Dalhousie Law Journal

Volume 23 | Issue 2 Article 4

10-1-2000

Independence and the Director of Public Prosecutions: The Marshall Inquiry and Beyond

Philip C. Stenning
University of Toronto

Philip C. Stenning*

Independence and the Director of Public Prosecutions: The Marshall Inquiry and Beyond[1]

The author describes the reforms to the prosecution system in Nova Scotia which were recommended by the Marshall Inquiry in its 1989 report, and reviews the extent to which they have been effectively implemented during the ensuing decade. He concludes that many of the objectives originally identified by the Marshall Inquiry in this respect have been substantially met, but that in some areas there is still room for improvement. Finally, he notes the absence of systematic evaluations of prosecutorial institutions and practices in Canadian jurisdictions, and that because of this, it is difficult to say whether the Marshall Inquiry's objectives might have been equally or more effectively met with less radical (and probably less expensive) reforms.

L'auteur décrit les réformes au système de poursuite de la Nouvelle-Écosse que la Commission royale d'enquête sur le cas Marshall avait recommandées dans son rapport de 1989 et examine dans quelle mesure ces reformes ont été effectivement mises en oeuvre dans la décennie qui a suivi. Il conclut que bon nombre des objectifs formulés au départ ont été en grande partie atteint, mais qu'à certains égards, il y a encore matière à amélioration. Enfin, l'auteur souligne l'absence d'une évaluation systématique des institutions et des pratiques de la poursuite dans les diverses juridictions canadiennes de sorte qu'il est difficile de déterminer si les objectifs de la Commission royale d'enquête auraient pu être atteints tout aussi bien ou plus efficacement par le biais de réformes moins radicales (et vraisemblablement moins coûteuses).

* Philip C. Stenning, Associate Professor, Centre of Criminology, University of Toronto <p.stenning@utoronto.ca>.

1. This paper is based on a presentation at a Symposium in honour of the Honourable T. Alexander Hickman, retired Chief Justice, Supreme Court of Newfoundland, Trial Division, held at the Hotel Newfoundland, St. John's, Newfoundland, on 17 November, 2000. I thank the organizers of the symposium for permission to publish the paper.

Introduction

The establishment ten years ago of the current office of Director of Public Prosecutions (DPP) and Public Prosecution Service (PPS) in Nova Scotia has been one of the most significant, if not *the* most significant, legacy of the Marshall Inquiry,[2] which was chaired by then Chief Justice Hickman of Newfoundland.[3] As is well known, the "independent", statutory office of Director of Public Prosecutions established in Nova Scotia remains unique in Canada, and its first ten years of life are consequently the subject of interest and curiosity among those concerned with the question of how the prosecutorial function can best be organized in the public interest.

In this paper, I review the experiences of the DPP and PPS in meeting the challenge of maintaining independence and public confidence in the administration of criminal justice in Nova Scotia during the first decade of their existence. Specifically, I attempt the rather audacious task of assessing to what extent these new institutions can be considered to have been successful in fulfilling the hopes which were voiced for them at the time of their creation ten years ago, and ask what principal benefits might be attributed to this unique Canadian prosecutorial experiment.

I. *The Marshall Inquiry*

In its final report, the Marshall Inquiry was highly critical of almost every element in the Nova Scotia criminal justice system at the time, but focused particular disapprobation on the Attorneys General and members of the Attorney General's Department in their handling of prosecutorial matters. Specifically, the Inquiry identified four principal problems in this area: first, Attorneys General themselves were found to have inadequately understood their proper role in prosecutorial decision making. In particular, they did not understand their responsibility to avoid any personal involvement (or acquiescence) in decision making in particular cases which might reasonably raise suspicions either of improper

2. Although the Nova Scotia government's initiative in establishing these institutions began before the Marshall Inquiry submitted its final report (the government advertised for a "Director of Public Prosecutions" in the Summer of 1989, 6 months before the Marshall Inquiry's report was published) , it was readily acknowledged by everyone at the time that it was the Inquiry which had inspired, and substantially influenced the content of, this reform initiative (see *e.g.* the 2nd Reading debate on Bill 72 - Nova Scotia Legislative Assembly Debates, Thursday 7th June, 1990, 4355-73).

3. The other Commissioners were Associate Chief Justice Lawrence Poitras (Quebec), and the Hon. Mr. Gregory Evans, Q.C. (a former Chief Justice of the Ontario High Court).

partisanship or bias. A related problem was that they demonstrated an unwillingness to fulfill their prosecutorial responsibilities in what may be termed "high profile" or "sensitive" cases. Secondly, officials, including very senior ones, in the Attorney General's Department were found to have been applying inappropriate double standards in their prosecutorial decision making. As the Inquiry put it, there was one standard for a poor Indian, and another for influential fellow cabinet ministers,[4] who were the subject of criminal investigations and prosecution.[5] Thirdly, the Inquiry found that some of the legal advice provided by senior members of the Department fell substantially below the standard of competence which should be expected of such officers. And fourthly, the Inquiry found that the conduct of Departmental officials did not reflect an understanding of the proper relationship between the police and prosecutors in criminal investigations and prosecutions.

To a great extent, the Inquiry characterized the problems collectively as an indication of an insufficient *independence* in the prosecutorial process and in the institutions charged with responsibility for prosecutorial decision making. The independence from unacceptable partisan or personal influence of almost all those involved in the process was considered to be in question, as was the independence of the police from improper pressures by prosecutorial authorities. As the Commissioners expressed it in their report:

> A full and clear understanding of the proper roles and relationships of and between the Attorney General, Crown prosecutors and the police is essential and fundamental to a fair system of justice. This understanding must be coupled with a system which is organized and structured so as to protect and enhance those proper relationships and which will, in so far as possible, minimize the possibility that their integrity can be compromised by any one individual.[6]

The Commissioners recognized that the existence of these several problems gave rise to the most fundamental concern of all, which was a loss of public confidence in the integrity and impartiality of the

4. In addition to investigating the circumstances of the Donald Marshal, Jr., prosecution, the Commission investigated the circumstances of police and prosecutorial investigations and decision making with respect to the activities of two Nova Scotia cabinet ministers, Roland Thornhill and Billy Joe MacLean.

5. The Commissioners wrote that these weaknesses "are all the more serious because they are not simply overt interference. They exhibit a deep-rooted and unwritten code that status is important, and that one is not blind to influence in enforcing the law. Such an attitude makes the ideal of justice for all meaningless, and renders the goal of complete public confidence in the system of administration of justice impossible": Nova Scotia, Royal Commission on the Donald Marshall, Jr., Prosecution, *Commissioners' Report, Vol.1: Findings and Recommendations* (Halifax: Royal Commission, 1989) (hereinafter "Commissioners' Report") at 211.

6. *Ibid.* at 211.

prosecutorial system in the province.[7] It was thus *the restoration of public confidence in the integrity and impartiality of the administration of criminal justice* to which the recommendations of the Commissioners were essentially directed. All their specific recommendations, including the call for greater independence in the administration of criminal justice, were intended to contribute to this ultimate goal. Perhaps in light of this, the challenge of establishing and maintaining independence in the prosecution process may be thought of more fundamentally as the challenge of maintaining public confidence in the administration of criminal justice.

To this end, the Commissioners put forward two key prescriptions. The first was:

> In order to guarantee the maximum independence in prosecutorial decisions, we believe it is vital that the Minister of the Crown responsible for the administration of justice become involved in the disposition of individual cases only in the most exceptional circumstances and that the nature and extent of any such involvement be publicly recorded.[8]

The second was for the "creation of the office of an independent Director of Public Prosecutions in Nova Scotia."[9] The Commissioners stated their belief that "the creation of such an office, similar to the one adopted in the Commonwealth of Australia,[10] will go a long way to restoring the public's belief that their criminal justice system is being administered properly and with fairness to all."[11]

---

7. The Commissioners wrote that the result of the handling of the Marshall, Thornhill and MacLean cases had been "at best, public questioning of the system and, at worst, a loss of public confidence in the integrity of the system itself. Ultimately, the integrity of the administration of justice depends on the integrity, independence, character and professional competence of the law officers of the Crown" (*Ibid* at 228-29).

8. The Commissioners added: "As a matter of principle, we do not believe it is appropriate for the Attorney General to become involved in day-to-day decisions affecting individual cases, but we recognize there will be exceptional circumstances in cases that raise public interest issues with significant implications for the public at large. We believe that such considerations, which are admittedly political in the broad sense of the word, are legitimate factors to be weighed in the exercise of prosecutorial discretion. The important point, however, is that these must be made public." (*Ibid* at 230). It is noteworthy, however, that these observations were not incorporated as a formal recommendation in the report. I suggest possible reasons for this below.

9. *Ibid.*

10. The Commissioners' consultant on this topic, the late Professor John Edwards, in his report to the Commissioners, had examined various versions of this office in a number of different jurisdictions in the Commonwealth, and recommended the Australian Commonwealth model as the most appropriate for Nova Scotia: see in particular Parts II, III, V & VII of Edwards, J. *Walking the Tightrope of Justice – An Examination of the Office of Attorney General in Canada with Particular Regard to its Relationships with the Police and Prosecutors and the Arguments for Establishing a Statutorily Independent Director of Public Prosecutions* (Vol. 5 of the Marshall Inquiry Report).

11. Commissioners' Report, *supra* note 5 at 230.

It is crucial to note here that the Commissioners recognized clearly that "independence" of the prosecution system should not be achieved at the expense of effective public accountability. "We reject," they wrote, "the concept of a totally independent Director of Public Prosecutions (or Attorney General), who would be accountable to no one except his or her conscience and the law." Rather, "the challenge has been to find the model that best reflects the right blend of independence and accountability."[12]

The result was a set of recommendations for the establishment of an office of Director of Public Prosecutions and a Crown Prosecution Service with *limited independence* from the Attorney General. The Attorney General, however, was to "continue to exercise the duties and responsibilities traditionally accorded to that office in relation to the administration of criminal justice", subject to specific accountability requirements. These were: (1) to intervene in prosecutorial decision making only after consultation with the DPP; (2) if such intervention was contrary to the advice of the DPP, it must be in writing; (3) to make public the nature and extent of any such interventions through publication in the *Gazette*; (4) after consultation with the DPP, to issue guidelines for the exercise of prosecutorial discretion, which were to be tabled in the provincial legislature; and (5) to table the DPP's annual report in the provincial legislature.[13] It is important to underscore these aspects of the Marshall Inquiry's recommendations on this subject, as I believe they have not always been as fully understood by members of the public, the media, and critics of the present institutions in Nova Scotia as one might wish.

In fairness to those I have just mentioned, however, it must be acknowledged that the Inquiry Report was arguably less than sufficiently precise about exactly what the limits to the independence of the new DPP should be. In the first place, it was uncertain *how it was to be determined* which cases are "cases that raise public interest issues with significant implications for the public at large" (and therefore, in the Commissioners' view, justify personal intervention by an Attorney General), or *whose determination of this issue should count* (the AG? the DPP? the AG in consultation with the DPP? the DPP in consultation with the AG?). Secondly, assuming these issues are resolved, the Commissioners did not give any indication as to what the nature of an AG's intervention in such cases might appropriately be (giving advice to the DPP? reviewing the DPP's proposed decisions with the possibility of overruling them?

12. *Ibid* at 229.
13. Recommendation 35(c) (*Ibid.* at 231).

actually reserving the decisions to him- or herself? *etc.*), although clearly the Commissioners' recommendations contemplated the possibility of the DPP being "overruled" by the AG in a particular case. Furthermore, the Commissioners' views on this critical issue, although they were expressed in general terms in the text of their report, were not expressly incorporated within their formal recommendation on the subject. Indeed, the words "independent" and "independence" did not actually feature in this recommendation at all.[14]

The *Public Prosecutions Act* which was enacted by the Nova Scotia legislature in the summer of 1990, represented the government's chief legislative response to these two key prescriptions of the Marshall Inquiry.[15] It is important to understand at the outset that this legislation did not precisely implement the recommendations of the Marshall Inquiry. Two matters in particular need to be noted in this respect. In the first place, the Marshall Inquiry recommended that whenever an Attorney General chose to intervene in a particular case, this should occur only after consultation with the DPP, and should always be in writing and eventually be made public through publication in the *Gazette*. These were considered to be the most important safeguards against unnecessary and/or inappropriate involvement of the Attorney General in prosecutorial decision making in particular cases (and hence a guard against both the fact and the perception of inappropriate political interference). Section 6(e) of the *PPA*, however, permits an Attorney General to personally exercise his or her "statutory functions with respect to prosecutions" in individual cases without any of these safeguards except the requirement for prior consultation with the DPP.[16]

---

14. See Recommendation 35 (*Ibid* at 230-31).

15. *Public Prosecutions Act*, S.N.S. 1990, c. 21 [hereinafter *PPA*]. The Attorney General at the time, the Hon. Thomas McInnis, when introducing Bill 72 at 2nd Reading said: "I am equally pleased to stand with this piece of legislation which was one of the recommendations in the Marshall Commission Report, that we establish the position of Director of Public Prosecutions" and commented that "the theme we were trying to put here . . . is to try to build in as much independence as we could" (Nova Scotia Legislative Assembly Debates, Thursday 7th June, 1990, pp. 4355 and 4356).

16. The Hon. Fred Kaufman, Q.C., in his 1999 review of the Public Prosecution Service, recommended that paragraph 6(e) should be amended to include a publication requirement (and by implication, presumably, a requirement that decisions be in writing): see Kaufman, F. *Review of the Nova Scotia Public Prosecution Service—Final Report* (Halifax: Government Printer, 1999) at 12 and 415. It is noteworthy in this connection that paragraph 6(b) the *PPA* does not restrict the other limitations to circumstances in which the AG decides to intervene in a prosecution "contrary to the advice of the Director of Public Prosecutions", as the Marshall Inquiry's recommendation had proposed, and thus in this respect imposes wider limitations on the AG's exercise of discretion than those proposed by the Inquiry.

Secondly, the Marshall Inquiry's suggestion that an Attorney General should only intervene personally in individual cases in "exceptional circumstances in cases that raise public interest issues with significant implications for the public at large" was not reflected in any of the provisions of the *PPA*. One can only speculate as to why this was. But the fact that this suggestion was not included in the Inquiry's formal recommendation on this subject may well have been a factor, as may the fact that fashioning legislative language to express such a vaguely defined limitation on an Attorney General's discretion may have proven too great a challenge. In addition, it is possible there may have been legal advice that inclusion of such a limitation on an Attorney General's constitutional authority with respect to the administration of justice would be beyond the legislative competence of the provincial legislature.[17] Whatever the reason, it is important to note that one of the Marshall Inquiry's most significant suggestions for minimizing the risk of improper political interference in the making of prosecutorial decisions was not (and still is not) reflected in the legislation. From the important perspective of public perception, the absence in the statute of any such substantive limitation on the Attorney General's right to intervene in decision making in individual cases may be quite significant, given the expectations on this issue which the Marshall Inquiry report probably raised.

There was another equally important suggestion for enhancing the independence of the prosecution process from undesirable partisan political or personal influence which had been emphasized by the Marshall Inquiry's consultant on this topic.[18] This was discussed in the Commissioners' report (although again not expressly included in their formal recommendation) and *was* reflected in the *PPA*. This was the provision in s. 6(d) that the Attorney General "may consult with members of the Executive Council regarding general prosecution policy but not regarding a particular prosecution."

In most other respects, the legislation reflected closely the spirit and content of the Marshall Inquiry's recommendations in this regard. As I have tried to illustrate, however, the *PPA*, despite its express objective of

---

17. Although presumably, if correct, such advice ought also to have precluded the other limitations on the exercise of such authority (the requirement to consult first, the requirement that directions be in writing, and the requirement for subsequent publication in the Gazette) which were included in the legislation. An argument as to the possible unconstitutionality of such legislative restrictions had been put forward in neighbouring New Brunswick just as the Marshall Inquiry was finalizing its report: see Office of the Attorney General of New Brunswick, *Proposal for Reform of the Machinery of Public Prosecutions* (October 1989) (Fredericton: Office of the Attorney General, Province of New Brunswick, 1989) at 18 and 33.

18. See Edwards, *supra* note 10 at 141-46.

"providing for the independence of the Director of Public Prosecutions and the public prosecution service",[19] in fact provided for a rather more circumscribed independence for these institutions than the Marshall Inquiry had suggested they ought to enjoy. For this reason, it could not reasonably be expected to establish the rather higher standard of independence envisaged by the Commissioners in their report.

The Inquiry's objectives, which the Commissioners believed that the establishment of a statutory office of Director of Public Prosecutions and Public Prosecution Service would achieve, can thus be briefly summarized as follows:

1. To restore public confidence in the administration of criminal justice.

2. To ensure that prosecutorial decision making is equitable and is not influenced by partisan considerations or considerations of personal benefit.

3. To ensure that Attorneys General appreciate and fulfill their independent constitutional responsibilities with respect to prosecutions (*i.e.* intervene when appropriate, refrain from intervention when not appropriate, and function as a conduit for effective public and legislative accountability for prosecutorial decision making).

4. To ensure competence and professionalism in prosecutorial decision making.

5. To ensure that the proper roles of police and prosecutors in prosecutorial decision making are observed in practice.

The particular means which the Commissioners felt were appropriate to achieve these objectives included:

1. The establishment of prosecutorial institutions with limited independence from political direction and control.

2. Ensuring that prosecutorial decision making in individual cases is not discussed in Cabinet.

3. Limiting intervention by the Attorney General in individual cases to "exceptional circumstances in cases that raise public interest issues with significant implications for the public at large".

4. Requiring that such interventions be made only after consultations with the DPP and that, when contrary to the advice of the DPP, they be in writing and be published in the *Gazette.*

5. Requiring regular consultation between the DPP and the AG "concerning all aspects of public prosecution and the administration of the prosecution service".[20]

---

19. *PPA*, *supra* note 15, s. 2(c).
20. Commissioner's Report, *supra* note 5 at 230, para. (b) (ii) of recommendation 35.

6. Preparation, by the AG after consultation with the DPP, of guidelines for the exercise of prosecutorial discretion which are to be tabled in the provincial legislature.

7. Providing the DPP with security of tenure comparable to that of a judge.

8. Establishing a Public Prosecution Service all of whose prosecutors would be under the direction of the DPP and accountable through him or her.

9. Establishing the independent right and responsibility of the police to conduct criminal investigations and determine who should be charged and for what offences, without undue pressure from prosecutorial authorities.

10. Submission by the DPP to the AG of an annual report on the activities of the PPS, a copy of which is to be tabled in the provincial legislature.

In the remainder of this paper, I explore to what extent it can be said that these means have been successfully implemented, and the objectives successfully achieved, in Nova Scotia during the decade since the Marshall Inquiry submitted its report. Before doing so, however, two facts which will not be seriously disputed by anyone need to be noted. First, the first ten years of these new prosecutorial institutions in Nova Scotia have not been without controversy and difficulties. A number of "high profile" cases (such as the *Westray*,[21] *Regan*[22] and *Morrison*[23] cases) have given rise to considerable public controversy, and in some cases vociferous criticism of the prosecutorial authorities.[24] In addition,

---

21. *R.* v. *Curragh Inc.* (1997), 5 C.R. (5th) 291 (S.C.C.). This case involved the prosecution of the owners of the mine involved in the "Westray Mine Disaster", in which several miners lost their lives.

22. *R.* v. *Regan* (1999), 21 C.R. (5th) 366 (N.S.S.C.) and (1999) 28 C.R. (5th) 1 (N.S.C.A.). This case involved the prosecution of a former Premier of Nova Scotia on a large number of "historical" sexual assault and indecency charges.

23. *R.* v. *Morrison* (1998), 174 N.S.R. (2d) 201 (N.S.C.C.). This case involved a prosecution of a Halifax doctor in connection with the death of one of her hospital patients.

24. See *e.g.* DeMont, J. "Justice under fire—Nova Scotia's prosecutors' office attracts controversy", *Maclean's*, Vol 111, No. 51 (December 21st, 1998), pp. 22-23; and Cox, K. "N.S. Crown under fire over Regan verdict", *Globe and Mail*, 16th January, 1999, p. A4. The Prosecution Service was also the subject of some harsh criticisms from two members of the Supreme Court of Canada in their dissenting opinion in the *Westray* case (*R.* v. *Curragh Inc.* (*supra* note 21) at 326-327), as well as adverse comments by the trial judges in *R.* v. *Corkum* (*R.E.*) (1998), 163 N.S.R. (2d) 197, at 201, and *R.* v. *Regan* (*supra* note 22) - this last decision, however, was reversed by the Nova Scotia Court of Appeal on appeal, and is currently on appeal before the Supreme Court of Canada. In their subsequent review of the *Westray* prosecution on behalf of the Kaufman Review (see note 16, *supra.*), M. Duncan Beveridge, Q.C., and Patrick Duncan, Q.C., argued that the criticisms of the two Supreme Court of Canada Justices in *R.* v. *Curragh Inc.* were not warranted by the facts of the case: Beveridge, D. & P. Duncan, *Review of the Nova Scotia Public Prosecution Service - Report on the Westray Prosecution* (Halifax: March 2000 - publisher not indicated) Vol. 1, 270-72.

these years have witnessed some substantial, and at times publicly manifested, employment relations difficulties within the PPS itself.[25] Secondly, and as a direct result of these controversies, the Office of the Director of Public Prosecutions and the Public Prosecution Service in Nova Scotia have already been the subject of two major reviews during these ten years (by the former Premier of Prince Edward Island, the Honourable Joseph Ghiz, and Bruce Archibald in 1994,[26] and by the Honourable Fred Kaufman in 1999-2000[27]).

The very fact of these several controversies, and the two reviews which were felt to be required in response to them, might be considered to be enough evidence that the objective of restoring public confidence in the administration of criminal justice in Nova Scotia has not yet been fully achieved during these ten years, despite the reforms which were introduced in 1990 and beyond. In this connection it is noteworthy that, in his report on his review of the PPS in 1999, Kaufman commented that his interviews with Crown Attorneys in Nova Scotia had "brought to mind the words of Sir Iain Glidewell, contained in his 1998 Report on the Crown Prosecution Service of England and Wales (CPS),[28] where he noted that the CPS 'has the potential to become a lively, successful and esteemed part of the justice system, but that, sadly, none of these adjectives apply to the Service as a whole at present'." Kaufman added at the conclusion of his report that he believed it was important that the PPS report on the implementation of recommendations contained in his report which are accepted, so as "to help *restore* public confidence".[29]

Such a sweeping generalization, however, while it needs to be noted, hardly does justice to the real progress which can be seen to have been made during the decade following the Marshall Inquiry's report. I conclude this paper, then, by considering more specifically first the ten "means" which the Marshall Inquiry proposed, and then the five primary objectives which I have identified above.

---

25. On June 2, 1998, the national newspaper, *The Globe and Mail*, published a photograph of Nova Scotia prosecutors picketing with placards outside the court house in Halifax (on A4).
26. Ghiz, J. & B. Archibald, *Independence, Accountability and Management in the Nova Scotia Public Prosecution Service: A Review and Evaluation* (Halifax: Law School, Dalhousie University, 1994).
27. Kaufman, 1999 (*supra* note 16), and Beveridge & Duncan, 2000, (*supra* note 24).
28. Glidewell, I. *The Review of the Crown Prosecution Service—Report* Cm. 3960 (London: H.M.S.O., 1998).
29. See Kaufman, 1999, See Kaufman, 1999, *supra* note 16 at 2, 27 and 69 [emphasis added].

II. *The Means*

1. *The establishment of prosecutorial institutions with limited independence from political direction and control*

The *PPA* certainly goes a long way to implementing this proposal, although, as noted above, it provided for a rather more limited independence than the Marshall Inquiry had recommended. Specifically, while the Marshall Inquiry envisaged that the Attorney General could only intervene in an individual prosecution in limited circumstances, and then only when a number of different accountability protocols were observed, s.6(e) of the statute preserves the Attorney General's right to intervene in any case and to personally make prosecutorial decisions after consultation with the DPP, without all the accountability safeguards which the Marshall Inquiry report proposed. In his 1999 review, Fred Kaufman recommended that the *PPA* be amended to bring it more into line with the original recommendations of the Marshall Inquiry in this respect.[30]

Both the Ghiz/Archibald and the Kaufman reviews, however, recognized that in addition to the direct relationship between the DPP and the Attorney General there are other, practical aspects of independence which require attention. Thus, for instance, the Ghiz/Archibald review suggested that the DPP should be given greater and more independent control over the resources and personnel of his office, and that the budget of the DPP's office should be determined more directly by an all-party committee of the provincial legislature, rather than by the Attorney General and Cabinet, and managed more independently by the DPP. It also recommended that the offices and files of the DPP be physically separated from those of the Department of Justice, to increase public perceptions of the DPP's independence from the Attorney General and the Department of Justice.[31] Many, but by no means all, of these

30. See *supra* note 16.
31. See Ghiz/Archibald, *supra* note 26, Recommendations 1-11 at 153-55.

recommendations were subsequently implemented.[32] Overall, there can be little doubt that the DPP and PPS in Nova Scotia are today the most theoretically and practically independent prosecutorial institutions in Canada.

2. *Ensuring that prosecutorial decision making in individual cases is not discussed in Cabinet*

S. 6(d) of the *PPA* expressly provides for this. Of course, whether it is being observed in practice is something that cannot be known for sure at this time, given current conventions with respect to the secrecy of cabinet deliberations. However, I am aware of no clear indication that it is not, and neither of the two formal reviews have suggested otherwise (although they, of course, also did not have access to cabinet minutes).

3. *Limiting intervention by the Attorney General in individual cases to "exceptional circumstances in cases that raise public interest issues with significant implications for the public at large"*

As noted earlier, this was not included in the *PPA*. There is every indication, however, that it has been observed in practice during the last ten years. In particular, Kaufman commented in his report that: "My inquiries indicate that since the passing of the Act there has been no unwarranted interference by an Attorney General with the decision making process of the DPP and the Service".[33] In their review of the *Westray* prosecution, Beveridge and Duncan suggested that the Attorney General's involvement in that case should perhaps have been more substantial than it actually was.[34] The Kaufman review noted that the AG's authority to issue instructions to the DPP in a particular case has not

---

32. See Nova Scotia Public Prosecution Service, *Response of the Public Prosecution Service to the Recommendations of the Ghiz/Archibald Review and Evaluation, as of September 1, 1998* (Halifax: Nova Scotia Public Prosecution Service, 1998 - reproduced as Appendix E (pp. 395-402) in Kaufman, 1999 (*supra* note 16). In particular, the recommendation for direct control over the DPP's budget by an all-party committee of the legislature was rejected in principle by the Attorney General of the day (see Gillis, W., "Notes for the Minister: Crown Attorneys Annual Meeting, September 28, 1994", at 7-8, quoted in Stenning, P., "The Independence and Accountability of the Office of Director of Public Prosecutions, and of the Public Prosecution Service, In Nova Scotia" - prepared as a Background Paper for the Kaufman review, and included as Appendix D (pp. 329-394) in Kaufman, 1999 (*supra* note 16) at 360-61), while expressing agreement with what he took to be "its intended purpose: objective public accountability and budget oversight".

33. See Kaufman, 1999 (*supra* note 16), at 13.

34. See Beveridge & Duncan, 2000, *supra* note 24 at 139-42. Such a suggestion is not unprecedented in Nova Scotia; the Marshall Inquiry made a similar suggestion with respect to the involvement of the Attorney General in the *Thornhill* case: see Commissioners' Report, Vol. 1, p. 205.

so far been exercised. In the *Morrison* case, however, the AG, after consultations with the DPP, and also after taking external advice,[35] publicly announced his decision not to intervene in the PPS's decision to proceed with a prosecution of Dr. Morrison.[36]

4. *Requiring that such interventions be made only after consultations with the DPP and that, when contrary to the advice of the DPP, they be in writing and be published in the Gazette*

S. 6(a) and (b) of the *PPA* now require the Attorney General to consult with the DPP before issuing either general instructions or guidelines with respect to prosecutions, or specific instructions or guidelines with respect to any particular prosecution. The Act also provides that any such guidelines or instructions must be in writing and eventually be published in the *Gazette*. The qualification suggested by the Marshall Inquiry, that instructions or guidelines should only be in writing and published in the *Gazette* if they are "contrary to the advice of the DPP", was not adopted in the *PPA*. Paragragh 6(e), however, contemplates various kinds of intervention in particular cases by an Attorney General without the last two of these public accountability safeguards. While he did not find any evidence suggesting that the Attorney General's discretion under paragraph 6(e) had in any way been abused, Mr. Kaufman, in his 1999 review, recommended that the Act be amended to eliminate this "anomaly".[37]

---

35. See Archibald, B. *An Opinion prepared for the Attorney General and Minister of Justice of the Province of Nova Scotia, the Honourable Dr. Jim Smith, in relation to the prosecution of Dr. Nancy Morrison* (Halifax: Dalhousie University Law School, 1998). This opinion is discussed in some detail in the Background Paper on "The Independence and Accountability of the Office of Director of Public Prosecutions, and of the Public Prosecution Service, in Nova Scotia", which I prepared for the Kaufman Inquiry, and which is reproduced as Appendix D of his report (Kaufman, 1999, *supra* note 16 - see in particular 351-55).

36. See Smith, J. "Statement of the Honourable Jim Smith, M.D., Minister of Health, Minister of Justice and Attorney General - *R. vs Dr. Nancy Morrison*" Halifax, Province House, 2nd July, 1998, in which the Attorney General reflected more generally on his role in the prosecution process.

37. Kaufman, 1999, *supra* note 16 at 12. In its response to the Kaufman report, the Government of Nova Scotia did not comment specifically on this recommendation, although it did state that it "accepts the recommendations of the review" and "commits to implementing the recommendations within the purview of the Government" (see Government of Nova Scotia, *Response to Kaufman Report*, June 1999 at 1).

5. *Requiring regular consultation between the DPP and the AG "concerning all aspects of public prosecution and the administration of the prosecution service"*

Again, this proposal was incorporated in s. 6(c), but as an option rather than a requirement.[38] In his review, Kaufman noted that practice in this regard had been inconsistent, and recommended that the *PPA* be amended to "require that not less than once a month meetings be held between the Attorney General and the Director of Public Prosecutions to discuss policy matters, as well as existing and contemplated major prosecutions".[39] In its response to Kaufman's report, the Government of Nova Scotia, commenting that "the relationship between the Attorney General and the DPP is much too important to be left to the discretion of individuals", indicated that the *PPA* would be amended "to include the requirement for meetings not less than once a month between the Attorney General and the DPP."[40] At the time of writing, however, no such amendment has been introduced.

6. *Preparation, by the AG after consultation with the DPP, of guidelines for the exercise of prosecutorial discretion which are to be tabled in the provincial legislature*

This was incorporated in s. 6(a) of the Act, but again as an option rather than a requirement. Kaufman noted in his review that "six policy-oriented written instructions were issued between 1992 and 1997, none of them controversial."[41]

7. *Providing the DPP with security of tenure comparable to that of a judge*

Section 5 of the *PPA* provides for the security of tenure of the DPP. It provides that the DPP holds office "during good behaviour", has the status of "deputy head", shall be paid the same salary as the Chief Judge of the provincial court, and can only be removed from office "for cause by a resolution of the Assembly." During the ten years since the Act was passed, two people have held the office of DPP. Both resigned after

---

38. The Marshall Inquiry had recommended that such "regular consultation" be one of the "duties and responsibilities" of the DPP (see Commissioners' Report, 1989: Vol. 1, p. 230, Recommendation 35, para. (b) (ii) - *supra* note 5). The Ghiz/Archibald Report (1994 - *supra* note 26) recommended "setting up a specific protocol through which the Attorney General can request information about individual cases, and having that request directed through the D.P.P." (122).

39. Kaufman, 1999, *supra* note 16 at 14.

40. Government of Nova Scotia, *supra* note 37 at 3.

41. Kaufman, 1999, *supra* note 16 at 13. The six policies are referenced in a footnote to this comment.

relatively short terms of service, and for the last few years the office has not been filled by a permanent appointee but by a senior prosecutor serving as an Acting DPP. In his Interim Report submitted to the Attorney General in late 1998, Kaufman emphasized his view that "it is of great importance to have a new DPP in place as quickly as possible . . . above all, [to] provide the [Crown Prosecution] Service with strong leadership."[42] No such appointment has yet been made.

8. *Establishing a Public Prosecution Service all of whose prosecutors would be under the direction of the DPP and accountable through him or her*

The *PPA*, in particular ss. 4 and 7-15, provides for the establishment of such a service, and it has been established. While both the Ghiz/Archibald Report in 1994 and the Kaufman Review Report in 1999 recommended various improvements to the internal management and administration of the Crown Prosecution Service and its relationships with other parts of the provincial government, neither recommended any major structural changes to the Service as established pursuant to the *PPA*. In the conclusion to his Final Report, Kaufman commented that, subject to the suggestions he had made, "the Act is sound and provides a good framework for the Service".[43]

9. *Establishing the independent right and responsibility of the police to conduct criminal investigations and determine who should be charged and for what offences, without undue pressure from prosecutorial authorities*

This right of the police seems now to be well recognized and observed in Nova Scotia, and neither of the two reviews suggested otherwise. In fact, Kaufman noted in his review that one Chief of Police had commented to him that "Independence has taken on a life of its own" to the point that there was evidence that police were engaging in inappropriate "Crown-shopping" in order to obtain the prosecutorial advice they wanted—a practice which Mr. Kaufman urged should be ended.[44] The trial judge in the *Regan* case, however, stayed half of the charges as an abuse of process on the ground, *inter alia*, that by interviewing complainants in the company of the police prior to the laying of charges, prosecutors had compromised their own independent judgment as well as the independence of the police in deciding what charges should be laid. Since this decision was reversed on appeal and is now the subject of a further appeal to the

42. The Hon. Fred Kaufman, Q.C., *Interim Report to the Attorney General*, December 1998 at 22.
43. Kaufman, 1999, *supra* note 16, at 69.
44. Kaufman, 1999, *ibid.*, at 33-34.

Supreme Court of Canada, it would be inappropriate to comment further on it at this point, other than to suggest that the case indicates that the appropriate division of responsibilities and "independence" of the police and prosecutors in the prosecutorial process may not yet be adequately clarified or always observed in Nova Scotia.

10. *Submission by the DPP to the AG of an annual report on the activities of the PPS, a copy of which is to be tabled in the provincial legislature*

An annual reporting requirement is provided for by s. 13 of the *PPA*, which requires that the DPP report directly to the Legislative Assembly rather than through the Attorney General.

III. *The objectives*

1. *To restore public confidence in the administration of criminal justice*

As has already been suggested, there is considerable evidence that this objective has not been fully achieved, despite the reforms and reviews which have occurred. A major reason for this may well be an inadequate public (and media) understanding of the prosecutorial system, of the proper roles of the various players in it (especially the Attorney General), and of the quite technical considerations which sometimes inevitably impinge on prosecutorial decisions. With respect to the role of the Attorney General in the prosecution process, the Marshall Inquiry may have unwittingly generated unrealistic or inappropriate public expectations. To some, the Commissioners' report may have been taken to imply that an Attorney General's intervention in decisions about particular cases could somehow be confined by law to "exceptional circumstances in cases that raise public interest issues with significant implications for the public at large." Their report, however, did not actually indicate how this might be achieved or what kinds of cases might properly be considered to fall within this rubric. This may have left an erroneous impression with the public that *any* personal intervention in prosecutorial decision making by an Attorney General should be regarded as inherently suspect, making it difficult for Attorneys General to fulfill their constitutional responsibilities in this respect without constantly arousing public suspicion.

While such suspicion may be thought to be a healthy prophylactic against abuses, if frequently aroused it probably is not conducive to sustained public confidence in the prosecution system. Legislative and administrative reforms should certainly not be expected, by themselves, to achieve this broad objective. Recognizing this, Kaufman recommended

in his report that "a significant public information campaign be undertaken to educate the citizens of Nova Scotia about the role played by the Public Prosecution Service in the administration of criminal justice." If public confidence in the prosecution system and the administration of justice in the province is to be fully restored, however, perhaps an even more broadly framed public education initiative will be required, one covering the proper role of the Attorney General and the proper relationships between that officer and the Public Prosecution Service, as well as with the other government ministers and cabinet. Such an approach would ensure that these matters are not the subject of public discussion and reflection only in the context of decision making with respect to "high profile", controversial cases. As the late John Edwards, the unchallenged expert on these matters in the common law world, once observed, anyone who wants to improve public and media understanding of these matters must find some way to confront the "vast body of public ignorance" about them.[45]

2. *To ensure that prosecutorial decision making is equitable and is not influenced by partisan considerations or considerations of personal benefit*

There is considerable evidence that this objective has largely been achieved in Nova Scotia since the Marshall Inquiry submitted its report, and that the reforms which have been put in place may have contributed significantly to its enduring existence. Certainly neither of the reviews of the PPS has identified any evidence that the problems which the Marshall Inquiry identified in this regard have persisted. For obvious reasons, however, it is difficult to find conclusive evidence, since such unacceptable influence can be accomplished with relative public invisibility (*e.g.* the secrecy of cabinet discussions). For reasons suggested with respect to the preceding objective, the public perception of the absence of such unacceptable influences may have been less successfully achieved than the reality of it.

---

45. Edwards, J. "Emerging problems in defining the modern role of the office of Attorney General in Commonwealth countries", reproduced in Edwards, J., *Ministerial Responsibility for National Security as it relates to the Offices of Prime Minister, Attorney General and Solicitor General of Canada* (Ottawa: Minister of Supply and Services Canada, 1980) at 121.

3. *To ensure that Attorneys General appreciate and fulfill their independent constitutional responsibilities with respect to prosecutions (i.e. intervene when appropriate, refrain from intervention when not appropriate, and function as a conduit for effective public and legislative accountability for prosecutorial decision making)*

As noted throughout this paper, the achievement of this objective may be hampered by the inadequate public understanding of the "proper" role of the Attorney General in the prosecutorial process, and in particular the desirable limits on his or her intervention in prosecutorial decisions in individual cases. The discrepancy between the suggestions in the text of the Marshall Inquiry report and the content of its formal recommendation (and the provisions of the *PPA*) illustrates this lack of clarity. As a result, the appropriate limits to an Attorney General's intervention in particular cases appear still to be neither agreed upon nor well understood by the public and the media. This situation may perhaps have led Attorneys General to be overly reluctant to fulfill their responsibilities with respect to intervention in some individual cases,[46] and the public and the media to be overly suspicious of *any* such involvement by an Attorney General. On the other hand, it can readily be acknowledged that these shortcomings may be preferable to their opposites, as revealed by the Marshall Inquiry's report.

4. *To ensure competence and professionalism in prosecutorial decision making*

The evidence, particularly that of the Ghiz/Archibald and Kaufman reviews, indicates that while great strides have been made towards the achievement of this objective, and while the reforms which have been introduced have contributed significantly to this progress, at the end of the first decade of the DPP and PPS there remains some way to go. A major factor identified by both reports in this respect has been the failure, during the last decade in Nova Scotia, adequately to resolve festering grievances of prosecutors over remuneration, resources and working conditions, and the associated low morale which these have engendered. The absence of continuous, strong leadership of the Public Prosecution Service was also identified as an important contributing factor by Kaufman in his report. In its response to Kaufman, the Government of Nova Scotia committed itself to addressing these issues and outlined the steps which it had already taken to do so, promising legislative amendments

46. See in particular the comments of Beveridge & Duncan, referred to in note 24, *supra*.

recommended by Kaufman if these proved insufficient.[47] So far, however, a permanent appointment to the office of Director of Public Prosecutions has not been made, and promised legislative amendments have not been introduced.

5. *To ensure that the proper roles of police and prosecutors in prosecutorial decision making are observed in practice*

The evidence suggests that this objective has been substantially achieved in Nova Scotia, although the *Regan* case indicates that uncertainties remain as to the proper relationship between police and prosecutors which need to be authoritatively resolved. It is to be hoped that the forthcoming decision of the Supreme Court of Canada in the *Regan* case will make a valuable contribution to the achievement of this objective.

Conclusion

The available evidence suggests that the reforms to the prosecution system in Nova Scotia introduced after (and largely inspired by) the Marshall Inquiry report have been substantially, but not fully, successful in achieving the objectives which they were intended to achieve, although substantial progress remains to be made with respect to some of these. The conclusion is inescapable, in this author's view, that despite any outstanding shortcomings in the administration of criminal justice in Nova Scotia, the Marshall Inquiry report has contributed very significantly to the improvement of the administration of criminal justice (at least as far as criminal investigation and prosecutions are concerned) in that province. Moreover, because of its status as a landmark document in this respect, it will stand as one of the most significant contributions to the quality of the administration of criminal justice, not just in Nova Scotia, but in Canada more generally.

Two questions inevitably remain, however. Were the kinds of problems which the Marshall Inquiry brought to light in the prosecution system of Nova Scotia in any way unique to that jurisdiction? And even if they were, could they have been addressed and resolved without the adoption of a new office of an "independent" Director of Public Prosecutions and Public Prosecution Service, such as have been developed in Nova Scotia during the last ten years?

Both questions are difficult to answer with any confidence. No other provincial prosecutorial system has been subjected to the kind of scrutiny the Nova Scotia system experienced at the hands of the Marshall Inquiry. Despite this, similarly serious questions about the integrity and competence

47. See Government of Nova Scotia, *supra* note 37 at 4-7.

of criminal investigations and prosecutions have been raised in numerous less comprehensive investigations in other provinces. The Owen Report in British Columbia,[48] the Hughes Report[49] (on prosecutorial decision making with respect to Mount Cashel) in Newfoundland (which ironically found itself looking into the role of Alex Hickman during his days as Attorney General there), the Kaufman Inquiry into the Guy Paul Morin case in Ontario,[50] the investigations into the prosecution of David Milgaard in Saskatchewan,[51] the Manitoba Inquiry[52] (examining the treatment of native people in general in the criminal justice system there, and the investigation and prosecution of suspects in the Helen Betty Osborne case in particular), the Cawsey Inquiry in Alberta[53] (examining the experiences of native people in the criminal justice system of that province), the Indian Justice Review Committee report in Saskatchewan[54] (a similar undertaking in that province), and the Commission on Systemic Racism in the Ontario Criminal Justice System[55] have all raised questions similar to those which surfaced during the Marshall Inquiry. They all suggest that these issues were not unique to Nova Scotia. What has not been undertaken so far, however—and what would surely merit extended consideration in another article—is any kind of systematic comparative review of the various solutions to the problems identified by these disparate investigations, and the evidence as to how successful they have been in satisfactorily and enduringly resolving those problems.

There is an unfortunate tendency to assume that once an inquiry has been held and has submitted its report and recommendations, and a government has publicly adopted such recommendations, problems can be considered solved. Yet the evidence which I have reviewed with respect to the experience in Nova Scotia during the last ten years indicates that such an assumption may not be fully justified. There were certainly

---

48. Owen, S., *Discretion to Prosecute Inquiry—Commissioner's Report* (Vancouver: Province of British Columbia, 1990).

49. Newfoundland & Labrador, *Royal Commission of Inquiry into the Response of the Newfoundland Criminal Justice System to Complaints* (The Hon. S.H.S. Hughes, Q.C., Commissioner) *Report* (St. John's, Queen's Printer, 1991).

50. Ontario, *Commission on Proceedings Involving Guy Paul Morin* (The Hon. Fred Kaufman, C.M., Q.C., Chair) *Report* (Toronto: Queen's Printer for Ontario, 1998).

51. *Reference Re Milgaard*, [1992] 1 S.C.R. 875.

52. Manitoba, *Public Inquiry into the Administration of Justice and Aboriginal People, Report: Vol. 1: The Justice System and Aboriginal People* (Winnipeg: Queen's Printer, 1991)

53. Alberta, *Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta, Report: Justice on Trial* (Edmonton: Government Printer, 1991)

54. Saskatchewan, *Indian Justice Review Committee, Report* (Regina: Government Printer, 1992).

55. Ontario, *Commission on Systemic Racism in the Ontario Criminal Justice System, Report* (Toronto: Queen's Printer for Ontario, 1995).

those, including this author, who, at the time the Marshall Inquiry's recommendations were being finalized, argued that the creation of an independent Director of Public Prosecutions and Public Prosecution Service might not be the best way to address the problems raised by the Inquiry, and that it might well not be successful in that respect. Indeed, one opponent of the concept argued that the "independence" of the office, as advocated by the Marshall Inquiry, would generate more problems of public accountability than it solved, and that improving the quality and training of the personnel in the existing system, and enhancing the transparency of its decisions, would achieve the desired results just as effectively, at considerably less expense, and with greater respect for democratic constitutional principles.[56]

Whether these arguments are persuasive or not—and in this author's view, the evidence from Nova Scotia reviewed in this article, as well as recent experiences in some other provinces, do lend some support to them—it may well be that what made the proposal for an independent DPP and PPS so attractive to its proponents in Nova Scotia was its symbolic, rather than just its more purely instrumental, appeal in restoring public confidence in the system. Symbolically, the creation of these institutions signalled a clean break from the tainted past and a clear distancing of prosecutorial decision making from unwanted political influence—two objectives which were much sought after in Nova Scotia at the beginning of the 1990s, but perhaps not quite so prominent in the minds of the public in other provinces at the time. However, persuasive evidence as to how effectively the new institutions in Nova Scotia have achieved these objectives, or whether they could just as effectively have been achieved through other means, remains tantalizingly elusive.

---

56. See in particular the comments of Mr. Serge Kuzawa, Q.C., a provincial prosecutor in Saskatchewan, in Vol. 7 of the Marshall Inquiry's Report, *Consultative Conference, November 24-26, 1988 – Edited Transcript of Proceedings* (Halifax: Royal Commission, 1989), at 115-18, and those of this author, at 119 of the same volume. Ironically, Mr. Kuzawa's role in the prosecution of David Milgaard was to come under critical scrutiny a few years later.