILLE & HALL**
Barristers & Solicitors
#500 - 77 Metcalfe Street
Ottawa, Ontario
K1P 5L6

Ottawa agents for the
solicitors for the
respondents and for the
Attorney General of Nova Scotia

AND TO: **SHORR, MALEK**
Barristers & Solicitors
#800 - 200 Elgin Street
Ottawa, Ontario
K2P 1L5

Ottawa agents for
counsel for Donald Marshall, Jr.

21315

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA APPEAL DIVISION)

BETWEEN:

T. ALEXANDER HICKMAN, LAWRENCE A. POITRAS and GREGORY THOMAS EVANS

Appellants
(Defendants)

AND:

IAN M. MacKEIGAN, GORDON L.S. HART, MALACHI C. JONES, ANGUS L. MacDONALD and LEONARD L. PACE

Respondents
(Plaintiffs)

AND:

THE ATTORNEY GENERAL OF NOVA SCOTIA and DONALD MARSHALL JR.

Intervenors
in the courts below

NOTICE OF MOTION

TAKE NOTICE that an application will be made by counsel on behalf of the appellants before the Chief Justice of Canada on Thursday, the 2nd day of March, 1989, at the hour of 10:00 o'clock in the forenoon or so soon thereafter as the same may be heard for directions concerning the hearing of this appeal and the appeal by Donald Marshall, Jr. in the same cause.

AND TAKE NOTICE that the following orders will be sought:

a. an order permitting the filing of the case on appeal material on or before March 8, 1989;

b. an order that the appellant's factum be served and filed on or before March 22, 1989;

c. an order that this appeal be heard April 19 and 20, 1989;

and such further or other orders as to the Right Honourable The Chief Justice may seem just.

DATED AT Ottawa, this 24th day of February, 1989.

GOWLING & HENDERSON
Barristers & Solicitors
160 Elgin Street
Ottawa, Ontario
K1N 8S3

Ottawa agents for the solicitors for the appellants

TO: THE REGISTRAR

AND TO: GRACE, NEVILLE & HALL
Barristers & Solicitors
#500 - 77 Metcalfe Street
Ottawa, Ontario
K1P 5L6

Ottawa agents for the solicitors for the respondents and for the Attorney General of Nova Scotia

AND TO: **SHORE, MALEK**
Barristers & Solicitors
#800 - 200 Elgin Street
Ottawa, Ontario
K2P 1L5

Ottawa agents for
counsel for Donald Marshall, Jr.

21315

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA APPEAL DIVISION)

(ON THURSDAY, THE 23RD DAY OF FEBRUARY, 1989)

BEFORE: THE HONOURABLE MR. JUSTICE LAMER
THE HONOURABLE MR. JUSTICE LAFOREST
THE HONOURABLE MR. JUSTICE SOPINKA

BETWEEN:

T. ALEXANDER HICKMAN, LAWRENCE A. POITRAS and GREGORY THOMAS EVANS

Applicants
(Defendants)

AND:

IAN M. MacKEIGAN, GORDON L.S. HART, MALACHI C. JONES, ANGUS L. MacDONALD and LEONARD L. PACE

Respondents
(Plaintiffs)

AND:

THE ATTORNEY GENERAL OF NOVA SCOTIA and DONALD MARSHALL JR.

Intervenors
in the courts below

ORDER

UPON APPLICATION by counsel on behalf of the applicants for an order granting leave to appeal from the judgment of the Nova Scotia Supreme Court, Appeal Division, pronounced December 8, 1988 and upon reading the pleadings and proceedings as filed together with the affidavit of Susan M. Ashley, also filed;

1. **IT IS ORDERED** that leave to appeal be and the same is hereby granted.

2. **IT IS FURTHER ORDERED** that the appeal is to be heard within three months on a date to be fixed by the Chief Justice.

DEPUTY REGISTRAR

Gowling & Henderson

BARRISTERS & SOLICITORS
PATENT & TRADE MARK AGENTS

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CANADA N1R 6W1

HENRY S. BROWN

February 24, 1989

BY COURIER

Mr. Stephen J. Grace
Grace, Neville & Hall
Barristers & Solicitors
#500 - 77 Metcalfe Street
Ottawa, Ontario
K1P 5L6

Dear Mr. Grace:

Re: Donald Marshall, Jr. Inquiry

Please find enclosed herewith in duplicate a draft order granting leave to appeal in the above noted matter. I should be grateful if you could return a copy to me duly approved as soon as possible.

This will confirm my advice to you yesterday that we intend to apply to the Chief Justice of Canada for an order setting April 19 and 20, 1989 as the dates for the hearing of this appeal. We would propose that the material be the same as that filed in the Court of Appeal plus the material relevant to the Supreme Court of Canada. We further propose that the Case on Appeal be served and filed no later than March 8, 1989, and that our factum in this scenario be served and filed no later than March 22, 1989.

Also enclosed, and pursuant to the above, in duplicate is an Agreement as to Contents of Case signed by us which I would ask you to return to me at your earliest convenience.

We are serving you simultaneously but separately with the notice of appeal and the notice of motion.

I look forward to your continuing cooperation in this connection.

Yours truly,

Henry S. Brown

HSB:md
Enclosures

21315

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA APPEAL DIVISION)

BETWEEN:

T. ALEXANDER HICKMAN, LAWRENCE A. POITRAS and GREGORY THOMAS EVANS

Appellants
(Defendants)

AND:

IAN M. MacKEIGAN, GORDON L.S. HART, MALACHI C. JONES, ANGUS L. MacDONALD and LEONARD L. PACE

Respondents
(Plaintiffs)

AND:

THE ATTORNEY GENERAL OF NOVA SCOTIA and DONALD MARSHALL JR.

Intervenors
in the courts below

AGREEMENT AS TO CONTENTS OF CASE

THE PARTIES herein hereby agree that the Case on Appeal shall consist of the following:

PART I - PLEADINGS, ORDERS, ENTRIES, ETC.

1. Originating notice dated January 25, 1988.
2. Notice of appeal to the Appeal Division dated August 19, 1988.
3. Amended notice of appeal to the Appeal Division dated July 22, 1988.
4. Notice of contention dated July 29, 1988.

5. Notice of contention dated August 1988.

6. Order granting leave to appeal to the Supreme Court of Canada dated February 23, 1989.

7. Notice of appeal to the Supreme Court of Canada dated February 24, 1989.

PART II - THE EVIDENCE

8. Affidavit of Ronald J. Downie sworn January 25, 1988 and exhibits thereto.

9. Affidavit of David B. Orsborn sworn April 21, 1988, together with Exhibits F, G, N, and O.

10. Proposed questioning of the plaintiffs by Donald Marshall, Jr.

PART III - EXHIBITS

11. All the exhibits referred to in Part II.

PART IV - JUDGMENTS AND REASONS FOR JUDGMENT

12. Formal order of Glube, C.J.T.D., made June 23, 1988, and entered August 9, 1988.

13. Reasons for judgment of Glube, C.J.T.D. dated June 23, 1988.

14. Formal order of the Appeal Division dated December 8, 1988.

15. Reasons for judgment of the Appeal Division dated December 8, 1988.

PART V - AGREEMENT, ETC.

16. Agreement as to Contents of Case.

17. Certificate of the Registrar of the Court of Appeal in Form D.

18. Certificate of Counsel for the appellant in Form D.

DATED AT Ottawa, this 24th day of February, 1989.

GOWLING & HENDERSON
Barristers & Solicitors
160 Elgin Street
Ottawa, Ontario
K1N 8S3

Ottawa agents for
solicitors for the
appellant

DATED AT Ottawa, this day of , 1989.

GRACE, NEVILL
Barristers &
#500 - 77 Met
Ottawa
K1P

Ottawa agents
solicitors for
respondents

McINNES COOPER & ROBERTSON

BARRISTERS & SOLICITORS

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FAX COVER SHEET

DATE: February 24/89

OUR FILE: I-1816

TO: (Name) Ms Susan Ashley

(Firm) Royal Commission

(City) Halifax

(Telecopier) 424-2709

FROM: W. Wylie Spicer

COMMENTS:

We are transmitting 5 pages (including this cover sheet).

If you do not receive all pages, PLEASE CALL Pam Jefferson AS SOON AS POSSIBLE.
Telephone (902) 425-6500. Thank you.

Gowling & Henderson

BARRISTERS & SOLICITORS
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February 23, 1989

BY TELECOPIER

Mr. W. Wylie Spicer
McInnes, Cooper & Robertson
Barristers & Solicitors
Cornwallis Place
1601 Lower Water Street
P.O. Box 730
Halifax, Nova Scotia
B3J 2V1

Dear Mr. Spicer:

Re: Donald Marshall, Jr., Inquiry - Leave to Appeal

Enclosed please find copies of the pronouncements of the Supreme Court of Canada in the three applications for leave to appeal.

Yours truly,

Henry S. Brown

HSB:md
Enclosures

Supreme Court of Canada | Cour suprême du Canada

February 23, 1989 | le 23 février 1989

JUDGMENT | **JUGEMENT**

MOTION | **REQUÊTE**

Donald Marshall, Jr. - and - Her Majesty the Queen in Right of Nova Scotia as represented by the Attorney-General of Nova Scotia, and the Royal Commission into the Donald Marshall, Jr. Prosecution, (N.S.)

CORAM: Lamer and La Forest and Sopinka JJ.

The application for leave to appeal is granted. The appeal is to be heard within three months on a date to be fixed by the Chief Justice.

La requête en autorisation de pourvoi est accordée. La requête sera entendue dans un délai de trois mois à la date qui sera déterminée par le juge en chef.

J.S.C.C.
J.C.S.C.

Supreme Court of Canada | Cour suprême du Canada

February 23, 1989 | le 23 février 1989

JUDGMENT | **JUGEMENT**

MOTION | **REQUÊTE**

Donald Marshall, Jr. - and - Ian M. MacKeigan, Gordon L.S. Hart, Malachi C. Jones, Angus L. MacDonald and Leonard L. Pace (N.S.)

CORAM: Lamer and La Forest and Sopinka JJ.

The application for leave to appeal is granted, costs in the cause.

La requête en autorisation de pourvoi est accordée, dépens à suivre.

J.S.C.C.
J.C.S.C.

Supreme Court of Canada | Cour suprême du Canada

February 23, 1989 | le 23 février 1989

JUDGMENT | **JUGEMENT**

MOTION | **REQUÊTE**

T. Alexander Hickman, Lawrence A. Poitras and Gregory Thomas Evans - and - Ian M. MacKeigan, Gordon L.S. Hart, Malachi C. Jones, Angus L. MacDonald and Leonard L. Pace (N.S.)

CORAM: Lamer and La Forest and Sopinka JJ.

The application for leave to appeal is granted. The appeal is to be heard within three months on a date to be fixed by the Chief Justice.

La requête en autorisation de pourvoi est accordée. La requête sera entendue dans un délai de trois mois à une date qui sera déterminée par le juge en chef.

J.S.C.C.
J.C.S.C.

Gold & Fuerst
Barristers

Suite 210 - 20 Adelaide Street East
Toronto, Ontario M5C 2T6

Alan D. Gold, B.Sc., LL.B.
Michelle K. Fuerst, LL.B.
Carolyn L. MacDonald, B.A., LL.B.

Telephone (416) 368-1726
Facsimile (416) 368-6811

February 29, 1989

DELIVERED BY PUROLATOR

Marshall Inquiry
Maritime Centre
Suite 1026
1505 Barrington Street
Halifax, Nova Scotia
B3J 3K5

ATTENTION: John Briggs

Dear John:

It was a pleasure to talk to you last night. As promised, I enclose excerpts from some work I did in 1970 that you may find useful (though dated). If there is any further way I can be of assistance, please do not hesitate to contact me.

I certainly wish you well in your consideration of these issues and would very much appreciate a copy of your Report when it is released.

Yours very truly,

Alan D. Gold per: A.D.G.

Alan D. Gold

ADG:gu

Enclosures

APPELLATE AND POST-CONVICTION REMEDIES IN THE CANADIAN CRIMINAL PROCESS

Second Draft
(July, 1970)

ALAN D. GOLD

The initial draft of this paper, written under the supervision of Professor R.R. Price, was submitted in May, 1970 as a Major Research Paper in fulfilment of the requirements for the LL.B. degree. The extensive revision and additions comprising the second draft were completed in connection with a series of related studies on The Canadian Law of Criminal Correction commenced in the Spring of 1970.

Alan D. Gold
Faculty of Law,
Queen's University
Kingston, Ontario

"...not the least significant test of the quality of a civilization is its treatment of those charged with crime..."

Irvin v Dowd 366 U.S. 717 (1961), at 729 per Frankfurther J. (concurring)

"...the rights of the best of men are secure only as the rights of the vilest and most abhorent are protected..."

People v Gitlow 136 N.E. 317 (1922), at 327 per Pound J. (Cardozo J. concurring), (dissenting)

"Conscience is a coward, and those faults it has not strength enough to prevent, it seldom has justice enough to accuse"

-Goldsmith

TABLE OF CONTENTS

CHAPTER I

APPEALS

Introductory

While a conviction entered after trial, either upon the verdict of a jury or the findings of a judge, does not terminate the criminal process, in practice it represents the stage at which an overwhelming majority of accused persons are diverted out of the judicial process. For example, in 1967, out of 45,703 convictions for indictable offences under the Criminal Code, there were only 824 appeals against conviction taken, representing a fraction of less than 2%.[2] Of these appeals, only one-third were successful.[3] Furthermore, there were only 2,150 appeals against sentence, of which over half could be termed successful.[4]

It is by no means a self-evident proposition that accused persons should have recourse to a higher authority to review either the process of conviction or the disposition decision. Consequently, this chapter will be concerned, after an historical survey, with an analysis of the advantages and disadvantages of criminal appeals, and an evaluation of the Canadian law.

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2. Statistics of Criminal and Other Offences (Dominion Bureau of Statistics, 1967) at 24 and 142.
3. Acquittals were entered in 126 cases; new trials ordered in 61; and a lesser verdict substituted in 19; Id., at 142.
4. In 660 appeals the sentence was varied; in another 103 it was suspended: Id.

As a frame of reference it should be pointed out that modern appeals in criminal cases were introduced into Canada in 1923, though the right to appeal against sentence was given in 1921.[5] Both enactments were closely modelled upon the English Criminal Appeal Act, 1907,[6] which marks the beginning of a modern era in criminal appeals in that country. Prior to these dates, procedure by way of appeal in both countries was generally as it grew up at common law. The law in the United States is harder to summarize because of variations among the various jurisdictions, but will be referred to where relevant.

Historical Perspective

There was nothing known to the Common Law which was, or could properly be called, a true appeal, though there existed several different types of proceedings which to some extent provided post-conviction review.[7]

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5. S.C., 1921, c.25, s.22; S.C. 1923, c.41, s.9.

6. 7 Edw. VII, c.23. See Rex v. Lanzon, [1940] 3 D.L.R. 606 (Que. C.A.) per Walsh J. at 617.

7. The ancient "appeal of felony" must be distinguished for it was not a mode of review at all, but rather a private accusation against the wrongdoer by his victim or representatives of his victim: 1 Stephen, History of the Criminal Law of England (1883), at 244. [Hereinafter cited as STEPHEN]. It was the alternative method, besides indictment and information, of instituting proceedings, with the appellor making a minute and highly formal statement before the coroner, who enrolled the statement; the appearance of the appellee was secured by publishing the appeal at five successive county courts. If he failed to appear he was outlawed, and if he appeared battle was waged. This procedure did not preclude further trial by jury on indictment, though from the sixteenth century indictments were usually tried first, the defendant still being subject to an appeal even though acquitted by the jury: Norkott's Case (1625) 14 How St. Tr. 1324. Although little used in later centuries, it was held to subsist in England in 1818: Ashford v. Thornton 1 B. and Ald. 405; it was finally abolished by statute: 59 Geo. III, c.46.

Appeal on finding on appeal that a trial has been a nullity may order a venire de novo,[49] while in Canada this has been subsumed under the general power of the Court of Appeal to order a new trial.[49a]

The Role of Criminal Appeals

Consideration of the modes of review at common law indicate several influences that shaped post-conviction procedure, and assessment of these influences and the premises upon which they were based is a prerequisite to determining the proper role of criminal appeals.

Orfield has succinctly summarized the situation:

> ...[R]eview of trials in the common law grew up under the influence of two ideas quite at variance with the ends of modern law, namely, the mechanical trial and the trial of the trial tribunal for its erroneous (or as it was conceived, false) determination.[50]

By 'mechanical trials', Orfield was referring to such modes as trial by ordeal, and trial by battle, and to the extent that it is their successor,[1] trial by jury, all of which, through the

---

venire de novo was awarded for errors apparent on the record, whereas a new trial was available for matter dehors the record.

49. Crane v D.P.P. [1921] A.C. 299 (H.L.); Rex v. Williams (1925), 19 Cr. App. R. 67; see BRIEDLAND, at 236 et. seq.

49a. See text infra at page 64.

50. Orfield, Criminal Appeals in America (1939), at 6.

1. "Not until...[modern appeals]...were the last vestiges which still attached to trials for felony finally removed from our law and the criminal jury finally lost that inscruitibility which it inherited from the ordeals": Plucknett, Edward I and Criminal Law (1960), at 76.

construct of divine intervention, postulated an infallible result. To the extent that it is assumed that decisions produced by such procedures are ipso facto correct, it becomes impossible to perceive any role for a review procedure, and it follows logically that the response to grievances concerning the correctness of decisions would be separate proceedings in which, the decision remaining directly unquestioned, the bona fides of the decision-maker is investigated. It is not sufficient to say as Pollock and Maitland have put it, that the problem existed because "...the idea of a complaint against a judgment which is not an accusation against a judge is not easily formed",[2] since it is not self-evident why judges qua judges are sacrosanct. The answer lies in the desire of the common law to maintain the integrity of the process. From this point of view it becomes apparent that common law modes of review essenttally attempted, and to some extent succeeded, in simultaneously supposing the infallibility of the process and correcting some of its errors, by having the corrective procedures operate against the individual decision-makers not qua components of the process but qua individuals and wrongdoers.

For example, common law lawyers would not consider the reluctance of appellate courts to allow the introduction of new evidence or the raising of new points on appeal as unreasonably ignoring the interest of the State in the just and effective

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2. 2 Pollock and Maitland, History of English Law (2d ed. 1952) at 668.

operation of its courts, since this was presumed. Consequently, following this presumption through, they would view the judge as a defendant in the accusation of error and conclude that it would be unfair to him to reverse his judgment on a point which had never been brought to his attention.[3]

---

3. The reductio ad absurdum of the doctrine that a reviewing court has no power to consider anything not passed upon below is found in the case of State v. Garcia, 143 P. 1012 (1914). In that case one Francisco Garcia and his brother were indicted for murder, and both were found guilty of manslaughter. In its opinion on review, the Supreme Court of New Mexico says:

> A curious fact appears in this case. Francisco Garcia, one of the defendants, became engaged in an altercation with the deceased, whereupon deceased shot Garcia and he fell to the floor, and remained there, unconscious, during the whole of the remainder of the difficulty. Cipriano Garcia, his brother, was at the back of the saloon where the difficulty occurred, and took no part in the same up to that time. Upon hearing the shot and seeing his brother fall to the floor, he rushed to his rescue, encountered the deceased and killed him. No proof of concerted action on the part of the brother is shown. It thus appears that it was physically impossible for Francisco Garcia to be guilty of any crime in this connection, and he was entitled to an instruction to the jury to acquit him. Had the matter been called to the attention of the court before instructing the jury, no doubt he would have so directed them. But counsel sat quiet. Nor did counsel call attention of the court to this proposition in the motion for a new trial. Under such circumstances, no relief can be granted here. No question is here for decision, the court below never having decided the point....The remedy of the defendant, Francisco, is an application to the Governor for pardon.... The judgment of the lower court is affirmed, and it is so ordered. [at 1013]

The persistence with which the scope of judicial review at common law was confined to the identification of errors, and avoided direct consideration of judgments, was also due to the institution of trial by jury. There is a certain logic in reasoning that if the jury was to be the tribunal of fact at the trial, alleged errors of fact should similarly be considered by a jury, either independently, on a new trial, or by a kind of "jury on appeal", as represented by the attaint.

> The remand of cases for a new trial was... a necessary incident in the use of juries. As long as the jury had the exclusive right to weigh the evidence and find the facts, no error which was related in any material respect to either of those functions could be cured in any other way. The judge of the higher court could not undertake to adjust the verdict so as to eliminate the error, without depriving the parties of their right to trial by jury.[4]

Such an argument, however, amounts merely to demanding that the appellate institution be identical to that of first instance, and ignores the fact that there has been a one-step regression. It is not the initial decision that must be made, but a decision concerning that decision and the process by which it was obtained.[5]

---

4. Sunderland, "Improvement of Appellate Procedure" (1940) 26 Iowa L.R. 3, at 8. Continental jurists, on the premise that the jury was a romantic and mystical institution, and "oracle", concluded that an appeal from one jury to another and a fortiorari the reversal of a verdict by a court composed of learned judges was absolutely impossible: Mannheim, "Trial By Jury in Modern Continental Criminal Law" (1937) 53 L.Q.R. 99, 388, at 114-5.

5. See Orfield, Criminal Appeals in America (1939), at 45-6.

In addition, it somehow seems ludicrous, when considering appeals by the accused, to speak of depriving an accused of his right to trial by jury, unless one means a right to be improperly convicted by a jury, but not by a judge alone.

Appellate review is also inextricably linked with the necessity for a reasoned judgment in the court below, and it is to the absence of this concomitant in jury trials, that some authorities attribute the retardation of common law appeals:

> A jury's verdict is unreasoned (if not unreasoning), and there can be no means of attacking such a decision....Unlike a judge, jurors are not required - and indeed could not be expected - to clothe in cold syllogism the impulses of sentiment which, we suspect, are often the basis of their decision....[6]

Yet again it is possible to respond that, if the common law had not postulated infallibility and focused on errors only, a process of review could have been developed in which the decision could be reviewed in terms of objective standards. Only when review is considered to focus on errors does the absence of explanation preclude review, by making the pinpointing of errors impossible.

Rational consideration of the desirability of criminal appeals and definition of the proper role of an appellate court in criminal matters is possible only after any assumption of

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6. Blom-Cooper and Drewey, "The House of Lords: Reflections on the Social Utility of Final Appellate Courts" (1969), 32 Mod L.R. 262, at 272.

infallibility is rejected.[7] Then, while the argument that they are unnecessary can be easily dismissed, there are other arguments against criminal appeals that merit consideration.[8]

It is, for example, argued that "...such an appeal system would interfere with the finality of the trial and lessen the care with which trial judges and juries approached their respective tasks."[9] Further, Lord Brougham, in debate on the English enactment, said:

> The criminal law depends for the effect, more or less, which it has in deterring from crime by example of punishment, upon the speediness with which the execution of the sentence follows trial.[10]

---

7. In 1848 Lord Denman, later Lord Chief Justice of England, attributed the desire for criminal appeals to two sources: "There are many thousands in this metropolis who live by crime, and who have a great interest in imputing that Courts of Justice are often mistaken....[Also,]...there... is a great desire...on the part of many active and able persons attached to the Law to see a Court and a new course of practice which would be popular and striking, and give a new scope for the display of their talents." SIBLEY, at 19, f.n. 2.
"It is contrary to the policy of the Criminal Law in England to allow an appeal in cases of felony..." Arquendo in Reg. v. Eduljee Byramjee (1847), 13 E.R. 496, at 500.

8. See, e.g., Smyth, "The Limitation of the Right of Appeal in Criminal Cases" (1904) 17 Harv. L.R. 317. The arguments are summarized in FRIEDLAND, at 231-232.

9. Justice Rept., at 7-8. See also SIBLEY, at 21 f.n. 3, and at 24.

10. Reported in SIBLEY, at 359-60, Cf. Mr. Justice Taft: "Another reason why English justice still maintains its reputation for certainty of punishment is the fact that there are no appeals allowed from the trial in the first court unless the judge presiding in the Court shall deem certain questions of law of sufficient importance and doubt to reserve them...When, therefore, after a long or a short trial the defendant is convicted, the conviction is final in ninety-nine cases out of a hundred." Taft, "The Administration of Criminal Law" (1905) 15 Yale L.J. 1, at 12.

And, finally, it appears that more than a few emminent English lawyers of the time felt that the Criminal Appeal Act, 1907 would make juries so sloppy in their consideration of cases that the doctrine of reasonable doubt would vanish in practice.[11]

While finality is desirable, the question remains whether it is desirable at the expense of justice.[12] To say that "...a criminal, however shocking his crime, is not to answer for it with forfeiture of life or liberty till tried and convicted in conformity with law,"[13] is to ostensibly declare a right, and this right becomes a hollow promise unless a remedy exists for its vindication where necessary.[14] Similarly, the argument that review encourages sloppiness, besides being unsupported, is misleading, unless the converse is true that lack of review results in perfection. The real question is: are the goals of the criminal process better achieved when there is a mode of review, having consideration as well to the judicial time and effort involved on the one hand, and the fact that the appellate court may serve additional useful functions on the other.

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11. SIBLEY at 43, f.n. 2.

12. "Finality is a good thing, but justice is a better:" Ras Behari Lal v. The King-Emperor (1933) L.R. 601 AC 354. at 361 (P.C.).

13. People v. Nuran (1927) 158 N.E. 35, per Cardozo J.

14. "Justice demands an independent and objective assessment of a...judge's appraisal of his own conduct of a criminal trial." Coppedge v. U.S. 369 US 438 (1962) per Stewart J. (concurring) at 455-6. c.f., Viscount Sankey LC in Maxwell v. D.P.P.

The appellate court's primary function would be to do justice for the individual accused, which means acquitting innocent persons wrongfully convicted and guaranteeing that the rights of other accused have been respected. However, the appellate court would also ensure the maintenance of consistent standards in the criminal courts, and it would develop and render uniform the criminal law of the jurisdiction.[15] Furthermore, it would do all

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[1935] A.C., 309 (H.L.), at 323: "...it may well seem unfortunate that a guilty man should go free because some rule of evidence has been infringed by the prosecutor. But it must be remembered that the whole policy of English criminal law has been to see that as against the prisoner every rule is in his favour is observed and that no rule is broken so as to prejudice the choice of the jury fairly trying the true issues. The sanction for the observance of the rules...in criminal cases is that, if they are broken in any case, the conviction may be quashed..."

15. See Orfield, Criminal Appeals in America (1939), at 32, and 185 et. seq.

c.f., Minimum Standards Respecting Appellate Review (A.B.A. Project on Minimum Standards for Criminal Justice, Tent. Dr. 1967) [hereinafter cited as Minimum Standards] s. 1.2(a) at 22:

(a) The structure of appellate course should be consonant with the purposes of appellate review, to wit:
  (i) To protect defendants against prejudicial legal error in the proceedings leading to conviction and within limits against verdicts unsupported by sufficient evidence;
  (ii) Authoritatively to develop and refine the substantive and procedural doctrines, and principles of criminal law; and
  (iii) to foster and maintain uniform, consistent standards and practices in criminal process."

Because values beyond mere conviction of the guilty and acquittal of the innocent are involved, it is not surprising that sometimes an appellate court reverses and releases a guilty accused where it feels it more desirable that precedent be maintained and/or trial courts disciplined: Note, "Operation of Appellate Procedure in Pennsylvania Criminal Cases" (1952) 100 U. of Penn. L.R., 868.

Also See Davies, "The Court of Criminal Appeal: The First Forty Years" (1951), J. of Soc. of Pub. Teachers of Law (N.S.)

this in an atmosphere with "...a measure of isolation from the dust raised by forensic combat."[16]

As Packer points out[17], within the context of an adversary system there are two models of appellate review possible, premised respectively on a bias in favour of the State or in favour of the accused: the 'Crime-Control' Model and the 'Due Process' Model.[18]

In the former, with its emphasis on finality, appellate review has a highly marginal role confined to "...those occasional slips in which the trier of fact either makes a plain error about factual guilt or makes some kind of procedural mistake so gross as to cause with some high degree of probability a substantial diminution in the reliability of the guilt-determining process."[19]

425, where the author canvasses the contributions of the English Court of Criminal Appeal to the law of criminal procedure and evidence.

Because of these different functions it seems realistic to say that judges on appeal are not the same as judges at trial, and the philosophy that judges on appeal should feel freer in examining the decisions of judges below than of juries, is based on the misconception that in the former case (but not the latter) the identical institution is the mechanism of appeal; see text accompanying f.n. 5 [page 19] supra.

16. Blom-Cooper & Drewey, op. cit. supra n. 6 [page 20] at 272-3. See also Hood, "The Right of Appeal" (1969) 29 Louisiana L.R. 498, at 520; Minimum Standard at 24.

17. Packer, "Two Models of the Criminal Process" (1964) 113 U. of Penn. L.R. 1, at 51, et. seq. [hereinafter cited as PACKER].

18. Packer himself did not realize this relationship between his models; it was pointed out by Griffith: see Griffiths, "Ideology in Criminal Procedure or a Third Model of the Criminal Process" (1970) 79 Yale L.J. 359.

19. PACKER, at 52-3.

In contrast, the appellate stage in the Due Process Model operates not only to correct errors in the assessment of factual guilt, but "...serves, more importantly, as the forum in which infringements on the rights of the accused...that have accumulated at earlier stages of the process, are to be redressed and their repetition deterred. The appellate forum...is both guardian and vindicator of the...[process's integrity]....[it is] qualitatively crucial and quantitatively significant."[20]

Such models provide useful criteria for evaluation of an appellate structure,[21] for each forces different decisions on such details as scope of appeals, complexity of appeal procedure, and

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20. PACKER, at 53.

21. The common law obviously approximated the Crime Control model. Also, the long debate in England concerning the creation of the Court of Criminal Appeal was between proponents of each of the two models, none of whom were probably aware of the underlying assumptions they were making. For example, compare the statement by Lord Brougham (text at 21) with Packer's statement that, under the Crime Control Model, "...once a determination of guilt has been made, either by entry of a plea or by adjudication, the paramount objective of the criminal process should be to carry out the sentence of the court as speedily as possible. We must be able to say that people who violate the law will be swiftly and certainly subjected to punishment. This end will be undermined if the process permits, and hence invites, delays in the execution of sentences. Finality of guilt determination is therefore the most important point of departure for evaluating any system of review. To put the matter bluntly, appeals should be so effectively discouraged that the mere taking of an appeal should be in itself a fairly reliable indicator that the case contains substantial possibility of error going to the issue of factual guilt." (at 53).

powers of the appellate court, and it consequently becomes possible after comparison with the existing legislation, to conclude that one or the other model best describes reality. Furthermore, reform becomes simply a matter of adjusting the reality to approximate more closely the model which is deemed desirable.

As to the threshold question involving choosing between the models, it should be readily seen that dissatisfaction with common law modes of review militates against favouring the Crime Control Model, and that the broad functions of an appellate court enumerated earlier can only be successfully fulfilled in the context of a Due Process Model.

Consequently, the general outline of the appellate structure would involve, first of all, full and unrestricted access, in view of the fact that since the right of appeal is an important safeguard for the rights of individual accused, a steady flow of criminal cases is required for the elaboration of those rights. Furthermore, the appellate court should be almost inquisitorial in its review, entitled to consider errors below sua sponte. And in disposition, the factual guilt of the accused would not be crucial,[22] but rather convictions of guilty defendants would be reversed to affirm the proper values and as a deterrent example

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22. In the Crime Control Model, "...no errors should suffice for reversal if the appellate court concludes on a review of all the evidence that the factual guilt of the accused was adequately established:" PACKER, at 54.

of the result when those values are slighted. In other words, rather than an exceptional institution only remotely connected with the criminal process until trial, it should be possible to say that "...[a]ppellate review has become such an integral part of our criminal procedure that it may properly be viewed as an extension of the trial itself."[23]

Modern Criminal Appeals

INTRODUCTORY

Dissatisfaction with the existing modes of review in criminal cases resulted in England, in three-quarters of a century of agitation for reform and the introduction of no less than twenty-eight separate bills into Parliament.[24] Judges, prosecutors and administrative authorities had all taken part in the debate on one side or the other. In 1907 the efforts culminated in the passing of the Criminal Appeal Act, 1907 which came into operation in April, 1908.

The Act[25] provided for a court made up of the Lord Chief Justice and eight judges of the King's Bench Division appointed

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23. Commonwealth ex rel. Neal v. Myers 227A. 2d 845, 846 n. 3 (1967).

24. These bills are summarized in Cohen, The Criminal Appeal Act, 1907 (1908), at 63.

25. The precipitating cause of setting up the Court was that certain miscarriages of justice had come to light; see O'Halloran, "Development of the Right of Appeal in England in Criminal Cases" (1949) 27 Can. Bar. Rev. 153.

Generally, all grounds upon which the appellant intends to rely must be stated in the notice of appeal; however the court of appeal will hear argument concerning the jurisdiction of the court below even if this ground is not set out,[46] and it appears that there is no hard and fast rule against sua sponte consideration of issues by the court of appeal.

In R v. Simms[47] the court proprio motu amended the notice of appeal so as to set out a ground not raised, nor even argued by counsel at the appeal (the entire absence of corroboration), and thereupon quashed the conviction on that ground. However, it was pointed out that

> ...[i]n taking this course the court wishes it to be understood that it is not to be taken as a precedent for discharging a prisoner upon grounds other than those set out in the notice of appeal. It is to be regarded as an exceptional course depending upon exceptional circumstances, and not to be taken as altering in any way the practice or rules of the court.[48]

Whatever may be the relevant considerations in civil cases,[49] it is questionable whether appellate courts should feel so bound in

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46. Halden v. The King (1929) 48 Que. K.B. 109; R v. Lynch (1956), 116 C.C.C. 333.

47. (1924) 43 C.C.C. 28 (N.S.C.A.).

48. Rex v. Simms (1924) 43 C.C.C. 28 (N.S.C.A.) c.f., Vestal, "Sua Sponte Consideration in Appellate Review" (1959) 27 Fordham L.R. 472, at 499 et. seq.

49. Campbell "Extent to Which Courts of Review will Consider Questions Not Properly Raised and Preserved" (1932-1933) 7 Wisc. L.R. 91, 160; 8 Wisc. L.R. 147, at 92 et. seq.

criminal cases, where the public interest in correct disposition surely outweighs such interests as allowing "the litigants" to control their case. As the Supreme Court of the United States has said,

> In exceptional circumstances, especially in criminal cases, appellate courts in the public interest may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.[50]

This "plain error" exception to the requirement of party initiative is codified in both the American Federal Rules of Criminal Procedure[1] and the Revised Rules of the Supreme Court of the United States,[2] and consideration might well be given to introducing a similar provision into the Code.

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50. Sibhen v. U.S., 370 U.S. 717 (1962), at 718. c.f., Rex v. Lanteign (1938) 70 C.C.C. 338 (N.B.C.A.) where, although the conviction was affirmed, Baxter, C.J., said that if inadmissible evidence had been admitted without objection at the trial, and the court was of opinion that that evidence had had any material hearing upon the result, it would not permit the conviction to stand, even though the question of the admissibility of the evidence had not been raised by counsel on the appeal.

1. Rule 52(b): "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court." See Reisman v. U.S. 409 F. 2d 789, 791 (9th Cir. 1969), U.S. v. Atkinson 297 U.S. 157, 160 (1936), Polansky v. U.S. 332 F.2d 233, 235 (1st Cir. 1964), McMillan v. U.S. 386 F.2d 29, 35 (1st cir. 1967).

2. Rule 40(d)(2): "Questions not presented. will be disregarded save as the Court, at its option, may notice a plain error not presented."

A related problem is the extent to which counsel must "preserve" errors at trial or, alternatively, the extent to which he can raise an issue for the first time on appeal. Philosophically, any absolute prohibition would be of the same school as the common law idea that appeals represent accusations against judges. Procedurally, such a requirement originated in proceedings in error, ancillary to which the plaintiff attached a bill of exceptions sealed by the judge. Then the rule that review was possible only of errors to which exceptions had been taken, of necessity meant that errors had to be brought to the trial court's attention.

Where the requirement is urged even though true appeals have replaced proceedings in error, it is often justified on the basis that if new points were to be considered, that would be the exercise of original jurisdiction. But this argument begs the question, since it is the judgment, and not the rulings (which became merged with it) that is being reviewed and the correctness of that judgment is equally under review whether new points or old points are being considered. "That argument confuses appellate power with the manner of its exercise...".[3]

Greater weight must be given to this attitude insofar as it is based on various practical considerations incident to a workable system of administering justice: the accused might have deliberately failed to raise the issue hoping to speculate on the verdict; litigation must not be interminable; and the time of appellate courts must be conserved.

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3. Sunderland, "Improvement of Appellate Procedure" (1940) 26 Iowa L.R. 3, at 11.

Probably any absolute rule one way or the other is both unnecessary and potentially unjust, in view of the occasional case in which the raising of a new issue on appeal should be allowed.[4] The Canadian law appears to be in accordance with this view, holding that failure to raise below is not a conclusive bar to an appeal.[5]

> There is no rule of law nor, in my opinion, of practice that failure of counsel...for an accused...to object ...is of necessity a bar to the right of appeal. No such general rule appliable in all circumstances exists.[6]

As will be seen, however, a failure by counsel to object is considered by the Court of Appeal in deciding whether or not to apply the proviso.

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4. Note, "Appellate Review in Criminal Cases of Points Not Raised Below" (1941) 54 Harv. L.R. 1204, at 1213.

5. Reg. v. Hulan [1970] 1 C.C.C. 37 (O.C.A.) Rex v. Fleming (1945) 84 C.C.C. 360; Rex v. Munroe (1939) 73 C.C.C. 357. Rex v. Rasmussen (1935) 62 C.C.C. 217; Rex v. Farrell (1909) 20 O.L.R. 182 (Ont. C.A.). Cullen v. The King (1949) 8 C.R. 141 (S.C.C.). Accord, Stirland v. D.P.P. [1944] A.C. 315 (H.L.):

> "The object of British law...is to ensure...that justice is done according to law, and if there is substantial reason for allowing a criminal appeal, the objection that the point now taken was not taken by counsel at the trial is not necessarily conclusive."

6. Cullen v. The King, cit. supra, at 148 per Locke J. (Rinfret, C.J.C., Taschereau, J. concurring). Cf. Kissick v. The King [1952] 1 S.C.R. 343, at 375 per Fauteux, J.:

> "These authorities are sufficient to support the proposition that, as to the consequences of the failure to object, there is no steadfast rule, and that, while the failure to object...is not always fatal, it cannot be said that it is never so.
>
> In the present case, however, the record,... discloses more than a mere omission to object, as it shows a consistent conduct in this respect and a clear and positive intention not to deal with this particular point as being one in controversy in the case.

Gowling & Henderson

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HENRY S. BROWN

February 23, 1989

BY TELECOPIER

Mr. W. Wylie Spicer
McInnes, Cooper & Robertson
Barristers & Solicitors
Cornwallis Place
1601 Lower Water Street
P.O. Box 730
Halifax, Nova Scotia
B3J 2V1

Dear Mr. Spicer:

Re: Donald Marshall, Jr., Inquiry - Leave to Appeal

Enclosed please find copies of the pronouncements of the Supreme Court of Canada in the three applications for leave to appeal.

Yours truly

Henry S. Brown

HSB:md
Enclosures

Supreme Court of Canada | Cour suprême du Canada

February 23, 1989 | le 23 février 1989

JUDGMENT | **JUGEMENT**

MOTION | **REQUÊTE**

Donald Marshall, Jr. - and - Her Majesty the Queen in Right of Nova Scotia as represented by the Attorney-General of Nova Scotia, and the Royal Commission into the Donald Marshall, Jr. Prosecution, (N.S.)

CORAM: Lamer and La Forest and Sopinka JJ.

The application for leave to appeal is granted. The appeal is to be heard within three months on a date to be fixed by the Chief Justice.

La requête en autorisation de pourvoi est accordée. La requête sera entendue dans un délai de trois mois à la date qui sera déterminée par le juge en chef.

J.S.C.C.
J.C.S.C.

Supreme Court of Canada | Cour suprême du Canada

February 23, 1989 | le 23 février 1989

JUDGMENT | **JUGEMENT**

MOTION | **REQUÊTE**

Donald Marshall, Jr. - and - Ian M. MacKeigan, Gordon L.S. Hart, Malachi C. Jones, Angus L. MacDonald and Leonard L. Pace (N.S.)

CORAM: Lamer and La Forest and Sopinka JJ.

The application for leave to appeal is granted, costs in the cause.

La requête en autorisation de pourvoi est accordée, dépens à suivre.

J.S.C.C.
J.C.S.C.

Supreme Court of Canada | Cour suprême du Canada

February 23, 1989 | le 23 février 1989

JUDGMENT | **JUGEMENT**

MOTION | **REQUÊTE**

T. Alexander Hickman, Lawrence A. Poitras and Gregory Thomas Evans - and - Ian M. MacKeigan, Gordon L.S. Hart, Malachi C. Jones, Angus L. MacDonald and Leonard L. Pace (N.S.)

CORAM: Lamer and La Forest and Sopinka JJ.

The application for leave to appeal is granted. The appeal is to be heard within three months on a date to be fixed by the Chief Justice.

La requête en autorisation de pourvoi est accordée. La requête sera entendue dans un délai de trois mois à une date qui sera déterminée par le juge en chef.

J.S.C.C.
J.C.S.C.

PEACE
UNITY
STRENGTH

Mohawk Council of Kahnawake

P.O.Box 720,
Kahnawake, Quebec. JOL 1B0
(OFFICE OF THE COUNCIL OF CHIEFS)

Tel. (514) 632-7500

February 20th, 1989

Royal Commission on the
Donald Marshall Jr. Prosecution
Maritime Centre, Suite 1026
1505 Barrington St.
Halifax, Nova Scotia
B3J 3K5

ATTENTION: **SUSAN M. ASHLEY**
COMMISSION EXECUTIVE SECRETARY

Dear Ms. Ashley:

This letter is to confirm your visit to our Territory scheduled for Thursday, February 23rd, 1989. In reply to your letter dated February 10th, 1989 to Winona Diabo, you requested information. I have made all the arrangements for your visit, it is as follows:

1. 9:30 - 12:30 p.m. Court of Kahnawake
   View our court in session - then meet Court Personnel

2. 12:30 - 2 p.m. Mohawk Council Office
   Luncheon Buffet

3. 2 p.m. to 3 p.m. Mohawk Council Office
   Meet Council Members

4. 3 p.m. to 4 p.m. Kahnawake Peacekeepers Department
   Presentation and Tour of Facilities

5. 4 p.m. and after Tour of Kahnawake if time permits

I have also prepared 2 documents for your information 1) Jurisdiction of the Court of Kahnawake and 2) The Evolution of our Justice System, which I am going to fax to you today.

Should you require more information, please do not hesitate to contact me. Our Fax number is 514-638-5958.

Yours truly,

Peggy Mayo

Peggy Mayo,
Justice Co-ordinator

PM/ng

PEACE
UNITY
STRENGTH

Mohawk Council of Kahnawake

P.O.Box 720,
Kahnawake, Quebec, J0L 1B0
(OFFICE OF THE COUNCIL OF CHIEFS)

Tel. (514) 632-7500

JURISDICTION

OF THE COURT OF

KAHNAWAKE

BY:

Peggy Mayo,
Justice Coordinator

MOHAWK COUNCIL OF KAHNAWAKE

DATE:

February 1989

P.O. Box 720
Kahnawake, Quebec
J0L 1B0
(514) 638-5647

This is a brief summary of the source of jurisdiction of the Court of Kahnawake. The Court derives its jurisdiction from the will of the Mohawk People of Kahnawake. The Mohawks have the inherent right of self-administration over the Territory of Kahnawake and within this right is the administration of justice. In the exercise of this right, they have directed that certain offences be adjudicated in the Territory of Kahnawake. In order to carry out this directive, it was decided to utilize the mechanisms of by-law powers and appointment of Justice of the Peace provided by the federal Indian Act.

Since 1889, there has been a court system operating in the Territory but it functionned in an irregular fashion and was presided over by non-Mohawk Justices of the Peace.

In 1985 two Mohawks from the Territory of Kahnawake were appointed as Justice of the Peace under Section 107 of the Indian Act and this provided stability as they hold court on a regular schedule. They adjudicate summary cases under the Criminal Code, Provincial Highway Code offences by incorporation under by-law powers of the Indian Act and offences legislated under by-law powers of the Indian Act and legislative powers as a Mohawk People.

In conclusion, one can see that a court derives its jurisdiction from the Mohawks. Their representatives whether as Justices of the Peace or spokespersons fulfill functions as directed by the Mohawks.

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EVOLUTION OF THE JUSTICE SYSTEM OF KAHNAWAKE

PRE-1987 JUSTICE SYSTEM

PRE EUROPEAN CONTACT

All offences or actions which disturbed the peace of the Mohawk community were mediated by Elders. If the wrongdoers refused to correct themselves, the War Chief reprimanded them or expelled the wrongdoers from the community.

POST EUROPEAN CONTACT UNTIL 1951

The traditional system of justice was displaced but not eliminated by strong European political, cultural and social influences.

Legislation such as the Indian Act sought to assimilate the Mohawk people into the dominant Canadian society. For example, all Indian Agents were automatically appointed Justices of the Peace.

The agents who were non-native changed the traditional system of justice using mediation and restitution by imposing the outside judicial concepts such as the adversarial system, retribution and individualism. They also imposed federal and provincial law on the Mohawk people.

Law enforcement officers were the Royal Canadian Mounted Police and the Quebec Provincial Police, none of whom were of native ancestry.

1951 - 1966

The Indian Act was amended thereby allowing anyone to be named as a justice. The Mohawks of Kahnawake became more politically astute and more protective of their Territory and their special status.

Political events resulted in the demand by the Mohawk people to control the administration of justice in Kahnawake.

1969 - 1979

The Mohawk Council established an all-native police unit with provincial sanction.

In 1974, Justice John Sharrow, a Mohawk of Akwesasne, began to preside over the s. 107 Court of Kahnawake. It was just the beginning of Mohawk control over justice.

1979 - 1987

The police unit was terminated due to another political event over provincial jurisdiction on the Territory. The Peacekeeper Force was established and it operated without formal funding until the Fortier Decision in 1982 pronounced they were legal "peace officers" according to Federal legislation. This meant the Mohawks had the right to establish a law enforcement unit sanctioned by the will of their people and therefore, receive funding. In 1985, Justice John Sharrow retired and two more Mohawks from Kahnawake were named in his place.

The Mohawk Council gave an administration directive to the Justice Committee to oversee the administration of justice in the Territory.

1987 UNTIL PRESENT

The Mohawk Council approved the Constitution of the Justice Committee and the Justice System of Kahnawake. (See section under the same title.)

The Components of the present Justice System are:
(See diagram attached)

1) **MOHAWK PEOPLE**
They are the source which express the needs for Mohawk Law to promote peace and harmony in the community.

2) **MOHAWK COUNCIL**
The people select them as political representatives and to pass Mohawk Law after consultation with the people.

3) **JUSTICE COMMITTEE**

They advise and direct the Justice Co-Ordinator in the administration of justice.

4) **JUSTICE CO-ORDINATOR**

Justice Co-Ordinator's role is the co-ordinating of all departments necessary to administer justice. The Co-Ordinator represents the Justice Committee.

5) **FIRE DEPARTMENT**

It has an active volunteer (25) membership. It has been in existence as long as this Territory.

6) **CONSERVATION FORCE**

It has an active volunteer (20-30) membership since October 31st, 1983. It has its own code of Ethics and is currently in process of writing its own Constitution. It has jurisdiction to patrol and enforce law within the water boundaries of Kahnawake and the Doncaster Territory in the Laurentians.

7) **PEACEKEEPER FORCE**

It has a salaried staff of 13 men. It has the necessary equipment and skills to do patrols, investigations, breathalysers and court testimony. It is responsible for 13,283 acres of Kahnawake, the estimated 150,000 vehicles which pass through the Territory and 8,000 calls per year. It has its own Code of Ethics which is currently under revision.

8) **s. 107 COURT (INCLUDES JUSTICES OF THE PEACE)**

It has a salaried staff of five people. There are 2 clerks, 2 justices, and one crown prosecutor. It has the jurisdiction to hear summary convictions, Highway Code offences, and Indian Act By-Law offences. It presently hears 700 cases per year, both native and non-native offenders, and there is a forecast for an increased number.

9) **BUILDINGS & PRISONS**

There is a separate police station with four cells, an evidence room and a pound for vehicles.

The Justice System is currently housed in the Mohawk Council building. The Court is located elsewhere.

There is a proposal for a new building.

10) **FINANCES**

They are controlled by the Operations Manager in conjunction with the Executive Committee of the Mohawk Council.

11) **COMMUNITY WORKS PROGRAM**

This offers an offender an alternative to fines and/or imprisonment by doing community work. It has been approved but not yet implemented.

FUTURE PLANS -

1) **LEGAL RESEARCH CENTER**

This will offer to the public an opportunity to educate themselves on the native justice system.

Laws and their interpretation will be accessible.

2) **LEGAL COUNSEL AND COURTWORKER**

They will advise the people of their legal rights.

3) **TRADITIONAL COURTS**

These will be administered by the Mohawk people. They will not be based on the adversarial concept. They are currently being researched for future implementation.

4) **JUSTICE TRAINING CENTER**

This center will provide training for law enforcement officials, court staff and any other legal personnel.

This training center will reflect native participation and the preservation of the special status of native people.

CONCLUSION

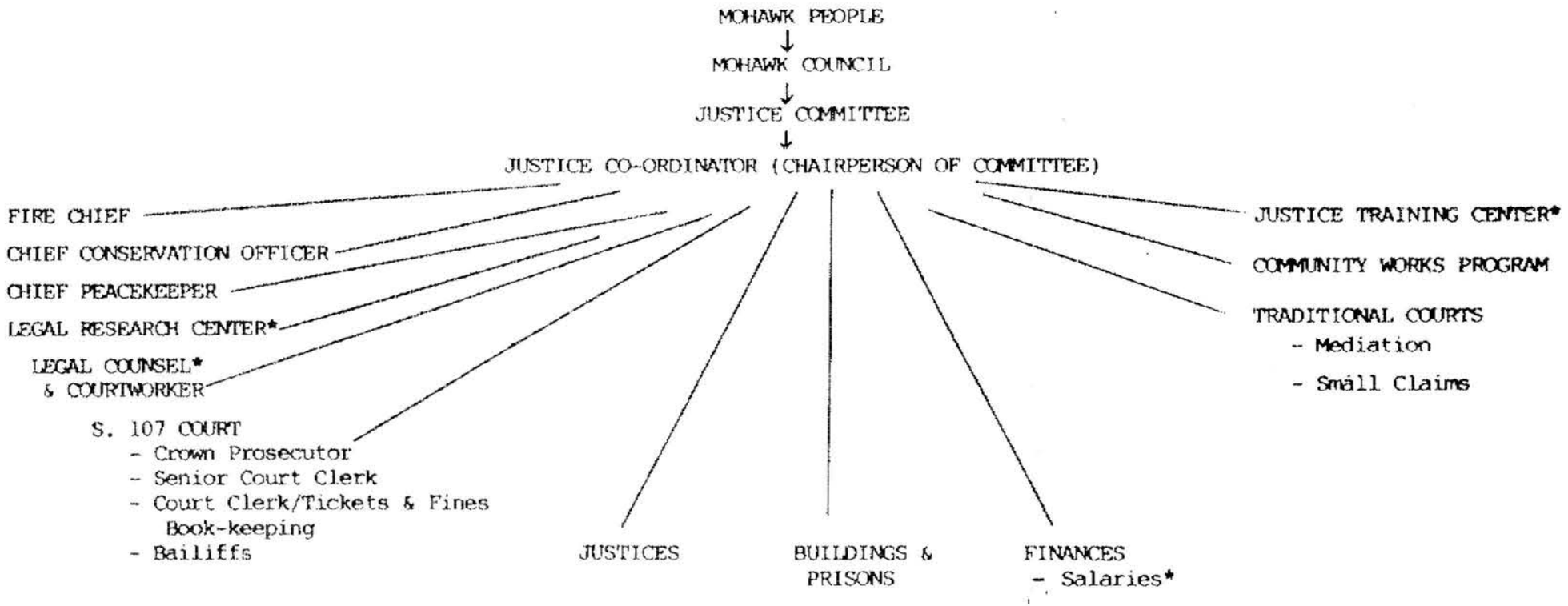
Our justice system is ever evolving. We can see the day that the Mohawk people will have complete jurisdiction over all events which threaten the peace and harmony of our community. The justice system is the means to prevent eradication of our special status and rights.

The traditional Mohawk system has not died but it is currently being revived and revised to suit modern times.

THE JUSTICE SYSTEM OF KAHNAWAKE* (PRESENT & FUTURE)

This system was given formal recognition by the Council and it became an independent administrative unit with a mandate to administer justice on the Territories. (See Constitution attached) Its goal is to be free of all personal and political influence in the exercise of its mandate and to have a system which applies laws fairly to all persons within its jurisdiction.

*Diagram of the Justice System - delegation of mandate



*Future plans

Graphic
Design
Associates

1697 Brunswick Street
Post Office Box 813
Halifax
Nova Scotia
Canada
B3J 2V2

902 423-6306

FEB 15 1989

February 14, 1989

Susan Ashley
Commission Executive Secretary
Royal Commission on the Donald Marshall Jr. Prosecution
Maritime Centre
Suite 1026
1505 Barrington Street
Halifax, N.S.
B3J 3K5

Dear Susan:

In an attempt to clarify the production process for the publications from the outset, I recommend that we follow a standard procedure for the exchange of information. The following points are for discussion and I would appreciate your feedback as soon as possible.

TABLE OF CONTENTS
At present, we have identified titles for six of the seven volumes. The next stage is to determine a table of contents for each volume. All materials would subsequently be identified by volume, chapter, figure and/or appendix number.

We realize that this will be a time-consuming task, but we encourage the exercise now in order to save time as the project proceeds. I would be prepared to sit down with you and identify the chapter names, etc. if that would help.

APPENDIXES

a) Will there be appendixes for each volume? The samples you provided appear to be all from the same volume and identified as 'Crown' - which volume is that?

b) Are the appendixes on disk, only hard copy, or a combination of both? Are some of the appendixes photocopies of memos; if so, will we be able to access the original memos for reproduction?
If appendixes are to be typeset, we ask that they be entered on disk.

GDA

February 14, 1989

Susan Ashley
Commission Executive Secretary
Royal Commission on the Donald Marshall Jr. Prosecution
Maritime Centre
Suite 1026
1505 Barrington Street
Halifax, N.S.
B3J 3K5

FIGURES

a) Are the figure examples you provided the only figures in the publication or are there others on disk? If others exist, could we have a complete set generated?

Susan, in response to your concern regarding confidentiality, I am enclosing for your reference a copy of our code of ethics.

Sincerely,

Karen Jans
Design Manager

See you Friday!

K.

GDA

Department of the Solicitor G. .ral
Office of the Assistant Deputy Solicitor General

M. .ère du Solliciteur général
Cabinet du sous-solliciteur général adjoint

FEB 0 3 1989

January 31, 1989

Mr. John Briggs
Director of Research -
Royal Commission on the
Donald Marshall J. Prosecution
Maritime Centre, Suite 1026
1505 Barrington Street
Halifax, Nova Scotia
B3J 3K5

Dear Mr. Briggs:

It is my understanding that Professor Bruce Archibard presented a major paper that dealt with the Office of the Attorney General and the Prosecution System in Nova Scotia to the Royal Commission on the Donald Marshall Prosecution.

This Department would appreciate receiving a copy of this paper on its release with a billing if there is a charge for reproduction.

Yours very truly,

Grant S. Garneau
Assistant Deputy
Solicitor General

GSG/gt

FACULTY OF LAW,
UNIVERSITY OF TORONTO

78 Queen's Park
Toronto, Canada M5S 2C5
Tel: (416) 978-3725
Fax: (416) 978-7899

JAN 30 1989

January 25, 1989

John E.S. Briggs
Director of Research
Royal Commission on the Donald Marshall Jr. Prosecution
Maritime Centre, Suite 1026
1505 Barrington St.
Halifax, Nova Scotia
B3J 3K5

Dear John,

Enclosed with this letter are the disc(s) containing the set of opinions on the Office of Attorney General. I have brought the text up-to-date including those matters that I had noted (in the text or in my own marginal notes) to follow up before submitting for publication.

There are a couple of new paragraphs (as you will see from the enclosed "points to be checked") but in the main the changes are editorial and not substantive.

The title page has been revised once more but I am now satisfied that it conveys the essential features of the contents. The revised title is a distinct improvement - it resulted from a discussion in our kitchen over coffee one morning!

I realise that once we begin tampering with the pagination, inserted by the Commission staff in order to provide a continuous base for reference purposes, it is important that the textual references conform to the final pagination of the entire volume. With this and other considerations in mind, I trust that I shall be given the opportunity to go through the proofs when they come back from the Government Printer.

With kindest personal regards,

Sincerely,

John.

/dw

J.Ll.J. Edwards
Professor Emeritus

Points to be checked

p. 13 - telephone Dep. Attorney General in Quebec and insert new para.

p. 21 - Ministry of S.G. in New Brunswick

p. 24 - see "The English Experience" post ff. 40 et seq.

rox copies on disc.

p. 37 - Insert new passage - (X) Annexure A - to be straightened out.

p. 53 - Recent letter from D.P.P. to J.Ll.J.E.

p. 89/90 - Missing page from the collated volume?

p. 116 - Insert citation to U.S.S.C. decision.

p. 196 - Insert Crosbie piece.

p. 245 - editorial work needed at foot of this page.

JAN 26 1989

NATIVE COUNSELLING SERVICES OF ALBERTA

#800 HIGHFIELD PLACE, 10010 - 106 STREET
EDMONTON, ALBERTA T5J 3L8 — PHONE (403) 423-2141

January 20, 1989

Chief Justice T. Alexander Hickman
Chairman
Royal Commission on the Donald Marshall Jr.,
Prosecution
Maritime Centre, Suite 1026
1505 Barrington Street
HALIFAX, Nova Scotia
B3J 3K5

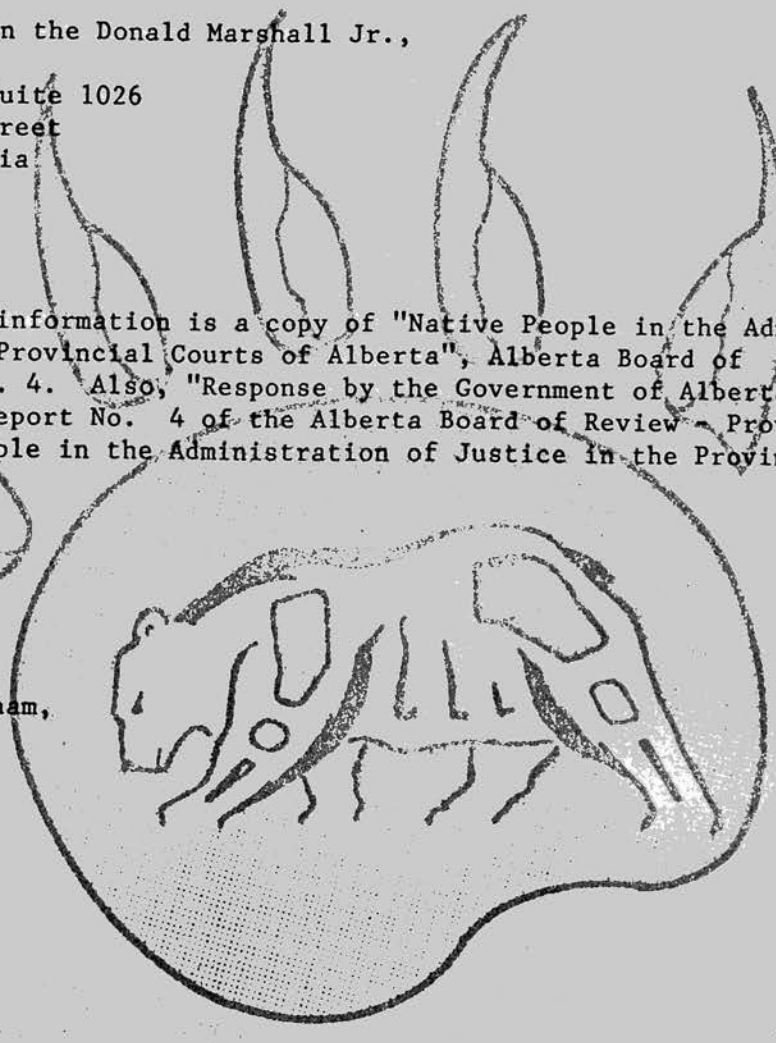
Dear Sir:

Enclosed for your information is a copy of "Native People in the Administration of Justice in the Provincial Courts of Alberta", Alberta Board of Review - Report No. 4. Also, "Response by the Government of Alberta (August 1980) to Report No. 4 of the Alberta Board of Review - Provincial Courts, Native People in the Administration of Justice in the Provincial Courts of Alberta.

Sincerely,

Chester R. Cunningham,
Executive Director
NCSA

/lh



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Toronto, Canada M5S 2C5
Tel: *(416) 978-3725*
Fax: *(416) 978-7899*

JAN 24 1989

January 20, 1989

John E.S. Briggs
Director of Research
Royal Commission on the Donald Marshall Jr. Prosecution
Maritime Centre, Suite 1026
1505 Barrington St.
Halifax, Nova Scotia
B3J 3K5

Dear John,

I am enclosing herewith case books in 2 volumes "Prosecutorial Discretion, Policies, Discretion and Accountability, 1987" - Salmon P. Chase College of Law, University of Northern Kentucky and "Criminal Prosecutions, Policy issues, ministerial responsibility and the exercise of discretionary powers 1987 - 1988.

Sincerely,

Per: D. Whitelaw

/dw

J.Ll.J. Edwards
Professor Emeritus

John Briggs has material refenced to.

Royal Canadian Mounted Police
Public Complaints
Commission

CANADA

Commission des plaintes
du public contre la
Gendarmerie royale du Canada

Chairman Président

JAN 23 1989

File No.: 1325-9

January 19, 1989

Mr. John E.S. Briggs
Director of Research
Royal Commission on the
Donald Marshall, Jr., Prosecution
Maritime Centre
Suite 1026
1505 Barrington Street
Halifax, Nova Scotia
B3J 3K5

Dear John,

Re: Jacobsen Report

Fernand Simard and I very much enjoyed meeting with you, and we look forward to seeing you again when you are down here in Ottawa, and, of course, hope you are sending along your résumé.

As promised, I enclose a copy of the Jacobsen Report which I expect you will find of interest.

Yours sincerely,

Richard Gosse

RFG/yc

P.O. Box / C.P. 3423, Station / Succursale "D"
Ottawa, Canada K1P 6L4

JAN 19 1989

Cities
HALIFAX-DARTMOUTH'S MAGAZINE

January 19, 1989

Susan Ashley
Royal Commission on the Donald Marshall Junior Prosecution
10th Floor
Maritime Centre
Halifax, Nova Scotia

Dear Susan:

Just a brief note to follow up on our discussion yesterday with Ian and the Chief Justice.

After our conversation, I got to thinking about the Chief's comments regarding production of the Ocean Ranger Report, in particular his comments about the designer who "almost became one of the staff" during the final production stages of the Report.

The production of the Report is going to be a major undertaking. While I understand — and agree with — your desire to have the province's Department of Government Services handle the actual printing and technical production, I think you may be fooling yourself if you expect them to do that job without almost constant coordination, liaison and supervision from the Commission side.

I'm not sure you want to — or should — take on that role.

My suggestion is that the Commission consider contracting out those duties — including the job of coordinating among the graphic designer, layout artist, typesetter, provincial people, printer and Commission staff to make sure the thing gets done the way you want and on a schedule that will work for everyone — in addition to looking for a designer to come up with a logo and layout.

Having suggested that, let me take the next step and suggest you consider hiring my wife, Jean, for the job I just suggested.

Aside from all the usual reasons husbands suggest wives, the simple fact is that Jean is an experienced and extremely competent publication

P.O. Box 45 Armdale Nova Scotia B3L 4J7 902-420-0550

production and design person. She's used to working to the kind of deadlines the Commission will need to meet; teaches design and desktop publishing at Saint Mary's University; and knows and has worked with many local designers as well as all of the provincial Government Services people you'll be dealing with.

After spending two years establishing *Cities* look and overseeing its production, she decided last spring to return to freelance design work. Since then, she's undertaken a number of major contracts for private and public sector clients, including the provincial government. She spent much of the fall, in fact, working with Pat Johnson preparing all the advertising in the province's annual tourism guide book (its 450,000-copy press run dwarfs ours by a considerable number of copies!). I think Pat would vouch not only for the quality of her work but also for the fact that she can meet seemingly impossible deadlines and do so within tight budgets.

Anyway, I throw it out as a suggestion. If you're interested in following it up, you can reach her at *Cities* (420-0550)—where she remains as co-publisher — or at home (422-6884).

By the way, I checked it out and I can transfer material from (and to) your Xerox computer programs so I can do a good deal of editing work directly on the computer disk. That should save some "keyboarding" time at your end.

We should also probably meet for a few minutes during next Tuesday or Wednesday's sessions to go over what needs to be done with the Research Reports to get them ready for publication. Talk to you then.

Yours truly,

Stephen Kimber

cc. Ian Fraser

JAN 17 1989

THE PUBLIC ARCHIVES OF NOVA SCOTIA

This is to acknowledge on behalf of the Board of Trustees of the Public Archives of Nova Scotia the gift by

ROYAL COMMISSION ON THE DONALD MARSHALL JR. PROSECUTION

to the Public Archives of the following items:

"Subject and Name Authority File to assist people using the material on the Royal Commission on the Donald Marshall Jr. Prosecution"

(1989-11)

These will be added to our collections and made available for research. We are most grateful to you for your generosity and can assure you that your gift will be much appreciated.

Carman V. Carroll

January 12, 19 89.

Carman V. Carroll
Provincial Archivist

6016 University Avenue, Halifax, N. S. B3H 1W4

JAN 16 1989

Alberta
ATTORNEY GENERAL

Office of the Assistant Deputy Minister
(Criminal Justice)

9833 - 109 Street, Edmonton, Alberta, Canada T5K 2E8 403/427-9616 Telex 037-3019, TWX 610-831-1167

January 10, 1989

Mr. John E.S. Briggs
Director of Research
Royal Commission on the
Donald Marshall, Jr., Prosecution
Maritime Centre, Suite 1026
1505 Barrington Street
Halifax, Nova Scotia
B3J 3K5

Dear Mr. Briggs: John.

Re: Alberta Attorney General's Department

When we met in Toronto you had asked me to provide you with some information with respect to a number of topics. I apologize for the delay in getting this material to you but I was awaiting some material on the Native Sensitization Program which was held up in its delivery to me.

In any event, I am sending you the following:

1) Native Sensitization

This Department through the Court Services Division has conducted a two day Cross-cultural Awareness Program in the Fall of 1988 at a recreation centre on one of the reserves near Edmonton. This Program invited members of the judiciary and court staff and dealt with such topics as Multiculturalism within a bilingual framework ; attitudes and beliefs; cultural differences; traditional concepts of justice.

There was sufficient interest to pursue these topics further by making presentations at the Provincial Court Judges Annual Meeting in the Fall of 1988.

. . . 2

It is anticipated that this program will be extended to other parts of the province where more staff members can take advantage of this type of program.

2. Crown Prosecutors School

For the last six or seven years the Department has sponsored a Crown Prosecutors School for a three day program in August. This School is normally attended by between 20 and 30 prosecutors with preference being given to those who are new to the system. The lecturers consist of senior crown prosecutors and some members of the Defence Bar who are invited to make presentations on topics of general interest to crown prosecutors.

3. Crown Prosecutors Conferences

This Department sponsors two three day Crown Prosecutors Conferences each year, one in the Fall and one in the Spring. The Conferences are organized by the Alberta Crown Attorneys' Association and the agenda is designed to ensure that the Crown Prosecutors are kept up-to-date on issues of interest.

4. Other Conferences

This Department sponsors attendance at the following conferences.

a) Federation of Law Societies (National Criminal Law Program) approximately 10

b) Western Canada Crown Seminar (1 week conference in Banff) approximately 40

c) The Department sponsors attendance at various other conferences such as the Child Sexual Abuse Conference in Vancouver in June of 1988 where we sent five crown prosecutors.

I hope this information is sufficient for your purposes, but should you require any further clarification or detail please do not hesitate to contact me.

Yours sincerely,

Neil McCrank
Assistant Deputy Minister
(Criminal Justice)

NMcC/lan

CANADIAN CIVIL LIBERTIES ASSOCIATION
229 Yonge Street, Suite 403
Toronto, Ontario M5B 1N9
Telephone (416) 363-0321

ASSOCIATION CANADIENNE DES LIBERTES CIVILES
229 rue Yonge, Suite 403
Toronto, Ontario M5B 1N9
Téléphone (416) 363-0321

JAN 16 1989

Friday, 13 January 1989

Chief Justice T. Alexander Hickman, Chairman
Associate Chief Justice Lawrence A. Poitras, Commissioner
The Honourable Mr. Justice Gregory Thomas Evans, Commissioner
Royal Commission on the Donald Marshall, Jr. Prosecution
Maritime Centre, Suite 1026,
1505 Barrington Street,
Halifax, N.S.
B3J 3K5

BY COURIER

Dear Commissioners:

I regret that it became inopportune for me to attend the proposed consultation on November 24th, 25th, and 26th. But I thought it might be useful to convey to you the views of the Canadian Civil Liberties Association regarding the recommendations that you will be making.

The disclosures during your hearings must have seriously shaken public confidence in the fairness of the Nova Scotia justice system. Witnesses have claimed that they were pressured by the police to give perjured testimony. One man has said that a senior police officer punched him and smashed his head against a table during a four hour interrogation. A county court judge allegedly warned a lawyer about getting his "balls caught in a vise over an Indian". A senior police officer has been quoted as saying that "those brown skinned all stick together".

The Commission has heard significant evidence of political interference, cover-ups, and double standards in law enforcement and prosecutorial discretion.

It must now be universally obvious that it will not suffice to compensate Donald Marshall and punish those who may be deemed most responsible for the miscarriage of justice he has suffered. It is of prime importance also to adopt measures now that can provide the public with reasonable assurances that such travesties are not likely to recur.

In this connection, the Canadian Civil Liberties Association recommends the establishment of an independent agency that will be empowered to monitor the province's law enforcement and administration of justice on an ongoing basis. Internal investigation of alleged police or prosecutorial misconduct simply cannot command the requisite public confidence. No matter how fair in fact an internal investigation might be, it simply could not appear fair. Those who have interests to protect in the good name of a police force or government department will be vulnerable to the suspicion that such interests will taint the integrity of their investigations.

Indeed, there are reasons for such skepticism even in a situation where one police force is investigating another. RCMP Sergeant Harry Wheaton, for example, reportedly expressed these very sentiments in the context

of a possible RCMP investigation of the Sydney police force. Wheaton was quoted as making the following statement: "Police officers are a fraternity. You feel a certain loyalty to one another". At some point, he apparently considered and decided against using a search warrant to obtain documents from the Sydney force. He rejected this course of action because of the adverse impact it might have on the relationship between the two forces.

Nor, for these purposes, can the public have sufficient confidence in the office of the Attorney General or the Crown Attorneys. Two RCMP officers testified that the Attorney General's office had blocked or discouraged RCMP investigations of the Sydney police force. This Commission also heard evidence that defence counsel was not told about the inconsistent statements that crown witnesses had made to the police, and about the subsequent surfacing of a witness who claimed the wrong man had been convicted. There was also testimony that the defence was not told that one of the witnesses against Marshall had required psychiatric hospitalization around the time of the trial. Indeed, testimony before the Commission contended that the prosecutors would make full disclosure only if defence counsel was part of an "old boy's network".

There have even been allegations against a former

attorney general. It has been alleged that, without consulting the RCMP, the Nova Scotia Attorney General announced that no charges would be laid in the case of former Deputy Premier Roland Thornhill. There is evidence that the RCMP had recommended charges against him for allegedly having received illegal benefits from certain banks which were doing business with the government. Moreover, even though the RCMP could have acted on its own, it failed to do so. According to the reported testimony of former Deputy Commissioner Raymond Quintal, this was because "there would be serious consequences in terms of the relationship between the (Attorney-General's) department and ourselves".

In our view, there will not be adequate public confidence in the criminal justice system of Nova Scotia until there is in place an investigative and review agency which is independent of all police forces and governments. Such an agency should be available not only to investigate and process the complaints of aggrieved civilians but also to conduct ongoing audits of the police and the prosecutors.

Like the Auditor General and the Security Intelligence Review Committee, this agency should be equipped with a substantial power of access to records and places. The existence of such a power, in itself, might serve not only to detect misconduct that has been committed but also to deter such misconduct even before it occurs.

Consider, for example, the testimony of Maynard Chant, John Pratico, and Bruce Patterson about the police pressures they suffered at the time of the original trial. In the case of Patterson particularly, he has complained of mistreatment during the course of a four hour interrogation. If police officers knew that they were subject to spot checks and audits by an independent agency, they could be expected to be much more careful about the propriety of their behaviour.

Where clear breaches of the law or established policy are concerned, this agency could perform the invaluable task of digging out the facts in a manner that could hope to enjoy public confidence. Once those facts have been unearthed, there is a wide variety of possibilities. There might be disciplinary proceedings initiated by the agency itself and conducted by an independent tribunal along the lines of the police complaints system in Toronto. The new agency might also be allowed to recommend criminal charges or compensation in certain types of cases. It is possible, of course, to consider several possible models for performing this function. The essence of the proposal is that the justice system must include the participation of an independent agency whose powers and functions will make both police and government more accountable for their conduct.

There will also be situations in which the

behaviour of the police and prosecutors is lawful but nevertheless awful. As has been suggested in some of the evidence before the Commission, the rich and powerful appear to be the recipients of solicitude that is not accorded to the poor and powerless. Strong representations were made to the Commission that native people and blacks often receive a level of severe treatment that is not as readily accorded to mainstream elements of the population. Similarly, it has been claimed that minority communities will not be as readily served by the police when they call for help.

Where no law or established policy deals with an issue, the role of the independent agency would be to discover the facts and then to make recommendations for the enactment of legislation or the promulgation of policy guidelines as the case may be. In this way, police and prosecutorial behaviour will be subject to constant scrutiny and rectification.

Where non-legislated policies are concerned, the Commission's recommendations should go even further. The Commission should call upon police, crown attorneys, solicitor general, and the attorney general to make public whatever existing guidelines determine investigative and prosecutorial discretion. Who and what now determines what matters are investigated, how they are investigated, who gets charged, and with what

offences?

The Commission should also recommend that, once these matters are made public, there should be public hearings at both the provincial and municipal levels to evaluate the reasonableness and adequacy of existing policy guidelines. Such forums could also entertain citizen recommendations for improvement. One of the additional benefits of such a Commission recommendation would be to raise public consciousness about the considerable discretion that is now exercised at the investigative and prosecutorial levels. By making such recommendations,the Commission would be alerting the public to the reality that our laws are not self-enforcing. They are subject to crucial decision making that is often relatively invisible to public scrutiny.

Regrettably, the impulse to rectify and reform is also not self-generating. This is the reason that our proposal for the independent agency is central to the recommendations that, in our opinion, the Commission should make. The creation of an agency with a mandate and budget to do such a job, increases substantially the likelihood that the job will in fact be done.

It should be noted that it would be inappropriate for the Nova Scotia Police Commission to play the role we are advocating. One of the Police Commission's functions is to serve as an advisor and consultant to police management

throughout the province. Such functions would divest the Police Commission of the requisite appearance of neutrality as between the police and civilian interests. Indeed, it is conceivable that, if it were charged with the responsibilities we are advocating, it could wind up reviewing some of its own policies.

It might also be suggested that the new police review board or the ombudsman could undertake the job we are recommending. The board is currently too tied to the Police Commission structure to clothe it with the appropriate concomitants of impartiality. The office of ombudsman may have a sufficient amount of structural independence for the job but its normal operating procedures might preclude self-initiated audits. Moreover,the office of the Nova Scotia ombudsman is specifically prohibited from dealing with prosecutorial discretion and, in any event, it acts only after all other processes have been exhausted. While we are not opposed to assigning the ombudsman the tasks we are recommending, we must point out that, even then, legislative change would be necessary.

The essential ingredients of our proposal require a power of independent and self-generated audits. This necessarily, involves a power to initiate investigations into matters <u>before</u> the Police Commission or the Government has become involved. As we conceive it, the

agency would be accountable directly to the Legislature. It should be allowed to make periodic public reports to the Legislature in the event that its recommendations are rejected. And it should be required to make whatever additional public reports the Legislature wishes. In any event, the enabling statute should require at least one such report per year.

If we can provide any further assistance in embellishing these proposals or in any other area of your important endeavours, we would be pleased to do whatever we can.

Sincerely,

A. Alan Borovoy
General Counsel

JAN 12 1989

UNIVERSITÉ D'OTTAWA
UNIVERSITY OF OTTAWA

FACULTÉ DE DROIT
FACULTY OF LAW

January 10, 1989

Mr. John Briggs
Director of Research
Royal Commission on the
Donald Marshall, Jr. Prosecution
Maritime Centre
1505 Barrington Street
Suite 1026
Halifax, N.S.
B3J 3K5

Dear John,

I thought I should follow up on our conversations during the consultation session in Halifax in late November.

Firstly, I would like to remind you of my request to obtain a copy of the survey instruments used in the studies on Micmacs and Blacks in Nova Scotia in the justice system.

Secondly, I want to thank you for inviting me to participate in your Consultative Conference. I found the event to be an extremely interesting, positive, and informative one. I hope that your commissioners and yourself were pleased with the results. I can assure you that it provided interesting ideas and useful information for the Aboriginal Justice Inquiry. We may follow your lead and organize a similar conference next summer.

Finally, let me also follow up on our discussions about the possibility of getting together in Ottawa on one of your future trips here. Please do give me a call the next time you think you will be in town. I would enjoy the chance just to get to know you better, as well as to discuss our mutual interests.

Thanks again for all your help. All the best.

Regards,

Brad

Bradford W. Morse
Professor of Law

BWM*dl

COMMON LAW
57 LOUIS PASTEUR, OTTAWA, ONTARIO, CANADA K1N 6N5
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JAN 1 1 1989

January 9, 1989

By Courier (Collect)

Mr. John Briggs
Director of Research
Marshall Commission of Inquiry
Maritime Centre
Suite 1026, 1505 Barrington Street
Halifax, Nova Scotia
B3J 3K5

Dear John,

Here are the 2 reports from Australia which I read during the Xmas break, Annual Report 1987/88 - Office of the Director of Public Prosecutions, Victoria and Annual Report 1987/88 - Office of Director of Public Prosecutions, Canberra.

In due course, will you kindly return these documents, together with those sent to you under cover of my letter dated December 1, 1988.

With warm regards,

Sincerely,

John

John Ll.J. Edwards
Special Adviser to the Commission

/dw
Encl.

John Briggs has material referred to.

PATTERSON KITZ
BARRISTERS & SOLICITORS

LEONARD A. KITZ, Q.C., D.C.L.
JOHN D. MacISAAC, Q.C.
DOUGLAS A. CALDWELL, Q.C.
DENNIS ASHWORTH
GEORGE L. WHITE
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ALSO OFFICES AT
TRURO, NOVA SCOTIA
BEDFORD, NOVA SCOTIA

JAN 9 1989

January 6, 1989

BY HAND

Mr. John Briggs
Director of Research
Royal Commission on the Donald
Marshall, Jr. Prosecution
Suite 1026
1505 Barrington Street
Halifax, N.S.

Dear John:

Our File No. 9201/1

As you requested, I am enclosing a copy of the job description for the Senior Advisor, Policy and Planning in the Attorney General's Department. I am advised the position is currently open and interviews are being conducted. As soon as I learn of the appointee, I shall advise.

Yours truly,

Darrel I. Pink

DIP/jl
Enc.

POSITION DESCRIPTION

POSITION: Policy Advisor to the Deputy Minister

INCUMBENT: Vacant

DEPARTMENT: Attorney General

DIVISION: Minister & Deputy

LOCATION: Halifax

DATE: November 1988

****

GENERAL ACCOUNTABILITY:

This position is accountable for the development of the legislative program of the Department of Attorney General and for advising on policy positions and planning with respect to issues arising out of the administration of justice in Nova Scotia.

STRUCTURE:

This position is one of eight reporting to the Deputy Minister.

The other seven positions are Director of Finance; Manager, Internal Audit; Personnel Manager; Manager, Information Systems; Co-ordinator Alcohol/Driving Countermeasures; Executive Director, Courts and Registries and Executive Director, Legal Services.

In the development of policy, planning and legislative submissions, this position acts as advisor to senior staff of the Department who provide the resources to the Policy Advisor in the discharge of the position's duties.

NATURE AND SCOPE:

The Department of Attorney General is structured in three Division, namely; the Legal Services division, which provides departments with civil legal services and is responsibile for criminal and penal law enforcement; the Court and Registries Division, which services public offices and courts; and the Administration Division, which provides administrative services to staff.

NATURE AND SCOPE (CONTINUED)

General responsibility for the administration of statutes in Nova Scotia, which are not specifically assigned to other departments, lies with the Attorney General. In discharging this responsibility, the Attorney General is required to recommend amendments to many provincial statutes.

In consultation with members of the Department's professional staff, the Policy Advisor develops the Department's legislative program. Under the direction of the Deputy Minister, the incumbent assists in the preparation of draft bills, develops justice policy and prepares planning submissions for review by senior management.

In consultation with staff, the Policy Advisor plans the administrative arrangements that are required to implement justice related programs arising out of federal legislation. Programs legislated under the Criminal Code are frequently stated in broad general terms leaving it to the provinces to work out the administrative details. For example, recent amendments to the Code dealt with the giving of evidence by children in sexual abuse cases. The amendments allowed the provinces certain options in the implementation of the legislation. This position is expected to work in conjunction with the appropriate directorate to ensure that such programs are implemented in the best interests of Nova Scotia's judicial system.

The Policy Advisor monitors justice related trends and legislation in other jurisdictions, assesses their relevance to the administration of justice in Nova Scotia and prepares reports for the consideration of senior management in a timely manner.

The incumbent keeps abreast of court decisions including decisions arising out of the Charter of Rights and Freedoms and analyzes the decisions with a view to recommending legislative action or initiative.

The major challenge of the position is to develop ideas that may be used by the Attorney General in his submissions to the Legislation Committee of Cabinet. The areas for development span a wide range of activities, both criminal and civil. The position will, therefore, be required to provide expert legal advice or arrange for the provision of expert advice from others within or outside of the Department in the formulation and presentation of ideas for legislative change.

The incumbent must be a self starter since the position is primarily an "ideas" one. There will be few restrictions on this position and while some guidance or direction may be given by senior management, the thrust of the position is to originate ideas for policy or legislative change.

NATURE AND SCOPE (CONTINUED)

The incumbent advises the Attorney General during the legislative progress of a bill and provides the Attorney General with advice and assistance if questions arise about a bill.

This position is responsible for analyzing and advising on complex constitutional, legal and administrative matters, including matters relating to the Charter of Rights and Freedoms. In the development of policy, planning and legislative submissions, the incumbent has frequent contact with and provides assistance and information to the Attorney General, the Deputy Attorney General and senior officials in the Department. In addition, this Policy Advisor frequently works with the Legislative Counsel and senior justice officials in the Federal and other Provincial Governments. The incumbent from time to time presents legislative proposals to the Cabinet-Caucus Committee on legislation, and provides advice to Members of the Legislative Assembly respecting Department Legislation as the Attorney General may request.

DIMENSIONS:

Annual Budget	$7.2 million
Total Staff	86

Develops policy positions and draft bills relating to the administration of justice in Nova Scotia.

SPECIFIC ACCOUNTABILITIES:

1) Contributes to the development and maintenance of an effective justice system in the Province of Nova Scotia by directing and co-ordinating the planning, development, implementation and review of justice policies and provincial statutes and through the recommendation of appropriate amendments when necessary.

2) Ensures the Attorney General is in a position to effectively present and respond to queries with respect to legislative submissions by drafting bills and through the provision of expert advice and assistance at all stages of a Bill's legislative progress.

3) Provides for the adequate planning, development and implementation of legislative action or initiative with respect to Nova Scotia Statutes, justice policy and legislative submissions by keeping abreast of and analyzing court decisions and justice reform issues throughout Canada and through consultation with senior staff.

SPECIFIC ACCOUNTABILITIES (CONTINUED)

4) Facilitates the exchange, review and development of information on policy and planning issues with other jurisdictions through the development and maintenance of positive relations with senior justice officials in the Federal and other Provincial Governments.

APPROVED BY:

INCUMBENT: _____ **DATE:** _____

DEPUTY MINISTER: _____ **DATE:** November 3, 1988

JAN 4 1989

Nova Scotia

Solicitor General
Province of Nova Scotia

Office of the Deputy Minister

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Station 'M'
Halifax, Nova Scotia
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Our file no: **05-87-0024-5D1**

December 29, 1988

Mr. John Briggs
Director of Research
Royal Commission on the
Donald Marshall Junior Prosecution
1505 Barrington Street
Suite 1026
Halifax, Nova Scotia
B3J 3K5

Dear Mr. Briggs:

Darrel Pink has forwarded a copy of your correspondence to him in which you request copies of reports which have been produced by the Minister's Task Force on Municipal Police Training. The Task Force has just completed its interim report which was presented to the Minister in early December. At this stage, the findings must be regarded as preliminary only. Therefore it is the Minister's wish that the information not be released until the Task Force has filed its final report.

Yours truly,

Nadine Cooper Mont
Deputy Minister

NCM:del

c.c. Darrel Pink