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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

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

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

9 MR. EVANS

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

12 MR. SAUNDERS

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

16 MR. EVANS

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

18 MS. DERRICK - Submission

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

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

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

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

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

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

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

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

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

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

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

3 MR. EVANS

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

8 MS. DERRICK

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

15 MR. EVANS

16 No problem with that.

17 MS. DERRICK

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

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

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

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

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

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

1 MR. EVANS

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

4 MS. DERRICK

5 Well the statement is:

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

9 which is the period 1982 to 1990:

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

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

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

7 MR. EVANS

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

11 MS. DERRICK

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

23 MR. EVANS

24 That's right.
25

1 MS. DERRICK

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

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

21 MR. EVANS

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

24 MS. DERRICK

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

1 MR. EVANS

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

4 MS. DERRICK

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

8 MR. EVANS

9 Right.

10 MS. DERRICK

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

14 MR. EVANS

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

21 MS. DERRICK

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

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

17 MR. EVANS

18 By him.

19 MS. DERRICK

20 By him.

21 MR. EVANS

22 Right.

23 MS. DERRICK

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

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

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

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

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

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

16 MR. EVANS

17 Whether he takes the treatment or not?

18 MS. DERRICK

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

25 MR. EVANS

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

6 MS. DERRICK

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

24 MR. EVANS

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

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

11 MS. DERRICK

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

24 MR. EVANS

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

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

3 MS. DERRICK

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

15 MR. EVANS

16 Which case are you referring to?

17 MS. DERRICK

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

20 MR. EVANS

21 Right. Oh yes, thank you.

22 MS. DERRICK

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

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

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

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

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

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

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

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

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

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

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

8 MR. EVANS

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

11 MS. DERRICK

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

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

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

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

7 MR. EVANS

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

9 MR. SAUNDERS

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

11 MR. EVANS

12 Mr. Spicer?

13 MR. SPICER

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

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

25 MR. EVANS

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

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

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14 Certified Correct:

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