COMMISSION OF INQUIRY CONCERNING THE ADEQUACY OF COMPENSATION PAID TO DONALD MARSHALL, JR.

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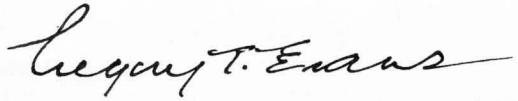
June, 1990.

To His Honour
The Lieutenant-Governor of Nova Scotia

May It Please Your Honour:

On March 22, 1990, I was appointed pursuant to the Public Inquiries Act of Nova Scotia "to recanvass the adequacy of compensation paid to Donald Marshall, Jr., in light of what the Royal Commission on the Donald Marshall, Jr., Prosecution found to be factors contributing to his wrongful conviction and wrongful incarceration, as indicated in Recommendations #8 of the Report of the Royal Commission, and to determine any further compensation which is to be paid as a result."

I beg to submit my Report to your Honour.



The Honourable Gregory T. Evans, Q.C.

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TO HIS HONOUR THE LIEUTENANT GOVERNOR

In the matter of the *Public Inquiries Act* and in the matter of the adequacy of compensation paid to Donald Marshall, Jr.

Report

On the 22nd day of March, 1990, His Honour The Honourable Lorne O. Clarke, Administrator of the Government of the Province of Nova Scotia, by and with the advice of the Executive Council of Nova Scotia, saw fit pursuant to the *Public Inquiries Act*, to appoint me, The Honourable Gregory T. Evans, Q.C., to recanvass the adequacy of the compensation paid to Donald Marshall, Jr., in light of what the Royal Commission on the Donald Marshall, Jr., Prosecution (the "Marshall Inquiry") found to be factors contributing to his wrongful conviction and continued incarceration, as indicated in Recommendation #8 of the Report of the Marshall Inquiry, and to determine any further compensation which is to be paid as a result.

I was directed in making my inquiry, determination and recommendation to the Governor in Council, to have regard to Recommendations 4, 5, 6, and 7 contained in the Marshall Inquiry Report and to report to the Governor in Council my findings, determination and recommendations.

Recommendations 4, 5, 6, 7 and 8 are as follows:

4. No limit on compensation amount

We recommend that there be no pre-set limit on the amounts recoverable with respect to any particular claim or any particular aspect of a claim.

5. Factors to be considered

We recommend that any judicial inquiry be entitled to consider any and all factors which may have given rise to the wrongful conviction, imprisonment or the continuation of imprisonment.

6. Legal fees and disbursements

We recommend that appropriate legal fees and disbursements incurred by or on behalf of the wrongfully convicted person be paid as part of the inquiry's expenses.

7. Report to be public

We recommend that the inquiry report become a public document.

8. Marshall compensation

We recommend that Government recanvass the adequacy of the compensation paid to Marshall in light of what we have found to be factors contributing to his wrongful conviction and continued incarceration.

Following my appointment, W. Wylie Spicer was appointed Commission Counsel and a meeting was held in Halifax on February 6 with Mr. Spicer, Ms. Anne Derrick, representing Donald Marshall, Jr., and Mr. Jamie Saunders, representing the Province of Nova Scotia. Mr. D. William MacDonald,Q.C., Deputy Attorney General for Nova Scotia, also attended. The purpose of the meeting was to discuss the procedure to be followed and to establish a tentative agenda.

On March 25 and 26, a further meeting was held with counsel in Halifax at which it was agreed that since all counsel involved in the present Inquiry had acted as counsel in the Marshall Inquiry, and since I had been a member of that Inquiry, together with the Chairman, Chief Justice Alexander Hickman, and Associate Chief Justice Lawrence Poitras, that the findings set out in Volume 1 of the Report of that Inquiry would form the factual basis for the present Inquiry. Ms. Derrick would be permitted to adduce such additional oral evidence as she may advise. Other counsel retained the right to cross-examine such witnesses. It was understood that while the examinations would not be conducted in the normal adversarial manner, all counsel were entitled to dispute any evidence introduced before this Inquiry. Documentary evidence would be filed later with written argument to follow and limited oral argument to be heard on May 8, 1990.

The May 8 meeting was postponed to May 31 to permit counsel to introduce and to dispute actuarial evidence as to loss of earnings and as to future rehabilitative treatment. The actuary and the psychologist were questioned on their reports at a discovery examination and, on consent, a transcript was filed as a separate sealed exhibit.

Oral evidence was heard at public hearings on April 2 and 3. In-camera hearings were heard on April 4 and 5. On the latter date, at the request of all counsel, I examined Donald Marshall, Jr., in the absence of counsel. His evidence was transcribed, and along with all the other evidence, has been reviewed by me.

Copies of the Commission and of the Order-In-Council No. 90-337 dated the 22nd day of March, 1990, referred to therein, are attached as Appendices 1 and 2 respectively.

All hearings were held in Halifax following publication of notices as required by the Statute in the presence of an official reporter and the following counsel:

Ms. Anne Derrick	*For Donald Marshall, Jr.*
Mr. Jamie Saunders	*For the Province of Nova Scotia*
Mr. W. Wylie Spicer	*For the Inquiry*

I wish to express my sincere appreciation to all counsel for their careful preparation and excellent presentation of argument. Their cooperation has been of great assistance to me in the conduct of the Hearings and in the preparation of this Report.

The reason for recanvassing the compensation already paid to Donald Marshall, Jr. results from the finding in the Marshall Inquiry Report that the process by which compensation was originally determined was flawed, and that the compensation awarded was restricted to Marshall's period of confinement in prison without taking into consideration the factors which put him in penitentiary and retained him there for eleven years.

The Marshall Inquiry made the following comments with respect to the flawed process:

> *The Commission did hear extensive evidence on the process by which compensation was eventually granted. Despite the intention of the Ministers involved, the process was not fair. Marshall's emotional state following 11 years in prison was such that he simply wanted to get the matter over with. It is our view that the final outcome was most significantly influenced by the findings and comments of the Court of Appeal in the Reference. The conclusion that Marshall was involved in a robbery and the opinion that Marshall had 'contributed in large measure to his conviction' provided the Crown with a strong basis for keeping any compensation as low as possible. We have concluded that there was no robbery, and that there was a gross miscarriage of justice which can in no way be blamed on Marshall. We do not know if the compensation negotiations would have reached a different result had the facts as we have found them been available to those concerned.*
>
> *Notwithstanding the release by Marshall, we believe it would be most unjust should that settlement be allowed to stand without any further consideration of its fairness based on the facts as now known. Accordingly, we recommend that Government recanvass the adequacy of the compensation paid to Donald Marshall, Jr. in light of what we have found to be the factors contributing to his wrongful conviction and continued incarceration.*

The Marshall Inquiry further commented on the quantum of the award and the facts which were not considered in determining the award:

> *The Government viewed the $270,000 as compensation for the period of time Donald Marshall, Jr. spent in jail. It did not take into consideration any negligence or wrongdoing that may have put him there or kept him there. Notwithstanding that, Marshall was asked to - and did - sign a full release of any and all claims which he might have had against the Crown. The monies paid to Donald Marshall, Jr. do not in any way purport to compensate him for the inadequate, incompetent and unprofessional investigations of Sandy Seale's murder by John MacIntyre and the Sydney Police Department; the inadequate representation he received at the hands of his counsel; the failure of the Crown prosecutor to disclose the inconsistent statements of key witnesses; the failure of the Attorney General's Department to disclose their knowledge of Jimmy MacNeil's coming forward in November 1971; and the incompetent reinvestigation by RCMP Inspector Marshall in November 1971 - none of which relates to the period Marshall spent in jail.*

It has been more than five years since Donald Marshall, Jr. was awarded compensation. However, it was only with the release of the Marshall Inquiry Report and the apology by the Province of Nova Scotia that Donald Marshall, Jr. can be said to have been vindicated. Having been found innocent in 1983, he was said to have contributed in large measure to his own conviction. This was an indignity which Donald Marshall, Jr. carried with him until this year.

Counsel for the Province of Nova Scotia has advised me that the Government accepts that the period from the decision of the Court of Appeal in May 1983 to February 1990 is also a relevant period which I may consider in awarding compensation.

Subsequent to oral argument being made on May 31, 1990, the Canadian Judicial Council convened in Halifax to hear evidence concerning the conduct of five Judges of the Nova Scotia Court of Appeal who had heard the Marshall Reference case in 1982. At these Judicial Council hearings, counsel acting for three of the Judges, on their behalf, accused Donald Marshall, Jr. once again of lying at his Trial and of being, at least in part, to blame for his own conviction, conclusions emphatically rejected by the Marshall Inquiry. These accusations received extensive media coverage. Counsel for Donald Marshall, Jr., as a consequence of these accusations, filed with me a copy of the submissions made by counsel for three of the Judges. I am asked to consider those submissions as forming part of the damages still being inflicted on Donald Marshall, Jr. I have reviewed his comments, but I do not consider that they are relevant to this Inquiry. Regrettably, they have adversely affected Donald Marshal, Jr. and his family by reviving memories of a tragic and traumatic experience which they believed and hoped had finally been laid to rest.

Counsel agreed that Volume 1 of the Marshall Inquiry Report should be filed as an Exhibit. Counsel also agreed that the findings and the facts of that Report should be considered as forming part of the record of this Inquiry, along with the transcripts of evidence taken at the Marshall Inquiry.

A brief summary of those factual findings is necessary to give some background to the happening which was to tragically alter the life of Donald Marshall, Jr., a 17-year-old Micmac, who resided with his family on the Membertou Reserve in Sydney, Nova Scotia. It is in light of these factors that I am to recanvass the adequacy of the compensation already paid to Donald Marshall, Jr.

Shortly before midnight on May 28, 1971, Donald Marshall, Jr., a 17-year-old Micmac, and Sandy Seale, a 17-year-old Black, met by chance and were walking through Wentworth Park in Sydney when they met two other men, Roy Ebsary, 59, a former ship's cook, and James (Jimmy) MacNeil, 25, an unemployed labourer.

Following a brief conversation, Marshall and/or Seale tried to "panhandle" Ebsary and MacNeil. That simple request - the kind most of us have encountered at one time or another - triggered a deadly over-reaction in the drunken and dangerous Ebsary. "This is for you, Black man", Ebsary said, and stabbed Seale in the stomach. He then lunged at Marshall, cutting him on the arm. Although Marshall's wound was superficial, Seale died less than a day later.

Seale was not killed during the course of a robbery or attempted robbery. Seale, who came from a strict family and was expected home before his midnight curfew, had enough money to catch a bus home. No evidence was adduced to indicate that he had ever been involved in any criminal activity. Although Marshall had had a few brushes with the law, they were of a minor nature involving supplying liquor to minors and one theft of wine. Roy Ebsary, on the other hand, had a reputation for violence and unpredictable behaviour, and had previously been convicted on a weapons charge involving a knife.

Seale and Marshall, who barely knew one another, would not have had the time or the inclination to plan a robbery in the few moments between their accidental meeting and the stabbing. According to the evidence, they did not even initiate the fateful conversation with MacNeil and Ebsary that ended in the stabbing.

The four Sydney police officers who initially responded to the report of the stabbing - Constables Leo Mroz, Howard Dean, Richard Walsh and Martin MacDonald - did not do a professional job. They did not cordon off the crime scene, search the area or question witnesses. In fact, none of the four officers dispatched to the scene even remained there to protect the area after Seale had been taken to the hospital. Their conduct was entirely inadequate, incompetent and unprofessional.

The same can be said of the subsequent police investigation directed by then Sergeant of Detectives John MacIntyre. MacIntyre very quickly decided that

Marshall had stabbed Seale in the course of an argument, even though there was no evidence to support such a conclusion. MacIntyre discounted Marshall's version of events partly because he considered Marshall a troublemaker and partly because he shared what was a general sense in Sydney's White community at the time that Indians were not "worth" as much as Whites.

Regardless of the reasons for his conclusions, MacIntyre's investigation seemed designed to seek out only evidence to support his theory about the killing and to discount all evidence that challenged it.

The most damning evidence against Marshall came from two teenaged "eyewitnesses", Maynard Chant, a 14-year-old who was on probation in connection with a minor criminal offence, and John Pratico, a mentally unstable 16-year-old whose psychiatrist later testified that he was known to fantasize and invent stories to make himself the centre of attention.

Shortly after Seale died, both youths gave statements to MacIntyre. Chant, although he had seen nothing, generally corroborated Marshall's version of events, while Pratico claimed to have seen two men running away from the stabbing scene. A few days later, however, they both gave contradictory second statements to MacIntyre. Pratico claimed he had seen Marshall stab Seale during an argument. Chant said he had also heard the argument and seen the stabbing. He placed a "dark-haired fellow" - presumably Pratico - in the bushes near where the stabbing took place.

None of this was true. The information in these second statements came from Pratico and Chant accepting suggestions John MacIntyre made to them. His attempt to build a case against Marshall that conformed to his theory about what had happened went far beyond the bounds of acceptable police behaviour. MacIntyre took Pratico, an impressionable, unstable teenager, to a murder scene, offered the youth his own version of events and then persuaded Pratico to accept that version as the basis for what became Pratico's detailed and incriminating statement. MacIntyre then pressured Chant, who was on probation and frightened about being sent to jail, into not only corroborating Pratico's statement, but also into putting Pratico at the scene of the crime. MacIntyre's oppressive tactics in questioning these and other juvenile witnesses were totally unacceptable.

Largely because of the untrue statements MacIntyre had obtained, Donald Marshall, Jr. was charged on June 4, 1971 with murdering Sandy Seale.

While the perjured evidence of Chant and Pratico did prove damning in Court, Marshall's wrongful conviction resulted as well from the failure of others - including both the Crown prosecutor and Marshall's own defence counsel - to discharge their professional obligations. The Crown prosecutor, Donald C. MacNeil, should have interviewed the witnesses who had given contradictory statements. He did not. He should also have disclosed the contents of those earlier inconsistent statements to the defence. He did not.

Marshall's defence counsel, for their part, failed to provide an adequate standard of professional representation to their client - C.M. (Moe) Rosenblum and Simon Khattar, who had access to whatever financial resources they required, conducted no independent investigation, interviewed no Crown witnesses and failed to ask for disclosure of the Crown's case against their client. Even though, prior to the Trial, they were aware that some witnesses had provided earlier statements, they made no effort to obtain them.

During the course of the Trial, the Trial Judge, Mr. Justice Louis Dubinsky, made several errors in law. The most serious of those was his misinterpretation of the *Canada Evidence Act* which prevented a thorough examination of Pratico's dramatic recanting of his statement against Marshall outside the courtroom. The cumulative effect of all of this was that Donald Marshall, Jr. was convicted and sentenced to life in prison.

Just ten days after Marshall's conviction, however, Jimmy MacNeil came forward to tell police that he had seen Ebsary stab Seale. At the request of the Sydney City Police Department and the Department of Attorney General, the RCMP looked into MacNeil's allegations, but the officer in charge of that investigation, in his own words, "botched" it.

Inspector Alan Marshall did not demand to see the Sydney City Police Department's entire file on the Seale case, did not interview Ebsary, Marshall, Chant or Pratico, and did not even speak to Jimmy MacNeil, except briefly in connection with the taking of a polygraph test. Instead, he relied almost exclusively on the results of those polygraph tests, on what MacIntyre had told him about the case, and on his own innate faith in the workings of the criminal justice system. Based on an incompetent and incomplete investigation, Inspector Marshall filed a report that claimed to be "a thorough review of the case", and concluded that Marshall had stabbed Seale.

The fact that MacNeil had come forward with this new and potentially important information was not disclosed to Marshall's defence counsel nor to the Halifax Crown counsel assigned to handle Marshall's Appeal of his conviction. As a result, this information was never presented to the Court of Appeal. If it had been, it is all but inevitable that a new Trial would have been ordered.

This, however, is not the only important issue that was not brought to the attention of the Court of Appeal. Neither Marshall's counsel nor Crown counsel raised the issue of the Trial Judge's erroneous rulings. And the Court of Appeal, which had a duty to review the complete Trial record to ensure that all relevant issues were argued, did not identify the significant errors. The Trial Judge's errors were so fundamental that the Court of Appeal would inevitably have ordered a new Trial if it had been aware of those errors. Unfortunately, however, these issues were not raised by counsel or identified by the Court of Appeal and Marshall's Appeal was denied.

Despite that, the case resurfaced on a number of occasions after the failure of the

Appeal. In 1974, for example, Roy Ebsary's daughter, Donna, confided to a friend that she had seen her father washing what appeared to be blood from his knife on the night of the murder. When she and the friend went to the Sydney City Police Department with this information, however, they were told by one of the key officers in the original Marshall investigation, Detective William Urquhart, that the case was closed. We believe Urquhart had a duty to pass this information on to his superior officer who, in turn, would have had an obligation to pass it on to the Crown. The Crown, for its part, would have then had an obligation to provide it to Marshall's counsel, who could have pursued the matter further.

In the end, Marshall's innocence only became apparent as the result of an almost accidental series of coincidences. While in prison in 1981, Marshall learned that Ebsary had admitted killing Seale. On the basis of that information, Marshall's new lawyer, Stephen Aronson, following his own review of the matter, asked police in January 1982 to reopen the case.

Although the RCMP officers assigned to the reinvestigation, Staff Sergeant Harry Wheaton and Corporal James Carroll, were initially skeptical of Marshall's innocence, they did what Inspector Marshall had not done in 1971 - they conducted a painstaking, professional investigation. They not only interviewed all of the appropriate witnesses - including Maynard Chant, John Pratico, Roy Ebsary and Marshall himself - but they also gathered the physical evidence that indicated that Ebsary's knife had been used to stab Sandy Seale.

This is not to suggest that everything about the 1982 investigation was handled well. The RCMP officers should not have suggested to Marshall during their interview with him in Dorchester Penitentiary that Marshall had better tell them a story they could believe or they would leave and never return or that they believed "there was something else going on in the park other than just a casual walk through the park to catch a bus".

That led Marshall who, it must be remembered, had spent 11 years in jail unsuccessfully protesting his innocence, to go along with what he already knew was Roy Ebsary's version of events - that the stabbing had occurred in the course of an attempted robbery.

Marshall's statement, which would not have been regarded as voluntary and therefore would not have been admitted into evidence in Court if Marshall were on Trial, was used to devastating effect against him during the later Court of Appeal Reference hearing. Harry Wheaton, like John MacIntyre, became blinded by his own assumptions during the course of his investigation. Wheaton believed Marshall had been victimized by MacIntyre, who he considered an "unscrupulous" police officer. As a result, Wheaton incorrectly accused MacIntyre of deliberately concealing evidence and erroneously suggested that the Department of Attorney General attempted to interfere in the RCMP investigation by restricting their efforts to interview key members of the Sydney City Police Department.

In fact, the RCMP's own sensitivity to its relations with the Sydney City Police Department and the Department of Attorney General was at the heart of its failure to fully pursue the investigation of the Sydney City Police Department's role in the Marshall case.

Wheaton's credibility as a witness was further tarnished when, during his testimony, he made a number of unsolicited comments about matters that were unrelated to his work on the Marshall case and which cast unwarranted aspersions on the reputation of an individual.

Nonetheless, it is fair to say that the investigative work by Wheaton and Carroll did lead directly to Justice Minister Jean Chrétien's decision to refer the Marshall case to the Nova Scotia Court of Appeal for hearing and determination. The Court of Appeal could have been an appropriate forum to examine why Marshall had been wrongfully convicted, but the decision to hold the Reference under what was then Section 617(b) [now Section 690(b)] of the *Criminal Code* instead of Section 617(c) [now Section 690(c)] precluded such a wide-ranging examination.

It is regrettable that the federal Justice Minister was influenced in this decision by the views of the then Chief Justice of Nova Scotia, Mr. Justice Ian MacKeigan, who expressed "real concern over whether [a Reference under Section 617(b)] would work". As a result of this decision, Marshall was not only put in the position where he was required to prove his own innocence, but the issue placed before the Court was narrowed to the simple question of whether Marshall was guilty or innocent of the charges against him.

Mr. Justice Leonard Pace, who was the Attorney General of Nova Scotia at the time of the original Marshall Trial and Appeal, should not have sat as a member of the panel hearing the Reference.

While the Court did quash Marshall's conviction and enter a verdict of acquittal, it also inexplicably chose to blame Marshall for his wrongful conviction. The Court's conclusion in this regard represented a serious and fundamental error. The Court used the evidence before it - as well as information that was never admitted into evidence - to "convict" Marshall of a robbery with which he was never charged, and concluded erroneously that Marshall had "admittedly" committed perjury. The Court's further suggestion that Marshall's "untruthfulness...contributed in large measure to his conviction" was not sustained by the evidence before the Court.

At the same time, the Court did not deal with either the significant lack of disclosure by the Crown prior to Marshall's original Trial, or the reasons for the perjured "eyewitness" testimony, nor did it deal with the Trial Judge's error in limiting the cross-examination of Pratico.

The Court's decision amounted to a defence of the criminal justice system at the expense of Donald Marshall, Jr. in spite of overwhelming evidence that the

system itself had failed.

The Court of Appeal's gratuitous comments about Marshall's responsibility for his own conviction and its conclusion that any miscarriage of justice was more apparent than real played a critically important role in Marshall's negotiations with the Department of Attorney General for compensation for his wrongful conviction. The Supreme Court of Canada commented on this influence in the course of its 1989 decision on judicial immunity. Within the Department of Attorney General, the Marshall case was not handled with the care and respect for fairness that is demanded.

Much of the blame for this must rest with Deputy Attorney General Gordon Coles. He failed to recognize the unique and tragic aspects of the Marshall case, and effectively prevented his Department from treating Marshall with the appropriate fairness.

When Coles did take action in the Marshall case, those actions were often inappropriate. For example, he should not have engaged in unilateral correspondence with counsel to the Campbell Commission, the Royal Commission which the Province had appointed to determine appropriate compensation for Marshall. Also, he should not have urged Crown Prosecutor Frank Edwards to take no position with regard to Marshall's guilt or innocence when Edwards appeared before the Court of Appeal Reference hearing.

Although Edwards must be commended for his refusal to back down from his position that he would urge the Court to acquit Marshall, he too acted improperly in arguing that the criminal justice system was in no way responsible for Marshall's wrongful conviction at a time when he knew such a position was not supported by facts.

That argument was adopted by the Court of Appeal and became an important factor in determining the amount of compensation paid Marshall. The Province's reliance on those comments - as well as the failure of senior officials within the Department of Attorney General to instruct their negotiator to treat the Marshall case as a unique situation rather than simply another civil dispute to be settled as cheaply as possible - made the compensation process itself flawed and unfair.

My mandate is therefore to recanvass the adequacy of the compensation paid to Donald Marshall, Jr. in the light of these facts, the findings of the Marshall Inquiry (included as Appendix 3 to this Report), supplemented by the additional evidence presented at this Inquiry; and taking into account the entire period from the date of his original incarceration in May 1971 to the present time. The award must be fair, reasonable and realistic showing care and concern for the victim, as well as a proper regard for the rights of the judicial system under which this miscarriage of justice occurred.

The Current Compensation Scheme in Canada

Canada ratified the *International Covenant on Civil and Political Rights* and the *Optional Protocol to the Covenant* on August 19, 1976. The *Covenant* is a binding obligation in international law upon the federal and provincial governments.

Article 14(6) of the *Covenant* provides as follows:

> *When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.*

In Canada, the only method whereby an individual who has been wrongfully convicted and imprisoned can be compensated is through an ex gratia payment by the Crown. Public attention has recently been focussed on this lacuna in Canadian law with the result that the matter was considered at a Federal-Provincial Deputy Ministers Conference in 1985 and a Task Force set up to consider the issue. In their Report they examined redress mechanisms in foreign jurisdictions, looked at Canadian compensatory schemes, highlighted a number of significant issues and suggested a number of options whereby a wrongfully convicted and imprisoned person could be compensated.

In March 1988 at a meeting in Saskatoon of Federal and Provincial Justice Ministers, the Federal/Provincial Guidelines relating to compensation for persons wrongly convicted and imprisoned were adopted. In addition, the Federal Government announced that it would pay 50% of the cost of compensation awarded in accordance with these Guidelines to persons who had been wrongly convicted. A copy of these Guidelines is included as Appendix 4 to this Report.

The fact remains, however, that there is in Canada no legislative mechanism to provide compensation to those who have been unjustly deprived of their freedom. It is in this context that I must reassess the compensation already paid to Donald Marshall, Jr. This compensation must also be fashioned in light of the request made by counsel for Donald Marshall, Jr. that compensation paid to him and to his parents be in the form of a structured settlement to the fullest extent possible.

Counsel for the Government of Nova Scotia has indicated that the Government is in full agreement with the proposal made by counsel for Donald Marshall, Jr. that the award be in the form of a structure.

Compensation in General

Compensation is comprised of two major components: reparation for financial losses suffered, whether past or future, as a result of the wrongful imprisonment (known as pecuniary loss) and an amount of money intended to alleviate the consequences of the wrongful imprisonment (known as non-pecuniary loss). This latter component, in the traditional setting of a personal injury case, addresses such questions as pain and suffering caused, for instance, by the loss of a limb. It is necessarily arbitrary since money is obviously not a true replacement.

Assessment of pecuniary loss is often based on actuarial calculations of income lost, based on a person's career pattern, age, physical condition, etc. If the victim is well-established in a career, this exercise can have some hope of accuracy. If the victim is young, however, it is naive to place reliance on lost income calculations based on a career not yet begun.

Money for non-pecuniary loss should be forward looking, to provide consolation to the victim with which he can continue his life. It must consider the individual situation of the victim, and in the context of wrongful imprisonment, this aspect of a claim should recognize the fact that the wrongdoer may be the Government itself, or those associated with the judicial system - the very people in whom we must all place our trust in order for our democratic society to function fairly.

The Claims

The following claims have been submitted for consideration in this case:

1. Donald Marshall, Sr. and his wife, Caroline

(a) Pecuniary

(b) Non-Pecuniary

2. Donald Marshall, Jr.

(a) Pecuniary
- (i) Past loss of income
- (ii) Future loss of income
- (iii) Cost of future care

(b) Non-Pecuniary

3. Derivative Claim

(1) MR. AND MRS. DONALD MARSHALL, SR.

(a) Pecuniary Losses

All counsel agreed that the pecuniary losses of Donald Marshall, Jr.'s parents should be assessed at $55,023.18. This amount was arrived at by estimating the cost of visits by Donald Marshall, Jr.'s parents to Dorchester and Springhill to visit their son, the costs of accommodation associated therewith and telephone and various other expenses incurred during the eleven years of this incarceration.

Mr. and Mrs. Marshall are entitled to interest on this principal amount. Since the claim was incurred over the eleven year period of Donald Marshall, Jr.'s incarceration, it is appropriate to calculate the interest by averaging the Chartered Bank 90-day deposit rates in force over that eleven year period and then dividing that average by two. This method recognizes the fact that the entire loss was not incurred completely at one time. The information provided to me was that the rate over that eleven year period on 90-day deposits was 9.84, half of which is 4.92 per cent. Interest on the principal amount at this rate over eleven years is $29,777. Interest for the remaining eight years (from 1982 to 1990) should be at the full rate since the expenditures had been fully made by the Marshalls by 1982. The information provided to me was that the Chartered Bank 90-day deposit rate average for the years 1982 to 1990 was 9.7 per cent. Interest on the principal amount at that rate amounts to $42,697.98. The total amount of interest, I therefore find to be $72,475 which, added to the principal amount, produces a total amount for pecuniary loss of $127,498.18.

(b) **Non-pecuniary Losses**

This part of the claim is to compensate the parents of Donald Marshall, Jr. for the years of anguish, anger and frustration which they suffered with such dignity whilst their son was in prison. I may have had some difficulty in concluding that the parents of Donald Marshall, Jr. were entitled to compensation for this loss, bearing in mind the terms of the Order-in-Council, but Mr. Saunders removed any such doubt when he advised that the Government of Nova Scotia urged me to favourably consider such an award. I repeat part of Mr. Saunders' submission on this point with which I am in full agreement:

> *There can be no doubt that they suffered immeasurably by virtue of their eldest son's arrest, conviction and incarceration.*
>
> *Feelings of uncertainty, sorrow, anger, frustration and loneliness must have been their constant companions.*
>
> *Yet it is a measure of their strength, love and spirituality that they never despaired. They refused to give up hope. They imparted that support and strength to their son by visits and phone calls whenever they could manage.*
>
> *As Grand Chief, Mr. Marshall held a position of the highest responsibility and respect. As a proud man, he kept his feelings to himself. He was unable to share the burden of shame he felt with others.*
>
> *He and his wife depleted their own savings, or borrowed from others, in order to visit their son in prison. Personal recollection indicates that either Mr. or Mrs. Marshall, Sr. was in attendance every day during the public hearings held in Sydney. Their support for their son was unwavering. Fortunately, he has had, and will continue to have, their help, tolerance and guidance.*
>
> *The evidence discloses that in the year following Donald Marshall, Jr.'s incarceration, his father's business suffered. Work dropped off. They were the victims of crank calls. He had to unlist their telephone number with the obvious result that their business was adversely affected. This is compensable. There is no evidence to what degree it suffered but we recommend it be taken into account by the Commission in determing an appropriate lump-sum award to Mr. and Mrs. Marshall.*

The following excerpts from the testimony of Mr. Marshall, Sr. demonstrate directly the suffering endured by both he and his wife:

> *Q.* *Mr. Marshall, did Junior's conviction and imprisonment have an effect on your ability to do your job as Grand Chief?*

A. *That's very, very hard to describe. It was very hard for me to face any public gatherings, even to my people, because myself, personally, I have a feeling that, you know, the people say to me now, in my mind, people saying that, 'There he is. His son killed somebody. There he is himself.' So it was really hard for me to face my people.*

. . .

Q. *Mr. Marshall, was Junior's conviction regarded as a disgrace to you and your family?*

A. *I would say, yes.*

In his submission, Mr. Saunders suggested that I might find some guidance in arriving at a quantum for this portion of the award from the fatal injuries cases, and the awards given therein, in respect of damages suffered by family members following the death of a loved one. While these cases have been of some assistance to me, they are significantly different inasmuch as Donald Marshall, Jr. is now back with his family.

Having reviewed all the material before me, I find that $25,000 is an appropriate amount to recommend as a joint award to Mr. and Mrs. Marshall for their non-pecuniary losses.

Mr. and Mrs. Marshall are entitled to interest on the sum of $25,000. I find that their suffering lasted throughout the period of their son's incarceration, and indeed, right up to the present time. Accordingly, and as explained earlier, the interest rate should be set at 4.8 per cent or one-half of the 90-day rate for the period 1971-1990. This generates an interest amount of $22,871.25 for a total of $47,871.25 for non-pecuniary losses.

I shall deal later in this Report with the request made by Mr. and Mrs. Marshall that as much of their award as possible be placed in a structure.

(2) CLAIMS OF DONALD MARSHALL, JR.

(a) Pecuniary Losses

At the time Donald Marshall, Jr. was charged with murder in June 1971, he had been out of school for merely a year. He had been helping his father in the latter's drywalling business, but it is very difficult to say whether he would have made a career of it. As a result of his years in prison, I accept that he is now partially disabled from holding a 9 to 5 job. To what extent that disability is a result of the prison experience is an impossible question to answer. Also interfering with Donald Marshall, Jr.'s ability to work is his substance abuse problem. Once again, how much of that disability has been caused by his prison experience and the way he has lived since being released from prison must remain an imponderable.

I have concluded that it is not appropriate to try to assess the pecuniary loss of Donald Marshall, Jr. either past, present or future by the use of the actuarial material provided to me. I refer to the comments of Dickson, J. of the Supreme Court of Canada, in Andrews v. Grand & Toy Alberta Ltd. (1978), 83 D.L.R. (3d) 452 (SCC) at p. 458:

> *The apparent reliability of assessments provided by modern actuarial practice is largely illusionary, for actuarial science deals with probabilities, not actualities. This is in no way to denigrate a respected profession, but it is obvious that the validity of the answers given by the actuarial witness, as with a computer, depends upon the soundness of the postulates from which he proceeds. ... actuarial evidence speaks in terms of group experience. It cannot, and does not purport to, speak as to the individual sufferer...*

This problem is exacerbated when the claimant is a youth. In this case, notwithstanding the best efforts of counsel, the material filed is simply too speculative to be of much assistance.

Nor do I intend to assess the degree to which Donald Marshall, Jr. is disabled from working based on the psychologist's report submitted to me. Once again, I find that this material is too speculative.

Instead, I believe that the appropriate way to deal with the pecuniary losses of Donald Marshall, Jr. is to recognize that, by some method, he should be provided with an income which will allow him to live his life with dignity. I have concluded that an income of $1,875 per month indexed at 3 per cent per year will produce such a result. Later in this Report, I deal with the way in which such an income will be generated.

Donald Marshall, Jr. has a substance abuse problem. That fact is admitted. The evidence is uncontradicted that in order for him to be able to live a productive life, he must overcome this problem. It would also seem to be the case that at the moment, Mr. Marshall, Jr. is unlikely to immediately seek out treatment and rehabilitation. It is, nevertheless, clear that it would be appropriate to set aside an amount of money which could be drawn upon by him should he decide the time had arrived for him to seek rehabilitation.

I, therefore, recommend that the Government of Nova Scotia undertake to provide a sum not to exceed $50,000 to cover necessary expenses for the treatment and rehabilitation of Donald Marshall, Jr. at a recognized treatment centre, to be chosen by him. The accounts for treatment are to be forwarded directly to the Government agency appointed to deal with the matter. Transportation and other proper expenses are to be forwarded to the same agency.

At some point, Donald Marshall, Jr. should take the initiative to seek professional assistance in his rehabilitation. The continuing publicity concerning

his tragedy makes any consideration of immediate treatment most unlikely. However, these monies should not be made available in perpetuity. I, therefore, recommend that the fund be available to him, provided that treatment commences within five years from the date of this Report. Early treatment and complete cooperation will enhance his opportunity not only for a longer life, but for a better quality of life.

It was submitted by counsel for Donald Marshall, Jr. that the rehabilitation and treatment award should be given to him whether he participated in a program of rehabilitation or not. This argument flies in the face of well recognized legal authorities and must be rejected.

(b) **Non-Pecuniary Losses**

> *There is no medium of exchange for happiness. There is no market for expectation of life. The monetary valuation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one... No money can provide true restitution.*
>
> *(per Dickson, J. in Andrews v. Grand & Toy Alberta Limited, supra, at p.475-6.)*

Money, however, is the only way known to the law to compensate a person for non-pecuniary losses.

As a victim of wrongful imprisonment, Donald Marshall, Jr. suffered at the hands of the judicial system itself. This very institution in which we pride ourselves so greatly, failed him grievously.

The types of losses which a person suffers as a result of wrongful imprisonment have recently been identified in a paper by Professor H. Archibald Kaiser, *"Wrongful Conviction and Imprisonment: Towards an End to the Compensatory Obstacle Course"*, Windsor Yearbook of Access to Justice, 1989, many of which were considered by the New Zealand Royal Commission in the Arthur Allan Thomas case, which will be referred to later:

(i) *loss of liberty;*
(ii) *loss of reputation;*
(iii) *humiliation and disgrace;*
(iv) *pain and suffering;*
(v) *loss of enjoyment of life;*
(vi) *loss of potential normal experiences, such as starting a family or social learning in the normal workplace;*
(vii) *other foregone developmental experiences, such as education or social learning in the normal workplace;*
(viii) *loss of civil rights;*
(ix) *loss of social intercourse with friends, neighbours and family;*

(x) *physical assaults while in prison by fellow inmates and staff;*

(xi) *subjection to prison discipline, including extraordinary punishments imposed legally (the wrongfully convicted person might, understandably, find it harder to accept the prison environment), prison visitation and diet;*

(xii) *accepting and adjusting to prison life, knowing that it was all unjustly imposed;*

(xiii) *adverse effects on the claimant's future, specifically the prospects of marriage, social status, physical and mental health and social relations generally.*

Professor Kaiser continues with the following apt commentary:

> *Surely few people need to be told that imprisonment in general has very serious social and psychological effects on the inmate. For the wrongfully convicted person, this harm is heightened, as it is hardly possible for the sane innocent person to accept not only the inevitability but the justice of that which is imposed upon him. For the person who has been subjected to a lengthy term of imprisonment, we approach the worst case scenario. The notion of permanent social disability due to a state wrong begins to crystallize. The longer this distorting experience of prison goes on, the less likely a person can ever be whole again. Especially for the individual imprisoned as a youth, the chances of eventual happy integration into the community must be very slim.*

Mike Grattan, who was convicted in 1971 and sentenced to life imprisonment for a murder committed when he was 15 years old, and who served approximately eleven years in Dorchester Penitentiary and the Springhill Correctional facility gave a graphic description of prison life. He and Donald Marshall, Jr. served time in the same institutions and knew each other very well. His description of grey walls, grey cement floors, grey bars, grey cell doors, grey-faced people and grey food, is indicative of the custodial setting in which an air of fear and tension continually existed. Punishment in the form of solitary confinement, loss of visiting rights and recreational privileges was a constant possibility. Violence among inmates flared up on the slightest provocation, real or imagined, and resulted in beatings, stabbings and deaths. Drugs, alcohol and weapons were a part of this noisy, cold and frightening place with searchlights flashing intermittently and the ever-pervasive smell of sweat and ammonia. His evidence reveals that prisoners live without privacy, subject to rules which govern their every hour, where strip searches and confinement in segregation are common occurrences. This was "home" to Donald Marshall, Jr. for eleven years - a life without freedom, without hope and without dignity.

It must not be forgotten that Donald Marshall, Jr. suffered these indignities as a Native person. He suffered the loss of his ability to use his language in prison because of the fact that he was Native. He may have lost the opportunity to become Grand Chief of the Micmac Nation due to his incarceration. The

evidence indicates that the Micmac community is very close knit and that Donald Marshall, Jr. would have suffered in the extreme by being wrenched away from the community as a youth.

As found by the Marshall Inquiry, many of the wrongs that were inflicted on Donald Marshall, Jr. were inflicted by the Government or by those charged with the administration of the judicial system in the Province of Nova Scotia. These are legitimate items which I may take into account in assessing the amount of money to be recommended as an award to Donald Marshall, Jr. for his non-pecuniary loss.

All counsel have referred to the "Trilogy" cases of Andrews, Teno, and Thorton, in which the Supreme Court of Canada determined that a limit of $100,000 was appropriate for the most serious non-pecuniary loss. The Federal-Provincial Guidelines set a limit in the same amount. The Marshall Inquiry recommended that there be no pre-set limit and the Government of Nova Scotia accepted that recommendation. Subsequent cases in the Supreme Court of Canada decided that inflation is a proper factor to be considered and the limit is now in the vicinity of $200,000. I am not bound by this limitation, nor do I consider that the rationale which led to the limitation is applicable in this case, although the judgments do provide assistance in understanding the nature and purpose of a non-pecuniary award.

In the New Zealand case of Arthur Allan Thomas, who was convicted of murder and later granted a free pardon, a Royal Commission awarded him approximately $250,000 Canadian, without any award for interest, as compensation for non-pecuniary loss. Thomas was 32 years old at the time of conviction and spent nine years in prison. Without attempting to make a comparison, I point out that Donald Marshall, Jr. was in custody for eleven years from age 17 to age 28. This is probably the most important period of a person's life, during which decisions on the future are formed and steps taken to advance them. These are years which can never be relived or replaced.

The primary objective of damages is to compensate the victim. Ability to pay is irrelevant in the quantification of pecuniary losses once the evidence is available to establish the actual monetary loss sustained. In a non-pecuniary situation, the loss cannot be quantified. There is no dollar figure which can replace lost years, lost opportunities or compensate for the injury sustained by the victim. I can only recommend an amount as solace which is fair and reasonable in the unusual circumstances of this tragic miscarriage of justice.

After assessing all the above factors, I recommend that the appropriate additional amount to be awarded to Donald Marshall, Jr. for his non-pecuniary losses, inclusive of interest, is $382,872. Of this amount, $225,000 represents the principal with the remaining $157,872 being interest calculated on the following basis. The losses incurred commenced in 1971 and continue to the present. Accordingly, and consistent with the manner in which interest has been calculated in other portions of this Report, the appropriate interest figure is 4.8

per cent. For the years 1971 to 1984, this generates interest in the amount of $140,400. In 1984, Mr. Marshall, Jr. received $173,000 and, therefore, for the remaining six years, interest should be calculated on the balance of the principal not yet paid, being $52,000.The amount of interest generated on this principal amount (calculated on 50% of the 90-day rate of 11.18 per cent for the years 1984-1990) for six years is $17,472 ($2,912 a year), for a total interest amount of $157,872. From this total must be deducted $183,000, of which $173,000 was received as a result of the first compensation process in 1984, and the remaining $10,000 payment made recently upon my recommendation. In making this deduction, I am applying the total amount of the interest ($157,872) and $25,128 of the principal to this reduction. The net amount of the award to Donald Marshall, Jr. for non-pecuniary losses is, therefore, $199,872, all of which is to be considered principal.

3. THE DERIVATIVE CLAIM

It has been argued by counsel for Donald Marshall, Jr. that part of the award of compensation to Donald Marshall, Jr. should be in the form of monies to be paid to the Grand Council of the Micmac Nation in trust. These monies would be used to establish and operate a Native Survival Camp for Micmac children, the idea being that the Camp would seek to retain and strengthen Native culture in Micmac children. It is suggested by counsel that Donald Marshall, Jr. would like to work at such a Camp.

I agree with counsel that the evidence before me is clear that Donald Marshall, Jr. has a particular ability to work with young children and that he has expressed an interest in being able to work at such facility.

With the experience and information gained as a Commissioner on this Inquiry and on the Marshall Inquiry, I agree with counsel that the concept of a Native Survival Camp is a worthwhile project and would no doubt assist in strengthening Native cultural values amongst Micmac children in Nova Scotia.

Notwithstanding my own support for such an idea, I cannot find authority in the Order-in-Council constituting this Inquiry whereby I could recommend such an award as part of compensation to Donald Marshall, Jr. I am being asked by this request to recommend an amount to finance a project in which Donald Marshall, Jr. will be involved as a part of his rehabilitation and as reparation to the Micmac community. I have already recommended compensation to him in the form of a substantial down payment and also by way of an income to entitle him to live with dignity. I have also recommended payment to him for his non-pecuniary losses which are intended to alleviate the consequences of his wrongful imprisonment. A further recommendation is that monies be set aside to facilitate his future substance abuse treatment and rehabilitation. In my view, I have recommended fair and adequate compensation to Donald Marshall, Jr. to the full extent permitted by the terms of the Order-in-Council. The request to fund the Grand Council to set up a Survival Camp falls outside the scope of my authority, and I do not recommend it.

In concluding this aspect of the award, I do note that part of the material filed with me includes the summary of the response of the Government of Nova Scotia to the Marshall Inquiry Recommendations. It is clear from reviewing this response that the Government of Nova Scotia is sensitive to the fragile position of the Micmac culture. The Government seems well disposed to responding to these concerns of the Micmacs. There is a rising consciousness among Canadians throughout the entire country that we have been less than generous and understanding towards aboriginal people, particularly in recognizing that they possess their own culture, languages and a way of life that has survived for centuries under difficult conditions and that it is worthy of preservation. The ceremonial drum is sounding a new era for aboriginal people whose leaders are developing educational programs and political strategies designed to bring to the attention of the public that they have been deprived of their ancestral lands, their cultural heritage and Native lifestyle. The leaders are creating a new confidence among their people; fostering an appreciation of the beauty of their own distinctive heritage; and instilling in them a firm resolve to play a more important role in the future of Canada.

A survival camp project should be a cooperative endeavour involving participation by governments, Micmacs and interested citizens. The amount required to fund the operation is relatively modest, and with the guidance and experience of the Elders of the Micmac community, the project could serve as a symbolic bridge between the Native and the White communities. In particular, in the Government's response to the involvement of Micmacs in the justice system, there is a clear indication of the Government's readiness to establish pilot projects to assist in eradicating difficulties encountered by Micmacs in dealing with the justice system. The request for funding for the Cultural Survival Camp might be properly directed to the Government. This Compensation Inquiry cannot be used as a means to solve issues other than the provision of proper compensation to Donald Marshall, Jr.

Appendix 1 Commission

By His Honour The Honourable Lorne O. Clarke, Administrator of the Government of the Province of Nova Scotia

To: The Honourable Gregory T. Evans, Q.C.

Greeting:

Whereas it is deemed expedient to cause inquiry to be made, pursuant to the Public Inquiries Act, into and concerning the public matters hereinafter mentioned in relation to which the Legislature of Nova Scotia may make laws;

Now know ye that I have seen fit, by and with the advice of the Executive Council of Nova Scotia, to appoint and do hereby appoint you, the Honourable Gregory T. Evans, Q.C. , during pleasure, under the Public Inquiries Act to recanvass the adequacy of compensation paid to Donald Marshall, Jr., in light of what the Royal Commission on the Donald Marshall, Jr., Prosecution found to be factors contributing to his wrongful conviction and continued incarceration, as indicated in Recommendation #8 of the Report of the Royal Commission, and to determine any further compensation which is to be paid as a result;

The Administrator in Council is further pleased to:

(1) Direct the Honourable Gregory T. Evans, Q.C., in making his inquiry, determination and recommendation to the Governor in Council:

(a) to have regard to recommendations 4, 5, 6, and 7 contained in the Report of the Royal Commission on the Donald Marshall, Jr., Prosecution;

(b) to retain the services of such technical, clerical and other personnel, including actuarial and legal counsel, who in his opinion are required for the purposes of the inquiry;

(c) to report to the Governor in Council his findings, determination and recommendations as he sees fit;

(2) Authorize the payment to all personnel required in the work of the Inquiry, for necessary disbursements, travel and reasonable living expenses as are required in the discharge of their duties;

(3) Order that remuneration, costs and expenses payable or incurred in the course of the inquiry shall be paid out of the Consolidated Fund of the Province.

Given under my Hand and Seal at Arms at the City of Halifax this 22nd day of March in the year of Our Lord one thousand nine hundred and ninety and in the thirty-ninth year of Her Majesty's reign.

Provincial Secretary

Appendix 2 Order in Council

Certified to be a true copy of an Order of his Honour the Lieutenant Governor of Nova Scotia in Council made the 22nd day of March, A.D., 1990

Whereas it is deemed expedient to cause inquiry to be made, pursuant to the Public Inquiries Act, into and concerning the public matters hereinafter mentioned in relation to which the Legislature of Nova Scotia may make laws:

Now therefore, the Administrator of the Government of the Province of Nova Scotia, by and with the advice of the Executive Council, is pleased to appoint the Honourable Gregory T. Evans, Q.C., under the Public Inquiries Act to recanvass the adequacy of compensation paid to Donald Marshall, Jr., in light of what the Royal Commission on the Donald Marshall, Jr., Prosecution found to be factors contributing to his wrongful conviction and continued incarceration, as indicated in Recommendation #8 of the Report of the Royal Commission, and to determine any further compensation which is to be paid as a result.

The Administrator in Council is further pleased to:

1. Direct the Honourable Gregory T. Evans, Q.C. , in making his inquiry, determination and recommendation to the Governor in Council:

(a) to have regard to recommendations 4, 5, 6, and 7 contained in the Report of the Royal Commission on the Donald Marshall, Jr., Prosecution;

(b) to retain the services of such technical, clerical and other personnel, including actuarial and legal counsel, who in his opinion are required for the purposes of the inquiry;

(c) to report to the Governor in Council his findings, determination and recommendations as he sees fit;

(2) authorize the payment to all personnel required in the work of the Inquiry, for necessary disbursements, travel and reasonable living expenses as are required in the discharge of their duties;

(3) order that remuneration, costs and expenses payable or incurred in the course of the inquiry shall be paid out of the Consolidated Fund of the Province.

H. F. G. Stevens, Q.C.,
Clerk of The Executive Council.

Appendix 3 Findings of the Marshall Inquiry

Summary of Findings

1.1 Introduction

We find:

that the criminal justice system failed Donald Marshall, Jr. at virtually every turn from his arrest and conviction in 1971 up to - and even beyond - his acquittal by the Supreme Court of Nova Scotia (Appeal Division) in 1983.

that his miscarriage of justice could have and should have been prevented if persons involved in the criminal justice system had carried our their duties in a professional and/or competent manner.

that Marshall was not the author of his own misfortune.

that the miscarriage of justice was real and not simply apparent.

that the fact that Marshall was a Native was a factor in his wrongful conviction and imprisonment.

1.2 The Incident

We find:

that Sandy Seale was not killed in the course of a robbery, attempted robbery, mugging or rolling.

that Donald Marshall, Jr. told the truth about the events surrounding the stabbing when first interviewed by the Sydney City Police on the night of the incident.

that Seale and Marshall met by chance following the dance.

that Ebsary and MacNeil initiated the contact with Marshall and Seale.

that Ebsary, MacNeil, Marshall and Seale engaged in a conversation that lasted for several minutes.

that the stabbing was the result of Ebsary's violent and unpredictable character.

1.3 The Police Response

We find:

that the immediate police response to the stabbing was entirely inadequate, incompetent and unprofessional.

that the subsequent MacIntyre investigation was inadequate, incompetent and unprofessional.

that MacIntyre, without any evidence to support his conclusions and in the face of evidence to the contrary, had identified Marshall as the prime suspect by the morning of May 29, 1971 and concluded that the incident occurred as the result of an argument.

that the fact that Marshall was a Native was one of the reasons MacIntyre identified him as a prime suspect.

that MacIntyre accepted evidence that supported his conclusion and rejected evidence that discounted that conclusion.

that MacIntyre should not have ignored the statements given by George and Sandy MacNeil, which described two men fitting the descriptions given by Marshall in the park at the time of the incident.

that MacIntyre failed to pursue efforts to locate the two men Marshall had described as being involved in Seale's killing.

that the Sydney City Police Department should have taken advantage of the investigative facilities and services available from the RCMP.

that an autopsy should have been performed on Sandy Seale.

that the information in John Pratico's statement of June 4, 1971 resulted from suggestions MacIntyre made to Pratico.

that MacIntyre's interview with Maynard Chant was conducted in an intimidating and unacceptable manner.

that the information in Chant's statement of June 4, 1971 concerning a dark-haired fellow in the bushes, an argument, and Marshall stabbing Seale, resulted from suggestions MacIntyre made to Chant.

that Urquhart did not crumple up and throw away Patricia Harriss' partially completed statements.

that Harriss used information given to her by someone else in providing the first story she told police.

that Urquhart, although a secondary player in the MacIntyre investigation, had a responsibility to speak out when the investigation was being conducted improperly.

that Robert Patterson was found by Sydney City Police and questioned but no statement was taken.

1.4 Trial Process

We find:

that the Crown prosecutor and the defence counsel in Donald Marshall, Jr.'s 1971 trial failed to discharge their obligations, resulting in Marshall's wrongful conviction.

that the Crown prosecutor, in view of the conflicting statements before him, should have interviewed all of the key witnesses separately prior to trial.

that the Crown prosecutor should have disclosed the contents of prior inconsistent statements to the defence.

that defence counsel failed to provide adequate professional representation in that they did not arrange for any independent investigation, interview Crown

witnesses or seek disclosure of the Crown case.

that defence counsel were aware of the existence of prior statements by Chant, Pratico and Harriss but did not request them.

that the trial judge misinterpreted the *Canada Evidence Act* in refusing to permit a thorough examination of Pratico's comments outside the courtroom.

that the cumulative effect of incorrect rulings by the trial judge denied Marshall a fair trial.

1.5 1971 RCMP Review

We find:

that the Crown prosecutor in Sydney, Donald MacNeil, and the Attorney General's office in Halifax failed to discharge their duties because they did not disclose the existence of important new evidence to counsel for Marshall in November 1971.

that Robert Anderson, the Director (Criminal) in the Department of Attorney General should have instructed his Crown prosecutors to bring the evidence to the attention of Marshall's counsel.

that the RCMP review failed to uncover Donald Marshall. Jr.'s wrongful conviction because of Inspector E.A. Marshall's incompetent investigation into Jimmy MacNeil's allegations.

1.6 Appeal Process

We find:

that counsel for Donald Marshall, Jr. failed to put arguments before the Court of Appeal concerning fundamental errors of law during the trial, and that this failure represented a serious breach of the standard of professional conduct expected and required of defence counsel.

that the Crown's case should not have been handled by a junior lawyer in the Department.

that Crown counsel should have raised the issue of the trial's judge's erroneous rulings when defence counsel failed to do so.

that there should have been greater cooperation between local Crown prosecutors in Sydney and the lawyers handling the appeal in the Department of Attorney General in Halifax.

that the Court of Appeal had a duty to review the complete trial record and ensure that all relevant issues were argued.

that the errors by the trial judge were so fundamental that a new trial should have been the inevitable result of any appeal.

1.7 The 1974 and 1975 Reviews

We find:

that Constable Gary Green acted properly in providing information regarding Donna Ebsary's evidence to the Sydney City Police Department, and that he cannot be faulted for failing to investigate the matter further.

that Urquhart was remiss in his duties when he failed to follow up on new evidence indicating that Donna Ebsary had seen her father with a blood-stained knife on the night of Seale's murder.

that the RCMP did conduct a file review of the Marshall case in 1975 and that while little is known about its purpose or results, it is clear that the Sydney City Police Department cooperated with the RCMP in the 1975 review.

1.8 The 1982 Reinvestigation

We find:

that Staff Sergeant Wheaton and Corporal Carroll should have been more circumspect in questioning Marshall in Dorchester about what happened on the night of the murder.

that Chief MacIntyre did not deliberately attempt to hide any documents from the RCMP investigators.

that the Department of Attorney General did not interfere with the RCMP investigation.

1.10 Setting up the Reference

We find:

that it is regrettable that the Attorney General of Canada was influenced by Chief Justice MacKeigan's views in his decision to hold the Reference under Section 617(b) [now Section 690(b)] of the *Criminal Code* rather than Section 617(c) [now Section 690(c)].

that the decision to proceed under Section 617(b) precluded a complete examination of why the wrongful conviction occurred.

1.11 Reference Decision

We find:

that the Court of Appeal made a serious and fundamental error when it concluded that Donald Marshall, Jr. was to blame for his wrongful conviction.

that the Court selectively used the evidence before it - as well as information that had not been admitted in evidence - in order to reach its conclusions.

that the Court took it upon itself to "convict" Marshall of a robbery with which he was never charged.

that the Court was in error when it stated that Marshall "admittedly" committed perjury.

that the Court did not deal with the significant failure of the Crown to disclose evidence, including the conflicting statements by witnesses, to defence counsel.

that the Court's suggestion that Marshall's "untruthfulness ... contributed in large measure to his conviction" was not supported by any available evidence and was contrary to evidence before the Court.

that the Court did not deal with the errors by the trial judge in limiting the cross-examination of Pratico.

that Mr. Justice Leonard Pace should not have sat as a member of the panel hearing the Reference.

that the Court's decision amounted to a defence of the criminal justice system at Marshall's expense, notwithstanding overwhelming evidence to the contrary.

that the Court's gratuitous comments in the last pages of its decision created serious difficulties for Donald Marshall, Jr., both in terms of his ability to negotiate compensation for his wrongful conviction and also in terms of public acceptance of his acquittal.

1.12 Donald Marshall, Jr. and the Attorney General's Department

We find:

that Donald Marshall, Jr. was not treated properly by the Attorney General's Department.

that Gordon Coles should not have attempted to persuade Frank Edwards not to urge the Court of Appeal to acquit Marshall.

that Edwards is to be commended for refusing to back down in his position in favour of arguing for the Court to acquit Marshall.

that Edwards acted improperly in arguing before the Court of Appeal that the criminal justice system was not in any way responsible for Marshall's wrongful conviction, a position he knew was not supported by the facts.

that Coles failed to do any research before advising the Attorney General not to appoint a public inquiry into the Marshall case.

that Coles' failure to take any positive action to determine why Marshall had been wrongfully convicted is inexcusable.

that Coles and Martin Herschorn failed to review any of the relevant documents before refusing a *Freedom of Information Act* request for them from Marshall's counsel.

that Coles' unilateral correspondence with counsel to the Campbell Commission was improper.

that Coles should have considered whether it was appropriate for the Province to approach the compensation process in the Marshall case simply with an eye to achieving the best possible financial deal for the Province.

that the Court of Appeal's gratuitous references to Marshall's responsibility for his own conviction were a factor in determining the amount of compensation

paid to him.

that the compensation paid to Donald Marshall, Jr. was only for the period of time Marshall spent in jail.

Appendix 4 Federal/Provincial Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons

The following guidelines include a rationale for compensation and criteria for both eligibility and quantum of compensation. Such guidelines form the basis of a national standard to be applied in instances in which the question of compensation arises.

A. Rationale

Despite the many safeguards in Canada's criminal justice system, innocent persons are occasionally convicted and imprisoned. Recently three cases (Marshall, Truscott, and Fox) have focussed public attention on the issue of compensation for those persons that have been wrongfully convicted and imprisoned. In appropriate case, compensation should be awarded in an effort to relieve the consequences of wrongful conviction and imprisonment.

B. Guidelines for eligibility to apply for compensation

The following are prerequisites for eligibility for compensation:

1. The wrongful conviction must have resulted in imprisonment, all or part of which has been served.

2. Compensation should only be available to the actual person who has been wrongfully convicted and imprisoned.

3. Compensation should only be available to an individual who has been wrongfully convicted and imprisoned as a result of a *Criminal Code* or other federal penal offence.

4. As a condition precedent to compensation, there must be a free pardon granted under Section 683(2) [now 749(2)] of the *Criminal Code* or a verdict of acquittal entered by an Appellate Court pursuant to a referral made by the Minister of Justice under Section 617(b) [now 690(b)].

5. Eligibility for compensation would only arise when Sections 617 and 683 [now 690 and 749] were exercised in circumstances where all available appeal remedies have been exhausted and where a new or newly discovered fact has emerged, tending to show that there has been a miscarriage of justice.

   As compensation should only be granted to those persons who did not commit the crime for which they were convicted (as opposed to persons who are found not guilty), a further criteria would require:

   (a) If a pardon is granted under Section 683 [now 749], a statement on the face of the pardon based on an investigation, that the individual did not commit the offence; or

   (b) If a reference is made by the Minister of Justice under Section 617(b) [now 690(b)], a statement by the Appellate Court, in response to a question asked by the Minister of Justice pursuant to Section 617(c) [now 690(c)], to the effect that the person did not commit the offence.

It should be noted that Sections 617 and 683 [now 690 and 749] may not be available in all cases in which an individual has been convicted of an offence which he did not commit, for example, where an individual had been granted an extension of time to appeal and a verdict of acquittal had been entered by an Appellate Court. In such a case, a Provincial Attorney General could make a determination that the individual be eligible for compensation, based on an investigation which has determined that the individual did not commit the offence.

C. Procedure

When an individual meets the eligibility criteria, the Provincial or Federal Minister responsible for criminal justice will undertake to have appointed, either a judicial or administrative inquiry to examine the matter of compensation in accordance with the considerations set out below. The Provincial or Federal Governments would undertake to act on the report submitted by the Commission of Inquiry.

D. Considerations for determining quantum

The quantum of compensation shall be determined having regard to the following considerations:

1. Non-pecuniary Losses

   (a) Loss of liberty and the physical and mental harshness and indignities of incarceration;

   (b) Loss of reputation which would take into account a consideration of any previous criminal record;

   (c) Loss or interruption of family or other personal relationships.

   Compensation for non-pecuniary losses should not exceed $100,000.

2. Pecuniary Losses

   (a) Loss of livelihood, including loss of earnings, with adjustments for income tax and for benefits received while incarcerated;

   (b) Loss of future earning abilities;

   (c) Loss of property or other consequential financial losses resulting form incarceration.

   In assessing the above mentioned amounts, the inquiring body must take into account the following factors:

   (a) Blameworthy conduct or other acts on the part of the applicant which contributed to the wrongful conviction;

   (b) Due diligence on the part of the claimant in pursuing his remedies.

3. Costs to the Applicant

   Reasonable cost incurred by the applicant in obtaining a pardon or verdict of acquittal should be included in the award for compensation.

Appendix 5 Donald Marshall, Sr. D.O.B. May 28, 1925
Caroline Marshall D.O.B. September 15, 1929
Lifetime Payments Guaranteed 10 years
based on both lives
Commencing August 15, 1990
Funding $80,023.18

Year	Age	Payments Monthly	Yearly	Cumulative
	Starting$600.99 a month indexed @ 3.000%			
1	60	600.99	7,211.88	7,211.88
2	61	619.02	7,428.24	14,640.12
3	62	637.59	7,651.08	22,291.20
4	63	656.72	7,880.64	30,171.84
5	64	676.42	8,117.04	38,288.88
6	65	696.71	8,360.52	46,649.40
7	66	717.61	8,611.32	55,260.72
8	67	739.14	8,869.68	64,130.40
9	68	761.32	9,135.84	73,266.24
10	69	784.16	9,409.92	82,676.16
	*** *minimum Guarantee* ***			
11	70	807.68	9,692.16	92,368.32
12	71	831.91	9,982.92	102,351.24
13	72	856.87	10,282.44	112,633.68
14	73	882.57	10,590.84	123,224.52
15	74	909.05	10,908.60	134,133.12
16	75	936.32	11,235.84	145,368.96
17	76	964.41	11,572.92	156,941.88
18	77	993.34	11,920.08	168,861.96
19	78	1,023.15	12,277.80	181,139.76
20	79	1,053.84	12,646.08	193,785.84
21	80	1,085.45	13,025.40	206,811.24
22	81	1,118.02	13,416.24	220,227.48
23	82	1,151.56	13,818.72	234,046.20
24	83	1,186.11	14,233.32	248,279.52
25	84	1,221.69	14,660.28	262,939.80
26	85	1,258.34	15,100.08	278,039.88
27	86	1,296.09	15,553.08	293,592.96
28	87	1,334.97	16,019.64	309,612.60
29	88	1,375.02	16,500.24	326,112.84
30	89	1,416.27	16,995.24	343,108.08
31	90	1,458.76	17,505.12	360,613.20

and thereafter for as long as either Donald or Caroline Marshall shall remain alive.

Appendix 6 Donald Marshall, Jr.
D.O.B. September 13, 1953
Lifetime Payments Guaranteed 30 years
Commencing August 15, 1990
Funding $291,542.00

Year	Age	Payments Monthly	Yearly	Cumulative
	Starting	*$1,875.00 a month indexed @ 3.000%*		
1	36	1,875.00	22,500.00	22,500.00
2	37	1,931.25	23,175.00	45,675.00
3	38	1,989.19	23,870.28	69,545.28
4	39	2,048.86	24,586.32	94,131.60
5	40	2,110.33	25,323.96	119,455.56
6	41	2,173.64	26,083.68	145,539.24
7	42	2,238.85	26,866.20	172,405.44
8	43	2,306.01	27,672.12	200,077.56
9	44	2,375.19	28,502.28	228,579.84
10	45	2,446.45	29,357.40	257,937.24
11	46	2,519.84	30,238.08	288,175.32
12	47	2,595.44	31,145.28	319,320.60
13	48	2,673.30	32,079.60	351,400.20
14	49	2,753.50	33,042.00	384,442.20
15	50	2,836.11	34,033.32	418,475.52
16	51	2,921.19	35,054.28	453,529.80
17	52	3,008.82	36,105.84	489,635.64
18	53	3,099.09	37,189.08	526,824.72
19	54	3,192.06	38,304.72	565,129.44
20	55	3,287.82	39,453.84	604,583.28
21	56	3,386.46	40,637.52	645,220.80
22	57	3,488.05	41,856.60	687,077.40
23	58	3,592.69	43,112.28	730,189.68
24	59	3,700.47	44,405.64	774,595.32
25	60	3,811.49	45,737.88	820,332.20
26	61	3,925.83	47,109.96	867,443.16
27	62	4,043.61	48,523.32	915,966.48
28	63	4,164.92	49,979.04	965,945.52
29	64	4,289.86	51,478.32	1,017,423.84
30	65	4,418.56	53,022.72	1,070,446.56

**** Minimum Guarantee ****

Year	Age	Monthly	Yearly	Cumulative
	Starting	*$1,875.00 a month indexed @ 3.000%*		
31	66	4,551.12	54,613.44	1,125,060.00
32	67	4,687.65	56,251.80	1,181,311.80
33	68	4,828.28	57,939.36	1,239,251.16
34	69	4,973.13	59,677.56	1,298,928.72
35	70	5,122.32	61,467.84	1,360,396.56
36	71	5,275.99	63,311.88	1,423,708.44
37	72	5,434.27	65,211.24	1,488,919.68
38	73	5,597.30	67,167.60	1,556,087.28
39	74	5,765.22	69,182.64	1,625,269.92
40	75	5,938.18	71,258.16	1,696,528.08
41	76	6,116.32	73,395.84	1,769,923.92
42	77	6,299.81	75,597.72	1,845,521.64
43	78	6,488.80	77,865.60	1,923,387.24
44	79	6,683.47	80,201.64	2,003,588.88
45	80	6,883.97	82,607.64	2,086,196.52
46	81	7,090.49	85,085.88	2,171,282.40
47	82	7,303.21	87,638.52	2,258,920.92
48	83	7,522.30	90,267.60	2,349,188.52
49	84	7,747.97	92,975.64	2,442,164.16
50	85	7,980.41	95,764.92	2,537,929.08
51	86	8,219.82	98,637.84	2,636,566.92
52	87	8,466.42	101,597.04	2,738,163.96
53	88	8,720.41	104,644.92	2,842,808.88
54	89	8,982.02	107,784.24	2,950,593.12
55	90	9,251.48	111,017.76	3,061,610.88

and thereafter for as long as Donald Marshall, Jr. shall remain alive.