

1 high regard with which he is held. Few men could  
2 survive. Lesser men would not. It's hoped that the  
3 positions that we have articulated in our brief, and  
4 the submissions this morning, will assist you in your  
5 reconsideration of his compensation, in order to  
6 acquire the professional counselling and treatment, so  
7 as to ensure him a comfortable future. Those are my  
8 submissions, Mr. Commissioner.

9 MR. EVANS

10 I note that you made comment, as to any suggested  
11 amount for the Marshall family.

12 MR. SAUNDERS

13 I did not. I can only refer to the other cases, in a  
14 different context, that I hope may be of assistance to  
15 you.

16 MR. EVANS

17 Thank you. Ms. Derrick, the floor is yours.

18 MS. DERRICK - Submission

19 Thank you, My Lord. Mr. Commissioner, as you well  
20 know, this is a case that reveals great wrong, and  
21 great suffering, and now great responsibility. Donald  
22 Marshall, Jr. has been terribly wronged, and he has  
23 suffered grievously because of it, and he suffers  
24 still. We've heard from Mr. Spicer and Mr. Saunders  
25 that many of Mr. Marshall's qualities auger well for

1 the future, and that things have taken a turn for the  
2 better. But I would respectfully remind this  
3 Commission, not to be lulled into a belief or into a  
4 way of thinking, that it's over for Donald Marshall,  
5 Jr. He will bear the scars that have been inflicted  
6 upon him, for the rest of his life. And that can not  
7 be lost sight of. The State now has the weighty  
8 responsibility and privilege, to right the wrongs,  
9 insofar as is possible, done to Donald Marshall, Jr.  
10 And in order to assist this Commission in discharging  
11 its duty, Donald Marshall Jr. brings to this  
12 Commission, a three-pronged claim, as you have heard,  
13 for compensation relating to his losses most directly;  
14 for compensation relating to his family's losses,  
15 particularly his parents -- or specifically his  
16 parents; and compensation relating to the losses of his  
17 community. These claims are all inter-related. And  
18 fundamentally, they are connected to Donald Marshall,  
19 Jr.'s unique cultural identity. They are all, also  
20 related to the requirements that compensation be  
21 adequate, that it take into account all the factors  
22 giving rise to the wrongful conviction, imprisonment,  
23 and continuation of that imprisonment, and that it  
24 contemplate no limit on any particular aspect of the  
25 claim. These are the words of the Order in Counsel,

1 as you have had them repeated to you on several  
2 occasions this morning. But before discussing the  
3 terms of your mandate, Mr. Commissioner, it's important  
4 to understand how the previous compensation award was  
5 not adequate. And I have referred to this in my brief,  
6 at Tab 7, and the references are on pages 1 and 2. The  
7 previous compensation was made in the absence of the  
8 truth about Donald Marshall, Jr.'s wrongful conviction,  
9 as detailed in the findings by the Royal Commission.  
10 It was made without acknowledgement of Donald Marshall,  
11 Jr.'s cultural distinctiveness. It did not take into  
12 account all of the losses Donald Marshall, Jr. has  
13 suffered, or the extent to which he has suffered. It  
14 lacked any acknowledgement of the appropriateness of  
15 aggravated damages. It provided no compensation for  
16 the losses to Donald Marshall, Jr.'s parents, and his  
17 community. And it was not informed by proper, or  
18 perhaps any, legal principles which obtain in the  
19 context of wrongfully convicted and imprisoned persons.  
20 I submit to you, Mr. Commissioner, that yours is a  
21 broad and extensive mandate, the operative part of  
22 which is the question of adequacy. Several times, Mr.  
23 Spicer said to you, that your mandate consisted of  
24 determining compensation for Donald Marshall, Jr. It,  
25 in fact, consists of determining the adequacy of

1 compensation paid to Donald Marshall, Jr., and requires  
2 you to take into account the other issues that I  
3 addressed. It is with respect to this issue of  
4 adequacy that I will be addressing to you, Mr.  
5 Commissioner, the concept of the compensation to Mr.  
6 Marshall's community, in the form of a cultural  
7 survival camp. I submit to you, that to be adequate,  
8 this compensation award must acknowledge Donald  
9 Marshall, Jr.'s unique cultural identity. It must  
10 recognize that certain aspects of Donald Marshall,  
11 Jr.'s experiences were experienced differently, because  
12 he is MicMac. His losses, in certain respects, are  
13 different and special. And to regard them as such, is  
14 appropriate, and culturally sensitive, not  
15 discriminatory, as Commission counsel suggests. We  
16 are, in fact, not all the same. And Mr. Marshall's  
17 experiences as a MicMac have informed how he has  
18 experienced the injuries over the last 19 years.  
19 Adequate compensation must acknowledge the gravity of  
20 Donald Marshall, Jr.'s injuries. The profound degree  
21 of harm, its prolongation by the State. And I submit,  
22 that this prolongation continued through the period of  
23 1983 to 1990, despite my friend for the Government's  
24 careful neutral characterization of the State's  
25 conduct, in his written and oral submissions. Adequate

1 compensation must also acknowledge the origins of Mr.  
2 Marshall's harm, the racism that was found by this  
3 Commission, the blind self-interest that was referred  
4 to by the Nova Scotia Legislature, in its unanimous  
5 resolution. And the fact that the perpetrator here was  
6 the State. Compensation must be a material  
7 acknowledgement of the wrong done. And Donald  
8 Marshall, Jr. must not only be compensated fully, he  
9 must be seen to be compensated fully. The public must  
10 understand through this process, the grievous nature  
11 of the harm done to Mr. Marshall. And with the  
12 greatest respect to all concerned, Mr. Commissioner,  
13 this can not be accomplished by plotting reliance on  
14 precedent. The state of the law, particularly for  
15 cases such as these, is not frozen. Every applicable  
16 principle has not been enunciated, nor in fact, are  
17 many of the enunciated principles applicable. This is  
18 a unique and challenging case. It's satisfactory  
19 resolution can only be accomplished through an  
20 application of culturally sensitive and thoughtful  
21 principles. Mr. Commissioner, with respect to the  
22 process that has been engaged in here, I believe my  
23 friends have characterized this accurately. It has  
24 been a cordial, and not a strictly adversarial process,  
25 in the usual sense. But let me add to their

1 submissions, that there should be no misunderstanding,  
2 that in some very important respects, we are at odds.  
3 And you are faced with fundamentally divergent  
4 positions, and must sort through these. I hope to  
5 assist you in doing so. And I hope particularly, with  
6 respect to inform your understanding of the central and  
7 essential nature of Donald Marshall, Jr.'s special  
8 cultural identity, which is so pivotal in this claim  
9 for compensation. I would also urge you, Mr.  
10 Commissioner, not to follow the suggestions of  
11 Commission counsel, or the Government, where they serve  
12 to limit Donald Marshall, Jr.'s compensation. I would  
13 like to review some of the cultural implications that  
14 apply here. And I have addressed these in detail, Mr.  
15 Commissioner, at Tab 8 of my written submission. I  
16 submit to you, that very extensive and useful evidence  
17 was provided to this Commission, concerning the  
18 important values and traditions on which the MicMac  
19 community is founded, and the significant aspects of  
20 that community, including a unique language, values of  
21 kinship, of caring and fostering and sharing, the  
22 significance of relationships amongst members of the  
23 community, not only just immediate family  
24 relationships, such as with parents and grandparents  
25 and siblings and children, but also in the broader

1 community. You heard evidence about the community  
2 dialogue that seems to both inform and also unite the  
3 community. And there are many indicators of points of  
4 continuity that have spanned the centuries, literally,  
5 in this unique, traditional community. It is important  
6 to understand these values of sharing, connections,  
7 inter-dependent kinship, in understanding the  
8 significant of what's been described as derivative  
9 claim, which I will address in more detail later. But  
10 it is significant that adequate -- in my submissions  
11 -- adequate compensation to Donald Marshall, Jr. can  
12 not be made without there being a material  
13 acknowledgement of these unique cultural features. It  
14 just so happens that the person injured here, is an  
15 aboriginal person. And that is significant. This is  
16 not a question of determining, should compensation be  
17 paid differently to a rich man, as opposed to a poor  
18 man. Those sentiments, as put forward by my friend for  
19 the Commission, do not apply here. What applies is the  
20 fact that this Commission has evidence of a community  
21 that is unique and special, has a long traditional  
22 heritage, and that Donald Marshall, Jr. is a member of  
23 that community, and was wrenched out of it, and placed  
24 in an authoritarian, hostile environment, which was  
25 alien to him and his culture. Compensation that does

1 not deal with that squarely and directly, can not be  
2 adequate compensation. In fact, Mr. Saunders' comments  
3 in his brief, and also in oral argument, concerning  
4 some recent involvement Donald Marshall, Jr. has had  
5 with respect to his community, for example, being  
6 involved in an indigenous people's conference in  
7 Ontario, being involved with the MicMac News in Ottawa,  
8 serve to illuminate that Mr. Marshall's strength and  
9 identity come through his being an aboriginal person.  
10 And that is a consistent and strong theme, throughout  
11 this story, that you are so familiar with, Mr.  
12 Commissioner. We have seen it exist in Donald  
13 Marshall, Jr.'s early years, before he went to prison.  
14 It existed through his experience in prison, as you  
15 heard described by Mike Grattan, who was a prisoner who  
16 served time with Mr. Marshall, and who commented on his  
17 relationships with other aboriginal prisoners, and his  
18 involvement in the Native Indian Brotherhood. And it  
19 is a relationship that has continued, since his release  
20 from prison. It is central and essential to Mr.  
21 Marshall's identity. It is not that I am suggesting  
22 that one person's imprisonment is worth more than  
23 another person's. This is not an award because Donald  
24 Marshall, Jr. is MicMac, in and of itself. Therefore,  
25 because he's MicMac, he should be awarded more money.



1 It is a proposition that the cultural factors that  
2 apply here must be taken into account. And that may  
3 very well result in an award that would be greater, if  
4 those cultural factors did not apply, and did not  
5 exist. We, in fact, have not heard any evidence that  
6 would cause us to treat these cultural factors, as  
7 being the same as, or identical to, the cultural  
8 factors that those of us who are not MicMac have. They  
9 have been quite clearly and emphatically described, as  
10 unique cultural factors. It is an understanding of  
11 this community, of these traditions and values, that  
12 informs this entire compensation process. And I would  
13 ask you to bear these sections of my brief in mind,  
14 when you're considering any and all aspects of Donald  
15 Marshall, Jr.'s claim. With respect to Donald  
16 Marshall, Jr.'s claim, it has correctly been  
17 characterized by my friends as consisting of several  
18 components, which I will attempt to deal with  
19 individually. But I would first of all, simply  
20 reiterate what they are. There are pecuniary losses  
21 for Mr. Marshall. And in dealing with those, I will  
22 be addressing to you, Mr. Commissioner, the question  
23 of the actuarial calculations, and the validity or lack  
24 of validity of relying upon them. And I will also be  
25 addressing to you the fact that you must, I submit,

1 take into account that there has been a permanent,  
2 chronic social disability created here, by the actions  
3 of the State, and that higher level assumptions are  
4 appropriate, as sustained by that. There is a  
5 component for future treatment. And I have some  
6 divergent views from my friends, with respect to that.  
7 And there are non-pecuniary losses. Before I get into  
8 dealing with the aspects of the claim specifically, I  
9 would like to discuss the issue of the use of  
10 principles in this case. This is not a torts case.  
11 And any attempt to consider or apply principles that  
12 arise in the torts context, will, either by design or  
13 result, mean a limitation of Donald Marshall, Jr.'s  
14 claim. The inadequacy of torts remedies and concepts,  
15 is precisely why jurisdictions have developed other  
16 structures for considering compensation to the  
17 wrongfully convicted. And for examples we have the  
18 International Covenant, and we have the Federal-  
19 Provincial Guidelines, as examples of where attempts  
20 have been made to deal with this, as other than in a  
21 torts context. The use of the torts analogy here,  
22 whether the Government intends it to or not, does serve  
23 to impose limits. And it has been made unequivocally  
24 clear, that pre-set limits were not to be consider.  
25 And I've referred to this at Tab 5 and Tab 7 of my

1 brief. And the fact of not applying pre-set limits  
2 does form part of the mandate of this Commission.

3 MR. EVANS

4 But with respect, that reference is really to the one  
5 hundred thousand dollars (\$100,000) and so forth,  
6 advocated by the Dominion and the Provincial  
7 Governments, I think, pretty well.

8 MS. DERRICK

9 But indeed, it is clear, in that recommendation that  
10 -- which I would like to lay my hands on. In fact,  
11 there's an additional reference to the Royal  
12 Commission, in making its recommendation, commenting  
13 on the Thomas Commission, and referring to the  
14 principles of common decency and generosity.

15 MR. EVANS

16 No problem with that.

17 MS. DERRICK

18 Thank you. I submit to you, Mr. Commissioner, that in  
19 the same regard, the trilogy of cases, from the Supreme  
20 Court of Canada, is also wholly inappropriate here.  
21 And I've addressed this at Tab 7 of my brief. And I  
22 will go into this in a little bit of detail. It has  
23 been observed by Professor Kaizer, that the Supreme  
24 Court of Canada trilogy has no place in the realm of  
25 compensation for the wrongfully convicted. These are

1 cases arising out of disputes between private parties,  
2 for personal injuries. This is not a case of a State's  
3 victim. The application of the principles in the  
4 trilogy, as I've said, would result in limits being  
5 imposed. And the report of the Federal-Provincial Task  
6 Force on Compensation, which is referred to in the  
7 Kaizer Paper -- and I'm looking at page 5 of my own  
8 brief, at page 7 -- provides further reasons for not  
9 imposing limits on non-pecuniary awards for  
10 compensation. They talk about wrongful conviction and  
11 imprisonment being such a serious error, that the State  
12 should fully compensate the injured party. But the  
13 number of potential claims would appear to be so small,  
14 that there's no justifiable fear of a drain on the  
15 public purse. That imposing a ceiling on the amount  
16 of the award, would appear to be contrary to the  
17 general philosophy of wanting to provide redress for  
18 an injured party. And that the State very rarely  
19 imposes a limit on awards available, resulting from  
20 damage to property. Limiting compensation in the case  
21 of unjust convictions would appear as if the State  
22 values property rights to a greater extent than the  
23 freedom of its citizens. An analysis of the trilogy,  
24 demonstrates that some of the concerns about the  
25 exorbitant level of personal injury awards in the

1 United States, and the proliferation of these types of  
2 awards, and wildly-extravagant claims, all of these  
3 principles informed the Supreme Court of Canada's  
4 decision to impose a limit on non-pecuniary damage  
5 awards. None of those speeches apply here. And so,  
6 the principles that arise out of those cases, come from  
7 a completely different genesis, and should be  
8 disregarded, as not being helpful, and not being  
9 applicable. As you've heard from counsel for the  
10 Commission, he also does not favour this approach, and  
11 rejects it. The trilogy also speaks of the moderation  
12 of awards. And I submit to you, Mr. Commissioner, that  
13 there's no reason why Donald Marshall, Jr.'s award  
14 should be moderated. It is your task to determine what  
15 will constitute adequate compensation, not moderate  
16 compensation. And along these lines, Mr. Saunders has  
17 stated that an award to Donald Marshall, Jr. should be  
18 fair and realistic to the system. And I submit to you,  
19 that that's not part of your mandate. There's no  
20 requirement in the Order in Counsel, that the award be  
21 fair and realistic to the system. It is to be adequate  
22 to Donald Marshall, Jr. Mr. Saunders, in the same  
23 paragraph in his brief, says that compensation must  
24 obtain a result that will impress the ordinary  
25 onlooker, as being just and sensible. I think we could

1 fairly assume that the ordinary onlooker is generous  
2 and anti-racist, and would therefore support a  
3 culturally sensitive and generous award to Donald  
4 Marshall, Jr., in the wake of his great suffering.  
5 Furthermore, there is the principle raised by my  
6 friend, Mr. Spicer, concerning the giving to Junior of  
7 the benefit of every doubt. And I submit that that  
8 involves going much further than either Mr. Spicer or  
9 Mr. Saunders had been prepared to do. Indeed, having  
10 said that, counsel for the Commission then proceeds not  
11 to give Donald Marshall, Jr. every benefit of the  
12 doubt, and refers to, in his brief, such things as the  
13 negative actuarial assumptions, the question of future  
14 treatment, and how Donald Marshall, Jr. should have  
15 access to that money, and also makes note of Donald  
16 Marshall, Jr.'s:

17 "Whether his situation can be  
18 said to be partly attributable  
19 to his own shortcomings.

20 I submit to you, Mr. Commissioner, that any question  
21 dealing with that, really invites an inquiry into  
22 blaming the victim, or suggesting that Donald Marshall,  
23 Jr. may be the author of his own misfortune, in some  
24 fashion. I don't ---  
25

1 MR. EVANS

2 I don't really think that is a fair comment. I didn't  
3 get anything.

4 MS. DERRICK

5 Well the statement is:

6 "You must somehow try to assess  
7 whether his life and employment  
8 for the last eight years ..."

9 which is the period 1982 to 1990:

10 "... has been the result of his  
11 years of imprisonment, and the  
12 pain and dislocation which he  
13 suffered, as a result of it,  
14 or whether his situation can  
15 be said to be partly  
16 attributable to his own  
17 shortcomings."

18 And I submit to you, Mr. Commissioner, that Donald  
19 Marshall, Jr. has obviously, and it's well known,  
20 suffered greatly in the last eight years. And you have  
21 certainly considerable evidence before you, concerning  
22 this. And I submit to you, that it is as a result of  
23 his experiences in prison, in being wrenched away from  
24 his community, in being sentenced to a life sentence,  
25 that he has experienced those difficulties, and that

1 it is an inappropriate approach, to suggest that there  
2 must be some analysis of Donald Marshal, Jr.'s own  
3 shortcomings. It is on that basis that I suggest that  
4 involves blaming the victim, holding Donald Marshall,  
5 Jr. responsible for not having more effectively got  
6 back on his feet. I will address that.

7 MR. EVANS

8 Would it be fair to make a comparison between Donald  
9 Marshall and Mr. Grattan, after their release from the  
10 institution?

11 MS. DERRICK

12 I don't think it would be fair, in part because we're  
13 dealing with the unique cultural factors here, in Mr.  
14 Marshall's case, that I submit to you, have made his  
15 ability to reintegrate, that much more difficult. The  
16 removal from his community has made his ability to  
17 reintegrate, that much more difficult. And it is also  
18 material to remember that in response to a question  
19 from Mr. Spicer, Mr. Grattan acknowledged that he went  
20 back inside. So from the time that he was released,  
21 to the time that he testified in front of this  
22 Commission, he served a further sentence.

23 MR. EVANS

24 That's right.  
25



1 MS. DERRICK

2       So there is a further example of how incarceration,  
3       even for something that you did do, can result in a  
4       profound degree of social dis-function. And I would  
5       ask you, Mr. Commissioner, to refer to those -- on this  
6       issue, in part, to refer to that section of my brief,  
7       which is found at Tab 9, and starts at Tab 5, which  
8       talks about, for example, in one area here, the  
9       employment prospects for ex-inmates generally. And it  
10      provides an overview of some of the literature that has  
11      discussed how difficult it is for people released from  
12      serving a penitentiary term, to reintegrate into the  
13      community, obtain employment, get back on their feet.  
14      And that literature deals with people that it is  
15      supposed were sent to prison for something that they  
16      were legitimately responsible for.

1 I would now like to discuss some aspects of Donald  
2 Marshall Jr's claim, specifically starting with his  
3 pecuniary losses and what I would like to respond to  
4 here, Mr. Commissioner, is the suggestion that the  
5 actuarial assumptions concerning Mr. Marshall are of  
6 no help to you and that they are far too speculative  
7 and that you should abandon them and make an award to  
8 Donald Marshall Jr. in the form of general damages.  
9 I submit to you that this is a case where indeed there  
10 is much better evidence than in many cases involving  
11 a person of Donald Marshall Jr's youth when the injury  
12 occurred in terms of what Donald Marshall Jr. may have  
13 done. And you have before you the evidence that there  
14 was this family drywalling business, that it had  
15 existed into the third generation at least, that  
16 Donald Marshall Sr. had worked in it for some  
17 considerable years before his sons joined him and that  
18 Donald Marshall Jr. had worked with him in that for  
19 the preceding year before he was wrongfully arrested  
20 and convicted.

21 MR. EVANS

22 That must have been for a very short period, was it  
23 not?

24 MS. DERRICK

25 I don't know that the evidence ---

1 MR. EVANS

2 Donald Marshall was -- he was incarcerated when he was  
3 about 16, 17 years old.

4 MS. DERRICK

5 He was incarcerated when he was 17. I believe the  
6 evidence from the Royal Commission shows that he left  
7 school at 16 ---

8 MR. EVANS

9 Right.

10 MS. DERRICK

11 --- and went into the -- working with his father at  
12 that point, so it would have been a year of his  
13 working with his father.

14 MR. EVANS

15 But as pointed out by other counsel, we have no record  
16 of how good a business that was. The only evidence I  
17 can recall offhand is that Mr. Marshall admitted there  
18 were periods of time when he had to seek social  
19 assistance because the business was not sufficiently  
20 productive. Is that not so?

21 MS. DERRICK

22 That is so and you may consider, therefore, that it is  
23 appropriate in looking the -- some of the assumptions  
24 made with respect to the drywalling aspect that some  
25 contingency with respect to unemployment would be

1 appropriate to be taken into account. Now that's  
2 addressing a different issue than you were raising,  
3 but I guess that's how I would suggest it would be  
4 most appropriate to deal with that if it is  
5 appropriate to consider periods of unemployment. The  
6 evidence you do have, Mr. Commissioner, is that that  
7 drywalling business had sustained that family for a  
8 long period of time, for 30 years before Donald  
9 Marshall Jr. became involved in it. And that that's  
10 what Mr. Marshall Sr. testified to -- that that was  
11 the family's principal source of income and that's  
12 what they relied upon and, as you pointed out, there  
13 may have been some down times. Mr. Marshall Sr. also  
14 testified that other tradeswork was picked up in those  
15 down times -- other construction work and insulation  
16 work.

17 MR. EVANS

18 By him.

19 MS. DERRICK

20 By him.

21 MR. EVANS

22 Right.

23 MS. DERRICK

24 But it is, I think, perfectly reasonable to assume  
25 that that might well have also been available to his

1 sons and that if we look at Mr. Marshall Sr's history  
2 we can imagine a similar future for Donald Marshall  
3 Jr. We can imagine that he may well have worked in  
4 that business if he'd been left unmolested and taken  
5 it over from his father. He was -- is -- the eldest  
6 son -- and carried on from there. I submit to you  
7 that that is a reasonable probability and that it is  
8 reliable for you to rely upon and that you don't need  
9 to feel that you have just to abandon any  
10 consideration of this assumption. I submit to you  
11 that in -- my position is that it's the best  
12 assumption to rely on. The drywalling assumption is  
13 the assumption that has the greatest foundation -- the  
14 best foundation. With respect to the matter of loss  
15 of earnings in the future, some of those same comments  
16 apply, I submit, Mr. Commissioner. And I think that  
17 what is appropriate to consider at that juncture, in  
18 looking into the future, are the questions of what  
19 affect does imprisonment have on a person who then is  
20 released and seeks to reintegrate themselves. And  
21 that is the purpose of having provided you with some  
22 discussion of the literature that has dealt with the  
23 experiences of ex-inmates being released into the  
24 community. The other assumption that's related to  
25 that is the assumption that Donald Marshall Jr. is not

1 fully able, or ever going to be fully able, to work 40  
2 hours a week, week after week and maintain a regular  
3 routine job. There's evidence before you concerning  
4 other people's opinions about that. You heard a  
5 reference from Mr. Saunders to Jack Stewart's  
6 testimony and I believe Felix Cacchione's testimony as  
7 well, both of them saying that -- and particularly,  
8 perhaps, the reference in Judge Cacchione's case --  
9 saying that he didn't see Donald Marshall Jr. ever  
10 being able to work in a 9 to 5 job. The purpose of  
11 providing calculations as to diminished earning  
12 capacity is to lend some concrete expression to that  
13 chronic residual disability and it is the same type of  
14 disability that is referred to by the Arthur Alan  
15 Thomas Commission when they commented that they  
16 expected Mr. Thomas would carry the residual effects  
17 of his experiences for the rest of his life. In fact,  
18 what I refer you to in my brief is, again, to assist  
19 you pto rofile Donald Marshall Jr's post-release  
20 employment history which lends credence, I submit, to  
21 these submissions. It is also worth noting, when we  
22 consider that things have taken a turn for the better  
23 and that there are indicators that auger well for the  
24 future -- to use the language of my Friends -- that in  
25 1983 when an actuarial report was prepared as part of

1 the discredited compensation negotiations there was an  
2 assumption built into those that in three years time  
3 Donald Marshall Jr. would be fully employed as a  
4 plumber. So that by 1986 that's what he would be  
5 doing to earn his living and it has been shown by the  
6 passage of time that that has not transpired. I  
7 submit to you that there may well have been periods of  
8 optimism with respect to the extent of Donald Marshall  
9 Jr's injuries and his ability to get on his feet that  
10 have not been borne out by reality. It is not -- in  
11 saying these things, it is not to be lost sight of  
12 that Donald Marshall Jr. is a strong and courageous  
13 man but in saying that and in appreciating that,  
14 especially through the evidence that you heard from  
15 his many supporters, it is essential to understand  
16 that the depths of his injury are very grave. My  
17 Friends, I believe, have both commented to you  
18 concerning the alternative assumptions which they  
19 requested that the actuary prepare, taking into  
20 account some negative contingencies. I have -- I  
21 believe both of them said in their submissions to you  
22 today that these additional calculations are not  
23 helpful and should be disregarded. I certainly agree,  
24 and perhaps some of my reasons may be somewhat  
25 different, or articulated in more detail, but they are

1 found at pages 11 to 15 of the section at Tab 9 or  
2 pecuniary loss. I won't go into them. I've addressed  
3 them there in the brief. I think that they are  
4 negative assumptions that are unreliable and, perhaps  
5 most importantly, unfair. That it would not be  
6 appropriate for the state to in any way benefit from  
7 any negative contingencies that are expressed in  
8 Donald Marshall Jr's life now given that, I submit,  
9 they are directly connected with his painful  
10 experiences and his wrongful conviction and  
11 imprisonment. I would like to address the issue of  
12 cost of future treatment, which is found at Tab 9,  
13 page 15 of my brief. I submit that the function of  
14 this aspect of the award would be to assist Donald  
15 Marshall Jr. in recovering a sense of well being and  
16 optimism and self esteem and that the inclusion in the  
17 sample course of treatment, which is provided as part  
18 of the filed submissions, of a family member was  
19 intended to be as an assistance to Mr. Marshall. It  
20 was not intended to be -- to provide that family  
21 member with treatment. It was as part of Donald  
22 Marshall's proposed treatment. Mr. Saunders didn't  
23 address this in his oral submissions, but he does  
24 address it in his brief, and therefore I feel I should  
25 comment on the suggestion that perhaps the local



1 psychologist could assist Donald Marshall Jr., and  
2 this is found at page 32 of Mr. Saunders' brief. I  
3 would say to that, Mr. Commissioner, that what -- my  
4 comments are not to minimize the psychologist's  
5 interest in Donald Marshall Jr. I would simply submit  
6 he is not as well qualified as the course of treatment  
7 that we provided to you. He has not produced results.  
8 Mr. Marshall has not seen him other than for  
9 assessment purposes in three years time. So there has  
10 been no voluntary effort on Donald Marshall Jr's part  
11 to seek out his assistance. He is not culturally  
12 attuned to Donald Marshall Jr. and he was chosen at  
13 random. I submit, with respect to the general issue  
14 of future treatment for Donald Marshall Jr., that  
15 Donald Marshall Jr. is entitled to this money.

16 MR. EVANS

17 Whether he takes the treatment or not?

18 MS. DERRICK

19 Whether he takes the treatment or not. And that the  
20 suggestion on the part of counsel for the government  
21 that Donald Marshall Jr. pay for this up front and  
22 bills be submitted and then Donald Marshall Jr. be  
23 reimbursed -- I submit that that is just not a  
24 satisfactory option.

25 MR. EVANS

1 That's contrary to all the cases that we've had. If  
2 you don't take the treatment and it's advocated that  
3 you should -- if it's required -- then you don't get  
4 paid for it. In other words, if you're supposed to  
5 have an operation that will cure your disability ---

6 MS. DERRICK

7 I think we obviously have to question how applicable  
8 those sorts of treatment that you're referring to, to  
9 do with physical injury, are with respect to this  
10 situation. I don't know that it is possible to  
11 consider curing Donald Marshall Jr. I think  
12 undoubtedly it is possible to consider him receiving  
13 assistance. But I think he needs to be treated with  
14 respect and autonomy and therefore I would submit that  
15 the award -- or any award -- for a cost for future  
16 treatment be -- form part of the structured settlement  
17 and come out in the form of enhanced increments. Now,  
18 perhaps that can be structured in a way that they  
19 don't come out right away, but that he is entitled to  
20 that money and that the state, with respect, should  
21 not interest itself in whether or not he does with it  
22 what it believes he ought to. It is hoped that that  
23 is what would happen.

24 MR. EVANS

25 What you're saying, as I understand you, is that in my

1 consideration I should eliminate any of the components  
2 that have gone into a long history of tort claims. Is  
3 it not reasonable that if something is proposed by way  
4 of treatment in the hope that it will correct you that  
5 you'd only get paid if you took it? In other words,  
6 if future hospitalization in a case is recommended by  
7 the medical authorities and the patient or the  
8 claimant refuses to take the treatment, are you going  
9 to pay for hospitalization and medical that never  
10 occurs?

11 MS. DERRICK

12 In this situation, Mr. Commissioner, it's difficult  
13 for any of us, I think, to determine what would be  
14 appropriate for Donald Marshall Jr. to do. And I  
15 think that's a determination he has to make. And he  
16 must be given the means so that he can make it with  
17 dignity and autonomy and it may be very tempting to  
18 approach it in a way that -- in my case might be  
19 maternalistic, otherwise might be paternalistic -- and  
20 maintain some control over how this money was meted  
21 out, but he has been gravely injured. He is entitled  
22 to be healed in the manner of his choosing. I think,  
23 obviously, this Commission would determine a sum ---

24 MR. EVANS

25 And do you say, then, he is not -- that if he doesn't

1 want to be healed we should still pay a sum? We  
2 should recommend a sum?

3 MS. DERRICK

4 I think he is entitled to a component for the cost of  
5 future treatment that he can then use privately and at  
6 his discretion. In conclusion, Mr. Commissioner, with  
7 respect to the area of pecuniary loss, I would like to  
8 make a comment with respect to several things that my  
9 Friends said in summary. You were asked by Mr.  
10 Saunders to have regard to the Poirier case, where  
11 actuarial evidence was used and I believe it showed  
12 loss of earnings in the range of two hundred and  
13 thirty-five thousand to nine hundred and forty-six  
14 thousand dollars (\$235,000.00-\$946,000.00).

15 MR. EVANS

16 Which case are you referring to?

17 MS. DERRICK

18 I believe it's called Poirier. It was the one that  
19 Mr. Saunders handed up to you.

20 MR. EVANS

21 Right. Oh yes, thank you.

22 MS. DERRICK

23 Poirier and Dyer. And I believe you were asked to  
24 have regard to this case because it is a case where  
25 the court found -- our court found -- that actuarial

1 evidence -- in that instance, anyway -- was of no  
2 assistance. The court, of course, doesn't say that  
3 actuarial evidence is never of any assistance and I'm  
4 not suggesting Mr. Saunders said that it did. Indeed,  
5 in the case the court says that it "should only be  
6 received where there is evidence placed before the  
7 court which establishes with reasonable certainty the  
8 hypotheses on which the actuary is to make his  
9 calculations". I submit to you, Mr. Commissioner,  
10 that the actuarial evidence is helpful to you here,  
11 and that was the whole point of having it prepared.  
12 That there were reasonable and probable assumptions  
13 that were available, that the actuary was given those,  
14 that that is of assistance to you in determining the  
15 extent of Donald Marshall Jr's pecuniary losses.  
16 There is -- I don't accept, with respect, that this is  
17 a case of extreme speculation. It's also material to  
18 note that in that case the actuarial evidence would  
19 have provided a much more substantial award. The  
20 person in that case got thirty-five thousand dollars  
21 (\$35,000.00). And I think again it falls in with the  
22 principle of giving Donald Marshall Jr. the benefit of  
23 every doubt that we not see this case as one of  
24 extreme speculation, but that we have regard for what  
25 we do know about the history of the family and its

1 economic circumstances and the economic prospects that  
2 were available to Donald Marshall Jr. I would like to  
3 make one closing comment with respect to the Trilogy  
4 as well, and perhaps this relates to your question to  
5 me -- am I suggesting that you abandon all tort  
6 principles and -- entirely. Mr. Spicer suggests that  
7 there are sound reasons for considering the Trilogy  
8 because they are cases where the victims suffered  
9 extreme injuries and those injuries were then detailed  
10 to you, and the Fenn case is another example of  
11 extreme injuries. Mr. Spicer then posited the point  
12 that there will be no doubt those who will quite  
13 legitimately say, "What possible reason can there be  
14 for Donald Marshall Jr. to get more than a person who  
15 has been rendered a quadriplegic?" I don't think, I  
16 submit to Your Lordship -- I don't think that that  
17 inquiry is -- or that suggestion -- is helpful. I  
18 think to some extent, looking at the Trilogy and the  
19 injuries suffered there and looking at the injuries  
20 suffered here is a bit like asking someone, "Would you  
21 rather be told that you're going to be locked up for  
22 life for a murder that you didn't commit or would you  
23 rather be in a car accident and confined to a  
24 wheelchair for the rest of your life?" I think that  
25 we are considering someone here who has been very

1 severely injured in very many fundamental senses that  
2 include an injury to a person's cultural connection  
3 and firmament. And that is surely as grave an injury  
4 as many other injuries that have been brought before  
5 you. I would like to address the issue of the  
6 cultural survival camp and the concept of compensation  
7 to Donald Marshall Jr's community. This is addressed  
8 at Tab 11 of my brief and it is also informed by Tab  
9 8, which talks about the cultural implications of  
10 compensation. As I've submitted already to you,  
11 adequate compensation in this case does mean something  
12 different because Donald Marshall Jr. is MicMac. And  
13 it is necessary, I submit, to have regard to the  
14 unique cultural features that are present with respect  
15 to Donald Marshall Jr. and his community. And I  
16 submit that impetus for this concept is to be found in  
17 the statements of the government which were made in a  
18 summary of their response to your Commission Report  
19 where they identified the need for pilot projects and  
20 close consultation between both levels of government  
21 and the MicMac community to develop those programs  
22 which will work most effectively in Nova Scotia. They  
23 also acknowledged in their summary the intrusion of  
24 our dominant culture upon the MicMac community and the  
25 detrimental effect that this has had on MicMac

1 community life. I'm not suggesting that what is  
2 contained in these statements is the full scope of  
3 your mandate with respect to this aspect of Donald  
4 Marshall Jr's claim. Your authority for awarding  
5 compensation of this nature is found in the Order in  
6 Council when it talks about adequate compensation to  
7 Donald Marshall Jr. having regard to all the factors.  
8 This is not a claim, as characterized by Commission  
9 counsel, to permit Donald Marshall his dreams. I  
10 submit that this compensation cannot be adequate if it  
11 is not culturally sensitive and responsive to the need  
12 to restore Donald Marshall Jr. within himself and to  
13 his community. If it also assists in realizing Donald  
14 Marshall's dreams, then that's additionally  
15 fortuitous. But this is a misstatement -- an innocent  
16 misstatement -- of this aspect of Donald Marshall Jr's  
17 claim. It is material to appreciate that Donald  
18 Marshall Jr. is first and foremost MicMac, that  
19 therein lie his strongest connections and identity.  
20 It is significant to understand that in the hostile  
21 environment of prison it was his Indianness that  
22 preserved and sustained him and that his is a story of  
23 cultural and personal survival as well as a story of  
24 cultural deprivation and resultant personal injury.  
25 There was ample evidence before this Commission



1 concerning the affect on a community of the removal of  
2 a child and the significance that that has and the  
3 significance of removing from the community many of  
4 the values and skills and gifts that such a person  
5 has, or had. In Donald Marshall Jr's case this  
6 dislocation, this loss, is further exacerbated by the  
7 fact that he is the son of the Grand Chief of the  
8 MicMac nation. And that, I submit, is a central  
9 feature to this - that the state did not remove only  
10 a MicMac youth from his community, it removed the son  
11 of a nation's leader and the potential leader for the  
12 future. Its actions may -- we cannot know this -- but  
13 it may -- they may have resulted in a permanent  
14 robbing of that community of that leader. And we have  
15 evidence that Donald Marshall Jr. would have been --  
16 and will still be discussed in these terms -- a  
17 natural candidate for the position. We also have  
18 evidence that his experiences and the notoriety and  
19 the injuries that have been inflicted upon him have,  
20 in the opinion of some in the community, diminished  
21 his potential to assume that role. It is essential,  
22 I submit, to appreciate that the state owes it to  
23 Donald Marshall Jr. to try and assist him in  
24 reintegrating with his community, and it is true that  
25 the concept of a cultural survival camp is a mechanism

1 providing that opportunity. In this case, because of  
2 the unique cultural values, because of the specific  
3 place that Donald Marshall Jr. and his family occupy  
4 in the community, adequate compensation must  
5 acknowledge that these values that have formed that  
6 community are special, do emphasize sharing, do  
7 emphasize the importance of integration, the  
8 importance of kinship, the importance of being part of  
9 the whole. And that to compensate Donald Marshall Jr.  
10 solely, with no aspect that acknowledges these unique  
11 cultural features or provides some manner for their  
12 expression, is not adequate compensation to Donald  
13 Marshall Jr. His own recognition of this is  
14 demonstrated through all the evidence that shows how  
15 consistently he has referred to this. Donald Marshall  
16 Jr. understands that that is how he can reconnect with  
17 his community. Through such an involvement as this,  
18 through interaction with children, through an  
19 expression of his culture and his language and his  
20 traditional values. Mr. Saunders has said to you that  
21 there -- other relationships in other ethnic  
22 communities are just as important, that we shouldn't  
23 be valuing this relationship above other  
24 relationships. What you don't have, Mr. Commissioner,  
25 is any evidence about the unique values and features

1 of other ethnic communities. You have evidence about  
2 the values that are inherent in this community. And  
3 it is not that you are being asked to regard these  
4 relationships and these values as being better or more  
5 worthy of compensation, but you are being asked to  
6 value them, to understand them as part of adequate  
7 compensation. In another case -- another case  
8 involving a wrongfully convicted person -- other  
9 values, other features, other aspects, may arise that  
10 might not be present in this case. But we are dealing  
11 with this case, not the hypothetical wrongfully  
12 convicted Italian, or the hypothetical wrongfully  
13 convicted Jewish person, so I submit that your mandate  
14 does sustain this as a legitimate part of Donald  
15 Marshall Jr's compensation. That it would provide a  
16 material acknowledgement of his unique cultural  
17 identity, of the loss to his community and of the need  
18 to restore and heal him There are a few final things  
19 I'd like to say in summary, Mr. Commissioner, with  
20 respect to compensation for Donald Marshall Jr's  
21 parents. You have heard that we are in agreement  
22 concerning the pecuniary loss and we are in agreement  
23 that there should be non-pecuniary -- a non-pecuniary  
24 award made. And I submit that that is a good and  
25 important concession on the part of the government and

1 will, I'm sure, be seen as a sign of respect for the  
2 Marshalls. I do not support, however, Mr. Saunders'  
3 suggestion in his brief that, based on the cases of  
4 wrongful death of children, that the Marshalls' award  
5 be suitably reduced. I believe he read you a passage  
6 where he said the awards of these nature are  
7 necessarily arbitrary. There is no need for them to  
8 arbitrarily moderated, or arbitrarily parsimonious.  
9 This is a case involving a wrong by the state. If  
10 Donald Marshall Jr. had been executed, would his  
11 parents be treated as if he had died accidentally in  
12 a car crash? Effectively, by sentencing Donald  
13 Marshall Jr. to a life sentence, they witnessed their  
14 son being taken off to a hostile environment, removed  
15 from them for who knew how long. I would submit that  
16 there is no need to consider those other cases as  
17 reducing or being standards by which Donald Marshall  
18 Jr's parents' non-pecuniary award can be reduced.  
19 Their suffering is grave and prolonged and I submit  
20 that it should -- any award should be generous. One  
21 thing that I note that I neglected to say with respect  
22 to the issue of cost of future treatment -- and this  
23 is mentioned in my brief, but I would just like to  
24 reiterate it. Concerning this issue of Donald  
25 Marshall Jr. seeking out assistance or not seeking out

1 assistance and placing responsibility on him to do so  
2 and tying any award to him to that -- I submit that  
3 the evidence supports the fact that Donald Marshall  
4 Jr's inability to reach out for help is born out of  
5 his experiences and there is evidence from Martha  
6 Tudor, who talks about how Junior kept himself  
7 together in prison by keeping it all in. When he did  
8 speak out, when he did open up, he was told he was  
9 lying and that he maintained himself by not reaching  
10 out and by not trusting others and that he now must  
11 not be penalized because that was his socialization,  
12 that was his experience, and that was how he survived.  
13 And that has made it that much more difficult for him  
14 to look for or accept help than may well be the case  
15 where someone is being presented with the suggestion  
16 that they receive physical treatment. With respect to  
17 the matter of aggravated damages, I have dealt with  
18 that in my submissions at Tab 12. I believe it to be  
19 -- it is my submission that it is within your mandate  
20 to award compensation in the form of aggravated  
21 damages in this case. Mr. Saunders refers you to the  
22 Lebar case -- I believe it's at page 69 of his brief  
23 -- and refers to the conduct that attracted the  
24 damages in that instance as having been oppressive,  
25 wilfull and wanton disregard of the plaintiff's

1 rights. I think those words can be appropriately  
2 applied in Donald Marshall Jr's case. I do not think,  
3 as I may have said earlier, that Mr. Saunders' review  
4 of the last eight years of this case at the bottom of  
5 that page and on page 70 accurately reflects the  
6 degree of unfairness, arbitrariness, harshness with  
7 which Donald Marshall Jr. was treated by the state.

8 MR. EVANS

9 What you're saying is that there should be a component  
10 for a general damage award.

11 MS. DERRICK

12 Yes. I would submit with respect to the issue of  
13 interest -- and I've addressed that as well in my  
14 brief -- but that concerning its calculation there are  
15 a variety of ways that you had presented to you as to  
16 how it might be done and concerning the assessment of  
17 it with respect to non-pecuniary loss. It is my  
18 submission that interest should be front loaded,  
19 effectively it should start to run from the time that  
20 Donald Marshall Jr. was injured. The pronouncement of  
21 a life sentence must have been devastating. Jack  
22 Stewart likened it to being told that one has terminal  
23 cancer. And the further knowledge that he was being  
24 wrongly convicted based on lies must have been almost  
25 unbearable. The injury occurred then and indeed it

1 was compounded as the years went by, but I submit that  
2 interest should be calculated from the start. In  
3 closing, Mr. Commissioner, I just have a few other  
4 comments concerning my Friends' submissions. I  
5 respect the fact that my learned Friend for the  
6 Commission regards that his role is an objective  
7 review of the evidence, but I submit he has no greater  
8 claim to objectivity than any of the rest of us. And  
9 the fact that each of us before you advanced some  
10 particular interest -- and I think that that's evident  
11 through Mr. Spicer's brief. I'm not meaning to  
12 criticize him for this in any sense, I'm merely  
13 meaning to point out that there is no particular claim  
14 to objectivity on the behalf of any one of us. We are  
15 each submitting the positions as we see them to be.  
16 I also question, with respect, his view that he would  
17 continue to be involved with this Commission following  
18 final submissions. I submit that this is not  
19 appropriate, that it permits either actual further  
20 influence or the appearance of further influence after  
21 Donald Marshall Jr. has had the last opportunity to be  
22 heard. And I submit that that would not be right in  
23 this case. I submit to you that it is of fundamental  
24 importance that the state compensate Donald Marshall  
25 Jr. according to principles of fairness and generosity

1 and that this Commission must be vigilant against  
2 interests that seek to limit Donald Marshall Jr's  
3 award and should resist strenuously any effort to be  
4 drawn into considering Donald Marshall Jr's conduct or  
5 lifestyle. The second set of assumptions, which it  
6 sounds -- are not being advocated by either counsel at  
7 present in any event -- second set of actuarial  
8 assumptions. And you are urged to recognize that  
9 despite Donald Marshall Jr's obvious strengths and  
10 abilities, he has experienced an aggregious wrong that  
11 has resulted in a chronic social disability and has  
12 been aggravated by the following factors. His youth  
13 at the time of the wrong being done to him. His  
14 cultural dislocation. The prolongation of his  
15 suffering and the severe psychological injury done to  
16 his self esteem, his autonomy and his confidence in  
17 himself and others. Donald Marshall Jr. has endured  
18 a terrible wrong with dignity and strength. It is  
19 quite remarkable indeed that he has endured and he is  
20 to be admired for his courage and his wonderful  
21 humanity, but he is not intact and he is not whole.  
22 I submit that no expense was spared when scrutinizing  
23 the criminal justice system in Nova Scotia and no  
24 expense must be spared in compensating Donald Marshall  
25 Jr. adequately and in a sensitive fashion in



1 accordance with the appropriate factors as I have set  
2 them out. This is a case of unique and dramatic  
3 dimensions, and nothing less than a significant and  
4 culturally sensitive award will achieve justice for a  
5 man who has been cruelly deprived of it for so long.  
6 Thank you.

7 MR. EVANS

8 Do you have any comments, either counsel, to make?

9 MR. SAUNDERS

10 I have nothing further to add, Mr. Commissioner.

11 MR. EVANS

12 Mr. Spicer?

13 MR. SPICER

14 Very brief comments, Mr. Commissioner. I wouldn't  
15 want my Friend, Ms. Derrick, to misunderstand a couple  
16 of my submissions and I just wanted to go back to  
17 comments that she'd made. When I'd indicated to give  
18 Junior the benefit of every doubt, I mean that, and to  
19 go on to merely mention certain conditions is not to  
20 not give him the benefit of every doubt. It is merely  
21 to recognize that these things have happened to Mr.  
22 Marshall. I'm not saying rely on them. I'm saying  
23 even with respect -- when you consider those things,  
24 give him the benefit of every doubt as to how those  
25 things may have happened. So I'm not trying to limit

1 in any respect that general statement that I made of  
2 giving Junior the benefit of every doubt. I'm not  
3 sure, frankly, that I quite yet understand the cost of  
4 future care position, whether or not it is that in any  
5 event, regardless of whether or not the treatment is  
6 taken, Mr. Marshall should be provided with the money.  
7 I would agree -- and in my submission did state --  
8 that money for the cost of future care should be  
9 independent of government. And in that sense there is  
10 an entitlement and should not -- Mr. Marshall should  
11 not have to go asking the government for it. But I  
12 don't think it should be in any event. And there's  
13 two other short points. One is that Ms. Derrick did  
14 indicate that the award may indeed be greater for non-  
15 pecuniary loss than if cultural factors are not  
16 present. I merely want to reiterate that I disagree  
17 fundamentally with that position. It seems to me that  
18 it's inappropriate. And it's not a question of rich  
19 or poor. I'd also indicated it's a question of white  
20 or black or anything else. Society must pay, but it  
21 pays the same amount. And finally, of course, my  
22 future involvement is not up to me. My future  
23 involvement is a decision that you will make, Mr.  
24 Commissioner.

25 MR. EVANS

1 I would like to thank all counsel for their  
2 cooperation and the assistance which they have given  
3 to me. I have a volume -- many volumes -- of material  
4 to consider before the report is finally issued, but  
5 I will endeavour to do that in the earliest possible  
6 opportunity, keeping in mind that I do have other  
7 committments that do not permit me to devote my full  
8 time and attention to the report. But I do not  
9 believe that it should be long delayed. I thank you  
10 again.

11  
12 --- Upon concluding at 1:30 p.m.

13  
14 Certified Correct:

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16  
17 *Regina Drake per*  
18 Nancy Brackett  
19 Verbatim Reporter  
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