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St. Thomas Aquinas Church Hall
Cornwall Street
Halifax, N.S.
May 31, 1990
9:35 a.m.

Per: Nancy Brackett
Verbatim Reporter

VOLUME V

IN THE MATTER OF THE DONALD MARSHALL, JR.
COMPENSATION HEARING

BEFORE: The Honourable Gregory Evans,
Commissioner

PRESENT: Mr. Wylie Spicer, Solicitor
for the Commission

Ms. Anne Derrick, Solicitor for
Donald Marshall, Jr.

Mr. Jamie Saunders, Solicitor
for the Government of Nova
Scotia

DRS

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May 31, 1990 - 9:35 a.m.

1 THE REGISTRAR

2 All rise. Please be seated.

3 MR. EVANS

4 I take it all counsel are ready to proceed?

5 MR. SPICER

6 Yes.

7 MR. EVANS

8 Mr. Spicer? Oh, I should say I understand the
9 lineup is Mr. Spicer and then the Crown and then Ms.
10 Derrick. Following that, I would think the first
11 two would have the right of some short reply.

12 MR. SPICER

13 Fine. Thank you. Mr. Commissioner, before I begin,
14 I would be remiss if I didn't comment and compliment
15 my co-counsel for the cooperation and assistance
16 that I have had in preparing the necessary material,
17 and on behalf of all of us, getting all the material
18 together in this period of time that we've had to
19 deal with this matter. It's been a non-adversarial
20 process. And although you will hear today
21 differences of opinion, it's my view that those
22 differences of opinion will, rather than take away
23 from the atmosphere in which we've conducted the
24 hearing this far, will assist you in coming to a
25 conclusion as to the appropriate amount of

1 compensation, because you will be presented with
2 different perspectives on any monies that might be
3 awarded to Mr. Marshall.

4 MR. SPICER - SUBMISSION

5 Let me say at the outset that, in my view, Donald
6 Marshall, Jr. must be compensated fairly, and I say
7 generously, for the losses which he has suffered and
8 which he will continue to suffer as a result of his
9 wrongful prosecution, conviction and imprisonment.
10 To a very large degree, as I'm sure you're aware,
11 you're being asked to gaze into the future and
12 determine an amount of money to replace what money
13 can never replace. And the law knows no other way
14 to do this and therefore seeks through the medium of
15 money to pay back what has been taken away from a
16 person and which can never be restored to him. In
17 this case you've been given a mandate and a set of
18 guidelines and directions from the Government of
19 Nova Scotia. That material circumscribes your
20 authority to award compensation. To that extent,
21 it's not a carte blanche and you must pay attention
22 to the Order in Council. You must apply the mandate
23 and the authority given to you to analyze the claims
24 submitted by or on behalf of Junior Marshall. As
25 Commission counsel, I'm going to analyze the claims

1 submitted by Mr. Marshall and indicate to you the
2 approach which I recommend that you take. As was
3 the case with the submission of Commission counsel
4 at the previous inquiry, I view the role of
5 Commission counsel as constituting an objective
6 review of the evidence and recommendations flowing
7 from that as to how you should approach your
8 mandate. It's important that I publicly state the
9 views which I hold so that other counsel can be
10 afforded the opportunity of challenging any
11 conclusions that I may urge upon you. The reason
12 for that, of course, is that, typically, Commission
13 counsel continue to be involved with the
14 Commissioner subsequent to the final submission, to
15 provide assistance and advice as the final report is
16 being prepared. And for that reason, it's only fair
17 that I publicly articulate my views, and I intend to
18 do that. At the outset, let me say that I will not
19 be proposing any dollar amounts to you. I don't
20 view that as my role. I will comment instead on the
21 various ways in which I think the various claims
22 which have been advanced on behalf of Mr. Marshall
23 can be analyzed. That analysis has to take place in
24 the context of at least two things, first of all, in
25 the context of the amount already received by Junior

1 Marshall. We all agree that the amount received
2 thus far is one hundred and eighty-three thousand
3 dollars (\$183,000.00).

4 MR. EVANS

5 And that includes the ten thousand dollars
6 (\$10,000.00)?

7 MR. SPICER

8 That includes the ten thousand dollars (\$10,000.00).
9 That's right. He received two hundred and seventy
10 thousand in 1984, of which ninety-seven thousand
11 dollars (\$97,000.00) was paid in legal fees. And
12 then, as you mention, consequent upon a
13 recommendation of yours, he received a further ten
14 thousand dollars (\$10,000.00). That brings us to
15 the total of a hundred and eighty-three. I want to
16 talk for a couple of minutes now about the mandate
17 that you have. Your power to grant compensation to
18 Junior Marshall is defined, of course, by the terms
19 of the Order in Council, March 22nd, 1990. And I
20 just want to repeat it. That Order in Council
21 directs you:

22 "To recanvass the adequacy
23 of compensation paid to
24 Donald Marshall, Jr., in
25 light of what the Royal

1 Commission on the Donald
2 Marshall, Jr., Prosecution
3 found to be factors
4 contributing to his wrongful
5 conviction and continued
6 incarceration, and to
7 determine any further
8 compensation which is to be
9 paid as a result."

10 That's the operative clause of the Order in Council.
11 The Order in Council then goes on to direct you, in
12 making this inquiry, to have regard to certain of
13 the recommendations made in the original report of
14 the Marshall Inquiry. And those are Recommendations
15 #4 to #7. I want to repeat two of those now because
16 they bear some relation to the task of awarding
17 compensation. And they are:

18 "Recommendation #4: That
19 there be no preset limit on
20 the amounts recoverable with
21 respect to any particular
22 claim or any particular
23 aspect of a claim."

24 That recommendation was made in the context of the
25 Federal and Provincial Guidelines on Compensation,

1 which had recommended that, for non-pecuniary
2 damages, a limit be set for compensation of a
3 hundred thousand dollars (\$100,000.00). And the
4 Marshall Report said, "No. There should be no
5 preset limit on the amounts recoverable with respect
6 to any particular claim or any particular aspect of
7 a claim." And Recommendation #5, that you be
8 entitled:

9 "...to consider any and all
10 factors which may have given
11 rise to the wrongful
12 conviction, imprisonment or
13 the continuation of that
14 imprisonment."

15 Counsel for Donald Marshall, Jr. argues -- and I'll
16 deal with later, but I want to state it at the
17 outset so we know where we're going -- that this
18 Order in Council can be interpreted to direct an
19 Order of compensation to Mr. Marshall, to his
20 parents and, in some way, to the community. I must
21 say that I reject that approach. I am, in fact,
22 encouraged by the Government at having agreed to
23 payment of some award for non-pecuniary loss to
24 Donald Marshall, Jr.'s parents. That submission is
25 being made by Mr. Saunders voluntarily on the part

1 of the Government. I would have thought that if it
2 had not been for that position being taken by the
3 Government, that there would have been some
4 difficulty in interpreting the Order in Council to
5 provide for the recovery of non-pecuniary damages by
6 Junior Marshall's parents. The words of the Order
7 in Council simply have to be given meaning. Counsel
8 for Donald Marshall, Jr. has argued that
9 compensation must be settled on the basis of
10 principle, and I agree with that. But it would be
11 wrong for me to say that I agree with it without
12 pointing out to you that you're not free to do
13 whatever you want. It is the Order in Council that
14 circumscribes your mandate, and at the end of the
15 day, that is the document to which you have to be
16 true. Counsel for the Government has advised us
17 that they are prepared to treat the following
18 matters as coming within your terms of reference.
19 And I've already mentioned the award for non-
20 pecuniary losses suffered by the parents of Donald
21 Marshall, Jr. And they have also indicated some
22 time ago that they consider that the period of time
23 from the decision of the Court of Appeal in the
24 reference case in May 1983 to the time of the
25 release of the Royal Commission Report in February

1 of this year to be part of the period for which
2 compensation is to be considered, plus the future,
3 of course. I have been advised by counsel for
4 Donald Marshall, Jr. that you will be asked to make
5 your award in such a way as to provide an income for
6 Mr. Marshall. This is traditionally known as a
7 "structured settlement," and most often comprises an
8 initial lump sum payment with provision for a
9 further capital sum required to generate an income
10 over a period of years. All counsel recommend and
11 support this approach to the award to be made to Mr.
12 Marshall. So what are the claims that have been
13 advanced? I'd like to just outline them at this
14 point. Claims have been submitted by Mr. Marshall
15 for compensation in the following categories.
16 Pecuniary loss, that is, loss of earnings, loss of
17 income, have been submitted with respect to three
18 periods which, while distinct in some ways, really
19 raise some of the same issues. Loss of earnings for
20 the period 1971-1982, the years that Mr. Marshall
21 was in prison. Loss of earnings for the period
22 1982-1990, in other words, for the period from the
23 time when he was released from prison to the
24 present. And loss of future earnings, that is,
25 earnings that Mr. Marshall may have earned in the

1 future and which may, in some respect, be reduced by
2 the effects of the years that he spent in prison. A
3 claim has also been submitted with respect to
4 pecuniary losses for the cost of future treatment
5 and the cost of future care for Mr. Marshall. And a
6 claim has also been advanced for out-of-pocket
7 expenses incurred by or on behalf of Mr. Marshall's
8 parents. That, for the most part, is expenses
9 incurred in going to visit their son while he was in
10 prison, phoning him, going to see him, the cost of
11 staying in the vicinity of the prison. And in the
12 submission of all counsel, as I will say later, that
13 amount is fairly minimal, considering the amount of
14 time that the imprisonment stretched over. We would
15 all recommend that it be paid. With respect to non-
16 pecuniary loss, and that is the loss suffered by Mr.
17 Marshall for the pain and the suffering and the
18 humiliation and the indignity, all the things that
19 he had to put up with by reason of the fact that he
20 had been wrongly imprisoned, such a claim is
21 advanced in this case. There is also a claim
22 advanced, best described, I think, as a "derivative
23 award" being advanced by Donald Marshall, Jr., to be
24 made in trust to the Grand Council of the Micmac
25 Nation on behalf of Donald Marshall, Jr. So those

1 are the claims that are being advanced. There are,
2 I think, three approaches to all of these claims.
3 And there are three ways in which you can analyze
4 these issues. And the first way is that you can
5 strictly apply the principles derived from the
6 personal injury cases. In other words, you can say,
7 "Mr. Marshall is no different from somebody who was
8 run over by a truck and I should apply the
9 principles derived from those cases," with which we
10 are all familiar. The second way to approach it is
11 to say that, "We should have no regard to principles
12 of law and that we should fashion this compensation
13 out of whole cloth, that is, that we should say that
14 this case is unique and that because it is an ex
15 gratia payment, you need have no regard to the
16 principles of law." And the third approach is to
17 bear the legal principles in mind as a guidepost to
18 you, but adapt them to the unique circumstances of
19 this claim, compensation for wrongful imprisonment.
20 For the reasons which I've set out in my brief, it's
21 my view that this third approach is the one that
22 will yield the most just result for Mr. Marshall.
23 I'd like now to go through the various claims and
24 outline to you my suggested approach to them, first
25 of all, the claims for pecuniary loss. In assessing

1 these claims, that is, assessing the claims made for
2 lost income, it is my submission that you should
3 bear in mind some of the principles enunciated
4 recently by the Supreme Court of Canada in a series
5 of cases known as "the trilogy," about which all of
6 us will speak during the course of the day. These
7 cases, insofar as they relate to non-pecuniary loss,
8 that is, the loss for pain and suffering, have been
9 rejected as guiding principles by the counsel for
10 Donald Marshall, Jr. And as you will hear later, to
11 a degree I also reject them as the proper approach
12 for non-pecuniary loss. But with respect to
13 pecuniary loss, they shouldn't be rejected, because,
14 indeed, some of the calculations that have been
15 presented to you are based on the principles
16 enunciated in those cases. And so they do have some
17 relevance. The important principles enunciated by
18 the Supreme Court of Canada which I think you should
19 bear in mind are the following. First of all, that
20 the compensation should be full. That may seem to
21 be self-evident. But the reason as stated by the
22 Supreme Court of Canada as it was in the Andrews
23 case is because, as Chief Justice Dickson pointed
24 out when he said in Andrews:

25 "I do not believe that the

1 doctrine of mitigation of
2 damages has any place in a
3 personal injury claim. The
4 common law says that so far
5 as money can compensate, the
6 injured person must be given
7 full reparation for the
8 wrongful act."

9 So that it is not necessary, even within the context
10 of personal injury cases, for the person who's been
11 injured to attempt to mitigate that loss. Secondly,
12 the compensation awarded must be based on an
13 assessment of the person as that person was prior to
14 the event giving rise to the claim. In other words,
15 in the context of this case, you look at Mr.
16 Marshall before he went into prison, not afterwards,
17 in order to try and assess, if you can -- and I'll
18 speak later about whether or not it's appropriate
19 for you to try and do that -- but to try and assess
20 what his future might have been if it had not been
21 for this terrible injustice. Thirdly, if you adopt
22 the approach of trying to assess income, you must
23 deduct from the award contingencies that may occur
24 in anybody's life, such as illness, unemployment,
25 accidents, that sort of thing. Fourthly -- and I

1 think this is particularly important because I'm
2 going to come back to it in a little while--
3 actuarial evidence is not conclusive. There have
4 been submitted a number of actuarial reports which
5 have been forwarded to you and which attempt to
6 predict Donald Marshall's life. I urge upon you the
7 words of the Supreme Court of Canada in the Andrews
8 case:

9 "The apparent reliability of
10 assessments provided by
11 modern actuarial practice is
12 largely illusionary, for
13 actuarial science deals with
14 probabilities and not
15 actualities."

16 And, again, in a text called Munkman's Damages For
17 Personal Injuries and Death, the authors state:

18 "An estimate of prospective
19 loss must be based, in the
20 first instance, on a
21 foundation of solid facts.
22 Otherwise, it's not an
23 estimate, but a guess."

24 The next principle is that interest is payable on
25 past losses. And because interest is payable, you

1 will have to calculate what a reasonable rate of
2 interest would be. And, also, because it may be
3 that the losses sustained in the past by Mr.
4 Marshall did not all occur at one point in time, it
5 may have accumulated over time and may, in fact,
6 have occurred over time, it may be necessary for you
7 to pick an interest rate that reflects the whole
8 period of time rather than one point in time, unlike
9 an accident case where it's clear that that's the
10 point from which you pick the date at which interest
11 runs from. And, finally, in cases where the
12 claimant is a youth and has not commenced on any
13 career, the law is clear that it is very difficult
14 to predict loss of future income. In a text that I
15 have provided you with an excerpt from in our brief,
16 Kemp and Kemp, the authors of The Quantum of Damages
17 say on this point:

18 "In this class of case, the
19 Court is really reduced to
20 pure guesswork. It is very
21 rare for the Court to
22 attempt to divide the award
23 into separate heads.
24 Usually, one global sum is
25 assessed, its amount varying

1 with the seriousness of the
2 claimant's injuries."

3 So that, in looking at Mr. Marshall's situation, it
4 may be appropriate -- and I'll speak more of this
5 later -- to utilize that principle, that is, to
6 accept the fact that Mr. Marshall really was a youth
7 who had embarked perhaps hardly at all on any sort
8 of career at the time that this terrible injury
9 occurred to him. Taking those principles now and
10 applying them to the claims for pecuniary loss,
11 let's look initially at the claims for the years
12 1971-1982. Applying those principles to arrive at a
13 reasonable and generous assessment of Mr. Marshall's
14 losses, you have to make some assessment of what his
15 life would have been like if it had not been for the
16 wrongful conviction. In other words, you have to
17 try and look at him at age 17. In doing so, you
18 must give the benefit of every doubt to Mr.
19 Marshall. The Royal Commission has already found
20 that one of the reasons that Mr. Marshall was
21 prosecuted and convicted at all was the fact that he
22 is an Indian. From the beginning, and right up
23 until 1990, he was never given the benefit of any
24 doubt at all. And in awarding compensation, that
25 terrible error should never be repeated. So when

1 thinking of Donald Marshall, Jr. as a 17 year-old in
2 1971, and in trying to assess his claims for lost
3 income, it is Mr. Marshall at that age, with all his
4 potential, his possibilities and his limitations
5 prior to incarceration. Now, what's the evidence?
6 Junior's father has testified that at ages 16 and 17
7 Junior was a very gentle boy and that he was very
8 considerate of his neighbours. Mr. Marshall also
9 testified it was his expectation that Junior would
10 have followed him in the drywalling business. The
11 evidence of Junior Marshall himself is much more
12 equivocal, and you cannot conclude from his
13 testimony that he would have followed a career in
14 drywalling at all. Indeed, during the years he was
15 in prison, he took up the trade of plumbing. And
16 you will no doubt remember some testimony at the
17 Marshall Inquiry in Sydney, that there were those in
18 the community who thought that Junior, as a 17 year-
19 old, was a "tough kid." You've been provided with
20 actuarial calculations which on several bases
21 attempt to predict Mr. Marshall's loss of income
22 both as a plumber and a drywaller.

23 MR. EVANS

24 Just for the purposes of the record, when you were
25 dealing with the reputation that Junior had in the

1 community that he was a "tough kid," there's always
2 been some discussion about his past record.

3 MR. SPICER

4 Yes.

5 MR. EVANS

6 And I would like that sometime to be made available
7 because, reading newspaper accounts and -- there's a
8 wide spread as to what is meant by a "tough kid."
9 There are others saying that he was just like other
10 kids in the community. So I think we should have
11 that on record as just what it amounted to and
12 whatever information you can give me as to the
13 particulars of the offense.

14 MR. SPICER

15 Yes. I think that's easily done. In fact, I think
16 that material was filed with the first Inquiry as an
17 exhibit.

18 MR. EVANS

19 Yes. My recollection of it doesn't go back and I
20 don't propose to read through that mammoth document.

21 MR. SPICER

22 Yes, there were a lot of exhibits.

23 MR. EVANS

24 Thank you.

25

1 MR. SPICER

2 The projections of the actuarial evidence -- or
3 "calculations" is perhaps a better word -- must be
4 regarded only as guesses. As the texts have
5 indicated, if you were to rely on the actuarial
6 material, you must try and find a substantial
7 foundation of solid facts on which to form a view of
8 Mr. Marshall's life. In my submission, you can't do
9 that. My submission is that the material is too
10 speculative and that to pick one course through the
11 mass of actuarial material would not be appropriate.
12 And, indeed, as I'll argue later, you're not
13 required to do that in this case, in any event.
14 You're not sitting as a Judge in a personal injury
15 claim and you have other options available to you.
16 One only has to ask oneself what he or she was like
17 at age 16 or 17 and what they're like now to realize
18 how little utility can be provided by actuarial
19 assumptions and calculations based on somebody's
20 future guessed at on the basis of what they were
21 like at age 16. The second period of time for which
22 loss of earnings has been advanced is the period
23 from 1982-1990. The actuarial problem is the same,
24 but it's compounded a little bit because now you
25 have to start looking at trying to assess whether

1 Junior Marshall's life and employment for the last 8
2 years, that is, the years since he was released to
3 the present, has been solely the result of his years
4 of imprisonment and the pain and dislocation that he
5 suffered, or whether his situation can be said to be
6 partly attributable to his own shortcomings. And
7 what's the evidence on that? You've heard in
8 private from Judge Cacchione, from Jack Stewart,
9 from Karen Brown, from Martha Tudor and from Junior
10 Marshall. You've been provided with a psychological
11 report which attempts to give you a picture of
12 Junior Marshall through these years. You've been
13 given a glimpse of a person who has suffered
14 greatly, a person whose condition seemed to get
15 worse through the years 1982-1989, but which has
16 recently started to take a turn for the better.
17 It's clear that the damage caused to Junior Marshall
18 by everything that's happened to him since 1971 is
19 substantial. But again, if you turn to the
20 actuarial material, you've been provided with
21 material which gives you calculations for deductions
22 for the cost of living, for the contingencies of
23 life, for the effects of alcoholism, for periods of
24 unemployment. There are about 6 or 7 or 8 balls
25 which are up in the air which you're asked to toss

1 around. And in my submission, that data is of very
2 limited assistance. It assists, it's true, in
3 painting several pictures of what Mr. Marshall's
4 career might have looked like had it not been for
5 his incarceration. But, once again, it's extreme
6 speculation and, in my view, it's unnecessary for
7 you to enter upon that course. And, finally, you're
8 being asked to consider a claim in pecuniary loss
9 for the loss of future earnings. Now, once again
10 you're asked to gaze into a crystal ball and decide
11 what dollar figure fairly represents Donald
12 Marshall's employment future. Again the actuarial
13 material suffers from the same inhibiting
14 limitations as it does with respect to the previous
15 two portions of the claim for pecuniary loss. But
16 now, for the future, you have to take cognizance of
17 the fact that Junior Marshall has been disabled by
18 the prison experience itself from being gainfully
19 employed. The actuarial material and the
20 psychological reports suggest that the fact of being
21 in prison has been a disabling factor. You have, on
22 the other hand, heard Mr. Marshall himself express
23 to you his hopes for the future. Those hopes don't
24 include being a drywaller or a plumber. Now, to
25 what degree is that feeling of Junior Marshall's now

1 based on the years that he has already lost and the
2 experience that he had in prison? You are asked by
3 the actuarial material for future lost earnings, to
4 ascribe a percentage to the disability inflicted on
5 Junior Marshall by his years in prison. I know you
6 will have reviewed the actuarial material and you
7 will know that contained in it are calculations
8 based on 40% disability, 50% disability or 60%, or
9 some other percentage. I reiterate to you that, in
10 my view, this is not a personal injury case, and
11 those percentages and figures require you to do what
12 I believe it would be wrong for you to do, because
13 it's not necessary, and that is to state just how
14 disabled you think Donald Marshall has become. I
15 don't think we need a statement as to how disabled
16 one thinks Mr. Marshall has become. So with respect
17 to all the claims for loss of earnings, my
18 submission to you is that the fairest way to
19 approach the problem of loss of earnings is to
20 recognize that at the time of his incarceration,
21 Donald Marshall, Jr. was a youth who had barely, if
22 at all, commenced a career. There is no reason now,
23 through this assessment, through this compensation
24 process, to try and pick what his life would have
25 been like, or to pick it apart, for that matter. In

1 my submission, your task now is to make Junior
2 Marshall's life comfortable and to provide
3 sufficient monies to produce that result. In other
4 words, I recommend that the claim for lost income be
5 treated as a part of the assessment of Mr.
6 Marshall's claim for general damages, and that you
7 don't specify a specific amount for lost income.
8 For you to so specify would be impossible because
9 the data is unsound, unnecessary because you can
10 still be fair and generous without doing it, and
11 inappropriate because I don't think that it's
12 necessary for you to assess the degree of Mr.
13 Marshall's disability. One other aspect of the
14 claim for pecuniary loss is the cost of future
15 treatment and care. Donald Marshall, Jr. has a
16 substance abuse problem. The testimony that you
17 have heard indicates that this problem has developed
18 in the years since his release and was not something
19 that he developed during his years in prison. The
20 testimony of those who know him and the
21 psychological opinions are unanimous that, in order
22 for the remainder of his life to be in any way
23 productive, Junior Marshall is going to have to try
24 and overcome this problem. The evidence is also
25 uncontradicted that at the present time it's

1 unlikely that Mr. Marshall would be willing to
2 subject himself to rehabilitative treatment, at
3 least at the moment. In Exhibit Volume #6 you have
4 been provided with a budget for rehabilitation and
5 treatment for Donald Marshall, Jr. In a personal
6 injury case, the cost of future care is a relatively
7 straightforward calculation. There is no doubt that
8 the victim needs and, indeed, will utilize the
9 treatment. And, indeed, that is recognized as being
10 the most important element of an award in a personal
11 injury case by the Supreme Court of Canada in the
12 cases to which I've already referred. There's a
13 real difference here, though. And that difference
14 is that Mr. Marshall may not use, may not take
15 advantage of, the opportunity for rehabilitation.
16 Bearing that in mind, my recommendation to you is
17 that some amount be set aside to provide for
18 treatment, should Mr. Marshall decide that he wishes
19 to exercise that option. He may never avail himself
20 of the treatment which everybody seems to think that
21 he needs. That being the case, you must decide
22 whether the amount claimed for future care should be
23 awarded, simply given to him, in the hope that he
24 will seek treatment, or whether the funds should be
25 set aside and made available to Mr. Marshall in the

1 event that he desires to seek treatment. It
2 shouldn't be a blank cheque, however. The amount
3 recommended should reflect a reasonable assessment
4 of an amount necessary to effect rehabilitation. If
5 you were to find that monies should be set aside, in
6 my submission these monies should be placed in the
7 control of an agency independent from government.
8 It's not appropriate that Mr. Marshall should have
9 to go and hold out his hand to the government. The
10 last claim for pecuniary loss is an out-of-pocket
11 expenses claim advanced by or on behalf of Mr.
12 Marshall's parents.

13 MR. EVANS

14 Before you proceed to that, your suggestion that an
15 amount be set aside in the hands of some agency
16 apart from government which would be available to
17 Donald Marshall in the event that he desires to take
18 this treatment, for how long a period? Have you any
19 suggestions as to how long that money is to be
20 maintained and what happens to it if he does not
21 take the treatment?

22 MR. SPICER

23 To take the second point last, clearly, I think if
24 it's not used, it reverts back to the source from
25 which it came, much as a trust. And with respect to

1 the period for which it remains available, I am
2 frankly unable to suggest a year to you for that.
3 It seems to me it should be available for a long
4 time.

5 MR. EVANS

6 Well, a long time doesn't leave me much assistance.

7 MR. SPICER

8 Five, ten years.

9 MR. EVANS

10 But the reason that I'm putting this question to you
11 is because in the reports that we have it indicates
12 that if he's going to take treatment, the treatment
13 should begin immediately.

14 MR. SPICER

15 Yes.

16 MR. EVANS

17 So that the longer there is a delay in getting
18 treatment, the less chance of a successful result.
19 So it occurs to me that you just can't have
20 something set aside without some term.

21 MR. SPICER

22 No, that's correct. And you will have to assess the
23 veracity and the soundness of the opinions that it
24 has to be done right away in trying to come to a
25 reasonable view as to how much time the money should

1 be set aside for. But again, I think to start from
2 first principles there, you've got to give the
3 benefit of every opportunity to Mr. Marshall. So
4 you should err on the side of leaving it longer than
5 you may think it's necessary.

6 MR. EVANS

7 So what you're saying is reasonable plus.

8 MR. SPICER

9 Reasonable plus. Plus, plus, I think, in the
10 circumstances. The final claim that has been
11 advanced is the out-of-pocket expenses for Mr.
12 Marshall's parents. The quantum of that claim is
13 set out in the Exhibit Volume #6 and totals about
14 fifty-five thousand dollars (\$55,000.00). This
15 amount has, in my submission, been calculated
16 reasonably and thoroughly. It's at Tab #4 of
17 Exhibit Volume #6. And then there are a series of
18 separate sheets which calculate the individual
19 items.

20 MR. EVANS

21 Where exactly is the total amount set out?

22 MR. SPICER

23 The total amount is at the end. The very last page
24 of the exhibit volume is where the final total ---
25

1 MR. EVANS

2 55,318.

3 MR. SPICER

4 That's right.

5 MR. EVANS

6 Thank you.

7 MR. SPICER

8 One only has to divide that total by 11 years to
9 realize that the amount is really quite modest. And
10 it's the recommendation of all counsel that that
11 award to Mr. and Mrs. Marshall be made with the
12 addition of an appropriate figure for interest on
13 those monies. And again, to come back to the
14 comments I made earlier, you have to recognize in so
15 doing that those expenditures were incurred over the
16 11-year period, so that you will have to pick an
17 interest figure that you think fairly reflects
18 interest on the amount, recognizing that the monies
19 were paid out over the 11-year period.

20 MR. EVANS

21 So you take the average rate of interest during the
22 11-year period.

23 MR. SPICER

24 I suspect that's right, and divide it by 2, which is
25 what the Courts have tended to do recently with

1 respect to that. We move on now to the claims for
2 non-pecuniary loss. And if there is a difference of
3 opinion amongst the three of us, this is where it
4 begins to arise, in the claims for non-pecuniary
5 loss. It's this area where there is a divergence of
6 approach as to the fundamental question of how much
7 Donald Marshall, Jr. should receive. To reiterate,
8 the claim encompasses two broad categories, a
9 payment to Donald Marshall, Jr. and the derivative
10 claim of an amount to be paid to the Grand Council
11 to fund a cultural survival camp for indigenous
12 children at which Mr. Marshall could and might work.
13 To analyze these claims, I want to return to the
14 three approaches that I outlined to you at the
15 beginning of this submission and analyze these
16 claims in the context of those approaches. With
17 respect to the claim for non-pecuniary loss advanced
18 by Mr. Marshall, if you adopt -- and it is an option
19 to you -- the personal injury model, that is, the
20 model that Mr. Marshall is no different conceptually
21 than a person who has been run down by a car, you
22 must then bear in mind the so-called "trilogy cases"
23 decided by the Supreme Court of Canada in 1978. In
24 those cases, the Court introduced, as a matter of
25 principle, an upper limit in dollars with respect to

1 which recovery for non-pecuniary loss should not go.
2 In 1978, that amount was a hundred thousand dollars
3 (\$100,000.00). And due to inflation and passage of
4 time, it's currently about two hundred (\$200,000.00)
5 or two hundred and ten thousand dollars
6 (\$210,000.00). Now, there are some sound reasons
7 why the personal injury model is mentioned. And
8 perhaps the most compelling of these is that the
9 cases decided by the Supreme Court of Canada were
10 cases where the victims had suffered extreme
11 injuries. To remind you, in the Andrews case--
12 there are three cases, Andrews, Arnold and Thornton.
13 In the Andrews case, a young man had been rendered a
14 quadriplegic in a traffic accident. In the Arnold
15 case, a 4 1/2 year-old girl, after crossing the
16 street to make a purchase from an ice cream vending
17 truck, was hit by a car. She suffered brain damage,
18 physical disability and mental impairment. In
19 Thornton, the Plaintiff was a secondary school
20 student who suffered severe injuries in an accident
21 at school, as a result of which total or partial
22 paralysis occurred to all four limbs. By the time
23 of the trial in Thornton, the Plaintiff was 18 years
24 of age, physically disabled, unemployable and wholly
25 dependent upon male orderly assistance for his day-

1 to-day needs. Yet he still had all his mental
2 facilities still intact. Based on that sort of
3 loss, there are those who will legitimately say,
4 what possible reason can there be for Junior
5 Marshall, who can still walk, who can still talk,
6 who is not trapped inside a body that won't respond,
7 what possible reason can there be for him to get
8 more than a person who's been rendered a
9 quadriplegic? In approaching these personal injury
10 cases, though, it is important to realize that the
11 Supreme Court of Canada, in limiting the non-
12 pecuniary recovery in the way they did, proceeded
13 upon certain assumptions which are important to
14 remember. I'm not going to go through the entire
15 quotes that I've put in my brief, but suffice it to
16 say that the Court considered that the most
17 important part of a claim in a personal injury claim
18 is the cost of future treatment and care. That's
19 what they focus on. And having analyzed that
20 portion of the claim and arrived at a figure, they
21 then go on to say that in the assessment of damages
22 for non-pecuniary losses, that is where you're
23 entitled, in the personal injury model, to look at
24 policy factors, to look at the cost to the insurers,
25 the burden to society, those various factors that

1 are adverted to in really all three of the decisions
2 of the Supreme Court of Canada. In the Andrews case
3 itself, the Court says:

4 "This area..."

5 The area of non-pecuniary.

6 "...is open to widely
7 extravagant claims. It is
8 in this area that awards in
9 the United States have
10 soared to dramatically high
11 levels in recent years.
12 Statistically, it is the
13 area where the danger of
14 excessive burden of expense
15 is the greatest."

16 The Supreme Court of Canada goes on to say:

17 "It is also the area where
18 there is the clearest
19 justification for
20 moderation."

21 So, based on a model which focuses on the fact that,
22 in a personal injury case, there are two parties,
23 not the government, not the state, but a wrongdoer
24 and the personal injury victim. And based on the
25 notion that the most important aspect of the claim

1 is the claim for loss of the ability to be able to
2 live, and with respect to that, the cost of future
3 care and treatment, the Court says, "We've got to
4 put a limit on non-pecuniary losses. We've already
5 taken care of this person, and it's not reasonable
6 to allow extravagant awards." The Court says, "If
7 you look at damage for non-pecuniary loss in this
8 respect, it's reasonable that large amounts should
9 not be awarded." If you accept those principles,
10 you should award no more than two hundred thousand
11 dollars (\$200,000.00) for all of Donald Marshall's
12 pain and suffering, if you were to accept that
13 position. In addition, there can be little doubt
14 that, according to that model, no serious argument
15 could be raised for an award through Donald Marshall
16 to the Grand Council. Such a claim would just
17 simply, to adopt the legal phraseology, be "too
18 remote." The second approach of the three that I
19 outlined at the outset is the approach of
20 uniqueness, that is, the argument that you are not
21 restrained in any way by the application of legal
22 principles relating to damages and you can do
23 whatever you want. This argument would urge you
24 along the following lines. You've been asked to
25 award compensation. And that payment is being made

1 as an ex gratia payment, not claimable as of right.
2 That fact, however, was also noted in the Arthur
3 Allan Thomas Report in New Zealand. Indeed, the
4 Royal Commission in that case specifically noted
5 that they were not bound by legal principles.
6 However, they went on in that case to refer to the
7 guidelines that had been issued by the Home Office
8 in England, according to which compensation is
9 provided, and did not, indeed, in the Arthur Allan
10 Thomas case then specifically indicate that they
11 were free to act in any way that they so chose. But
12 if you were to adopt the approach unfettered by
13 reference to any other situation, that, indeed, is
14 attractive and, indeed, is an option. It will be
15 argued as an option. A very large amount can be
16 awarded for non-pecuniary loss in that scenario. An
17 argument will be made today that the situation of
18 Mr. Marshall as a Native person is such that in
19 order to compensate him properly, a mechanism must
20 be provided by which he can be reintegrated into his
21 community, and that that integration is a two-way
22 street and cannot be completely accomplished by
23 Marshall acting on his own. The community has to
24 have a mechanism for reaching out and taking Mr.
25 Marshall back in. And the award to the Grand

1 Council is one way of approaching that mechanism.
2 To that approach I say that, even unencumbered by
3 legal precedent, you are not at liberty to ignore
4 the terms of the Order in Council. So you are bound
5 to give real meaning to the words in the Order in
6 Council, "compensation to Donald Marshall, Jr." The
7 third approach, which is to bear these legal
8 principles in mind but adopt them to the
9 circumstances of this claim, is the approach which I
10 urge upon you. So, accordingly, in my view, the
11 personal injury approach of limiting to two hundred
12 thousand dollars (\$200,000.00) the non-pecuniary
13 claim as enunciated by the Supreme Court of Canada
14 should be rejected. And there are two reasons to
15 reject that approach. And the first reason, which
16 is pretty straightforward, is that Recommendation #4
17 of the Marshall Inquiry Report recommended that
18 there should be no preset limits on the amounts
19 recoverable by a person wrongly imprisoned. And
20 that recommendation forms part of the terms of
21 reference of your inquiry. But, second, and more
22 importantly, and I think looking to the future, the
23 two hundred thousand dollar (\$200,000.00) limit
24 should be rejected for the simple and compelling
25 reason that Donald Marshall, Jr. was not run down by

1 a car. Donald Marshall, Jr. was run down by the
2 justice system. And it was that very justice system
3 that kept him down. And even when it freed him, it
4 turned around and ran over him again. Mr.
5 Marshall's case is far more important than a motor
6 vehicle case. As noted in the report of the English
7 Group, "Justice: On Compensation For Wrongful
8 Imprisonment," they state:

9 "One of the conditions of an
10 ordered democratic society
11 is that every citizen should
12 submit himself to the laws
13 of the land in which he
14 lives and to the
15 jurisdiction of those who
16 are authorized to administer
17 and enforce them."

18 Now, in some sense, each of us has entered into a
19 contract with society. And in return for submitting
20 to the laws of that society, each of us is entitled
21 to expect the protection and the fair and unbiased
22 treatment from those people who are authorized to
23 enforce and administer society's laws. This
24 contract can be broken in at least two ways. The
25 individual can commit an offense, thereby breaking

1 his agreement to submit to the laws of the society.
2 And, conversely, those enforcing and administering
3 the law may break the contract by wrongly
4 prosecuting and convicting an innocent member of
5 society. And merely stating the framework in which
6 such a wrongful conviction takes place surely makes
7 it glaringly obvious how different it is in terms of
8 the importance to the society in which we live than
9 the case of an individual who, through inattention,
10 runs down and injures another person, no matter how
11 grievously. In making the case that there is a
12 difference between the personal injury situation and
13 the situation of wrongful imprisonment, we must,
14 however, not lose sight of the fact that the mandate
15 of this Commission is to compensate Donald Marshall,
16 Jr. That's what the Order in Council directs you
17 to, and not to punish those persons and institutions
18 whom the Marshall Inquiry found to have been in some
19 way responsible for Marshall's prosecution,
20 conviction and incarceration, nor to punish those
21 who treated Marshall as being to blame for a murder
22 he did not commit. So your job is to compensate.
23 However, within the mandate of compensation, in my
24 view it's quite legitimate, as part of the exercise
25 of compensating, to bear in mind the fact that

1 Marshall was charged and convicted by the guardians
2 of our legal system. This, in my submission, is a
3 factor which you may take into account in assessing
4 his general damages. Through the use of the
5 traditional concept of aggravated damages, you can
6 award, as part of the general damage quantum, an
7 amount which reflects the abhorrence that all of us
8 must have for the way in which Donald Marshall was
9 treated. I provided to you in the volume of cases
10 which I've handed to you earlier material concerning
11 awards for punitive or exemplary damages. As you
12 will be aware, punitive damages are aimed at
13 punishment. They're not aimed at compensation. And
14 they've been rejected and have fallen out of fashion
15 in England. But even in England, there is an
16 exception where conduct has been by government or by
17 servants of government, including the police, where
18 that conduct has been oppressive, arbitrary or
19 unconstitutional. So even in England, in that sort
20 of case, punitive damages can be awarded. But you
21 don't need to go that far. You don't need to push
22 at the edges of your authority to be able to award
23 Mr. Marshall compensation for the actions that
24 occurred to him and that were taken out on him. You
25 don't have to do that, because the Supreme Court of

1 Canada, in a case called Vorvis v. ICBC -- I'm now
2 at page 25 and 26 of my brief -- recognizes that
3 aggravated damages can be awarded. And Mr. Justice
4 McIntyre, speaking for the Supreme Court of Canada,
5 says:

6 "Aggravated damages will
7 frequently cover conduct
8 which should also be the
9 subject of punitive damages,
10 but the role of aggravated
11 damages remains
12 compensatory."

13 He goes on to say:

14 "Aggravated damages are
15 awarded to compensate for
16 aggravated damage."

17 That seems fairly self-evident.

18 "They take account of
19 intangible injuries and, by
20 definition, would generally
21 augment damages assessed
22 under the general rules
23 relating to the assessment
24 of damages. Aggravated
25 damages are compensatory in

1 nature and may only be
2 awarded for that purpose."

3 So you do have the option, clearly within the limits
4 of the Order in Council, to award some money to Mr.
5 Marshall recognizing the aggravation on the basis of
6 aggravated damages. I would go further and say that
7 you are really required to do that. Because
8 Recommendation #5 of the Marshall Report, which
9 you've been directed to take into account by the
10 Order in Council, requires you to -- and this is
11 Recommendation #5:

12 "...consider any and all
13 factors which may have given
14 rise to the wrongful
15 conviction, imprisonment or
16 the continuation of that
17 imprisonment."

18 Now, those factors are set out in the findings of
19 the Marshall Report. And a great number of those
20 findings, as you are aware, take aim at government,
21 at persons employed by or on behalf of government or
22 those who administer our justice system. And some
23 of those bear repeating today because they are
24 factors which you will have to bear in mind. The
25 Royal Commission found that the criminal justice

1 system failed Donald Marshall, Jr. at virtually
2 every turn, from his arrest and conviction in 1971,
3 up to and even beyond his acquittal, that this
4 miscarriage of justice could have and should have
5 been prevented if persons involved in the criminal
6 justice system had carried out their duties in a
7 professional or competent manner, that the fact that
8 Marshall was a Native was a factor in his wrongful
9 conviction and imprisonment, that the police
10 response to the stabbing was entirely inadequate,
11 incompetent and unprofessional, that the Crown
12 Prosecutor and the defence counsel in Donald
13 Marshall's trial failed to discharge their
14 obligations, resulting in Marshall's wrongful
15 conviction, that the cumulative effect of incorrect
16 rulings by the trial Judge denied Marshall a fair
17 trial, that the R.C.M.P. review failed to uncover
18 Donald Marshall, Jr.'s wrongful conviction because
19 of Inspector Marshall's incompetent investigation
20 into Jimmy MacNeil's allegations, that the errors by
21 the trial Judge were so fundamental that a new trial
22 should have been the inevitable result of any
23 appeal, that the Court of Appeal made a serious and
24 fundamental error when it concluded that Donald
25 Marshall, Jr. was to blame for his wrongful

1 conviction, and that the Court's suggestion that
2 Marshall's untruthfulness contributed in large
3 measure to his conviction was not supported by any
4 available evidence and was contrary to evidence
5 before the Court, and, finally, that Donald
6 Marshall, Jr. was not treated properly by the
7 Attorney General's Department. Now, merely
8 repeating those findings will, I'm sure, bring home
9 to you the fact that much of what the Marshall
10 Inquiry found was directed at the failings either of
11 government, prosecutors, lawyers, judges, police,
12 people involved in the administration of criminal
13 justice. Those are the factors which I think you
14 should take into account in considering, in your
15 global considerations, an award for aggravated
16 damages for Mr. Marshall. Now, what other factors
17 should you consider in assessing this aspect of his
18 claim for general damages? Counsel for Donald
19 Marshall, Jr. will suggest to you, I believe, that
20 you should give special consideration in this aspect
21 of the claim to the fact that Junior Marshall is a
22 Native and that, by reason of that fact, he somehow
23 lost more by his wrongful conviction and
24 incarceration than would a non-Native person. There
25 can be no doubt that Donald Marshall, Jr. has

1 suffered terribly. And the fact that he is a Micmac
2 has caused him to suffer in some ways which would
3 not be experienced by a non-Native person. For
4 instance -- and I know Ms. Derrick will elaborate on
5 these items -- Junior Marshall may have lost the
6 opportunity to become Grand Chief of the Micmac
7 Nation. He lost the ability to use his language
8 while he was in prison. He lost his identification
9 with the culture and traditions of his Micmac
10 community. And there are many other things which
11 Mr. Marshall lost which are perhaps peculiarly
12 attributable to the fact that he's Micmac. He also
13 lost, like others who are wrongly imprisoned, many
14 other things. Those have been conveniently
15 summarized in Professor Kaiser's paper, which you
16 have, and they include loss of liberty, loss of
17 reputation, humiliation, pain and suffering, loss of
18 enjoyment of life, loss of civil rights, loss of
19 social intercourse, physical assaults, subjection to
20 prison discipline, accepting and adjusting to prison
21 life, adverse effects on his future, the prospects
22 of marriage, social status, physical and mental
23 health. Professor Kaiser continues in words I think
24 that bear repeating today.

25 "Surely, few people need to

1 be told that imprisonment in
2 general has very serious
3 social and psychological
4 effects on the inmate. For
5 the wrongfully convicted
6 person, this harm is
7 heightened, as it is hardly
8 possible for the same
9 innocent person to accept
10 not only the inevitability
11 but the justice of that of
12 which has been imposed upon
13 him. For the person who has
14 been subjected to a lengthy
15 term of imprisonment, we
16 approach the worst case
17 scenario. The notion of
18 permanent social disability
19 due to a state wrong begins
20 to crystallize. The longer
21 this distorting experience
22 of prison goes on, the less
23 likely a person can ever be
24 whole again. Especially for
25 the individual imprisoned as

1 a youth, the chances of
2 eventual happy integration
3 into the community must be
4 very slim. Therefore,
5 beyond the factors noted,
6 special levels of
7 compensation need to be
8 considered for this chronic
9 social handicap."

10 The price that society must pay for this breach of
11 contract, for the humiliation, the indignity and the
12 damage caused to persons wrongly convicted should,
13 in my submission, be the same, whether the victim is
14 poor, rich, male, female, White or otherwise. The
15 price should be high. But you should not be asked
16 to say that one person's imprisonment is worth more
17 or less than another's. They are all tragic. To
18 start to differentiate between the pain suffered by
19 persons of different sex, race or social status is,
20 in a way, to reopen the door to discrimination.
21 While in this case you may hear the argument that a
22 person should receive more because of his race, you
23 will realize that that's not a very long step,
24 structurally, from an argument that somebody should
25 receive less for the very same reason. I would urge

1 you not to open that door. To value one person's
2 pain and suffering in these circumstances as greater
3 than another's is wrong. And it is one of the very
4 things that the first Marshall Inquiry struggled
5 with. That position, that this sort of loss should
6 be treated the same, has recently been enunciated by
7 various texts on damages. And I just wish to quote
8 briefly from one. It's McGregor, an English text on
9 damages.

10 "For while it may be argued,
11 on the one hand, that the
12 poor should obtain more
13 because an addition to total
14 assets has so much more
15 significance for them, it
16 may be argued, on the other
17 hand, that the rich should
18 obtain more because a larger
19 amount is necessary to have
20 a significant effect on
21 their lives. Accordingly,
22 it would seem that the
23 sensible view is that rich
24 and poor, great and humble,
25 should be treated alike,

1 receiving similar amounts
2 for pain and suffering. And
3 it appears that the Courts
4 have moved toward acceptance
5 of this view."

6 McGregor then goes on to refer to a decision of the
7 English Court of Appeal and quotes from Lord
8 Diplock:

9 "I cannot think that it
10 ranks any higher because the
11 Plaintiff before the
12 accident was a rich man.
13 Had an ordinary working man
14 who, like the Plaintiff, had
15 led before the accident a
16 full, active and useful
17 life, sustained the same
18 injuries with the same
19 physical and mental results,
20 he would, in my view, have
21 been entitled to monetary
22 compensation of the same
23 order."

24 And one of the other Judges on the same case was
25 even more emphatic. He said:

1 "The Plaintiff's economic
2 and social position is
3 irrelevant. The normal
4 compensation for the loss of
5 an arm for a rich man is the
6 same as it is for a poor
7 man."

8 Cases of wrongful imprisonment are tragic. They
9 share a common thread, whether the person wrongly
10 imprisoned is White, Native or otherwise. Merely
11 because this may be the first case of which we are
12 aware where compensation is being considered for an
13 Aboriginal person who has been wrongly convicted
14 does not, ipso facto, make other cases irrelevant.
15 You should, in my submission, consider the other
16 cases, look at the other cases that have been
17 submitted to you. Consider, for instance, the case
18 of Arthur Allan Thomas, convicted of two murders in
19 New Zealand on the basis of evidence planted by the
20 police. They put a bullet in the garden. In 1980,
21 a Royal Commission in New Zealand awarded Mr. Thomas
22 for his non-pecuniary loss about half a million New
23 Zealand dollars, or the equivalent of about two
24 hundred and fifty thousand Canadian. Mr. Thomas
25 spent 9 years in prison. Counsel for Donald

1 Marshall has indicated in her brief that the Arthur
2 Allan Thomas terms of reference were, quote, "They
3 were quite restrictive terms of reference." The
4 term of reference in the Arthur Allan Thomas case
5 said, what sum should be paid by way of compensation
6 to Arthur Allan Thomas? The Order in Council in
7 this case recommends reconvening the adequacy of
8 compensation paid to Donald Marshall, Jr. Those two
9 terms of reference are not terribly dissimilar. You
10 can't just ignore them. On the other hand, they
11 don't govern. You're not bound by them. But you
12 are entitled to look at them to see what thoughtful
13 consideration has been given by others faced with
14 the task of awarding reasonable compensation to a
15 person, whoever that person may be, for the loss
16 suffered by their wrongful incarceration. The claim
17 for Mr. Marshall's parents, the non-pecuniary claim.
18 You have heard testimony from Donald Marshall, Sr.,
19 as to the way in which he and his wife suffered when
20 their son was wrongfully convicted and throughout
21 the years that he remained incarcerated. It's
22 difficult to think of a more tragic circumstance to
23 befall a family as closely knit as the Marshall
24 family. And all counsel recommend that an award of
25 some sort be made to Mr. Marshall's parents by way

1 of general damages. And, finally, in the area of
2 the claims where counsel differ the most is what I
3 will call the "derivative claim." And this aspect
4 of the general damages claim relates solely and
5 directly to the argument that in order to properly
6 compensate Mr. Marshall as a Micmac, some monies
7 must be given in trust to the Grand Council of the
8 Micmac Nation to fund a cultural survival camp for
9 Micmac children at which Donald Marshall, Jr. could
10 work. The argument, in part, is that in order for
11 Donald Marshall, Jr. to become properly
12 reintegrated, this award is necessary. In other
13 words, in some respect, it's compensation for Donald
14 Marshall. But what is it that you're really being
15 asked to do here? In my submission, you're being
16 asked to provide Donald Marshall, Jr. for money for
17 his dreams. And the testimony, it's true, is
18 unanimous, that Donald Marshall, Jr. would wish to
19 work in such a camp. The testimony is also
20 unanimous that he seems to have a special ability to
21 develop relationships with children. And I direct
22 you to a short excerpt from the testimony of Jack
23 Stewart.

24 "Does he want to be able to
25 maintain a traditional job?"

1 And Jack Stewart said:

2 "I don't think he knows.
3 He's never held a
4 traditional job, for a
5 start, so he's got nothing
6 to compare that with. And I
7 think if Junior gets money
8 -- I think if he sees that
9 money assisting him in his
10 dreams and can be assisted
11 in his dreams, then that
12 money is going to mean
13 something."

14 And from the testimony of Judge Cacchione:

15 "Did he ever articulate to
16 you what his short or long-
17 term goals might be?"

18 And Judge Cacchione said:

19 "Yes. I remember we had
20 conversations about wanting
21 to have children, wanting to
22 sort of run a wilderness
23 camp. I think he was
24 interested in that. He had
25 had some experience with a

1 wilderness camp when he was
2 in the institution. And I
3 think he felt that if he
4 could work at something like
5 that with Native youth, take
6 them away from the booze and
7 the drugs and bring them
8 back to the land -- I
9 remember that conversation,
10 wanting to help in that way.
11 I don't think that Junior
12 would ever be employable in
13 a 9 to 5 context."

14 And it's striking and I bring that quote to your
15 attention because Judge Cacchione represented Junior
16 Marshall in 1984. And that's a recollection of a
17 conversation that Judge Cacchione would have had
18 with Junior Marshall at that time. And
19 notwithstanding what I accept to be a very sincere
20 desire on the part of Donald Marshall, Jr. to work
21 at such a camp, and notwithstanding that such a camp
22 may be needed in order to assist in the preservation
23 of the Micmac culture, I have concluded that it's
24 not the function of compensation. It may well be
25 the function of some other institution, but it's not

1 the function of compensation to pay for somebody's
2 dreams, especially where, as here, you're already
3 asked to provide an income to make Mr. Marshall
4 comfortable. Now, I realize that this part of the
5 claim is culturally specific. It is that, because
6 it's a request for a camp. So, in this particular
7 context, it is culturally specific. But as a
8 general proposition, it's a category. It's a type
9 of claim. And when regarded in that way, the claim
10 is a request to make fulfillment of dreams part of
11 the award for compensation. I can't support that
12 proposition. I can assure you that all of us, I
13 think, have wrestled with this component of the
14 claim from the outset. And there is a lot that will
15 be appealing to anyone's sense of generosity to
16 recommend such a camp, or money to be given to the
17 Grand Council. But that sense of generosity cannot,
18 perhaps unfortunately, get in the way of analysis.
19 I have read the section many times of Ms. Derrick's
20 brief on this aspect of the claim. And I cannot
21 find a connection between your mandate and the
22 presentation of this claim that would enable me to
23 support it. There is an argument advanced by
24 counsel for Donald Marshall, Jr., on his behalf,
25 that because the Order in Council directs you to

1 bear in mind the warning that there should not be
2 any restriction on any particular aspect of the
3 claim -- that's from Recommendation #4 of the
4 previous Marshall Report which said there should be
5 no ceiling on any particular aspect of the claim--
6 that this means that the community claim cannot be
7 rejected since that would effectively put a zero
8 limit on the community claim. In other words, to
9 reject that claim would be to put a ceiling on it,
10 and that ceiling would be zero. And that that would
11 therefore be to put a limit on, quote, "any
12 particular aspect of the claim." With respect,
13 surely just because a particular type of claim is
14 advanced, that doesn't make it a claim. It's a
15 bootstrap argument. Because somebody says, "I am
16 advancing a claim for X," doesn't mean that that
17 claim then necessarily comes within your terms of
18 reference and then must fall to be considered in the
19 aspect of a limitation on any particular aspect of a
20 claim. That part of your Order in Council is not
21 the operative part. The operative part is
22 compensation for Donald Marshall, Jr., not any
23 particular aspect of a claim. My view is that
24 you're restricted by compensation paid to Donald
25 Marshall, Jr. And it's not retrogressive to reject

1 a claim for compensation that's not within your
2 mandate. This process of compensation cannot solve
3 everything. It can provide compensation to Donald
4 Marshall, Jr., and I urge you to provide reasonable
5 and generous compensation to Donald Marshall, Jr.
6 But, in my submission, that does not include the
7 derivative claim because it doesn't come within the
8 terms of your mandate. And, finally, and in
9 conclusion, my recommendation is that an amount be
10 awarded to Donald Marshall, Jr. which will make his
11 life comfortable, and that that amount should be
12 awarded by way of a structured settlement and it
13 should be awarded as a claim for general damages.
14 And it should be an amount which truly reflects
15 compensation for what you will have to assess he has
16 been through for the last 19 years and what that 19
17 years has done to the life of Donald Marshall, Jr.
18 Thank you.

19 MR. EVANS

20 Mr. Saunders, do you wish to proceed now or do
21 counsel wish to have a short recess? I think 10
22 minutes, maybe.

23 (10-MINUTE BREAK)
24
25