

ROYAL COMMISSION ON THE DONALD MARSHALL, JR., PROSECUTION

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MR. JUSTICE GREGORY THOMAS EVANS
COMMISSIONER

April 13, 1988


Dr. Peter Dockwrey
5469 Victoria Road
Halifax, Nova Scotia
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Dear Doctor Dockwrey:

Thank you for your letter of March 27, 1988 which has been forwarded to the Commissioners. We appreciate your comments on the roles of certain players in the administration of justice. These issues are of great concern to us both in the public hearing phase of the Inquiry and in our research program. It is hoped that our recommendations will be sensitive to the issues that you raised in your letter and will ensure that the justice system is fair to all Nova Scotians.

Thank you for your interest in the work of the Royal Commission.

Yours truly,


Susan M. Ashley
Commission Executive
Secretary

SMA:jrc

Copies sent to your colleagues.

I should perhaps note that my background includes several years work with the National Council for Civil Liberties in the U.K.

D.D.

C. J. T. A. H.
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27 March 1988

Royal Commission on the Donald Marshall Prosecution
Halifax N S

My Lords,

As a Cape Bretoner and as a trained historian I have followed the Marshall affair over recent years and, in common with many Nova Scotians, am relieved this regrettable business has come at last under the searching scrutiny of a Royal Commission. The catharsis of this tragedy prompts us all to examine personally the very basis upon which our Civil Society rests and I note that the recent turn of the testimony has begun to spotlight the role of the Attorney General in our system.

In the Canadian climate of opinion since the advent of the Charter of Rights, and more universally since R. Dworkin's admonition to "take rights seriously" has become the prevailing orthodoxy, the distinctive procedures of the English legal tradition, to which we are heirs, seem increasingly to be misunderstood or (what is worse) misrepresented by some lawyers and the press.

Chief Justice Harry How's spirited (if defiant) self-exculpation focussed this issue in a way unexpected by his antagonists and possibly unintended by him. For, given the abstractions and pieties of current progressive thinking, what seems most difficult for some legal counsel to comprehend or value is that the principle of Justice, the Prerogative of Mercy, may be personally embodied in an office-

holder who has all the instincts, failings, and foibles of a politician. This of course is the essence of the elusive and fictive notion of a Law Officer of the Crown--possibly the key, certainly the most complex, element in the English administration of Justice, whose function has not been devised by human reason but evolved through centuries of struggle.

To be specific, the role of Attorney General 'works' precisely when it is a union of opposites, a Whole incorporating conflicting Parts. Arguably what some counsel and the media would castigate as negligence or worse (i.e. a vague and hands off approach or an implicit policy of keeping the lid tight) on the part of the responsible minister, may have been exactly what encouraged Staff Sgt Wheaton to adopt a broad latitude in his enquiries and to define for himself the performance of his 'duty'.

While it is in the highest degree unfortunate that eleven years had to elapse before Donald Marshall Jr was released and indeed there may be some question (which the Commission may see fit to address) as to whether or not the A G's Office delayed action unduly once the conviction was suspected of being unsafe, it would be rash to assume that an independent bureaucratic body, charged and empowered permanently and exclusively to uphold the Liberty of the Subject against the incarcerating sanction of the State, would have acted more expeditiously or have brought the matter into the light of day in the first place. The opposite may have been the case. As I recall the sequence of events (from the limited perspective of an informed and concerned citizen), the

rumblings about Marshall's innocence grew considerably in volume and began in wider circles to become a presumption precisely when there seemed to be a hint of resistance on the part of the Law Officer and the Government of the day.

While a permanent and separate body (such as an Ombudsman's apparatus) would not ostensibly operate like Star Chamber, it would normally be prone to the institutional secrecy which grows from the rules of procedure generated by all bureaucracies (not least because of its specific mandate to 'protect' the innocent and 'conceal' their reputations from public odium) and would arguably be less open to adverse public scrutiny than an elected Government member, whose declared political interest and party affiliation make him less able to take refuge behind the mask of reproachless expertise and objective integrity. This is what constitutes the productive paradox of embodying contradictions in the person of a flawed human being--and it may be argued that it worked to Marshall's advantage in the event, regardless of the (for some) puzzling concept of combining the stewardship of Rights and the exercise of Authority in a single public office.

In broader terms, while it is salutary for some counsel and the press to pursue ideal solutions, to do so imperils the utilitarian virtues of our 'humanised' system of Justice. Immanuel Kant was certainly friendly to such idealist ambitions but even he recognized--"Out of the crooked timber of humanity no straight thing was ever made." Uniquely, English Justice tries to work with this raw material available.

The Americanization of our Constitution may have become an unstoppable torrent but, at the risk of sounding like a tiresome echo of Sir Edward Coke, there is more to be said for our subtle tradition of English Law than that it originated in the "mists of time." Without presuming to anticipate your deliberations, I hope I have suggested practical reasons, arising from the matters presently before you, for perpetuating it into the future.

Out of the respect I bear the learned Commission and in view of my strictly lay knowledge of the law, I would not normally presume to draw these thoughts to Your Lordships' attention, except in the spirit of apprising you of the concern of some citizens of Nova Scotia, neither barristers at law nor members of the press, who value the cherished traditions of the Queen's Justice and are fully alive to the fragile and time-honoured mechanisms by which it is maintained.

Yours sincerely,

P. Dockwrey

DR PETER DOCKWREY