

1 MR. EVANS

2 Mr. Saunders?

3 MR. SAUNDERS - SUBMISSION

4 Thank you, Mr. Commissioner. You will have received
5 the brief that I filed on behalf of the Government of
6 Nova Scotia, together with the brief filed by
7 Commission Counsel, and that of Ms. Derrick, on behalf
8 of Donald Marshall, Jr. In my remarks this morning,
9 I will review the themes that we canvassed in our
10 submission, and the components, which we suggest form
11 a part of any new compensation which this Commission
12 deems appropriate. I will, this morning, from time to
13 time, address certain of the remarks made by Mr.
14 Spicer, and Ms. Derrick, in their briefs. But I will
15 not spend too much time reviewing the evidence that was
16 heard, either at the original Royal Commission, or
17 during the Inquiry during the first week of April of
18 this year, or in subsequent Discovery Examinations of
19 certain witnesses. My detailed review of that evidence
20 is set forth in our written brief. I well recall the
21 direction given to all counsel in early February, when
22 you, Mr. Commissioner, met with us, and expressed the
23 hope that this process, called by the Government of
24 Nova Scotia to re-canvass the adequacy of Donald
25 Marshall, Jr.'s earlier compensation, would be non-

1 adversarial. Consequently, I saw my role as being
2 instructive, as best I could, providing whatever
3 information we could gather, on useful precedents,
4 research, text authorities, jurisprudence, or other
5 sources, suggesting the proper components of a
6 compensation award, and the manner in which those
7 features, and methods of payment might be addressed by
8 you. Where possible, I have attempted to scrupulously
9 avoid the adversarial role, and instead, sought to
10 describe varying methodology which might be applied to
11 this unique situation, and advanced the factors and
12 principles which I consider to be appropriate or
13 persuasive. We have, on behalf of the Government of
14 Nova Scotia, advanced certain proposals, which are
15 unique. And we have urged that they form part of this
16 Commission's recommendations. And we have provided you
17 with the guidelines and suggestions which might provide
18 assistance, in the final analysis, of this award.
19 Where warranted, we have not hesitated to break new
20 ground, or urge upon you, as a Commissioner, a
21 particular or unique solution, given the special
22 circumstances of this case. We say we have not shied
23 from innovation. In fact, we have urged it, on
24 occasion, and suggested various ways for you to
25 accomplish that. But neither do I hesitate to draw a

1 line where I suggest it ought to be drawn, or say that,
2 for all good reason of common sense, sound judgment and
3 important precedent, that reasonable bounds of
4 compensation ought not to be breached. I will suggest
5 that the award determined by this Commission of Inquiry
6 be a significant element to the restoration of public
7 confidence in the administration of justice in Canada.
8 And for that reason, any new award to Donald Marshall,
9 Jr., must be both fair and realistic, to both him, and
10 our system of justice. It must retain a result that
11 will impress the ordinary onlooker as being sensible.
12 And it must not offend reasonable standards for
13 fairness. These goals were repeated by Mr. Spicer for
14 the Commission, and Ms. Derrick for Mr. Marshall, in
15 her brief. For his part, Mr. Spicer urges that Donald
16 Marshall, Jr. be compensated fairly and generously for
17 his past and continuing sufferings. He urges that
18 Donald Marshall, Jr. be given an amount to make his
19 life comfortable. Ms. Derrick asks that the award be
20 sufficient to give Mr. Marshall the opportunity to
21 recover a life for himself. After so many years of
22 pain and suffering, that he be provided with sufficient
23 means to bring about his healing and restoration.
24 These then, are the underlying premises of the
25 submissions which we'll make. With respect to your

1 mandate, Mr. Spicer has already referred to the
2 provisions of the Order in Council, to re-canvass the
3 adequacy of compensation, in light of what you, as
4 Commissioners, found to be factors, and to determine
5 any further compensation which is to be paid, as a
6 result. In these respects, you are asked to consider
7 the recommendations four through seven of the findings
8 and recommendations of the Royal Commission. And Mr.
9 Spicer has articulated those to you. In addition, I
10 now confirm, for the record, on behalf of the Province
11 of Nova Scotia, that we are prepared, and ask you to
12 consider, non-pecuniary damages suffered by Donald
13 Marshall, Jr.'s parents. And that regard may be had
14 to the period of time, from the decision of the Court
15 of Appeal in the reference, in May of 1983, to the
16 release of your report, in January 1990, as being a
17 span of time for which compensation might be
18 considered. I have also, on behalf of government,
19 recommended that the expenses incurred by Donald
20 Marshall, Jr.'s parents, on account of their son's
21 wrongful incarceration, be reimbursed. And I will say
22 more about that later in my remarks this morning. Let
23 me turn now to damages, on behalf of Mr. & Mrs. Donald
24 Marshall, Sr., both pecuniary and non-pecuniary. We
25 urge that you, Mr. Commissioner, favourably consider

1 reimbursing them for their out-of-pocket expenses. We
2 asked Ms. Derrick to prepare a series of calculations,
3 to fairly reconstruct those damages. They were based,
4 in part, on records still available at federal
5 institutions. Other gaps were filled by recollection,
6 and guesstimates. I have reviewed those calculations,
7 which total some fifty-five thousand dollars (\$55,000).
8 And I recommend that that sum be accepted by you. In
9 addition to that sum, Mr. Commissioner, I propose that
10 an add-on be calculated for pre-judgment interest. In
11 other words, interest lost by Mr. & Mrs. Donald
12 Marshall, Sr., on their money, which they would
13 otherwise not have had to spend. I disagree, to some
14 extent, with Ms. Derrick, in her brief, that the amount
15 of pre-judgment interest be fixed to run on all of the
16 disbursements going back to day one. Rather, the
17 evidence is that these disbursements were incurred over
18 the 11-year time span that their son was incarcerated.
19 And I believe the proper way to compute the interest
20 is that suggested earlier, that you seize the rate that
21 you find to be most appropriate over that time, and
22 simply half the rate. With respect to non-pecuniary,
23 or general damages on behalf of Mr. & Mrs. Marshall,
24 I say this. Although the component is not specified
25 in the Order in Council, we do urge that you favourably

1 consider such an award to his parents. This award is
2 not made to Mr. & Mrs. Marshall on account of them
3 being MicMac. It is made to them because they are
4 loving, caring parents, who were aggrieved, by virtue
5 of their son's wrongful incarceration and conviction.
6 Their suffering is immeasurable. Their strength, the
7 love, the tolerance and support is not merely obvious,
8 but well documented in the evidence before this
9 Commission. In my written brief, at page 8, I have
10 referred your Commissioner to some specific details,
11 regarding their loss and their suffering. It is
12 evidence before this Commission, that Mr. Marshall's
13 business suffered. To what degree, we do not know.
14 But I am recommending that you at least take it into
15 account, in considering a lump sum award to Mr. & Mrs.
16 Marshall. In my questioning of Mr. Marshall, he
17 confirmed that when he gave up the business in 1983,
18 it was continued by one of his sons. I was not
19 particularly impressed with the narrow approach taken
20 by the Royal Commission in New Zealand, in the Arthur
21 Allan Thomas case, which declined to award non-
22 pecuniary damages to Mr. Thomas' family. I urge, on
23 behalf of government, that the preferred approach in
24 this case, is to find that Mr. & Mrs. Marshall, Sr.
25 are entitled to award of non-pecuniary damages. You

1 may ask what, if anything, may be taken as a useful
2 guide, to assist you in determining an appropriate
3 level of compensation to his parents. I have referred
4 you, in our brief, to several cases in the context of
5 fatal injuries litigation. At least that provides the
6 analogy of the analysis conducted by a judge faced with
7 the prospect, as you are, of monetary compensation for
8 such intangibles as loss of guidance, care and
9 companionship. Each of those tragic situations bears
10 the absolute finality caused by the death of a child.
11 Courts there must grapple with the value of such a
12 loss, when attempting to compensate parents for the
13 permanent termination of any hoped for shared guidance,
14 care and companionship. I have considered those cases
15 in our written submission, and referred you to recent
16 awards, both in Nova Scotia, and in Ontario. At page
17 18 of our written brief, I referred you to the decision
18 of Mr. Justice Krever in Gervais v. Richard. From that
19 case, and others, it is seen that there's no objective
20 yardstick for fixing non-pecuniary loss for such things
21 as pain and suffering, loss of amenities, etc. It is
22 still largely an arbitrary and conventional decision.
23 It is simply not possible to put any price tag on the
24 pain and suffering endured by Donald Marshall, Jr.'s
25 parents. However, they are able to share the love and

1 affection and companionship of their son, for his and
2 their future. The references that I have included in
3 our written brief, suggest an appropriate sum, in
4 instances where there has been a loss of life, and
5 where that devastation is irreversible. And I suggest
6 that these may be a helpful guide to you, in measuring
7 and contrasting the loss suffered by Mr. & Mrs.
8 Marshall, great though it was, but not permanent. I
9 turn now, Mr. Commissioner, to the derivative claim on
10 behalf of Donald Marshall, Jr., with respect to the
11 MicMac community. We are unable to support this claim.
12 To say that it goes beyond the scope of your mandate,
13 or accepted principles of compensatory damages, ought
14 not to be the case, as narrow minded, or oppressive,
15 or restrictive, or ill-informed, or mis-guided, or to
16 ignore Mr. Marshall's distinct cultural identity. It
17 is none of those things. It is simply to say, to
18 anyone observing this compensation process, that the
19 analysis performed must be rooted in legal principle
20 and authority. There is nothing in your mandate, in
21 my submission, which would sustain or legitimize the
22 derivative claim being advanced by or through Donald
23 Marshall, Jr., on behalf of the MicMac community.
24 Neither is there any precedent which might suggest it
25 be included. It is simply wrong to say that a

1 rejection of that part of the claim is prohibited, on
2 the basis of the argument that it would offend the
3 prescription in your recommendation, that there ought
4 be no limit on an award, or any part of the award. To
5 interpret that to its conclusion, would suggest that
6 all claims are limitless, subject to no critique or
7 comment. We say that it is beyond your mandate. We
8 reject the suggestion by Ms. Derrick, in her brief,
9 that we have not acknowledged the harm done to Donald
10 Marshall, Jr. That was obviously done by the Royal
11 Commission in the report, and done following, by the
12 response of government, in February of this year. Some
13 might find it, I suggest, disturbing to hear or read
14 that a relationship between a child or a parent, in a
15 non-aboriginal context, is somehow less. Who is to say
16 that the spiritual connection is any less in a Chinese,
17 or a Jewish, or a Scottish, or an Italian family, for
18 example, or the kinship is any less? This Royal
19 Commission determined that, the fact that Mr. Marshall
20 was a Native, was a factor in his wrongful conviction
21 and imprisonment. The Royal Commission did not say
22 that it was the only, or a pivotal, or an overwhelming
23 reason for his treatment and incarceration. The Royal
24 Commission did not weigh its findings. My friend for
25 Donald Marshall, Jr., urges that you must include, in

1 any compensation, an acknowledgement, in dollars, of
2 his special cultural heritage, and his relationship
3 with his community. It is suggested that hostility and
4 indifference towards the MicMac community and its
5 culture still exist, notwithstanding the release of
6 your report, or the apology of government, or the
7 unanimous resolution passed in the House of Assembly.
8 It is argued that it is critical that a serious effort
9 be made to strengthen and reinvigorate MicMac culture.
10 Without appearing, in any way, to comment on the
11 descriptions characterized by my learned friend, I
12 simply say that it is not within the mandate of this
13 Commission to award a material acknowledgement, as
14 described or requested. It was not a recommendation
15 of this Royal Commission, that such an approach be
16 taken in re-evaluating the circumstances of Mr.
17 Marshall's situation, and the adequacy of his
18 compensation. Had it been your intention, then I'm
19 sure it would have been articulated as specifically as
20 all of the other findings and recommendations were
21 written. And it was not. Instead, the concentration
22 and emphasis, by this Royal Commission, was on
23 compensation paid to Donald Marshall, Jr. personally.
24 And that then, is the focus that I have taken in our
25 brief, and my submission this morning. We concur with

1 Mr. Spicer's conclusion, and rejection of the
2 derivative claim. If it is not the function of this
3 compensation process, and your mandate, to pay Donald
4 Marshall, Jr., his dreams, then it is surely even more
5 remote and not within your function or mandate, to
6 advance the dreams of others. We must leave it to Mr.
7 Marshall personally, to determine whether he wishes to
8 share some of what he has received, or might receive,
9 with his community, and in that way, foster the idea
10 of a cultural account. I turn now, Mr. Commissioner,
11 to the claim advanced by Donald Marshall, Jr., with
12 respect to pecuniary loss. My friend Ms. Derrick
13 engaged an Actuary, Brian Burnell, to prepare a series
14 of calculations which purported to quantify his past
15 and future loss of income. These were based on
16 scenarios advanced by counsel for Mr. Marshall.
17 Discovery Examination of the Actuary and the
18 psychologist were completed two weeks ago, and
19 transcripts of their testimony have been filed with
20 you, together with their reports. Having considered
21 the calculations originally prepared by that Actuary,
22 and in light of his cross-examination during Discovery
23 Examination, I submit that his calculations are
24 inappropriate and inaccurate. They do not provide much
25 assistance, if any, to you, in fixing this portion of

1 Mr. Marshall's award. In our written brief, beginning
2 at page 21, I have set forth extracts from the evidence
3 of this witness, and drawn to your attention, those
4 factors which he did not consider in preparing his
5 projections. It is our submission that those facts,
6 if known, would have provided a much more accurate
7 indication of Mr. Marshall's actual loss. Without
8 knowing the extent of Donald Marshall, Sr.'s earnings,
9 it is really impossible to contrast his son's
10 expectations to his own. It certainly does not seem
11 appropriate to imply that he would have earned wages
12 as a union plumber, or a union plaster, when there is
13 no evidence to indicate how Donald Marshall, Sr.'s own
14 income would have compared to those levels. It's to
15 be remembered that Donald Marshall, Sr.'s own
16 employment was interrupted by periods of unemployment,
17 during which time he acquired welfare. Neither did Mr.
18 Burnell take into account those negative contingencies
19 which appear from the evidence, the reports and the
20 Discovery testimony of those expert witnesses. I have
21 drawn your attention to those factors. And following
22 the Discovery Examination of those witnesses, Mr.
23 Spicer and I asked the Actuary to go away and return
24 with new calculations, after taking into account such
25 evidence. That information was provided to me a few

1 days ago, and I have reviewed it. And I presume that
2 you have the letter from Mr. Burnell to Ms. Derrick,
3 with schedules attached, dated May 17th, and the letter
4 from Mr. Burnell's partner, Ms. Gmeiner, to Ms.
5 Derrick, dated May 23rd. These purport to calculate
6 present and future loss, having regard to the negative
7 contingencies identified by Mr. Marinic, the
8 psychologist. I have concluded, Mr. Commissioner, that
9 even these revisions are not helpful. They complicate
10 a process already fraught with uncertainty. I share
11 the concerns expressed by Mr. Spicer. They simply
12 invite extreme speculation. And it is deceptive to
13 place too much attention on the dollar figures
14 mentioned in these reports. Instead, I have concluded,
15 and respectfully submit, that the way to approach it,
16 is as if it is a diminution of earning capacity,
17 awarded as a lump sum and part of the non-pecuniary
18 damages to be considered by you, for Donald Marshall,
19 Jr. You have met him. You have questioned him
20 privately. And you are in the best position to decide.
21 You can do it without affixing any guess as to a
22 percentage of disability, or how long that might last.
23 And I say, why add to his burdens by attaching such a
24 level of presumed disability? Especially where, as
25 here, we simply do not have any expert evidence to

1 establish it precisely, either as to the level or the
2 continuance of any dis-function. Instead, Mr.
3 Commissioner, I would prefer the approach used by
4 judges, both in Ontario and Nova Scotia. And I have
5 a copy of a decision of Mr. Justice Davidson of our
6 Supreme Court, Trial Division, which I'll refer to you.
7 And I've passed copies to my friends. This is a
8 decision of Mr. Justice Davidson, of the Nova Scotia
9 Supreme Court, Trial Division, in the case of Poirier
10 v. Dyre and Dyre. The citation is penned at the top
11 of the case report, Mr. Commissioner. And it's a
12 decision that was rendered on May 19th, 1989. It
13 involved a 17-year-old male who suffered injuries in
14 an accident, and claimed compensation from the
15 defendants, as a consequence. I simply review quickly,
16 the findings of fact of Mr. Justice Davidson, and then
17 we'll take you to the law. In paragraph 1, Davidson,
18 J. says:

19 "The Plaintiff suffered
20 injuries in a motor vehicle
21 accident on December 9, 1985,
22 in Dartmouth, Nova Scotia. The
23 Defendants have admitted
24 liability, and the only issues
25 relate to the quantum of

1 damage, to which the Plaintiffs
2 are entitled."

3 And paragraph #12:

4 "It's described that the
5 Plaintiff developed an early
6 interest in wood working. When
7 he entered high school, he took
8 a number of academic courses
9 in grade 10, but his favourite
10 subjects were shop and gym."

11 #13:

12 "Tony stated that by the time
13 he completed grade 9, he had
14 decided to become a carpenter."

15 Mr. Justice Davidson, in Clause 14, said:

16 "There is no doubt that Tony
17 is an energetic and industrious
18 youth."

19 Turning now to the law referred to by His Lordship,
20 starting at paragraph #18. The Trial Judge says:

21 "The young Plaintiff is seeking
22 a substantial sum, for loss of
23 future wages. Brian Burnell,
24 an Actuary, testified for the
25 Plaintiffs and made a number

1 of comparisons, including
2 comparisons between the sums
3 the Plaintiff could expect to
4 receive as a journeyman
5 carpenter ..."

6 And then a series of other alternatives are mentioned.

7 At the end of the paragraph:

8 "The various scenarios were
9 further refined by other
10 calculations, considering
11 further assumptions. The
12 projected loss of future
13 earnings ranged from two
14 hundred and thirty-five
15 thousand dollars (\$235,000) to
16 nine hundred and forty-six
17 thousand dollars (\$946,000)."

18 His Lordship says:

19 "In my opinion, the actuarial
20 evidence was of no assistance.
21 Since the Supreme Court of
22 Canada, in 1978, there has been
23 attempts to make use of this
24 type of evidence in many
25 situations where it is

1 inappropriate to do so.
2 Actuarial evidence should only
3 be received where there has
4 been evidence placed before the
5 Court, which establishes, with
6 reasonable certainty, the
7 hypothesis on which the Actuary
8 is to make his calculations."

9 His Lordship then goes on to refer to commentary from
10 our Court of Appeal, in a case called Guy v. Trisec,
11 and from the Supreme Court of Canada in the trilogy of
12 cases which have already been described. One final
13 reference to the case, is to turn to paragraph 28, My
14 Lord. And that is the reference to commentary of the
15 late Mr. Justice Morrison, the Court of Appeal, where
16 he said:

17 "To this being a case of
18 diminution of earning capacity
19 which is incapable of precise
20 calculation, rather than a
21 complete loss of earning
22 capacity, I feel that the
23 question of damages for future
24 pecuniary loss of earnings
25 should be included as an item

1 under general damages."

2 And so that is the approach that I would commend to
3 you, with respect, Mr. Commissioner, that ought to be
4 taken, in reviewing the pecuniary loss claimed on
5 behalf of Donald Marshall, Jr. I now wish to turn to
6 the ---

7 MR. EVANS

8 What was the award there, for the general damages?

9 MR. SAUNDERS

10 I believe it was thirty-five thousand dollars
11 (\$35,000), Mr. Commissioner, with respect to this 17
12 year old's loss of future. Yes, that is stipulated in
13 the case note, at the beginning of the case:

14 "General damages of thirty-five
15 thousand (\$35,000) were
16 awarded."

17 MR. EVANS

18 Without any comment with respect to out-of-pocket, or
19 future earnings rather?

20 MR. SAUNDERS

21 Without any specific comment with respect to that.
22 That's right. But rather, just the diminution of
23 earning capacity was incorporated in that overall
24 award. And I submit that where one doesn't know, and
25 where one is forced to this extreme speculation, as

1 identified by Mr. Spicer, and suggested by myself, that
2 that is the approach to take.

3 MR. EVANS

4 Thank you.

5 MR. SAUNDERS

6 I turn now to a consideration of the cost of future
7 care claim for Mr. Marshall. Counsel have considered
8 the two facilities described in the information, which
9 was provided to you. To preserve anonymity, I have
10 simply referred to those facilities as one and two, in
11 our brief. Both take a specialized treatment approach,
12 while at the same time embodying cultural awareness,
13 and the techniques of Alcoholics Anonymous. The goals
14 and methods of each facility, so far as they are
15 presently known, are described at pages 30 and 31 of
16 our brief. I did, Mr. Commissioner, question certain
17 entries in the series of estimates which were provided
18 by my friend, Ms. Derrick. I have raised these, for
19 further reflection by you. We say that the process of
20 compensation is designed to consider the fairness of
21 the previous award paid to Mr. Marshall personally.
22 Neither the terms of reference, nor the findings and
23 recommendations in your report, suggest that his
24 compensation be expanded, so as to include any cost of
25 future care or treatment, accommodation or travel

1 expenses of somebody else. And so, we simply raise the
2 questions posed at pages 31 and 32 of my brief, not at
3 all to challenge the necessity of treatment for Mr.
4 Marshall, and obtaining the means for providing it.
5 But rather, to critically review the expenses proposed
6 for others, who are outside the terms of reference, in
7 my submission, and for which there is no evidence that
8 they ought to be included within the therapy, or are
9 a necessary component of Mr. Marshall's treatment. You
10 will be asked to address and determine the proper
11 method of payment, in providing for this cost of future
12 care. I have described three possible options,
13 beginning at page 33 of the written submission. The
14 first way would be to simply include it as a part of
15 his overall general damage award. And he would use
16 whatever was required for his compensation, to pay for
17 psychological counselling and drug abuse treatment.
18 A second way would be to set aside a specific sum,
19 either as a structured settlement or a fixed amount,
20 should Mr. Marshall choose to seek and complete such
21 therapy. The problem is, what happens if he doesn't?
22 It would be unworkable, in my view, to have a separate
23 amount set aside, and potentially tied up, for the
24 balance of his life, or some long-term plan, unless or
25 until he obtained treatment. This would imply or

1 impose some kind of long-term, on-going connection or
2 obligation. And no one wishes that. Instead, I have
3 suggested a third option, which would make sufficient
4 funding available to Mr. Marshall, should he desire to
5 seek such treatment. This would prevent, as Mr. Spicer
6 puts it -- and I concur -- the simple issuance of a
7 blank cheque. Instead, it should provide a reasonable
8 amount of money, to provide for Mr. Marshall's
9 rehabilitation. And I have gone further. Rather than
10 deplete his general damage award by the cost of future
11 care, I have instead proposed that you designate an
12 amount you consider to fairly represent the cost of
13 future care. Then, if Mr. Marshall embarks on such a
14 program, and completes it, the facility chosen would
15 simply inform the Government of Nova Scotia that
16 counselling had been provided, and would list the
17 expenses incurred. This sum would then be repaid by
18 the Government of Nova Scotia, to Mr. Marshall, to
19 reimburse him the cost, which he had earlier paid. I
20 submit that this method is the fairest in providing
21 access to funds, should Mr. Marshall require them, and
22 be interested in using them, without depleting any
23 other award that you may give him for non-pecuniary
24 damages. It is in this context, and this context
25 alone, that I have referred this Commission to those

1 cases dealing with the principles of mitigation, as
2 described at page 61 of our brief. If I could just
3 turn Your Lordship's attention to some of those
4 references. Page 62 of the submission extract, from
5 the decision of Lord Justice Singleton, in the Markroft
6 case, where His Lordship said:

7 "I do not wish to say anything
8 that would hurt the feelings
9 of the Plaintiff, in a case of
10 this kind, but I do believe it
11 to be the duty of the Court to
12 say that if a man is
13 recommended by his own medical
14 advisors, and by others, to
15 undergo a course of treatment,
16 he ought to undergo it. If he
17 is advised that it gives him
18 a reasonable chance of
19 recovery, and if the treatment
20 is reasonable, he ought to
21 undergo it. If he will not,
22 and does not, he must see that
23 it is a little hard upon the
24 Defendants, if they are asked
25 to pay damages in respect of

1 a period extending afterwards."

2 Similar comments are identified at the bottom of page
3 63, and the top of page 64 of our brief. And so it's
4 in that context, that I have addressed the issue of
5 mitigation. And I have proposed that third option, as
6 being a method to permit the fund to be available, and
7 accessible by Mr. Marshall, should he choose.

8 MR. EVANS

9 That fund would be maintained by the Government of Nova
10 Scotia?

11 MR. SAUNDERS

12 It wouldn't be a fund, Mr. Commissioner. It would just
13 be an indication by the facility, that the thing had
14 been done and completed, and a request made, and a
15 cheque issued.

16 MR. EVANS

17 Well is there to be a limitation on the amount?

18 MR. SAUNDERS

19 I believe that you ought to determine what a reasonable
20 sum would be for the future treatment of Mr. Marshall,
21 so that we have some idea as to the amount that it is.

22 MR. EVANS

23 Do you express any opinion as to the time limit?

24 MR. SAUNDERS

25 You identified earlier, Mr. Commissioner, the dispatch,

1 or speed, with which it must be undertaken, if it's to
2 have results. You have the evidence of the
3 psychologist, Mr. Marinic, who said that if he failed
4 to seek such treatment and therapy, he would jeopardize
5 his chances of having a satisfactory life. On that
6 basis of that evidence, I believe that the time frame
7 ought not to be long, perhaps five years, so that
8 within the five years, hopefully Mr. Marshall will have
9 recognized and taken the opportunity to acquire the
10 treatment, that so many of his friends and expert
11 witnesses have urged him to take.

12 MR. EVANS

13 You have gone over the various components of the claim
14 submitted by Ms. Derrick.

15 MR. SAUNDERS

16 Yes, My Lord.

17 MR. EVANS

18 I think if you will check the airfare, you'll find that
19 there's a mis-calculation there, I think.

20 MR. SAUNDERS

21 I see. I didn't note that.

22 MR. EVANS

23 I think it's double, but we'll check that out with Ms.
24 Derrick. But I do think it is double the actual fare.

25

1 MR. SAUNDERS

2 That is, that in actual fact, the fare would be double
3 what is noted in the brief, or vice versa?

4 MR. EVANS

5 No, it would be one half.

6 MR. SAUNDERS

7 Okay. We'll look into that. And we can advise the
8 Commission. May I turn now to a consideration, Mr.
9 Commissioner, of the non-pecuniary damages, claimed on
10 behalf of Donald Marshall, Jr., and the assistance
11 which, I submit, may be obtained from the consideration
12 of the Supreme Court of Canada in the trilogy of cases.
13 We must, I suggest, as did the Royal Commission in New
14 Zealand, in the Arthur Allan Thomas case, seek guidance
15 from the mandate of the Commission, together with any
16 useful precedents and jurisprudence that may be
17 obtained from other jurisdictions. While admittedly,
18 the non-pecuniary damages suffered by the Plaintiffs
19 in the trilogy of cases, came as a result of serious
20 accidents, nonetheless, the principles and guidelines
21 outlined by the Supreme Court of Canada, do provide
22 assistance, in my view, in understanding and fixing a
23 non-pecuniary damage award. In those cases, the Courts
24 endeavoured to measure the losses suffered by the
25 victim, and award a sum of money which would provide

1 solace, and make the person's life more endurable,
2 using the only means available, to provide that level
3 of comfort, which the Court determined would provide
4 adequate compensation. The fact that the Supreme Court
5 of Canada fixed a limit or a ceiling of a hundred
6 thousand dollars (\$100,000) in the trilogy, which has
7 since been exceeded to almost two hundred thousand
8 (\$200,000), on account of inflation, is not the basis
9 of my submission. We are not saying there should be
10 a pre-set limit on non-pecuniary damages component of
11 a compensation award for wrongful incarceration. Such
12 a position was stipulated by the Federal and Provincial
13 guidelines and fixed at a hundred thousand dollars
14 (\$100,000). But that notion was rejected by this Royal
15 Commission. And we have accepted the Commission's
16 recommendation. For any number of reasons, a hundred
17 thousand dollar (\$100,000) limit might be found
18 constraining, or inappropriate, to the peculiar
19 circumstances being examined by any future Royal
20 Commission. Rather, what I am suggesting is that
21 guidance may be obtained from the principles enunciated
22 in those cases. It doesn't matter much what the dollar
23 limit or ceiling was. What does matter, is that the
24 Court considered it appropriate to reserve a sum of
25 money, for the most grievous, tragic and irreversible

1 of personal injury cases. If this is the sum which a
2 Court has decided is reasonable, by reason of several
3 legal, social and policy considerations, in the case
4 of a young person whose life is irreversibly altered,
5 and on account of total physical disability is rendered
6 unemployable and wholly dependent on others, then we
7 suggest it may be a legitimate measure against which
8 someone who is not so severely injured may be compared.
9 It is for you to determine whether such considerations
10 are worthy of contrast. Someone who, like Donald
11 Marshall, Jr., is still physically and mentally capable
12 of enjoying employment prospects, outdoor recreation
13 and sound and gratifying relationships with women,
14 young children, and members of his family. Mr. Spicer
15 has reviewed with you the circumstances surrounding the
16 Teno, the Thornton and the Andrews decisions. In our
17 brief, we have referred to those, and as well, others.
18 One decision was that of the Supreme Court of Canada
19 in Lindal v. Lindal, Mr. Commissioner, a 1982 decision.
20 Mr. Justice Dickson, as he then was, for the Supreme
21 Court of Canada, wrote for the majority in dismissing
22 the appeal brought in that case, and affirming the
23 reduction of a non-pecuniary damage award component
24 from one hundred and thirty-five thousand dollars
25 (\$135,000) down to one hundred thousand dollars

1 (\$100,000). In that case, Brian Lindal claimed against
2 his brother, for damages suffered while a passenger in
3 his brother's car. He was in a coma for three months,
4 suffered extensive brain and brain stem injury, leaving
5 him with speech impairment, spastic movement, loss of
6 muscle control. He was left emotionally scarred and
7 given to fits of depression. Mr. Justice Fulton, for
8 the British Columbia Court, decided that the facts of
9 that case made it an exceptional case, and so broke
10 through the ceiling of a hundred thousand dollars
11 (\$100,000). The British Columbia Court of Appeal
12 reduced the damage award from one hundred and thirty-
13 five thousand dollars (\$135,000), to one hundred
14 thousand dollars (\$100,000). And Mr. Lindal appealed.
15 And the sole issue then, before the Supreme Court of
16 Canada, was whether or not that reduction was
17 appropriate. And the Supreme Court of Canada held that
18 it was. The facts of the Fenn decision, that are
19 referred to in our written brief, are equally as
20 tragic. In our case Book of Authorities, the Fenn
21 decision, in the Court of Appeal, is at Tab 7, Mr.
22 Commissioner. And one really can't imagine more
23 horror.

24 MR. EVANS

25 Peterborough?

1 MR. SAUNDERS

2 That is Fenn v. City of Peterborough. That is correct.
3 And so that's at Tab 7 of our book of cases, Mr.
4 Commissioner. And I'm just going to highlight an
5 extract from page 223 of that decision, which described
6 the facts, as Mr. Fenn literally came home from noon
7 hour, rounded the corner of his street, and saw that
8 his house had been demolished, on account of a gas
9 explosion. And the facts were described:

10 "As a consequence, Mrs. Fenn
11 was pinned to the floor by
12 rubble. Her baby, Gregory, had
13 been in her arms and was beside
14 her. She was conscious until
15 her rescue. She watched the
16 fire spread. Her legs were
17 consumed by fire, and her body
18 and hands terribly burned. She
19 heard her children crying.
20 When she was rescued, the burns
21 to her legs were so severe,
22 that her feet fell off."

23 And so on, it goes. The horror of Mr. Fenn is
24 described in the trial decision, of Mr. Justice
25 Holland. And as one could expect, claims were

1 advanced, on behalf of Mrs. Fenn, and Mrs. Fenn, not
2 only for her terrible injuries, but the nervous shock
3 suffered by Mr. Fenn and the separation that ensued
4 between them, because the constant memory was enough
5 to drive them apart. At trial, two hundred and fifty
6 thousand dollars (\$250,000) was awarded to Mrs. Fenn,
7 which included a component for loss of future income.
8 They went on to Appeal, so that the amount of the
9 damage claim, the non-pecuniary damage claim for Mrs.
10 Fenn was broken into components. The Appeal Court
11 ordered one hundred and twenty-five thousand dollars
12 (\$125,000) non-pecuniary damages to her. The balance
13 was declared to be for future income. For the horrible
14 nervous shock suffered by Mr. Fenn, forty thousand
15 dollars (\$40,000) were awarded. And that included loss
16 of consortium, on account of the devastation, in the
17 injuries suffered by his wife, and the death of his
18 children. It is my respectful submission, Mr.
19 Commissioner, that it is not insidious, or
20 illegitimate, to wonder whether there ought to be some
21 comparison. We do ask the question, because if we are
22 to advise a crippled 24 year old, now confined to a
23 wheelchair or a bed, totally dependent on others for
24 life support, who can't move from the chin down, and
25 whose life expectancy is shortened as a consequence,

1 if we are to tell such an individual that non-pecuniary
2 damages for her or him are said to be within a range
3 determined by the Supreme Court of Canada, then what
4 answer do we give, if it were suggested that Donald
5 Marshall, Jr. be entitled to more non-pecuniary damages
6 than that. It is simply not enough to suggest that
7 this case is different than a motor vehicle case,
8 because one victim was hit, and someone else was
9 affected, by virtue of the system. Nor, I say, is it
10 any answer to say that the Supreme Court of Canada has
11 no standing here. We are simply suggesting, Mr.
12 Commissioner, that these decisions may well provide a
13 framework, a standard against which non-pecuniary
14 damages to Mr. Marshall may be considered. The several
15 categories proposed, to describe what his damages
16 should include, have been addressed in our brief,
17 starting at page 46, and by Mr. Spicer and Ms. Derrick
18 in theirs. I simply repeat the point, that I think it
19 would be wrong to fix a sum of money for each heading,
20 and then simply add them up for a total. Such a method
21 would be duplicitous, given the natural overlapping of
22 many of the harms suffered. There may well have been
23 harm suffered by Donald Marshall, Jr. during his
24 incarceration, which were peculiar to him, on account
25 of being the son of the Grand Chief, and a MicMac.

1 These special features may be considered by you, in
2 determining his non-pecuniary loss. But only in such
3 a way as to recognize that he suffered differently, not
4 that he suffered more. We concur with the position
5 advanced by Commission counsel, that one must not award
6 greater general damages on account of cultural
7 distinctiveness, because in doing so, you would be
8 approving a proposition that Mr. Marshall's
9 imprisonment was worth more, on account of his race.
10 And that approach simply invites discrimination. You
11 have been referred to the Arthur Allan Thomas case,
12 where Mr. Thomas' nine years in prison, was brought
13 about by police deliberately planting evidence, in
14 order to frame him. For his non-pecuniary damages, the
15 Royal Commission in New Zealand awarded the equivalent
16 of two hundred and fifty thousand dollars (\$250,000)
17 Canadian. In addition to that, he was awarded, I
18 believe, close to five hundred thousand dollars
19 (\$500,000) New Zealand, for the loss of his farm, after
20 the Royal Commission first took into account the
21 negative contingency of mortgage payments which he
22 would likely have incurred, had the wrongful arrest and
23 incarceration never happened. With respect to the
24 component of pre-judgment interest, Mr. Commissioner,
25 I've described the approach ---

1 MR. EVANS

2 Before you leave that, do you have any comment to make
3 with respect to the matter of aggravated damages?

4 MR. SAUNDERS

5 I will at the end of my submission. I'm coming to
6 that, if I may.

7 MR. EVANS

8 Then I won't interrupt you.

9 MR. SAUNDERS

10 Thank you, Mr. Commissioner. On the item of pre-
11 judgment interest, I have described what I submit the
12 approach may be, beginning at page 41 of our brief.
13 We've considered the practice in Nova Scotia, in
14 calculating the appropriate interest rate, and have
15 reviewed decisions in Nova Scotia and Ontario, as well
16 as reports and recommendations of the Ontario Law
17 Reform Commission, suggesting the appropriate rate of
18 interest, and its method of calculation. First, for
19 the pecuniary damages suffered by Mr. and Mrs.
20 Marshall, Sr., I suggest that the rate be staggered
21 over time. I make the same recommendation concerning
22 any claim of Donald Marshall, Jr., for past loss of
23 income, that the rate of interest be staggered over
24 time, you determine the appropriate rate and half it,
25 because not all of the loss of income commenced in

1 1971, but rather, was suffered over the duration of his
2 incarceration. I make the same point, with respect to
3 non-pecuniary damages claimed by Donald Marshall, Jr.,
4 or non-pecuniary damages which we submit ought to be
5 awarded by this Commission, to his parents. Not only
6 ought they be entitled to an award for their suffering
7 by way of non-pecuniary damages, but I would ask this
8 Commission to favourably consider an interest
9 component, on top of that. For the same reason that
10 those losses were not suffered all at once, but grew
11 and developed and were added to, tragically, over the
12 11 years of his incarceration, I believe any component
13 of interest ought to be staggered as well. There is
14 the suggestion made by the Ontario Law Reform
15 Commission, Commissioner Evans, that the appropriate
16 rate, in that kind of case, if you had already taken
17 into account inflation, in determining what a likely
18 award for general damages for Donald Marshall, Jr.
19 ought to be, if you had already taken into account the
20 idea of inflation, then the Law Reform Commission has
21 said that that ought not to be doubly compensated. And
22 so that, if there were going to be an add-on for
23 interest, that instead of looking at a rate and then
24 halving it, over the years, one would instead, apply
25 a rate of 2.5 percent. And the authority and citations

1 for that approach, are set forth at page 53 of our
2 submission. I turn now, Mr. Commissioner, to the idea
3 of punitive damages. We submit that this is not a case
4 for punitive or exemplary damages. Such damages are
5 not compensatory, but rather are strictly to punish or
6 deter the wrong-doer. It would seem incongruous for
7 this Commission to make such an award. You were
8 directed to re-canvass the adequacy of compensation
9 paid. Punitive damages are unrelated to the function
10 of compensating the Plaintiff. In our brief, we have
11 appended articles and case authorities for principles
12 which we believe might be of assistance to you, in
13 considering the issue. In the case of Donald Marshall,
14 Jr., when the miscarriage of justice came to the
15 attention of government, he was released from
16 Dorchester, without undue delay. The reference was
17 convened. The province established this Royal
18 Commission, and empowered it to conduct an exhaustive
19 review of all matters relating to his arrest,
20 conviction, and imprisonment. A settlement was paid.
21 As a result of your investigation and report, Mr.
22 Marshall was entirely vindicated. This government
23 accepted all of your recommendations that were its
24 responsibility. An interim payment was made by the
25 Province, once requested by his counsel, and

1 recommended by you. The Attorney General, on behalf
2 of the Province, expressed a profound apology to Mr.
3 Marshall, and to his family. And he quickly convened
4 this Commission, to re-canvass the adequacy of the
5 compensation previously paid. For all of these
6 reasons, we submit it is simply not a case where
7 punitive or exemplary damages ought to be awarded. We
8 submit that you will already have taken into account
9 those swollen or aggravated or intangible injuries
10 suffered by Mr. Marshall, such as distress and
11 humiliation, mentioned by Mr. Spicer, when you embark
12 on the process of determining what his non-pecuniary
13 damages ought to be. In our submission, we have
14 commended the structured settlement approach to
15 damages. This was one that we urged at the outset.
16 In our written submission, we have identified what I
17 consider to be the attractions of such an approach.
18 It would ease the flow of compensation to Donald
19 Marshall, Jr. And it would avoid an administration of
20 any fund. It would safeguard continuity of interim
21 payments. It would guarantee a stream of payments for
22 a term considered appropriate by you. It would provide
23 structure and stability to his future. In that way,
24 Donald Marshall, Jr. could embark on whatever
25 employment, counselling and treatment was to his

1 choosing. On the question of whether or not such
2 compensation paid by the Federal or Provincial
3 government would be taxable in his hands, we prepared
4 a memorandum to his counsel, and refer to jurisprudence
5 on that point, the details of which are described,
6 starting at page 72 of my brief. We urge that an
7 advanced ruling be obtained from Revenue Canada
8 Taxation, to ensure that any structured settlement
9 proposed satisfied the conditions of the Interpretation
10 Bulletin on which structured settlements are based.
11 The details of our recommendations to Mr. Marshall's
12 counsel are set forth in that section of our
13 submission. In conclusion, Mr. Commissioner, we have
14 recommended that pecuniary damages be paid to Mr. &
15 Mrs. Marshall, that their expenses be reimbursed. We
16 have also urged that, in the unique circumstances of
17 their case, non-pecuniary damages be paid to them. We
18 have concluded that any new compensation paid to Donald
19 Marshall, Jr., should not include a derivative claim,
20 sought on his behalf, with respect to the cultural
21 account. We have proposed that a pre-judgment interest
22 component be applied to the damages which might be
23 awarded to Mr. & Mrs. Marshall, Sr., and their son.
24 And we have indicated how that might be done. We have
25 suggested precedents that might be helpful to you, in

1 carefully addressing the non-pecuniary damages of Mr.
2 Marshall. We have reviewed, in our submission, the
3 testimony and documentary evidence, emphasizing the
4 hope that he will enjoy a future which will prove
5 satisfying and rewarding, to both himself and his
6 family. There is much to be confident about, as one
7 reviews the evidence led in these Compensation
8 Hearings. Not only the strength, dedication and
9 support shown by so many of the witnesses who appeared
10 on his behalf, but the positive attributes, the
11 intelligence, the leadership qualities, and the
12 strength of character which were identified by people
13 closest to him. These all auger well. He has had some
14 success in facing the notoriety which follows him. And
15 it would appear that he can now use this positively and
16 constructively, to articulate worthwhile concerns in
17 public. You have spent time with Mr. Marshall, and
18 questioned him closely. We can be confident that
19 professional assistance is available to him, and that
20 such efforts will prove beneficial, as soon as he is
21 ready to embark on that help. As Mr. Spicer has
22 pointed out, things have recently started to take a
23 turn for the better. Mr. Marshall deserves our respect
24 and our support. He has been sustained through this
25 ordeal by inner strength, and the warm affection and