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

BRIEF SUBMITTED ON BEHALF OF THE GOVERNMENT OF NOVA SCOTIA

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1. INTRODUCTION

On May 28, 1971, at Wentworth Park in Sydney, one young man's life was tragically taken while another youth's life was irrevocably altered. As we all know now, this tragedy unfolded by the actions of a crazed and habitually drunk eccentric, Roy Newman Ebsary.

Who could have thought that those few minutes, now frozen in time, would have had an impact of such overwhelming proportions? Not only the lives and careers which were permanently affected; but moreover, the ways in which the strengths and resilience of our system of justice were tested to its limits.

In the case of Donald Marshall, Jr. we have learned that the system failed. Not only for him but for our society. Each deserved more.

We who proudly claim to be Canadians have sought comfort in the belief that our system will not fail. It will do the right thing. It will be applied equally, without fear or favour, to whomever should be in need of its protection, or subject to its gaze. The eyes of Justina were blindfolded in the expectation that justice would be dispensed fairly and even handedly, firmly but compassionately, while cooly devoid of favouritism. Ironically the means devised to insure such objectivity sometimes miss the vagaries of human existence and unique features of those whose cultures, history and values differ.

The ordeal of Donald Marshall, Jr. spawned a Royal Commission of Inquiry which convened 89 days of hearings where the slightest detail was scrutinized.

Perhaps never before in Canada's history has there been such an exhaustive and penetrating analysis of the criminal justice system. Each issue was relentlessly considered.

Nova Scotia should feel no discomfort with the attention generated by convening this Commission and providing it with the resources to complete its work. It has subjected its system of justice to a level of scrutiny unmatched. This has served as an example and lesson from which Canada and other jurisdictions may be the beneficiaries.

The Report and Recommendations of the Royal Commission were delivered to the Executive Council of the Province of Nova Scotia in January, 1990. Eleven days later, after very thorough consideration, the Attorney General for Nova Scotia presented the government's response. No recommendations were rejected. All recommendations that were the responsibility of the government of Nova Scotia were accepted.

Clearly, the matter requiring the most urgent attention was the establishment of this Commission, under your direction, to re-examine the fairness of compensation previously paid to Donald Marshall, Jr.

The plight of Donald Marshall, Jr. began in Wentworth Park in 1971, and continued unabated until his release in 1982. Other hardships continued to plague him until the release of the Royal Commission's Report and the apology delivered by the Attorney General on behalf of the people of Nova Scotia. Then, finally, Mr. Marshall was able to stand proudly having been convincingly and honourably vindicated. Against that background the Province asked you as Commissioner to return to Nova Scotia and re-canvass the amount of compensation paid to Mr. Marshall and determine, whether it could be said to be fair, given what we now know.

In our submission, any new award to Mr. Marshall must be both fair and realistic to both the victim and the system, at whose hands he suffered. It must obtain a result that will impress the ordinary onlooker as being just and sensible. It must not offend reasonable standards for fairness. It will be a significant element to the restoration of public confidence in the administration of justice in this Country.

2. PROCEEDINGS

The Executive Council of Nova Scotia established this Royal Commission by Order in Council on October 28, 1986.

Public hearings began in Sydney in September 1987, and ended there with final arguments presented in November 1988. The public hearings produced more than 16,000 pages of transcript evidence and resulted in the introduction of 176 exhibits. As well, the Royal Commission solicited a number of independent research projects and organized a series of private workshops as well as a public consultative forum.

The seven volume Report and Recommendations were delivered by the Royal Commission in January, 1990.

On February 7, 1990, the response of the Government of Nova Scotia was presented publicly by the Attorney General, the Honourable Thomas J. McInnis, and the Solicitor General, the Honourable Neil J. LeBlanc (a summary of the response of the Government and the text of the Attorney General's statement are found at Tabs 1 and 2 respectively of exhibit 9. The full response of Government has been separately introduced).

This further inquiry to review the compensation paid to Donald Marshall, Jr. was established by an Order in Council dated March 22, 1990.

The Order in Council provides that you are 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, and to determine any further compensation which is to be paid as a result."

Meetings were held among yourself and counsel for the parties in February and March to determine the most appropriate process for this inquiry.

Public hearings opened in Halifax on Monday, April 2. Those hearings lasted two days. Other witnesses testified in-camera on April 4-5.

Since then, further reports and documentation have been compiled and filed with this Commission. As well, two witnesses, a psychologist and an actuary, were questioned on the reports they had prepared, at a discovery examination. Their testimony was recorded and a transcript has been prepared and filed with the Commission as a separate and sealed exhibit.

Written briefs are to be filed by counsel on Friday, May 25, 1990, with oral argument to be presented in Halifax on Thursday, May 31, 1990.

The actuary, Brian Burnell, was required to prepare a series of new calculations, based on different assumptions. As this written brief is being prepared, Mr. Burnell's revised report has only just been received. His revisions and the relevance of any actuarial calculations to this case will be addressed in oral argument.

3. DAMAGES

(a) Mr. and Mrs. Donald Marshall, Sr.

(i) Pecuniary

Counsel for the Government of Nova Scotia has urged that this Commission favourably consider reimbursement to Mr. and Mrs. Marshall Sr. for the out-of-pocket expenses they incurred on account of their son's wrongful conviction and incarceration.

We invited Mr. Marshall's lawyer to prepare a series of calculations to fairly reconstruct these special damages.

We proposed that inquiries be made of the administrators of those federal institutions where Mr. Marshall was jailed to see if log entries might verify actual visitation. These records were helpful, but only for certain years. It appeared that Mr. and Mrs. Marshall visited their son on ten occasions in a space of 14 months (testimony of Donald Marshall, Sr., April 2, 1990, page 172). Counsel for Mr. Marshall has prepared a series of appendices which appear to carefully estimate the expenses incurred by Mr. and Mrs. Marshall Sr. For the purpose of those calculations it was assumed that they visited their son 10 times each year between November 1972 and March 1982.

Counsel for the Government has reviewed the calculations and the assumptions on which they are based and recommends that the total of $55,023.18 be accepted by this

Commission. It represents an average expenditure of $5,000 per year which would seem appropriate having regard to their modest circumstances.

As well, the Commission may choose to add a sum for pre-judgment interest, as interest lost by Mr. and Mrs. Marshall Sr. on their money which they would otherwise not have had to spend. As these special damages were not incurred all at once, but rather accumulated over time, we propose that the rate of interest must, as well, be adjusted and the easiest method is to simply halve the rate which the Commission finds most appropriate, for the applicable term.

(ii) Non-Pecuniary

Although not specified in the Order in Council, the Government of Nova Scotia urges this Commission to favourably consider an award to Donald Marshall, Jr. 's parents by way of non-pecuniary damages.

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 (testimony, April 2, 1990, page 179).

He and his wife depleted their own savings, or borrowed from others, in order to visit their son in prison (supra, page 173). 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 determining an appropriate lump-sum award to Mr. and Mrs. Marshall.

Happily, the consequences were only temporary. In 1972 Mr. Marshall acquired business cards and used those to advertise his plastering and drywalling (testimony, supra, page 176). He continued his business until 1983 when ill-health forced his retirement and the business was carried on by one of his sons.

"Q. When you gave up working in 1983, did you sell your business?

A. No, I didn't.

Q. But what happened to the business?

A. One of my boys buys, just carries on with my business.

Q. And has he still continued it?

A. He still does, yeah." (testimony, page 177)

Other jurisdictions have deliberately restricted compensation to the actual victim of the wrongful conviction and incarceration. Their review has not been expanded to include parents or spouses of the direct victim.

Your attention is drawn to the Report of the Royal Commission into the circumstances of the conviction of Arthur Allan Thomas for the murders of David Harvey Crewe and Jeanette Lenore Crewe ("the Thomas inquiry"). It would be helpful to repeat the circumstances of that horrible injustice.

Arthur Allan Thomas was arrested on November 11, 1970, when he was 32 years of age. In 1971 he was tried and convicted in the Supreme Court at Auckland, New Zealand, of the murders of David Harvey Crewe and Jeanette Lenore Crewe. The Court of Appeal directed a new trial. In 1973, Thomas was again tried and convicted of those same murders. He was sentenced to life and was detained in prison until December 17, 1979, when the Governor-in-Council of New Zealand granted him a free pardon. The Royal Commission was convened on April 24, 1980, and instructed to submit its findings and opinions no later than January 31, 1981. In its report, the Commission declined any non-pecuniary award to anyone other than Arthur Allan Thomas.

> "506. The third question concerns the persons from whom such claims should be entertained and the nature of those claims. We must immediately make clear

> that in our view there is no question of anyone other than Arthur Allan Thomas recovering compensation for non-pecuniary losses. We sympathise with the plight of some of the family, particularly the parents, in the physical and mental injury they have suffered. But we are bidden to determine the amount of compensation to be paid to Arthur Allan Thomas; subject to the limited extent of services rendered by relatives to meet a need caused by his arrest and imprisonment, there is no other category of compensation included.
>
> 507. The expenses and services of the family which we believe should be regarded as within the claim of Arthur Allan Thomas are:
>
> (a) Help on the farm after his arrest.
>
> (b) Expenses incurred in visiting him in prison (which we consider to have been an assistance to his well-being).
>
> We do not feel able to include any sum for the time spent, or out of pocket expenditure, in searching for further evidence, attending judicial hearings, or attending meetings, etc., aimed at securing his release."

We submit on behalf of the Government of Nova Scotia that the preferred approach to take in the circumstances of this case is to find that Mr. and Mrs. Donald Marshall, Sr. are entitled to some award for their non-pecuniary loss.

What measure then is appropriate? Some guidance may be obtained from the approach taken by Canadian courts in fatal injury awards. Those tragic situations where statutory amendment filled the void at common law (which provided no

entitlement to parents upon the death of a child) but which amendments restrict damages to proved loss of care, guidance, and companionship, while taking no account of grief.

At common law, parents of children injured through the negligence of others would not be entitled to compensation except insofar as services such as nursing, etc. may have been rendered to the injured plaintiff. No claim could be advanced for damages suffered by the family members following the death of a loved one.

With the passing of fatal injuries legislation in most Canadian provinces, this impediment to recovery has been remedied through legislation. Family members of a person who has died in circumstances that give rise to a claim under the Fatal Injuries Act may claim for an amount to compensate for the "loss of guidance, care and companionship" the deceased person would have provided.

In Nova Scotia the Fatal Injuries Act R.S.N.S. 1989, c. 163 was amended in 1986 to permit such claims by family members (see s. 5(2(d)).

There has only been one decision from the Supreme Court of Nova Scotia since this amendment was passed which has resulted in an award under this new provision.

The case of Morrell-Curry v. Burke (1989), 92 N.S.R. (2d) 402 (N.S. T.D.) was decided in June, 1989. In the Morrell-Curry decision a 24-year-old husband died in a motor

vehicle accident caused by the defendant's negligence. His 33-year-old wife brought an action for damages under the Fatal Injuries Act. At p. 407 of the decision, Justice Hallett considered damages to be awarded to the widow for loss of guidance, care and companionship and stated as follows:

> ". . . The courts have made it very clear that this award is not to compensate a person for grief suffered when a family member dies in circumstances that give rise to a claim under the Fatal Injuries Act. Grief is not compensable with any amount of money. The award is for actual loss of guidance, care and companionship." [emphasis added]

As there were no previous Nova Scotia cases upon which to base his decision, Justice Hallett turned to the Ontario Court of Appeal for guidance in his deliberations. Justice Hallett referred to the decision in Nielsen et al. v. Kaufman (1986), 13 O.A.C. 32 (C.A.), and cited the following passage from that decision:

> "It is self-evident, as has been said, that the amount of compensation in any given case 'will depend on the facts and circumstances in evidence in the case': Mason v. Peters, supra, at p. 40. The existence of the relationship covered by the section only gives the right to make the claim. Although essentially non-pecuniary in character, there must be an actual loss of care, companionship and guidance." [emphasis added]

Plaintiff's counsel in the Morrell-Curry case had suggested an award to Justice Hallett in the range of $20,000

for the deceased's widow. Justice Hallett responded to this suggestion as follows:

> ". . . On the facts of this case, I feel such an award would be too high. The parties had been married for just under a year, Mrs. Morrell-Curry was established in a career and did not need any particular guidance. However, she has been deprived of her husband's care and companionship. Defendant's counsel has urged me to make an award that could be characterized as somewhat conventional, although he hesitates to use that word, in the same sense that the awards of $100,000.00 for non-pecuniary damages for pain, suffering and loss of amenities made by the Supreme Court of Canada in Teno et al. v. Arnold et al., [1978] 2 S.C.R. 287; 19 N.R. 1."

Having referred to the Teno case, Justice Hallett continued at pp. 408 and 409 to quote extensively from this Supreme Court of Canada decision. Basically, from the passages cited from the Teno decision, it is clear that Justice Hallett appreciated the impossibility of trying to use non-pecuniary damages as "compensation" for the loss of guidance, care and companionship. Just as it is impossible to equate serious personal injuries with a particular dollar figure, Justice Hallett pointed out that grief suffered by a survivor is not compensable and every effort should be made to assess what loss has actually been suffered rather than fixing awards to reflect one's feeling of compassion for the survivor. The comments of Justice Hallett leading to his

eventual award of damages for the surviving widow do provide some useful direction:

> "These are relevant considerations on the question before me in dealing with a claim for loss of guidance, care and companionship under the Fatal Injuries Act as there are parallels between the totally disabled victim and the surviving spouse who is making a claim for loss of guidance, care and companionship." [emphasis added]
>
> As in the cases of serious disability decided by the Supreme Court of Canada such as Teno v. Arnold, the compensation for loss of guidance, care and companionship should have some degree of uniformity although I am not suggesting a maximum. However, as noted by the Ontario Court of Appeal, the award to Mr. Nielsen of $40,000.00 was at the high end of the scale as were the awards to her mother, brothers and sisters; the surviving family members in that case were very dependent on Mrs. Nielsen. In most cases, it is impossible to make an accurate assessment of damages under this head. The primary compensation for the surviving spouse is the award to replace the benefit of the lost income as in the cases of total disability. . ."
>
> I assess damages for actual loss of guidance, care and companionship as follows:
>
> > To the widow, Mrs. Morrell-Curry, $10,000.00.
> >
> > To the deceased's mother, Mrs. Alice Curry, $2,500.00.
> >
> > To the deceased's father, Donald Curry, $2,500.00." [emphasis added]

Justice Hallett, in Morrell-Curry has accepted that the Ontario Court of Appeal's awards in the Nielsen case were

awards at "the high end of the scale". In Nielsen, the husband received $40,000 for the loss of guidance, care and companionship of his wife; $11,000 was awarded to the deceased's sister; $5,000 to the deceased's brother; $20,000 to a 16-year-old son and $30,000 to a 10-year-old son. The trial judge had awarded these figures except for the award to the 10-year-old son which the Court of Appeal had increased from $25,000 to $30,000.

The decision in Morrell-Curry follows the decisions of the Ontario courts which have held that consideration will be given to the specific circumstances of each case in determining the appropriate award under this provision. This point was specifically addressed in the Ontario Court of Appeal case, Re: Zdasiuk; Zdasiuk et al. v. Lucas et al. (1987), 39 C.C.L.T. 1 (O.C.A.) in which the Appeal Court of Ontario considered the adequacy of awards made at trial under s. 60(2)(d) of the Ontario Act, (the parallel section to s. 5(2)(d)). Thorson, J. A. stated that awards made under this section should have some degree of consistency but he rejected the notion that such consistency should be achieved by means of making "conventional awards", that is, awards arrived at without any regard to the presence of circumstances which might show the case to be exceptional. He concluded that the trial judge had made awards to the father and mother of the deceased in exactly the same amounts as in another case

that he had referred to in his decision, without any analysis or further consideration of the particular facts before him. His Lordship ruled that the trial judge had erred in this approach. He stated at pp. 4-5:

> "The making of comparisons between human losses is indeed invidious. The measurement in money terms of the loss of such intangibles as guidance, care and companionship is always a difficult task, and it is even more so where the principal element of loss which the Court must seek to compensate is the loss of companionship. . . I would add that it probably goes without saying that in order for any claim to succeed based principally on the loss of companionship, there must first be found to have existed a close family relationship involving the claimant and the person injured or killed, which had been impaired to a significant extent by the latter's injury or brought to an end by his or her death. The existence of such a close relationship is, therefore, the beginning point in such a case, but it cannot at the same time be its ending insofar as the Court's task is concerned."

His Lordship then reviewed the evidence at trial and concluded that the awards made had been unduly low. He increased awards to the parents of the deceased, a 25-year-old daughter, from $10,000 to $17,500 (for the father) and $12,000 to $20,000 (for the mother). The court stated that were it not for the deceased's daughter's marriage plans and her likely move to the United States, factors which would "inevitably have impaired, at least to some extent the intimate kind of companionship that had previously been

enjoyed by this family", the awards would have been increased even more.

The courts of Ontario (like Justice Hallett in Nova Scotia) have also turned to the Supreme Court of Canada's comments regarding non-pecuniary damages when assessing these losses.

In Gervais v. Richard (1984), 30 C.C.L.T. 105 (O.S.C.), Justice Krever assessed the non-pecuniary loss of guidance, care and companionship suffered by surviving family members of a 16-year-old girl:

> "In my view, guidance can be found, in assessing the losses with which I am concerned, in the language of Mr. Justice Dickson in Andrews v. Grand & Toy Alta. Ltd., [1978] 2 S.C.R. 229, [1978] 1 W.W.R. 577, 3 C.C.L.T. 225, 8 A.R. 182, 83 D.L.R. (3d) 452, 19 N.R. 50, in his discussion of the non-pecuniary losses suffered by a quadriplegic as a result of a traffic accident. At p. 261 (S.C.R.), p. 476 (D.L.R.) he said:
>
> > '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.'
>
> And at p. 262 (S.C.R.) and at p. 477 (D.L.R.) he continued:
>
> > 'However one may view such awards in a theoretical perspective, the amounts are still largely arbitrary or conventional.'"

Justice Kerver awarded $10,000 to this young girl's father, and $12,000 to her mother.

In Reidy et al. v. MacLeod et al. (1984), 30 C.C.L.T. 183 (O.S.C.) the court considered the claims of the family members of two teenaged boys killed in a motor vehicle accident. Both boys were an integral part of their respective families. Both deaths had "devastating" effects on the surviving family members. The mother and father of one received $50,000 and $35,000 respectively, while the mother of the second boy received $65,000. These were the highest awards noted in our case law review. The high award in the latter case was explained by the trial judge on the basis that this was a son of a single mother who:

> ". . . lives on unemployment insurance and family allowance. Her age, educational background and present economic climate would seem to mitigate against her employment opportunities. Mrs. Goldsack testified that she enjoyed a very close relationship with James. On hearing her testify, one gained the impression that he provided her with the companionship a mother would normally seek with her husband. . ." (p. 201)

As Justice Thorson stated in Zdasiuk, (supra), drawing comparisons between human losses is indeed "invidious". To put a price tag on Mr. and Mrs. Marshall's pain and suffering is not possible. A review of the cases above dealing with claims under the Fatal Injuries Act is provided as guidance in this most difficult task.

These references suggest an appropriate sum in instances where there has been loss of life. The devastation is irreversible. As is the case in many other approaches to damage theory, the courts recognize that no amount of money will ever compensate for the finality of such a tragedy. Consequently, law makers and judges have restricted awards to those specific and tangible benefits "care, guidance and companionship" which are irretrievably lost.

If these figures are said to approach the maximum end for awards of this kind, then compensation to Mr. and Mrs. Marshall would be suitably reduced. But at least it is proposed as some standard against which their claim might be measured.

(b) Donald Marshall, Jr.

(i) Pecuniary

A. Past Loss of Income

B. Future Loss of Income

Counsel for Donald Marshall, Jr. engaged Halifax actuary, Brian Burnell, to prepare calculations which purport to quantify the subject's past and future loss of income.

It is respectfully submitted that the assumptions on which the calculations are based are both inappropriate and inaccurate and that the projections advanced on behalf of the subject ought to be ignored.

Rather, counsel for the Government and the Commission have requested Mr. Burnell to prepare new calculations based not on scenarios advanced by the subject's solicitors, but rather based on what we submit the evidence discloses.

Mr. Burnell addressed two scenarios, one assuming that Donald Marshall, Jr. would be employed as a plumber, the other assuming that he would work in his father's business as a drywaller. Those were the only two scenarios suggested by the subject's counsel (discovery testimony, May 11, 1990, page 93).

Mr. Burnell assumed an arbitrary figure of 25% unemployment in the plumbing industry. He had not made any

inquiries, nor was able to say whether unemployment among plumbers in Cape Breton might actually be higher than 25%.

"Q. So this was a 25% figure that you arbitrarily applied?

A. Yes.

Q. Based on unemployment statistics overall ---

A. Yes.

Q. --- but concentrated in Cape Breton.

A. Yes, that's correct.

Q. Without any specific bearing on the plumbing industry, I take it.

A. That's correct.

Q. Are you able to say whether or not unemployment among plumbers in Cape Breton may be higher than 25%?

A. No, I don't know." (discovery testimony, page 89)

If statistical information indicated that the rate of unemployment among plumbers in Cape Breton over the years was greater than 25%, that would reduce the calculations prepared by Mr. Burnell (discovery testimony, page 90, line 10).

The actuary did not obtain information regarding the personal history of Donald Marshall, Jr., his state of health, or his use of alcohol, tobacco or other drugs (discovery testimony, page 90, line 17).

Mr. Burnell was unaware that Mr. Marshall's psychologist described him as a chain-smoker. Mr. Burnell admitted that such a heavy dependency on tobacco would shorten a person's life expectancy (discovery testimony page 91, line 6-7).

Mr. Burnell was unaware that Mr. Marshall's psychologist described him as an alcoholic (discovery testimony, page 71, line 9), a binge drinker who imbibed 30 to 40 drinks in the space of three or four days, with such behaviour subsequently repeated. Mr. Burnell admitted that such evidence "would lead to some shortening of the life expectancy" (discovery testimony, page 91, line 23-24).

Mr. Burnell was unaware of the subject's admission to his psychologist of using illicit drugs while in prison, and using cocaine after his release. Mr. Burnell admitted that this would also be a factor tending to reduce life expectancy (discovery testimony, page 92, line 3).

Further, evidence of suicidal tendency in the person's history should also be factored:

> "into the probabilities in terms of anticipating a higher than normal probability of death."

(discovery testimony, page 92, lines 11-13).

Mr. Burnell would want to have such information in order to determine the person's life expectancy (discovery

testimony, page 93, line 12). He had none of this information.

Mr. Burnell had no idea what the income levels for non-union drywallers were in Cape Breton. He simply assumed it would be union wages.

He made no comparison between union wages and what, in fact, the subject's father earned in his business.

"Q. Do you have any idea what the income levels for independent drywallers were in Cape Breton over that same span of years?

A. No, I don't have any information on that.

Q. So the only information that we have with respect to salaries over those years is that provided by the Union.

A. Yes, that's right.

Q. Did you make any comparison between those figures advanced by the Union and what, in fact, Donald Marshall, Sr. earned in his business?

A. No. I do not have any information on what Donald Marshall, Sr. earned.

Q. Do you have any information on the profitability, if any, of Donald Marshall, Sr.'s business?

A. The information I was given was that the business had operated, I think, continuously for a period of 30 years. And that was -- basically, was the sum total of my information as I recall it.

> Q. Do you consider it to be a more accurate indicator of loss of income by Donald Marshall, Jr. to ascertain what, in fact, his father was able to earn in the business?
>
> A. I think that would be helpful as perhaps a basis for alternative calculations, yes.
>
> Q. Yes. And if it turned out to be so that Mr. Marshall, Sr. earned less than the figures obtained from the Union and factored in your report, then that would be a better indicator of what Donald Marshall, Jr.'s claim would be?
>
> A. Maybe not necessarily better, but certainly something we would want to look at in terms of, again, the balance of probabilities." (discovery testimony, pages 94-95)

In making calculations under the drywalling scenario, Mr. Burnell simply assumed that the business was carried on 52 weeks per year, without interruption. He said he:

> "...was advised that there was continuing activity right through the year with his business, and it wasn't subject to long periods of down time or anything of that nature."

(discovery testimony, page 96, line 23ff).

> "Q. If the evidence from Donald Marshall, Sr. were that prior to his son's incarceration there were times each year when he was unemployed in the plastering

business, that would tend to reduce the figures that have been projected in their report, correct?

A. Yes."

Apparently, Mr. Burnell was not shown this exchange taken from the cross-examination of Donald Marshall, Sr.

"Q. I would like to review with you some of what you said regarding the business of drywalling and plastering.

A. Yes.

Q. I take it that, as you've described, it was seasonal employment with some periods of time when you did not have such employment.

A. Yes.

Q. And that would be so during the years prior to 1971?

A. Yes.

Q. So that there were some months in the year ---

A. Yes.

Q. --- when you were not employed either as a drywaller or a plasterer?

A. Right.

Q. And on those occasions, Mr. Marshall, when you were not so employed, you would be forced to acquire welfare, is that so?

A. Yes." (testimony April 2, 1990, pages 175-176)

Mr. Burnell was under the impression that the business ceased operation in 1970 or 1971 (discovery testimony, page 98, line 13). He had no knowledge that the business continued after Donald Marshall, Jr.'s incarceration and was carried on by another son after Mr. Marshall retired from the business in 1983. All of this is information that Mr. Burnell would have wanted.

> "Q. Is that information that you would have wanted to have, Mr. Burnell, in making your projections of loss of income from this scenario?
>
> A. I think it would have been helpful." (discovery testimony, page 98)

Again, Mr. Burnell simply assumed that the subject would become a union plumber rather than an independent contractor. He obtained no information with which to contrast wages as between an independent plumber or a union plumber. If earnings turned out to be less, then all of Mr. Burnell's calculations would be reduced.

> "Q. Under the plumbing scenario, again you have assumed that Donald Marshall, Jr. would have chosen to be a Union member rather than an independent contractor?
>
> A. Yes.
>
> Q. And do you have any information with which to contrast wages over that same span of years for an

independent plumber as compared to a Union plumber?

A. No, I don't.

Q. And if it turned out to be less, then that would tend to reduce all of the calculations that you've advanced in your report?

A. If one assumed that he would have not been a Union member, yes." (discovery testimony, page 99)

Mr. Burnell did not take into account negative contingencies like alcohol addiction, heavy smoking, prior cocaine use and evidence of suicidal tendency. He promised to do so in his subsequent calculations (discovery testimony, page 106, line 16).

The actuary projected loss of future income diminished to 40-60% of his "pre-incarceration expectations". He did this based on information provided by the subject's solicitors. He has never consulted with Mr. Marshall's psychologist, nor seen his reports.

"Q. And how is it that you came to understand that expectation?

A. This was information provided to me by counsel.

Q. Have you ever consulted with Mr. Marshall's psychologist, Mr. Kris Marinic?

A. No, I haven't.

Q. Have you ever seen any reports prepared by psychologist Marinic?

A. No.

Q. Other than the expectation described by counsel to you, are you aware of any other information suggesting these percentages?

A. No, I'm not." (discovery testimony, page 100)

Mr. Burnell was instructed to prepare new calculations based on a fixed term of unemployment which might then be factored (used as a multiplier) by the Commission in projecting loss of future income over a length of time which the Commission deemed appropriate.

C. Cost of Future Care

Material has been provided by counsel for Donald Marshall, Jr. describing two facilities in Canada which were established to treat alcoholism and provide for the recovery from addiction to alcohol or other drug.

It is recognized that the documentation describing these two facilities should be kept confidential so as to ensure anonymity for Mr. Marshall, should he choose to seek such treatment.

For clarity the facility located closest to Halifax will be referred to in this brief as "F-1" and the other will be referred to as "F-2".

Both facilities appear to be designed to provide a specialized treatment approach which embodies Indian cultural

awareness coupled with the proven success and philosophy of Alcoholics Anonymous.

In F-1, residents are given an extensive three month treatment program which is said to include assessment, treatment, rehabilitation and after care.

Among the admission criteria is a requirement that the individual be motivated to finding a more positive life style and prepared to sign a contractual agreement to abide by the facility's rules and to participate fully in the program.

The goals are described, inter alia, to rekindle through various native cultural awareness programs, a sense of pride and self-esteem. As well, practical life skills are taught to ease the person's re-entry to the main stream of society.

Residents are required to attend outside AA meetings.

F-1 was established more than 14 years ago.

In the documentation supplied we do not have a cost comparison for the programs described in F-1.

The Commission has received material describing F-2. It was founded four years earlier than F-1, and operates both an out-patient and in-patient treatment centre. In its 28 day residential treatment program, F-2 addresses the spiritual, mental, emotional and physical functioning of the person seeking treatment from addiction. Its structure

includes education, skills development, counselling and native culture.

A series of estimates listed as Part I, II, III and IV have been prepared by Mr. Marshall's counsel.

The projected costs are said to include transportation and accommodation for Donald Marshall, Jr. during the initial period of assessment lasting one month. One must question the inclusion of a family member to accompany Donald Marshall, Jr.

Fundamentally, this process of compensation is designed to consider the fairness of the previous award paid to Mr. Marshall personally. Neither the terms of reference of this Commission nor the findings and recommendations of the Royal Commission suggest that compensation to Mr. Marshall be expanded so as to include the cost of future care/treatment to someone other than Mr. Marshall personally.

The "accompaniment" under Part I is described as lasting two weeks. While rejecting its relevance, one wonders why it is only for the first half of Mr. Marshall's initial assessment.

Part II describes follow up treatment for Mr. Marshall if he were to return periodically for one to two months of follow up care, say "every other month" extended over a 16 month period. These costs are sizable. It is our respectful submission that there is no evidence suggesting

such sessions be extended over 16 months; nor any justification that it include accommodation and air fare for a family member.

Part III describes additional counselling and psychological services, presumably orchestrated by F-2. The first entry is said to provide services over a 10 month period. There is no evidence indicating that this is appropriate in Mr. Marshall's case. His psychologist, Kris Marinic, testified that he had built up a level of trust with Donald Marshall, Jr. over the years, that Mr. Marshall had benefited from such therapy with him and that in his opinion after a year of intensive therapy, he would have a chance to resume a relatively satisfactory life. Mr. Marinic was not familiar with F-2 and had no knowledge of the level of success this particular facility may have had in alcohol and drug abuse treatment (discovery, page 51, line 18).

One is forced to question why the psychological and counselling services could not be continued with Mr. Marinic in Halifax, someone who has worked with Donald Marshall, Jr. since 1984. As well, for the reasons already advanced, we reject the entitlement of anyone other than Donald Marshall, Jr. to such therapy.

Under Part IV described as "follow up sessions" we raise the same questions concerning the estimated duration of such sessions, why therapy could not be obtained in Halifax,

and in any event, compensation should only provide for the therapy of Mr. Marshall personally.

The Commission will be asked to consider the proper method of payment so as to provide for the cost of future care.

One option would be to simply include it as a portion of the lump sum award for Donald Marshall, Jr.'s non-pecuniary damages. If that method were followed, Mr. Marshall could use a portion of his compensation to pay the cost of whatever future therapy was required to obtain psychological counselling and treatment of his alcohol and drug abuse.

A second method would be to set aside a specific sum said to be the likely cost of such treatment and therapy and award that either in cash or as a structured settlement, on the chance that Donald Marshall, Jr. were persuaded to complete such treatment. A criticism of that approach would be how ought one treat the cash award or the separate structure, should Mr. Marshall choose not to avail himself of these opportunities for counselling and treatment? One might suggest that it would simply revert to the government, should the opportunity for counselling be ignored. The difficulty with this concept is that it would imply some long term, ongoing connection between Mr. Marshall and the government of Nova Scotia and would oblige someone to administer the fund almost as a kind of trust, until the occasion of his death, at

which time, if unused, it would revert to government. We submit such arrangements would be cumbersome and inappropriate.

A third and perhaps most efficient option would be for the Commission to fix a sum of money which it considered to be appropriate to cover the cost of future counselling and treatment for drug and alcohol abuse. If Mr. Marshall chose to avail himself of those opportunities, whether at F-1, F-2 or with Mr. Marinic and a facility closer to Halifax, he should be able to do so using money available to him in his award of compensation. Then, were he to conclude the treatment at the facility designated, that institution would simply inform the government of Nova Scotia that counselling had been provided and would list the expenses incurred. This sum would then be repaid by the government of Nova Scotia to Mr. Marshall as reimbursement for the costs which he had incurred, and as being within the amount designated by the Commission as fairly representing the cost of future care.

This would provide access to such funds, should Mr. Marshall require them and be interested in using them.

(ii) **Non-Pecuniary**

How can Donald Marshall, Jr. be compensated for the pain and suffering he has experienced over the past two decades? What amount of money will provide restitution for

the intangible losses he suffered: his separation from family and community, his loss of liberty, his loss of youth.

What dollar figure can be placed on these components of Donald Marshall's loss?

The Trilogy

In a series of cases reported in 1978, commonly referred to as the "trilogy", the Supreme Court of Canada attempted to establish certain principles for the evaluation of non-pecuniary damages.

It is respectfully submitted that guidance may be obtained from these principles in assessing non-pecuniary damage for wrongful conviction and incarceration.

In the trilogy, the Supreme Court of Canada determined that a limit of $100,000 was appropriate for the most serious non-pecuniary loss. In this submission we are not suggesting that a "cap" or maximum be fixed in all cases dealing with wrongful conviction and imprisonment. While it is recognized that the Federal-Provincial Guidelines did set a limit for non-pecuniary loss at $100,000, it was the recommendation of this Royal Commission that there be no preset limit on the amounts recoverable with respect to any particular claim, and the government of Nova Scotia has accepted that recommendation.

Rather, it is our submission that the principles enunciated by the Supreme Court of Canada in the trilogy are instructive and might be used as a guide or standard against which non-pecuniary damages for wrongful imprisonment might be measured.

In cases of the most serious personal injury, the Courts are endeavouring to measure the losses suffered by the victim and to award a sum of money which will make that person's life more endurable, using the only means available. In considering the non-pecuniary aspect of the award a judge would apply the "functional" approach and award the victim a sum of money to provide solace for his or her misfortune.

Having determined that a figure of $100,000 (since exceeded to almost $200,000 on account of inflation) was appropriately restricted to all but the most serious of personal injury cases - typically quadriplegia - it is submitted that this may serve as a guide to this Commission in determining non-pecuniary damages to Donald Marshall, Jr., someone who is physically and mentally capable of enjoying employment prospects, outdoor recreation, sound and gratifying relationships with women, young children, and members of his family.

The trilogy is comprised of the following cases; Andrews v. Grand and Toy Alberta Limited (1978), 83 D.L.R. (3d) 452 (S.C.C.); Arnold v. Teno (1978), 83 D.L.R. (3d)

609 (S.C.C.); and Thornton v. Board of School Trustees of District No. 57 (Prince George) (1978), 83 D.L.R. (3d) 480 (S.C.C.).

Though dealing with the non-pecuniary damages suffered by plaintiffs severely disabled as a result of accidents, the principles and guidelines outlined by the Supreme Court of Canada provide assistance in understanding the nature and purpose of a non-pecuniary damage award.

In the trilogy, the Supreme Court reaffirmed that the basic objective in an award of damages for personal injury is to compensate the victim. The goal is to put the victim in a position he would have been in had the injury not been suffered. The principle of compensation ensures a measure of fairness to both parties:

> "The focus should be on the injuries of the innocent party. Fairness to the other party is achieved by assuring that the claims raised against him are legitimate and justifiable." (Andrews, at page 463)

Determining what are "legitimate and justifiable" monetary losses entails assessing the expenses and losses a victim has suffered and compensating him for these losses. Different considerations become paramount, however, when trying to determine damages for non-pecuniary, non-monetary loss. Mr. Justice Dickson (as he was then), delivering the reasons for judgement of the unanimous Court, stated in Andrews (supra) at pp. 475-476:

> "Andrews used to be a healthy young man, athletically active and socially congenial. Now he is a cripple, deprived of many of life's pleasures and subjected to pain and disability. For this, he is entitled to compensation. 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 of 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."

The pain, suffering and loss of amenities suffered by Donald Marshall, Jr. through his wrongful conviction, imprisonment and treatment before the courts are intangible but very real losses. They were not possessions that have an ascertainable dollar value. They defy valuation.

The challenge of assigning a dollar value to such intangibles was identified and discussed by the Supreme Court of Canada in the trilogy. In Andrews, Justice Dickson reviewed three theoretical approaches to the problem of the assessment of non-pecuniary losses. These had been outlined by A.J. Ogus, in "Damages for Lost Amenities: For a Foot, Feeling or a Function?" (1972), 35 Mod. L. Rev. 1. The first two approaches discussed, attempted to measure in dollar

figures the loss of human happiness and human faculties. The Supreme Court however, adopted the third approach termed the "functional" approach, which attempted to assess the compensation required to provide the injured person with reasonable "solace" for his misfortune. Justice Dickson stated at p. 476:

> "'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 of being replaced in any direct way
>
> . . .
>
> 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 coordinated and interlocking basis for compensation, and a more rational justification for non-pecuniary compensation."

Mr. Justice Spence, writing on behalf of the Court in Arnold v. Teno (supra) adopted the approach taken by

Justice Dickson in Andrews with respect to the valuation of non-pecuniary damages and stated at p. 639:

> ". . . I adopt the course taken by my brother Dickson in Andrews, that is, to fix the non-pecuniary damages by reference to a rational basis for them. If, as did my brother Dickson, one realizes that it is impossible to compensate for the losses of the various elements involved in non-pecuniary damages and that it is reasonable, none the less, to make an award then gauge that award by attempting to set up a fund from which the plaintiff may draw, not to compensate for those losses, but, to provide some substitute for those amenities. As Harman, L.J. put it so well in Warren et al. v. King, [1963] 3 All E.R. 521 at p. 528, . . . What can be done to alleviate the disaster to the victim, what will it cost to enable her to live as tolerably as may be in the circumstances?'"

The Supreme Court of Canada had an opportunity three years later to revisit the trilogy in the case of Lindal v. Lindal (1981), 129 D.L.R. (3d) 263 (S.C.C.). Mr. Justice Dickson elaborated on the functional approach in the assessment of non-pecuniary damages and stated at page 271:

> "The functional approach in the assessment of damages for non-pecuniary loss was adopted by the Pearson Commission in England ("Royal Commission on Civil Liability and Compensation for Personal Injury" (1978), Cmnd. 7054-1). The Commissioner stated that the main aim of any system for the award of pecuniary damages should be to make good the loss. Non-pecuniary damages should be awarded only when they can serve some useful purpose, for example, by providing the plaintiff with an alternative source of satisfaction to replace one that he has lost (Vol. 1, para. 397). This led the

Commissioners to recommend that a permanently unconscious plaintiff should not receive any damages for non-pecuniary loss since the money award could serve no useful purpose (Vol. 1, para. 398).

I have already indicated that the social costs of the award cannot be controlling when assessing damages for loss of income and the cost of future care. The plaintiff must be provided with a fund of money which will provide him with adequate, reasonable care for the rest of his life. The social impact of the award must be considered, however, in calculating the damages for non-pecuniary loss. There are a number of reasons for this. First, the claim of a severely injured plaintiff for damages for non-pecuniary loss is virtually limitless. This is particularly so if we adopt the functional approach and award damages according to the use which can be made of the money. There are an infinite number of uses which could be suggested in order to improve the lot of the crippled plaintiff. Moreover, it is difficult to determine the reasonableness of any of these claims. There are no accurate measures available to guide decision in this area.

A second factor that must be considered is that we have already fully compensated the plaintiff for his loss of future earnings. Had he not been injured, a certain portion of these earning would have been available for amenities. Logically, therefore, even before we award damages under the head of non-pecuniary loss, the plaintiff has certain funds at his disposal which can be used to provide a substitute for lost amenities. This consideration indicates that a moderate award for non-pecuniary damages is justified.

A third factor is that damages for non-pecuniary loss are not really 'compensatory'. The purpose of making the award is to substitute other amenities for

> those that have been lost, not to compensate for the loss of something with a money value. Since the primary function of the law of damages is compensation, it is reasonable that awards for non-pecuniary loss, which do not fulfil this function, should be moderate." [emphasis added]

In 1987, the Ontario Law Reform Commission published its report on "Compensation for Personal Injuries and Death". In chapter 3 of that report, damages for non-pecuniary loss were discussed and a specific section was dedicated to the arguments against the approach taken in the trilogy followed by a discussion of alternative approaches (page 99). These arguments and alternatives ranged from abolishing any awards for non-pecuniary losses to maintaining awards for this loss but eliminating or increasing the limit set in the trilogy. At page 105 of the report the Commission concluded the approach adopted in the trilogy should not be changed and stated at page 106:

> "By way of summary, the Commission believes that the goals of consistency, predictability, and fairness - as between one award and another, and as between awards in one province and awards in another - necessitate the retention of some sort of limit. Since money cannot alleviate pain and suffering or return to the injured person the lost years or lost amenities of life, and given the social burdens of indulgent awards, a reasonable, moderate award is required. In order to advance the goals referred to above, appellate review of lower court awards is essential. So long as some flexibility is assured, in order to deal with very exceptional cases demanding higher awards,

> and so long as there is an adjustment for inflation in the level of awards, we believe that injured persons are adequately protected by the existing law respecting damages for non-pecuniary loss. If such persons are not properly compensated in respect of pecuniary losses, the remedy clearly lies in reform of that facet of the law. Indeed, it is an essential goal of our recommendations to ensure full recovery for such losses. . . Accordingly, the Commission recommends that there should be no change in the present law and practice, as enunciated by the Supreme Court of Canada in the trilogy, respecting awards of damages for non-pecuniary loss."

A review of the passages above shows a similarity between the task facing the Supreme Court in its efforts to compensate these plaintiffs and the challenge facing this inquiry in the assessment of compensation for Donald Marshall, Jr. We recall the words of Justice Dickson in Andrew at p. 475:

> "There is no medium of exchange for happiness. There is no market for expectation of life."

Mr. Justice Spence in Arnold quoted from Harmon, L.J. in Warren et al. v. King (cited above):

> "What can be done to alleviate the disaster to the victim, what will it cost to enable her to live as tolerably as may be in the circumstances?"

In the trilogy, the Supreme Court of Canada had to consider the non-pecuniary damages suffered by individuals severely physically disabled with no hope for future recovery. With counselling and drug abuse treatment we trust Donald Marshall, Jr. will be able to recover from the trauma of his

experiences, the loss of amenities of life, the emotional damage he sustained, and the loss of enjoyment of life. These losses also faced the individuals seeking compensation in the trilogy. The difference is that their losses were permanent with no hope of improvement.

This inquiry is asked to compensate Donald Marshall, Jr. for the pain and suffering he experienced as a result of his wrongful imprisonment and corresponding hardships. It is respectfully submitted that the direction from the Supreme Court of Canada is very relevant in assessing the claim for non-pecuniary damages advanced by Donald Marshall, Jr.

The Supreme Court of Canada set an upper limit of $100,000 for non-pecuniary losses in 1978. Subsequent decisions have shown the courts' willingness to take inflation into account in applying this upper limit (see for example Fenn v. City of Peterbourough (1979) 104 D.L.R. (3d) 174 (O.C.A.)). In Lindal, the Supreme Court of Canada upheld the decision of the British Columbia Court of Appeal to reduce the trial judgment from $135,000 for non-pecuniary damages to $100,000 but stated that account could be taken of inflation and that $100,000 was not to be taken as the absolute limit. Justice Dickson also stressed the need for flexibility when considering an award for non-pecuniary damages and stated at p. 370 of the Lindal decision:

> "Thus the amount of an award for non-pecuniary damage should not depend alone

> upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determined. An appreciation of the individual's loss is the key and the 'need for solace will not necessarily correlate with the seriousness of the injury' (Cooper-Stephenson and Saunders, Personal Injury Damages in Canada (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a 'tariff'. An award will vary in each case 'to meet the specific circumstances of the individual case' (Thornton, at page 284 S.C.R.)."

In the trilogy, the Supreme Court also made it clear that an award for non-pecuniary loss should be made on a "global basis" as opposed to a separate assessment for the various components making up the award. Mr Justice Dickson in Andrews noted the inevitable similarity of purpose among the various components making up the non-pecuniary loss and stated at p. 478:

> "It is customary to set only one figure for all non-pecuniary loss, including such factors as pain and suffering, loss of amenities, and loss of expectation of life. This is a sound practice. Although these elements are analytically distinct, they overlap and merge at the edges and in practice. To suffer pain is surely to lose an amenity of a happy life at that time. To lose years of one's expectation of life is to lose all amenities for the lost period, and to cause mental pain and suffering in the contemplation of this prospect. These problems, as well as the fact that these losses have the common trait of irreplaceability, favour a

> composite award for all non-pecuniary losses."

Various categories or topics have been proposed to describe what non-pecuniary damages to Donald Marshall, Jr. ought to include. Logically, they comprise such things as pain and suffering, loss of reputation, loss of liberty, loss of enjoyment of life, prison indignities and loss of kinship. Many of these were the same categories examined by the Royal Commission in Thomas, supra. It would be wrong to fix a sum of money for each heading and then simply add it up for a total of non-pecuniary damage. As noted by Mr. Justice Dickson in Andrews, such an approach would be duplicitous, given the natural overlapping of many of the harms suffered. It is enough for this Commission to address the various categories and then determine an appropriate lump sum award based on a global assessment.

There may be other harms suffered by Donald Marshall, Jr., but peculiar to him on account of his race and being the son of the Grand Chief.

While incarcerated in a predominately white population at Springhill Medium Institution and Dorchester Penitentiary, it is likely that Donald Marshall, Jr. carried a greater burden, despite the spiritual comfort and support provided through the Native Brotherhood, visitations by elders, etc. As well, there is evidence before the Commission that his chance to succeed his father as the Grand Chief of

the Mi'Kmaq was impaired by virtue of his conviction and incarceration. It is speculative to conclude that those chances are permanently forestalled, or whether with therapy and the support of his community and family, Donald Marshall, Jr. can continue to build on the respect he has earned. His father testified that Donald Marshall, Jr. has returned to a position of honour in the Mi'Kmaq community and he agreed with the testimony given by Mr. Knockwood that Donald must continue by his actions and deeds to earn the respect of the members of his community (testimony at hearings page 180, lines 4 and 9).

If there are damages peculiar to Donald Marshall, Jr. (like the greater burden of shame or loss of kinship through his separation from community), these losses should be recognized and Donald Marshall, Jr. compensated through the award for non-pecuniary damages.

(iii) **Prejudgment Interest**

The provisions of s. 41 of the Judicature Act, R.S.N.S. 1989, C-240, provide as follows:

> "41. In every proceeding commenced in the Court, law and equity shall be administered according to the following provisions: ...
>
> (i) 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;
>
> . . .
>
> (k) the Court in its discretion may decline to award interest under clause (i) or may reduce the rate of interest or the period for which it is awarded if
>
> (i) interest is payable as of right by virtue of an agreement or otherwise by law,
>
> (ii) the claimant has not during the whole of the pre-judgment period been deprived of the use of money now being awarded, or
>
> (iii) the claimant has been responsible for undue delay in the litigation."

"Court" is defined in s. 2(a) of the Judicature Act as the Supreme Court of Nova Scotia and includes a judge sitting in Court or in Chambers.

All Canadian common law provinces (except Saskatchewan) have passed legislation that allows for the award of prejudgment interest in personal injury actions. This legislation uses mandatory language, stating that the Court shall award prejudgment interest unless factors like those included in Section 41(k) are present. All provinces, (except Ontario) have specified that the interest accrues from the date the cause of action arose to the date of judgment.

The Court may decline to award interest or may reduce the rate of interest if the person claiming interest

has not been deprived of the use of the money being awarded. (s. 41(k)(ii))

Interest on Pretrial Pecuniary Loss

The Nova Scotia Judicature Act does not provide a formula for determining the appropriate prejudgment interest rate. However, the former Chief Justice Cowan of the Nova Scotia Trial Division issued a Practice Memorandum (No. 23 - March 24, 1981) setting out guidelines as to how the prejudgment interest rate should be determined. The suggested practice is for counsel to prepare three tables to be introduced into evidence. The tables would show: (i) the average prime lending rate of chartered banks, (ii) the average rates of interest paid with respect to 90-day deposit receipts and (iii) the average interest rates paid with respect to five-year certificates or debentures over the prejudgment period.

Counsel for Donald Marshall, Jr. seeks prejudgment interest on Donald Marshall's pretrial pecuniary loss. Consideration must be given to the compensation award Donald Marshall, Jr. received in 1984 and also to any employment income he earned after the time of his release from prison.

Section 41(k)(ii) authorizes the Court to take these amounts into consideration when determining whether prejudgment interest will be allowed or whether to reduce the

rate of interest to be applied. In the case of Pooley v. Misener (1980), 42 N.S.R. (2d) 76 (N.S.T.D.), Justice Morrison considered the claim for prejudgment interest by a plaintiff injured in a motor vehicle accident and stated at p. 87:

> "33. However, counsel agreed that a certain amount of special damages was paid in advance by the defendant without prejudice and the claimant was compensated in part by a form of employee benefits she had with her employer. Consequently, I am satisfied that Section 38(11)(b) and Section 38(11)(c) should apply.
>
> "34. The total amount of monies paid in advance by the defendant is $4,311.20 and the plaintiff received from her employer sick leave benefits totalling $2,207.44. I shall take these sums into consideration in fixing the rate of interest and the period for which it may be awarded.
>
> . . .
>
> "36. I find that the sum of $6,518.64 has been realized by the plaintiff by way of 'without prejudice' payments made by the defendant and by way of sick benefits. In my opinion both these payments were meant to compensate for lost wages; consequently the total amount of special damages that I have awarded to wit, $14,047.00 will be reduced by the amount of $6,518.64 for the purpose of calculating interest. This would leave a balance of $7,528.36 special damages upon which interest may be awarded."

The Court therefore exercised its discretion under the Judicature Act and deducted the monies received by the plaintiff before trial before making the prejudgment interest calculation on the loss of earnings. If prejudgment interest

is applicable to this case, a similar calculation should be made before interest is calculated.

Another problem with calculating the appropriate prejudgment interest on past pecuniary losses is that the whole of the loss generally does not arise at one time. These pecuniary losses accumulate from the date of the injury until judgment. Donald Marshall's loss of wages claim is an example of such a pecuniary loss. Though the legislation in Ontario provides a formula to calculate the interest on these pretrial losses (see s. 138(2) of the Courts of Justice Act, S.O. 1984, c. 11), the legislation in Nova Scotia does not provide any such formula.

Our courts have, however, faced this issue and have dealt with it in the case of Comeau v. Marsman et al. (1981), 47 N.S.R. (2d) 568 (T.D.). In that case, Justice Hallett stated at p. 568:

> "In Cookson v. Knowles, the House of Lords has suggested that the rate of interest should be half the rate that the court would otherwise order as the full sum applicable to the period in question was not due from the date of the accident but simply continued to accumulate over the period from the date of the accident to the date of judgment. This is a rough but logical approach. Interest rates for guaranteed investment certificates maturing in a year during the period September, 1979, to July, 1981, would average about 14%, half of which is 7%. Therefore, I allow pre-judgment interest on the sum of $12,588.00 at the rate of 7% from September 17, 1979, to July 17, 1981. If the order is not taken out by July 17,

> 1981, the interest calculation will have to be revised upward as Section 38(9) of the Judicature Act requires that the pre-judgment interest be calculated to the date of judgment, being the date the order is signed. In addition, I will allow pre-judgment interest on $1,573.00 at 14% per annum from September 17, 1979, to the date of judgment." [emphasis in the original]

Interest on Non-Pecuniary Loss

Traditionally, courts have awarded prejudgment interest at the same rate for both pecuniary and non-pecuniary losses. There is argument against this practice on the ground that it overcompensates the injured person. In the Ontario Law Reform Commission's Report on Compensation for Personal Injuries and Death (supra), the authors discuss this issue at p. 208 and state as follows:

> "The $100,000 limit on non-pecuniary loss established by the Supreme Court of Canada is adjusted for inflation from the date of injury to the date of trial. Because commercial interest rates comprise not only an amount reflecting the "real rate" of interest but also an amount reflecting the loss of the value of money over time, an award of prejudgment interest at the full prejudgment interest rate, in effect, allows double recovery in respect of the loss due to inflation.
>
> "The argument for a reduction of the current rate of prejudgment interest awarded on non-pecuniary losses seems to us compelling. There appears to be no good reason why an injured person should be double compensated for inflation. A person who, in 1978, suffers a non-pecuniary loss for which the maximum of $100,000 in non-pecuniary damages would be

> awarded, but who is not compensated until 1987, will receive almost $200,000."

The Ontario Law Reform Commission went on to consider what the appropriate rate of interest for non-pecuniary loss should be and stated at p. 209:

> "As to the appropriate 'real rate', in Graham v. Persyko, the Court awarded an interest rate of 2.5% for damages for non-pecuniary loss. This is the same rate used for discounting future losses. On balance, this would appear to be a fair choice. Accordingly, a majority of the Commission [Mr. Earl A. Cherniak, Q.C. dissents from this recommendation] recommends that prejudgment interest should be awarded for damages for non-pecuniary loss at the rate specified in the Rules of Civil Procedure, from time to time, in respect of the discount rate, which at present would 2.5%."

The Law Reform Commission made this recommendation although the Ontario Court of Appeal had upheld the decision in Borland v. Muttersbach (1985) 23 D.L.R. (4th) 664 (O.C.A.) rejecting this approach.

The same rate recommended by the Law Reform Commission (i.e. 2.5%) is the discount rate specified in the Nova Scotia Rules of Civil Procedure (see R. 31.10(2)).

(c) Derivative Claim

Counsel on behalf of Mr. Marshall has advanced the idea of a "derivative" claim. This claim is advanced on behalf of the Mi'Kmaq community of Nova Scotia. Counsel for Donald Marshall, Jr. argues the community is entitled to compensation for the damage it suffered as a result of the wrongful imprisonment and treatment of Donald Marshall. His counsel suggests a sum of money be awarded to provide for the establishment of a cultural camp for Mi'Kmaq youth.

No precedent exists in the case law which considered the merits of such a "derivative" claim.

This Inquiry was established to:

> "recanvass the adequacy of compensation paid to Donald Marshall, Jr. in light of what the Royal Commission on Donald Marshall, Jr. prosecution found to be factors contributing to his wrongful conviction and continued incarceration ..." [emphasis added]

This Inquiry has heard evidence relating to the injuries suffered by Donald Marshall, Jr. and of the pain and suffering experienced by his family. The Nova Scotia Government has agreed the compensation claim should be broadened to include the claims of Donald Marshall, Jr.'s parents in recognition of the proven losses the family experienced as a result of Donald Marshall, Jr.'s wrongful imprisonment.

The derivative claim being advanced on behalf of the community goes beyond the scope of the Inquiry and certainly

beyond the scope of accepted principles of compensatory damages.

In Teno v. Arnold (supra), Spence, J. made the following statements at p. 638 in the context of explaining the reasons for increased awards for non-pecuniary damages and are relevant to this issue as well:

> "The reasons probably are many. Firstly, I have pointed out the impossibility of accurate assessment. Then there must be many cases of what really are expressions of deep sympathy for the terribly injured plaintiff and a mistaken feeling that his or her sore loss of the amenities of life may be assuaged by the feeling of satisfaction from a pocket-full of money. There might even be some element of punishment for the wrongdoer or, the most irrelevant of considerations, a measuring of the depth of the defendant's purse. Certainly, such awards, which one may well characterize as exorbitant, fail to accord with the requirement of reasonableness, a proper gauge for all damages." [emphasis added]

As Justice Spence noted above, there is a requirement that damages accord to a standard of reasonableness.

In the law of torts, two principles frequently used to bring a measure of "reasonableness" to damages are the doctrines of foreseeability and causation.

Before a cause of action for negligence can be established, several elements must be present. In Canadian Tort Law (4th ed., 1988), Linden describes the elements of a cause of action for negligence as follows:

> "1. The claimant must suffer some damage;
>
> 2. The damage suffered must be caused by the conduct of the defendant;
>
> 3. The defendant's conduct must be negligent, that is, in breach of the standard of care set by law;
>
> 4. There must be a duty recognized by the law to avoid this damage;
>
> 5. The conduct of the defendant must be a proximate cause of the loss or, stated in another way, the damage should not be too remote as a result of the defendant's conduct;
>
> 6. The conduct of the plaintiff should not be such as to bar his recovery."

Reviewing the components above, one must question what "damage" was suffered by the community which was caused by the conduct of the Government or its servants. If there is proof of such damage, the question must be asked whether the conduct of the Government was the "proximate cause" of the loss suffered by the community. It is clear there must be <u>proof</u> that the Government's conduct was the cause of the proven loss suffered by the community. There must be some connection or link between the wrongful act alleged on the part of the Government and the proven damage suffered by the community. As Mr. Justice Spence wrote in <u>Joseph Brant Memorial Hospital</u> v. <u>Koziol</u> (1977), 2 C.C.L.T. 170 (S.C.C.), at p. 180:

> "There must be not only negligence but negligence causing the injury before there can be recovery."

The derivative claim being advanced on the part of the community cannot succeed for the following reasons:

(a) No loss on the part of the community has been proven;

(b) There is no proof that the Government's conduct or the conduct of Government servants has caused a loss to the Mi'Kmaq community; and

(c) An award of this nature is beyond the terms of reference of this inquiry.

In 1980, the New Zealand Royal Commission looking into the circumstances of the conviction of Arthur Allan Thomas faced a similar issue. Mr. Thomas had been wrongfully convicted of the murders of David and Jeannette Crewe. One of questions the Commission was to answer was: "What sum, if any, should be paid by way of compensation to Arthur Allan Thomas following upon the grant of free pardon?"

The Commission heard evidence relating to the various categories of loss similar to the categories advanced by Mr. Marshall's counsel. Along with the pecuniary and non-pecuniary loss claimed on behalf of Mr. Thomas, the Commission also received claims for compensation from Mr. Thomas' parents, all his brothers and sisters (including their spouses), a cousin, two members of the Thomas Re-Trial Committee as well as Mr. Thomas' former spouse. At paragraph

500 of the Thomas Commission Report, these claims were discussed:

> "500. These claims raise three questions of principle:
>
> (a) Does Term of Reference 6 envisage or allow us to consider them either directly or indirectly as part of Arthur Allan Thomas's own claim?
>
> (b) Apart from the Terms of Reference does experience elsewhere in the Commonwealth or any principle of law by analogy suggest that such claims should be entertained?
>
> (c) If such claims are to be considered favourably, who should be regarded as eligible to make them, and in what respect?"

The Thomas Commission found that the claims of Mr. Thomas' family could be allowed because of a directive issued by the British Government which specifically stated that "additional expense incurred in consequence of detention, including expenses incurred by the family" would be considered in compensating individuals wrongfully imprisoned. As well, the Thomas Commission found support in tort law for such awards. In the law of damages, claims from third parties for such things as the cost of nursing care of the injured party had been allowed. On the basis of such precedents in the common law, as well as the directive referred to above, the Thomas Commission found that there "should be considered certain expenditure incurred and services rendered by members of his family" (para. 504).

The Thomas Commission was then faced with answering question (c), that is, which individuals should be regarded as eligible to make these claims. In paras. 505-508, the Thomas Commission set out its reasoning for restricting the claims to members of Mr. Thomas' immediate family:

> "506. The third question concerns the persons from whom such claims should be entertained and the nature of those claims. We must immediately make clear that in our view there is no question of anyone other than Arthur Allan Thomas recovering compensation for non-pecuniary losses. We sympathise with the plight of some of the family, particularly the parents, in the physical and mental injury they have suffered. But we are bidden to determine the amount of compensation to be paid to Arthur Allan Thomas; subject to the limited extent of services rendered by relatives to meet a need caused by his arrest and imprisonment, there is no other category of compensation included.
>
> "507. The expenses and services of the family which we believe should be regarded as within the claim of Arthur Allan Thomas are:
>
> (a) Help on the farm after his arrest.
> (b) Expenses incurred in visiting him in prison (which we consider to have been an assistance to his well-being).
>
> We do not feel able to include any sum for the time spent, or out of pocket expenditure, in searching for further evidence, attending judicial hearings, or attending meetings, etc., aimed at securing his release.

> "508. The above statements of principle largely answer the question of whose services and expenditure should be regarded as falling under this category. It also seems reasonable to limit it to members of the immediate family." [Emphasis added]

Neither the terms of reference of this Commission nor any principle of common law establish a legitimate basis for a claim such as this.

It will be left to Donald Marshall, Jr. to personally decide whether he wishes to share a portion of his award with his community and in that way establish the beginnings of a cultural camp for Mi'Kmaq youth. Experts and other witnesses have described his above-average intelligence and leadership capability and as well the need that he continue to earn the respect of the members of his community.

While answering questions posed by the Commissioner, Donald Marshall, Jr. was ready to agree that the next step towards his rehabilitation is his to make (page 660, lines 13-14), that he isn't the only person facing problems with his future (testimony page 665, lines 13-14) and that he would be prepared to relocate for a month or so in order to obtain treatment (page 664, line 16).

Donald Marshall, Jr. has been injured as a result of his experience with the criminal justice system. His injuries have not restricted him to a wheelchair nor rendered him subject to ongoing physical pain. His injuries, however, are

real. They have affected his emotional health; his psychological well being.

A person injured as a result of the acts of another is to be compensated for his injuries. There is, however, a requirement that the injured person take whatever steps are reasonably open to him to lessen the effects of the injury.

In Yphantides v. McDowell et al. (1984), 30 C.C.L.T. 264 (M.Q.B.) Justice Wilson of the Manitoba Court of Queen's Bench considered the situation of a plaintiff who persistently declined all recommendations of her medical advisors to undergo surgery. Evidence at trial showed that 80% of those undergoing the surgery recommended to the plaintiff enjoyed perceptible relief from their symptoms. At p. 272 of the decision, Justice Wilson considered the plaintiff's duty to mitigate and stated as follows:

> "The general principle that a plaintiff must take whatever steps are reasonably open to him to mitigate his loss extends to the acceptance of medical advice. The Court will not decide for the plaintiff whether or not he will undergo an operation or otherwise submit to any particular medical attention or regimen; but should it appear the plaintiff has wilfully refused treatment which in all the circumstances seemed reasonable the defendant ought not to be charged with the dollar consequence of that refusal. And see Seaton J. A. in Schultz v. Leeside Devs., [1978] 5 W.W.R. 620 at 632, 6 C.C.L.T. 248, 90 D.L.R. (3d) 98 (B.C. C.A.) [Leave to appeal to the Supreme Court of Canada dismissed, 25 N.R. 609n.], and MacPherson J. in Hayden v. Klavs, [1975] W.W.D. 78 (Sask. Q.B.).

Upon his review of the English cases cited to him in Bateman v. Middlesex (1911), 24 O.L.R. 84, affirmed 25 O.L.R. 137 (Div. Ct.) [varied on other grounds (1912), 27 O.L.R. 122, 6 D.L.R. 533 (C.A.)], Riddell J. said, p. 87:

> 'The principle to be deduced from these is, if a patient refuse [sic] to submit to an operation which it is reasonable that he should submit to, the continuance of the malady or injury which such operation would cure is due to his refusal and not to the original cause. Whether such refusal is reasonable or not is a question to be decided upon all the circumstances of the case.'

Singleton L. J. in Marcroft v. Scruttons Ltd., [1954] 1 Lloyd's Rep. 395 (C.A.) put it this way, p. 399:

> 'I do not wish to say anything that would hurt the feelings of a plaintiff in a case of this kind, but I believe it to be the duty of this Court to say that if a man is recommended by his own medical advisers and by others to undergo a course of treatment, he ought to undergo it; if he is advised that it gives him a reasonable chance of recovery, and if the treatment is reasonable he ought to undergo it; if he will not, and does not, he must see that it is a little hard upon the defendants if they are to be asked to pay damages in respect of a period extending afterwards. If the general opinion is that that treatment would cure him, or, at least, render him in a much better state in every way, then he ought to undergo the treatment.'

This Inquiry has heard evidence from individuals close to Donald Marshall, Jr. (Mr. Stewart, friends, his former counsel and from his psychologist), that courses of treatment to assist Donald Marshall, Jr. in overcoming his emotional and psychological difficulties have been recommended. Specifically, his psychologist has stated that in his opinion, Donald Marshall, Jr. could resume a relatively satisfactory life after one year of intensive therapy.

Donald Marshall, Jr. himself recognizes the need to undergo treatment to assist him in recovering from the effects of his ordeal. Courses of treatment have been available to him in the past, which he has either not pursued or has not completed.

One must be careful, particularly in a case such as this, not to "blame the victim". However, one would not be fair to Donald Marshall, Jr. if responsibility for his own recovery were taken away from him. To repeat Singleton L. J.'s comments in Marcroft v. Scruttons Ltd., (supra) cited above:

> "I do not wish to say anything that would hurt the feelings of the plaintiff in a case of this kind, but I believe it to be the duty of this Court to say that if a man is recommended by his medical advisers and by others to undergo a course of treatment, he ought to undergo it; if he is advised that it gives him a reasonable chance of recovery, and if the treatment is reasonable he ought to undergo it; . . ."

As Blair J. A. stated in Ippolito v. Janiak et al. (1981), 34 O.R. (2d) 151 (C.A.) (and relied upon in Yphantides at p. 276):

> "It is trite law that 'a plaintiff must always do what is reasonable to mitigate his loss': Eley v. Bedford, [1972] 1 Q.B. 155 at 158, [1971] 3 All E.R. 285, per MacKenna J. If a plaintiff does not do what is reasonable to mitigate the loss, the result is that the claim for damages is diminished to the extent that it could have been mitigated if reasonable steps had been taken. The Courts will not award damages for avoidable loss. . ."

As his psychologist testified, much depends on Donald Marshall, Jr.'s motivation. Psychological counselling must be provided simultaneously with treatment for drug and alcohol abuse. With the exception of what was said earlier regarding the cost of future care, one ought not to impose conditions on the use to which Donald Marshall, Jr. puts any additional compensation. It must be left to his own choosing whether he seeks to direct some of what he has already or might receive to the establishment of a camp, in which he would have a significant role.

(d) Punitive Damages

It is anticipated that counsel on behalf of Donald Marshall, Jr. will suggest this may be an appropriate case for an award of punitive damages.

An award of punitive or exemplary damages is based on the defendant's conduct rather than the plaintiff's loss (Rookes v. Barnard, [1964] 1 All E.R. 367 (H.L.)).

E. A. Cherniak, Q.C. and J. R. Morse in "Aggravated, Punitive and Exemplary Damages in Canada" (1983), Law Society of Upper Canada, Special Lecture, p. 151 defines punitive or exemplary damages as follows:

> "Since Rookes v. Barnard it seems clear that exemplary or punitive damages are '. . . fictional or judicial damages, designed to indicate the displeasure of the court, whether judge or jury, to indicate the heinousness of the defendant's conduct' so as to punish and deter the defendant and like-minded individuals. These damages are characterized as fictional in the sense of not bearing a direct relation to the harm suffered by the plaintiff, but rather, for the most part, are a function of the court's perception of the objectionable nature of the defendant's conduct. Additionally they are judicial in that they are imposed by and emanate from the court (judge or jury), as opposed to originating from or relating back to the harm suffered by the plaintiff. Hence these damages are aptly termed exemplary because their purpose is to make an example of the defendant. They are appropriately termed punitive to connote the punishment or penalization of the wrongdoer."

It is clear from the definition provided above that punitive damages are not compensatory but are awarded strictly for the purpose of punishing or deterring the wrongdoer and others of like mind when engaging in similar behaviour.

Acknowledging the purpose of punitive damages, it would seem incongruous for this Commission to make such an award. This Commission was directed to "recanvass the adequacy of compensation paid to Donald Marshall, Jr. . . . and to determine any further compensation which is to be paid as a result." Punitive damages are "unrelated to the function of compensating the plaintiff" (see Cherniak, "Aggravated, Punitive and Exemplary Damages" at p. 155).

If this Commission chose to consider punitive damages, one must first address the relationship between compensatory and punitive damages before determining the amount, if any, of punitive damages to be awarded.

The relationship between compensatory and punitive damages and the procedure to follow in determining whether to award punitive damages was considered by the House of Lords in the case of Cassel & Company Limited v. Broome, [1972] 1 All E.R. 801 (H.L.):

> "The only practical way to proceed is first to look at the case from the point of view of compensating the plaintiff. He must not only be compensated for proved actual loss but also for any injury to his feelings and for having had to suffer insults, indignities and the like. And where the defendant has behaved

> outrageously very full compensation may be proper for that. So the tribunal will fix in their minds what sum would be proper as compensatory damages. Then if it has been determined that the case is a proper one for punitive damages the tribunal must turn its attention to the defendant and ask itself whether the sum which it has already fixed as compensatory damages is or is not adequate to serve the second purpose of punishment or deterrence. If they think that that sum is adequate for the second purpose as well as for the first they must not add anything to it. It is sufficient both as compensatory and as punitive damages. But if they think that sum is insufficient as a punishment then they must add to it enough to bring it up to a sum sufficient as punishment. The one thing which they must not do is to fix sums as compensatory and as punitive damages and add them together. They must realise that the compensatory damages are always part of the total punishment." [emphasis added]

Following this approach, if the Commission thought a punitive award appropriate, it would consider the total award of compensation to Donald Marshall, Jr. and determine if that "sum is adequate" to serve the purpose of punishment or deterrence.

The case of LeBar v. Canada (1988) 90 N.R. 5 (F.C.A.) was an appeal of a Federal Court Trial Division decision and provides some guidance with respect to compensatory and punitive damages. An inmate was held in prison 43 days past his proper date of release. A declaratory judgment had been rendered in another case which set out how to calculate the term of imprisonment for people in LeBar's

situation. Though the prison authorities were made aware of this decision, they refused to release him and LeBar sued for damages for his unlawful incarceration of the additional 43 days. At the trial level, Muldoon, J. awarded general damages in the amount of $430 and exemplary damages in the amount of $10,000.

The general damage award for pain and suffering was very low because of LeBar's history. The trial judge reviewed cases where the general damage award in other instances was much higher and stated at p. 263:

> "The above recitation indicates why the damages awarded in the cases cited for the plaintiff are greater than he can expect to recover here. Upon becoming sui juris, if one does not exercise that restraint which nourishes personal liberty but continually victimizes others by means of criminal depredations, one is responsible for the devaluation of one's own liberty. Such a person cannot reasonably require the people and government of Canada to pay him a princely price for the liberty which he himself has constantly under-valued and squandered."

The trial judge therefore awarded the nominal sum of $430 in general damages.

The punitive damage award of $10,000 was, in contrast, very high. The Court of Appeal accepted the trial judge's assessment and stated at paragraph 11:

> "In my opinion, the necessity for the government and its officials to obey the law is the fundamental aspect of the principle of the rule of law which is now enshrined in our constitution . . ."

. . .

> "The assessment of exemplary damages must be an adequate disapproval of those servants reprehensible conduct in ignoring the law whose authoritative interpretation was clearly signalled to them and in oppressively, abusively, and deliberately disregarding the plaintiff's right to regain his conditional liberty and liberation from unlawful imprisonment. In light of the juris prudence, which, unfortunately for the assessor of damages does not present any exactly or even nearly similar situation, the court awards the plaintiff the sum of $10,000 exemplary damages".

It is respectfully submitted that LeBar is clearly distinguishable from the case of Donald Marshall, Jr. In LeBar the officials were found to have been negligent in their conduct and to have disregarded the Plaintiff's right to be released through an oppressive, wilful and wanton disregard of the Plaintiff's rights. The Appeal Court found that they had "deliberately detained" Mr. LeBar.

In the case of Donald Marshall, Jr., when the miscarriage of justice came to the attention of the Government, Mr. Marshall was released without undue delay and the Reference was convened.

Subsequently the Province of Nova Scotia established the Royal Commission and welcomed the exhaustive review of all matters related to his arrest, conviction and wrongful imprisonment. A settlement was paid by the Province of Nova Scotia to Donald Marshall, Jr. As a result of the Royal

Commission he was entirely vindicated. The Government has accepted all of the recommendations of the Royal Commission that were the responsibility of the Province of Nova Scotia. An interim payment was made by the Province, once requested by Donald Marshall, Jr.'s solicitors. The Attorney General, on behalf of the Province, expressed a profound apology to Mr. Marshall and his family. It established this Commission to recanvass the adequacy of the compensation previously paid.

For all of these reasons, it is respectfully submitted that this is simply not a case where punitive or exemplary damages ought to be awarded. All damages suffered by Mr. Marshall may be adequately addressed under the various heads of damage previously described and it is inappropriate and beyond the scope of this Commission to separately or in addition "punish" the impugned conduct of the state.

4. STRUCTURED SETTLEMENT

From the outset of this compensation process we have urged that a structured settlement be employed so that any additional award of compensation to Mr. Marshall, or a portion thereof, be structured. This method has a number of attractions. It would facilitate the flow of compensation coming into the hands of Donald Marshall, Jr. It would avoid the necessity of a manager or some other official administering the fund. It would safeguard the continuity of interim payments to Donald Marshall, Jr. over the term deemed appropriate by the Commission. It would exhaust itself at the end of such a term. It would guarantee a stream of payments to Mr. Marshall and thereby provide structure and stability to his future so that he would be able to embark on whatever employment, counselling and treatment was to his choosing.

If this Commission were disposed to recommend that all or any portion of Mr. Marshall's compensation be structured, then it is likely that the Government of Nova Scotia would advance monies sufficient to purchase an annuity contract after the Government had first obtained the advice of a broker of its choice, which broker would negotiate with various life insurance companies and obtain the best rate to fund that particular annuity.

Were there to be such a recommendation from this Commission, it would be left to the Province to determine the

appropriate broker and insurance company from which the annuity would be purchased.

Inasmuch as the evidence of heavy smoking, alcoholism, illicit drug use and suicidal tendency have a marked effect on actuarial projections, it is most likely that such factors would also be a relevant consideration to any life insurance company called upon to structure an annuity. It may well be that such circumstances would necessitate a current health profile, history, or other relevant inquiries, to ensure that funding requirements are accurate. If such be the case, we ask for the co-operation of Donald Marshall, Jr.

In its efforts to assist Mr. Marshall, while urging that serious consideration be given to a structured settlement, counsel for the Government prepared and circulated to other counsel a memorandum on the question of whether or not any further compensation paid by the Federal Government or the Province of Nova Scotia would be taxable to Donald Marshall, Jr.

We said that the Income Tax Act (Canada) generally taxes income from an office or employment, income from a business or property and capital gains. It is difficult to categorize any compensation that may be paid to Donald Marshall, Jr. as any of these general types of income. In relation to this matter it will be helpful to consider how Revenue Canada Taxation in general treats payments received as

damage awards in personal injury cases. Revenue Canada, Taxation has published an Interpretation Bulletin, IT-365R2, that relates to payments for damages in respect of personal injury or death. In this Interpretation Bulletin it is stated in paragraph 2 in part that:

> "all amounts received by a taxpayer . . . that qualify as special or general damages for personal injury . . . will be excluded from income regardless of the fact that the amount of such damages may have been determined with reference to the loss of earnings of the taxpayer in respect of whom the damages were awarded."

Therefore, in the case of damages for personal injury even though the damage may be calculated based on a loss of past or future earnings, such damages would not be included in income. The comments in this Interpretation Bulletin are based on the case of Domenic Cirella v. Her Majesty the Queen, [1978] C.T.C. 1 (F.C.T.D.). In this case as part of the damages received, the taxpayer received an amount of $14,500 as special damages for loss of income from the time of the injury to the end of 1971. Mr. Justice Thurlow, the Associate Chief Justice, held that this amount could not be considered to be income from a business nor could it be income from employment. He also went on to consider whether or not it could be taxed as generally coming within the definition of income. With respect to this he made the following comments at p. 4:

> "What a Court awards in personal injury cases is damages to compensate the injured person for the wrong done him. One of the elements frequently involved in such awards is the impairment of the earning capacity of the injured person resulting from his injuries and, in such cases, it is usual to assess the damages in respect thereof in two parts: one consisting of the loss up to the time of the judgment, which can generally be calculated with some approach to accuracy because the relevant events have already occurred; and the other, the loss for the future which can never be better than an informed and reasonable estimate. In both instances, however, they are for the same injury, the same impairment of earning power. There is but one tort and one impairment and, in my opinion, the damages therefor are all of the same nature."

And at p. 5:

> "Adopting, as I do, this view of the nature of the right of the plaintiff to the damages in question and having regard as well to the fact that they were in no sense earned or gained in the pursuit of any calling or trade or from property but arose through the injury done him, I am of the opinion that these damages are not of an income character and that the description of them in the judgment as damages for loss of income and the reasoning applicable thereto do not characterize the amount awarded as income but merely indicate the method by which a portion of the total award, which is of a capital rather than an income nature, was calculated."

Many of these comments will also apply to any compensation paid to Donald Marshall. However, because there is a lack of judicial precedents concerning the taxation of the types of payments that might be made to Donald

Marshall, Jr., it is difficult to provide a definite opinion.

We suggested that it would be important to determine how the earlier payment was treated by Revenue Canada, Taxation, as any subsequent payment should be treated in the same manner. We advised Mr. Marshall's solicitor that it is possible to obtain an advance income tax ruling concerning the taxation of any proposed payments. We provided the address for the Specialty Rulings Directorate in Ottawa and information regarding the disbursements likely incurred if such a request were made.

Counsel for the Government of Nova Scotia suggested that applying for an advance ruling would remove any doubt concerning the taxation of the payments before the payments were actually made.

We understand that counsel for Donald Marshall, Jr. have made such an application.

In the Interpretation Bulletin referred to above Revenue Canada, Taxation has also provided some comments on structured settlements. In paragraph 5 of this Bulletin it is stated that:

> "A 'structured settlement' is a means of paying or settling a claim for damages, usually against a casualty insurer, in such a way that amounts paid to the claimant as a result of the settlement are free from tax in the claimant's hands. to create such a structured settlement the following conditions must be complied with:

(a) A claim for damages must be made in respect of personal injury or death,

(b) The claimant and the casualty insurer must have reached an agreement under which the latter is committed to make at least periodic payments to the claimant for either a fixed term or the life of the claimant,

(c) The casualty insurer must

(i) purchase a single premium annuity contract which must be non-assignable, non-commutable, non-transferrable and designed to produce payments equal to the amounts, and at the times, specified in the agreement referred to in (b),

(ii) make an irrevocable direction to the issuer of the annuity contract to make all payments thereunder directly to the claimant, and

(iii) remain liable to make the payments as required by the settlement agreement (i.e. the annuity contract payout).

As a consequence of compliance with the foregoing conditions, the casualty insurer is the owner of, and annuitant (beneficiary) under, the annuity contract and must report as income the interest element inherent in the annuity contract while the payments received by the claimant represent, in the Department's view, non-taxable payments for damages."

An advance ruling from Revenue Canada, Taxation would confirm that any structured settlement proposed satisfied those conditions.

The record confirms (opening remarks, April 2, 1990, page 11) the compensation previously paid to Donald Marshall, Jr. He received a settlement in 1984 of $270,000. Of that sum, $97,000 was paid in legal fees. The Government, following your recommendation, approved an interim payment of $10,000 to Donald Marshall, Jr. The net amount he has received in compensation is $183,000.

5. CONCLUSION

We have addressed the claims advanced on behalf of Mr. and Mrs. Donald Marshall, Sr. We have recommended that their pecuniary damages be paid. We have urged that in the unique circumstances of this case, non-pecuniary damages ought not be restricted to the direct victim and that the preferred approach is for this Commission to award a suitable sum to compensate Mr. and Mrs. Donald Marshall, Sr. for their pain and suffering occasioned by their eldest son's conviction and incarceration.

We respectfully submit that there is no basis for a derivative claim sought on behalf of the Mi'Kmaq community. Ties of custom, culture and spirituality linking Donald Marshall, Jr. to his community are not relevant to issues of entitlement and adequacy. They do not sustain or legitimize a derivative claim for damages.

It is the responsibility of this Commission to consider the adequacy of compensation previously paid to Donald Marshall, Jr. and that review takes its authority from the Report and Recommendations of the Royal Commission and the Terms of Reference of this Commission of Inquiry.

We have suggested that there be a pre-judgment interest component applied to the damages sought by Mr. and Mrs. Donald Marshall, Sr., and their son. We have suggested how that be done.

Finally, we have dealt in considerable detail with the pecuniary and non-pecuniary losses suffered by Donald Marshall, Jr. We have proposed a method by which a fund of money would be available to provide the cost of future care, recognizing that this is an essential component to Mr. Marshall's rehabilitation, and stipulating that any overall award for his compensation should not be reduced by expenses necessitated through psychological therapy and drug abuse treatment.

From the outset, we have urged that serious consideration be given to a structured settlement were any further compensation to be awarded. Our brief describes how such a vehicle would be employed so as to avoid taxation in the recipient's hands.

These submissions and your subsequent deliberations will mark the final chapter in these proceedings.

One hopes that it will herald a new beginning for Donald Marshall, Jr., and lead to a future which will prove satisfying and rewarding to both himself and his family.

There is much to be confident about as one reviews the evidence led in these compensation hearings. One was struck by the strength, dedication and support shown by so many of the witnesses who appeared on his behalf. He was vindicated by the findings of this Royal Commission. He is seen as a very courageous person who is gradually returning to

a position of respect and honour. It is a status that must be earned in his native culture and one will expect Donald Marshall, Jr. to continue to demonstrate that such respect is well founded by his own actions and deeds (testimony, Knockwood, April 2, 1990, page 142; Marshall, Sr., pages 179-180).

The healing will take some time. He has received and will receive the support of his community. He is seeking that help and is obtaining it (Knockwood, page 147). He is held in high esteem as a symbol for all the things that he endured (Battiste, April 3, 1990, page 377). His vindication was considered a kind of victory by his community and one in which his community celebrated vicariously (Battiste, page 378).

One was also struck with the careful insight provided through close friends like Felix Cacchione, Jack Stewart, and two women with whom he had established a significant and lengthy personal relationship, formerly Karen Brown and presently Martha Tudor. These women articulately described the difficulties encountered by Donald Marshall, Jr. but also spoke of the great inner strength and other positive qualities which enabled him to succeed.

Some spoke of a frustration, early on, in persuading Mr. Marshall to seek help. They sensed a reluctance on his part to admit that he had difficulties and needed help. A

machismo attitude prevailed (testimony, April 4, 1990, page 531).

It is recognized that Mr. Marshall has to pull his own weight, but he will require the help of others at the same time. Acceptance of that assistance will depend on how it's offered and it must not be in any condescending way (testimony, April 4, 1990, pages 506 and 508).

The reports prepared by his psychologist, Mr. Kris Marinic, as well as the discovery testimony of Mr. Marinic, has been filed with the Commission. That evidence clearly establishes that Mr. Marshall's motivation is critical to a successful and satisfying future. His many positive attributes, intelligence, leadership qualities and strength of character, all auger well. One must prudently avoid "making too many decisions" for Donald Marshall, Jr. (Exhibit No. 8, tab 2, page 5).

A close friend expressed the wish that Donald Marshall, Jr. learn to treat notoriety as comfortably as did his father - to learn to either ignore it or have a little fun with it (testimony, April 4, 1990, page 512). Evidently, Donald Marshall, Jr. has had some success in this respect when one considers recent public appearances: in Ottawa seeking funding on behalf of the Mic Mac News; and a participant at the Drum Beat Indigenous People's Conference in Ontario on May 1, 1990. He feels more confident and these public

appearances are not as stressful as they used to be (discovery testimony, May 11, 1990, page 58).

The expert evidence before this Commission confirms that if Mr. Marshall were to undertake a year of psychotherapy and treatment for alcohol and drug abuse, he will have a chance to resume a relatively satisfactory life. Conversely, if he fails to seek such treatment and therapy, he will jeopardize his chances of having a satisfactory life (discovery testimony, May 11, 1990, pages 55-56).

This is what we must hope for Donald Marshall, Jr. He deserves our respect and support in the expectation that help will be sought. We can be confident that professional assistance is available and such efforts will prove beneficial.

Surely Mr. Marshall must consider himself fortunate to be sustained by the warm affection and high regard with which he is held by those who have come to know him.

It is hoped that the positions advanced in our Brief will assist this Commission in its reconsideration of the adequacy of compensation paid to Donald Marshall, Jr. and provide a framework and method of payment to ensure a healthy and satisfying future.

> "I have often brought about alliances, which there was no room to think could ever be made; and I have been so fortunate . . . and furnished our nation with supports, defenders, and subjects, to eternize our race, and to protect us from the insults of our enemies."
>
> (Oral Tradition: Maillard, 1758: 17.)

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Halifax, Nova Scotia, this 25th day of May, 1990.

JAMIE W. S. SAUNDERS
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TABLE OF CASE AUTHORITIES

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