

ROYAL COMMISSION INQUIRY
INTO COMPENSATION

SUBMISSIONS ON BEHALF OF DONALD MARSHALL, JR.

COMPENSATION FOR DONALD MARSHALL, JR.

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DONALD MARSHALL, JR. - COMPENSATION

INTRODUCTION: THE CONTEXT FOR COMPENSATION

On May 28, 1990, Donald Marshall, Jr.'s nightmare of wrongful accusation and punishment, triggered by events in Wentworth Park, will enter its twentieth year. Even on this 20th anniversary of the events which gave rise to a miscarriage of justice of such tragic proportions, the legal system will not have concluded its involvement in Donald Marshall, Jr.'s life.

For Donald Marshall, Jr., his experiences as a wrongfully convicted and imprisoned person are now as much a part of the fabric of his life and future as are any of the formative experiences we have had in the course of our more ordinary, kinder existences.

Donald Marshall, Jr. has been put through two preliminary hearings, four trials, four appeals, three Royal Commissions of Inquiry, a book, a film, countless newspaper, magazine, television and radio reports, stories, commentaries and editorials. Collateral legal proceedings have arisen in relation to the case including Donald Marshall, Jr.'s 1983 action against the City of Sydney and John MacIntyre, John MacIntyre's defamation action against the C.B.C. and the various cases on appeal to the Supreme Court of Canada arising out of the Royal Commission. Although not all of these matters proceeded to trial, they too cluttered the landscape of

Donald Marshall, Jr.'s life even after his release from prison and his acquittal by the Nova Scotia Court of Appeal.

The purpose of this compensation process as set out on March 22, 1990, by Order-in-Council of the Executive Council for the Government of the Province of Nova Scotia is "...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."

The tragedy and horror of the wrongfully convicted and imprisoned person does not readily translate into compensation. It is an essential and challenging responsibility for the State to compensate the individual who has been so egregiously injured by its actions. The extent of the injury, particularly in the case of a young man, hardly more than a boy, who has been wrongfully convicted, then imprisoned for many years in a hostile and dangerous environment, has profound dimensions.

Indeed the legal system is capable of creating few errors that have a greater impact upon an individual than to incarcerate him when he has committed no crime.

O'Neil v. The State of Ohio (1984), 83 A.C. 104 (10th Dist.)

As Peter Ashman, Counsel for Justice in London, has stated in "Compensation for Wrongful Imprisonment" (1986), 136 New Law Journal 497 at p.497-498, "...a miscarriage of justice by which a man or woman loses his or her liberty is one of the gravest matters which can occupy the attention of a civilized society."

The recent attention that has been focused on this case, first by the Royal Commission of Inquiry on the Donald Marshall, Jr. Prosecution and now by the Royal Commission of Inquiry into his compensation has finally begun the essential process of establishing the truth, although the endless scrutiny is still burdensome to Mr. Marshall's spirit. The compensation process as the denouement must meet the challenge of redressing creatively, sensitively and generously as far as is possible, the State occasioned injuries done to Donald Marshall, Jr.

This case should be recognized as a particularly egregious example of wrongful conviction. A young man was convicted on the basis of contrived evidence of the most serious crime and sentenced to life. Following his release he was subjected to further stigmatization by the same system that had wronged him originally. As an aboriginal person he has experienced the cruelest and most heartless features of a majoritarian society.

The depth of Donald Marshall, Jr.'s tragedy is enormous: labelled a murderer and subjected to a life sentence, he was wrenched out of his traditional community in the wake of an incompetent and biased investigation, locked up hundreds of miles from his family and community and forced to live bearing the burden of his innocence for many violent and unpredictable years.

This is also a case of family injury: steadfast in their belief of their son's innocence, Mr. and Mrs. Marshall made great sacrifices to keep in contact with him and to keep his memory alive with their other children. They visited him faithfully, called him and devoted their energies in trying to get justice for him against all odds.

The process and award of compensation must acknowledge Donald Marshall, Jr.'s profound injury and suffering and must be discharged with a sense of the critical moral and legal obligations involved.

Donald Marshall, Jr.'s case is of epochal significance in the history of Canadian Criminal justice. The state finally has the opportunity to return to Donald Marshall, Jr. that which will help to restore him. He can never be given back his youth. He can never relieve those many years lost in prison as a subsequent painful experience following his release. He will never know what it might have been like to have lived out an ordinary life with his community and his family. Donald Marshall, Jr. is serving a life sentence in

the most complete and tragic sense despite his innocence. His restoration requires an understanding of his origins and his loss.

CULTURAL DIFFERENCES RELEVANT TO COMPENSATION
FOR DONALD MARSHALL, JR.

The fact that Donald Marshall, Jr. is a citizen of the Micmac nation is the fundamental grid through which his entire experience with the criminal justice system must be viewed. His experience of racism, wrongful conviction and community scorn are all experiences which should be understood, especially in the context of compensating him, from a subjective, and therefore, Micmac perspective.

It is one thing to understand legal issues relating to compensation and settlement as a private law matter under Canadian law, it is quite another to begin to appreciate the ways in which this way of thinking about compensation may or may not be appropriate for Donald Marshall, Jr.'s situation. There are at least three critical cultural differences relevant to Donald Marshall, Jr.'s compensation.

The first important difference is the fact that as a Micmac, and as an aboriginal person, Donald Marshall, Jr.'s incarceration experience has been particularly severe. The present system is based on guilt and isolation, two values which are not part of Micmac culture. Donald Marshall, Jr. has been taken out of his community,

away from a place where he could speak his language and practice his culture, and effectively banished.

Related to this first difference, is the fact that Donald Marshall, Jr. is not only Micmac, but he is a member of a very important family in the Grand Council of the Micmac Nation. By being taken away from his family and his community at a very young age, Donald Marshall, Jr. has perhaps been deprived of the ability to develop into and understand the roles of responsibilities associated with the family of the Grand Chief. He has not only been deprived of his liberty, he has been deprived of his culture in a particularly dramatic and notorious way, given that his own father is the Grand Chief of the Micmac nation, a position he was positioned to assume. The magnitude of this injury is difficult for a non-aboriginal person to understand whose commitment to his or her parents and family is rarely of this spiritual character.

The second cultural difference relevant here is closely related to the first. Donald Marshall, Jr.'s injury and suffering throughout this horrible miscarriage of justice has not only been the suffering of one individual, it has been the suffering of an entire community. The Micmac are structured along kinship lines. Each family is an extended one. In a very real sense the aboriginal community is a large family.

When an individual is taken from an aboriginal family, and placed outside the community, especially in a prison, the suffering and distress on the part of the immediate family is enormous. They are not able to practice their culture and raise their children according to their values. It is seen as a message that their culture has failed because their son has been taken away from them. The upshot of this is that not only has Donald Marshall, Jr. been harmed profoundly, but so also has his immediate family and his extended family, the community.

The third area of cultural difference relevant to compensation relates to the relationship between Donald Marshall, Jr., his community, and the dominant or majority society. Donald Marshall, Jr.'s experience and injury is also one of damage to an historical and legal relationship between the Micmac and the Crown which will need special attention and effort to be restored. The Treaty of Peace and Friendship of 1752, one of several treaties between the Micmac and the Crown is not just a historical novelty, it is a living agreement as far as the Micmac are concerned, and an agreement creating legal obligations at Canadian law, following the Supreme Court of Canada decision in Simon v. The Queen [1985] 2 S.C.R. 387.

As the Supreme Court stated:

Both the Governor and the Micmacs entered into the treaty with the intention of creating mutually binding obligations which would be solemnly respected.

One important article of the Treaty of 1752, Article 8, makes specific provision for the resolution of legal disputes between Micmacs and the British. It ensures that the "Indians shall have the same benefits, advantages and privileges as any others of his Majesty's subjects." One of the critical reasons why Donald Marshall, Jr. was wrongfully accused and punished was because he is Indian, because he is a Micmac. He did not receive the same benefits and advantages in the administration of justice as a non-Indian would. As a result, a treaty relationship has been damaged and the Micmac's relationship to the Crown, as set out in the legal obligations created in Treaty of 1752, has been compromised. Consequently, it is important to see the wider community implications of the wrongful conviction and punishment of Donald Marshall, Jr. and to be mindful of these in assessing the extent and form of compensation.

It is not being advanced that compensation for Donald Marshall, Jr. should compensate the Micmac nation for the breach of a treaty obligations. This is a live issue which must be settled elsewhere. However, compensation must be understood in light of this as this is an integral part of Donald Marshall, Jr.'s cultural perspective, a perspective that includes the 1752 treaty as part of its oral traditional and cultural understanding of who the Micmac are and how they fit into or a part of a relationship with the non-aboriginal community. In failing Donald Marshall, Jr., the justice system has

also failed Micmac people. These concepts are intimately connected. It is because of these factors that Donald Marshall, Jr.'s case for compensation is not standard or archetypal and cannot be fitted into the existing conceptions of civil damages and compensation. A creative approach to compensation is required in order to repair, restore, and compensate for the damage here on the basis of these broader and inextricably linked relationships.

This brief to the Commission on Donald Marshall, Jr.'s compensation is intended to assist an understanding of Donald Marshall, Jr.'s claim for compensation and the unique features applicable to its resolution.

The brief sets out the essential features of the case and the findings of the Royal Commission on the Donald Marshall, Jr. prosecution, acknowledging this Commission's intimate knowledge in these areas. It identifies the philosophical origins of this particular compensation process and addresses the Order-in-Council which established this Commission.

The general theory and principles which it is submitted apply are examined in the context of this influential and novel case. Although it is submitted that many conventional damage principles do not apply to this unique case, it is appropriate to follow the common law doctrine which directs that one "takes the victim as one finds him/her".

This mandates an assessment of subjective factors which, in this case, means more than considering the age and gender and occupation of Donald Marshall, Jr. It means coming to terms with the significant differences in how he, his family, and his entire community, experience this miscarriage of justice. These differences are formidable and real, they cannot and should not be denied.

The losses that Donald Marshall, Jr. has suffered and the losses of his parents and community will be discussed in detail so as to assist the Commission in understanding the depth and gravity of the injury done to Donald Marshall, Jr. and those with whom he is inextricably linked.

Other features relative to adequate compensation will also be considered, including the appropriateness of awarding aggravated damages and prejudgment interest.

Finally, the proposed structure of the award for compensation will be set out.

Donald Marshall, Jr.'s losses and suffering and his claim for compensation arising therefrom are profound and complex but not unfathomable. Only a creative and informed resolution can ultimately do justice to compensation for this brave man, who has been so greatly wronged.

FACTS OF THE CASE

Donald Marshall, Jr. was born on September 13, 1953. He is the eldest son of Donald and Caroline Marshall, Donald Marshall, Sr. is the Grand Chief of the Micmac Nation. There are 12 other children in the family.

Donald Marshall, Jr. left school in 1970 at the age of 16 after completing grade 6. He began working as a drywaller/plasterer in the family's drywalling business which his father had operated since the death of his father in 1953. Pius Marshall, the next oldest son, also worked in the business.

On May 28, 1971, Donald Marshall, Jr.'s life was fatefully and permanently altered, when he and Sandy Seale, an acquaintance, were stabbed in Wentworth Park.

On June 4, 1971, Donald Marshall, Jr. was arrested by Detective Sergeant John MacIntyre of the Sydney City Police for the murder of Sandy Seale and placed in custody in the Cape Breton County Correctional Centre. His preliminary hearing was held on July 5 when he was committed to trial for non-capital murder. His trial took place during November 2 to 5 and on November 5 he was convicted of non-capital murder and sentenced to life in prison.

On November 15, 1971, Jimmy McNeil came forward and accused Roy Ebsary of the fatal stabbing of Sandy Seale. This information was never

disclosed to Donald Marshall, Jr.'s lawyers: the next day, on November 16, 1971, an appeal against the conviction was filed with the Nova Scotia Court of Appeal.

From November 17 to 21, the R.C.M.P. reinvestigated Donald Marshall, Jr.'s murder conviction. After a wholly inadequate and incompetent process the R.C.M.P. report supported the murder conviction.

On September 8, 1972, Donald Marshall, Jr.'s appeal was denied and on November 11 he was transferred to Dorchester Penitentiary, a transfer that should have occurred months before. He served the rest of his time either in Dorchester (maximum security) or Springhill (medium security).

In 1974 while Donald Marshall, Jr. was incarcerated at Dorchester Penitentiary, Detective Sergeant Urquhart failed to bring to anyone's attention the new and potentially significant evidence of Donna Ebsary who provided a statement that she saw her father washing blood off a knife after the stabbing in the Park.

On March 29, 1982, following a second RCMP reinvestigation into his case, Donald Marshall, Jr. was released from Dorchester Penitentiary to the Carlton Centre after serving nearly 11 years behind bars.

On July 29, 1982, following three months at the Carlton Centre, Donald Marshall, Jr. was released on bail pending a further review of his case. The Reference hearing before the Nova Scotia Court of Appeal was held in December, 1982, with argument in February, 1983. The Court

rendered its back-handed acquittal of Donald Marshall, Jr. on May 10, 1983.

On May 12, 1983, Roy Newman Ebsary was charged with the murder of Sandy Seale. Ebsary's preliminary was held on August 4, and he was committed to trial on a charge of murder. On September 12, the first Ebsary trial commenced. It ended in a hung jury and a second trial was commenced on November 4. Ebsary was convicted of manslaughter and commenced an appeal to the Nova Scotia Court of Appeal.

During 1984, while the Ebsary appeal was pending, an unfair compensation process played itself out to a mean-spirited and inadequate conclusion.

Ebsary's appeal was allowed and a new trial ordered which commenced in January, 1985. Having testified at his preliminary, and both previous trials, Donald Marshall, Jr. testified once again for the prosecution in Ebsary's third trial.

In 1985, following Roy Ebsary's conviction for manslaughter after a third trial, a further appeal on his behalf was made to the Nova Scotia Court of Appeal and denied. A leave application was then made to the Supreme Court of Canada which was denied in October, 1986.

Following this, on October 28, 1986, the Royal Commission of Inquiry into the Donald Marshall, Jr. Prosecution was established.

After extensive testimony, argument and collateral judicial proceeding, a report was rendered by the Royal Commission on January 26, 1990.

The present compensation process was initiated quickly in the wake of the Royal Commission Report.

The nearly 20 years that this case has spanned has also meant substantial periods of intense public scrutiny for Donald Marshall, Jr. His original arrest, trial and conviction attracted considerable media attention, particularly in Cape Breton. The re-opening of his case, generated great media interest, starting in 1981 and continuing, relentlessly, to the present day.

The proceedings of the Royal Commission of Inquiry into his prosecution were covered daily by both print and electronic media, and any public appearance by Donald Marshall, Jr., for any purpose, has attracted flocks of reporters, cameras and microphones. It has been for him an unrelenting and arduous struggle.

Facts of the Case
Marshall #1

FINDINGS OF THE ROYAL COMMISSION OF INQUIRY
ON THE DONALD MARSHALL, JR. PROSECUTION

The Royal Commission's findings are set out in Volume 1 of its report: the following is a summary of the main points relevant to the compensation process.

The Royal Commission concluded that:

The Criminal Justice System failed Donald Marshall, Jr. at virtually every turn, from his arrest and wrongful conviction in 1971 up to - and even beyond - his acquittal by the Court of Appeal in 1983. The tragedy of this failure is compounded by the evidence that this miscarriage of justice could have - and should have - been prevented or at least corrected quickly, if those involved in the system had carried out their duties in a professional and/or competent manner (p.15).

The evidence is persuasive and the conclusion inescapable that Donald Marshall, Jr. was convicted and sent to prison, in part at least, because he was a native person (p.17). The Commission viewed this to be one of the their most difficult and disturbing findings (p.148).

Donald Marshall, Jr. was not to blame for his own conviction and the miscarriage of justice against him was real (p.16).

The simple fact is that in 1971 Donald Marshall, Jr. told the truth concerning the events in the park. (p.27.)

THE POLICE RESPONSE

The police response to the stabbing was woefully inadequate. The subsequent MacIntyre investigation was conducted in an incompetent and unprofessional manner.

The response by the Sydney Police Department on the night of May 28 to 29 was incompetent to the point of negligence. Had proper and thorough investigation techniques been followed, it is highly unlikely that later events would have unfolded as they did.

MacIntyre immediately concluded without any evidence or investigation that Marshall was responsible for the crime. In doing so, he invented a context for the stabbing, an argument between Seale and Marshall.

MacIntyre identified Marshall as the prime suspect by the morning of May 29th - less than 12 hours after the stabbing - and had surmised if not concluded, that the stabbing arose out of an argument between Seale and Marshall (pp.40-41).

It is not acceptable for police officers to formulate a theory that has no evidence to support it and some evidence against it, and then to adopt that theory to the exclusion of any others. By doing so, John MacIntyre compromised the objectivity and impartiality of the ensuing investigation (p.41).

The fact that Marshall was a native is one reason why MacIntyre singled him out so quickly as the prime suspect without any evidence to support his conclusion (p.41).

MacIntyre's blind belief in Marshall's guilt dominated his conduct of the investigation and committed it to a course that was designed to seek out only evidence to support his theory. This "closed mind" approach, stubbornly pursued, resulted in a flawed investigation, culminating in the laying of charges against Marshall for the murder of Seale (p.41).

MacIntyre's direction of the beginning stages of his investigation - like the Department's crime scene investigation the night before - was also inadequate and incomplete to the point of incompetence (p.41).

MacIntyre was only prepared to consider information consistent with his own theory of the stabbing (p.47).

MacIntyre did not tell the truth to the Royal Commission when he denied speaking to Pratico between May 30 and June 4th statements.

The Commission found that MacIntyre was in the park with Pratico and made suggestions to him which formed the bases for a detailed and incriminating statement against Junior.

The Commission found that it was reprehensible for a police officer to take an unstable and impressionable teenager to a murder scene, review the scene with him, and then persuade him to accept suggestions in this fashion (p.50).

The Commission found that MacIntyre's interview of Chant on June 4th was oppressive, offensive and improper. As a result the interview, Chant signed a statement in which he identified Marshall as the assailant (p.51).

The Commission found that "the pursuit of truth is not the only value held dear by a civilized justice system; so too is freedom from coercion, threats and arbitrary action from those in authority" (p.51).

The Commission rejected MacIntyre's evidence that no suggestions were made to Chant and concluded that MacIntyre provided the references in Chant's statement to a dark haired fellow in the bushes, to an argument and to Marshall stabbing Seale.

The Commission found that it was completely wrong for MacIntyre to suggest a set of facts to Pratico. It was outrageous for him to suggest a corresponding set of facts to Chant and to then go even further by placing Pratico within Chant's line of sight to ensure the consistency of the two untrue statements.

The Commission found that it is highly improper police investigative practice to obtain any statement, let alone a statement

from an "eyewitness" to a murder, by misleading the witness and by making detailed suggestions which conform with the investigator's theory of the crime. The Commission found that MacIntyre's obtaining of Chant's statement went beyond improper practice. "In our view, it must be seen as purposeful action on the part of MacIntyre intended to extract from Chant a story consistent with that of Pratico. In order to get the statement, MacIntyre was prepared to tell Chant what he knew was not true, that is, that the police had a witness who had seen Chant in the park" (p.55).

The Commission found that these statements, obtained through improper police practice, played a significant role in Marshall's wrongful conviction (p.55).

The Commission believes MacIntyre obtained the statements from Pratico, Chant and Harris through tactics that were reprehensible (p.62).

The Commission found MacIntyre to be frequently evasive and, on several occasions, simply untruthful in his evidence before the Commission (p.65).

The Commission found that in failing to speak up about the deficiencies in the investigation, Urquhart failed in his responsibility as a professional police officer (p.68).

TRIAL PROCESS

The Commission found that both the Crown Prosecutor and Defence Counsel failed to discharge their obligations adequately or properly, and that the trial judge failed to interpret correctly the Canada Evidence Act, with the result that the trial process failed Donald Marshall, Jr. and led to his wrongful conviction.

The Crown Prosecutor should have interviewed each of the juvenile witnesses separately in depth (p.71). Not only did he not make the necessary effort to find out the reasons for the conflicting statements, but he also did not disclose the existence of those earlier statements to Marshall's defence counsel (p.72).

The Commission found that MacNeil had an obligation prior to the preliminary inquiry to disclose to defence counsel the contents of the prior inconsistent statements and his failure to do so was a contributing factor leading to Donald Marshall, Jr.'s wrongful conviction (p.72).

Donald Marshall, Jr.'s defence counsel let him down. Their actions, or lack thereof were found by the Commission to be the antithesis of what which would be expected from competent, skilled counsel (p.73).

Rosenblum failed to follow up the new evidence provided by Barbara Floyd (p.75).

Junior's defence counsel were aware of the prior inconsistent statements.

The fact that Junior was a native influenced Rosenblum and Khattar; the totally inadequate defence they provided to Marshall led the Commission to the irresistible conclusion that Marshall's race did influence the defence provided to him (p.77).

Mr. Justice Louis Dubinsky made various incorrect rulings on the evidence which significantly contributed to the conviction (p.84). The cumulative effect of these rulings was such that the Commission concluded that Junior did not receive a fair trial (p.77).

1971 R.C.M.P. REVIEW

In 1971, Inspector Al Marshall of the RCMP had the opportunity to uncover information that would have led inevitably to the conclusion Donald Marshall, Jr. had been wrongfully convicted (p.81). Al Marshall was not given the entire Sydney City Police Department's file on the case and made no request for it.

Crown Prosecutor MacNeil had an obligation to disclose to Junior's lawyers that Jimmy McNeil had come forward, the resulting statements and the fact that the polygraph tests of Ebsary and McNeil had been taken. His failure to do so was a breach of his obligation to disclose (p.82).

Robert Anderson, having been made aware of the new information, was under an obligation to make sure his prosecutor provided this information to Junior's defence counsel. If defence counsel had been aware of this new evidence, it would almost certainly have resulted in a new trial and that in turn in all likelihood have resulted in Marshall's acquittal (p.82).

Inspector Marshall's lack of effort is shocking. The Commission found that there can be no doubt that Marshall's incompetent investigation was a major contributing factor to Junior spending 11 years in jail (p.83).

APPEAL PROCESS

The 1972 appeal process failed Marshall as did the Crown, Defence, and the Court of Appeal, all of whom failed to recognize, in advance, arguments on the serious evidentiary errors involved in Junior's trial.

Rosenblum's failure to argue certain issues at Junior's appeal represented a serious breach of the standard of professional conduct expected and required of defence counsel (p.85).

The Attorney General's Department treated Junior's 1972 appeal as a routine appeal which they should not have done. The Crown at the appeal, and his superiors had an obligation to ensure that any error of law contributing to the conviction, and not raised by the defence, was

before the Court (p.86). This failure contributed to the denial of Marshall's appeal and to his continued incarceration.

The lack of communication or briefing between the Crown and the Sydney prosecutors represented a serious oversight (p.87).

The Commission found that a Court of Appeal has a duty to review the record of a criminal case placed before it, and to raise any significant error with counsel and ensure that it is properly argued. The serious issues in Junior's case were readily apparent on a reading of the trial transcript. Since the possibility of a "routine" criminal matter being heard by the Supreme Court of Canada is virtually non-existent, Provincial Courts of Appeal represent the final opportunity to make sure the law is properly applied according to accepted principles (p.88).

THE 1974 AND 1975 REVIEWS

In 1974 Urquhart failed to bring to at least MacIntyre's attention new and potentially significant evidence of Donna Ebsary seeing her father washing blood off a knife (pp.89-90).

THE YEARS IN PRISON

The effect of the Parole Board's policy concerning prisoners' claims of innocence is that a prisoner claiming innocence has a more difficult struggle in getting released.

Members of Donald Marshall, Jr.'s case management team were putting a lot of pressure on him to admit that he was guilty. Donald Marshall, Jr.'s frustration in maintaining his innocence in the face of the response that he was guilty provoked an aggressive reaction from him (p.110).

Once Donald Marshall, Jr. was out on bail, he ended up back on the street with none of the supports ordinary parolees usually have available to them (p.112).

The bitter irony is that the system, which had failed Donald Marshall, Jr. on so many occasions in the past, failed him again even as it sent him back into society. Although this was found by the Commission not to be the fault of the corrections system, which is simply not set up to deal with the unique situation in which Donald Marshall, Jr. found himself, it found that it was difficult to imagine a more tragic circumstance (p.113).

THE 1982 RCMP INVESTIGATION

The RCMP in reinvestigating the case obtained a statement from Junior at Dorchester which was not voluntary (p.95).

SETTING UP THE REFERENCE

Chief Justice MacKeigan influenced officials in the Department of Justice with respect to the determination of the final form of the Reference such that the Reference was constituted under s.617(b) of the Criminal Code leaving Marshall with the burden of preparing and presenting the case to prove his own innocence (p.115).

The Commission found it regrettable that officials in the Department of Justice were influenced by the view of Chief Justice MacKeigan in determining the final forum of the Reference (p.115).

REFERENCE DECISION

The Court of Appeal in acquitting Junior made a serious and fundamental error when it placed the blame on him. The Court of Appeal's gratuitous comments, which were not relevant to the acquittal, created serious difficulties for Junior both in terms of his ability to negotiate compensation for his wrongful imprisonment and also in terms of public acceptance of his acquittal (p.118).

The Court took it upon itself to "convict" Marshall of an offence - committing a robbery - with which he was never charged. The Court failed to deal with the failure of the Crown to disclose evidence, including the conflicting statements by witnesses, to defence counsel. The Court did not comment on the failure of the Crown to disclose to

defence counsel with statements taken from McNeil and others on November 15, 1971 (p.121).

The Court's suggestion that Marshall's "untruthfulness ...contributed in large measure to his conviction" is a conclusion which cannot be supported. It is a conclusion not borne out by any available evidence, and is contrary to evidence before the Court (p.121).

The Court failed to comment on the propriety of the Crown using Pratico as a witness and failing to disclose to the defence counsel the fact that he was in the N.S. Hospital and had given a statement on May 30th (p.123).

The Court of Appeal had before it evidence that Chant, Pratico and Harris had provided inconsistent statements (p.123).

The error in limiting the cross examination of Pratico should have been apparent to the Court of Appeal and the serious effect of the error should have been recorded (p.124).

The upshot of the Court of Appeal's gratuitous comments in the last two pages of the judgment was to place the blame squarely on Marshall for his conviction and to ignore any evidence which would suggest fault on the part of the Criminal Justice System. The decision amounted to a defence of the system at Marshall's expense, not withstanding overwhelming evidence to the contrary.

Even in the narrowest sense, Donald Marshall Jr.'s wrongful imprisonment for 11 years in a federal penitentiary is a miscarriage of justice in the extreme (p.125).

The Court of Appeal's conclusions as to Marshall's fault are unwarranted and without foundation (p.126).

Mr. Justice Pace should not have sat on the Reference. The perception of absolute impartiality and fairness demands that a judge who, by virtue of an earlier position, bears some or all of the responsibility for the matter now before the Court, refrain from any involvement in the matter as a judge (p.126).

DONALD MARSHALL, JR. AND THE ATTORNEY GENERAL'S DEPT.

Donald Marshall, Jr. was not treated properly by the Attorney General's Department. In almost every instance, the architect of this lack of attention and lack of concern was the Deputy Attorney General, Gordon Coles (p.127).

Crown Prosecutor Frank Edwards urging on the Court of Appeal that Donald Marshall, Jr. be held responsible in part for what happened to him is improper and not in conformity with the responsibilities of his office (p.131).

The opposing of any public inquiry by Coles had the effect of placing the onus on Donald Marshall, Jr. to identify wrongful conduct by

those involved in his prosecution. Coles' failure to take any positive action following the Court of Appeal Reference to determine what had gone wrong in Donald Marshall, Jr.'s case is inexcusable (p.133).

The responsible officials in the Department of the Attorney General had a professional responsibility to give Donald Marshall, Jr.'s counsel request [for information] a proper review. Their failure to do so is another example of dereliction of responsibility by senior staff in the Attorney General's Department (p.134).

Coles' unilateral communications with the Campbell Commission and his suggestions on the how Commission should proceed were improper (p.135).

The monies paid to Donald Marshall, Jr. do not in any way purport to compensate him for the inadequate, incompetent and unprofessional investigations of Sandy Seale's murder by MacIntyre and the Sydney City Police Department; the inadequate representation he received at the hands of his counsel; the failure of the Crown Prosecutor to disclose the inconsistent statements of key witnesses; failure of the Attorney General's Department to disclose their knowledge of Jimmy MacNeil's coming forward in November 1971; and the incompetent reinvestigation by RCMP Inspector Marshall in November 1971 - none of which relates to the period Marshall spent in jail (p.139-140).

Donald Marshall, Jr. should not have had to pay for the legal expertise necessary to get him out of jail nor should he have had to pay

the legal fees incurred in getting compensation (p.140). The compensation process was not fair.

The Commission concluded that the compensation negotiations were strongly influenced by factors which were either wrong or inappropriate, and that as a result the compensation process was so seriously flawed that the amount paid should be re-evaluated (p.18).

Notwithstanding the release by Marshall, the Commission found that it would be most unjust should the original settlement be allowed to stand without any further consideration of its fairness based on the facts as now known (p.140).

ADMINISTRATION OF CRIMINAL JUSTICE

The Commission made findings that a two-tier system of justice exists in Nova Scotia - a system that does respond differently depending on the status of the person investigated (p.220). Donald Marshall was profoundly victimized by this insidious system.

RESPONSES TO THE REPORT OF THE ROYAL COMMISSION

The Government of Nova Scotia responded to the findings and recommendations of the Royal Commission on February 7, 1990.

In its response, the Government acknowledged the existence of racism and the differences in treatment that influential people under investigation had received (Exhibit Vol. 9, Tab 1, pp.4, 5 and 6).

The Government's response also acknowledged as apparent that, "...as the dominant culture has intruded upon Micmac communities, community life has suffered."

On Friday, February 23, 1990, the Nova Scotia House of Assembly passed a unanimous resolution on behalf of every Nova Scotian, "...expressing [our] most sincere apology for the grievous injustice dealt [Donald Marshall, Jr.] by every public institution he encountered during that tragic 19 year period" (Exhibit Vol. 9, Tab 3).

The resolution refers to "...the tragic injustice..." being "...compounded and prolonged for almost two decades by a system bent on exonerating itself, rather than righting its wrong..." and refers to Donald Marshall, Jr. and his family as "...victims of public institutions mindlessly engaged by racism and blinded by self-interest. .."

THE COMPENSATION ASPECT - THE POSITION OF THE GOVERNMENT OF
NOVA SCOTIA ON PRINCIPLES AND PROCESS FOR RESOLUTION

In the early stages of the compensation process, the Government agreed on certain governing principles for the inquiry into compensation. The Government accepted the findings of fact of the Royal Commission on the Donald Marshall, Jr. Prosecution. It directed there to be no pre-set limit on the amounts recoverable with respect to any particular claim or any particular aspect of a claim. William MacDonald, Q.C., Deputy Attorney General, in a meeting on February 5, 1990, with counsel and the Commissioner, stated the Government's position that "there is to be no discussion of any ceiling." The Government confirmed that the Federal Provincial Guidelines for compensation of the wrongfully convicted are not applicable to this case.

The Government committed itself to compensating Donald Marshall, Jr. for all aspects of his treatment at the hands of the judicial system, no matter who the state officials or agents were and agreed that any and all factors can be considered which may have given rise to the wrongful conviction, imprisonment or the continuation of that imprisonment.

The Compensation Aspect
Marshall #1

ORDER-IN-COUNCIL: A FRAMEWORK FOR COMMON DECENCY

It will be submitted in this brief that compensation should be awarded to Donald Marshall, Jr., his parents and his community, in the latter instance, in the form of a specific and concrete acknowledgement of Donald Marshall, Jr.'s connection to his people and the unique culture and heritage they share.

The Order-in-Council which established this tribunal presents a broad base for inquiry and recommendation which certainly is consistent with the approach taken in these submissions on behalf of Donald Marshall, Jr. toward the level, type and potential recipients of compensation. The Order must be interpreted so as to give effect to its primary purpose - to "reconass the adequacy of compensation paid to Donald Marshall, Jr. in light of what the Royal Commission on the Donald Marshall, Jr. Prosecution found to be factors contributing to his wrongful conviction and continued incarceration, as indicated in Recommendation No. 8..."

If a literalist approach were taken, it would involve an attempt to argue, albeit unconvincingly, that compensation should be confined to Donald Marshall, Jr. and that his family and community should be altogether excluded. However, even the plain text of the applicable recommendations from the Commission show that such a narrow outlook would not be defensible.

The Order specifically directs that this Commission should, in performing its duties, have regard to recommendations 4, 5, 6, and 7. For present purposes, the former two recommendations are relevant. Of course, as is argued supra, Recommendation 4 effectively ends any debate about there being a limit imposed on compensation for nonpecuniary losses from either the Trilogy of cases from the Supreme Court of Canada, the Federal Provincial Guidelines or any other source. Neither are these would-be limitations able to be resuscitated and disguised as guidelines. However, beyond the obvious points, it is clear that the Commissioners were indicating that a sense fairness and generosity ought to inform any decision on compensation for wrongfully convicted persons. They could have either recommended specific arbitrary ceilings on claims or suggested that such limits would be appropriate. Instead, in their rejection of this approach, they merely reiterated the sentiments of the Thomas Inquiry which emphasized principles of common decency, fairness and generosity.

Therefore, the Order-in-Council must be interpreted according to this perspective which was imparted by the Commissioners themselves and is specifically to be invoked in the interpretation of this Commission's mandate.

Just as there is to be no pre-set limit with respect to any particular claim, neither is there to be any restriction on "any particular aspect of a claim." To argue that claims by Mr. Marshall on

behalf of his family or community are excluded would be to impose a limit on a vital and appropriate aspect of a reasonable claim: such an argument would propose that the ceiling be nothing.

The Order-in-Council and the Commissioner's Report also do not permit a restrictive perspective concerning Mr. Marshall's global claim, especially when one considers Recommendation 5: "...any judicial inquiry be entitled to consider any and all factors which may have given rise to the wrongful conviction, imprisonment or the continuation of that imprisonment."

This recommendation does not advance merely a noble-minded view. It is the only rationale outlook which the Commissioners could have maintained in light of their findings. The Commissioners were demonstrating that they were prepared to employ their analytical framework in a consistent manner: no inquiry into compensation, when it sets about providing some material redress for the victim of injustice, can ignore the factors identified by the Royal Commission as having contributed to the miscarriage of justice in the first place.

In the case of Donald Marshall, Jr., the Commissioners found "that the fact that Marshall was a Native was (a) factor in his wrongful conviction and imprisonment." (Vol. 1, p.15).

At p.17, the Commissioners continued: "from all of that, the evidence is once again persuasive and the conclusion excapable that

Donald Marshall, Jr. was convicted and sent to prison, in part at least, because he was a Native person."

Any interpretation of the Order-in-Council that contends that Mr. Marshall's compensation must be for his injuries only, conceived in the narrowest possible sense, would be dramatically inconsistent with the Order-in-Council and the directly applicable portions of the Report of the Royal Commission. To do so would ignore the fact that Mr. Marshall is Micmac, with the many vital considerations that this fact necessarily brings into play as argued throughout this brief. He was wrongfully convicted in part because he was Native. Now he must be compensated with this factor in mind, requiring a careful and studied reference to his family and community.

The Order-in-Council must be acted upon in a manner which is consistent with its plain meaning as presented above. It must also be interpreted in a purposive way, which obligation is made easy by its invoking Recommendations 4 and 5. There is no ambiguity in these aspects of the Order-in-Council. Rather, there is a clear and mandatory duty to compensate Mr. Marshall generously and liberally. There is no room in the Order-in-Council or this process, in general, for narrow-mindedness, parsimony, or a desperate and retrogressive attachment to precedent. The Order-in-Council and the Report of the Royal Commission on which it is based must provide the framework for discharging an overdue obligation to Mr. Marshall, his family and community by Canadian society. That this duty is also consistent with moral and legal

obligations makes the argument for a trifurcated approach to compensation involving Mr. Marshall, his parents and his community, unassailable.

THE THEORY AND ADEQUACY OF COMPENSATION

The Inadequacy of the Previous Compensation Process and Award

By Order-in-Council, dated March 22, 1990, this Royal Commission has been directed to "reconvaass the adequacy of compensation paid to Donald Marshall, Jr., in light of what the Royal Commission on the Donald Marshall, Jr. Prosecution found to be factors contributing to his wrongful conviction and continued incarceration, as indicated in recommendation no. 8 of the Report of the Royal Commission, and to determine any further compensation which is to be paid as a result."

In discharging this mandate, it is necessary for this Commission to assess what has made the previous compensation award inadequate. It is submitted that the previous compensation:

1. Was made in the absence of the truth about Donald Marshall, Jr.'s wrongful conviction as detailed in the findings by the Royal Commission.
2. Was made without acknowledgement of Donald Marshall, Jr.'s cultural distinctiveness.
3. Did not take into account all of the losses Donald Marshall, Jr. has suffered, or the extent to which he has been injured.
4. Lacked any acknowledgement of the appropriateness of aggravated damages.

5. Provided no compensation for the losses to Donald Marshall, Jr.'s parents and his community.

6. Was not informed by the proper, or perhaps any, legal principles which obtain in the context of wrongfully convicted and imprisoned persons.

The claim for compensation for Donald Marshall, Jr. is trifurcated: (1) Obviously Donald Marshall, Jr. must as an individual be appropriately compensated, but his claim includes the derivative claims for compensation to Donald Marshall, Jr.'s parents (2) and his community (3). It is submitted that adequate compensation for Donald Marshall, Jr., particularly because of unique cultural factors, necessitates that compensation to him include compensation for these others.

The Necessity of a Culturally Appropriate Interpretation of the Traditional Boundaries of Compensation

The necessity of a culturally appropriate interpretation of the traditional boundaries of compensation.

Although, it is not unreasonable that the wrongfully convicted person be required to present the primary claim for compensation, there are no compelling reasons to refuse to add others who have suffered injury arising out of the miscarriage of justice.

Kaiser, H. Archibald "Wrongful Conviction and Imprisonment: Towards an End to the Compensatory Obstacle Course", Windsor Yearbook of Access to Justice, Vol. 9, p.98 at pp.123,124.

This broader scope for compensation recognizes a number of important factors, some of which are particularly pertinent in Donald Marshall, Jr.'s case. Compensation for others is an acknowledgement of the interdependence of individuals in society and "the clear fact that people seldom suffer misfortune alone."

Kaiser at p.124.

It offers a sense of legitimacy and encouragement to those who have been injured by the experiences of their loved one and whose own lives have been fractured. The suffering of the wrongfully convicted person is also the suffering of his family. The state must bear responsibility for these injuries as well.

Breaking New Ground: The Moral and Legal Imperatives of the Marshall Case for Compensation

The assessment of compensation to Donald Marshall, Jr. must involve an exercise wherein the minimization of cost is not a dominant or even an influential factor. Compensation for Donald Marshall, Jr. must be settled on the basis of principle: failure to live up to this challenge will merely bring further discredit to an already shameful chapter in the history of Canadian Criminal justice. It is self-evident that it is time to do that which has not yet been done; acknowledge the

harm done to Donald Marshall, Jr. and compensate him fairly, which must mean generously in the circumstances.

It is submitted that justice has a high price: this is a position "based on an assumption that it is simply imperative that the state make amends for its infliction of harm on innocent citizens."

Kaiser, at p.108.

The Kaiser paper discusses extensively the general principle which underlie the above assertion that there is a moral and legal obligation to compensate those who are wrongfully convicted and imprisoned (Kaiser, pp. 100-103 and pp. 103-108). The contrary arguments are surveyed and dismissed at pp. 108-109 of the Kaiser paper.

Concerns about the extent and frequency of liability and the attendant costs are, according to Professor Kaiser in his paper "...really of a trifling nature in comparison to the condemnatory statement such prospects make about the reliability of the criminal justice system." (p.108)

There is no evidence to suggest that the number of cases of compensation for wrongful conviction and imprisonment has been anything but miniscule, even on an international basis. All the additional factors of the Marshall case make it an even more unusual case.

The Trilogy: Gutting the Red Herrings

The Kaiser paper observes that the Supreme Court of Canada Trilogy of personal injury cases has no place in the realm of compensation for the wrongfully convicted. These involve cases which arose out of disputes between private parties for personal injuries. None of them are examples of the state discharging a moral and legal duty to one of its victims.

Kaiser at p.149, referring to Arnold v. Teno, [1978] 2 S.C.R. 288, Thornton v. Board of School Trustees of School District No. 57 (Prince George), [1978] 2 S.C.R. 267 and Andrews v. Grand and Toy, [1978] 2 S.C.R. 230.

Any suggestion that the Trilogy of cases should apply to limit the award of non-pecuniary damages in this compensation claim would be most unfortunate. That such a ceiling would be employed has already been condemned in the scholarly literature (see Kaiser, p.149). For that matter, even the Federal Provincial Task Force anticipated the inappropriateness of this unhelpful benchmark (see infra, at p.149).

The Report of the Federal Provincial Task Force on Compensation for the Wrongfully Convicted referred to in Kaiser's paper at p.149 provides further reasons for not imposing limits on nonpecuniary awards for compensation:

- Wrongful Conviction and imprisonment...is such a serious error that the state, ...should fully compensate the injured parties;

- The number of potential claims would appear to be small so that there is no justifiable fear of a drain on the public purse;
- Imposing a ceiling on the amount of the award would appear to be contrary to the general philosophy of wanting to provide redress for an injured party;
- The state very rarely imposes a limit on the awards available resulting from damage to property. Limiting compensation in the case of unjust convictions could appear as if the state valued property rights to a greater extent than the freedom of its citizens.

Before analysing the content of the Trilogy cases and further noting the other critiques of this suggestion, it is in order to pose the question of why the inapplicability of the Trilogy would even be questioned in the unusual circumstances faced in this case.

It is a feature of our common law legal system and approach to problem solving that past decisions are used as guides to future conduct in similar cases. However, the Marshall case is simply sui generis at this point in Canadian legal history. This is not to say that there have not been other wrongful convictions and occasional examples of compensation (e.g. Fox). Nonetheless, Marshall is in many ways unprecedented, given the enormity and the character of the various state wrongs and the fact of his being an aboriginal person. Following the Trilogy, or for that matter the British Assessors Awards or the Thomas case, would be to adopt the wrong concept from a wholly divergent juridical context in the case of the Trilogy or to import uncritically the only extensively similar work of foreign tribunals. Such a reaction would represent the reflex of a nervous legal system in confronting a hard new case and like all reflexes, would be unthinking

and unguided. The only result would be to stultify progress and to demean the high ideals of justice, with little to say in defence of the approach or the result other than that "precedent was followed", even if principle was sacrificed.

It should simply be faced that to reach for decided cases can lead to error, especially when those precedents are not applicable to the problem at hand.

It is submitted that the Trilogy does not apply either as a limit, or more insidiously, as a guidepost, in the first instance because the principal parties here simply say that they are not to be considered: the Government of Nova Scotia explicitly adopted Recommendation 4 of the Royal Commission (Vol. 1, p.147) in the Order-in-Council with respect to the determination of the adequacy of compensation: "We recommend that there be no pre-set limit on the amounts recoverable with respect to any particular claim or any particular affect of a claim. Although the Federal-Provincial Guidelines...set a limit for non-pecuniary loss at \$100,000 we echo the admonition...Common decency and the conscience of society at large demand that Mr. Thomas be generously compensated." Therefore the position of this Commission must be that the Federal-Provincial Guidelines should not apply and that no ceiling is to be discussed. This is therefore not a legal environment where the Supreme Court of Canada has any right to be heard, so to speak. The parties to this tribunal have made the declarations of the Supreme Court of Canada irrelevant. Any proposal to have the Trilogy (or the Federal-Provincial Guidelines) be considered as mere aids in determining the final sum for

non-pecuniary losses should similarly be rejected. This would have the affect of reintroducing the Trilogy by way of a conceptual backdoor when these cases cannot enter more directly. In the Trilogy (and the Guidelines) the \$100,000 figure was only intended to be a limit or ceiling. Now that this use has been rejected by the Order-in-Council and the Commissioners, discussion of this issue must be ended in this inquiry.

Even if the ground rules for this tribunal had not already been set in a manner which excludes the Trilogy, they have nothing to offer with respect to the matter at hand, the rationale of their limiting principles being entirely irrelevant in this compensation context.

The Supreme Court of Canada approach in the Trilogy from the prespective of awarding sufficient pecuniary compensation to provide the injured plaintiffs with adequate future care, but established a ceiling in nonpecuniary awards in personal injury cases of \$100,000, "save in exceptional circumstances..."

Andrews, supra at p.265.

This statement from the Supreme Court of Canada itself clearly contemplates circumstances where the limiting principles of the Trilogy should not apply. Such are the circumstances of Donald Marshall, Jr.'s case.

In the Andrews and Arnold cases, the Supreme Court of Canada discussed concerns about the social burden of large awards and the fact that the area of personal injury was open to "...wildly extravagant claims."

Andrews, supra, at p.261.

The Court referred to the dramatically high levels for these awards in the United States and the "soaring" damage awards. In Arnold v. Teno, at p.333, the Court stated "we have a right to fear a situation where none but the very wealthy could own or drive automobiles because none but the very wealthy could afford to pay the enormous insurance premiums which would be required by insurers to meet such exorbitant awards."

This quote graphically illustrates how inappropriate it is to apply principles developed in a completely different context, that of conventional personal injury litigation, to an award of compensation to a person injured by a state wrong. The remarks of the Supreme Court even in the context in which they were made might well be criticized as being hyperbole. To employ them here would do great violence to the principle of stare decisis, by grafting these comments on to radically different juridical corpus.

The British Assessors Awards (Tab 2, Commission Counsel cases)

A desperate search for precedent might fasten on the British Assessors Awards. This would be a poor choice indeed, unless these cases were examined for guidance on how not to handle the Marshall claim. They are inapposite in a legal sense given that they emerge from the distinct and, in this context, discredited British environment (Kaiser at p.110 and pp.142-143). They are deficient procedurally and in an evidential sense. They lack clear statements of governing legal principles. They ignore the conduct of the agents of the state. They emerge from a different social and economic environment and from a country which, despite its many influences on Canadian legal culture, does not have the same level of protection of constitutional rights as Canadians enjoy. Wrongfully convicted and imprisoned people in Canada ought not to be kept in the dark shadows cast by the British experience.

With respect to many categories of loss referred to in the assessors' cases, no evidence was offered, claims being advanced on the basis of mere assertions.

The assessors also paid considerable attention to the duration of the period of imprisonment. While this is obviously relevant, the wrongfully imprisoned person's subjective conditions of imprisonment were not examined. Further, the cases presented involved relatively short periods of incarceration, anywhere from 104 to 2 years and 9 months. Donald Marshall not only served 11 years in prison, he was sentenced to life.

The awards do not contemplate cases involving the degree of injury and catastrophic injustice found in Donald Marshall's case. Even where attention is focused on the wrongs done to claimants, it is justifiable to question the assessors' perspective and the Home Office's instructions where, for example, one assessment explicitly refers to the misconduct of the police as "...unintentional and not of a grave nature. I do not consider that the situation was to any great extent attributable to their conduct..."

Commission Council cases, Tab 2, Assessment dated October 29, 1986.

In another award, it was stated that, "The conduct of a police investigation is not a matter for which compensation by the Home Secretary may be considered."

Nor was the alleged treatment by the police and "loss of standing" in the local community, which was allegedly affected by police actions, considered compensable losses.

The British assessment awards are simply so woefully inappropriate as guide posts in this case as to be not worthy of consideration, let alone emulation.

The Thomas Case: Of Interest, But Not Persuasive

This Commission may also wish to review the Arthur Allan Thomas Commission Report which provides some useful information with respect to how a miscarriage of justice was handled in New Zealand. However, the case is clearly different in many aspects from that of Donald Marshall, Jr. Further, the process by which the Commission arrived at the compensation is comparatively vague and uninstructed. The New Zealand Commission also had quite restrictive terms of reference in its Order in Council. Thomas, therefore, cannot be relied upon as a clear and authoritative precedent. Nonetheless some essential basic principles are enunciated by the Commission. "Common decency and the conscience of society at large demand that Mr. Thomas be generously compensated." (Commission Counsel cases at p.115). If nothing else, this sentiment should infuse the decision of this tribunal.

In awarding compensation, the Commission considered a broad range of losses and injuries many of which are appropriate to Donald Marshall, Jr.'s case. However, other distinguishing aspects were not present, including the distinctive features of being an aboriginal person and the losses unique to this characteristic.

There are distinguishing features in aggregate which make the Arthur Allan Thomas compensation merely noteworthy, rather than persuasive.

Some examples of these features are: the findings of the Royal Commission on his prosecution that the legal system betrayed Donald Marshall at every turn, the unique cultural and language factors present in Donald Marshall's case, including the significance of his position in the community as the son of the Grand Chief, the gratuitous comments of the Court of Appeal and his youth when arrested and falsely charged.

Adequate compensation to Donald Marshall, Jr. requires that these unique factors be taken into account and the case of Arthur Allan Thomas cannot assist this Commission in this regard.

The Commission did refer to the fact that Mr. Thomas had always been an outdoors man and they remark on the deprivation he endured in this respect by virtue of his incarceration, (p.116) and to this extent the New Zealand tribunal did consider some matters which are also present in the Marshall case.

Further, the Commission identified the effect on Mr. Thomas of listening to false evidence being given against him, describing his undoubtedly deep form of mental anguish.

Mr. Thomas received the sum of \$950,000 New Zealand dollars for pecuniary and non-pecuniary compensation, not including compensation to his family for prison visits, legal and other professional fees. Like the British cases, this case emerges from a different legal,

constitutional, economic and social environment and is based upon widely variant facts. Altogether, little purpose is served by attempting to use Thomas as a template over this case.

Despite contact, settlement, and attempts at assimilation, the Micmac culture is distinctive and very much alive (McGee, p.67). Micmac culture and traditions are found in the Micmac language, in interpersonal behaviours, in story telling and folklore which has passed from generation to generation, in anecdotal accounts of events, and in various celebrations and traditional ceremonies (McGee, p.37-38). Historical records from the time of early contact with the Micmac Nation document unique cultural phenomena and characteristics that have been transmitted and can still be seen as vital today.

Values of gift giving as restitution, personal autonomy, looking after community members, despair in the face of insult, reactions of repugnance to captivity or loss of liberty, notions of kinship and extended family characterized the traditional Micmac community and are constant features of the contemporary community (McGee pp.44-53).

Examples of historical continuity include representative instances of consensual decision making which existed in the 1600 and 1700's, and still exist in the present day structure and operation of the Micmac Grand Council (McGee at p.63).

Language, which is central to the transmission of culture, continues to be a potent and rich component of the Micmac community.

The Micmac language is a repository of many of the important values that underlie the Micmac community. For example, the term

"uncle" (Nugumis) suggests a broad notion relating to responsibility for the well-being of those in his care, meaning, someone who generally looks after or someone who cares.

By being removed from his community, Donald Marshall, Jr. was deprived of the ability to practice his culture through the use of his language and cut off from a central aspect of his identity of a Micmac.

The contemporary Micmac community is structured in terms of extended family and kinship. There is a very strong sense of linkages and extended kinship that is not restricted to blood relatives, or to relatives acquired through marriage. In this notion of kinship, the concepts of fostering and caring as a sense of looking after each other, assume a prominent place (McGee, pp.55-56). Kinship is so strong in the Micmac community that injuries to one person hurts the immediate family and effects the entire community so that it is "...possible that the entire nation could be affected by any kind of misdeeds that happen to particular individuals" (Knockwood at p.125).

Donald Marshall, Jr.'s connections therefore are not only to his immediate family or reserve, but extend throughout his community, a community bound together by common traditions, sharing and interdependence.

In the Micmac community, the relationship with parents is very significant, and sibling relationships are extraordinarily strong (McGee at p.58). Dr. McGee testified that an examination of the early

historical literature, as well as contemporary involvement, suggests that some of the strongest kinship bonds in native communities in the Atlantic Region are those among siblings.

One of the essential values underlying the Micmac community is the notion of personal autonomy. This involves creating a well developed sense of self, and a sense of competence, of being able to get by, of being prepared and capable of surviving in the world (McGee, p.60). The Micmac notion of autonomy is one of a competent, self-reliant person, who is linked to, and integrated with, other autonomous persons in the community. The traditional political decision-making process, which is essentially one of consensus, emphasizes both personal autonomy and connectedness or interdependence (McGee, p.61).

This is a consciousness that Donald Marshall, Jr. has been separated from: over the years he has lost, it has shifted and flourished as an essential feature of contemporary Micmac community life and culture.

It is an important part of Micmac culture to take an interest in what is happening to other people in the community (McGee, p.62). Dr. Marie Battiste has described a feature of this in terms of an ongoing, ever-present community dialogue which forms the tribal consciousness (p.365-368).

Gifts symbolize important values in the Micmac community. Gifts have represented the validation of understandings or transactions

amongst peoples, the symbolizing of connections to others which establish and maintain social relationships, as a means of restitution, in reestablishing social relationships which have been breached, and an economic redistribution for equalizing disparities (McGee, p.73-74).

These symbolic functions of gift-giving have contemporary manifestations. The person who is generous, and gives gifts with a good heart, is someone to be respected in the community (McGee at p.74).

The capacity for giving and sharing in Micmac culture is the most important indications of a good person (Battiste, p.363). Inherent in the concept of sharing with others is the elemental sense that the maintenance of an individual's own integrity and sense of autonomy involves looking after the well-being and autonomy of others for whom an individual cares and has an obligation (McGee at p.75). Sharing and giving are characteristics of the culture, not the accumulation of wealth and material goods (Knockwood, at p.124).

Donald Marshall, Jr. has had little opportunity to share with his community other than through his suffering: yet his recognition of the importance of sharing is revealed by his desire to start a cultural survival camp for Micmac children.

The Micmac values associated with child-rearing and the significance of children to the community are material in understanding Donald Marshall, Jr.'s compensation claim. There are clear and distinct cultural differences between aboriginal and non-aboriginal child-rearing

practices and context (Vol. 7 at Tab 12), (Battiste at p.317-318). Child-rearing practices and philosophies have been addressed before this Commission by evidence from Dr. Battiste and in some of the materials found in Exhibit Vol. 7.

The Micmac community has a very deep love, concern and attachment to their children and other children (Battiste, p.317). Children are greatly valued by the community, belonging not only to their immediate family but also to the greater good and the greater collective community (Battiste at p.317).

The consequences of the removal of a child from the community are devastating, occasioning a sense of loss, and having profound and far-reaching effects (Battiste, pp.330-334).

In addition to the special relationship to children in the Micmac community, women are uniquely regarded as the first teachers who bring the future of the nation into the world (Monture, p.205). They occupy a very special place in the Micmac community (Battiste, Exhibit Vol. 7, Tab 5). It is a feature of Micmac culture that mothers have a profound and enduring relationship with their children (Battiste, p.325-326).

As Donald Marshall, Jr. was taken away from his community as a youth at the age of 17, it is important to understand the significance this holds in the Micmac community given the emphasis placed on the later teenage years in terms of child development terms.

Donald Marshall, Jr. was deprived of his community's nurturing and was deprived of a relationship with his mother which was seen as essential for a solid foundation as a Micmac.

Dr. Battiste testified that the later teenage years are when an individual develops some of the most critically important skills in Micmac society: the ability to be self-reliant, the ability to be resourceful, the ability to have a bond, a sociality with the larger community network. Dr. Battiste described this as a time when individual's understanding of the collective consciousness of his particular community and culture is established (pp. 326 - 327).

It is essential to think about compensation for Donald Marshall, Jr. in terms of the 17 year old aboriginal youth loved and cherished by his closely knit family and community, who was wrenched out of his community and taken to a dangerous, alien and hostile environment, hundreds of miles away, to face a life sentence.