

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 "re-canvass 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.

DONALD MARSHALL, JR.

PECUNIARY LOSSES

1) Legal Fees

In 1984, following the conclusion of the first compensation process, Donald Marshall, Jr. paid legal fees and disbursements in the amount of \$97,000 to Stephen Aronson and Felix Cacchione. (See Volume 6, tab 2).

2) Loss of Earnings - The Past

In Volume 6 at tab 3 is an actuarial report prepared by Brian Burnell, an actuary with the Wyatt Company. This report considers Donald Marshall, Jr.'s loss of earnings, perspective and prospectively, on the basis of two alternative assumptions: that he would have continued to work as a drywaller/plasterer and that he would have worked as a plumber.

There is good evidence to support the assumption that Donald Marshall, Jr. would have worked as a drywaller/plasterer had he not been wrongfully convicted and imprisoned in 1971. His father was a drywaller/plasterer, having worked in the family business since he was 15 years old, taking it over upon his father's death in 1953. The business was the principal source of income for the Marshall family. Donald Marshall, Jr., and Pius Marshall, his younger brother, began

working with Mr. Marshall, Sr. in 1970 (Donald Marshall, Sr., p.155-157; Donald Marshall, Jr., p.635).

Mr. Marshall, Sr. testified that, prior to his arrest, Donald Marshall, Jr. was very involved doing drywall with the family business (p.156). He testified that it was his expectation that his son would have taken over the business (p.176). That is the probability.

In prison, Donald Marshall, Jr. learned to be a plumber. In his evidence, he testified that he found plumbing more interesting and cleaner work than drywalling (p.636), but there is no evidence that he did not intend to continue as a drywaller in 1971; his change of trade was occasioned by his imprisonment. Nevertheless, his choice of the plumbing trade demonstrates an interest in that field which might have been pursued and which forms a reasonable basis for this alternative career assumption.

Had Junior been able to take over his father's drywalling business, most probably it would have provided him with a livelihood just as it did for his father and his father's father before him. Although, according to Mr. Marshall, Sr.'s evidence, there may have been some periods of unemployment (p.175, 176), other work was also available, such as construction and insulation work (p.156,176). The evidence indicates a business that to 1971 had prospered for at least 30 years.

The same time periods have been applied and actuarial calculations generated on the basis of Donald Marshall, Jr. being a plumber although a net unemployment contingency of 15% was factored in. Plumbing was the trade that he obtained while incarcerated, although he does not have his journeyman plumber's papers.

The actuarial reports prepared for this compensation process dated May 2nd and May 23rd, 1990, contain calculations of Donald Marshall Jr.'s actual earnings at present day values from the time of his release for a total of \$50,755.75. 63 weeks of employment for either the Department of Indian and Northern Affairs as a counsellor trainee or for the union of Nova Scotia Indians as an apprentice plumber have been taken into account. Records of remuneration for these employment period and placements were obtain and provided to the actuary.

However the table of Donald Marshall, Jr.'s post release employment history includes 36 weeks of work, the remuneration for which has not been included in the actuarial calculations. No records could be obtained concerning remuneration which Donald Marshall, Jr. may have received for these weeks of work: therefore these wages were estimated on the basis of other wages earned for apprentice plumbing work. For the period of April 1983 to January 1984, a period of 30 weeks, Donald Marshall, Jr.'s wages were calculated on the basis of \$385 per week for a total of \$11,550. For the period of 2 weeks in December 1986 and 4 weeks in January and February 1987, Donald Marshall, Jr.'s remuneration was calculated on the basis of \$434.61 per week for a total of

\$2,607.66. As the actuarial reports had already been completed, these wages were not included by agreement among counsel.

3) Loss of Earnings - The Future

In 1983, still fresh from prison, Donald Marshall, Jr. was employed as an apprentice plumber and the assumption was made in the 1983 actuarial report that he would be fully employed as a plumber after three years (evidence of Brian Burnell, p.133). This vision of the future has not been borne out by fact. Donald Marshall, Jr. is unemployed and has not held a job for three years. It is no secret that Donald Marshall, Jr. has been struggling under the weight of various problems, which if anything have worsened since his release. It is submitted that the Commission must understand this trend as related to Donald Marshall, Jr.'s dreadful experiences. He carries through his life the burdens of his experiences, describing the continuing process of his case as a full-time job that isn't done yet (p.663). His compensation should acknowledge his torment, not penalize him for it. It cannot be said that Donald Marshall, Jr. is free to get his life in order, to get a job, and to lessen his prospective loss of future earnings: he is experiencing now and will continue to experience a profound degree of social disability occasioned by the harm done to him by the state.

The Employment Prospects for Ex-Inmates Generally

As might be expected, studies have shown that ex-inmates experience considerable difficulty in terms of obtaining and retaining employment following release.

In a study done in partial fulfillment of the requirements for the degree of Masters of Business Administration at St. Mary's University Peter Dickson examined 123 men released over a three year period from the Springhill Institution. Of the sample group, slightly more than 82% of the sample were not working at their first job six months after starting it; 25% of the sample appeared to be chronically unemployed, that is unemployed for seven or more months; a substantial percentage, 20%, had found no employment whatsoever.

Only 30% of the sample group reported year round full-time work. Nearly 23% were employed part-time, nearly 11% at odd jobs; 16% were unemployed; and, nearly 10% had full-time work but only on a seasonal basis.

In the United States, the unemployment rate for ex-offenders is three times that of non-offenders (Tropin, 1977). However, this estimate is probably low considering that many ex-offenders are not included in these statistics because they are no longer actively looking for employment.

In an article reviewing federal ex-offender employment initiatives in the U.S., Jacobs, McGahey and Minion have stated as follows:

Such persons [ex-offenders] tend to have erratic connections to the world of work - spotty employment history, low skill levels, lack of motivation, poor work discipline,...drug and alcohol problems. It is little wonder that employers hesitate to hire ex-offenders even when they are assured that ex-offenders have skills and are subsidized. Combine these problems with high national unemployment - a sheer lack of jobs for all who want to work - and what is surprising is that any ex-offenders establish themselves in the labour market.

Ex-offender Employment, Recidivism, and Manpower Policy: CETA, TJTC and Future Initiatives, Crime and Delinquency, Vol. 30, No. 4, October 1984, 486 - 506.

This article notes that, in an internal U.S. Department of Labour study, it was concluded that inmate training could give offenders an employable skill. But such training did not ensure that offenders would have a greater chance of being hired, or, if hired, of remaining employed (p.488).

Other research has highlighted the grave problems for ex-offenders with respect to retaining employment. In 1976 a study done of 874 ex-offenders provided with job replacements by a programme in Chicago, 77% were still employed after five days, 46% after 30 days, and only 29% after 90 days.

Knox, George "Differential Integration and Job Retention Among Ex-Offenders" Criminology, Vol. 18, No. 4, February 1981, 481 at p.491.

This research showed that those ex-offenders with higher structural integration scores had significantly higher job retention (p.494).

The structural approach traces the etiology of crime, delinquency and deviance to the disjunction between success goals and the structured opportunities for achieving success.

This approach assumes that a high degree of social integration reflects exposure and access to legitimate opportunities. It is also expected that individuals with higher social integration, as measured by participation and membership in various social institutions and organizations, would be less inclined to deviance (pp.482-483). The Knox study supports the conclusion that the greater degree of adherence by an ex-offender to conventional societal norms, the greater likelihood of job retention.

In a survey of research findings by Nicholas Astone, it is concluded that many variables contribute to an offender's chances of success in the community upon release. Although the analysis in this article is directed toward factors affecting recidivism, it is easy to see how much of what is discussed would effect employability.

Astone, Nicholas, What Helps Rehabilitation? "A Survey of Research Findings" International Journal of Offender Therapy and Comparative Criminology, September 1982, Vol. 26 (2) 109.

The article notes that one of the greatest obstacles for the former offender seeking employment is that he cannot provide the skills and qualities the market place demands (p.115).

Donald Marshall, Jr.'s Future Employment Prospects

A number of factors indicate that Donald Marshall, Jr.'s future prospects for obtaining and maintaining employment are poor. This is not at all surprising when it is remembered that Donald Marshall, Jr. spent his formative years in prison, isolated from the experiences and norms essential to the development of consistent and productive working habits.

With respect to Donald Marshall, Jr.'s future loss, reference should be made to the most recent psychological assessment and report of Kris Marinic dated April 25, 1990, found in Volume 8 at tab 2. In it, Mr. Marinic states his opinion that Donald Marshall, Jr.'s work prospects in the future will probably be affected by his experiences. Mr. Marinic states that Mr. Marshall could, in some settings, work part-time under supervision.

Donald Marshall, Jr.'s post-release employment history reveals the extent to which he has been unable to settle into a stable and consistent working routine. It has been reconstructed from personal recollection, employment records from the Department of Indian and Northern Affairs and the Union of Nova Scotia Indians and other sources. The following pattern of employment illustrates the issue graphically:

DONALD MARSHALL, JR.'S POST-RELEASE EMPLOYMENT HISTORY

1982	Released from Dorchester, March 29, 1982.	
	June 14 - Dec. 31	28 weeks
1983	Jan. 3 - Apr. 1	13 weeks ¹
	Apr. - Dec.	*26 weeks ¹
1984	Jan.	*4 weeks
	Sept. - Dec.	12 weeks
1985	Jan. 11 - Apr. 19	10 weeks
1986	Dec.	*2 weeks (approx.) ²
1987	Jan. - Feb.	*4 weeks (approx.) ²
1988	Ø	
1989	Ø	
1990 to May 31	Ø	
450 weeks in total		99 weeks

Percentage of total time employed 22%.

¹Red Vol. 30 pp.5-6 (application for pardon)

²personal recollection

*remuneration for these weeks not calculated into actuarial tables.

450 weeks have passed since March 29, 1982, when Donald Marshall, Jr. was released from Dorchester Penitentiary, to the date of the submissions relating to compensation. Donald Marshall, Jr. has only worked approximately 99 of those weeks. 78% percent of the time he has been unemployed - more than four days out of every five on average.

It is significant to note that Donald Marshall, Jr. has not worked at all in the last three years.

The actuarial calculations with respect to Donald Marshall, Jr.'s loss of future income were prepared in accordance with the instructions of counsel. Calculations were done to reflect a diminished earning capacity of 40%, 50% and 60%. Although it is acknowledged that there is no support for the suggestion that Donald Marshall, Jr. is completely unable to work in the future, these assumptions of impairment should be considered as conservative given Donald Marshall, Jr.'s employment history since release.

May 2nd, 1990 Actuarial Report

The actuarial calculations for Donald Marshall, Jr.'s future loss of earnings as a drywaller produces a present value of over \$719,106.65 on the assumptions made. If Donald Marshall, Jr.'s ability to work is impaired by 40 percent due to his experiences, he can be expected to earn \$431,463.99 of this total, \$359,553.33 if his ability to work in the future is impaired by 50 percent, and \$287,642.66 if his ability to work is impaired by 60 percent. Therefore, taking into account Donald Marshall, Jr.'s loss of earnings to the present day and a reduced ability to work in the future, if Donald Marshall, Jr. is able to work three days a week for the rest of his life, his total loss of earnings is \$1,117,231.91; two and a half days per week, \$1,189,142.57; and two days per week, \$1,261,053.02.

Certain assumptions were provided to the actuary by Commission Counsel and Counsel for the Province and on the basis of these assumptions a further actuarial report was prepared dated May 17, 1990.

It is respectfully submitted that these assumptions are not reasonable or sustainable and should not be considered by this Commission in the determination of the compensation award.

a) Mortality

Calculations have been provided in the May 17th report on the basis of "rating up" Donald Marshall, Jr.'s mortality by 19 years. This assumption takes into account potentially self-destructive behaviour and its effect on Donald Marshall, Jr.'s life expectancy. It is submitted that any self destructive behaviour exhibited by Mr. Marshall is a direct and cruel consequence of his wrongful conviction, imprisonment and his subsequent experiences. If Donald Marshall's life has been shortened, it is the actions of the state which have shortened it. The state should not then "benefit" financially as a result. Any consideration of Donald Marshall, Jr.'s loss of future earnings should be treated on the basis of normal mortality as if his injuries had not been inflicted. To suggest that he should be awarded a reduced quantum on the basis of a potentially shortened life span is offensive to a sense of fairness.

b) Expenses Associated with the Cost of Living

The actuary was also requested to provide calculations with respect to a cost of living contingency and reference was made to the Statistics Canada Publication "Family Expenditure in Canada 1986". Expenditures for food and clothing according to these statistics amount to 20.4% in total. As stated in the May 17, 1990, actuarial report at p.5, "To the extent that it is found to be appropriate to adjust the figures contained in my May 2nd report to reflect such expenditures, this can be done simply by reducing all applicable figures by 20.4%".

It is submitted that there are considerable problems with the use of such a contingency factor. First of all, its application to the loss of future income is wholly inappropriate. Mr. Burnell, the actuary, testified to never having come across this before in terms of a calculation offset against a loss of future income (Discovery, p.116). What it may cost Donald Marshall, Jr. to live is simply irrelevant to the issue of his loss of future earnings as a result of the injuries done to him by the state.

It would be perverse to suggest that Donald Marshall, Jr. did not have to pay room and board in prison and so this should be offset against his compensation award. The issue of expenses associated with the cost of living has no application to this situation at all.

A further aspect of this cost living contingency is problematic. As stated by Mr. Burnell in his discovery evidence at p.132, the

expenditure level is developed from statistics obtained by a random survey across Canada, mostly within the major urban areas, and does not include a consideration of the cost of living for aboriginal people. It is completely unreliable to apply a 20% cost of living expenditure contingency in Donald Marshall, Jr.'s case: as an aboriginal person with a profoundly modest and unmaterialistic lifestyle, this amount simply does not reflect reality. Neither should it apply to a period of incarceration as a matter of common sense and policy.

(c) The 7 Year Cap

The actuary provided alternative calculations for income loss to Donald Marshall, Jr. over a period of 7 years with a diminished earning capacity of 55%. The total amount of loss earnings based on these assumptions is shown as \$354,033. (Example No. 2, May 17 report).

These assumptions, for which there is absolutely no foundation in the evidence, contemplate Donald Marshall, Jr. being fully able to work in 7 years time. However, as noted throughout this brief, the obstacles to Donald Marshall, Jr. achieving this are great and Donald Marshall, Jr.'s post release employment history paints a far more pessimistic picture. It must be appreciated there is no evidence that since Donald Marshall, Jr.'s vindication by the Royal Commission he is substantially better off.

Any assumption that after a period of years, Donald Marshall, Jr. will be able to maintain full and consistent employment is not grounded in reality.

(d) Unemployment - The Drywalling Trade

Actuarial calculations were generated in the May 17th report on the assumption that if Donald Marshall, Jr. had worked as a drywaller in his father's business, he would have experienced a 15% reduction in income due to periods of unemployment. This 15% reduction is calculated on the basis that there would have been 25% unemployment offset by 40% income paid in unemployment insurance benefits. The evidence does not support such a high level of unemployment had Donald Marshall, Jr. become a drywaller with his father, especially in light of other types of trades work available during downtimes for drywalling. Furthermore, research done relevant to the issue of unemployment for Micmacs in the construction industry would not support such a contingency. As noted in 1986 by Fred Wien in "Rebuilding the Economic Base of Indian Communities: the Micmac in Nova Scotia" published by Institute for Research on Public Policy, there is a large concentration of employed Micmac males in construction occupations, more than three times the provincial average, amounting to almost a third of all Micmac occupations.

In a paper by Ellice Gonzalez "Changing Economic Roles for Micmac Men and Women: An Ethno Historical Analysis", published in 1981 in the National Museum of Man Mercury series, a study of Micmac economic issues found that individual Micmac businesses have been the most successful

and referred specifically to businesses specializing in construction and drywall.

In summary, therefore, the assumptions advanced as the basis for the May 17th actuarial report cannot and should not prevail in this case on the basis of the evidence or probability.

If the Commission does decide to take a contingency factor into account, in this case, it is submitted that the statement by the Supreme Court of Canada in Andrews v. Grand and Toy Alberta Ltd., supra, at p.253, is relevant: "Clearly, the percentage deduction [for contingencies] which is proper will depend on the facts of the individual case, particularly the nature of the plaintiff's occupation, but generally it will be small." (emphasis added)

C) Cost of Future Treatment

The evidence before this Commission is that Donald Marshall, Jr. needs professional therapy and counselling but is not completely ready yet to reach out for it. Jack Stewart's opinion is that such treatment has to be obtained at an aboriginal run centre, or at least at a facility with a lot of aboriginal input because of the cultural differences which are major factors in recovery (p.542).

This view is consistent in all we have learned about Donald Marshall, Jr. and his cultural identity.

We have also learned that the experience of prison and the scars it inflicts take many many years to resolve (Grattan, p.291). Martha Tudor says, "it's just going to be a process of healing that may take a long, long time." (p.613).

It is submitted that the very nature of Donald Marshall, Jr.'s experience and injuries has made it painfully difficult for him to reach out for assistance. He learned in prison that talking elicited accusations that he was lying. As Martha Tudor has said, "...I think he bore up through the years by just holding himself in as tight as he could and holding on to every bit of strength he had. And he learned nothing about how to ask for help or how to lean on someone or - because of all those avenues he was cut off, you know. As soon as he opened his mouth, they didn't believe him... He is just not willing to open up to anybody... He doesn't trust anyone." (pp.595-595).

Dr. McGee described the tendency to "...become very isolated and to become very much cut off from all sources of healing and support as a fairly typical Micmac reaction to the loss of community." (p.80).

It is submitted, on behalf of Donald Marshall, Jr., that the cost of future treatment is routinely regarded under the head of pecuniary loss and it is particularly appropriate in a case where the State wrongs an individual over such an extended period of time, with such profound harm has resulting.

Donald Marshall, Jr. should be entitled, as part of his compensation, to receive treatment and therapy of his choice to assist him in dealing with his anger, his pain, his damaged self-esteem and the other psychological wounds he bears which have been described by his friends and Psychologist, Kris Marinic to this Commission. It is therefore submitted that the cost of a course of treatment at an appropriate aboriginal controlled facility be awarded as part of Donald Marshall, Jr.'s compensation. Although at the present time, no specific course of treatment has been identified as appropriate by Mr. Marshall, he has endorsed inquiries of a particular, culturally sensitive facility which offers the type of counselling and therapy identified in general terms by Mr. Marinic and the lay witnesses. A suggested course of treatment is outlined in summary fashion in Exhibit Volume 6 at Tab 4 and in more detail in materials made available to the Commission and counsel.



DONALD MARSHALL, JR.

2. NON-PECUNIARY LOSSES

It is not proposed the injuries that followed upon Mr. Marshall's arrest on June 4, 1971, be regarded as separate causes of action but rather that they be regarded as cumulative, and aggravating, all relating back to the date of his arrest. However the instances and types of harm should be considered in determining compensation.

(1) Pain and Suffering

Even a person unfamiliar with the intricacies of this case, "the person in the street" may have an understanding that Donald Marshall, Jr. must have suffered, and be suffering, greatly as a result of his experiences. However, only people who truly know Donald Marshall can begin to describe the egregious pain with which he must live. His suffering is exacerbated by the fact that he is a Micmac.

Donald Marshall, Jr.'s state of mind, from the time of his arrest for a crime he did not commit, must have been, to borrow the words of the Arthur Allan Thomas Royal Commission, "...one of unspeakable anguish." This unspeakable anguish has dogged Donald Marshall, Jr. every step of his life since that time, and although it may have been alleviated, it has not been eliminated by the report of the Royal Commission. For Donald Marshall, Jr., the innocent man, the arrest, the committal to trial, the lying witnesses, the jury's verdict, the judge's

sentence, the lost appeal, the endless years in, and deprivation and denial by, the prison system, the words of the Court of Appeal, the cross-examinations during the Ebsary preliminary and trials, the news reports and more must have cut him like a knife, over and over again.

Reliable and consistent information is available about the seventeen year-old Donald Marshall, Jr. He has been described by his father as a "...very, very gentle boy." who was very concerned about the neighbours, urging his mother on many occasions to share with other families (Mr. Marshall, Sr., at p.169).

Other young people who knew Donald Marshall, Jr. in 1970 describe him as being "nice", "quiet" and seeming to "mind his own business" (Evidence of Barbara Floyd, Transcript Vol. 18 at p.3124).

Junior is also described as having been "very quiet, shy and gentle" (Evidence of Mary Csernyik, Vol. 18 at p.3285, Catherine Soltesz, Vol. 19 at p.3360).

Roy Gould, who has known Junior all his life, testified that "Junior was no different growing up than all the rest of the kids." (Transcript Vol. 21).

However, now one only has to look at Donald Marshall, Jr.'s prison photographs, (Volume 10 at tab 3) taken in 1972 when he first went to Dorchester, and then again in 1973, 1976, and 1979, to see how the experience of prison changed Donald Marshall from a young boy whose eyes

are filled with fear and whose face is round with baby fat through a process of physical maturation to a lean, hard and impenetrable man cynically stamped with the grimness of prison.

The Royal Commission of Inquiry on the Donald Marshall, Jr. Prosecution heard considerable evidence concerning Donald Marshall, Jr.'s emotional state in the years following his release from prison. Steven Aronson gave evidence with respect to Donald Marshall, Jr.'s emotional state when he started representing him through the Court of Appeal reference, describing Donald Marshall as being institutionalized and under a lot of pressure. "As court dates would approach, whether it was a motion for release from custody or an application to admit evidence, the pressure on him would mount and it's at those points that I was basically able to see after the first few times that this had a considerable effect on him mentally. But there was very little I could do about it, and he was certainly in need of a significant amount of counselling and assistance in trying to return to society or perhaps begin a life in society."(Transcript Vol. 56/10235.)

Donald Marshall, Jr. took great issue with the position of the Crown during the Court of Appeal reference that there was no miscarriage of justice (Evidence of Aronson, Vol. 56 at p.10209).

Donald Marshall, Jr. was upset by the verdict of the Court of Appeal and the fact that the Court blamed him when he believed that the fault lay elsewhere (Aronson at p.10224).

His Honour Judge Felix Cacchione also described both physical and emotional changes to Donald Marshall, Jr. prior to the various Court proceedings. "Psychologically there was a change. He would become nervous. He would become tense. He would at times just decide [to] go out and get drunk. and...once the pressure was on if he knew it was coming up, it was as if he couldn't control himself in the sense that we can say "let's be rational about this...(Cacchione Vol. 64 at p.11440).

Donald Marshall, Jr. did not trust the Courts and always had the feeling that he was the one "they are going to try and get" (Cacchione, p.11440).

Judge Cacchione also recalled occasions when Donald Marshall, Jr. "would be in bad shape, would have been drinking, confused, crying, angry..." (Cacchione, at p.11502).

He recalled evenings with Donald Marshall, Jr. "where he would just be in tears, not rational and go from just crying to becoming upset, physically upset, pacing... (Cacchione, p.11503).

When describing Donald Marshall, Jr.'s condition during the later stages of the original compensation process, Judge Cacchione testified that he was dealing with a client who was "to understate it, in the most fragile frail state I have ever seen a person before. He was on the verge of cracking... He had just had enough. He was at his wits end (Cacchione at p.11512).

The psychological harm done to Donald Marshall, Jr. has been very well documented by those who have been closest to him since his release and by the psychologist, Mr. Marinic. Despite his vindication by the Royal Commission, Donald Marshall, Jr. still carries the enormous burdens of his experiences and as Jack Stewart has described, "he gets tired, trying to deal with it." (p.511) (p.454-455).

(2) Interference with Cultural Experience and Practice

The injuries done to Donald Marshall, Jr. by the actions of the state in wrongfully accusing, convicting and imprisoning him, and the further injuries he has suffered following his physical release from prison, are profound and devastating. The unique features of being Micmac govern how Donald Marshall, Jr. has been affected by these experiences.

When Donald Marshall, Jr. was growing up on the Membertou reserve, Micmac was the language spoken at home. It is still the language spoken in the Marshall home (Donald Marshall, Sr. at pp.169-170).

Therefore, although Donald Marshall, Jr. spoke English at the age of 17, his first language was Micmac and by being removed from his family and community and placed in an environment where the principal language he heard and spoke was English, he was denied the ability to speak his language.

This Commission has heard that language is central to a person's world view (McGee at p.70) and acts as the vehicle for the transmission of culture (Knockwood at p.121 and Battiste, Ex. Vol. 7, Tab 6).

Dr. Harold McGee testified that language provides an opportunity for confirming cultural values and that the restriction of an individual to expression using a second language means that..."to a large extent, one is being compelled to view the world, and to think about the world, in ways that are perhaps alien and a source of chaos...It's a way of alienating someone in a sense, from their own selves. It is a challenge to [the] notion of autonomy." (p.71)

By being removed to prison, Donald Marshall, Jr. also lost the ability to practice his culture, and interact within his own culture milieu. Evidence was advanced to the Commission concerning the effect, in cultural terms, of a Micmac being removed from his community.

Dr. Harold McGee testified that:

...the very act of being removed is, again, a threat to an individual's autonomy. They are subjected to other people's control. And that, in itself, brings a sense of loss, a sense of self, with respect to one's self, and a sense of shame, with respect to the community. So that, being removed from the community, is having one's self image diminished...being removed from a setting by which...the world view that one personally has, is shared by others...then there is that alienation from being able to have other people relate to your actions, or understand your behaviours, because they don't possess the world view that you have. They don't understand your responses, or your reactions and that then becomes a source of threat, in one sense, a source of chaos in your own world view. So to

be separated from a community, is to be separated from a cultural milieu, in which your expectations of how the world works, are not being shared by the people with whom you have to interact. And it is a very threatening and alienating kind of circumstance (p.76, 77).

Noel Knockwood testified that, in traditional cultural terms, a very severe form of punishment for a Micmac was banishment or exile. Rejection of this form was "...the highest form of insult that one could give another individual" (pp.126, 127).

Professor Monture testified about the effect on the community of forceable removal, describing the community as being robbed because of a destruction of the natural balance in the community and a deprivation of the gifts otherwise available to the community through the individual (p.202).

Dr. Marie Battiste described the somewhat analogous situation of boarding schools, where Micmac children were taken from their homes on the reserve. By example, she referred to these removals as having had a very negative and devastating effect on her personally and on the culture and vitality of the community (p.330).

Children removed in these circumstances did not have the collective consciousness passed on to them, they were deprived of the daily dialogues in the home, they lost a sense of who they were and who they should bond with. Dr. Battiste testified that, in her experience as an educator, and also as a person whose sister had been removed to a boarding school, such individuals go through "...many, many, if not

endless, years of turmoil trying to recover from that experience. Some don't recover. Some people succumb to alcohol as a way of removing the pain that they went through" (p.331).

Dr. Battiste testified that the community, at the time of removal, suffers a sense of loss (p.332).

Donald Marshall, Jr., by being removed from his community was deprived of, and has lost a significant amount of nurturance, recognition, acceptance, and cooperation from the community (Battiste p.338). He has also lost the opportunity to develop particular skills and knowledge by being removed from the community at a critical time of his development. Removal from the community involves a loss to the individual of the teachings of other people in the community. (Monture, p.203, 208).

Donald Marshall, Jr. also lost the most significant experiences of the cultural and spiritual life of the community: the Micmac nation celebrated 11 St. Ann's Days at Chapel Island while Donald Marshall, Jr. languished in prison hundreds of miles away.

The Legal Recognition of the Significance of Culture

The significance of being able to practice one's culture has been recognized jurisprudentially in Lovelace v. Canada, a decision of the United Nations Human Rights Committee on July 30, 1981, and reported in [1983] Canadian Yearbook of Human Rights 306.

Ms. Lovelace was born and registered Maliseet Indian but lost her rights and status as an Indian in accordance with the Indian Act R.S.C. 1970, c.I-6 after having married a non-Indian. Lovelace successfully challenged the Act on the grounds of discrimination under the International Covenant on Civil and Political Rights.

Ms. Lovelace, by virtue of losing her Indian status, became disenfranchised as a member of her band and was no longer able to live on the reserve. She claimed as one of the consequences of this the major loss to her the "cultural benefits of living in an Indian community, the emotional ties to home, family, friends and neighbours, and the loss of identity." (at p.310).

The U.N. Committee acknowledged the significance of Ms. Lovelace's cultural attachment to her community and concluded that the loss of her status was an unjustifiable denial of her rights under Article 27 of the Covenant which reads: "In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." (p.312).

In reaching its decision, the Committee addressed the breakup of Ms. Lovelace's marriage to a non-Indian and stated that "...it is natural that in such a situation she wishes to return to the environment in which she was born, particularly as after the dissolution of her

marriage, her main cultural attachment again was to the Maliseet band" (p.313).

It is submitted that the Lovelace decision expresses important principles intrinsic to Donald Marshall, Jr.'s case. Despite Donald Marshall, Jr.'s removal to a non-Indian environment, his main cultural attachment is to his Micmac community and the state's wrongful, interference with that relationship should be compensable.

(3) The Grand Chief of the Micmac Nation - An Elusive Destiny

The spiritual and diplomatic leader of the Micmac nation is the Grand Chief. This position is currently held by Donald Marshall, Sr. Mr. Marshall, Sr. is related to the two previous Grand Chiefs, Mr. Denny and Mr. Syliboy. Mr. Marshall, Sr.'s father was Grand Captain and a member of the Grand Council of the Micmac nation (Ex. Vol. 7, tab 7).

The Micmac requires that their Grand Chief have certain characteristics or qualities. It is necessary to be bilingual, to have a strong spiritual committment, a high sense of self-esteem, to be sober, steadily employed and to exemplify the value, beliefs, traditions and customs of the Micmac (Knockwood, at p.149, Battiste at p.403, 355).

The Micmac community looks for a person to occupy this position who is stable, good of heart, caring of his people, shares, who is

generous to others, self-reliant, resourceful, who can teach children and be an exemplary Micmac (Battiste, p.358).

The Grand Chief is very much a part of making sure that the Micmac culture and tradition are passed on to the children in the community so that there is a continuity of culture and traditions (Battiste, p.357-358).

Donald Marshall, Jr. comes from this tradition. His father has been Grand Chief of the Micmac nation since 1965. The traditional process for selecting the Grand Chief was one of a combination of succession within a family line and consensual agreement that the individual was worthy of the position (McGee, p.92).

The contemporary process will involve a discussion of Donald Marshall, Jr.'s ability to be the next Grand Chief following the death of his father (Donald Marshall, Sr. at p.168).

The Grand Chief testified: "I imagine they'll talk about him, first, before anybody else." (p.168).

We can never know what Donald Marshall, Jr.'s destiny will be, nor can we know what it might have been if the dreadful events of the past two decades had not happened. We do know however that he comes from an established and honoured family whose members have been leaders in the Micmac community for many generations. His father is the spiritual and diplomatic leader of the nation. Lineage is relevant in the

determination of who will become the next Grand Chief and Donald Marshall, Jr.'s position as the eldest son would, on that basis alone, have made him a likely candidate for consideration (Knockwood, p.130, Battiste, p.360).

However, it was consistently suggested in the evidence before this Commission that Donald Marshall, Jr.'s experiences have harmed his chances, the guilt and shame attendant upon the wrongful accusation lingers as a stain, despite his vindication (Knockwood, p.131).

Dr. Marie Battiste testified that one elder has said that it would not be possible for Donald Marshall, Jr. to become Grand Chief "...because he has lost continuity from his community, from his people." (p.360).

On a previous occasion a potential candidate for Grand Chief was passed over because he had not been in the community on a continuous basis.

Mr. Marshall, Sr. testified that in his opinion his son would have had a better chance of being chosen if these tragic events had not happened to him (p.169).

There is considerable evidence that Donald Marshall, Jr., who is bilingual, is strongly and profoundly committed to the traditions and heritage of his people with an overriding concern for the wellbeing and culturally appropriate development of Micmac children.

There is evidence that suggests Donald Marshall, Jr. would like to succeed to the honour of being Grand Chief (Stewart, p.465).

There is no evidence to suggest that Donald Marshall, Jr.'s potential to ascend to what otherwise might have been a natural role as leader of his people has not been permanently and irrevocably diminished.

The qualities expected of a Grand Chief, as described earlier in this argument are not sufficiently present in Donald Marshall, Jr. despite evidence from Mr. Marinic, the psychologist, that he may have leadership qualities. The evidence shows that Donald Marshall, Jr. himself is painfully aware of this loss (Cacchione, p.546).

Donald Marshall, Jr. is notorious through no fault of his own, has not worked steadily, is not grounded in his community and still carries with him a great and unresolved burden. He has not yet been able to come back into his collective community because of the pain he has experienced and continues to experience. (Battiste, p.338-339).

Donald Marshall, Jr. has been deprived of an opportunity that otherwise may very well have been rightfully his and his nation has probably been deprived of a strong and natural leader.

(4) Loss of Reputation/Defamation

Donald Marshall, Jr. has experienced the assassination of his character since he was first suspected of murdering Sandy Seale. This is another significant dimension of the wrong done to him.

His arrest, committal to trial, verdict, Court of Appeal decision, statements by the Federal Minister of Justice (Red Vol. 30/29), and so on, all exposed him to hatred, ridicule and contempt. Additional statements by individuals outside government, i.e. by members of the news media, editorial writers and private citizens contributed to the profound injury done to Donald Marshall's character. Exhibit Volume 10 is a sampling, from the print media only, of the coverage of the case which graphically demonstrates many instances of harm to Donald Marshall, Jr.'s reputation escalating the notoriety which he now cannot shake.

The Court of Appeal decision is a particularly damaging defamation of Donald Marshall, Jr. which has haunted him throughout the years when, having been given his physical liberty, he should have been able to start repairing the damage done after so long behind bars (eg. Battiste, pp.365-366).

With respect to defamation, the fact of it having been so prominent and so notorious is material.

Linden, Canadian Tort Law, 4th ed., Butterworths, 1988, at p.633.

For most of his life, Donald Marshall Jr.'s public image has been negative. From the time of the arrest to the release of the report of the Royal Commission at the end of January 1990, Donald Marshall Jr. was only ever defamed. Even the report of the Royal Commission cannot expunge the stain on Donald Marshall Jr.'s image and character in all quarters. His reputation has been permanently and irreparably harmed. He has been notorious and reviled.

It is submitted that this dimension of Donald Marshall Jr.'s experience must be considered in compensating him. Donald Marshall Jr.'s compensation should include compensation for the harm to his reputation which has "...a dignitary value, ...[and economic worth,] ..."

Linden, supra.

The classic definition of defamation refers to conduct that "...is calculated to injure the reputation of another by exposing him to hatred, contempt or ridicule."

Parmiter v. Coupland (1840), 6M&W 105, ap 108 (per Baron Parke).

Other definitions refer to a "false statement about a man to his discredit."

Scott v. Sampson (1882), 8 Q.B.D. 491 at p.503.

And that which "tends to lower a person in the estimation of right thinking members of society generally."

Sim v. Stretch, [1936] 2 All E.R. 1237, at p. 1240.

There can be no question but that Donald Marshall, Jr. has been dreadfully defamed, his reputation having been tarnished and impaired.

(5) Humiliation and Disgrace/Impairment of Self-
esteem the Burden of Shame

Donald Marshall, Jr. has been humiliated and disgraced, first accused of being guilty of murder, and then when acquitted of murder, accused of being guilty of robbery, lying, and being responsible for his own misfortune and the death of Sandy Seale. This humiliation was heightened by the public notoriety of the case and the fact that it was a body of jurists who condemned Mr. Marshall's conduct and character.

The cruel and unfair decision of the Court of Appeal was like a blow, provoking feelings of anger and guilt. (Brown, p.564).

He felt responsible for his father losing his job and respect, for his mother's emotional breakdown, for disappointing them even as he struggled to adjust to life on the street.

Donald Marshall, Jr.'s self-esteem, his ability to form trusting relationships, his ability to cope with crisis, stress, and intimacy have all been shattered by the brutalizing experience of his wrongful conviction and imprisonment.

Dr. Clare Brant, a Mohawk and the only aboriginal psychiatrist in Canada, has stated that: "Native people are particularly vulnerable to humiliation and respond to loss with humiliation; everyone does, but native people moreso. This is something that is not generally known because it is so difficult to express and to grasp... While [non-aboriginal] people operate their conscience on the basis of guilt, native people operate on the basis of shame... Humiliation as in the oriental cultures, is a terrible thing. The thing which may tip the scale; private or public humiliation may tip the scales in the favour of the wish to die versus the will to live." (Ex. Vol. 7, Tab 13, at p.137, Tudor, p.593).

(6) Loss of Enjoyment of Life

(a) Loss of Liberty

Mr. Marshall's liberty interests have been infringed from the time he was arrested on June 4, 1971, to the present: he was in custody from June 4, 1971, until he was acquitted on May 10, 1983, but following this he continued to be burdened by the case, testifying five times in the Ebsary preliminary and trials and at the Royal Commission and being exposed to persistent media and public attention.

As an expression of the impairment to Donald Marshall, Jr.'s liberty, we have the words of the Royal Commission which described the gratuitous comments of the Nova Scotia Court of Appeal as having haunted Donald Marshall, Jr. ever since they were made (Report, Vol. 1, p.125.)

(b) Lost Years

Donald Marshall, Jr. was sentenced to a life sentence. Jack Stewart described the pronouncement of this in terms of being told you are going to die of a terminal illness (p.420).

The rest of a lifer's life is uncertain; he is not sure if he is going to get out at any point. There is no guarantee of parole. (Stewart, p.421).

A lifer is socialized as a lifer: the institution digs for an admission of responsibility for the offence. The digging goes on for as long as it takes to get the person to come to terms with the fact that he has done a serious crime (Stewart, p.424).

Ms. McConkey's view testified before the Royal Commission on the Donald Marshall, Jr. Prosecution that, Donald Marshall, Jr. would have needed help upon release from the institution. She referred to him coming into the penitentiary system as a youth and becoming very involved in it as a matter of survival, "If you know you are going to be there for quite awhile you adapt and he adapted." (Vol. 71, p.12519).

Survival in prison requires many profound adaptations. The lifer must suppress his emotions, he must be constantly vigilant against violence, withdraw into himself to ignore the physical prison, he must adopt the code and ethics of prison life.

Many of these adaptive strategies are wholly unsuitable to life on the outside. Coupled with this is the fact that a prisoner doesn't mature in prison, doesn't "...grow, through life experiences, because everyday is the same as every other day,..." (Grattan p.272). It is impossible to keep up with the outside world in prison. Upon release, Donald Marshall, Jr. has had to try and feel comfortable and at home after being wrenched away from his community and then taught not to ask for help from people he does not know, not to express emotion, not to let down his guard.

Jack Stewart testified that Donald Marshall, Jr. lost "the normal sort of evolutionary socialization that takes place...The ability to interact with people. The ability to think in the sort of a critical fashion as opposed to a necessarily a paranoid fashion. To be a little less focused...If you wind up in a community that's...by design an isolated community, you miss a lot of just the normal socialization." (Vol. 71 at p.12670).

Diahann McConkey who worked as a parole officer during the time Donald Marshall, Jr. was incarcerated testified before the Royal Commission that Donald Marshall, Jr. "...would have had probably more

adjustment problems than your average lifer, because he had had fewer releases prior to that point than your average lifer." (Vol. 70 at p.12512).

She testified that he would have experienced a very high level of street shock, meaning that he would not know how to go into a restaurant and order a meal and would not be up to date on the cost of things and the "language of the man on the street." (p.12513).

It was her opinion from knowing Donald Marshall, Jr. inside the institution that he would have "a lot of difficulties." She described this in terms of him being a very soft spoken individual who would easily be taken advantage of and who had a lot of mistrust of the system. "...it would be difficult for him to ask for help if he needed help..." He had a lot of pride and independence which would also make it difficult for him to say "I can't manage." (pp.12518-12519).

When Donald Marshall, Jr. left the Carleton Centre in July 1982, he still did not have a lot of the coping skills that he needed to deal with life on the street. (Evidence of Jack Stewart, Vol. 71 at p.12687).

Other losses to Donald Marshall, Jr.'s enjoyment to life include:

- (c) Loss of Potential Normal Experiences, such as marriage, having a family;

(d) Loss of Developmental Experiences, such as Education and Normal Socialization;

(e) Loss of Civil Rights such as Voting

As a prisoner, Donald Marshall, Jr. was deprived the right of voting, federally, provincially and in band elections.

(f) Loss of Kinship

The removal of Donald Marshall, Jr. from his family resulted not just in a tragic deprivation over 11 anguished years. The hardship and loss associated with being removed from his mother and father, brothers and sisters, needs no further elaboration. After such an absence, it is not possible to just pick up and go on as before: Donald Marshall, Jr. felt like a stranger and experienced feelings that his family did not know him and that he did not know them. (Brown, p.569). He didn't even know which children were his nieces and nephews.

(g) Loss of Nature

For the aboriginal person, the experience of prison involves the loss of a relationship with nature and the opportunity to experience peace and balance in the natural environment. (Monture, pp.211-213).

(7) The Experience of Prison

As great as Donald Marshall, Jr.'s suffering has been in the face of such a terrible public wrong against him, it is submitted that certain factors exacerbated the painful experience of prison: the fact of his youth, the fact of his being an aboriginal person, the fact of his being a quiet, gentle sensitive person. He was also innocent. These are factors which must be accounted for in compensating him.

For any prisoner, innocent or guilty, aboriginal or non-aboriginal, prison is a frightening, dangerous and alienating place. This Commission heard extensive evidence from Mike Grattan concerning prison life: the tensions, the violence, the drugs, the boredom, the grayness and the bleakness. For 11 years Donald Marshall, Jr. lived in an environment alien to him culturally, emotionally and intuitively where he witnessed violence, was strip-searched, had nightmares, was punished and deprived. This is where he grew up.

The Aboriginal Experience of Prison

Prison culture was described to this Commission as presenting many of the dominant cultures and values—power and control—in extreme form (McGee, p.102).

Such an environment will threaten an aboriginal persons's sense of integrity and sense of well-being (p.102).

The aboriginal person's prison experience was described by Professor Patricia Monture, an aboriginal woman who has worked as a volunteer in Federal penitentiaries with aboriginal prisoners and who served on the Federal Task Force on Federally Sentenced Women, as "...totally overwhelming" (p.215) where everything is "...intensified and magnified and the conflict with values is felt very wholly and completely. It is a very overwhelming, oppressive experience." (p.218).

It is submitted that there should be no argument that the aboriginal person, coming from a distinctive cultural background and heritage, experiences prison differently. The fact of this difference has been examined and documented extensively by the Government of Canada, the Solicitor General's Department in the context of the aboriginal offender. (See vol. 7, tabs 1 and 2).

DONALD MARSHALL JR.'S EXPERIENCE OF PRISON

Even as a youth, Junior adopted a leadership role, standing up for the more vulnerable. "He seemed always to be the protector." (Soltesz, at p.3361.)

These characteristics endured through Donald Marshall, Jr.'s prison experience. He was known to be quiet and dignified (Grattan, p.275).

Mike Grattan described Donald Marshall, Jr. as "...an elder brother to a lot of guys inside... And that entails protecting the weaker guys from the stronger guys, and making sure that things stay quiet." (p.267.)

Unlike other, "lifers" whose relationships with each other are characterized by a "...very strong bond..." (Grattan at p.270), Donald Marshall, Jr. did not associate with lifers but was very close to the other aboriginal prisoners who looked up to him and over whom he had an influence (Grattan, at p.275-276).

Donald Marshall, Jr. was active in the Indian Brotherhood while incarcerated. In a letter dated January 28, 1979, found in Exhibit 63 at p.15 he refers to his pivotal role in getting it established.

The Grimness of Prison

Mr. Marshall was subjected to considerable prison indignities which included:

- (i) assaults & threats
- (ii) discipline
- (iii) prison diet
- (iv) adjustment to prison
- (v) damaging associations with other inmates
- (vi) witnessing degradation of, and violence to, others

- (vii) learned dependence on drugs
- (viii) searches

Donald Marshall, Jr. has been described as someone who did "hard time". (Cacchione. p.550, Grattan, p.279).

Donald Marshall, Jr. spent considerable periods of time in disassociation, for example in a letter sent in October 1980 to Roy Gould, he refers to having been "in the hole for 27 days so far" (Exhibit 63 at p.38).

One particular kind of prison indignity was that described by Mike Grattan, strip searches.

It is submitted that strip searches would hold a particular horror for Donald Marshall, Jr. because of his cultural heritage. Dr. Battiste characterizes the Micmac as a "very exceptionally modest people." Personal, or physical modesty is a characteristic of the Micmac. (P.368.)

Donald Marshall, Jr.'s experience of prison also included a profound and disturbing degree of neglect. Soon after being incarcerated at Dorchester in 1972, Donald Marshall, Jr. injured his right wrist playing hockey. As indicated in a medical report found in Red Volume 30 at p.66, "his wrist was sore at that time, however, he did not receive any medical treatment. Over the years his wrist continued to be sore and painful with limitation of motion."

Donald Marshall, Jr. had x-rays taken of this right wrist which showed "an old non-union fracture of the scaphoid..." An orthopaedic examination found some tenderness and pain on motion with restriction of motion. He was originally scheduled to have bone grafting done but "at operation there was some arthritic changes at the distal radial surface." Therefore a scaphoid prosthesis was inserted.

In prison, Donald Marshall, Jr. also experienced the significant harm of gender isolation, and for years was deprived of the experience of socializing with, and learning from, women (see Tab 8, p. 6 of this Brief).

The experience of prison denied Donald Marshall, Jr. many important personal experiences: for example he was refused a temporary leave of absence to attend his grandmother's funeral. (Exhibit 69).

(8) Prison Punishment for Refusing to Admit Guilt

The parole process in prison was described to this Commission as being a very hard humiliating experience. (Grattan, p.273). This process of getting, in prison parlance, "sorry papers" must have been particularly painful and humiliating for Donald Marshall, Jr.

In Donald Marshall, Jr.'s case, he had to constantly, persistently, and doggedly resist the pressure to admit to something he did not do. This Commission has heard evidence that this triggered

explosive reactions from him such that he was punished, placed in disassociation and denied privileges.

Diahann McConkey expressed the opinion that it would be harder for a person to serve a long sentence for something he did not do than it would be to serve a long sentence for something he did do (Vol. 71, at p.12604). Donald Marshall, Jr. did his time knowing he had been falsely accused and convicted.

The fact of Donald Marshall, Jr.'s innocence prevented him from reaching the point of acceptance and then settling down and starting to do his life sentence. His focus had to be that he did not do a terrible crime he was accused of, so, upon his release he was, in the words of Jack Stewart, "...more ill prepared than any other lifer I have taken out." (p.443).

(9) Impairment of Future Prospects, re: marriage, reintegration into community etc.

Mr. Marshall has been fundamentally harmed by his experiences and will bear the burden of those experiences and their deleterious effect throughout the rest of his life.

After a life time of fighting to prove his innocence, ironically, the release of the Royal Commission Report vindicating him has created new and hazardous problems for Donald Marshall, Jr. The pressure now exists on him to "get better". The focus he has had for so long, to

clear his name, is gone now. Where does Donald Marshall, Jr. go from here? The system that wronged him, and cleared him, must help heal him.

It is not realistic to take the position that Donald Marshall, Jr. can just go out and get himself a job and get his life in order. Jack Stewart, who has known him and remains close to him for eight years has testified to this Commission that Donald Marshall, Jr. does not have the skills to maintain a traditional job. He is still trying to ground himself in a community, still trying to get back to the community he was taken away from and struggling to work out inter-personal relationships and his own place in the world.

For the wrongfully convicted person, the injurious effects of prison are exacerbated. These effects will, in all probability, not be eradicated. The Commission in the Arthur Allan Thomas case stated that: "Quite apart from the various indignities and loss of civil rights associated with his deprivation of liberty, we consider he will for the rest of his life suffer some residual social disabilities attributable to the events of the last ten years."

Commission Counsel cases at p.115.

There is, therefore, in this case, an injury in the nature of a permanent social disability due to a state wrong. The chances of eventual reintegration for the individual imprisoned as a youth are especially poor. The person subjected to the psychological and emotional distortion of prison life will likely never be whole again.

DONALD MARSHALL, JR.'S FAMILY

A. PECUNIARY LOSS

Mr. and Mrs. Marshall's claim for compensation is being advanced as a claim in its own right. They have suffered grave emotional and financial loss. However even a narrow interpretation of the scope of this Commission supports compensation to Mr. and Mrs. Marshall as part of Donald Marshall, Jr.'s own claim. Their losses are inextricably linked to the question of the adequacy of compensation for Donald Marshall, Jr. He feels responsible for what has happened to his family: for the burdens that they have been carrying. He honours and loves them and bears their loss as well as his own. The nature of the Marshall's loss is both pecuniary and non-pecuniary.

The claim for this pecuniary loss relates to expenses associated with prison visits and telephone calls which can properly be regarded as having assisted and supported Donald Marshall, Jr. through his long and painful years of imprisonment.

This loss incurred between 1972 and 1982 is outlined in Volume 6 at tab 5, Appendices A to I and totals \$55,023.18 before the application of any interest factor.

Compensation for such expenses were awarded to the family of Arthur Alan Thomas by the New Zealand Compensation Inquiry as these

expenses were considered to have been "...an assistance to his well being." (Commission Counsel Cases, Tab 1, p.119)

B. NON-PECUNIARY LOSS

For a very protracted period in their lives Mr. and Mrs. Marshall endured heartbreaking torment. Some dimensions of their loss include:

Pain and Suffering

Donald Marshall, Jr.'s parents, brothers and sisters have all experienced intense loss and pain (Mr. Marshall, Sr., p.160, 164).

Impairment to the Self-esteem of Mr. Marshall, Jr.'s Family

Mr. Marshall, Sr. has experienced his own burden of shame and loss of self-esteem with an attendant impairment of his essential function as Grand Chief of the Micmac nation. He described to this Commission how difficult it was for him to face the public because his son had been convicted of murder. (p.167). The community dialogue described by Dr. Battiste would have ensured that the Micmac community shared fully in the knowledge of this dreadful and disgraceful accusation against the son of the Grand Chief. Nothing like this has ever happened in the family of a Grand Chief of the Micmac nation. This stigma has been unjustly borne by the Grand Chief and his family and must be expiated.

Deprivation of the Family's Kinship with Mr. Marshall

The significance of kinship within the Micmac community is of pivotal significance to the fact of Mr. Marshall's loss and the loss of him, especially as the eldest son, to his family is critical.

Economic Hardship

Donald Marshall, Jr.'s arrest affected Mr. Marshall, Sr.'s drywalling business significantly. Mr. Marshall, Sr. relied on the telephone in his business and he had to unlist his telephone number as a result of threatening calls (Mr. Marshall, Sr., p.158). The family, which had been dependent on the business, turned to welfare. After this, Mr. Marshall gradually regained his self-employed status (p.159).

Having regard to the above, it is submitted that an award of compensation for non-pecuniary damages to Mr. and Mrs. Marshall should be recommended by this Commission.

DONALD MARSHALL, JR.'s COMMUNITY

Adequate compensation for Donald Marshall, Jr. necessitates a compensation award that contains a material acknowledgement of his special and enduring cultural heritage and his relationship with his community. The values and principles upon which the Micmac community is founded underscore the significance of Donald Marshall, Jr.'s relationship to it and the profound injury done as a result of his removal and ensuing events.

An understanding of this aspect of the argument must be informed by the discussion of relevant cultural factors found at Tab 8.

Mr. Marshall's case occurred against a background of mindless racism, to paraphrase the language used by the Nova Scotia Legislature on February 23, 1990 (Volume 9, tab 3). The hostility and indifference toward the Micmac community and its culture exists still, notwithstanding the Royal Commission Report or the unanimous resolution by the House of Assembly. It is critical that a serious effort be made to strengthen and reinvigorate Micmac culture in the face of these adverse realities. It is vital for Donald Marshall, Jr.'s journey back to his community and to his healing that concrete steps be taken by the Government and people of Nova Scotia to assist him, and to do so in a real and culturally sensitive fashion. A narrow and circumscribed view of compensation is wholly unsuitable in this case: to restrict

compensation to Mr. Marshall would be to deny his unique cultural identity and perpetuate the harm done to him and his community.

Impetus for the concept that a component of compensation be of material benefit to the Micmac community is found at page 5 of the summary of the response of the Government of Nova Scotia to the recommendations of the Royal Commission on the Donald Marshall, Jr. Prosecution (Volume 9 at tab 2). In the summary, the Government has identified "...the need for pilot projects and close consultation between both levels of government and the Micmac community to develop those programs which will work most effectively in Nova Scotia." The Government also acknowledged the intrusion of our dominant culture upon the Micmac community and the detrimental effect that this has had on Micmac community life. These statements provide a foundation for a compensation settlement that is not only sensitive to Donald Marshall, Jr., but also responsibly addresses the interests and realities of his people.

Donald Marshall, Jr. is first and foremost Micmac. His strongest connections are with his Micmac friends: for them, as described by Martha Tudor at p.610 "...being Indian is one of the most important things, probably about their survival."

This Commission has heard consistent evidence of Donald Marshall, Jr.'s interest in working with Micmac youth around issues of culture, language, nature and heritage. The idea of working with Micmac children

has been described as a consistent and pervasive theme in Donald Marshall, Jr.'s aspirations for his future.

Tudor, p.605.

Stewart, p.497.

Cacchione, p.539

Junior, p.640-641

Report of Mr. Marinic Vol. 8 at tab 2

By all accounts, Donald Marshall, Jr. has a special affinity with children.

It must be remembered that Donald Marshall, Jr. was taken from his community as a youth. In the hostile environment of prison, his cultural values and his "Indianness" preserved and sustained him. His is mostly a story of survival - cultural survival, personal survival. Tragically, it is also a story of cultural deprivation and resultant personal injury.

Donald Marshall, Jr. has indicated to this Commission his interest in what can be described as a cultural survival camp or centre for children and youth (p.629). This camp can be a means for restoring Donald Marshall, Jr. to his community as well as rebuilding the foundation lost by his removal from the Micmac world. The concept is rooted in the fundamental Micmac value of sharing discussed at Tab 8, p.5 of the Brief.

The concept of a cultural survival camp is based on the need for cultural awareness and experience, and enhancing the quality of life involves the continuation of such traditional practices as pow-wows, Micmac crafts, drumming and dancing, harvesting and eating traditional Micmac foods, and sharing spiritual values. There is, as well, strong support for the recovery of Micmac heritage through opportunities for learning Micmac history, language, and cultures. A non-aboriginal society should reflect an awareness and sensitivity to aboriginal cultural traditions. (Vol. 7, Tab 9) Especially in light of the very considerable harm done to the Micmac community at large by the treatment of Donald Marshall, Jr., there is a need to establish a point of reconnection for Donald Marshall, Jr., and to demonstrate support for the continuation of Micmac culture and heritage in the province of Nova Scotia.

Materials have been filed on behalf of Donald Marshall, Jr. with this Commission concerning the concept of a cultural survival camp. The materials which specifically referred to cultural survival camps are found in Vol. 7 at tabs 8, 9, 10, 11, 14, 15 and 16. Dr. Battiste also referred to the concept (p.373,374).

There is persuasive evidence before this Commission that involvement in a cultural survival camp would be very beneficial for Donald Marshall, Jr. Jack Stewart has described it as "...probably the one thing, ...that would start healing him" (p.470). In his opinion, Donald Marshall, Jr.'s future lies in working with adolescents and

children "...doing something that really reinforces the Micmac tradition, that uses the language, that uses the environment." (p.489).

It is in such a setting that Donald Marshall, Jr. could gradually become reintegrated with his community and reestablished in a balanced and productive life. His dislocation from this community has caused him to suffer many disabilities in white society. For example, the evidence strongly points to Donald Marshall, Jr.'s inability to settle into a conventional, routine job.

Tudor, p.598.

Marinic, Vol. 8, Tab 2.

Stewart, p.504-505.

Mr. Marinic, has stated that "perhaps such setting [a cultural survival camp] would provide more friendly environment for him and he may find it challenging and rewarding." [sic]

Micmac concepts of care denote cultural and spiritual maintenance as well as physical and emotional needs fulfillment. (Vol. 7, Tab 12, p.85).

A compensation award for Donald Marshall, Jr. that provides for the establishment of a cultural survival camp in his honour and with his participation could be profoundly instrumental in healing Donald Marshall, Jr.'s wounds. As Dr. Battiste has said at p.388, "...having some kind of organized collective activity gives one focus. It enables

one to do something. It enables ones ideas to be given recognition and nurturance...If they [children] have been taken away from us then we have to find ways to nurture that person again to find recognition and nurturance and cooperation with each other." Dr. Battiste's answer was in response to an invitation by counsel for the Attorney General to articulate ways in which Donald Marshall, Jr. can be encouraged to reintegrate with his community.

The restoration of diminished self-esteem requires "...some kind of reintegration into the community, some kind of reestablishment of well being, of connectedness..." (McGee, p.80).

There is evidence before this Commission that "...the individual is recognized only in relation to the greater whole of tribe and culture. This essential difference in community and family structure is reflective of the Indian pantheistic view that man [sic] is part of a delicate balance in a universe where all natural elements and living creatures interact and are interdependent" (Vol. 7, Tab 12, at p.85).

We have seen that for Donald Marshall, Jr., reintegration can only take place in his own Micmac community. It is submitted that, with the right assistance, "...continued support and compassion and understanding," (Tudor at p.612) this reintegration can still take place. It can be limited, diverted, or destroyed by an inadequate, inappropriate or insensitive compensation award or it can be enhanced and assisted by a compensation award that is generous, culturally sensitive and genuinely informed.

Another critical benefit of the cultural survival camp would be its function as a sharing by Donald Marshall, Jr. with his community. For him to do this would be consistent with the fundamental values in Micmac culture. To compensate Donald Marshall alone in such a manner that does not involve the community would be contrary to the fundamental principles upon which the Micmac nation is founded. It is instructive to understand that the meaning of Micmac is "the allied people." (Vol. 7, Tab 7, p.3).

The sharing with the community could, both spiritually and practically, assist significantly in the reintegration of Donald Marshall, Jr. with his community. As stated by Dr. Marie Battiste "...he has lost a significant amount of nurturance and recognition, acceptance and cooperation from that community,...[he has]...lost a collective consciousness...[a]...sociality network of bonding with people, it has been devastating because he has to deal with so much." (p.338). A sharing of his healing and restoration with his community could be, in fact, his actual healing and restoration as a Micmac person.

The Micmac Grand Council is prepared to act as trustee of a fund for the establishment of a cultural survival camp or centre, in full consultation with Donald Marshall, Jr. As it is necessary that it be Micmac run, no further government involvement would be necessary or desired.

At Tab 13 are two possible budgets for the operation of a Donald Marshall, Jr. Mi'kmaw cultural Survival Centre. The budgets are for the operation of a Donald Marshall, Jr. Mi'kmaw Cultural Survival Centre for one year only although the duration of this funding could be extended by the Commission in its determination of compensation.

The budgets have been organized into two parts: Part I reflects one-time expenses associated with the initial establishment of a Donald Marshall, Jr. Mi'kmaw Cultural Survival Centre, including the costs of developing an organizational strategy, meetings and deliberations to constitute a board of directors for the Centre (which would, of course, include Donald Marshall, Jr.), and the construction of a facility. Part II reflects the annual operating budget for a Donald Marshall, Jr. Mi'kmaw Cultural Survival Centre.

It is respectfully submitted that this Commission must ensure that Donald Marshall, Jr. is not deprived of the opportunity to recover a life for himself after so many years of pain and turmoil. He must be restored as he was found: as a Micmac, as a member of a distinct cultural community, as an autonomous individual connected to his community. It is submitted that this can only be accomplished, in full, through the establishment of a cultural survival camp or centre.

AGGRAVATED DAMAGES

This is a case where the harm done is so profound that additional compensation should be paid in the form of aggravated damages for the oppressive and arbitrary actions of State agents. It is a case where, to use the words of the House of Lords in Broome v. Cassell & Co., the conduct has been oppressive, highhanded, malicious and wanton.

The findings of the Royal Commission (Tab 3 of this Brief) detail the shocking extent to which agents of the State committed outrageous wrongs against Donald Marshall, Jr. at every juncture. The Royal Commission also included that the miscarriage of justice was, at least in part, occasioned by racism. For Donald Marshall, Jr., an aboriginal person, this has meant distinctive consequences and losses: the actions of those exercising functions of a governmental character fall into the category of cases appropriate for aggravated damages contemplated by Lord Devlin in Rookes v. Barnard.

Aggravated damages are awarded to compensate for the wrongdoer's conduct which intensifies the damage. Their role "remains compensatory", as opposed to punitive.

Vorvis v. Insurance Corporation of British Columbia (1989), 1984 N.R. 321 (S.C.C.) at pp. 333,334.

Aggravated damages describes an award that aims at compensation,

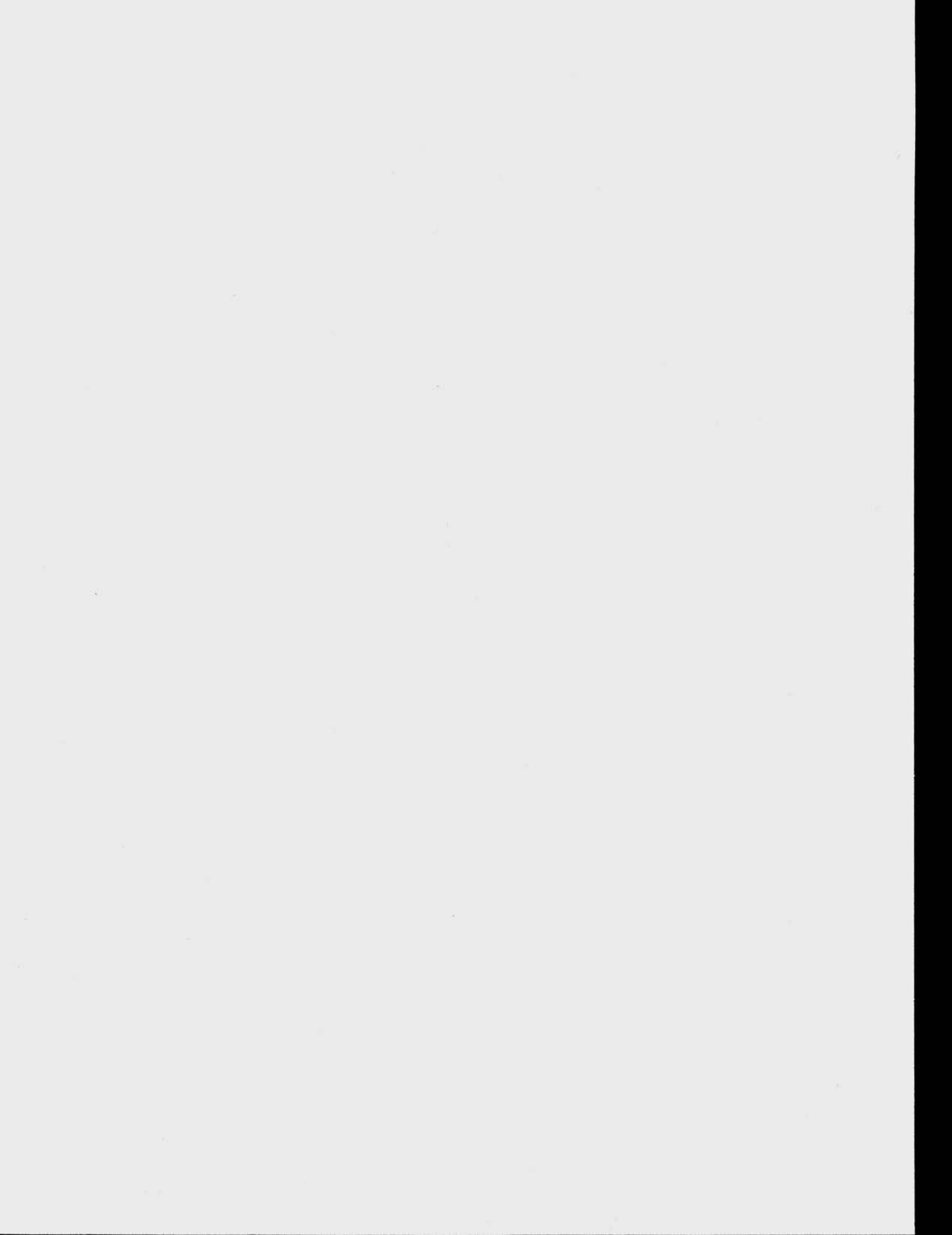
but takes full account of the intangible injuries, such as distress and humiliation, that may have been caused by the defendant's insulting behavior.

Vorvis, supra, p. 334.

Aggravated damages will frequently cover conduct which could also be the subject of punitive damages.

Vorvis, supra, p. 333.

By inference therefore "...malice, fraud or cruelty as well as other abusive and insulting acts towards the victim...[including conduct which]...wilfully disregards the rights of others...", all of which can be the subject of punitive damages, can also give rise to an award of aggravated damages, which are compensatory in nature. Adequate compensation in this case must acknowledge that the conduct responsible for the damage inflicted has intensified the injury.



PREJUDGMENT INTEREST

Adequate compensation to Donald Marshall, Jr. requires that prejudgment interest be calculated on the full extent of his non-pecuniary award. Equally, prejudgment interest should be calculated on the full extent of any award made to Mr. and Mrs. Marshall, both non-pecuniary and pecuniary in their case. Fairness demands that Donald Marshall, Jr. and his parents not be treated differently in this regard solely because this may be considered an ex gatia award.

The provisions in the Judicature Act, or at least the principle espoused there should be applied: "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 appeals"; (s.41(i)).

Prejudgment interest should be granted from the date of the injury, June 4, 1971, the date of Donald Marshall, Jr.'s wrongful arrest, which was the date when the cause of action arose.

The extent of the injury done in this case, the fact of Donald Marshall, Jr. knowing that he was accused and convicted on false testimony and the impact on him of receiving a life sentence and losing his liberty justifies prejudgment interest being awarded on the full extent of his compensation.

With respect to Mr. and Mrs. Marshall's pecuniary claim of approximately \$55,000, there may be several different ways of calculating prejudgment interest. For example, calculations could be made on the basis of the 8 years from 1982 (date of release) to 1990 (date of conclusion of compensation inquiry) and one-half of the 11 years from 1971 to 1982 for a total of 13.5 years for the period on which interest would be calculated. Or, by averaging the claim over 11 years, prejudgment interest could be worked up by \$5,000 per year. Mr. and Mrs. Marshall should receive prejudgment interest on any award for non-pecuniary loss from the date of their son's arrest.

To assist the Commission, tables prepared by the actuary, Brian Burnell and dated May 7, 1990, in accordance with Practice Memorandum No. 23 of the Nova Scotia Civil Procedure Rules have been submitted for use in the calculation of prejudgment interest.



A STRUCTURED AWARD

It is proposed that this Commission recommend to the Province of Nova Scotia that compensation paid to Donald Marshall, Jr. and his parents be structured to the fullest extent possible. In Donald Marshall, Jr.'s case it is proposed that a lump sum payment from the structure be made up front to provide Donald Marshall, Jr. with the means to house himself in the manner of his choosing.

The province of Nova Scotia has, through counsel, confirmed its agreement in principle to the idea of a structured settlement.

It is proposed that additional compensation be paid in trust to the Grand Council of the Micmac Nation for the establishment in full consultation with Donald Marshall, Jr. of the Donald Marshall, Jr. Mi'kmaw Cultural Survival Centre for the benefit of Donald Marshall, Jr. and the Micmac community.

MODEL I

Budget for a Donald Marshall Jr. Mi'kmaw Cultural Survival Centre

Part I - The Establishment of the Centre

Development of an organisational structure, board of directors, and mission statement	5,000.00
Lease of land from Band Council	10,000.00
Construction of a main lodge	150,000.00
Furnishings (including cooking facilities) for buildings	20,000.00
Tents and related equipment	10,000.00
Canoes and related equipment	10,000.00
Office equipment purchase (telephone, computer system)	10,000.00
Subtotal:	<u>215,000.00</u>

Part II - Annual Operating Budget

(i) Salaries and Benefits

(a) Director	50,000.00
(c) Programming Coordinator/ Community Outreach Worker	35,000.00
(e) Language Resources Worker	30,000.00
(f) Temporary counsellors and teachers	20,000.00
(i) Secretary	24,000.00
Subtotal:	<u>159,000.00</u>

(ii) Office and Administration

Insurance	5,000.00
Telephone	5,000.00
Office supplies and postage	3,000.00
Equipment maintenance	1,000.00

Audit	2,000.00
Utilities (for whole Centre, including gas, oil, electricity and repairs)	3,000.00
Miscellaneous	2,000.00
Subtotal:	<u>21,000.00</u>
<u>(iii) Transportation and Residence Costs</u>	
Centre vehicle leasing and staff mileage	10,000.00
Transportation of children to Centre (cost-shared with Bands)	10,000.00
Food and supplies for children (approximately 3000 per year)	50,000.00
Subtotal:	<u>70,000.00</u>
Total annual operating budget for Centre Year I:	250,000.00
<u>GRAND TOTAL (Establishment and Year I):</u>	\$465,000.00

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MODEL II

Budget for a Donald Marshall Jr. Mi'kmaw Cultural Survival Centre

Part I - The Establishment of the Centre

Development of an organisational structure, board of directors, and mission statement	5,000.00
Lease of land from Band Council	10,000.00
Construction of a main lodge	50,000.00
Furnishings (including cooking facilities) for buildings	10,000.00
Tents and related equipment	5,000.00
Canoes and related equipment	5,000.00
Subtotal:	<u>85,000.00</u>

Part II - Annual Operating Budget

(i) Salaries and Benefits

(a) Director/Programming Coordinator	40,000.00
(f) Temporary counsellors and teachers	20,000.00
(i) Half-time Secretary	12,000.00
Subtotal:	<u>72,000.00</u>

(ii) Office and Administration

Insurance	5,000.00
Telephone	2,500.00
Office supplies and postage	3,000.00
Equipment maintenance	1,000.00
Audit	2,000.00
Utilities (for whole Centre, including gas, oil, electricity and repairs)	1,000.00

Miscellaneous	2,000.00
Subtotal:	<u>16,500.00</u>
<u>(iii) Transportation and Residence Costs</u>	
Transportation of children to Centre (cost-shared with Bands)	5,000.00
Food and supplies for children (approximately 1,500 per year)	25,000.00
Subtotal:	<u>30,000.00</u>
Total annual operating budget for Centre Year I:	118,500.00 ←
<u>GRAND TOTAL (Establishment and Year I):</u>	\$203,500.00

All of which is respectfully submitted,

A handwritten signature in black ink, appearing to read "Anne S. Derrick", written over a horizontal line.

Anne S. Derrick

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May 28, 1990