RG 44 vol. 270 #14

ROYAL COMMISSION ON COMPENSATION

FOR DONALD MARSHALL, JR.

SUBMISSION OF COMMISSION COUNSEL

⇒ Order of presentation

— Kudos An / Jennie

— counsel have all filed briefs – May 25

INTRODUCTION

Donald Marshall, Jr., must be compensated fairly and generously for the losses which he has suffered and will continue to suffer as a result of his wrongful prosecution, conviction and imprisonment. To a very large degree, you are being asked to gaze into a crystal ball and determine an amount of money to replace what money can never replace. The law seeks, through the medium of money, to pay back what has been taken away.

In this case, you have been given a mandate, a set of guidelines and directions from the Government of Nova Scotia which circumscribe your authority to award compensation. You must apply this mandate and the authority given to you by it to the claims submitted by or on behalf of Donald Marshall, Jr.

In this submission I shall analyze the claims submitted by Mr. Marshall and will indicate to you the approach to them which I, as Commission Counsel, recommend. As with the earlier Marshall inquiry, I view the role of Commission Counsel to constitute an objective review of the evidence and to suggest to you the conclusions which flow from an analysis of the claims, your mandate and

the law.

It is important that I publicly state the views which I hold so that other counsel may be afforded the opportunity of challenging my conclusions. Typically, Commission Counsel will continue to be involved with the Commissioner subsequent to final submissions to provide assistance and advice as the Final Report is being prepared. For that reason, it is only fair that I publicly articulate my views.

At the outset, let me say that I will not be proposing dollar amounts to the Commission. I will merely comment on the way in which the various claims may be analyzed.

The amount received thus far by Junior Marshall is $183,000.00. He received $270,000.00 in total in 1984, of which amount $97,000.00 was paid in legal fees (Exhibit 6, Tab 1). In addition, consequent upon a recommendation made by this Commission, Mr. Marshall has received a further $10,000.00 for a total of $183,000.00.

MANDATE OF THIS INQUIRY:

Your power to grant compensation to Junior Marshall is defined by the terms of the Order-in-Council

A. argues that this OIC directs & orders Comp to Marshall, Parents & community. I reject that approach. I am only by Govt agreeing to Marshall's parents being compensated for non pec. loss but if it were not for ~~their agre~~ Govt agreement I do not think of such comp would come & in your mandate. The words of the OIC must be given meaning.

A argues that comp must be settled on basis of principle (7, pg 3).
I agree but you are not free to do whatever you want. There is an OIC and you must be true to it

(Exhibit 1) of March 22, 1990). That Order-in-Council directs you 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 number 8 of the Report of the Royal Commission, and to determine any further compensation which is to be paid as a result.

The Order-in-Council goes on to direct you in making this inquiry to have regard to Recommendations 4 - 7 of the Report of the Royal Commission on the Donald Marshall, Jr., Prosecution. Those Recommendations, forming as they do part of your mandate, bear repeating:

> 4. 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. To be entitled to consider any and all factors which may have given rise to the wrongful conviction, imprisonment or the continuation of that imprisonment.
>
> 6. Appropriate legal fees and disbursements incurred by or on behalf of the wrongfully convicted person be paid as part of the Inquiry expenses.
>
> 7. The Inquiry Report become a public document.

Counsel for the Government has advised that it is prepared to treat the following matters as coming within your Terms of Reference:

A. Dominic argues that this

1. An award for non-pecuniary losses suffered by the parents of Donald Marshall, Jr.

2. The period from the decision of the Court of Appeal in the Reference case in May, 1983 to the release of the Royal Commission Report in February of this year is part of the period for which compensation may be considered.

As part of your task, I am advised by counsel for Donald Marshall, Jr. that you will be asked to make your award in such a way as to provide an income for Mr. Marshall. This is traditionally known as a structured settlement and most often comprises an initial lump sum payment with provision for a further capital sum required to generate an income over a period of years. All counsel recommend and support that approach to this award to Mr. Marshall.

THE ELEMENTS OF THE CLAIM

Claims have been submitted by Mr. Marshall for compensation in the following categories:

PECUNIARY LOSS:

Loss of earnings 1971-1982

Loss of earnings 1982-1990

Loss of future earnings

Cost of future treatment/care

Out-of-pocket expenses incurred by or on behalf of Donald

Marshall's parents.

NON-PECUNIARY LOSS:

Past, present and future

Derivative award to be made in trust to the Grand Council of the Micmac Nation on behalf of Donald Marshall, Jr.

THREE APPROACHES TO THE ISSUE

In attempting to come to a fair and reasonable conclusion as to the amount of money which should be awarded to Donald Marshall, Jr., there are at least three ways in which the claims may be analyzed. These are:

1. Strict application of principles derived from personal injury cases.
2. Having no regard to principles of law and fashioning compensation out of wholecloth.
3. Bearing legal principles in mind but adapting them to the unique circumstances of a claim for compensation for wrongful imprisonment.

For reasons set out hereafter, it is my view that the third approach will yield the most just result.

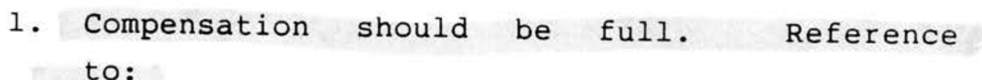
THE CLAIMS FOR PECUNIARY LOSS

In assessing a claim for pecuniary loss, the following principles recently enunciated in various decisions of

~~These cases are known as the Trilogy & are dismissed insofar as they~~

These cases, known as the Trilogy, are rejected by M. insofar as they relate to non pecuniary loss, ~~an approa~~ a conclusion with which i agree. They should not be rejected for pecuniary loss however. Indeed Dr. actuarial calculations are based on principles developed in the Trilogy cases. These cases do have some relevance and indeed they form the foundation of M. claim in some areas. Even tho i we rejected the actuarial material, because it is too speculative, some of the sec principles are cornerstones of compensation

the Supreme Court of Canada and in texts on damages must be borne in mind:



1. Compensation should be full. Reference to:

   Andrews v. Grand and Toy [1978] 2 S.C.R. 230 at 240 per Dickson J:

   > . . . a plaintiff must be reasonable in making a claim. I do not believe that the doctrine of mitigation of damages has any place in a personal injury claim. . . . In assessing damages in claims arising out of personal injuries, the ordinary common law principles apply. The basic principle was stated by Viscount Dunedin in Admiralty Commissioners v. S.S. Susquehanna at p. 661 (cited with approval in West & Son Ltd. v. Sheppard, at p. 345) in these words:
   >
   > > ... the common law says that the damages due either for breach of contract or for tort are damages which, so far as money can compensate, will give the injured party reparation for the wrongful act...

   The principle that compensation should be full for pecuniary loss is well established. See McGregor on Damages, 13 ed. p. 738:

> The plaintiff can recover, subject to the rules of remoteness and mitigation, full compensation for the pecuniary loss he has suffered. This is today a clear principle of law.

2. Compensation is based on an assessment of the person as he was prior to the event giving rise to the claim. Reference to:

   Andrews v. Grand and Toy, supra, at p. 252:

   > It must be the loss of that capacity which existed prior to the accident.

   MacGregor on Damages (14th Edition) 1980 at p. 799.

3. Deductions from the award must be made to take account of contingencies such as illness, unemployment, accidents, etc.

4. Actuarial evidence is not conclusive.

   Actuarial evidence is frequently relied upon in a calculation of pecuniary loss. It is useful to remember the comments of Chief Justice Dickson in the Andrews case at p. 236:

   > 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. Although a useful aid, and a sharper tool than the "multiplier-multiplicand" approach favoured in some jurisdictions, actuarial evidence speaks in terms of group experience. It cannot, and does not purport to, speak as to the individual sufferer. So long as we are tied to lump sum awards, however, we are tied also to actuarial calculations as the best available means of determining amount.

5. With respect to future income and cost of treatment, the amount awarded is a capital sum necessary to generate over time the monies awarded.

6. Interest is payable on the past losses.

In many cases the loss not having been incurred completely on one date interest is applied in a way which reflects the fact that the loss was incurred over a long period of time. This principle is found in the Nova Scotia Judicature Act at s.38(9) and (11)(b):

> (9) In any proceeding for the recovery of any debt or damages, the Court shall include in the sum for which judgment is to be given interest thereon at such rate as it thinks fit for the period between the date when the cause of action arose and the date of judgment after trial or after any subsequent appeal.
>
> (11) The Court in its discretion may decline to award interest under clause (9) hereof or may reduce the rate of interest or the period for which it is awarded.
>
> > (b) If the claimant has not during the whole of the pre-judgment period been deprived of the use of the money now being awarded.

As a matter of practice, where the loss has accrued over a long period of time, Courts have adopted the method of averaging the interest over the relevant years and then dividing it by two.

7. In cases where the claimant is a youth and has

tables) the future salary policy of the company in question, the possibility of the man losing his job because of matters unrelated to his health and even unrelated to his ability (e.g., merger or change of company control) possible government policy changes re pensions, change in interest rates, etc."

[21] Reference is made to Munkman's **Damages for Personal Injuries and Death** (2nd Ed.), p. 27. The author states:

> "An estimate of prospective loss must be based, in the first instance, on a foundation of solid facts: otherwise it is not an estimate, but a guess. It is, therefore, important that evidence should be given to the court of as many solid facts as possible. When it is shown that the plaintiff was earning money at a specified rate at the time of the injury, the ordinary presumption of the law is that he would have continued to earn at the same rate. If the plaintiff claims that he would have earned more, he must prove relevant facts, for example by showing that he was on a regular ladder of promotion, or in a trade where rates of pay are increased from time to time, or that he had special merits or qualifications or opportunities which would have lead to an improvement."

[22] At p. 107, the author states:

> "The legal duty of the court is to arrive at a broad estimate of the financial loss. In doing so it is not required to carry out any precise calculations, and may adopt whatever method appears to suit the individual case: or it may adopt a combination of several methods.
>
> . . . . .
>
> "The important thing to remember is that these are only rough and ready methods of making a broad estimate of net loss. It would be an illusion to support that there is any categorical formula which will give an exact arithmetic result."

[23] In **Kassam v. Kampala Aerated Water Co. Ltd.**, [1965] 2 All E.R. 875, the Privy Council commented at p. 880:

> "The question of damages for the loss of support is essentially a jury question which must be dealt with on broad lines. Mathematical calculations can never lead to a precisely accurate estimate for the loss suffered."

[24] In his very useful article entitled **A New Handbook on the Assessment of Damages and Personal Injury Cases from the Supreme Court**, W.H. Charles stated that one of the principles of law which was made clear in the **Andrews, Thorton, Teno** [**Teno et al. v. Arnold et al.**, [1978] 2 S.C.R. 287; 19 N.R. 1; 83 D.L.R.(3d) 609; 3 C.C.L.T. 372] **and Keizer** [**Keizer v. Hanna**, [1978] 2 S.C.R. 342; 19 N.R. 209; 89 D.L.R.(3d) 449] cases was:

> "The court should continue to use actuarial evidence, as long as lump sum payments are made, but with a realization that actuarial predictions are not as accurate in relation to individual cases as they might seem to be."

[25] In **Andrews et al. v. Grand & Toy (Alberta) Ltd. et al.**, [1978] 2 S.C.R. 229; 19 N.R. 50; 8 A.R. 182, Mr. Justice Dickson stated at p. 57:

> "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. Although a useful aid, and a sharper tool than the 'multiplier - multiplicand' approach favoured in some jurisdictions, actuarial evidence speaks in terms of group

not commenced on any career.

In situations where either a child or a youth has been injured, it is very difficult to predict loss of future income. Reference to:

Kemp & Kemp, The Quantum of Damages (4th ed.) 1975 at p.135:

> In this class of case the court is really reduced to pure guesswork. It is very rare for the court to attempt to divide the award of general damages into separate heads. Usually one global sum is assessed, its amount varying with the seriousness of the plaintiff's injuries. In this class of case the damages are so much at large that there is a very wide sphere for the individual judge's discretion.

Cooper-Stephenson and Saunders, Personal Injury Damages in Canada (1981) at pp.173-179.

APPLICATION OF THE PRINCIPLES TO THE CLAIMS OF DONALD MARSHALL, JR., FOR PECUNIARY LOSS

1971-1982

To arrive at a reasonable and generous assessment of Donald Marshall, Jr.'s pecuniary losses you will have to make some assessment of what his life would have been like had it not been for the wrongful conviction. In so doing you must give the benefit of every doubt to Mr. Marshall. The Royal Commission has already found that one of the reasons Marshall was prosecuted and convicted at all was the fact that he is an Indian. From the beginning and

Principle fr SCC (1) full (2) attention of accident

right up until 1990 he was never given the benefit of any doubt at all. In awarding compensation this error should not be repeated.

Accordingly, in thinking of Donald Marshall, Jr., as a 17 year old in 1971 and in trying to assess his claims for lost income, you must try to form some picture of Marshall at age 17. It is Mr. Marshall with all his potential, possibilities and limitations prior to incarceration that is relevant.

What is the evidence? Donald Marshall, Sr., has testified that at ages 16 and 17 Junior was a "very, very gentle boy" (Transcript, Volume 1, p.169) and that he was very considerate of his neighbours. He also testified it was his expectation that Junior would have followed him in the drywalling business (Volume 1, p.176). The evidence of Donald Marshall, Jr. himself is much more equivocal and one cannot conclude from his testimony that he would have followed a career in drywalling (Volume 4, p.636). During the years he was in prison, he took up the trade of plumbing. You will no doubt remember some testimony at the Marshall Inquiry in Sydney that there were those in the community who thought that Junior as a 17 year old was a tough kid.

You have been provided with actuarial calculations which

I invite you to try & find a "substantial foundation of solid facts" upon which to form a view for the — actuarial material. In my submission you cannot do so. — [illegible] without being continually forced to make — assumptions.

on several bases predict Mr. Marshall's loss of income both as a plumber and as a drywaller. These projections, as either a plumber or a drywaller, must be regarded as guesstimates, perhaps good guesstimates, but nevertheless, just that.

One has only to ask oneself what he or she was like at age 16 or 17 to realize how little utility can be provided by actuarial assumptions and calculations of a person's future based on that person at age 17.

1982-1990

How does one assess the reasons for the loss of earnings suffered by Donald Marshall, Jr., from the time that he was released from Dorchester to the present. You must start once again by giving Mr. Marshall the benefit of every doubt. But, once again, you must somehow try to assess whether his life and employment for the last eight years has been the result of his years of imprisonment and the pain and dislocation which he suffered as a result of it or whether his situation can be said to be partly attributable to his own shortcomings.

What is the evidence? You have heard in private from Judge Cacchione, Jack Stewart, Karen Brown, Martha Tudor

and from Junior Marshall himself. You have been provided with a psychological report which tries to give you a picture of Donald Marshall, Jr., through these years. As you already know, you have been given a glimpse of a person who has suffered greatly. A person whose condition seemed to get worse through the years 1982-1989 but which has recently started to take a turn for the better. The damage caused to him by everything that has happened to him since 1971 is substantial.

For the years 1982-1990, you will be asked by Mr. Marshall's counsel based once again on the actuarial material to assess an amount for loss of income. The actuarial material provides for deductions for cost of living, contingencies of life, the effects of alcoholism, periods of unemployment, etc., etc. This data is of limited assistance. It assists in painting several pictures of what Mr. Marshall's career might have looked like had it not been for his incarceration but at the end of the day, you are once again being asked to engage in extreme speculation if you are being asked to pay too much attention to the dollar figures presented to you in the actuarial material.

In my submission, the material and scenarios provided to you can be of assistance but should in no respect be governing. You are not bound by the requirements of proof

of a personal injury case. You are in the position of being able to draw on that data and reach an overall conclusion.

<u>Loss of Future Earnings/Earning Capacity</u>

Again, you are asked to look into the crystal ball and decide what dollar figure fairly represents Donald Marshall's employment future. In this part of the claim, you must take some cognizance of the fact that Donald Marshall, Jr., has been disabled by his prison experience from being gainfully employed. You have heard Mr. Marshall express to you his hopes for the future. Those hopes do not include being a drywaller or a plumber. To what degree is that view based on the years that he has already lost.

You have been given more actuarial material to assist you in predicting the future. Now you are asked by the actuarial material to ascribe a percentage to the disability inflicted on Junior Marshall by his years in prison. Has he been 40% disabled from being gainfully employed, 50%, or some other percentage? This is not a personal injury case and these percentages and figures require you to do what I believe it would be wrong for you to do and that is to state just how disabled you think

Donald Marshall has become.

Conclusion - Loss of Earnings

The fairest way to approach the problem of loss of earnings is to recognize that at the time of his incarceration Donald Marshall, Jr. was a youth who had barely, if at all, commenced a career. There is no reason now, through an assessment of damages, to try to pick what his life would have been. In my submission, your task now is to make his life comfortable and to provide sufficient monies to produce that result. In other words, I am recommending that the claims for lost income be treated by you as part of the assessment of Mr. Marshall's claim for general damages and that you not specify a specific amount for lost income. For you to so specify would be impossible, unnecessary and inappropriate.

Cost of Treatment/Care

Donald Marshall, Jr., has a substance abuse problem. The testimony that you have heard indicates that this problem has developed in the years since his release and was not something that he developed during his years in prison. The testimony of those who know him and the psy-

That is only one option.
There are others of which
you are aware.

MSI
option

chological opinions are unanimous that in order for the remainder of his life to be any way productive, Donald Marshall, Jr., must overcome this problem. The evidence is also uncontradicted that at the present time it is unlikely that Mr. Marshall would be willing to subject himself to rehabilitative treatment.

In Exhibit 6 at Tab 3 you have been provided with a budget for rehabilitation and treatment for Donald Marshall, Jr. In a personal injury case, the cost of future care is a relatively straightforward calculation. There is no doubt that the victim needs and will utilize the treatment. Indeed, it is recognized as being the most important element of an award in the Supreme Court of Canada cases to which I have already referred.

There is a very substantial difference in this case however. My recommendation is that an amount be set aside to provide for treatment should Mr. Marshall decide that he wishes to exercise such an option. Mr. Marshall may never avail himself of the treatment which everyone seems to think he needs. That being the case you must decide whether the amount claimed for future care should be awarded in the hope that Mr. Marshall will seek treatment or whether the funds should be set aside and made available to Mr. Marshall in the event that he desires to seek treatment. This should not be a blank cheque, however.

The amount recommended should reflect a reasonable assessment of an amount necessary to effect rehabilitation. If you were to find that monies should be set aside these monies should be placed in the control of an agency independent from government. Mr. Marshall should never have to hold out his hand to the government.

Out-of-Pocket Expenses of Parents

The quantum of this claim is set out in Tab 4 of Exhibit Volume 6 and totals about $55,000.00. This amount has been calculated reasonably and thoroughly. I recommend an award to Mr. and Mrs. Marshall of this amount with the addition of an appropriate figure for interest on these monies, recognizing that the incurring of the expenses took place over the entire period of Junior Marshall's incarceration. Counsel for the Government is in agreement with this submission and will make a similar recommendation.

THE CLAIMS FOR NON-PECUNIARY LOSS

It is this area where there is a divergence of approaches to the fundamental question of how much Donald Marshall,

Jr., should receive for his non-pecuniary losses. The claim encompasses two broad categories: payment to Donald Marshall, Jr., and a derivative claim of an amount to be paid to the Grand Council of the Micmac Nation to fund a cultural survival camp for indigenous children at which Mr. Marshall could and might work. I return to the three approaches to compensation outlined at the beginning of this argument to analyze this claim in the context of those three analyses.

1. The Personal Injury Model

According to this model, the assessment of non-pecuniary loss for Donald Marshall, Jr., proceeds on the assumption that Marshall is no different from an accident victim. As you are aware, in the so-called "trilogy" cases decided by the Supreme Court of Canada in 1978, the Court introduced as a matter of principle, an upper limit in dollars beyond which recovery for non-pecuniary damages should not go. In 1978 that amount was $100,000.00. Due to inflation and the passage of time that amount is currently at about $200,000.00.

There are some sound reasons why the personal injury model is mentioned in the context of Mr. Marshall's case. Perhaps the most compelling of these reasons is that the

cases decided by the Supreme Court of Canada were cases where the victims had suffered extreme injuries. In the Andrews case, a young man had been rendered a quadraplegic in a traffic accident. In the Arnold case a 4½ year old girl, after crossing the street to make a purchase from an ice-cream vending truck, was hit by a car. The victim suffered brain damage, physical disability and mental impairment. In the Thornton case the Plaintiff, a secondary school student, suffered severe injuries in an accident at school as a result of which total or partial paralysis occurred to each of his four limbs. By the time of the trial in Thornton, the Plaintiff was 18 years of age, physically disabled, unemployable, and wholly dependent upon male orderly assistants for his day-to-day needs yet with all his mental facilities still intact.

There are no doubt those who will quite legitimately say what possible reason can there be for Junior Marshall to get more than a person who has been rendered a quadraplegic.

In approaching these personal injury cases it is important, however, to realize that the Supreme Court of Canada in seemingly arbitrarily limiting the recovery for non-pecuniary loss to $100,000.00 proceeded upon certain assumptions which are best illustrated by a quotation from the Andrews and Toy case (at p.261):

But the problem here is qualitatively different from that of pecuniary losses. There is no medium of exchange for happiness. There is no market for expectation of life. The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also be necessity be arbitrary or conventional. No money can provide true restitution. Money can provide for proper care: this is the reason that I think the paramount concern of the courts when awarding damages for personal injuries should be to assure that there will be adequate future care.

However, if the principle of the paramountcy of care is accepted, then it follows that there is more room for the consideration of other policy factors in the assessment of damages for non-pecuniary losses. In particular, this area of where the social burden of large awards deserves considerable weight. The sheer fact is that there is no objective yardstick for translating non-pecuniary losses, such as pain and suffering and loss of amenities, into monetary terms. This area is open to widely extravagant claims. It is in this area that awards in the United States have soared to dramatically high levels in recent years. Statistically, it is the area where the danger of excessive burden of expense is greatest.

It is also the area where there is the clearest justification for moderation. As one English commentator has suggested, there are three theoretical approaches to the problem of non-pecuniary loss (Ogus, 35, M.L.R.1.). The first, the "conceptual" approach, treats each faculty as a proprietary asset with an objective value, independent of the individual's own use or enjoyment of it. This was the ancient "bot", or tariff system, which prevailed in days of King Alfred, when a thumb was worth thirty shillings. Our law has long since thought such a solution unsubtle. The second, the "personal" approach, values the injury in terms of the loss of human happiness by the particular victim. The third, or "functional" approach, accepts the personal premise of the second, but rather than attempting to set a value on lost happiness,

> it attempts to assess the compensation required to provide the injured person "with reasonable solace for misfortune." "Solace" in this sense is taken to mean physical arrangements which can make his life more endurable rather than "solace" in the sense of sympathy. To my mind, this last approach has much to commend it, as it provides a rationale as to why money is considered compensation for non-pecuniary losses such as loss of amenities, pain and suffering, and loss of expectation of life. Money is awarded because it will serve a useful function in making up for what has been lost in the only way possible, accepting that what has been lost is incapable for being replaced in any direct way. As Windeyer J. said in Skelton v. Collins, supra p. 495:
>
> > . . . he is, I do not doubt, entitled to compensation for what he suffers. Money may be compensation for him if having it can give him pleasure or satisfaction. . . But the money is then a recompense for a loss of something having a money value. It is given as some consolation or solace for the distress that is the consequence of a loss on which no monetary value can be put.
>
> If damages for non-pecuniary loss are viewed from a functional perspective, it is reasonable that large amounts should not be awarded once a person is properly provided for in terms of future care for his injuries and disabilities. The money for future care is to provide physical arrangements for assistance, equipment and facilities directly related to the injuries. Additional money to make life more endurable should then be seen as providing more general physical arrangements above and beyond those relating directly to the injuries. The result is a co-ordinated and interlocking basis for compensation, and a more rational justification for non-pecuniary loss compensation.

If you accept the principles stated above as applicable, you should award no more than $200,000.00 for all of Donald Marshall's pain and suffering.

In addition, there can be little doubt that according

to this model, no serious argument could be mounted for an award through Donald Marshall to the Grand Council. Such a claim would simply be too remote.

2. The Approach of Uniqueness

There is, of course, an argument to be made that you are not restrained in any way by the application of the legal principles relating to damages in awarding compensation to a person who has been wrongly imprisoned.

This argument would urge you along the following lines. You have been asked to award "compensation", the fact remains that the payment being made is an ex gratia payment not claimable as of right. This fact was noted in the Arthur Allan Thomas Report in New Zealand at the outset of the Discussion concerning compensation (Tab 1, Volume of Cases). However, in that case the commission went on to refer to the guidelines used by the Home Office in England according to which compensation is provided in England. One of the factors specifically referred to in England is the fact that there will not be any amount "analagous to exemplary or punitive damages".

Adopting this approach unencumbered by reference to any other situation is, of course, attractive and indeed an

but even unencumbered by legal precedent you are not at liberty to simply ignore the OIC. You are bound to give real meaning to the words "compensation to DMJr"

option for you. A very large amount could be awarded for non-pecuniary loss. An argument can be made and I am certain that it is going to be made today, that the situation of Mr. Marshall as a Native person is such that in order to compensate "him" properly, a mechanism must be provided by which he can be reintegrated into his Micmac community. That integration is a two-way street and cannot be completely accomplished by Marshall's acting on his own. The community has to have a mechanism for reaching out and taking Marshall back in. The award to the Grand Council is this mechanism.

3. <u>Bearing legal principles in mind but adapting them to the unique circumstances of a claim for compensation for wrongful imprisonment</u>.

This final approach which incorporates elements of the first two analyses is the one which I favour.

In my view, the personal injury approach to non-pecuniary damages enunciated by the Supreme Court of Canada should be rejected. There are two reasons for this rejection.

The first reason to reject the limitations dictated by the Supreme Court of Canada is because Recommendation 4 of the Marshall Inquiry Report recommended that there

should be no pre-set limits on the amounts recoverable by a person wrongly imprisoned. That recommendation forms part of the Terms of Reference for your Inquiry.

Secondly, and in my view, more importantly, the trilogy ~~cases~~ should be rejected for the simple and compelling reason that Donald Marshall, Jr., was not run down by a car. Donald Marshall, Jr., was run down by the justice system and it was that very justice system that kept him down and, even when it freed him, ran him down yet again.

The case of Donald Marshall, Jr., is far more important than a motor vehicle case. As noted in the report of the English group Justice on Compensation for Wrongful Imprisonment (Tab 2 of literature p. 1):

> One of the conditions of an ordered democratic society is that every citizen should submit himself to the laws of the land in which he lives and to the jurisdiction of those who are authorized to administer and enforce them.

In some sense, each of us has entered into a contract with society. In return for submitting to the laws of society, the individual is entitled to expect protection and fair and unbiased treatment from those authorized to enforce and administer the society's laws. This contract can be broken in at least two ways. The individual may commit an offence, thereby breaking his agreement

to submit to the laws of his society. Conversely, those enforcing and administering the law may break the contract by wrongly prosecuting and convicting an innocent member of society. Merely stating the framework in which a wrongful conviction takes place makes it glaringly obvious how different it is in terms of importance to the society in which we live than the case of an individual, who through inattention runs down and injures another person, no matter how grieviously.

In making the case that there is a difference between the personal injury situation and that of wrongful imprisonment we must not lose sight of the fact however that the mandate of this Commission is to "compensate" Donald Marshall, Jr. Your job is not to punish those persons and institutions whom the Marshall Inquiry found to have been in some way responsible for Marshall's prosecution, conviction and incarceration. Nor are you to punish those who treated Marshall as being to blame for the murder he did not commit.

However, it is a quite legitimate exercise of the compensatory function which you have been empowered to carry out to bear in mind the fact that Marshall was charged and convicted by the guardians of our legal system. This is a factor which you may take into account in assessing general damages. Through the use of the tradit-

ional concept of "aggravated damages", you can award as part of the general damage quantum an amount which reflects the abhorrence that all of us must have for the way in which Donald Marshall, Jr., has been treated.

I have provided to you in the Volume of Cases material concerning the awarding of punitive or exemplary damages. Such awards have fallen out of fashion in England. But even there, there has been an exemption fashioned in the cases which could support such an award in situations where conduct had been "oppressive, arbitrary, or unconstitutional action by the servants of the government" (Rookes v. Barnard) (at Tab 4(i)). This comment was later explained in the English Courts to include the activities of police and various other persons who may exercise governmental functions (Broome v. Cassell) (Tab 4 (2)). The Canadian Courts have not felt restrained by the English Rules and have not followed these English cases. Further, the Supreme Court of Canada has recently articulated the concept of "aggravated damages" and has stated that such damages can be considered to be compensatory in nature and should be considered to cover some of the same ground which could also be the subject of punitive damages. Mr. Justice McIntyre, speaking for the Supreme Court of Canada in Vorvis v. ICBC (1989), 94 N.R. 321 (at p.333-334):

> ...Aggravated damages will frequently cover conduct which could also be the subject of pun-

itive damages, but the role of aggravated damages remains compensatory. The distinction is clearly set out in Waddams, **The Law of Damages** (2nd Ed. 1983), at p.562, para. 979, in these words:

> An exception exists to the general rule that damages are compensatory. This is the case of an award made for the purpose, not of compensating the plaintiff, but of punishing the defendant. Such awards have been called exemplary, vindictive, penal, punitive, aggravated and retributory, but the expressions in common modern use to describe damages going beyond compensatory are exemplary and punitive damages. 'Exemplary' was preferred by the House of Lords in **Cassell & Co. Ltd. v. Broome,** but 'punitive' has also been used in many Canadian courts including the Supreme Court of Canada in **H.L. Weiss Forwarding Ltd. v. Omnus.** The expression 'aggravated damages', though it has sometimes been used interchangeably with punitive or exemplary damages, has more frequently in recent times been contrasted with exemplary damages. In this contrasting sense, aggravated damages describes an award that aims at compensation, but takes full account of the intangible injuries, such as distress and humiliation, that may have been caused by the defendant's insulting behaviour. The expressions vindictive, penal and retributory have dropped out of common use.

Aggravated damages are awarded to compensate for aggravated damage. As explained by Waddams, they take account of intangible injuries and by definition will generally augment damages assessed under the general rules relating to the assessment of damages. Aggravated damages are compensatory in nature and may only be awarded for that purpose. Punitive damages, on the otherhand, are punitive in nature and may only be employed in circumstances where the conduct giving the cause for complaint is of such that it merits punishment.

Without stepping outside generally accepted legal principles, it is therefore open, and I would argue, required

for you to apply the concept of aggravated damages as a portion of Donald Marshall, Jr.'s claim for general damages. I say required because Recommendation 5 of the Marshall Inquiry Report which you have been directed by the Order-in-Council in this Inquiry to take into account, requires you to:

> Consider any and all factors which may have given rise to the wrongful conviction, imprisonment or the continuation of that imprisonment.

These factors are set out in the findings of the Marshall Report (Exhibit 3) and a great number of them take aim at government, persons employed by or on behalf of government or those who administer our justice system. Some of these bear repeating here today. The Royal Commission found:

> 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 this miscarriage of justice could have and should have been prevented if persons involved in the criminal justice system had carried out their duties in a professional and/or competent manner.
>
> ...
>
> that the facts that Marshall was a Native was a factor in his wrongful conviction and imprisonment.
>
> ...
>
> 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 the immediate police response to the stabbing was entirely 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 a result of an argument.

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

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

...

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

...

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.

...

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

...

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

What other factors should you consider in assessing this aspect of the claim for general damages? Counsel for Donald Marshall, Jr., will suggest to you that you should give special consideration in this aspect of the claim to the fact that Junior Marshall is a Native person and that by reason of that fact, he somehow lost more by his wrongful conviction and incarceration than would a non-native person. There can be no doubt that Donald Marshall, Jr., has suffered terribly and that the fact that he is a Micmac has caused him to suffer in some ways which would not be experienced by a non-native person. For instance, he may have lost the opportunity to become Grand Chief of the Micmac Nation; he lost the ability to use his language while in prison; he lost his identification with the culture and traditions of his Micmac community. There are other things which Mr. Marshall lost which are peculiarly attributable to the fact that he is Micmac. Donald Marshall, like others who are wrongly imprisoned, also lost many other things conveniently summarized in Professor Kaiser's paper on Wrongful Conviction at p.148:

(i) loss of liberty. [This may be particularized in some of the following heads. Indeed some overlap is inevitable.]

(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;

(xiv) any reasonable third party claims, principally by family, could be paid in trust or directly; for example, the other side of (ix) above is that the family has lost the association of the inmate.

Professor Kaiser continues in words that bear repeating today:

> Surely few people need to be told that imprisonment in general has very serious social and

to value one persons pain & suffering
as greater than anothers is wrong. It is
one of the very things the Inquiry wrestled
with in the 1st place

> 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 begings 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. Therefore, beyond the factors noted in this section, special levels of compensation need to be considered for this chronic social handicap...

The price that society must pay for the humiliation, indignity and damage caused to persons wrongly convicted should be the same regardless of whether the victim is poor, rich, male, female, white or otherwise. This price should be high but you should not be asked to say that one person's imprisonment is worth more or less than another's. They are all tragic. To start to differentiate between the pain suffered by persons of different sex, race or social status is to open the door to discrimination. While in this case you may hear the argument that a person should receive more because of his race, this is not a very long way away from an argument that somebody should receive less for the same reason. I urge you not to open that door.

— + McGregor —

Cases of wrongful imprisonment are tragic. They share a common thread, whether the person wrongly imprisoned

T of R for A.A. Thomas

What sum should be paid ~~to A.A. Thomas~~ by way of compensation to A.A. Thomas ...

T of R Marshall

recomm adeq of comp paid to D.M. Jr ...

to determine any further compensation.

– referred to by D.M. in submn as

"quite restrictive terms of reference"

there is nevertheless great similarity in the T of Reference

is white, Native or otherwise. Merely because this may be the first case of which we are aware where compensation is being considered for an aboriginal person who has been wrongly convicted does not make cases of non-aboriginal persons irrelevant. You should consider the other cases which have been submitted to you in the Volume of Cases filed earlier. Consider, for instance, the case of Arthur Allan Thomas convicted of two murders in New Zealand on the basis of evidence planted by the police. In 1980, a Royal Commission in New Zealand awarded Mr. Thomas for his non-pecuniary loss about half a million dollars (New Zealand) or the equivalent of about $250,000.00. Mr. Thomas spent nine years in prison. I also direct your attention to Tab 2(ii) where you will find various of the assessments rendered by the Home Office in England in respect of wrongful convictions. I do not suggest for a moment that any of these situations are the same or determinative, merely that they are of some assistance to you.

The Claim for Donald Marshall's Parents

You have heard testimony from Donald Marshall, Sr., as to the way he and his wife suffered when their son was wrongly convicted and throughout the years that he remained incarcerated. It is difficult to think of a more tragic circumstance to befall a family as closely knit as the

Marshall family.

The Derivative Claim

This aspect of the general damages claim relates solely and directly to the argument that in order to properly compensate Mr. Marshall as a Micmac person, some monies must be given in trust to the Grand Council of the Micmac Nation to fund a cultural survival camp for Micmac children at which Donald Marshall, Jr., could work. The argument is that in order for Donald Marshall, Jr., to become properly reintegrated as a Micmac, this award is necessary. In other words, it can be properly described as compensation paid to Donald Marshall, Jr.

But what is it that you are being asked to do? You are being asked to provide money to in some way permit Donald Marshall, Jr. his dreams.

The testimony is unanimous that Donald Marshall, Jr., wishes to work in such a camp. The testimony is also unanimous that he seems to have the ability to develop special relationships with children. I direct you to the following excerpt from the testimony of Jack Stewart.

> Q. Does he want to be able to maintain a traditional job?
>
> Q. I don't think he knows.

Q. No.

A. I don't think he knows. He has never held a traditional job, for a start. So he's got nothing to compare that with.

Q. Yes. ...

A. And I think that if Junior gets money -- I think if he sees that money assisting him in his dreams and can be assisted in his dreams, then that money is going to mean something. If that's going somewhere -- if it's just, okay, here it is, we paid you off, now get out of our hair. That's not going to mean anything.

And from the testimony of Judge Cacchione (at Volume III, p.539):

Q. Did he ever articulate to you what his short or long term goals might be?

A. Yes. I remember we had conversations about wanting to have children, wanting to sort of run a wilderness camp. I think he was interested in that. He'd had some experience with a wilderness camp when he was in the institution and I think that he felt that, if he could work at something like that with Native youth, take them away from the booze and the drugs and bring them back to the land, so to speak, that -- I remember that conversation, wanting to help in that way. I don't think that Junior would ever be employable in a 9 to 5 context.

It is striking that this conversation between Judge Cacchione and Junior Marshall occurred in 1984.

Notwithstanding what I accept to be a very sincere desire on the part of Donald Marshall, Jr. to work at such a camp and notwithstanding that such a camp may be needed in order to assist in the preservation of the Micmac

I can assure you that i have wrestled c this component of the claim from the outset. There is a lot that would be appealing to anyone's sense of generosity to recommend such a camp, through $ to be given to the Grand Council. But our sense of generosity, our own personal wish to identify with such a recommendation cannot get in the way of analysis. I have read the section of M. [illegible] Brunner on this aspect of the claim many times & I can find no connection between the presentation of the claim & your mandate.

There is an argument advanced by M that because the OIC [illegible]ects you to bear in mind the admonition that there should not be any [re]striction on "any particular aspect of a claim" that this means the [co]mmunity claim cannot be rejected since that would effectively put [a] 0 limit or restriction on the community claim. With respect this [a]rgument has no merit. Surely just because a particular type of [cl]aim is advanced that does not mean you are bound to make an [a]ward in respect of it – but that is the argument. My [vi]ew is that you are restricted by "compensation" paid to D.M. Junior" [i]t is not retrogressive to reject a claim for compensation that is not c [i]n your mandate. ~~That mandate is not dele~~ ~~The scope of that mandate~~ ~~not determined by what Mcausland argues comes~~

This process of compensation cannot solve all the issues. The camp is [si]mply not a proper aspect of compensation.

culture, I have concluded that it is not the function of compensation to pay for somebody's dreams especially where, as here, you are asked to provide an income to make Mr. Marshall comfortable.

I realize, of course, that this particular claim is culturally specific. That is true of the request for a camp. As a general proposition, however, you must regard it as a "category" and when regarded in that way, the category is a request to make fulfillment of dreams part of an award for compensation. I cannot support that proposition.

CONCLUSIONS

My recommendation is that an amount be awarded to Donald Marshall, Jr. which will make his life comfortable. It should be an amount which truly reflects compensation for what you will have to assess he has been through for the last 19 years and what that 19 years has done to his life.

W. Wylie Spicer
Commission Counsel

Halifax, Nova Scotia
May 25, 1990