DALHOUSIE LAW SCHOOL HALIFAX CANADA B3H 4H9

CONFIDENTIAL

DATE: March 14, 1988

TO: W. Wylie Spicer, Counsel, The Royal Commission on the Donald Marshall Junior Prosecution

FROM: Archie Kaiser

SUBJECT: Compensation for Wrongful Conviction and Imprisonment: Quantum, Principles, Factors and Process

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Following our telephone conversation of Friday, March 11, I reviewed some of any materials with a view to assisting you in your preparation for your examination of Mr. Giffin. Obviously, there was very little time available to properly advise you on the issues which might arise during the testimony of this witness, but I am sending along these brief notes anyway.

A. Quantum

I attach a table where I have noted a few awards, both recent and as far back as 1905. The examples should be studied with caution. They are largely drawn from the U.S. and U.K. experience and I make no claim that this is anything near an exhaustive list. The rules, such as they are, in the U.K. are based upon various ministerial statements and provide for ex gratia payments. The American cases vary widely as far as the basis of claim is concerned. Until recently, many states passed a moral obligation bill which was quite fact-specific and which would provide for the state agreeing that a cause of action could be brought against it in the courts. There are contemporary examples (e.g. New York) giving a legislative entitlement to compensation. Beyond these differences in the mechanism of compensation being paid, there are important distinctions in the legal systems and economic conditions among the various countries which could make

a simple foreign exchange conversion quite misleading.

None the less, you may learn something from my short list. The Quantum of awards has not been a matter of great interest for me, dwelling as I have been on broader issues.

B. Principles

Any compensation scheme (or for that matter, any decision on an individual case in the absence of a scheme) must have some basic set of principles as a foundation for the assessment of the individuating factors which must be considered before an award can be made. It would, of course, be possible to merely set an arbitrary formula similar to that found in some workers' compensation programs, for example, $10,000 per year for the first three years of imprisonment and $15,000 thereafter. In the same vein, there could be a ceiling on awards, regardless of the length or conditions of imprisonment or the effect on the life of the wrongfully convicted person.

However, there are far stronger arguments (and ample precedent) for full compensation for the injured party. Simple restitutionary principles should form the baseline for any award: the victim should be restored to the economic position he would enjoy if not for the wrongful act of the state. Beyond that, given the seriousness of convicting the innocent (it has often been said to be among the gravest problems with which a civilized society can concern itself) the idea of full compensation, on a fair and reasonable basis, is dominant in the little academic writing in the field and in many current legislative developments. Taking this stance inevitably means the rejection of any mechanistic formula or artificial ceiling and may mean that large sums ought to be paid to those who have been treated worst

by the criminal justice system - innocent people who have been found guilty and served long terms of imprisonment.

Out of interest, although the Federal-Provincial Task Force does not make a recommendation on the full compensation/no ceiling issue, they seem to be heading in the right direction, by their identification of arguments, at pp. 33-34.

The Thomas Royal Commission seems to have understood these issues and I note a few extracts from pp. 115-116.

> "This Commission is privileged to have been given the task of righting wrongs done to Thomas, by exposing the injustice done to him by manufactured evidence. We cannot erase the wrong verdicts or allow the dismissed appeals."
>
> "Quite apart from the various indignities and loss of civil rights associated with his deprivation of liberty, we consider he will for the rest of his life suffer some residual social disabilities attributable to the events of the last 10 years." [Emphasis added]
>
> "We now consider the amount of compensation to be awarded to him to compensate him for all the damage, suffering, and anguish he has sustained mentally and physically as a consequence of his wrongful convictions and subsequent years in prison."

C. Factors

I am here going to address only a limited range of variables which ought to be considered in giving effect to the principles discussed above. I have drawn my rough list from several sources (citations available) and have amplified it in some areas which may be of interest to you in examining Mr. Giffin (and elsewhere). I am assuming that a person entitled to compensation would have been (i) convicted, (ii) imprisoned, (iii) pardoned or found not guilty on a reference, and (iv) a person who did not commit the

acts charged in the accusatory instrument. Any purported blameworthiness of his or her conduct will be addressed separately.

1. Non-Pecuniary Losses

(i) loss of liberty, which may be particularized in some of the following heads; indeed some overlap is inevitable;

(ii) loss of reputation;

(iii) humiliation and disgrace;

(iv) pain and suffering;

(v) loss of enjoyment of life;

(vi) loss of potential normal experiences, such as starting a family;

(vii) other foregone developmental experiences, such as education or social learning in the normal workplace;

(viii) loss of civil rights, such as voting;

(ix) loss of social intercourse with friends, neighbours and family;

(x) physical assaults while in prison by fellow inmates or staff;

(xi) subjection to prison discipline, including extraordinary punishments imposed legally (the wrongfully convicted person might, understandably, find it harder to accept the prison environment), prison visitation and diet;

(xii) accepting and adjusting to prison life, knowing that it was all unjustly imposed;

(xiii) adverse effects on future advancement, employment, marriage, social status, physical and mental health and social relations generally;

(xiv) any reasonable third party claims, principally by family, could be paid in trust or directly; for example, the other side of (ix) above is that the family has lost the association of the inmate.

Surely few people need to be told that imprisonment in general has very

serious and quite detrimental effects on the inmate, socially and psychologically. For the wrongfully convicted person, these harmful effects are heightened exponentially, as it is never possible for the sane innocent person to accept not only the inevitability but the justice of that which is imposed upon him. The above list is intended to add some specificity to the mainly non-pecuniary category which it reflects. For the person who has been subjected to a lengthy term of imprisonment, we approach the worst case scenario. The notion of permanent social disability due to a state wrong begins to crystallize. The point is that prison, for many, teaches a very maladjusted way of being for life outside the institution and that the longer this distorting experience goes on, the less likely a person can ever be whole again. Especially for the individual imprisoned as a youth, the chances of eventual happy integration into the normal community (which by the way sent the accused to jail unfairly in the first place) must be very slim. Therefore, beyond the factors noted in this section, special levels of compensation need to be considered for this likely chronic social handicap.

2. Pecuniary Losses

There will be considerable variability here, reflecting in part the person's skills and employability at the time of incarceration. One should be cautious in this regard, however, in assessing compensation, for it may be that the wrongfully convicted person's pre-existing marginality contributed to his or her being found guilty and kept in prison. If full compensation is one of the guiding principles, then each claimant should be given the benefit of the doubt on what his or her life would have held out

but for the mistaken conviction.

Some headings might include:

(i) loss of livelihood;

(ii) loss of employment related benefits, such as pension contributions by employer;

(iii) loss of future earning ability;

(iv) loss of property due to incarceration or foregone capital appreciation;

(v) legal expenses, in connection with the original trial and appeal, subsequent appeals or special pleas, any new trial or reference, and the compensation application itself. Most awards add the legal expenses, presumably on the belief that the wrongfully convicted person should not have to pay to secure his or her release and redress when he or she is the victim. A fortiori, when the imprisonment is long, the new evidence elusive or the authorities recalcitrant;

(vi) expenses incurred by friends and family; for example, in visiting the prisoner or securing his or her release, perhaps to be paid in trust for them or directly to them.

3. Blameworthy Conduct

Most compensation schemes envisage some reduction or exclusion for the person who has contributed to or brought about his or her own conviction. The obvious example would be the person who eagerly but fancifully confesses to a crime for which he or she was not responsible. Even there, caution is in order, for the criminal justice system is supposed to find the truth of allegations, even if the accused has been partly to blame for a particular falsehood or an atmosphere of untruth. Further, there is great imprecision in many statements to the effect that "the accused is the author of his or her own fate". How often can anyone confidently say that the accused's conduct is to be held to account to the tune of a 10% reduction of the total

award? Finally, the spectre of the state simultaneously thereby evading and projecting responsibility, in effect scapegoating and blaming the victim for its errors, must loom large in the mind of any conscientious person when it comes to assessing the relevance of the victim's behaviour.

By all means, some escape hatch should be reserved for the fraudulent victim or the reckless participant in a criminal trial, but this feature of a compensation scheme (or award) should not be used to punish the naive, the youthful, the feeble-minded, the powerless or the frightened, among others.

Actual awards seldom recite specifically why (or if) they may have been reduced due to this type of factor. Again, if fairness and reasonableness are the bywords and full compensation the desired end, the state should err on the side of generosity. Meanness, vindictiveness, small-mindedness, or intellectual laziness should not allow the importance of the victim's conduct to be overblown.

D. Process

You have not asked me to address this issue, so I will comment upon it very briefly. The fundamental point is that, in the absence of a statutory scheme, can there and ought there to be guidelines for the submission of an ex gratia claim? The answer must be an emphatic yes, if the state is accepting its responsibilities, moral and legal, in a bona fide manner. This provision of mere guidelines is by no means adequate to meet the obligations of a signatory to the International Covenant, but is a step in the direction of procedural fairness and basic decency.

I am not sure whether this was done in the Marshall case, but it ought to have been the first step of the Attorney-General once a decision had been

made to compensate. Materials would have been readily available, especially from the U.K. and adaptations could have readily been made for the Canadian environment and the facts at hand. If this were not done, then one in the position of Marshall would be left with trying to figure out the bases for a relatively unprecedented claim, with no indication by the government of how it has determined that it should discharge its moral and international legal obligations. The process could readily become a conventional cat and mouse bargaining game which is certainly not the proper spirit for the settlement of such issues.

I attach some recent British materials in the nature of an Explanatory Note to Claimants and a subsequent Ministerial statement. It is by no means ideal, but is much better than nothing.

There are many other "process" issues which could be addressed in this case, no doubt, but I am not now aware of the specific facts.

Best of luck in your examination. I am at your service.

AK/lmr
Attachments

CASE/ PLACE/ DATE	AWARD	METHOD	IMPRISONMENT	FACTORS	LEGAL + OTHER COSTS	REDUCTION FOR...?	OTHER ISSUES	MISC. NOTES incl. SOURCE
VGAN, G.B., 1985	85 pending; '86 £18,500	eg Home Office	Wounding 4 yrs, quashed on appeal		legal costs added	£ [illegible] + [illegible] + Justice submission ←	Confession withheld by Crown resulted in 471 days more in prison	Justice 85 24-25; " 86 15; was still [illegible] [illegible]
M. + P. McDONAGH [illegible] G.B. [illegible] dates [illegible] Justice cites →	—						C.A. rejects appeal; Justice calls for difficult cases to be resolved by special tribunal unhampered by [illegible].	Justice 85 26-27
E.CLARKE	85 —; 86 CA reference fails		murder				H.O. Minister meets w group + promises review; earlier rejected C.A. Ref. as [illegible] not new, but reinterpretation	85 Justice; '86 16-17 - C.A. upheld [illegible] [illegible] despite [illegible] slipping away
LIVESEY	85 —; 86 CA Ref. ordered; 87 " Dismissed		murder				Justice/BBC call'n resulted in refusal to reopen case	85 Justice acc. likely [illegible] after murder; will [illegible]; 87 Justice — CA [illegible]
Canterbury Jeweller	'86 pending	appeal out of time unopposed	4 yrs sent; 3½ mo served				confession of actual robber made before trial not passed on to [illegible].	56 Justice
MYCOCK	? £11K per year expected; £20K rec'd	C.A. Ref on Home Sec order quashes conv.	robbery; 5 yrs. sent; served 2 yrs, 5 mos	police misconduct [illegible], [illegible]; [illegible] [illegible]	costs add'l.		id. evid defective; police [illegible] [illegible] mistaken id. to [illegible]	86 Justice / BBC + [illegible] material.
FOX	?	[illegible] Sec asked for ref.	murder - W; [illegible]				alibi disbelieved; BBC uncovers other evid.	86 Just. BBC
STEEL	?	"	murder - life				police brutally extract confession; other [illegible] [illegible] w [illegible].	86 Just BBC
POCOCK	?	[illegible] + sent quashed [illegible] [illegible] rejected	poss drugs (2); attempt [illegible] of justice → 5 yrs → 2 [illegible]				p.o.'s [illegible] have seen what they described	87 Just.
LOUGHLIN	N.A.	sent appeal only	wounding [illegible] - life [illegible] — 5				[illegible] sent appeal	87 Just

CASE/ PLACE/ DATE	AWARD	METHOD	IMPRISONMENT	FACTORS	LEGAL + OTHER COSTS	REDUCTION FOR...?	OTHER ISSUES	MISC. NOTES incl. SOURCE
GB / 86 likely "recent case" NGAN	£18000	?	16 mos	£8000 non-pec loss [illegible]				22 Dec 86 letter Ashman
USA / 84 Texas GETER	SUIT $2 million	civil suit	19 mos / robbery					ABAJ June 84
USA / ? Tennessee FORBES	$250 K award ($1.2 mil sought) on appeal	" "	5 yrs max	- salary - loss approx. time - phys injuries - legal expenses ($41.5 K) - loss liberty	included			" "
USA / 80 Calif. Grannelli (Ureno Verenga?) see ⊕	$1 mil	civil suit - false imp.	2½ yrs 2nd murder	int. infliction of emotional distress				3 New LJ 14 Dec 15/80 (in Dave ⊕) → p.267 (check)
USA / 1946 NY. Campbell	$115K	moral obligation bill; then suit	?; long term	- loss earnings + prison misery - suffering + effects of long term				Albany LR ⊕ Vandem 202
USA NY Zimmerman	$1 mil (cashed for $10 mil)	moral oblig. bill + suit	24 yrs / murder		as much as $500 K deducted from award of $1 mil		victim unhappy w award; died soon after getting it; harsh prison treat., protested innocence throughout	⊕ ↑ 204 + 41 [illegible]
USA NY Dabbs	$15K	suit; false arrest + imp	4 days					⑤
NZ Thomas	$1.1 mil NZ			extensive disc.				
UK / 1965 BECK	£4K	eg	7 yrs				mist. id.	Justice 1982 Report ↓
UK / 1928 SLATER	£6K	"	18½ yrs murder				didn't commit	"
" / 1935 / Emery et al	£300-400	"	2 yrs [illegible]					
" 1965 Gross et al	£800-1000	"	8 mos robbery				wrong id.	
" 1974 Virag	£17.5K	"	5 yrs				" "	
1977 Mechan	£7.5K		[illegible] murder	[illegible] lower award				

CASE/ PLACE/ DATE	AWARD	METHOD	IMPRISONMENT	FACTORS	LEGAL + OTHER COSTS	REDUCTION FOR...?	OTHER ISSUES	MISC. NOTES incl. SOURCE
Dougherty/UK/75	£2K	eg	8 mos/theft					Justice 82 ↓
Naughton/UK/77	£10K	"	3yrs/robbery				abi divisible'd	"
Benjamin/UK/76	£9K	"	rape/12 yrs → not served					
Taylor/1979/UK	£21K	"	5yrs/murder					
Preece/≈1982	£70	"	?/murder	Report contains Price factors			discredited sci evid.	
Stevens/76	£8.5K	"	3yrs/robbery (out of work)					
Burke/80	£7.0K	"	18 mos/murder	see esp. p. 11 - existing practice p. 19+ - proposals + comparative reviews				
Daniels/USA 1985	$600K	civil suit; settled	6–18 yrs sex/assr att murder served 4	treated badly by other inmates as sex off.				Huffer ⑧ 538
Warwick/Fox Canada/1986	$275K	eg	8 of 10 yrs for rape				$10K deduction for victim's previous rape	
Howard/USA ILLINOIS/1955	$51K	special bill	17 yrs served for murder					

Friday, 29th November, 1985.

Written No. 173

Mr. Tim Smith (Beaconsfield): To ask the Secretary of State for the Home Department, if he will make a statement with regard to the payment of compensation to persons who have been wrongly convicted of criminal offences.

MR. DOUGLAS HURD

There is no statutory provision for the payment of compensation from public funds to persons charged with offences who are acquitted at trial or whose convictions are quashed on appeal, or to those granted Free Pardons by the exercise of the Royal Prerogative of Mercy. Persons who have grounds for an action for unlawful arrest or malicious prosecution have a remedy in the civil courts against the person or authority responsible. For many years, however, it has been the practice for the Home Secretary, in exceptional circumstances, to authorise on application ex gratia payments from public funds to persons who have been detained in custody as a result of a wrongful conviction.

In accordance with past practice, I have normally paid compensation on application to persons who have spent a period in custody and who receive a Free Pardon, or whose conviction is quashed by the Court of Appeal or the House of Lords following the reference of a case by me under section 17 of the Criminal Appeal Act 1968, or whose conviction is quashed by the Court of Appeal or the House of Lords following an appeal after the time normally allowed for such an appeal has lapsed. In future I shall be prepared to pay compensation to all such persons where this is required by our international obligations. The International Convenant on Civil and Political Rights [Article 14.6] provides that: "When a person has by a final decision been convicted of a criminal offence and when subsequently

/ his

his conviction has been reversed. or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him".

I remain prepared to pay compensation to people who do not fall within the terms of the preceding paragraph but who have spent a period in custody following a wrongful conviction or charge, where I am satisfied that it has resulted from serious default on the part of a member of a police force or of some other public authority.

There may be exceptional circumstances that justify compensation in cases outside these categories. In particular, facts may emerge at trial, or on appeal within time, that completely exonerate the accused person. I am prepared, in principle, to pay compensation to people who have spent a period in custody or have been imprisoned in cases such as this. I will not, however, be prepared to pay compensation simply because at the trial or an appeal the prosecution was unable to sustain the burden of proof beyond a reasonable doubt in relation to the specific charge that was brought.

It has been the practice since 1957 for the amount of compensation to be fixed on the advice and recommendation of an independent assessor who, in considering claims, applies principles analogous to those on which claims for damages arising from civil wrongs are settled. The procedure followed was described by the then Home Secretary in a written reply to a Question in the House of Commons on 29th July 1976 (Official Report, columns 328 330). Although successive Home Secretaries have always accepted the assessor's advice, they have not been bound to do so. In future, however, I shall regard any recommendation as to amount made by the assessor in accordance with those principles as binding upon me. I have appointed Mr Michael Ogden QC as the assessor for England and Wales.

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He will also assess any case which arises in Northern Ireland where my rt. hon. Friend the Secretary of State for Northern Ireland intends to follow similar practice.

HOME OFFICE LETTER TO CLAIMANTS

EXPLANATORY NOTE
EX GRATIA *PAYMENTS TO PERSONS WRONGLY CONVICTED OR CHARGED:*
PROCEDURE FOR ASSESSING THE AMOUNT OF THE PAYMENT

1 A decision to make an *ex gratia* payment from public funds does not imply any admission of legal liability; it is not, indeed, based on considerations of liability for which there are appropriate remedies at civil law. The payment is offered in recognition of the hardship caused by a wrongful conviction or charge and notwithstanding that the circumstances may give no grounds for a claim for civil damages.

2 Subject to Treasury approval, the amount of the payment to be made is at the direction of the Home Secretary, but it is his practice before deciding this to seek the advice of an independent assessor experienced in the assessment of damages. An interim payment may be made in the meantime.

3 The independent assessment is made on the basis of written submissions setting out the relevant facts. When the claimant or his solicitor is first informed that an *ex gratia* payment will be offered in due course, he is invited to submit any information or representations which he would like the assessor to take into account in advising on the amount to be paid. Meanwhile, a memorandum is prepared by the Home Office. This will include a full statement of the facts of the case, and any available information on the claimant's circumstances and antecedents, and may call attention to any special features in the case which might be considered relevant to the amount to be paid; any comments or representations received from, or on behalf of, the claimant will be incorporated in, or annexed to, this memorandum. A copy of the completed memorandum will then be sent to the claimant or his solicitor for any further comments he may wish to make. These will be submitted, with the memorandum, for the opinion of the assessor. The assessor may wish to interview the claimant or his solicitor to assist him in preparing his assessment and will be prepared to interview them if they wish. As stated in paragraph 2 above, the final decision as to the amount to be paid is a matter entirely for the Home Secretary.

4 In making his assessment, the assessor will apply principles analogous to those governing the assessment of damages for civil wrongs. The assessment will take account of both pecuniary and non-pecuniary loss arising from the conviction and/or loss of liberty, and any or all the

following factors may thus be relevant according to circumstances:–

Pecuniary loss
Loss of earnings as a result of the charge or conviction.
Loss of future earning capacity.
Legal costs incurred.
Additional expense incurred in consequence of detention, including expenses incurred by the family.

Non-pecuniary loss
Damage to character or reputation.
Hardship, including mental suffering, injury to feelings and inconvenience.

The assessment will not take account of any injury a claimant may have suffered which does not arise from the conviction (eg as a result of an assault by a member of the public at the scene of the crime or by a fellow prisoner in prison) or of loss of earnings arising from such injury. If claims in respect of such injuries are contemplated, or have already been made to other awarding bodies (such as the courts or the Criminal Injuries Compensation Board), details should be given and included in the memorandum referred to in paragraph 3.

When making his assessment, the assessor will take into account any expenses, legal or otherwise, incurred by the claimant in establishing his innocence or pursuing the claim for compensation. In submitting his observations a solicitor should state, as well as any other expenses incurred by the claimant, what his own costs are, to enable them to be included in the assessment.

5 In considering the circumstances leading to the wrongful conviction or charge the assessor will also have regard, where appropriate, to the extent to which the situation might be attributable to any action, or failure to act, by the police or other public authority, or might have been contributed to by the accused person's own conduct. The amount offered will accordingly take account of this factor, but will not include any element analogous to exemplary or punitive damages.

6 Since the payment to be offered is entirely *ex gratia*, and at his discretion, the Home Secretary is not bound to accept the assessor's recommendation, but it is normal for him to do so. The claimant is equally not bound to accept the offer finally made; it is open to him instead to pursue the matter by way of a legal claim for damages, if he considers he has grounds for doing so. But he may not do both. While the offer is made without any admission of liability, payment is subject to the claimant's signing a form of waiver undertaking not to make any other claim whatsoever arising out of the circumstances of his prosecution or conviction, or his detention in either or both of these connections.

09-84-0258-01

House of Assembly
Nova Scotia

P. O. Box 877
Kentville, N. S.
B4N 4H8

January 23, 1984

ATTORNEY GENERAL

Hon. Ron Giffin
Attorney General
Province of Nova Scotia
Halifax, N. S.

Dear Sir:

Enclosed is a photocopy of my letter to the editor of the Kentville Advertiser in December 1983 regarding the Donald Marshall case. Enclosed also is a photocopy of the Donham column which prompted my letter.

Yours very truly,

Edd W. Twohig, M.L.A.
Kings North

hlh
Enc.

Nov 1983

Giffin's moral duty is clear

Comment

Parker Barss Donham

Nova Scotia new attorney Giffin, has had a month to consider what the province will do for Donald Marshall Jr., the Micmac Indian who spent 11 years in prison for a murder someone else committed.

The choice confronting Giffin is straight forward: He can accept the province's obligation to correct this grotesque injustice, or he can follow Ottawa's example and try to sleaze out of his responsibility on the strength of dubious technicalities.

Three steps are necessary to balance the province's moral ledger. Marshall must be reimbursed for the $82,000 in legal expenses he incurred overturning the original, unjust verdict. He and his family must be compensated financially for 11 lost years. And the circumstances surrounding his imprisonment must be subjected to a full impartial, public inquiry.

The last of these obligations will be the hardest for the province to accept, since it will entail public censure for the officials who handled Marshall's case. Men in positions of authority customarily close ranks in situations of this sort, especially white men when the aggrieved is an Indian.

Much is already known about the events surrounding Marshall's original trial. He was convicted on the testimony of two eyewitnesses who claimed to have seen him stab 16-year-old Sandy Seale, and a third witness whose account of Marshall's movements on the night of the murder fitted the police version of the incident.

All three witnesses have since recanted their testimony. All say they were pressured by police into giving false evidence.

Ten days after Marshall's conviction, a man walked into the Sydney Police station and identified the real killer. His description of events closely matched Marshall's account. But when the RCMP instituted a second investigation on the basis of this evidence, they did not reinterview a single one of the witnesses who had testified at Marshall's trial. Nor did they notify defense lawyers that the new witnesss had come forward, despite the fact that an appeal was underway.

There were other inexplicable lapses in the police investigation. The dead boy's body was never subjected to an autopsy. No photographs were taken. No murder weapon was discovered, although when the case was re-opened in 1982, the murder weapon turned up quickly.

Apologists for the system's handling of the Marshall case contend that on the night of the Seale boy's death, Marshall and Seale were attempting to rob Roy Newman Ebsary, the man who has now been convicted of killing Seale. The most public exponent of this view has been the Appeals Division of the Supreme Court of Nova Scotia, whose infamous decision acquitting Marshall last spring included the incredible statement that "any injustice is more apparent than real" because Marshall was "partly the author of his own misfortune."

The Supreme Court overlooked the fact that Marshall has never been convicted of this alleged attempted robbery. He has never even been charged with it. He is entitled to a presumption of innocence. There is not a shred of evidence to suggest that the police investigation would have taken a different course had Marshall owned up to an attempted robbery.

On the contrary, there is much that suggests police were determined to pin the crime on Marshall, no matter how much contrary evidence presented itself. It's this suspicion that needs to be aired at a public inquiry.

Men in positions of great power do not like to see the system of which they are pillars called to account. The Supreme Court has gone far out of justice's way to offer the province an escape from its responsibilities in the Marshall case.

Ron Giffin should resist the temptation to take his easy way out. He will never be confronted with a clearer moral choice.

(Parker Barss Donham welcomes comments on his columns. You can write him at R.R. 1, Box 88, Bras d'Or, Nova Scotia, B0C 1B0.)

DEC 1983

Letters

Columnist didn't think clearly

Dear Sir:

The shrill cry for moral responsibility in your recent "Comment" column (Parker Barss Donham) reflects the commentator's failure to follow the most basic of moral tenets: to think clearly.

Some journalists feel that freedom of the press, unlike freedoms of other kinds, does not also require responsibility. If the commentator's column is not irresponsible by its failure to present a balanced position, then it does reflect lack of reason. Although I have given much thought to the Marshall case, I have not been able to come to such clear-cut conclusions as your commentator would lead us to believe he has.

We do not live in the Kingdom of God. What we live in is a society created by humans in an attempt to serve all members of that society. We should always strive for perfection, knowing, however, that we will never reach it. Is it society's obligation to single Donald Marshall out for financial remuneration?

There are others who have suffered the imperfections of our society. Maybe as a price for the good we receive from society we must each take our chances with the bad. If our reason tells us that our responsibility as members of society do go further than establishing the rules of society, how do we quantify that responsibility to any one individual?

During my lifetime, I have heard a few concerns, and fewer confirmations, of innocent people being convicted. However, one hears continuous complaints that our system seems to favor the criminal. I do not feel that we, as members of society, should need to bear guilt because our judicial system allows the conviction of Donald Marshall for a crime he did not commit. The problem would appear to lie not with the system, but with human frailties.

I believe there is merit in the idea of having an investigation of the circumstances to determine the degree of responsibility that could be attributed to the actions of those persons who allowed our system not to work properly. Any responsibility or damages that might be determined should not be a charge against the taxpayers of Nova Scotia unless the system itself is found at fault.

A monetary loss should first be determined and the percentage of blame for this loss should be attributed to those responsible. There can be no doubt that Donald Marshall would need to bear some proportion of the liability. A percentage could be attributed to the fact that his original intent to carry out a crime started the whole chain of events. Another percentage would need to be allowed for his failure to give true evidence at his trial.

The percentage of liability to the various policeman and members of the judicial system for any failure to carry out their duties properly and with impartiality would have to be quantified. If it could be established that society as a whole had failed to establish proper controls and systems, a percentage might be allocated to all taxpayers. This procedure would determine who should be responsible for the monetary costs and damages.

What are the costs and damages? Certainly, Donald Marshall spent longer in prison than for the robbery attempt that started it all. His lost earnings for that extra time would need to be determined. The costs to taxpayers for police costs, court costs, and prison costs would have to be included since they would not have been incurred except for the murder and subsequent events.

An accumulation of all these costs and damages distributed among those who could be determined to have acted wrongly might provide some very good information on the costs of crime. The percentages of costs could be distributed to false testimony by eye-witnesses, policemen for pressuring the giving of false evidence, police responsibility for an improperly conducted second investigation, lapses in police investigation, any others who might bear a per cent of responsibility including, of course, Donald Marshall himself.

On a daily basis I am aware of difficulties, hardships and injustice, real or imagined, suffered by many in our society. But what I see, hear, and read that is going on in most of the rest of the world is worse. We can only strive to do better.

Journalists who present incomplete, inaccurate or biased commentary do more to increase our problems than to decrease them.

Edd W. Twohig, M.L.A.
Kings North

Susan

Compensation

NOV 21 1988

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November 16, 1988

Mr. Wiley Spicer
Commission Counsel
Royal Commission on the Donald
Marshall, Jr., Prosecution
Maritime Centre
1505 Barrington Street
Suite 1026
Halifax, Nova Scotia
B3J 3K5

Dear Wiley:

Here is a copy of a very recent English case that I thought would be of interest to you. You might want to share it with the Commissioners as you contemplate the need for more clearly defined rules and procedures for the payment of compensation to those who are deserving.

I hope you find it useful.

Sincerely,

ME/jp

Marlys Edwardh

ME:jp

R v Secretary of State for the Home Department, ex parte Harrison

QUEEN'S BENCH DIVISION
STUART-SMITH LJ AND FARQUHARSON J
19, 20 MAY 1988

Crown – Prerogative – Ex gratia payments – Ex gratia payments to persons imprisoned but subsequently acquitted – Whether Secretary of State required to give reasons for refusing to make ex gratia payments.

The applicant was charged with conspiracy to defraud over the running of a co-operative of vegetable growers. After spending over £9,000 on his defence he ran out of funds and applied to the Crown Court for legal aid, which was granted on condition that the applicant pay £1,500 towards his costs. The applicant was unable to meet that condition and represented himself at the trial. He was convicted and sentenced to three years' imprisonment, reduced on appeal to one year, which the applicant served. On a further appeal out of time the Court of Appeal held that the Crown Court had been wrong to refuse the applicant legal aid and, having regard to the way the case had been presented in the Crown Court, the applicant's appeal was allowed and his conviction quashed. The applicant applied to the Secretary of State for compensation for the term of imprisonment he had served, but the Secretary of State refused his request without giving reasons. The applicant sought, inter alia, an order of certiorari quashing the Secretary of State's decision, contending that the Secretary of State had kept confidential the criteria on which he had based his decision to refuse compensation and that the applicant ought to have had that information available to him so that he could make representations on his own behalf.

Held – Since ex gratia payments to persons who had been imprisoned but subsequently acquitted were made under the royal prerogative, the Secretary of State was not obliged to give reasons for refusing to make such a payment. In the circumstances and in the absence of any suggestion that the Secretary of State had acted in a biased or fraudulent manner, the application would be refused (see p 90 *f* to *h*, p 91 *h j*, p 92 *h j*, p 93 *b c* and p 94 *b* to *d*, post).

Dictum of Megarry V-C in *McInnes v Onslow Fane* [1978] 3 All ER 211 at 223 applied.

Notes

For powers of pardon under the royal prerogative, see 8 Halsbury's Laws (4th edn) paras 949–951, and for cases on the subject, see 11 Digest (Reissue) 684–686, *179–207*.

Cases referred to in judgments

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, CA.
McInnes v Onslow Fane [1978] 3 All ER 211, [1978] 1 WLR 1520.
R v Immigration Appeal Tribunal, ex p Khan [1983] 2 All ER 420, [1983] QB 790, [1983] 2 WLR 759, CA.

Cases also cited

A-G of Hong Kong v Ng Yuen Shiu [1983] 2 All ER 346, [1983] 2 AC 629, PC.
R v Secretary of State for Foreign and Commonwealth Affairs, ex p Everett (1987) Independent, 4 December.

Application for judicial review

Joseph Harrison applied, on a renewed application with leave of the Court of Appeal given on 23 March 1987, for (i) an order of certiorari to quash the decision of the respondent, the Secretary of State for the Home Department, made on 3 February 1986 whereby he refused the applicant's application for an ex gratia payment by way of compensation for a term of imprisonment served by the applicant between 14 October 1982 and 10 October 1983, (ii) an order of mandamus requiring the Secretary of State to assess and pay an ex gratia payment, and (iii) to remit the matter back to the Secretary of State. The facts are set out in the judgment of Farquharson J.

Peter Martin for the applicant.
John Laws for the Secretary of State.

FARQUHARSON J (delivering the first judgment at the invitation of Stuart-Smith LJ). This is a motion for judicial review of a decision by the Secretary of State of the Home Department made on 3 February 1986 whereby he refused the application for an ex gratia payment made by the applicant by way of compensation for a term of imprisonment which he served between 14 October 1982 and 10 October 1983.

To establish the background of the case and the circumstances in which this application to the Home Secretary was made, it is necessary to look at the facts. In May 1980 the applicant became concerned in the running of a co-operative of vegetable growers called the Lea Valley Salad Co Ltd. During the period of his overseeing the operations of this co-operative it ran into financial difficulties. One of the customers of the co-operative was a company called Ken Perrett (Evesham) Ltd and at the time of the matters which later were the subject of investigation that company owed something in excess of £11,000 to the co-operative.

The applicant made arrangements for that sum to be paid, not to the co-operative which was likely to go into liquidation but to another company where he had a majority holding called Raltrex Ltd. That sum was duly paid by the customer and, thereafter, the money disappeared or remained unaccounted for.

The applicant's explanation of these financial transactions was that he had made these arrangements to protect the other growers in the co-operative from financial difficulties, and it was also his case that they and others had been informed of what it was he had set out to do. It was for those reasons that the police investigation took place, and in due course the applicant was charged with conspiracy to defraud contrary to common law. Charged with him was an associate named Nichols, an accountant who had been concerned also in the running of the co-operative.

By its very nature it was a substantial case, according to the applicant's affidavit the depositions amounted to nearly 200 pages and there was a very large number of exhibits. It was obviously a case which needed careful and proper preparation.

In the initial stages the applicant instructed solicitors privately and, indeed, before the matter even came on for trial he had expended a sum in excess of £9,000. As a result he ran out of money and made an application to the Crown Court at St Albans for a legal aid certificate. On the first occasion that application was refused. It was subsequently renewed and on that second attempt the judge (who considered each of the applications) granted the applicant a certificate of legal aid but made it conditional on his paying the sum of £1,500.

From a practical point of view that was a hopeless decision because, for the reasons I have already stated, the applicant no longer had funds to meet the costs of his trial. It appears that the judge had made the decision on the basis that the applicant, at the time, owned and was living with his wife in a house which was of substantial value. The relevant regulations at that period in fact provided that that feature, on any application for legal aid, had to be disregarded. The judge's decision to refuse the application on that

When the trial started in September 1982 the applicant had to represent himself. It would be difficult enough for a man in his position to contend with the complexities of a trial involving an allegation of fraud, but his difficulties were compounded by the fact that his co-defendant, Nichols, was represented by counsel and, to some extent, the blame was heaped on the applicant by his co-defendant. He was thus in a difficult position and in the result he was convicted of the offence.

The trial judge imposed a sentence of three years' imprisonment with a compensation order for the repayment of the money that had been paid by the customer and also an order to pay prosecution costs. He instructed his solicitors to appeal immediately but unfortunately, for reasons which are not clear, the appeal was confined to one against sentence. As a result, when the applicant appeared before the Court of Appeal in July 1983, whilst the sentence was reduced there was no argument that his conviction was unsafe. It was in those circumstances that he served a prison sentence from the dates I have already adverted to: October 1982 to October 1983.

The applicant continued in his attempt to appeal against the conviction and subsequently was successful in bringing it before the Court of Appeal, which heard it on 5 July 1985. On that occasion the presiding judge condemned what had happened in strong terms, saying that the case was very disturbing indeed. As a result of his comments about the manner in which the case had been presented the applicant's appeal was allowed and his conviction quashed.

On 30 July 1985, two or three weeks later, his solicitors wrote a letter to the Secretary of State asking for compensation on behalf of the applicant for the term of imprisonment which he had served. The letter, which was comprehensive, set out most of the facts which I have already recounted. Towards the end of it the solicitors wrote this:

> 'We are therefore applying to you on behalf of Mr. Harrison for compensation for the one year he spent in prison as a result of the negligence/misconduct of the Public Officials involved here, namely the Court Officials and the Trial Judge. If there is any matter upon which you require further assistance in order to determine the amount of compensation, please do not hesitate to contact us. Additionally, if there is any matter which you feel militates against compensation could you draw it to our attention so that we can make adequate representation to you in relation to that.'

Thereafter it took some months for this letter to be considered. The respondent referred the matter to the Lord Chancellor's Department. Subsequently, having received a report from them, he considered the application and, on 3 February 1986, as I have already said, refused to pay compensation to the applicant.

During the course of these proceedings, at an interlocutory stage, discovery of certain documents in the possession of the respondent was ordered. One of them, headed chapter A14, is a document which sets out the criteria on which the Secretary of State operates when entertaining an application of this kind. It says this:

> 'For persons convicted but later granted a free pardon, acquitted after a reference by the Secretary of State to the Court of Appeal under section 17 of the Criminal Appeal Act 1968 or acquitted on appeal out of time—those are the three separate categories—an ex gratia payment may be made provided that: (a) on a balance of probabilities, the claimant was more likely that not to have been innocent; and (b) hardship to the claimant has resulted.'

There was a further alternative basis on which he would entertain applications which related to persons who were convicted but acquitted on appeal, having made their application to appeal within time. In those circumstances he would not entertain an application for an ex gratia payment unless, in addition to fulfilling criteria (a) and (b) which I have just read out, there had also been some negligence or default on the part of

During the period that the Secretary of State was entertaining the application made by the applicant in this case, he made a statement to the House of Commons on 29 November 1985, setting out the basis on which he considered these claims. He pointed out, as is the case, that there is no statutory provision for the payment of compensation from public funds, but then went on to explain how, in certain circumstances, he would grant them.

Without going through the Home Secretary's statement, he repeated in effect the grounds that have appeared in the document to which I have already referred (chapter A14), with an additional modification arising out of the United Kingdom obligations under the International Convention on Civil and Political Rights (New York, 16 December 1966; TS 6 (1977); Cmnd 6702). That is not material to the present proceedings.

I am satisfied that there was no variation in fact from the criteria which he already operated, as set out in chapter A14. It is to be noted, however, that in his statement to the House of Commons he did not set out the two conditions (a) and (b) which I have already recited. The reason is that if he was to make it public, as indeed alas it now has been, that he would operate the scheme on the basis that payment would be made only, inter alia, if it was established on the balance of probabilities that the claimant was more likely to be innocent than not, it would reveal to those who knew of the matter that if anybody was refused an ex gratia payment there would be reasons to suspect that the Home Secretary thought that he was still guilty, even though he had been acquitted. That is why the confidentiality of that aspect of the scheme had hitherto remained.

The applicant came within the first of the criteria that I read out. He was in that group of three, namely a person who had been acquitted by the Court of Appeal on an application made out of time. He was not therefore concerned to establish the negligence and default on the part of the police or some other public authority. That has, in fact, been argued before us but, in my judgment, a judge does not come within the definition of 'police or of some other public authority'. There was no need for the applicant to establish that category because, I repeat, he was already entitled to have his claim entertained by the Home Secretary on the other one. No doubt the fact that he had suffered as a result of the orders made by the judge when he applied for legal aid was a factor that the Secretary of State would properly take into account, but it is because of the confidentiality of these criteria that the applicant now bases his present claim.

The grounds are that the Home Secretary had acted unfairly. Whether that is because the decision he made or because the policy embodied in this document which he followed was unfair perhaps does not greatly matter. In effect, it seems to me at all events that the applicant has got to attack the policy as being an unfair one if he is to succeed in the present claim.

The fundamental point made by counsel for the applicant is that the applicant and his solicitors were never informed of these criteria which were adopted by the Secretary of State. Putting it more shortly, he was never aware that his guilt or innocence was in issue as part of the application.

It is the contention of counsel for the applicant that the solicitor, and the applicant himself, should have been so informed so that they could have addressed points to the Secretary of State for his consideration. He says this complaint is in fact fortified because as appears from the same document (chapter A14) the Secretary of State, when entertaining an application of this kind, calls for a police report; not to give an opinion on the guilt or innocence of any particular applicant, but simply so that the Secretary of State can familiarise himself with the background of the matter. The Secretary of State also calls for the documentation on the case from the Court of Appeal.

The complaint made by counsel for the applicant is that if this information is available to the Secretary of State, it ought to be provided for the applicant himself. He too should have the opportunity to study those documents so that he can make comments on them on his own behalf, either establishing his innocence or rejecting anything that may be

contained in the documents which may be to his prejudice. He was given no opportunity therefore to deal with the allegations against him. Putting it in the bald phrase that counsel for the applicant used in his submissions to us, the Secretary of State weighed the matter up but he weighed it up on one side only.

A further complaint made by counsel for the applicant was in relation to the consultation by the Secretary of State with the Lord Chancellor's Department. He said that was transferring the responsibility from his own shoulders to that of the Lord Chancellor. In fact, a study of the documents shows that that is an unreal complaint. It is apparent that the Secretary of State for the Home Department (the respondent) was inquiring whether the Lord Chancellor's Department had any scheme which would operate to compensate the applicant in the present case. It appears that because the decision was made by a judge and not by one of the staff of the department, no such scheme was in being. That was the extent of the reference. I deal no further with that part of counsel's argument.

Finally, he said that the Secretary of State, in giving his decision, did not disclose the reasons for it, neither did he do so in the affidavit filed on behalf of the Secretary of State. This is not a ground that was pleaded as part of the motion in this case but, none the less, it has been raised and dealt with by both sides.

Summarising those arguments on behalf of the applicant, counsel submits that the Secretary of State acted unfairly towards the applicant and that the policy itself operated unfairly against the applicant. For those reasons he submits that the decision should be quashed by this court.

On behalf of the Secretary of State, reference was made first of all to the fact that the decision made by the Secretary of State in these proceedings was an exercise of the royal prerogative. It is a matter that is open at the present time; whether this court has and, if so, to what extent, any power to review such an exercise of the prerogative. In fact counsel on behalf of the Secretary of State, has reserved this point for argument on another day on the basis, as he submits, that on ordinary grounds of public law the present motion must fail.

It therefore behoves us to examine that argument. He submits that, first of all, there is no doubt that the Secretary of State adhered to the policy which is set out in chapter A14. There is no evidence before us to show that he acted otherwise.

In those circumstances, can that policy be challenged as being unreasonable or unfair on the basis advanced on behalf of the applicant? The answer to that question depends on the nature of the decision which the Secretary of State is making. It is necessary in considering it, and to what extent this court may be able to interfere, to look at the various features that attach to it.

First of all, it is necessary to bear in mind that this is an exercise of the royal prerogative. It is a power vested in the Secretary of State on behalf of the Crown. Accordingly, and second, that decision is not made within the framework of a statute or pursuant to the terms of any contract. Third, the very nature of the payment, being by description 'ex gratia', presupposes that there is no obligation to make it.

It is submitted by counsel for the Secretary of State that bearing those factors in mind, unless the Secretary of State can be shown to have acted fraudulently or with bias, he can set out his own rules for the application of this policy in the granting of payments of the kind with which we are concerned.

He illustrated the kind of category with which he says the Secretary of State is concerned by reference to a case which, on the facts, was very different: *McInnes v Onslow Fane* [1978] 3 All ER 211, [1978] 1 WLR 1520, a decision of Megarry V-C. That was a case in which the plaintiff was applying for a licence from the Boxing Board of Control. The application was refused and the board gave no reasons for their refusal. Therefore the plaintiff brought proceedings to establish that the board were acting without natural justice.

It is in that context that Megarry V-C said ([1978] 3 All ER 211 at 219, [1978] 1 WLR 1520 at 1530):

> 'I do not think that much help is to be obtained from discussing whether "natural justice" or "fairness" is the more appropriate term. If one accepts that "natural justice" is a flexible term which imposes different requirements in different cases, it is capable of applying appropriately to the whole range of situations indicated by terms such as "judicial", "quasi-judicial" and "administrative". Nevertheless, the further the situation is away from anything that resembles a judicial or quasi-judicial situation, and the further the question is removed from what may reasonably be called a justiciable question, the more appropriate it is to reject an expression which includes the word "justice" and to use instead terms such as "fairness", or "the duty to act fairly" . . .'

Thus at one end of the scale the rules of natural justice require that the procedures of a public tribunal are akin to those of a court of law. In contrast, when a decision is being made, as in this case, by a minister 'in his closet', to adopt the descriptive phrase of counsel for the Secretary of State, he is required only to act fairly in the sense that his decision is free from bias or fraud. In the present case there is no suggestion that the Secretary of State's decision is tainted in this way.

There is a further citation which can usefully be made from the judgment of Megarry V-C in the *Onslow Fane* case [1978] 3 All ER 211 at 223, [1978] 1 WLR 1520 at 1535, where he says:

> 'There is a more general consideration. I think that the courts must be slow to allow any implied obligation to be fair to be used as a means of bringing before the courts for review honest decisions of bodies exercising jurisdiction over sporting and other activities which those bodies are far better fitted to judge than the courts. This is so even where those bodies are concerned with the means of livelihood of those who take part in those activities. The concepts of natural justice and the duty to be fair must not be allowed to discredit themselves by making unreasonable requirements and imposing undue burdens.'

I do not for one moment suggest that the decisions of the Secretary of State for the Home Department could ever be given the generic title 'sporting and other activities', but the weight of Megarry V-C's observations, of course, is directed to the category of decision that has to be made, and for my part I accept the warning that he gives with regard to the practice of this court in reviewing such a decision.

A further point made in relation to the present application is that if the applicant is right, namely that the Secretary of State (or through his policy) has a duty to ensure that the applicant had an opportunity to put before the Secretary of State arguments supporting his innocence of the crime which was alleged against him, it would open the door to a very difficult debate. It would in fact involve, to some extent, a retrial of the matter that had come before the court on indictment.

The very nature of the confidential type of decision which has to be made by the Secretary of State when considering ex gratia payments militates against that kind of process. Basically we have to consider whether the Secretary of State's decision to keep the confidentiality of the criteria which he operates in this context is fair or unfair.

In my judgment there are no grounds for saying that such a decision is unfair. It seems to me to be an inevitable consequence of discharging the duty that is cast on him. It is not for this court to monitor or control the method by which he makes ex gratia payments pursuant to the royal prerogative. It follows from the nature of the decision which he is called on to make that he is equally under no obligation, having come to that decision, to give his reasons for having done so.

For those reasons I propose that this application should be refused.

STUART-SMITH LJ. The first question which falls to be determined, it seems to me, is whether the Secretary of State complied with the policy which he himself has set out. There is no dispute in this case that the applicant satisfied one of the conditions in para 4 of chapter A14, namely that he had been acquitted on appeal but out of time. It was also contended on behalf of the applicant that he came within the second and alternative category, namely that he was a person convicted but acquitted on appeal within time and that there had been negligence or default on the part of the police or of some other public authority.

It does not seem to me to be necessary to consider that point since it is accepted, as I have said, that the applicant falls within one of the categories in para 4, but speaking for myself I do not think that the fault or negligence, if that be it, of a judge can be described as 'negligence or default on the part of the police or of some other public authority'. I agree with Farquharson J that a judge exercising his judicial independence is not such a public authority or such a person within the scope of that paragraph.

That was a view taken by Phillips J in an unreported case to which we have been referred. So if it were necessary to decide it (which in my judgment it is not) I would take the view that the judge who made the error in this case does not come within that definition.

But the policy required, as Farquharson J has pointed out, that the Secretary of State, or in this case Mr Caffarey who exercised the powers for the Secretary of State, be satisfied (a) on a balance of probabilities that the claimant was more likely than not to have been innocent, and (b) that hardship to the claimant has resulted. Mr Caffarey says that he did consider those matters, and it seems to me that there is no material before this court from which we can conclude that he did not do so.

It was further submitted by counsel on behalf of the applicant that this case fell within the category of exceptional circumstances that justified compensation in cases outside the categories to which Farquharson J has referred. That was a part of the statement made to the House of Commons on 29 November 1985. But, in order to attack the Secretary of State's decision on that point, namely that it was not an exceptional case, it seems to me that the applicant would have to show that the decision was unreasonable in the *Wednesbury* sense, ie one to which no reasonable Secretary of State could come (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223), or was irrational. For my part I do not think that that can possibly be said in this case.

The second question therefore that arises is whether or not the policy which the Secretary of State has is unreasonable, again in the *Wednesbury* sense. Counsel for the applicant has not suggested that it was unreasonable to have the two criteria to which I have referred, namely (a) that on a balance of probabilities the claimant was more likely than not to have been innocent or (b) that hardship to the claimant has resulted. Indeed, it seems to me to be quite impossible to contend that those are unreasonable requirements.

The other aspect of this matter is whether or not it was unreasonable of the Secretary of State not to publicise those requirements. It is, as counsel for the Secretary of State has pointed out, a very sensitive area and in chapter A14 the Secretary of State says:

> 'Because it would be undesirable and invidious for the Secretary of State to appear to cast doubt upon the innocence of a defendant who has been acquitted by the courts it is not the practice to refer publicly to criterion (a).'

Speaking for myself, I can see nothing unreasonable in that policy whatever. Indeed any other policy would seem to me to be very unsatisfactory. Unfortunately, as a result of this case no doubt, that is now made clear but it seems to me that it is quite impossible for the applicant to contend that that was an irrational or unreasonable policy.

Moreover, as counsel for the Secretary of State has pointed out, this is not a case where

there is a statutory or common law obligation on the Secretary of State to pay compensation in certain circumstances. It is an exercise of the royal prerogative. He is not obliged to have such a policy. He has in fact laid down a policy for himself and it seems to me that it would be highly undesirable for this court to indicate conditions or the manner in which he should seek to exercise it.

The third complaint and really the nub of the case of counsel for the applicant here is that there was procedural unfairness in relation to the applicant because the applicant was unaware of the requirement that he had to satisfy the Secretary of State on a balance of probabilities as to his innocence.

It seems to me that that proposition must fail unless the policy to which I have just referred can be satisfactorily attacked. I do not see how it can be said that it was procedurally unfair to apply that policy in the applicant's case unless the policy can be undermined, and for the reasons which I have indicated I do not think it possibly can.

Therefore the main ground of complaint that the applicant advances, namely that he was unaware of that ground of the policy and did not address himself specifically to it, cannot be sustained. But the Secretary of State is under a duty to act fairly and he does have to consider the material in order to reach a conclusion on the two points to which I have referred, namely innocence and hardship.

What he does is to consider all the documentation which is before the Court of Appeal. That includes the depositions, the summing up, the notice of appeal and the judgment of the Court of Appeal. The complaint in this case is that the Secretary of State did not consider the applicant's case as to his innocence.

I find it difficult to see really what more could properly have been put before the Secretary of State. The documents which I have referred to, and in particular the summing up, must have contained an account of the applicant's defence, his case that was being put to the jury. It was not suggested in the notice of appeal that the judge had failed to do justice to the applicant's case in that regard. Had it done so and had there not been material before the Secretary of State on which he could deduce what the applicant's case was, then it may be that it would be incumbent on him to make further inquiries from the applicant. But in this case none of the grounds of appeal which were before the Court of Appeal touched on any criticism that the judge had failed to put adequately the applicant's case to the jury. The complaints were all of a different nature and it is not necessary to go into them.

It is true that the Court of Appeal in this case did not deal with the grounds of appeal other than that the applicant had not had a fair trial because of the refusal of legal aid. The other matters were not dealt with in that judgment but it does not seem to me that it really could be sustained here, in any event, as a complaint since the Secretary of State must have had the applicant's account as put forward by the judge in his summing up to the jury.

Moreover, it is not for this court to enter into a consideration of whether or not the Secretary of State is satisfied on balance that the applicant is more likely to have been innocent than not. It would be wholly undesirable that that matter should be dealt with in correspondence between the Secretary of State and the applicant. It is wholly undesirable that this court should seek to reopen any such issue at all. This is a matter solely, as it seems to me, within the discretion and consideration of the Secretary of State and not one on which this court should intervene.

The second and subsidiary head on which counsel for the applicant complains that there was procedural unfairness was that the Secretary of State considered a police report, as he may sometimes do, and did not ask the applicant to deal with what was said in it. I can dismiss that because there is no evidence in this case that the Secretary of State ever did consider a police report. It seems to me that that, again, must be a matter for his discretion. If he considers it necessary to have a police report on the prosecution, then so be it: he is entitled to do so if he wishes to.

The next ground on which the applicant contends that there should be a judicial review is that the Secretary of State gave no reasons for his decision, either in the refusal letter or in the affidavit, other than a bare assertion that the case did not fall within the criteria set out.

Cases vary enormously as to whether or not reasons for a decision should be given. At one end of the scale one has a tribunal such as the Immigration Appeal Tribunal, which was the subject of consideration in *R v Immigration Appeal Tribunal, ex p Khan* [1983] 2 All ER 420, [1983] QB 790. There it was said that a tribunal set up by Parliament, very similar to the position of a court, had to give reasons.

At the other end of the scale one has the exercise of the royal prerogative in this case. I would adopt again some words from the judgment of Megarry V-C in *McInnes v Onslow Fane* [1978] 3 All ER 211 at 219–220, [1978] 1 WLR 1520 at 1531, where he said:

> 'I think it is clear that there is no general obligation to give reasons for a decision. Certainly in an application case where there are no statutory or contractual requirements but a simple discretion in the licensing body there is no obligation on that body to give their reasons.'

A fortiori it seems to me it is an exercise of the royal prerogative with sensitive areas such as I have indicated.

The final matter of complaint which the applicant raised was in relation to the reference by the Secretary of State for the Home Department to the Lord Chancellor's Department for their consideration whether this case could be dealt with under the compensation scheme operated by that department.

I cannot myself see that any possible criticism can be directed to the Home Secretary in relation to that. It was in the applicant's interest that they should refer it to another department in the hope that the matter could be covered by that department's scheme. It is quite clear as it seems to me, the Lord Chancellor's Department having unfortunately answered that question in the negative, that the Secretary of State thereafter continued to consider the matter. There is no evidence to my mind that there was any mistake of law here in the application of his own criteria. The fact that the Lord Chancellor's Department decided that the error made by the judge did not fall within their scheme in no way represented a delegation of the Secretary of State's functions to that department, nor, so far as I can see, did it in any way influence the decision in this case.

I can find no basis therefore on that ground either and for those reasons, and the reasons given by Farquharson J, this motion must be dismissed.

Application dismissed.

Solicitors: *David Lee & Co* (for the applicant); *Treasury Solicitor.*

Dilys Tausz Barrister.

Practice Direction

QUEEN'S BENCH DIVISION

County court – Transfer of action – Transfer from High Court – Transfer from Queen's Bench Division – Actions outside London – Cases suitable for transfer – Notice of proposed transfer – Objection to proposed transfer – Consideration of objection – Matters to be considered – Appeal from order of district registrar – County Courts Act 1984, s 40.

1. Section 40 of the County Courts Act 1984 provides for transfer of proceedings by the High Court of its own motion or on the application of any party to the proceedings (i) where the parties consent to the transfer or (ii) where the amount in issue is or is likely to be within the monetary jurisdiction of the county court or (iii) where the proceedings are not likely to raise any important question of law or fact and are suitable for determination by a county court.

2. Immediately after an action has been set down for trial at the trial centre, the district registry of the trial centre shall place before the district registrar of the trial centre the documents in the case. The district registrar will thereupon decide (a) whether or not the action appears to be suitable for transfer to a county court and (b) which county court appears to him to be the appropriate court to try the action if an order for transfer were made.

3. The following types of case will normally *not* be considered suitable for transfer to a county court. Cases involving (a) professional negligence, (b) fatal accidents (unless the damages are obviously modest), (c) allegations of fraud or undue influence, (d) jury trial, (e) claims against the police, (f) public rights or having special features of public interest, (g) novel or difficult point(s) of law, (h) complicated disputes of fact or of expert evidence, (i) more than about £25,000, (j) trials likely to last more than five days.

4. The district registrar of the trial centre shall serve a notice in Form 1 in the appendix on all parties to an action in which he has decided that the action appears to be suitable for transfer to a county court ('a notice of proposed transfer'). [The appendix to the direction is not printed herein.]

5. Any party who objects to the proposed transfer or to transfer to the court specified in the notice of proposed transfer shall, within 14 days after service on him of such notice, give notice stating briefly the grounds for objection to the district registrar in Form 2 in the appendix ('a notice of objection').

6. Where no notice of objection is received in the district registry within the time limited, the district registrar shall make an order transferring the action to the county court specified in the notice of proposed transfer.

7. Where notice of objection is received in the district registry from any party within the time limited, the district registrar shall fix an appointment for consideration of the question of transfer and shall serve notice thereof on all parties to the action.

8. At the appointment the district registrar will consider all relevant matters and in particular those mentioned in para 3. Where unliquidated damages are claimed he will normally expect to receive an indication whether the award is likely to be more or less than £25,000; and in personal injury cases he will expect up-to-date medical reports to be available. After giving to all parties an opportunity to be heard, the district registrar will make an order transferring the action to a specified county court or will order that it remain in the High Court and will, in either case, make provision for the costs of the hearing.

9. Appeal from the order of the district registrar will lie to the presiding judge sitting on the circuit or to a High Court judge invited to act on his behalf by one of the presiding judges of the circuit.

10. Cases transferred to county courts under s 40 shall be heard by a circuit judge and not by a recorder or assistant recorder without the prior approval of a presiding judge.

11. This direction will take effect on 3 October 1988.

Explantory note

This practice direction lays down guidance for the transfer of Queen's Bench Division actions in district registries and establishes a system for enabling the court to consider whether cases should be transferred to a county court for trial. The system for the Royal Courts of Justice remains as set out in the Senior Master's Direction of 4 July 1984 ([1984] 2 All ER 672, [1984] 1 WLR 1023) and the Practice Statement issued by Michael Davies J on 12 January 1988 ((1988) Times, 13 January).

TASKER WATKINS LJ
Senior Presiding Judge.

28 July 1988

[An appendix to the direction, which is not set out herein, sets out a form of 'Notice of Proposed transfer to a County Court' (Form 1) and a form of 'Notice of Objection to transfer' (Form 2).]

Practice Direction

CHANCERY DIVISION

County court – Transfer of action – Transfer from High Court – Chancery business – London – Transfer of Chancery business to Mayor's and City of London Court – Pre-trial directions – Transfer of court file – Procedure – County Courts Act 1984, s 40(7)(8).

Under the arrangements for transfers to the Mayor's and City of London Court in accordance with the Vice-Chancellor's announcement of 26 May 1988 (see *Practice Note* [1988] 2 All ER 639, [1988] 1 WLR 741) the Chancery Registry usually send the court file to the Mayor's and City of London Court as soon as the order for transfer has been drawn up. However, as cases so transferred are not normally set down for pre-trial review in the county court, the master, when ordering transfer, will usually give pre-trial directions. Where those directions are unusually extensive or the transfer has been ordered subject to the fulfilment of some condition the Chancery Registry will not send the file to the Mayor's and City of London Court of its own motion. In such cases the registry is not able to monitor the working out of the master's order or the fulfilment of conditions, and the sending of the file to the Mayor's and City of London Court will have to be initiated by one of the parties' solicitors as required in sub-ss (7) and (8) of s 40 of the County Courts Act 1984.

Where the file has been sent by the court both parties will be notified by the Mayor's and City of London Court as soon as it has been received. Where such notification is not received within about a fortnight of the order for transfer the parties themselves should, when ready, initiate the sending of the file simply by applying by letter to the Chancery Registry for the file to be sent. There is no need to lodge any documents.

R D MUNROW
Chief Master.

21 July 1988

Cases reported in part 1

Noter-up

CASES

STATUTES ETC

LAW REFORM COMMISSION OF WESTERN AUSTRALIA

PROJECT NO. 43
COMPENSATION FOR PERSONS DETAINED IN CUSTODY WHO ARE ULTIMATELY ACQUITTED OR PARDONED

WORKING PAPER

Law Reform Commission
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8 November 1976

PREFACE

The Law Reform Commission has been asked to consider the question of compensation for persons detained in custody who are ultimately acquitted or pardoned.

The Commission having completed its first consideration of the matter now issues this working paper. The paper does not necessarily represent the final views of the Commission.

Comments and criticisms on individual issues raised in the working paper, on the paper as a whole or on any other aspect coming within the terms of reference, are invited. The Commission requests that they be submitted by 14 January 1977.

Copies of the paper are being sent to the -

Chief Justice and Judges of the Supreme Court
Chief Secretary and Minister for Justice
Chief Probation and Parole Officer
Citizens Advice Bureau
Civil Liberties Association
Commissioner of Police
Community Welfare Department
Department of Corrections
Institute of Legal Executives
Judges of the District Court
Law School of the University of Western Australia
Law Society of W.A.
Magistrates' Institute
Solicitor General
Under Secretary for Law
Law Reform Commissions and Committees with which this Commission is in correspondence

The Commission may add to this list.

A notice has been placed in *The West Australian* inviting anyone interested to obtain a copy of the paper and to submit comments.

The research material on which the paper is based is at the offices of the Commission and will be made available there on request.

C O N T E N T S

CLAIMS FOR COMPENSATION

PROCEDURE FOR DETERMINING CLAIM

TERMS OF REFERENCE

1.1 The Commission has been asked to consider whether compensation should be granted to persons who have been detained in custody and who are ultimately acquitted or pardoned.

INTRODUCTION

Scope of paper

2.1 This working paper deals with two aspects of the administration of the criminal law which may warrant consideration for compensation.

These are -

(a) where a person is detained in custody pending final disposition of his case and he is acquitted (either at the trial or on appeal);

(b) where a person has been convicted and has served part or all of his sentence before his conviction is quashed or he is pardoned.

The first of these aspects broadly covers the day to day operation of the system of criminal justice as it affects persons accused of crimes. The second covers those unusual circumstances where a special reference to the Court of Criminal Appeal under s.21 of the Criminal Code results in an acquittal or where the Governor-in-Council has issued a pardon to that person.

General principles

2.2 From the time of Magna Carta in 1215 it has been a fundamental principle of the English common law that a man should not be imprisoned without a fair trial: see Magna Carta clause 39. This principle has found further expression in the "golden thread" of English criminal law that a man is presumed innocent until proven guilty: see *Woolmington v D.P.P.* [1935] AC 462 at 481. Having regard to these principles it might be thought that an accused person should not ordinarily be imprisoned or otherwise

prejudiced before he is tried (see paragraphs 7.1 to 7.10 below), and that if he is acquitted he should not suffer as a result of the proceedings. This does not always happen, however, and the question then arises whether the State should compensate the accused person, and if so, in what circumstances and to what extent.

2.3 In the pre-trial situation there has been a conflict between the principles mentioned in paragraph 2.2 above and the administrative necessity of ensuring that the accused person does not abscond before he can be tried. Accordingly, a person who is arrested and charged with an offence can be remanded in custody pending trial - a process described by Lord Hailsham as the solitary exception to Magna Carta in peace-time (noted in *Bail or Custody*, published by the Cobden Trust at 90).

2.4 The expectation of society to have the law enforced in an effective manner must be balanced against the rights of the individual. Detention in custody pending trial may in many cases involve substantial hardship to the individuals concerned and their families. For example, an accused who is detained in custody may well lose his income and possibly his employment.

2.5 It has been suggested that detention may also result in an increased likelihood of being convicted, and if convicted, being imprisoned: see *Bail or Custody* at 71-75. While it is difficult to analyse the precise reasons why this should be so, there does appear to be statistical evidence to support this conclusion from a number of studies in different jurisdictions: ibid. This may reinforce the commonly held impression that an accused person suffers some prejudice by reason of detention pending trial.

Bail

2.6 In Australia, as in England, the legal system has attempted to ameliorate such hardships and make the system more flexible by providing that after a person is arrested he must be brought before a justice as soon as possible: see Justices Act 1902, s.64; Criminal Code, s.570. The justice can then, with certain exceptions, either release him on bail or remand him in custody: see Justices Act 1902, ss.116-117. In the

case of offences triable summarily certain police officers may admit the accused to bail: see Police Act, s.48. In the case of other offences unless the offence is of a "serious nature" certain police officers may bail the person if it is not practical to bring him before a justice within twenty-four hours: see Justices Act, s.64.

2.7 In Western Australia bail is generally not granted by Courts of Petty Sessions to those people the magistrate considers are likely to -

(a) abscond before trial;
(b) intimidate witnesses;
(c) hinder the investigation of the alleged offence;
(d) commit further offences pending trial.

The Commission understands that bail in Western Australia is also refused on a wide variety of other grounds including "further enquiries to be made", "previous convictions", "the seriousness of the offence" and "no fixed abode": see also Brown, *Bail: An Examination* (1971) 45 ALJ 193. For the English position which is similar, see Michael Zander, *A Study of Bail/Custody Decisions in London Magistrates' Courts* (1971) Crim LR 191.

2.8 The manner of granting and refusing bail is under consideration by the Commission in Project No. 55 (review of the Justices Act) and Project No. 64 (review of bail procedures), and will be considered in detail in relation to those projects. However, bail also has some relevance to this project, since it is arguable that one effective way of dealing with the problems arising out of the acquittal of persons detained pending trial is to minimize the incidence of unnecessary detention in custody. This could be done by reforming the rules relating to bail and by changing the law and practice with regard to the manner in which proceedings are started - viz: a greater use of summonses and a lesser use of arrests would tend to reduce the problem. This has been suggested by the Australian Law Reform Commission in its Report, *Criminal Investigation* (ALRC 1975), paragraphs 62-63. If this were done it would in many cases avoid the need for a bail decision altogether.

2.9 The problem of determining whether a person is a good or bad bail risk, is not that magistrates lack sufficient legal powers but rather that the system is not geared to ensure that

the appropriate facts are gathered, verified and then placed before the magistrate in such a way that the bail decision can be made in the light of them. It appears from the Commission's enquiries that magistrates in Western Australia are very much aware of the difficulties in this field and of the need for relevant information to be obtained and placed before them before they make a bail decision. While the lack of information may not matter in minor summary charges where bail is granted by Courts of Petty Sessions almost automatically, it could make a difference in more serious cases.

2.10 The present bail system operates in such a way that some persons subsequently found not guilty have been remanded in custody before trial. It also operates so that many guilty persons who subsequently receive a non-custodial sentence have been detained in custody pending trial.

The American experience with bail

2.11 This shortage of relevant information about the accused has occurred in other jurisdictions. In New York it was overcome by a project initiated by the Vera Foundation, which is a private foundation set up as a result of the interest of Louis Schweitzer, a New York industrialist, in the protracted pre-trial detention of penniless youthful offenders. The project involved gathering and verifying certain simple yet appropriate items of information about the accused, such as family background, residence, prior convictions and employment, and placing it before the magistrate. This information was collated and graded on a points system according to a formula. Subsequent use of the system over a three year period from 1961 to 1964 indicated the reliability of the formula in assessing bail risk. The scheme thus had two desirable effects. The first was that it verified and placed the relevant information before the magistrate in a coherent manner. The second was that if the accused met the thresh-hold requirement (that is if he scored the necessary points) he was statistically a good bail risk. Hence in the absence of some countervailing fact the magistrate could release the accused on bail with considerable confidence that he would appear at his trial. Full details of the scheme are set out in Appendix V.

2.12 A similar scheme could perhaps be considered for Western Australia. The method proposed by the Vera Foundation was considered and recommended by the Australian Law Reform Commission in its Report, *Criminal Investigation* paragraph 179. Its adoption on an experimental basis was also recommended by the English Working Party on *Bail Procedures in Magistrates' Courts* (HMSO 1974) but has not been included in the Bail Bill currently before the English Parliament.

2.13 In the United States following the success of the Vera Foundation's project the scheme has now been embodied in legislation in a number of jurisdictions, including New York and the District of Columbia.

2.14 If the courts could predict bail risk with greater accuracy, it is likely that the administration of bail would change. It may well be that more persons would be released on bail than at present; and it is likely that some who are now released would no longer be granted bail. It is conceivable, however, that the overall effect would be that fewer people who are subsequently found not guilty would be detained in custody pending trial.

Conviction quashed or pardoned

2.15 Apart from the pre-trial situation there will always be cases where an accused person has been tried and wrongly convicted and has served part or all of his sentence before his conviction is set aside. In Western Australia one such case has been that of Gouldham where his conviction was set aside following a special reference to the Court of Criminal Appeal several years after he had completed serving a prison sentence: see *R. v Gouldham* [1970] WAR 119. Such situations have more frequently occured in England. Examples known to the Commission include the cases of Beck (convicted in 1904 and served ten years), Slater (convicted in 1908 and served eighteen years) and the more recent cases of Latimore (served three years of a life sentence for murder), Meehan (served seven years of life sentence for murder) Virag and Dougherty: see Appendix IV. The ordinary appeal processes do not always deal effectively with wrongful convictions, particularly where the evidence on which the accused was convicted was principally that of identity: see the Report of the Devlin Committee, *Evidence of Identity in Criminal Cases* (HMSO 1976).

2.16 Following the Devlin report and in view of the number of persons found to have been wrongly convicted in England on the basis of identity evidence, five senior judges sat in July 1976 as a special Criminal Appeal Court to review the cases of four people convicted on such evidence and currently serving sentences, who it was believed ought not have been found guilty: *The Times*, 10 July 1976. The Court quashed the conviction of two of these people.

2.17 In England the Court of Criminal Appeal has been criticized in the editorial of the New Law Journal 6 May 1976 for its restrictive view of its role on appeal which has resulted in miscarriages of justice not being corrected.

The powers of the Court of Criminal Appeal in Western Australia are contained in s.689 of the Criminal Code, the relevant part of which reads as follows:

> "(1) The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal, if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal: . . .".

This provision was recently discussed in *Conroy, Warn and Sisson v R.* [1976] WAR 91. In that case the Chief Justice (at page 94) said the Court would be entitled to allow an appeal if "in its opinion, it would be dangerous or unsafe in the administration of the criminal law to allow a verdict of guilty to stand". However, no matter how widely its power is construed, the Court could not be expected to conduct a complete retrial and there is therefore always the possibility of a person who has been wrongly convicted failing to succeed on appeal.

WESTERN AUSTRALIA: SITUATIONS IN WHICH PEOPLE CAN BE DETAINED IN CUSTODY IN THE COURSE OF THE ADMINISTRATION OF JUSTICE

Pending trial

3.1 In Western Australia there are no comprehensive figures available on the number of persons detained in custody pending trial who are ultimately acquitted. The Western Australian Department of Corrections has produced some figures (see Appendix I) which are a by-product of a study and evaluation of the Duty Counsel Scheme: see M. Martin, *A sample of Custodial Remands Extracted from the Duty Counsel Scheme Evaluation Study* (unpublished, Western Australian Department of Corrections, 1975). These figures show that one person in twenty-three of those detained in custody was found not guilty (4.3 percent). While the sample is in itself too small to be reliable the figures derive some interest from the fact that they closely resemble the English statistics which show that approximately four to five percent of persons remanded in custody are acquitted.

3.2 For Australia as a whole it has been estimated by Mr. D. Biles, Assistant Director (Research) of the Australian Institute of Criminology, that of the 9,000 people in Australian jails at any one time over 1,000 of these are remanded in custody pending trial: see Australian Institute of Criminology Information Bulletin (1974) Vol. 1 No. 3 at 9. As far as Western Australia is concerned the most recent statistics available show that there were sixty-eight persons in custody awaiting trial or on remand pending sentence on the night of 30 June 1975. When regard is had to the length of time a person may be detained (for which see Appendix I) and the fact that it costs over $160 per week to keep a person in custody, a significant cost to society can be seen to be involved.

During trial

3.3 Persons, even though granted bail pending trial, are sometimes detained in custody during trial. Since the case of *R. v Cutler* (1972) (Western Australian Supreme Court case No. 193/72) the practice has been to release the accused if exceptional circumstances exist for doing so. It appears that courts are now tending to be more readily satisfied

that such circumstances exist, with the consequence that more people are being released during trial. However, some accused are still detained during trial and it must be presumed that some of those persons are subsequently acquitted.

Pending appeal

3.4 Persons may also be detained in custody after conviction and pending appeal even though there is power for bail to be granted: see Criminal Code, s.700; Justices Act, s.187. The Commission understands that bail is not infrequently granted under the latter provision. In those cases in which bail is not granted a successful appeal could mean that an accused person has spent time in jail for a crime of which he has been ultimately acquitted. For example, in *R. v Cross* the Court of Criminal Appeal of Western Australia quashed both convictions against Cross and entered a verdict of acquittal: case No. 55/1972; Supreme Court Library Case No. 1152. By the time this happened Cross had been in custody for thirteen months.

Until conviction quashed or pardoned

3.5 There have been a number of cases of people convicted in Western Australia who have served part or all of their prison sentence and who have either had their conviction quashed or received a pardon. The case of Gouldham referred to in paragraph 2.15 above is a case in point. The accused was convicted of an offence and served a prison term of almost a year. Subsequently the conviction was quashed as a result of fresh evidence. The State Government made an ex gratia payment to him of $12,500.

3.6 In a recent case Morse, Blackman and Antonovich were convicted of assault and sentenced to three months imprisonment. After a day's detention they were released on bail pending appeal. Before the appeal was heard it subsequently appeared that this was a case of mistaken identity. The men were pardoned and set free: see *The West Australian*, 25 and 29 October 1975 and the *Weekend News*, 25 October 1975.

REMEDIES AVAILABLE TO PERSONS IN WESTERN AUSTRALIA WHO HAVE BEEN DETAINED IN CUSTODY AND ULTIMATELY ACQUITTED OR PARDONED

Legal remedies

4.1 Whilst Western Australian law is comparatively well developed to assist acquitted persons with their legal costs particularly in the inferior courts (see generally Official Prosecutions (Defendants' Costs) Act 1973 and the Suitors' Fund Act 1964), for the most part no remedy is available to compensate persons for loss caused to them by detention in custody. Officers of the State, such as magistrates and police officers, enjoy a wide measure of immunity from tort actions for wrongful arrest or imprisonment: see Justices Act, ss.230 and 232; Police Act, s.138. Apart from this, the vast majority of detentions do not, of course, occur as a consequence of misuse of authority by such persons: but cf. *Leutich v Walton* [1960] WAR 109; *Trobridge v Hardy* (1955) 94 CLR 147.

Ex gratia payments

4.2 Consequently, the only source of compensation which may be available is an ex gratia payment by the Crown. There are no official figures available as to how many ex gratia payments have been made. The Commission understands, however, that there have been no ex gratia payments for detention pending final disposition of a case and only one in the case of a person wrongly convicted: Gouldham.

COMPENSATION SCHEMES AND PROPOSALS IN OTHER JURISDICTIONS

Other Australian states

5.1 There are no formal compensation provisions in other Australian states and ex gratia payments are rare. There have been no cases in which ex gratia payments have been made in Tasmania and, as far as the Commission is aware, none in Victoria in the twenty years prior to 1970: see opinion of Sir Marcus Gibson relating to the Gouldham case tabled in the Western Australian Legislative Assembly on 11 August 1970.

Nor does there appear to have been any case in Queensland in which an ex gratia payment was made.

5.2 In New South Wales there appears to have only been the case of McDermott, who in the 1940's served some years of a life sentence for murder. A Royal Commission found the evidence against him to be unsatisfactory and he was released and given an ex gratia payment of £1,000.

South Australian proposals

5.3 The Criminal Law and Penal Methods Reform Committee of South Australia has recommended that compensation should be paid to persons who are acquitted after having been detained in custody pending trial: see the Third Report of Criminal Law and Penal Methods Reform Committee of South Australia, *Court Procedure and Evidence* (1975) at 62, paragraph 4. The Committee recommended that compensation should be assessed by the trial judge after acquittal if he considers that, on the balance of probabilities, the defendant is innocent and has suffered loss amounting to hardship. The Commission has been informed that no decision has yet been taken by the South Australian Government on whether to implement this aspect of the report.

England

Detention pending trial

5.4 In 1808 Sir Samuel Romilly introduced a Bill into Parliament for granting compensation in certain cases to persons tried for felonies and acquitted: see Cobbett's Parliamentary Debates Vol. XI at 395-403. The question of whether the accused was to be compensated, and if so for how much, was to be left to the trial court. The Bill was withdrawn after strong opposition.

5.5 There has been considerable pressure in England in recent times for reform in this area from the Cobden Trust, from Dr. Glanville Williams, *The Proof of Guilt* (London, 1963) at 133 et seq, Professor Street, *Governmental Liability* (Cambridge, 1953) at 44, and others. However, as far as the Commission is aware, no legislation has been introduced into Parliament.

5.6 Thus, as in Western Australia, the only remedy is by way of ex gratia payment. Very few acquitted persons have been recommended for such payments by the Home Secretary. For example, of the 2,186 persons acquitted in 1972, only five were awarded ex gratia payments: see M. King, *Bail Reform: The Working Party and the Ideal Bail System* (1974) Crim LR 451 at 455.

Until conviction quashed or pardoned

5.7 Even where a person has been wrongly convicted and served part or all of the sentence it is difficult to get an ex gratia payment; moreover where one is granted it is rarely adequate. For example, of the seventy people who between 1950 and 1970 were either pardoned or had their convictions quashed very few received ex gratia payments: see Brandon and Davies, *Wrongful Imprisonment* (London, 1973), at 200.

5.8 However, there have been some famous cases in England involving miscarriages of justice in which ex gratia payments were made. For example, Adolf Beck who was awarded £5,000 spent ten years in prison for a crime he did not commit - a case of mistaken identity in which the real culprit was later apprehended. Another case was that of Oscar Slater, who was awarded £6,000. Slater spent eighteen years in prison for a murder of which he was innocent. There have also been such recent cases as Virag and Dougherty who received ex gratia payments. These last two cases led to the setting up of the Devlin Committee: see paragraph 2.15 above.

Other countries

5.9 Many jurisdictions operate schemes to compensate people who have suffered as a result of the inappropriate functioning of the system of criminal justice. These schemes differ widely as to the scope of compensation available and the way in which such compensation is assessed.

5.10 Some jurisdictions compensate only for erroneous conviction and subsequent imprisonment. These include Italy, Portugal, Spain, Mexico, Brazil, California, North Dakota, Wisconsin, New York and the United States in its Federal jurisdiction: see Appendix III for the text of the statute

relating to the United States in its Federal jurisdiction.

5.11 Other jurisdictions go further and also compensate for detention in custody pending final disposition of the accused's case. These include Sweden, Norway, Denmark, Austria, France, West Germany, Hungary, Holland, Belgium and some of the Swiss Cantons.

5.12 Paragraphs 5.13 to 5.31 below set out the details of some of these schemes. The information is derived from inquiries made from the Ministers of Justice in the countries concerned.

West Germany

5.13 Compensation in West Germany is available from the State Treasury in three broad situations in which an individual may have been inappropriately dealt with by the system of criminal justice. These are -

(a) where a person has received a sentence which on appeal is subsequently quashed or reduced;

(b) where a person has been damaged by being detained in custody pending trial, or by some other prosecution measure and the person is acquitted or the proceedings against him are discontinued;

(c) where the pre-trial criminal process is discontinued at the discretion of the court or the State Attorney's office.

5.14 In each of the above situations the accused person has a right to compensation, but only insofar as it is equitable in the circumstances of the case. Compensation is barred where the accused person has by some action of his caused the prosecution either deliberately or through gross neglect.

5.15 Compensation may also be refused if the accused kept silent about mitigating circumstances or had made a confession which was subsequently found to be false, or if the proceedings were discontinued because of the accused's unfitness to plead or because of some techinicality.

5.16 Compensation is available for both pecuniary and non-pecuniary loss and is assessed by the trial court either at the conclusion of the proceedings or at some later date. There is no limit on the amount of compensation which can be awarded. Any person who is maintained by the accused person has a claim for compensation as well as the accused. There is a full right of appeal from the compensation decision.

5.17 In 1974, the last year for which figures are available, 1,300 people received compensation in West Germany under this legislation. The total sum expended was DM2.5 million (A$ 818,598).

Sweden

5.18 In Sweden a person who has been detained in custody pending trial can claim compensation from the Government if -

(i) he has been found not guilty at his trial;
(ii) the charges are withdrawn at his trial;
(iii) the preliminary investigations are concluded without legal proceedings being instituted.

A person who has served a prison term is also entitled to compensation from the Government if his conviction is quashed on appeal without a new trial being ordered or if a reduced sentence is imposed.

5.19 A person has no right to compensation if he has caused the custody situation, destroyed evidence, or in some other way made investigation of the crime more difficult. Compensation is not paid if it is unreasonable to do so having regard to the circumstances of the case. However, compensation cannot be refused merely because the question of guilt or innocence has not been resolved.

5.20 Compensation covers both pecuniary loss and non-pecuniary loss and there is no limit on the amount of compensation which can be paid. Any amount of compensation which a claimant has a right to claim from some other source is deducted from the compensation otherwise payable. The compensation scheme is administered by the Attorney General who decides whether there is to be compensation and, if so, the amount. If the claim

is in excess of 100,000 Swedish crowns (A$ 18,730) then compensation is decided by the Government instead of the Attorney General.

5.21 In 1975, the last year for which figures are available, approximately 160 people were acquitted after being detained in custody pending trial and a further 72 persons had their conviction quashed on appeal. Of these 232 persons 55 received awards of compensation totalling 120,743 Swedish crowns ($A 22,615).

France

5.22 Under French law compensation may be granted to persons detained in custody pending trial and subsequently acquitted and to those recognised as innocent after being convicted. In the case of detention pending trial the person charged does not have to prove his innocence. In fact the accused may have escaped being convicted merely by receiving the benefit of the doubt. However, he must show that detention in custody has resulted in "obviously abnormal damage of particular severity". This qualification greatly restricts the number of people to whom compensation is paid. For example in 1973, 54,000 people were detained in custody pending trial and of these 1,037 were acquitted. However only about four acquitted persons per year receive compensation.

5.23 If compensation is granted it is not limited to financial loss but covers all non-pecuniary loss suffered by the accused as well. There is no limit on the amount of compensation which can be awarded. The average sum awarded is about 56,000 francs per person(A$ 9,162). In respect of people who claim to have been wrongly convicted the conditions are so restrictive that out of approximately sixty applications per year only one or two are successful.

5.24 Compensation for detention pending trial is awarded by a special commission of three judges, whereas compensation for a wrongful conviction is awarded by a court other than the one which tried the convicted person, but of the same status.

5.25 In respect of a person who has been wrongly convicted, his spouse, ancestors or descendants may claim compensation

as well as the wrongly convicted person. If the applicant so requests, the decree declaring his innocence will be displayed in the place where he lived and advertised in five newspapers chosen by the court. Legal aid is available for a person to pursue a claim of this nature.

Holland

5.26 Holland provides compensation for persons detained in custody who are ultimately acquitted and for persons whose sentence is annulled after having been wholly or partly served. Compensation is also available where a case is disposed of without any punishment having been imposed.

5.27 Compensation is provided for both pecuniary and non-pecuniary loss and there is no limit on the amount of compensation which can be awarded. Compensation is provided for arrest by the police as well as actual detention in custody. An application for compensation must be submitted within three months after the close of the case. The applicant has a right to be heard and is entitled to be represented on such a hearing by counsel. Insofar as it is possible, the court deciding compensation is composed of the same members of the court who presided at the trial. A full right of appeal is allowed from all compensation decisions.

5.28 Compensation is awarded provided the court is of the opinion that taking all the circumstances into account it is fair and reasonable to do so. The law does not require the applicant to prove his innocence, but on the other hand does not lay down that compensation must be awarded automatically in every instance.

5.29 A claim for compensation for damage suffered by a person wrongly detained may alternatively be submitted by his dependants and the compensation paid to them. In that event no compensation is awarded for any non-pecuniary loss suffered by the person wrongly accused.

5.30 If the accused person dies after having submitted his application or after having lodged an appeal, compensation is awarded to his heirs.

5.31 In 1973, the last year for which figures are available, 7,177 persons were detained in custody pending trial and of these 134 were ultimately acquitted. Of these only six were awarded compensation, the total amount awarded being FLS 8,541 (A$ 2,672). The average number awarded compensation for 1969 to 1973 was fifteen persons per year. There are no figures available for compensation awarded on an annulment of sentence. Such cases are apparently very rare.

United Nations

5.32 The United Nations adopted, as part of the United Nations Covenant on Civil and Political Rights, a clause stating that where a person has been erroneously convicted by final decision he should be entitled to compensation: see Article 14(6), reproduced in Appendix III. Australia signed this Covenant in 1972. However, while this binds the Commonwealth of Australia internationally, legislation to give effect to the Covenant within Australia would require to be enacted by the appropriate Parliament or Parliaments: see Wynes, *Legislative Executive and Judicial Powers in Australia* (5th ed) at 89 and 296-301. No legislation to ratify or give effect to the Covenant has been passed.

SHOULD THERE BE A SCHEME OF COMPENSATION IN WESTERN AUSTRALIA?

General

6.1 In paragraphs 7.1 to 9.9 below, the Commission discusses the categories of loss that might be covered by any statutory scheme to compensate those who are detained in custody and subsequently acquitted or pardoned, and possible alternative procedures for determining such claims. These questions, of course, only become relevant if the decision is made to introduce a statutory scheme. The Commission has come to no conclusion on this basic question and would welcome comment. In order to elicit considered views on the matter, the Commission has set out in the following paragraphs of this section what it considers to be the principal arguments for and against the introduction of a statutory scheme of compensation. In considering the question it should be borne in mind that although no statutory scheme exists elsewhere in Australia or in the United Kingdom, the notion is not without precedent, for such schemes have operated successfully in a number of countries for many years: see paragraphs 5.9 to 5.31 above.

6.2 The argument for introducing such a scheme is simply that the State, through the direct action of its officers, has caused loss to persons who are subsequently found not guilty of the charges against them or who are pardoned, and it is better that the State should bear the loss (that is, pay compensation) than that the unfortunate individual should be forced to bear it. The kinds of loss that may be suffered in particular cases by persons detained in custody are outlined in paragraphs 7.1 to 7.10 below. The principle that the State, rather than the individual, should bear the loss is already accepted in the Official Prosecutions (Defendants' Costs) Act 1973 in the context of the legal costs of an accused who is acquitted. Until the passing of that Act, the general rule was that costs were not awarded against the Crown unless it was shown to have been at fault in bringing the prosecution. However, under the legislation, costs to acquitted defendants are awarded as of right (subject to certain limited exceptions): see Official Prosecutions (Defendants' Costs) Act 1973, s.5.

6.3 In reply, it could be argued that compensation should be payable only if the officials concerned were at fault, and that, if they were, the proper course is for the person suffering loss to commence proceedings against them. However, officials at present enjoy a wide measure of immunity from tort actions (see paragraph 4.1 above) which was given them so that they could proceed with the efficient discharge of their duties without undue harassment. To reduce or remove this immunity may therefore not be in the public interest. Further, the relief offered to persons detained in custody would be of a very uncertain nature if their only recourse was against individual officials. Cases where officials involved in the administration of justice act in bad faith are rare. In the overwhelming proportion of cases, those charged with the responsibility of administering criminal justice carry out their duties in a proper and reasonable manner. The argument in favour of a statutory scheme of compensation (as distinct from giving a right of action against an official) does not depend on the assumption that the State or its officers were at fault: see paragraph 6.2 above.

6.4 It might also be argued that the notion of a statutory scheme of compensation for persons who have been detained in custody and ultimately acquitted is misplaced, since it assumes that those who are acquitted are in fact innocent of the charge, whereas the precise question before the trial court is whether

the offence has been proved beyond reasonable doubt. To obtain acquittal, it is not necessary for the accused affirmatively to show his innocence.

6.5 It is of course true that in the case of acquittals the question of the accused's innocence has not necessarily been settled. In common with most other jurisdictions, no more detailed verdict is obtainable from the jury which would reveal whether it considered that the accused was innocent of the charge against him. Even where a conviction is quashed or a pardon given (see paragraph 2.1 above), the question is not "Has the innocence of the prisoner been affirmatively shown?" but "Was the conviction so defective that it cannot properly be sustained?".

6.6 Some persons might feel that most of those who are acquitted are in fact guilty and "get off" because of luck or technicalities. For example Sir Robert Mark, the Commissioner of the London Metropolitan Police, stated in a public lecture that "only a small proportion of those acquitted by juries are likely to be innocent in the true sense of the word" and under the present system it was the professional criminal who was "the very man most likely to escape society's protective net" (see Robert Mark, *The Disease of Crime, Punishment or Treatment* (1972) Royal Society of Medicine at 6 and 13). This view was strongly criticised by Michael Zander in *Are too many Professional Criminals Avoiding Conviction? - A study in Britain's two busiest Courts*, Modern Law Review Vol. 37 (1974) at 28. Of particular interest in Zander's article was a statement of a senior prosecuting counsel who pointed out that a large number of those acquitted should never have been tried in the first place because there was insufficient evidence: op. cit. at 48.

6.7 However, even if some guilty persons are in fact acquitted (and it would seem likely that this is the case), it should not be concluded that a statutory scheme of compensation should not be introduced at all. Such an argument would seem to be relevant only to the question of what the claimant should be required to prove in order to obtain compensation. It does not seem to be an argument against a compensation scheme as such.

6.8 A further argument against introducing a scheme is that if reforms were made to the bail system and to the procedure for dealing with more cases by summons instead of arrest (see paragraphs 2.6 to 2.10 above), the number of persons likely to suffer

compensable loss or damage would be so reduced as to make it unnecessary to have any formal scheme of compensation. It may be suggested that any cases that did arise could be satisfactorily dealt with by way of ex gratia payments. On the other hand there will always be a hard core of exceptional cases which warrant compensation as a matter of right and not at the discretion of the Government. In other words, it might not be sufficient to deny a statutory right to compensation merely because the criminal justice system was working well over all. It is little consolation to the individual who has been detained in custody, to know that there are few others who have been similarly dealt with.

6.9 There are two other arguments that may be advanced against a statutory scheme of compensation - one based on the supposed attitude of the police, and the other on the supposed attitude of juries. The first is that the police might be less likely to prosecute suspected persons. However, the police when arresting a person would never know whether that person would become liable to be compensated or not. There do not appear to have been any justifiable complaints of this nature arising out of the Official Prosecutions (Defendants' Costs) Act 1973.

6.10 The second argument is that juries would be more likely to convict if they knew the accused would receive compensation on acquittal. However, the jury would rarely know whether the accused had been remanded in custody or on bail, or had suffered any loss which would entitle him to compensation on acquittal. It is therefore unlikely that the jury would be influenced by the possibility or otherwise of a claim for compensation.

Criteria

6.11 If it is assumed that a statutory scheme of compensation is desirable in some circumstances, the question arises as to precisely what those circumstances should be. Perhaps the most important question in this context is whether compensation should be payable only to those who satisfy the determining authority that they are in fact completely innocent of the charge.

6.12 At first sight, to impose a requirement that the applicant prove affirmatively that he is innocent seems reasonable. Nevertheless, there appear to be difficulties

in this notion. Firstly, it would often require separate proceedings to determine the question. The criminal trial is, as pointed out in paragraph 6.5 above, concerned solely with the question whether the charge was proved beyond reasonable doubt, and sufficient evidence may not have been produced to prove innocence affirmatively. Guilt and innocence are sometimes uncertain concepts, involving the ascertainment of the state of mind of the accused and the witnesses. If evidence of the accused's innocence is not overwhelming, it would probably be necessary to institute full scale proceedings as to the question of his innocence, and to give opportunity to the Crown to produce evidence in rebuttal and to cross-examine the applicant and his witnesses. In other words, it might be necessary to traverse again all the issues that were involved in the criminal trial, this time from the point of view of the accused's innocence.

6.13 A further argument against requiring proof of innocence is that, if the applicant is denied compensation on this ground, his reputation may be compromised, and his acquittal at the trial converted into a "second class acquittal". This would particularly be so if determination of the question of compensation was in the hands of the trial judge (see paragraph 9.4 below), and could also be so if that question were decided by a separate tribunal. A similar point was made by the Commission's predecessor, the Law Reform Committee, in its working paper on the payment of the legal costs of acquitted persons: see the Working Paper on Project No. 12, *Payment of Costs in Criminal Cases*, paragraph 31.

6.14 It may therefore be preferable not to treat innocence as the determining criterion. It is significant that none of the European schemes described above requires affirmative proof of innocence.

6.15 Although there may be good reasons against introducing a requirement that the applicant prove his innocence, it does not follow that compensation should be awarded as a matter of course in every case. In paragraph 8.5 to 8.6 below the Commission discusses the question of other possible bars to compensation. These parallel the bars enacted by the legislature in the Official Prosecutions (Defendants' Costs) Act 1973: see s.6.

6.16 The Commission has no final views on the question of the criteria for determining whether in a particular case compensation should be paid, should a statutory scheme be introduced. The Commission would welcome comment.

POSSIBLE COMPENSABLE LOSSES

Pecuniary loss

7.1 There are several possible categories of pecuniary losses which could be incurred by a person eligible for compensation under a statutory scheme. Legal costs have already been mentioned: see paragraph 4.1 above. Other possible losses are -

(i) loss of income;
(ii) loss of employment;
(iii) loss of accommodation, loss of goods on hire purchase, and so on;
(iv) economic losses generally.

(i) *Loss of income*

7.2 A significant loss which may be incurred by an accused who is remanded in custody is loss of income. This loss may lead to a chain reaction of other losses as the accused will become unable to keep up repayments on accommodation and other commitments. In the case of an employee, loss of income will usually be easy to ascertain but may be more difficult in the case of a self employed person.

7.3 Since 1973 the Commonwealth Government has paid a discretionary special benefit to people detained in custody pending trial at a rate equivalent to unemployment benefits. Formerly, as such people were not available for work they did not come within the qualifications for unemployment benefits. However, the special benefit would be of only marginal assistance to the average wage earner who would have house repayments, hire purchase and other commitments to meet. Nevertheless, it should be taken into account in assessing compensation if the persons have actually received them.

(ii) *Loss of employment*

7.4 Detention in custody on a criminal charge frequently results in loss of employment: see *Bail or Custody* at 79-80. This would be compensable if liability were based in tort, i.e. on the principles applicable to ordinary civil actions. A different way of dealing with the situation might be to provide appropriate employment protection measures. This is a familiar Australian legislative concept: see e.g. National Service Act 1951 (Cwth) s.54B. There are obvious practical difficulties with such an alternative. The Commission has no concluded view on this aspect and welcomes comment.

(iii) *Loss of accommodation, loss of goods on hire purchase and so on*

7.5 One consequence to a family, if the breadwinner is in custody, is that due to the loss of income default may be made on the normal outgoings in respect of mortgage repayments, rent or hire purchase commitments: see *Bail or Custody* at 81. Such losses would be compensable if compensation were assessed on a tort basis. On the other hand, it might be better to prevent or restrict the sort of action which can be taken against an accused person prior to his conviction. An analogy for this sort of provision is to be found in s.36A of the Hire Purchase Act 1959, whereby a consumer can apply to have his obligations suspended under a hire purchase agreement during illness or unemployment. Such a moratorium would prevent some of the more unfortunate situations from arising and thus tend to reduce the amount needed to be paid to adequately compensate the accused. However, it is difficult to assess whether such a scheme would be feasible in the context of accused persons.

(iv) *Economic losses generally*

7.6 If the compensation were based on normal tort liability, then all reasonably forseeable economic losses would be compensable. These could include business losses due to absence from the business, failure to carry out a contract requiring personal service or even loss of or damage to the business.

Non-pecuniary loss

7.7 This is a further area which could be compensable if compensation were to be assessed on a tort basis. This would cover such matters as loss of enjoyment of life, emotional distress, loss of leisure time and so on: see discussion J.M. Jackson, *The Costs of Prosecution to the Acquitted*, New Law Journal (1975) at 1158. It might have particular relevance to a person who was not in employment and therefore had no claim for financial losses as such, for example, a mother looking after a house and family. The compensation schemes of those countries discussed earlier (see paragraphs 5.9 to 5.31 above) all provide compensation for non-pecuniary loss.

7.8 An instance of the way in which such matters can arise and the distress which can be caused is provided by the English case of F.E. Stalham which was reported in *The Times* on 26 November 1970 and in *Bail or Custody* at 79. Stalham was accused of a crime he did not commit and was detained in custody. He lost his home and his wife had a nervous breakdown. His father-in-law who had been living with them had to be placed in a hostel. One year after Stalham was acquitted, the family circumstances had still not been restored. The facts of the case are set out in Appendix IV below.

7.9 The above heads of loss, both pecuniary and non-pecuniary, would fall with even greater impact in the case of a man who has served part or all of his sentence before his conviction is quashed or he is pardoned.

7.10 It is, therefore, arguable that compensation should be awarded under the usual tort basis for both pecuniary and non-pecuniary damage. The Commission invites comment.

Other benefits to be taken into account

7.11 As a matter of principle it would seem that any compensation scheme should be designed to compensate only for losses actually incurred. Any benefits obtained by the accused (e.g. special benefit under the Social Services Act) should be taken into consideration. Such a provision is to be found in the Swedish scheme: see paragraph 5.20 above.

Limit on compensation

7.12 It could be argued that detention of an innocent person in custody pending trial or the punishment of an innocent person is such a grave invasion of civil liberties that the State should fully compensate such persons. The State does not, for example, place a limit on compensation for resumption of a person's property: see Public Works Act 1902, s.34.

7.13 Alternatively, it could be argued that for practical reasons there should be some limit on compensation so as not to create too great a drain on the public revenue. However Sweden, France, Germany and Holland have no limits on compensation: see paragraphs 5.13 to 5.31 above.

7.14 If there is to be any limit on compensation, from the point of view of certainty it might be desirable to prescribe a maximum amount, such amount operating as a cut-off point. Opinion will obviously differ as to the appropriate upper limit, particularly as actual losses in this area can be very substantial. Possibly a cut-off point analogous to that in the Criminal Injuries (Compensation) Act could be appropriate: the Criminal Injuries (Compensation) Act Amendment Act 1976 has increased that sum to $7,500. However, the effect of such a limitation would be that some people would be fully compensated and others would not. In fact, the more the accused was damaged the less adequately in proportionate terms would he be compensated. Thus if it were thought desirable to have a limit it could possibly be either a percentage of the full damages as assessed or alternatively compensation could be restricted to certain heads of loss. For example, compensation could be restricted to loss of income and legal costs.

7.15 It might be argued that detention pending final disposition of a case warrants a different limit on compensation than the case of a person who has been wrongly convicted and subsequently imprisoned. It might be thought that in the latter case a person should have a claim to more generous compensation than in the former. Alternatively, it could be argued that as a person suffers an injustice in both cases the limit on compensation should be the same, if indeed a limit were to be imposed.

CLAIMS FOR COMPENSATION

Who should be able to claim?

8.1 In deciding who should be able to claim, there are two distinct issues involved -

(a) Should compensation be payable not only to the accused person but also to others who have suffered as a result of the detention of the accused?

(b) Should the claim for compensation survive the death of the accused so as to vest a right of action in his personal representative?

Compensation for persons other than accused

8.2 When an accused person is held in custody pending trial not only may he be damaged but other persons who are dependant on him may likewise be damaged as was the Stalham Family: see Appendix IV. This may extend not only to his immediate family but to his employers and other persons who are in a business relationship with him. The damage may be particularly aggravated where the accused has been convicted and served part of his sentence. If the accused's dependants have suffered damage in addition to those suffered by the accused then it is arguable that they should have a claim in damages. All the European schemes outlined above except Sweden allow such a claim: see paragraphs 5.16, 5.25 and 5.29.

8.3 On the other hand, it might be said that to allow persons other than the accused to have a claim would be to extend the scheme too widely. It might prove difficult to draw the line if compensation was not restricted to the accused.

Survival of the claim

8.4 There have been a number of cases in various jurisdictions where a convicted person susbsequently found to have been innocent has been either executed or died of natural causes while in custody. The question then arises whether his claim for compensation should survive so that it can be pursued by his dependants or personal

representative. It would seem arguable that at least his dependants should be able to claim in such cases. Whether his estate should be able to maintain a case is more debatable. The Commission has no concluded view on this aspect, and welcomes comment.

Bars to compensation

8.5 The question whether the accused should be barred from obtaining compensation if he does not prove his innocence affirmatively has been discussed earlier: see paragraphs 6.11 to 6.14 above. This paragraph and the following paragraph discusses whether there should be a bar of any other sort. It is arguable that an acquitted person should either be barred from recovering compensation altogether or that the determining authority should have a discretion to refuse compensation in the following circumstances: where the accused -

(a) is discharged even though the offence is proved (for example under s.669 of the Criminal Code as a first offender or under s.26 of the Child Welfare Act);

(b) is acquitted through incapacity, either insanity or infancy;

(c) is acquitted of major offences but convicted of a lesser offence;

(d) has contributed to his own misfortune - for example, by bringing about the prosecution by voluntarily signing a false confession, by hiding the guilt of another or by failing to disclose an alibi until the actual trial.

Certain overseas jurisdictions make provision for both bars and discretions: see paragraphs 5.13 to 5.31 above. There are also bars in Western Australia under the Official Prosecutions (Defendants' Costs) Act 1973: see s.6.

8.6 Frequently, people are charged with a number of offences at the same time, ranging from the principal offence to various minor offences. It could be that a person was held in custody because he was accused of a major offence and would have been released on bail if he had only been charged with the minor offences. An example taken from *Bail or Custody* (at 81) is that of Gibson, which illustrates that point, as well as the general predicament faced by people remanded in custody. Gibson was charged with a number of offences and acquitted of all charges except one of possession of two rounds of ammunition. He had spent three months in custody. For the full facts see Appendix IV.

PROCEDURE FOR DETERMINING CLAIM

Tribunal

9.1 The question as to who should decide compensation claims may permit of a variety of possible answers. However, determination of claims by an appropriate tribunal seems the most satisfactory means as such a tribunal would be independant of the trial system. This would be particularly important if a claim for compensation were to involve a consideration of whether the accused was innocent or not.

9.2 If the tribunal were involved merely with an assessment of losses, this could be done in an informal way so as not to create a further trial on the question of damages. The tribunal could be constituted by a single judge of the District Court, as is now the case under the licensing provisions of the Hire Purchase Act. A similar proposal was made by this Commission for the setting up of a Criminal Injuries Compensation Tribunal: see *Report on Criminal Injuries Compensation*, paragraphs 27-28. The enlargement of the jurisdiction of the District Court by enabling a single judge to act as a compensation tribunal would avoid the disadvantage which may arise if an entirely separate tribunal was established.

Other alternatives

(a) *Jury*

9.3 It might be argued that the jury should decide the compensation. However, this would confuse the question of guilt

or innocence with that of compensation. A jury should not be distracted from the real question at issue in the trial, which is whether the accused is guilty. Moreover, an accused person who is acquitted may wish to bring further evidence of the losses he has suffered before compensation is assessed. This could be done by allowing the accused to bring further evidence after the verdict of not guilty has been given but to do so would be very inconvenient in practice. It may also be impossible to accurately estimate the losses suffered by the accused at that stage. Moreover, except occasionally for claims for defamation, juries are not used in this jurisdiction for determining damages.

(b) *Judge*

9.4 It might be argued that the trial judge (or Magistrate in a Court of Petty Sessions) should assess compensation as he will have heard the evidence and be experienced in assessing damages. However, as with the jury, the issues at the trial should not be confused with those of compensation. Moreover, the trial judge may not agree with the jury's verdict and it might seem difficult for him to assess compensation impartially. Also, it may not be possible to assess accurately the damages suffered by the accused immediately after the trial even if he were allowed to call further evidence. This could be overcome by allowing the accused to make separate application at a later date, but there may be practical difficulties if the application has to be made before the same judge who presided at the trial.

(c) *Treasurer*

9.5 If the compensation scheme were limited to, say, legal costs and loss of income the Treasurer might be considered a suitable person to assess and pay out on claims. However, the Treasurer might not wish to become involved in a formal compensation scheme.

9.6 A practical objection to the Treasurer filling the role would be that his decision would not be subject to appeal. While this is the current position with applications for an ex gratia payment, it would not seem appropriate in the context of a formal compensation scheme.

(d) *Ombudsman*

9.7 It might be argued that the Parliamentary Commissioner for Administrative Investigations would be an appropriate person to decide the matter of compensation. He has expertise in investigating cases and making recommendations. On the other hand, it might well be thought that such a role would be inappropriate and in conflict with his role as a watchdog on the administrative activities of the Government - a role in which he does not make decisions, only recommendations.

Appeal

9.8 The question arises whether an applicant should be allowed an appeal from a compensation decision and if so to what court should such an appeal lie?

9.9 It would seem clear that if compensation is to be decided on the basis of tort with its attendant complexities a full right of appeal on both fact and law should be allowed. If the tribunal was constituted by say a District Court Judge then the logical hierarchy of appeal would be to the Full Court of the Supreme Court. Even if one of the other alternatives were chosen to decide compensation it would still appear appropriate that an appeal on such a matter should be to the most authoritative court in Western Australia.

QUESTIONS FOR DISCUSSION

10.1 The Commission invites comments on the issues raised in this paper or on any other matters within the terms of reference. In particular the Commission invites answers to the following questions. It would be helpful if reasons were given, where appropriate, for the views expressed.

(1) In Western Australia should there be a scheme to provide compensation -

(a) where a person is detained in custody pending final disposition of his case and he is acquitted (either at the trial on on appeal);

(b) where a person has been convicted and has served part or all of his sentence before his conviction is quashed or he is pardoned?

If the answer to question 1 is yes:

(2) Should the scheme provide full compensation on the normal basis of damages in tort or should it only provide compensation for certain specific losses, e.g. loss of income and legal costs?

(3) Should other benefits such as unemployment benefits be taken into account when assessing compensation?

(4) Should there be a limit on compensation and if so what should that limit be or how should it be calculated?

(5) Should compensation be claimable by other persons as well as the acquitted or pardoned person?

(6) Where an acquitted or pardoned person has died, should his dependants or personal representative be able to claim?

(7) Should the claimant have to prove his innocence to obtain compensation or should it be sufficient that the claimant has been acquitted or pardoned as the case may be?

(8) Should there be any bars to compensation and if so what should these be?

(9) Who should decide the claim - a special tribunal, the trial court (either judge or jury) or some other body?

APPENDIX I

Survey of remand prisoners

The following table refers to the actual length of imprisonment experienced by the twenty-three remand prisoners in the survey before sentence was passed or they were acquitted or the charge withdrawn.

Number of days in custody	Number of people
1	1
3	1
15	1
20	1
21	8
22	1
27	1
29	1
30	1
42	1
84	1
110	1
112	1
123	1
145	1
208	1
	TOTAL 23

Outcome of court hearing	Number of Charges	Relative Frequency
Charge withdrawn	2	1.9%
Acquitted on charge	1	.9%
Bench warrant issued	4	3.7%
Fine	2	1.9%
Probation	9	8.4%
Imprisonment	89	83.2%
TOTAL	107	100.0%

APPENDIX I (cont.)

Note: Each number refers to one charge. Thus there were 107 charges laid against 23 persons in the survey. It can be seen that on 14 charges the defendant was either acquitted, the charge withdrawn or he received a non-custodial sentence. An examination of the actual cases discloses that these 14 charges were against 8 people. One who was detained for 208 days, only had one charge (murder) against him, and was acquitted.

APPENDIX II

Extracts from Justices Act, Police Act and Interpretation Act

Sections 230 and 232 of the Justices Act 1902 (W.A.)

230. In an action against a Justice for any act done by him in the execution of his duty as such Justice, it must be expressly alleged in the statement of claim or plaint that the act was done maliciously and without reasonable and probable cause, and if such allegations are denied, and at the trial of the action the plaintiff fails to prove them, judgment shall be given for the defendant with costs.

232. When the plaintiff in an action against a Justice is entitled to recover, and he proves the levying or payment of any penalty or sum of money under a conviction or order as parcel of the damages which he seeks to recover, or proves that he was imprisoned under such conviction or order, and seeks to recover damages in respect of such levying or payment or imprisonment, then, if it is proved that he was actually guilty of the offence of which he was so convicted, or that he was liable by law to pay the sum which he was so ordered to pay, and, in case of imprisonment, that he has undergone no greater punishment than that assigned by law for the offence of which he was so convicted, or for non-payment of the sum which he was so ordered to pay, he shall not be entitled to recover the amount of the penalty or sum so levied or paid, or any sum beyond the sum of a farthing as damages for such imprisonment, or any costs of suit whatsoever.

Section 138 of the Police Act 1892 (W.A.)

138. Sections A, D, G, and H of "The Shortening Ordinance, 1853", shall be incorporated with and taken to form part of this Act to all intents and purposes, and in as full and ample a manner as if the said section had been introduced and fully set forth in this Act.

Paragraph H of the Second Schedule to the Interpretation Act 1918 (W.A.)

No action shall lie against any Justice of the Peace, Officer of Police, Policeman, Constable, Peace Officer, or any other person in the employ of the Government authorised to carry the provisions of this Act, or any of them, into effect, or any person acting for, or under such persons, or any of them, on account of any act, matter, or thing done, or to be done, or commanded by them, or any of them, in carrying the provisions of this Act into effect against any parties offending or suspected of offending against the same, unless there is direct proof of corruption or malice; and if any such person shall be sued for any act, matter, or thing which he shall have so done, or shall so do, in carrying the provisions of this Act into effect, he may plead the general issue and give the special matter in evidence; and in case of judgment after verdict, or by a Judge sitting as a jury, or on demurrer being given for the defendant, or of the plaintiff discontinuing, or becoming non-suit in any such action, the Court before which the action was brought may award treble costs to the defendant or such portion of those costs as the Court thinks fit.

APPENDIX III

Extracts from United States Code Annotated and United Nations Draft Covenant on Civil and Political Rights

United States Code Annotated

Title 28 Part IV S.1495

"Damages for unjust conviction and imprisonment - Claim against United States.-
The Court of Claims shall have jurisdiction to render judgment upon any claim for damages by any person unjustly convicted of an offense against the United States and imprisoned. (June 25, 1948, c.646. s.1, 62 Stat. 941.)"

Title 28 Part VI S.2513

"Unjust conviction and imprisonment.- (a) Any person suing under section 1495 of this title must allege and prove that:

(1) His conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted, or on new trial or rehearing he was found not guilty of such offense, as appears from the record or certificate of the court setting aside or reversing such conviction, or that he has been pardoned upon the stated ground of innocence and unjust conviction and

(2) He did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution.

(b) Proof of the requisite facts shall be by a certificate of the court or pardon wherein such facts are alleged to appear, and other evidence thereof shall not be received.

(c) No pardon or certified copy of a pardon shall be considered by the Court of Claims unless it contains recitals that the pardon was granted after applicant had exhausted all recourse to the courts and that the time for any court to exercise its jurisdiction had expired.

(d) The Court may permit the plaintiff to prosecute such action in forma pauperis.

(e) The amount of damages awarded shall not exceed the sum of $5,000. (June 25, 1948, c.646, S.1, 62 Stat. 978; Sept. 3, 1954, c.1263, S.56, 68 Stat. 1247.)"

United Nations Draft Covenant on Civil and Political Rights

Article 14(6)

"When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

APPENDIX IV

Selected cases

Case of F.E. Stalham mentioned in The Cobden Trust: *Bail or Custody* at 79

"Mr. Stalham was a 29 year old lorry driver with no criminal convictions, living with his wife, his retired father-in-law and a son aged eight in a council house. In March 1969 he was arrested and charged with serious offences in connection with a robbery which had allegedly been planned in his house. The magistrates at Hendon Magistrates' Court decided to remand in custody, after hearing the police object to bail on the grounds that Mr. Stalham might abscond and that two other persons in the case had still to be arrested. Altogether he appeared five times at the magistrates' court and was refused bail on each occasion, the police later altering their objection to asserting that Mr. Stalham might intimidate witnesses. Finally, when the case was committed to the Old Bailey, the police withdrew their objections and bail was granted with two sureties of five hundred pounds each. By the time he left Brixton, after almost four weeks in jail, Mr. Stalham no longer had a job to return to, and the rent of the house where he had lived for seven years, was seriously in arrears. Three weeks later he and his family were evicted. He had to live separately from his wife and child for three months, while his father-in-law was given hostel accommodation. The mental strain of the situation caused Mrs. Stalham to suffer a nervous breakdown and so disturbed their son that he had to be given psychiatric treatment "He was pining for me, while I was in prison." says Mr. Stalham.

He found it difficult to get work and could not obtain unemployment benefit because he was awaiting his trial, and was not, according to the local labour exchange, therefore "available for work". When the case was heard in July 1969, the judge directed the jury to find Mr. Stalham not guilty of all the charges against him. Over a year later, Mr. and Mrs. Stalham were still in temporary accommodation, the father-in-law was still living at a hostel, and the son was still receiving psychiatric treatment.

In this case an innocent man and his family found their lives completely shattered as the result of somewhat spurious police objections to bail - objections which do not appear to have any factual basis, and which were eventually withdrawn, although the circumstances affecting their validity had not altered in any way. Yet, unless he can prove the police acted maliciously, that is from improper motives, Mr. Stalham has no right of action under civil law. Furthermore, there is no Government fund from which he or his family can seek compensation for the financial and other hardships they have suffered."

Case of Robert Gibson mentioned in *Bail or Custody* at 81

The facts are as follows -

"He appeared before the Acton Magistrates charged with theft of a motor vehicle, receiving and possession of two rounds of ammunition. The magistrates refused bail because of the

APPENDIX IV (cont.)

seriousness of the charges and on the grounds that there were further police enquiries to be made and also that he might interfere with prosecution witnesses. Mr. Gibson was working as a computer progress chaser at the time of his arrest. He lost his job and with it an income of thirty-five to forty pounds per week. He had been living in furnished rooms and wrote to his landlady from prison telling her to treat the deposit he had paid her as rent for the period he was in custody. However the magistrates continued to refuse bail on each occasion that he appeared before them, and his application to a judge in chambers through the Official Solicitors' Department failed. After the deposit had been exhausted, his landlady asked him to terminate the tenancy agreement. Mr. Gibson agreed, because he could no longer afford to pay the rent. When the case next came before the magistrates, the police used the ground of "no fixed abode" as an objection to bail. He was again remanded in custody. The final outcome of the case was that Mr. Gibson, having been committed for trial, was found not guilty of theft or receiving, but guilty to possession of the two rounds of ammunition, for which he was fined twenty pounds. He had spent over three months in custody."

Case of Vincent Taylor Brown mentioned in *Bail or Custody* at 20

"A 23 year old West Indian living in London, was accused of entering a house and stealing a shirt, two bottles of beer and other small articles worth in all about one pound forty pence. At the time of his arrest he was living with friends of his parents, but when he appeared at East Ham Magistrates Court the police maintained he did not have a permanent address. He was remanded to Brixton Prison, where he spent eleven weeks before being granted bail by a judge of the North East London sessions who stated in court that he had 'never come across a case with such a lack of sense of proportion. The man has no previous convictions and he probably would not have been sent to prison anyway'."

Case of Dougherty*

Mr. Dougherty was convicted of a shoplifting offence which occurred when he was in fact on a special bus trip with fifty-four other people. Only two of these passengers were called as witnesses at the trial. The jury did not believe them and convicted Dougherty. Dougherty then appealed.

Under the rules adopted by the Court of Criminal Appeal fresh evidence cannot be called unless such evidence was unavailable at the original trial. It could not be said that the evidence of the other witnesses on the bus was of that nature and consequently the appeal was argued on another point of law and dismissed. The Court of Appeal however did advert to the evidence of the other fifty-four witnesses and said that counsel was right in not arguing the question of such fresh evidence before the Court. After a further investigation and public outcry Mr. Dougherty was pardoned and granted an ex gratia payment of £2,000.

APPENDIX IV (cont.)

Case of Virag*

Mr. Virag was charged with stealing from parking meters, carrying a firearm with intent to resist arrest, attempted murder and wounding a police officer. He was wrongly identified by six witnesses and was convicted and sentenced to ten years imprisonment. After five years in prison it became clear that another person had committed the crimes. Virag was pardoned and given an ex gratia payment of £17,500 in compensation for his wrongful conviction and its consequences.

* For further details see Report of the Devlin Committee: *Evidence of Identification in Criminal Cases* (HMSO 1976).

Meeting of Commonwealth Law Ministers

Sri Lanka, 14-18 February, 1983

COSTS FOR SUCCESSFUL DEFENDANTS IN CRIMINAL CASES AND COMPENSATION FOR WRONGFUL IMPRISONMENT

Memorandum by the COMMONWEALTH SECRETARIAT

Commonwealth Secretariat
MARLBOROUGH HOUSE · PALL MALL · LONDON SW1Y 5HX

MEETING OF COMMONWEALTH LAW MINISTERS
COLOMBO, SRI LANKA
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COSTS FOR SUCCESSFUL DEFENDANTS IN CRIMINAL CASES AND COMPENSATION FOR WRONGFUL IMPRISONMENT

Memorandum by the COMMONWEALTH SECRETARIAT

This paper draws on material available at the Commonwealth Secretariat in January 1983 and on information supplied by a cross-section of Commonwealth jurisdictions.

2. The question of compensation for acquitted persons falls into two quite separate categories: compensation for those who incur costs in successfully defending criminal charges, and those who are imprisoned but are subsequently found (whether on appeal or subsequently) to have been wrongfully convicted. To some degree the criteria applied in redressing grievances can overlap, and in each instance the remedy provided is generally the tort of malicious prosecution.

A. COSTS FOR SUCCESSFUL DEFENDANTS

3. The normal rule in Commonwealth jurisdictions is that it is the prerogative of the State not to pay costs. As was said by the first Chief Justice of the High Court of Australia, Sir Samuel Griffiths in Affleck v. The King (1906) 12 ALR 112,119:-

> "There is no doubt that at common law the Crown is, by its prerogative, exempt from the payment of costs in any judicial proceeding, or that this right cannot be taken away except by Statute."

4. The position may differ in courts of summary jurisdiction, where the State as such may not be the prosecutor [see Hamdorf v. Riddle (1971) SASR 398].

5. The question of costs for successful defendants only assumes relevance to the extent that a defendant is not the recipient of legal aid.

(i) Australia

6. The position in Australia varies from state to state, and the material available suggests that there is a considerable lack of uniformity throughout Australia in the respective State and Territory legislation on this topic and that the principles behind the enactment of the United Kingdom's Costs in Criminal Cases Act have been adopted by only New South Wales and Tasmania. Why this should be so is not clear as there is a general dearth of legal literature on the topic, both in Australian law journals and textbooks on costs and the criminal law.

7. The first Act enacted in Australia to deal specifically with the granting of costs to successful defendants in criminal cases was the costs in Criminal Cases Act 1967 of New South Wales. This provides, inter alia -

> 2. The Court or Judge or Justice or Justices in any proceedings relating to any offence, whether punishable summarily or upon indictment, may -
>
> (a) where a defendant, after a hearing on the merits, is acquitted or discharged as to the information then under inquiry; or

(b) where, on appeal, the conviction of the defendant is quashed and -

(i) he is discharged as to the indictment upon which he was convicted; or

(ii) the information or complaint upon which he was convicted is dismissed,

grant to that defendant a certificate under this Act, specifying the matters referred to in section three of this Act and relating to those proceedings.

3. (1) A certificate granted under this Act shall specify that, in the opinion of the Court or Judge or Justice or Justices granting the certificate -

(a) if the prosecution had, before the proceedings were instituted, been in possession of evidence of all the relevant facts, it would not have been reasonable to institute the proceedings; and

(b) that any act or omission of the defendant that contributed, or might have contributed, to the institution or continuation of the proceedings, was reasonable in the circumstances.

(2) A certificate granted under this Act by a Justice or by Justices shall specify the amount of costs that he or they would have adjudged to be paid if he or they had made an order for costs against the informant, prosecutor or complainant, as the case may be.

4. (1) In this section "Under Secretary" means the Secretary of the Department of the Attorney General and of Justice.

(2) Any person to whom a certificate has been granted pursuant to this Act may, upon production of the certificate to the Under Secretary, make application to him for payment from the Consolidated Revenue Fund of the costs incurred by that person in the proceedings to which the certificate relates...

8. In his speech at the second reading of the Bill, the then-Minister of Justice said that the measure "represented a middle course" between two extremes. "It departs from the old English conception that costs in criminal trials should only be awarded in exceptional cases. On the other hand it establishes criteria which, when applied judicially, permit courts to make orders in appropriate cases without any innuendo arising from the making, or the refusal to make such orders that would be critical either of the prosecutor or the accused. In summary matters, costs may. by existing provisions of the Justices Act, be awarded against the informant. Where it would not seem appropriate to make such an order, the magistrate, under this bill, may grant his certificate leading to the successful defendant being paid by the Treasurer the costs which would have been ordered to be paid by the informant had the court seen fit. More important, where examining justices determine not to commit the accused for trial on the ground that the evidence is not sufficient to put him upon his trial, and for example are of the opinion that the charge was not made in good faith, the Bill permits them to order the prosecutor to pay costs incurred in or about the defence. Again it will be noted that the Treasurer may pay such costs where the court grants a certificate rather than order costs against the informant. The criteria to which I have referred, which will be relevant to the court in reaching its decision whether a certificate is to be granted, are simply applied. The two questions to be answered in the negative by the court before granting a certificate are first, does it appear that the prosecutor would not have been acting reasonably in initiating the proceedings had he been in possession of all the facts established in the course of the trial; and second, and equally important, did the defendant do or fail to do anything which resulted in or contributed to the proceedings' being commenced or continued. These two tests are applied in England where the Costs in Criminal Cases Act of 1908 permits the costs of the prosecution and expenses of witnesses for the prosecution or for the defence to be paid from local funds."

9. In an editorial (28 April 1967) the Australian Law Journal observed :-

"The Costs in Criminal Cases Act does not seek to pay the costs of their defence to all persons who are acquitted. The decision not to do so may be quite justifiable but once taken it is difficult to find any basis for reimbursement which will entirely eliminate the danger that a refusal of costs may be interpreted as casting a doubt on a jury's finding in favour of innocence. The Act itself certainly does not ask the court to consider guilt or innocence. Rather, it has regard to the reasonableness of the institution of proceedings. Clause 2 provides that the court, judge, justice or justices in any proceedings relating to any offence, may grant a certificate where a defendant, after a hearing on the merits is acquitted or discharged, or where, on appeal, the conviction is quashed and the defendant discharged on the information or complaint dismissed. But the certificate must specify the matters referred to in s.3. By virtue of this section the court etc. must specify that, in its opinion, if the prosecution had, before the proceedings were instituted, been in possession of evidence of all the relevant facts, it would not have been reasonable to institute the proceedings and that any act or omission of the defendant that might have contributed to the institution or continuation of the proceedings was reasonable in the circumstances. The class of cases in which a certificate may be granted is thus a rather narrow one. The mere granting of a certificate, moreover, does not ensure payment of costs. The Treasurer must also consider that, in the circumstances, a payment is justified and he is also to have a discretion as to the amount of the costs which are to be paid. The certificate itself is not to contain any specification of the amount of costs except that, under s.3(2), one granted by a magistrate (or justices) shall specify the amount that would be adjudged to be paid if an order was being made for costs against the informant, prosecutor or complainant. The Under Secretary is to furnish a statement to the Treasurer in which he is to state the amount specified under s.3(2), or what in his opinion are the reasonable costs, and also to specify any amounts that the applicant has received or could have received independently of the Act, by reason of incurring the costs. Then, where the Treasurer considers that "in the circumstances of the case the making of payment to the applicant is justified, the Treasurer may pay to the applicant his costs or such part thereof as the Treasurer may determine." Speaking on this discretion, on the introduction of the Bill for the Act, the Minister of Justice said that the Treasurer might decide, for example, that payment is unjustified where a person acquitted on one charge is subsequently convicted on another charge arising from the same circumstances. The discretion reserved to the Treasurer thus goes far beyond the mere questions of what costs were reasonably incurred and of what alternative means of covering them could be, or could have been, explored. It seems unfortunate that such a broad discretion is being given to the Treasury and it at least seems desirable that its exercise to refuse reasonable costs, where a certificate has been granted, should be confined to the most exceptional circumstances."

10. In Tasmania, a special Act was passed, the Criminal Proceedings (Special Defence Costs) Act 1976, in order to discharge an undertaking given by the prosecution to meet certain costs and expenses incurred in an abortive criminal trial. A fortnight later a further Act, Costs in Criminal Cases Act 1976, was enacted to make provision generally for the payment of costs in criminal cases to successful defendants. The Act provides inter alia:-

4. (1) Subject to this Act, where a person having been charged with an offence is discharged from the proceedings in respect thereof, that is to say, where -

(a) he is acquitted of the offence;

(b) the complaint charging him with the offence is dismissed or withdrawn; or

(c) he is discharged upon an indictment for the offence.

the court having the conduct of the proceedings may, upon the application of the defendant, order that he be paid in respect of his defence such costs as it thinks just and reasonable.

(2) The court, in deciding whether to grant costs and the amount of any costs granted, shall have regard to all relevant circumstances

and in particular to the following:-

(a) Whether the proceedings were brought and continued in good faith;

(b) Whether proper steps were taken to investigate any matter coming to, or within, the knowledge of any person responsible for bringing or continuing the proceedings;

(c) Whether the investigation into the offence was conducted in a reasonable and proper manner;

(d) Whether the evidence as a whole would support a finding of guilt but the defendant is discharged from the proceedings on a technical point;

(e) Whether the defendant is discharged from the proceedings because he established (either by the evidence of witnesses called by him or by cross examination of witnesses for the prosecution or otherwise) that he was not guilty.

(3) No defendant shall be granted costs by reason only of the fact that he is acquitted of an offence, the complaint charging him with an offence is dismissed or withdrawn, or he is discharged upon an indictment.

(4) No defendant shall be refused costs by reason only of the fact that the proceedings were properly brought and continued.

(5) No defendant shall be refused costs by reason only of the fact that in the investigation of the offence with which he had been charged he remained silent or refused to assist in respect thereof.

11. There appears to be no overview of the current legal position for this area of the law throughout Australia. It is, however, possible to say that a successful defendant in criminal proceedings is likely to be awarded costs in cases of summary offences but with the exception of Tasmania and New South Wales not necessarily in all cases of indictable offences. It should, however, be remembered that the general availability of legal aid in cases of criminal offences is now such that the absence in Australia of statutory enactments similar to the United Kingdom's Costs in Criminal Cases Act may not be quite such a handicap as might be thought at first glance.

12. As noted, courts of summary jurisdiction are generally given a discretion to make an order for costs in favour of successful complainants or defendants. In such provisions there is usually nothing to indicate that any different principles are to be applied in awarding costs against unsuccessful parties depending upon whether they are complainants or defendants, or depending upon whether (being complainants) they happen to be police officers or not. However, there appears to be a practice whereby costs are awarded against unsuccessful defendants almost as a matter of course, whereas costs are awarded against unsuccessful complainants who happen to be police officers only in unusual circumstances, such as where the police have acted unreasonably in laying or proceeding with the complaint. Such a practice was rejected by the Full Court of South Australia as "offending against the conception of evenhanded justice" (Hamdorf v. Riddle, (1971) S.A.S.R. 398). An example of the legislation is Victoria's Justices Act 1958, which provides:-

105. The power of a magistrates' court to award costs and the award of costs by any such court shall be subject to the following provisions:-

(1) .....

(2) Where the court dismisses the information or complaint, or makes any order in favour of the defendant it may in its discretion in and by its order of dismissal or other order award and order that the informant or the complainant respectively shall pay to the defendant such costs as to such court seem just and reasonable;

(3) The sums so allowed for costs shall in all cases be specified in the conviction or order or order of dismissal;

(4) Any sum adjudged awarded or ordered to be paid whether to an informant or complainant or to a defendant for costs including any such sum for costs alone may be raised and levied by distress under the provisions of this Act and in the case of costs adjudged awarded or ordered on a conviction for a fine may be raised and levied by a separate warrant of distress;

(5) When any case is adjourned the court may in its discretion order that the costs of and occasioned by the adjournment be paid by any party to any other party;

(ii) Barbados

13. Magistrates' courts are empowered to award costs by s.120 of the Magistrates' Jurisdiction and Procedure Act, Cap. 116. This is severely circumscribed as it is limited to costs other than legal costs (note s.120(11). It is further restricted by s.120(3) where the prosecution is brought by public authorities.

14. Section 120 provides as follows:-

> 120. Subject to the provisions of any other enactment to the contrary, on the trial of an information or hearing of a complaint, a magistrate shall have power in his discretion to make such order as to costs -
>
> (a) on convicting the accused or making the order for which the complaint is made, to be paid by the accused or defendant to the informant or complainant;
>
> (b) on dismissing the information or complaint, to be paid by the informant or complainant to the accused or defendant,
>
> as he thinks reasonable.
>
> (2) Notwithstanding subsection (1), where the complaint is for an order for the periodic payment of money or for the revocation, revival or variation of such an order or for the enforcement of such an order, the magistrate may, whatever adjudication he makes, order either party to pay the whole or any part of the costs of the other.
>
> (3) No costs shall be awarded against a constable, public officer or officer in the service or employment of the Interim Commissioner for Local Government prosecuting any information or complaint in his official capacity unless the information or complaint is dismissed and the magistrate is of opinion that the information or complaint was frivolous or vexatious.
>
> (4) Where a magistrate has dismissed an information or complaint and is of opinion that the information or complaint was frivolous or vexatious, he may also with the consent of the accused or defendant, order the informant or complainant to pay to the accused or defendant a reasonable sum, not exceeding one hundred dollars, as compensation for the trouble and expense to which the accused or defendant may have been put, by reason of such information or complaint, in addition to his costs.
>
> (5) The consent of the accused or defendant to any such order for compensation shall be a bar to any subsequent civil proceedings for false imprisonment or malicious prosecution by him against the informant or complainant.

(6) Where a magistrate has convicted an accused or made an order against a defendant, he may, in addition to the sentence or penalty, if any, imposed on such accused or defendant and to any costs ordered under subsection (1) or (2) and subject to subsections (7) and (8), order the accused or defendant to pay to the informant or complainant or any other person such compensation, not exceeding one thousand dollars, as to the magistrate may seem just and reasonable.

(7) The magistrate shall not award compensation in respect of damages for injury or loss suffered by the informant or complainant as a result of the offence or matter upon which the information or complaint was founded unless the informant or complainant or such other person consents.

(8) The award of any such compensation mentioned in subsection (7) shall release the accused or defendant from all other civil proceedings for the same cause.

(9) The amount of any costs or compensation ordered to be paid under subsection (6) shall be specified in the conviction, order or order of dismissal, as the case may be.

(10) Any order for payment of costs made against an accused or a defendant may include costs of and attendant upon his apprehension.

(11) No order for payment of costs made under this section shall include any fees to attorney-at-law.

(12) Subject to subsection (13), any sum of money awarded for costs or compensation under this section shall be enforceable as a sum adjudged to be paid by conviction or order.

(13) Any costs or compensation awarded on a complaint for an affiliation or maintenance order or for the enforcement, variation, revocation, discharge or revival of such an order, against the person liable to make payments under the order shall be enforceable as a sum ordered to be paid by an affiliation order or a maintenance order, as the case may be.

15. The High Court has a general discretion to grant costs in all cases heard by it.

(iii) Canada

16. The question is under active review in a number of Canadian jurisdictions.

17. In 1973, the Law Reform Commission of Canada in a Study Paper recommended a federal scheme for the compensation for the acquitted accused. The Law Reform Commission will be reviewing the matter in the future, but probably not before they have completed their work on the Criminal Law Review. In 1974, the Law Reform Commission of British Columbia recommended legislation permitting an award of costs to a successful defendant in cases prosecuted under provincial statutes. No action has been taken on this recommendation. The Law Reform Commission of Saskatchewan is studying the question, but has not yet reported. The Canadian Bar Association has undertaken a study of the question arising out of discussions on the issue at the 1982 Annual Meeting. The Government of Ontario is also examining the question.

18. The review in Ontario arises out of a prosecution in which in 1982, after a hearing of fifty sitting days (probably the longest preliminary inquiry in the history of Canada) a finding of no case to answer was made and a defendant discharged. Press reports estimate legal costs at £75,000.

19. The range of options tentatively identified by one Canadian researcher are as follows:-

(a) the formalising of an ex gratia scheme, with a panel of High Court judges advising Cabinet (as recommended by the Ontario Royal Commission on Civil Rights);

(b) conferment of judicial discretion (viz: Barbados);

(c) conferment of judicial discretion with guidelines (viz: U.K.; New South Wales; Tasmania).

(d) establishment of an independent tribunal along the lines of the Criminal Injuries Compensation Board (suggested in a Working Paper of the Law Reform Commission of Canada);

(e) retrospective waiving of guidelines on legal aid to enable a successful defendant, who was not legally aided, to be granted such aid (suggested by the Law Reform Commission of British Columbia);

(f) creation of a new tort of "improper prosecution" so as to downgrade the requirements of estbalishing malicious prosecution.

(iv) Jamaica

20. In common with most Commonwealth jurisdictions, there is no provision for costs as such in Jamaican law. Such compensation can only be obtained through an action for malicious prosecution.

(v) Kenya

21. The general position in Kenya is that unless an acquitted person succeeds in bringing an action for malicious prosecution, there is no power for the court to award costs against the prosecution. The Criminal Procedure Code does, however, provide by s. 171 for costs to be awarded against a person who is convicted. They may only be awarded in favour of a person who is acquitted of charges brought by a private prosecutor, provided that -

(i) such costs shall not exceed one thousand shillings in the case of an acquittal or discharge by the High Court or five hundred shillings in the case of an acquittal or discharge by a subordinate court;

(ii) no such order shall be made if the judge or magistrate considers that the private prosecutor had reasonable grounds for making his complaint.

(vi) New Zealand

22. The statutory basis for awards of sums of money "towards the costs" of acquitted defendants is to be found in the Costs in Criminal Cases Act 1967, s. 5 of (which applies to all courts exercising jurisdiction in criminal cases) provides:-

> 5. Costs of successful defendant—(1) Where any defendant is acquitted of an offence or where the information charging him with an offence is dismissed or withdrawn, whether upon the merits or otherwise, or where he is discharged under section 179 of the Summary Proceedings Act 1957 the Court may, subject to any regulations made under this Act, order that he be paid such sum as it thinks just and reasonable towards the costs of his defence.
>
> (2) Without limiting or affecting the Court's discretion under subsection (1) of this section, it is hereby declared that the Court, in deciding whether to grant costs and the amount of any costs granted, shall have regard to all relevant circumstances and in particular (where appropriate) to--
>
> (a) Whether the prosecution acted in good faith in bringing and continuing the proceedings:
>
> (b) Whether at the commencement of the proceedings the prosecution had sufficient evidence to support the conviction of the defendant in the absence of contrary evidence:

(c) Whether the prosecution took proper steps to investigate any matter coming into its hands which suggested that the defendant might not be guilty:

(d) Whether generally the investigation into the offence was conducted in a reasonable and proper manner:

(e) Whether the evidence as a whole would support a finding of guilt but the information was dismissed on a technical point:

(f) Whether the information was dismissed because the defendant established (either by the evidence of witnesses called by him or by the cross-examination of witnesses for the prosecution or otherwise) that he was not guilty:

(g) Whether the behaviour of the defendant in relation to the acts or omissions on which the charge was based and to the investigation and proceedings was such that a sum should be paid towards the costs of his defence.

(3) There shall be no presumption for or against the granting of costs in any case.

(4) No defendant shall be granted costs under this section by reason only of the fact that he has been acquitted or discharged or that any information charging him with an offence has been dismissed or withdrawn.

(5) No defendant shall be refused costs under this section by reason only of the fact that the proceedings were properly brought and continued.

23. The costs of a convicted defendant may also be contributed to, s.6 providing:-

6. Costs of convicted defendant—Where any defendant is convicted but the Court is of the opinion that the prosecution involved a difficult or important point of law and that in the special circumstances of the case it is proper that he should receive costs in respect of the arguing of that point of law, the Court may, subject to any regulations made under this Act, order that he be paid such sum as it considers just and reasonable towards those costs.

24. Costs on appeal are provided for in s.8:-

8. Costs on appeals—(1) Where any appeal is made pursuant to any provision of the Summary Proceedings Act 1957 or the Crimes Act 1961 the Court which determines the appeal may, subject to any regulations made under this Act, make such order as to costs as it thinks fit.

(2) No defendant or convicted defendant shall be granted costs under this section by reason only of the fact that his appeal has been successful.

(3) No defendant or convicted defendant shall be refused costs under this section by reason only of the fact that the appeal was reasonably brought and continued by another party to the proceedings.

(4) No Magistrate or Justice who states a case in accordance with Part IV of the Summary Proceedings Act 1957 and no Judge who states a case shall be liable to costs by reason of the appeal against the determination.

(5) If the Court which determines an appeal is of opinion that the appeal includes any frivolous or vexatious matter, it may, if it thinks fit, irrespective of the result of the appeal, order that the whole or any part of the costs of any party to the proceedings in disputing the frivolous or vexatious matter shall be paid by the party who raised the frivolous or vexatious matter.

(6) If the Court which determines an appeal is of opinion that the appeal involves a difficult or important point of law it may order that the costs of any party to the proceedings shall be paid by any other party to the proceedings irrespective of the result of the appeal.

25. Regulations may be made prescribing the heads of costs that may be ordered and the maximum scales of costs (s.13). The court may exceed any maximum scale "having regard to the special difficulty, complexity, or importance of the case."

26. However, the Secretariat has been informed by another country that the total costs awarded between 1968 and 1972 averaged only $1,000 per annum (i.e. about £450). As against this, in 1980 the High Court handled 2,550 indictments or informants involving 989 distinct persons, and in 1979 the Magistrates' Courts handled 295,612 cases. It appears that costs are seldom awarded, and that where they are, only modest sums are ordered.

(vii) Nigeria

27. Section 32 of the Constitution of the Federal Republic of Nigeria 1979 guarantees the right to personal liberty and, among other things, deals with arrest, detention and bail of persons arrested by the police or charged before the Courts. The Criminal Procedure Act (Cap. 43 of the Laws of the Federation - applicable to the Southern States) and the Criminal Procedure Code (Cap. 89 of the Laws of Northern Nigeria - applicable in all the ten Northern States) have complementary provisions.

28. Specifically, section 299 of the Criminal Procedure Act (Cap.43) enjoins the Court in giving its decision at the conclusion of a trial, in addition to either discharging or convicting the accused, also to make such other order as to it may seem just. In addition to the foregoing, the following ancillary orders, (inter alia) may be made in favour of the victim of an offence or against the convicted accused, as the case may be:-

(a) On Acquittal: Costs against a private Prosecutor

Section 258 provides that where an accused person is acquitted or discharged in a prosecution originally instituted on a summons or warrant issued by the court on the complaint of a private prosecutor, not being a person prosecuting on behalf of the State or any public officer prosecuting in his official capacity, the court may order the private prosecutor to pay to the accused such reasonable costs as it considers proper unless the court is of the view that the private prosecutor had reasonable grounds for starting the prosecution. This provision is subject to any other provision in any written law relating to the procedure to be followed in awarding of costs.

(b) Compensation to the accused for false and vexatious charge

Section 256 provides that if the court discharges or acquits any accused person and the judge or magistrate is of the opinion that the accusation against him was false and either frivolous or vexatious, the judge or magistrate may for reasons to be recorded, order compensation of a specified amount, not more than N20 to be paid to the accused person by the complainant.

29. The accused may refuse to accept the compensation under (b) but where he accepts it, the accused is precluded from any civil action in respect of the same injury.

30. The Northern Nigeria Criminal Procedure Code contains provisions corresponding to the foregoing.

31. Mention should also be made of the novel provisions of subsection (6) of section 32 of the Constitution which reads:-

> "Any person who is unlawfully arrested or detained shall be entitled to compensation and public apology from the appropriate authority or person; and in this connection, "appropriate authority or person" means an authority or person specified by law."

(viii) United Kingdom

32. The material available suggests that in the Commonwealth the U.K. is the jurisdiction in which a successful defendant is most likely to have all or a part of the costs he has incurred reimbursed.

33. The power to award costs in criminal proceedings depends on statute and is governed mainly by the Costs in Criminal Cases Act 1973, under which the court may order payment of costs out of central funds to the prosecutor and to a successful defendant and payment of costs by one party to the other. Costs out of "central funds" should normally be awarded to a successful defendant unless there are positive reasons for making a different order. An order may be made notwithstanding that the defendant has been granted legal aid. "Central funds" simply means money provided by Parliament.

34. In a Practice Note [1973] 2 All ER 592,the then Lord Chief Justice, Lord Widgery, stated -

> "Although the award of costs must always remain a matter for the court's discretion, in the light of the circumstances of the particular case, it should be accepted as normal practice that when the court has power to award costs out of central funds it should do so in favour of a successful defendant, unless there are positive reasons for making a different order. Examples of such reasons are:-
>
> (a) Where the prosecution has acted spitefully or without reasonable cause. Here the defendant's costs should be paid by the prosecutor.
>
> (b) Where the defendant's own conduct has brought suspicion on himself and has misled the prosecution into thinking that the case against him is stronger than it really is. In such circumstances the defendant can properly be left to pay his own costs.
>
> (c) Where there is ample evidence to support a verdict of guilty but the defendant is entitled to an acquittal on account of some procedural irregularity. Here again, the defendant can properly be left to pay his own costs.
>
> (d) Where the defendant is acquitted on one charge but convicted on another. Here the court should make whatever order seems just having regard to the relative importance of the two charges, and to the defendant's conduct generally."

35. As has been observed by a number of writers, a decision by the court in exercise of such a discretion can involve an interpretation of a "not guilty" verdict, either as amounting to "not proven" or as being technical in nature and therefore undeserved. It can therefore place a gloss on the verdict, casting doubt on the verdict and thereby undermine the presumption of innocence (see, e.g. 40 Australian Law Journal (1967) at page 411).

36. Where a court has exercised its discretion in favour of making an award of costs out of central funds there is no further discretion to limit the amount awarded. Any provision of the Costs in Criminal Cases Act 1973 enabling any sum to be paid out of central funds, however, has effect subject to regulations prescribing rates or scales of payments of any costs so payable and the conditions under which such costs may be allowed.

37. Where costs are ordered to be paid out of central funds costs may be allowed as follows in respect of:-

(1) a witness for attending to give professional evidence, an allowance not exceeding the prescribed maximum and, where appropriate, a night allowance not exceeding such maximum;

(2) an expert witness for attending to give expert evidence and for work in connection with its preparation, an expert witness allowance of such amount as the court considers reasonable;

(3) a seaman who misses his ship for the purpose of attending to give evidence, an allowance in respect of loss of wages and maintenance;

(4) a witness other than those named under heads (1) to (3) who attends to give evidence, a subsistence allowance in accordance with the prescribed scale and, where appropriate, a loss allowance not exceeding the prescribed maximum;

(5) a witness who travels to or from court by public conveyance or private motor vehicle, a travelling allowance as prescribed;

(6) a person employed as an interpreter, such allowances as the court may consider reasonable;

(7) any prosecutor, defendant or appellant, or party to proceedings before a Divisional Court of the Queen's Bench Division, the same travelling and subsistence allowances as if he had attended to give evidence other than professional or expert evidence.

(8) any other person who in the opinion of the court necessarily attends for the purpose of the case otherwise than to give evidence, the same allowances as if he had attended to give evidence other than professional or expert evidence;

(9) a written report made by a registered medical practitioner in pursuance of a request by the court, a medical report allowance in accordance with the prescribed scale.

B. COMPENSATION FOR PERSONS WRONGFULLY CONVICTED

(ix) General

38. We are not aware of any Commonwealth jurisdiction which has a statutory scheme providing for compensation for persons who have been wrongfully convicted. It has, however, been suggested that in Nigeria such a person might seek redress under the Fundamental Rights provisions of the 1979 Constitution.

39. A number of Commonwealth countries are, however, party to the UN International Covenant on Civil and Political Rights, Article 6 of which provides:-

> "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

40. It has been suggested that this Article imposes upon a signatory an obligation to provide a statutory basis for such compensation as has been done in a number of European countries (cf. Compensation for Wrongful Imprisonment, JUSTICE, 1982).

41. Instead, Commonwealth jurisdictions have up till now dealt with the matter on an ex gratia basis, although a Royal Commission in New Zealand in 1980 was asked to suggest appropriate compensation, "if any", for a person convicted of two murders and subsequently granted a free pardon after serving eight years' imprisonment. Its recommendation of approximately NZ$1,87,450.35 (£450,000), and which also embraced members of Thomas's immediate family, was accepted by the Government.

42. In 1982, a report by JUSTICE (the British Section of the International Commission of Jurists) published a report entitled Compensation for Wrongful Imprisonment. It cites the following extract from a letter from the Home Secretary as being "the clearest statement of the position" in a case in which the Home Secretary has not intervened:-

> "The law makes no provision for...payments to persons acquitted in the ordinary process of law, whether at trial or an appeal. If someone thinks he has grounds for compensation his legal remedy is to pursue the matter in the civil courts, by way of a claim for damages. In exceptional circumstances, however, the Home Secretary may authorise an ex gratia payment from public funds, but this will not normally be done unless the circumstances are compelling and there has been default by a public authority."

43. The JUSTICE Report recommends the establishment of an Imprisonment Compensation Board to deal with such cases, with the following guidelines:-

(a) After the Board has accepted a claim as falling within its jurisdiction and being worthy of consideration it may refuse or reduce compensation if it considers that:-

  (i) a conviction has been quashed on grounds that the Board regard as being a mere technicality;

  (ii) it would be inappropriate in view of the imprisoned person's conduct in respect of the matters which led to the criminal proceedings;

  (iii) the applicant has failed to give reasonable assistance to the Board in its efforts to assess compensation.

(b) In respect of paragraphs (a)(i) and (a)(ii) above the Board will normally only consider evidence which was advanced at the trial or at the hearing of the appeal, except that it may consider and take into account matters which have come to light in the course of a subsequent investigation.

(c) Where the applicant's claim is accepted as coming within the provision of the scheme the Board will grant compensation for:-

  (i) expense reasonably incurred in securing the quashing of the imprisoned person's conviction;

  (ii) loss of earnings by the imprisoned person or any dependant person where such loss is a direct consequence of the imprisonment;

  (iii) any other expenses or loss which are reasonably incurred upon imprisonment either by the imprisoned person or any dependant person;

(iv) pain suffering and loss of reputation suffered by the imprisoned person or by the imprisoned person's dependants,

The Board will reduce any award by the amount of any other compensation or damages already received by the claimant.

(d) Compensation will not be paid if the assessment is less than £250.

(e) A person compensated by the Board will be required to undertake that any damages, settlement or compensation he may subsequently receive in respect of his wrongful imprisonment will be repaid to the Board up to the amount awarded by the Board.

Chronicle - Herald
Tuesday, Sept 11 th.

04-84-0256-01

Neither side will comment

By DEAN JOBB
Staff Reporter

Nova Scotia's attorney-general and the lawyer for Donald Marshall Jr. declined comment Monday on a report the provincial government will offer $270,000 in compensation to the Micmac Indian who served 11 years in prison before being cleared of murder.

CBC News, quoting anonymous sources, said Monday night Marshall will get $170,000 to compensate for time wrongly spent behind bars and a further $100,000 to cover the legal fees needed to prove he was innocent of a 1971 Sydney stabbing.

Reached at his Truro home last evening, Attorney General Ron Giffin said "I don't know where they got that," but refused to comment on the accuracy of the figures.

Giffin said the government would not be making any announcements on the Marshall case "until we're ready," adding he expected an official statement would be made, probably at a press conference, "in the very near future."

Marshall's lawyer, Felix Cacchione, would say only "the matter is not resolved," and to his knowledge, was still being dealt with by the attorney-general's department and Mr. Justice Alex Campbell of Prince Edward Island, the one-man commission appointed in March to study the compensation issue.

According to the CBC report, Mr. Justice Campbell had approved of the amount of compensation, which was to be made conditional on Marshall agreeing not to bring a lawsuit against the City of Sydney.

At the request of Mr. Justice Campbell, the provincial government paid the 30-year-old Marshall a $25,000 advance in April pending the commission's final report, originally slated for completion this fall.

Serving a life sentence for the second-degree murder of teenage friend Sandy Seale, who was stabbed to death in a Sydney park, Marshall was acquitted in May, 1983, by the Appeal Division of the Nova Scotia Supreme Court.

Evidence that witnesses had committed perjury at Marshall's trial, coupled with indications information was withheld from the defence, led to calls for a full investigation of the circumstances surrounding the case.

After a long silence the Nova Scotia government responded with the appointment of Mr. Justice Campbell, who was directed to concentrate on the issue of compensation.

AG, lawyer decline comment

By Dean Jobb
Staff Reporter

Nova Scotia's attorney-general and the lawyer for Donald Marshall Jr. declined comment Monday on a report the provincial government will offer $270,000 in compensation to the Micmac Indian who served 11 years in prison before being cleared of murder.

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09-84-0258-01

Nov 21st 1983

Mr. Gary How
Q.C. M.L.A.

Dear Sir:

I'm writing to you Concerning Donald Marshall J.R. Case: asking Ottawa for Compensation To which they Refused.

Marshall Was Convicted in 1971 of Murdering his friend Sandy Seale Due to the fact and in my own opinion He Lied To the Court.

So Why Should the taxpayer or the Provincial Govt — pay him Compensation.

At Present Marshall is employed on the Shubenacdie reserve outside Halifax as a plumer

Thank You Kindly
Yours truly
Joseph Frances Boudreau
West Arichat
Richmond County N.S.
B0E-3J0.

09-84-0258-01

Nov 21st 1983

copy

Mr. Mary How
Q.C. M.L.A.

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Richmond County N.S.
B0E-3J0.

09-84-0258-01

Broad'Or C.B.
Nov. 22 / 1983

Honourable Ron Giffin M.L.A.

Dear Sir, I am writing you concerning Donald Marshall case seeking compensation. I don't think he should get anything. Coming to the point how many years in prison would he have got for armed Robbery. Also why not check into his Record before the incident happened. What kind of character was he before the incident and also in prison. Also Marshall family looking for compensation because of discrimination what do you think the Sandy Seale family is going through after all these years, opening the case up again, and the fact that Marshall lost eleven years of his life; Seale lost them all.

Thank you.

Kevin Boudreau.
RR#1 Broad'Or
Box 245
C.B. N.S.

09-84-0258-01

F

P.O. Box 365
Lockeport, Nova Scotia
BOTILO, Nov. 27, 1983

Attorney General,
Government of N.S.,
Halifax

Dear Sir,

This letter deals with the Donald Marshall case. It makes me both angry and ashamed over the handling of this matter.

From the evidence and information that has been released during the pass several months, one can only conclude that Mr. Marshall was 'railroaded' into jail. This makes me feel angry that an innocent man was sent to jail. Thankfully, this country does not believe in capital punishment.

I feel ashamed because the politicians, both federally and provincially, that we elected, are passing the buck. Mr. Marshall and the public has been hearing nothing but political jargon. Doesn't anyone feel that justice must be served? Prove that this is a just society and admit a mistake was

made.

There are demands for an inquiry. I personally feel that would prove both lengthey and expensive. Let Mr. Marshall get on with his life debt free.

Try to imagine spending eleven years in a maximum security prison Knowing you are innocent:

Please do not answer this letter with a form reply that your office is looking into this matter. Admist there has been a miscarriage of justice and compensate Mr. Marshall. $82.000 is a drop in the bucket to the government. At least it would show the public and perhaps instill some faith in our goverment leaders.

I trust and pray that a just decision will be made shortly.

Respectfully,
Elizabeth Acker

09-84-C258 -01

2. Nov 1983

DOMINIC ROLAND HILL
112 FLYING CLOUD DR
DARTMOUTH N.S.
B2W 4T3

Attorney General.
Province of N. S
The Hon R. C. Giffin

Dear Sir;

For your consideration in respect to the payment of legal fees or court costs for Donald Marshall.

Considering Mr Marshalls acknowledged intention to commit a felony on the night of the murder, his deliberate devousness during his first trial and the Judges observation that he was personally reponsible for all his own problems I will take very great exception to any financial assistance, to Mr Marshall, from Government Funds.

Thank you.

D. R. Hill

Justice is not yet complete

Donald Marshall is now a free and exonerated man.

Twelve years after the Cape Breton man was convicted and imprisoned for murdering a friend, and in the light of overwhelming evidence that the conviction was a glaring error, the Nova Scotia Supreme Court has acquitted him.

Complete justice has not, however, yet been done. Nor will it be until Mr. Marshall's legal fees of $79,000 have been paid and the conduct of the Sydney police force which initially charged him has been thoroughly investigated.

Mr. Marshall, who after 11 years in prison is now on welfare, cannot pay his fees. Nova Scotia says it will pay only the standard $3,000 legal aid grant. John Munro, federal Indian Affairs minister, had said Ottawa would pay the fees (Mr. Marshall is a Micmac Indian). No money, however, has been forthcoming — apparently partly because Ottawa feels, with some justice, that the provincial government should pay because it is responsible for the administration of justice.

Meanwhile Mr. Marshall's lawyer, Stephen Aronson, has had to take a job in the federal civil service to cut his losses on the Marshall case. That is an appalling commentary on our system of justice.

Ottawa at least understands that the state should pay these fees, since the state created the need to incur them. It should therefore pay them and then seek to recover the money from Nova Scotia.

Meanwhile, an even graver blot on the judicial system remains: the failure to launch any investigation into the conduct of the Sydney police force, even though three witnesses have testified that Sydney policemen pressured them into false (and crucial) testimony in the 1971 trial.

The two officers in question are now Sydney's police chief and chief of detectives. Neither the Nova Scotia government nor the provincial police commission has shown the slightest interest in investigating the grave allegations against them.

Sydney Indians are restive. It is hard to blame them. One suspects the police would have been investigated long ago if Mr. Marshall had been white.

But his race is not important. What is important is that sworn statements attesting to such serious police misconduct must never go uninvestigated. Only in a police state are the police held to be above the law.

Montreal Gazette May 12/83

EDITORIALS

Case not closed

The case of Donald Marshall still has not been concluded, even though someone else has at last been convicted of the killing for which Mr. Marshall served 11 years in prison.

The matter will remain a blot on Canada's judicial and moral record until Mr. Marshall has been paid the $82,000 in legal fees incurred to prove his innocence and, even more important, until the apparently strange conduct of the police force which originally charged him has been thoroughly investigated.

Mr. Marshall is the Nova Scotian man who in 1971, at the age of 17, was convicted of murdering his friend Alexander Seale in Sydney. Not until this year was he able to win a retrial which found him innocent. Now Roy Ebsary of Sydney has been found guilty of killing Mr. Seale.

The judge who acquitted Mr. Marshall this spring said he was largely responsible for his original conviction because he lied at his trial (he denied being in the park where the fatal stabbing occurred when in fact he and Sandy Seale were attempting to rob Mr. Ebsary there). But any fault of Mr. Marshall does not excuse the fault of others involved in this case.

Crucial witnesses have testified that two Sydney policemen pressured them to give false testimony in the 1971 trial. The two officers are now Sydney's police chief and chief of detectives. But, in an outrageous display of indifference, responsible authorities have shown no interest in investigating their conduct. It has been left to Mr. Marshall to take legal action against the city and the police force.

All this legal action has cost Mr. Marshall a great deal of money — $82,000. yet the state, which created the need to pay these fees, will not reimburse them. Nova Scotia refuses outright. The federal minister of Indian affairs, John Munro, said Ottawa would pay (Mr. Marshall is a Micmac Indian) but has since reneged.

Meanwhile Mr. Ebsary — whose own daughter testified that he spent hours sharpening knives in the basement, once ripped the head off her pet budgie and killed her cat; who in 1971 swore he would kill the next person who mugged him; and who allowed an innocent man to spend 11 years in prison — has been released without bail until sentencing.

He is admittedly, old (72) and sick. But Donald Marshall lost 11 of his best years of young adulthood. Does he not deserve at least the knowledge that his society is willing to face all of its responsibilities?

04-83-0638-09

Cape North P.O.
N.S. BOC 1CO
Nov. 25, 1983

Hon. Ronald C. Giffin
Attorney-General,
Province House,
Halifax, N.S.

Dear Sir:

Enclosed are two clippings from the Montreal "Gazette", dated almost exactly six months apart, yet making the same points. I am sending both to emphasize that time has been allowed to pass and nothing has been done on these matters.

There is currently a good deal of discussion on the payment of Mr. Marshall's legal fees, but I hear nothing on the question of the behavior of the Sydney police officers mentioned. Let others argue as to whether the nation or the province should foot the bill — I am concerned with what the "Gazette" calls "an outrageous display of indifference" --- "neither the Nova Scotia government nor the provincial police commission has shown the slightest interest." The "Gazette" concluded, last May, : "Only in a police state are the police held to be above the law."

May I urge that as the new Attorney-General you take steps to investigate the behavior of the Sydney police in this matter.

Yours very truly,
Mary D. Cox

P.S.

09-84-0258-01

H.Holt, P.Eng.
902-165 Ontario St.
Kingston K7L 2Y6

27.Nov.83

The Hon. Harry How. Q.C.
Attorney General of Nova Scotia.

re: Donald Marshall

Dear Sir,

Donald Marshall has been in jail for 11 years, from age 17 till 28 - the best years of our life. Now that it has been proved that he was totally innocent and that a grave error of justice had occured, every one is sorry for him, Federal and Provincial government alike.

But there is embarrased silence when it comes to the question of compensation. Of course nothing can really compensate for a life sentence, but the very least is restitution of legal costs and a cashsettlement or life annuity.

We are shocked; we think Canada is a civilized country, we think Nova Scotia a civilized province, but it does not appear to be so!

Please act now and quickly to avoid further embarassement. The next step after this, is to enact legislation which makes it a matter of course to compensate people who are victims of justice gone astray. Remember Canada IS a civilized country after all!

Respectfully and sincerely

yours H. Holt

especially one who is willing to commit suicide, is almost impossible to stop."

He said that many threats had been made against the embassy in the past but no warning had been given of the recent attack.

Meanwhile, an Iranian Foreign Ministry spokesman, in a Tehran Radio broadcast monitored in London, said the bombings had "no connection whatsoever" with Iran.

Responsibility for the series of blasts was claimed by a pro-Iranian group called Islamic Holy War, which also claimed to have set bombs in Beirut in April and October that killed 361 people, most of them U.S. and French troops.

U.S., French, British and Italian troops make up the multinational peacekeeping force in Beirut.

U.S. Marines in full combat gear

MELBOURNE, Australia (Reuter) — Melbourne's pioneering test-tube baby scientists have rejected overseas requests that they attempt to grow human embryos to provide medical "spare parts," the team leader said yesterday.

Professor Carl Wood said his team had been asked to help research into the use of organs and tissue from embryos in transplant and graft surgery.

Prof. Wood, head of the Queen Victoria Medical Centre in vitro fertilization team, did not say who made the requests, but said: "We've had two overseas approaches from people who believe the IVF techniques could be used to grow embryos beyond the five- or seven-day stage that we have limited ourselves to.

"There would have to be a change in community attitudes before we would begin to consider being involved in the work."

Prof. Wood said although spare-parts procedures might benefit the sick, they would result in the death of the embryo.

IVF involves fertilizing an egg outside the body and reinserting it in the womb.

The Government of Victoria state has lifted an eight-month ban on certain techniques being developed by the Melbourne team — a ban imposed partly because of the possible consequences.

year-old war between Iran [and] Iraq.

Gulf leaders quickly confer[red by] telephone and voiced suppor[t for] Kuwait. Some diplomats said [the] attacks might strengthen the [re]solve of the six-nation Gulf Co-[operation] Council, formed in 1981 p[artly] as a result of the rebellion in Ira[n].

The Council is made up of [Ku]wait, Saudi Arabia, Bahrain, Q[atar,] the United Arab Emirates [and] Oman.

Mr. Griffin said U.S. fore[nsic] experts were coming to Kuwa[it to] investigate the bombing.

He said one U.S. company [re]moved its American personnel [and] dependents yesterday "but this [was] not done upon recommendatio[n of] the U.S. Embassy."

The U.S. business commu[nity] numbers about 2,500 in Kuwait.

AROUND THE WORLD

09-83-0638-09

Canadian given suspended sentence

ANKARA — A Canadian accused of insulting Turkish President Kenan Evren has been sentenced to a suspended 10-month prison term in the western city of Denizli, his lawyer, Veli Devecioglu, said. Bernard Beaulieu, a Quebec Government computer technician, is expected to be able to leave Turkey when the appeal process becomes final in a week's time, Mr. Devecioglu said. The defence does not plan to appeal, but prosecutors can file an appeal within a week after the court's verdict. Mr. Beaulieu was charged with insulting General Evren while watching the President on television in the lobby of a hotel in Denizli.

Dec 14/83

Man is set free on new evidence

LONDON — Two legal appeals, a television documentary and years of campaigning by pressure groups have finally resulted in the release from prison of a man wrongly convicted of murder. Mervyn Russell, 39, may get as much as $100,000 in compensation for the six years he spent in prison. Mr. Russell was jailed for life in 1977 for stabbing 20-year-old Alison Bigwood to death. Last week the court set him free after hearing new pathological evidence that showed the handful of hair found in the victim's hand could not have been Mr. Russell's.

Yugoslav minister is dismissed

BELGRADE — The Yugoslav Government has announced that Finance Minister Joze Florijancic will be dismissed, but said he will be given another Government post. It gave no reason for what Western diplomats consider a highly unusual move, but sources said Mr. Florijancic had resigned because of a dispute over next year's budget and planned financial reforms.

Bolivia paralyzed by general strike

LA PAZ — Bolivia was virtually paralyzed yesterday by the second general strike in three weeks, union sources said. Public transport was working to some extent in the capital, but other public services and virtually all private business came to a halt at the start of the 48-hour stoppage. Unions want the Government to raise the minimum monthly wage to $240 from the current $62 to cope with sharp price increases.

100 Nicaraguan rebels accept amnesty offer

MANAGUA — More than 100 U.S.-backed rebels have handed themselves over to Nicaraguan authorities, accepting an amnesty offer from the Sandinista Government, Victor Tir[ado] of the ruling junta said yesterday. He said the rebels, who were pres[illegible] at the [illegible] of [illegible] had been [illegible] [illegible]

said those accepting will be allowed to take [part] in 1985 elections.

Dynamite bombs rock U.S. recruiting office

EAST MEADOW, N.Y. — Two dyna[mite] bombs hidden in attache cases rocked a [Long] Island building that houses a U.S. Navy re[cruit]ing station moments after 170 occupants fl[ed in] response to a telephone threat. No injuries [were] reported. A group calling itself the United [Free]dom Front claimed responsibility for the bl[asts at] the four-story building in East Meadow, off[icials] said. The group also issued a communique [criti]cizing U.S. actions in South and Central Ame[rica].

Two bombs planted in British cities

LONDON — A small bomb demoli[shed an] unoccupied telephone booth last night in [Oxford] a few hours after polie cleared out thou[sands of] shoppers so the bomb squad could deton[ate a] kilogram charge planted in a busy Lond[on store.] Police blamed the Irish Republican Arm[y for the] London bomb, but there was no imme[diate indi]cation as to who was responsible for [the explo]sion in Oxford. No group immediatel[y claimed] responsibility for either bomb.

Four bombs exploded on Chilean protest d[ay]

SANTIAGO — Terror[illegible] yesterday, including one that [illegible] train, on a Day of National In[illegible] protest against the Chile[illegible] ment's new mining la[w] [illegible]

09-84-0258-01

Marshall's Appeal Lawyer Says He Didn't Receive New Evidence

By JOHN CAMPBELL
Staff Writer

C.M. Roseblum, the Sydney lawyer who represented Donald Marshall Jr. in his appeal back in 1972, said Wednesday that he went into the appeal unaware that new evidence had come to light in the weeks following Marshall's conviction of murdering Sandy Seale.

Provincial Court Judge D. Lewis Matheson, an Assistant Crown Prosaecutor at Marshall's original trial, told the Post earlier that he believed the defence lawyer would have been informed by the late Donald C. MacNeil, the Crown Prosecutor in charge of the case.

But Mr. Roseblum, who is vacatilioning in Florida, told the Post in a telephone interview yesterday that he was not told of the new evidence.

Meanwhile, an ex-RCMP officer who took part in the investigation of the new evidence has decided not to talk publicly about the case unless he gets permission from his former superiors.

Gene Smith, now director of security with Irving Oil in Saint John, New Brunswick informed the Post that he will honor the oath of secrecy taken as a Mountie until he's officially released from it.

Smith was one of two Mounties who took part in the investigation which was turned over to the RCMP by Sydney Police, through the Crown Prosecutor's office. The in-

Mr. Rosenblum

quiry included lie detector tests.

Judge Matheson recalled that the Crown Prosecutor was away from the city when James MacNeil came forward with his new evidence 10 days after Marshall's conviction. He remembers contacting N.R. Anderson, director of criminal presecutions with the the Attorney-General's Department in Halifax at the time. Now a County Court Judge, he has been quoted as saying he does not recall the MacNeil statement.

Judge Matheson said the new evidence seemed "Dramatic" to him, but may have seemed "routine" to Judge Anderson at that point.

The Attorney General at that time, Leonard Pace, was appointed to the Supreme Court shortly after, and was one of the three Justices who heard the unsuccessful appeal of the Marshall conviction in January of 1972. Judge Pace was quoted this week as having "no personal recollection" of the 1971 incident and not having been involved, because of department procedures at the time.

Not Aware

Judge Matheson was not aware whether the Crown Prosecutor had ever received any formal, official report from the Attorney-General's department as a result of the RCMP investigation it ordered into the new evidence. Case files, he said. are normally returned to the police, not filed by the Prosecutor's office.

Sydney Police Chief John MacIntyre testified during the second trial of Roy Newman Ebsary last November that as the officer in charge of the investigation that led to Marshall's conviction, he felt the investigation of the new evidence was best handled by RCMP, to avoid any conflict oof interest.

The chief testified that his involveent with the case ended when the new evidence was turned over to the Crown Prosecutor's Department in November of 1971.

However, the Sydney Police Department has preserved its file on the original investigation and the introduction of the new evidence as well.

A Canadian Press report meanwhile quotes Innis MacLeod, Nova Scotia's deputy Attorney-General at the time, as saying that Marshall's lawyers should have been notified before his appeal that an eyewitness had come forward with information that could clear Marshall.

MacLeod said he had no recollection of an RCMP review undertaken in 1971 when James MacNeil came forward after the trial. MacNeil had not testified at Marshall's trial.

Judge Matheson

Marshall served more than 11 years in jail for the 1971 stabbing death of his friend Sandy Seale in Wentworth Park before it was found last year that another man, Roy Newman Ebsary, was the real killer. Ebsary was later convicted of manslaughter in connection with Seale's death.

MacLeod said he had no recollection of an RCMP review undertaken in November 1971 when James MacNeil came forward after the trial and told investigators that his friend Ebsary was actually the killer. MacNeil had not testified at Marshall's trial.

RCMP ended the review after Ebsary passed a lie-detector test and results were inconclusive on MacNeil.

The former deputy attorney general said he would expect MacNeil's information would have been transmitted to the defence lawyers. He said his department kept a general eye on criminal proceedings but local crown prosecutors "pretty well ran the show in the city where they prosecuted."

Marshall's current lawyer, Felix Cacchione, has asked for a full public inquiry by the attorney general's department into the handling of the initial investigation, at which three crown witnesses gave false statements. Two of the crown witnesses have said they were pressured by investigators into giving the statements.

Other justice officials involved in the originals trial either had no recollection of MacNeil's statement in 1971 or thought Marshall's lawyer had been notified.

An attorney general's department official said Monday the file on Marshall's original case has been destroyed under routine department procedures.

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centre does not hold.
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the Institute of Urban
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Seek redress over rights, judge says

An Alberta judge has ruled that an accused man whose constitutional rights were violated when he was jailed for five days can seek state compensation.

Mr. Justice David McDonald of the Alberta Court of Queen's Bench ruled that Denis Germain can ask for money as a remedy for the violation under the Charter of Rights and Freedoms or can ask, if convicted of the charge against him, for a shorter sentence than would otherwise be imposed.

Mr. Germain was jailed for contempt after he appeared in provincial court without a lawyer. His explanation that he could not afford a lawyer and had been unable to obtain legal aid was rejected by Provincial Court Judge Lucien Maynard, a former attorney-general of Alberta.

Judge McDonald said the section of the Charter providing for infringement remedies "must be given a generous interpretation," although he added that only in unusual and special cases should proceedings against an accused be quashed.

Mr. Germain's case was not an example of one in which charges should be dismissed, because the assault charges against him are serious, the judge said.

Judge McDonald, best known nationally as the head of a royal commission that investigated wrongdoing by the RCMP, said:

"The conduct of the accused did not constitute a contempt of court. . . . The power of any court to find a person guilty of contempt of court is one that must be used with great prudence. . . . What occurred in the present case was an abuse of the summary power of punishing for contempt."

But in his recent ruling, Judge McDonald stopped short of awarding Mr. Germain damages for infringement of his rights. Instead, the judge denied Mr. Germain's request that the assault charges still pending against him be quashed and invited Mr. Germain "to seek other relief," such as asking specifically for a monetary award.

David Midanik, an Edmonton lawyer now representing Mr. Germain, said in an interview he still is considering the options. A trial date for the four assault charges against Mr. Germain is to be set in September in St. Paul, about 120 miles northeast of Edmonton.

Judge McDonald elaborated at some length on the availability of monetary compensation as a possible remedy to a Charter violation. He said the existence and scope of this remedy have not been explored in detail in any previous decision under the Charter.

"It was necessary to demonstrate that it forms part of the armory of remedies that may be just and appropriate when there has been an infringement of a right guaranteed by the Charter," Judge McDonald said.

He ruled that Judge Maynard did not make plain to the accused the nature of the contempt with which he was being charged.

"Here, the accused was deprived of his liberty by a procedure that was not in accordance with the principles of fundamental justice, which require that the specific nature of the complaint against him be distinctly stated and that he be given an opportunity of answering it," Judge McDonald ruled.

Judge McDonald said there may be circumstances in which dismissing a charge will be a just remedy for an infringement of a Charter right. But when the offence is serious, like the one in question, this might not be the best remedy because it would foster a sense of injustice in the community, Judge McDonald said.

"I think that a just remedy in the context of the criminal law is one which, while furthering the object of the right guaranteed by the Charter that has been infringed, nevertheless does that, as far as possible, in a way that does not offend the reasonable expectations of the community for the enforcement of the criminal law," the judge said.

"Moreover, the remedy, to be just, must be otherwise consistent with other values enshrined in the Charter that are designed to protect an egalitarian pluralistic society that is free and democratic."

Mr. Germain is alleged to have assaulted four people on July 18, 1983. The most serious of the alleged assaults, Judge McDonald said he was told, resulted in the loss of sight in one of the victim's eyes.

After two months and a few Provincial Court appearances, Mr. Germain appeared before Judge Maynard on Sept. 12, 1983. Mr. Germain said he couldn't get a lawyer because he didn't have money and hadn't qualified for legal aid. Judge Maynard cited him for contempt.

had hiah death rates: study

5. In another situation that was reviewed in the courts, a corporation was formed with the objective of overseas marketing of liquefied petroleum gases. The essential preliminaries to the carrying on of this business in an active way included assurances of supplies from producing oil companies, plans for extracting, gathering, and transporting the gas to seaboard by pipeline or other means, the obtaining of export permits, arrangements for refrigerated storage and loading facilities at the seaboard and transport for shipments overseas, and the negotiating of firm contracts with overseas buyers. It was held by the courts that this corporation commenced business when these preliminary studies and negotiations were undertaken even though, in the end, the project was abandoned. The fact that no revenue was generated during this period was held not to be a significant consideration in determining whether the business had commenced and was being carried on.

Expenditures Prior to the Commencement of a Business

6. Expenses in respect of a proposed business that are incurred prior to the commencement of the business do not constitute a business loss or a non-capital loss and thus cannot be applied against income in the year the expenses were incurred, and cannot be carried back to be applied against income of the preceding year or forward to be applied against income of any subsequent year. If capital assets are acquired for a business before the business commenced, are later used in the business and are not used for some other purpose in the meantime, the capital cost of the assets is the amount that it would have been had the business been operating when the assets were acquired. If the business for which the capital assets were acquired never commences, the normal rules in the Act regarding capital gains and capital losses would apply if and when the assets were subsequently disposed of.

Expenditures After the Commencement of a Business

7. After a business has commenced, all expenditures that are recognized for purposes of the *Income Tax Act* and that were made in respect of the business are to be classified in the usual way as being expenses incurred for the purpose of earning income or as outlays on account of capital. Expenses incurred for the purpose of earning income normally are deductible in the year when incurred even if, after all the efforts made, the business has to be wound up before its normal operation ever does begin. Fees or other costs incurred in connection with the proposed acquisition of capital assets, which would normally be added to the cost of the assets when acquired, are to be classed as eligible capital expenditures if the assets are not in fact acquired, perhaps because of an abandonment of the business. In regard to representation expenses and interest on money borrowed to acquire depreciable property, see comments in Interpretation Bulletins IT-99 and IT-121R, respectively.

More Than One Business

8. Any taxpayer, whether a corporation or an individual, may occasionally be carrying on business activities that consist of two or more separate businesses (see Interpretation Bulletin IT-206). Where such is the case, each business must be considered separately where it is necessary to determine the date of commencement of one of the businesses.

[¶ 52,370] Interpretation Bulletin No. IT-365R: Damages, settlements and similar receipts

[Interpretation Bulletin No. IT-365R *dated March* 9, 1981, *issued by the Department of National Revenue, Taxation, replaces and cancels Interpretation Bulletin No.* IT-365 *dated March* 21, 1977. *This Bulletin examines the tax status of damages, settlements and similar receipts in the nature of compensation.* CCH.]

Reference: Section 3 (also sections 5, 6 and 56, and paragraphs 81(1)(*g*.1) to (*g*.3)).

1. The purpose of this bulletin is to discuss the tax status of termination payments, damages for personal injury, compensation for loss of property or income, and settlements and similar receipts. It is recognized that the question of whether or not a taxpayer is in receipt of taxable income can be determined only by an examination of all the facts pertinent to the particular situation; however, the criteria in

the following paragraphs are applicable in making this determination in arm's length situations.

Receipts in Respect of Termination of Employment

2. An amount that a taxpayer receives in respect of a termination of employment by his employer under the expressed or implied terms of an employment contract is to be included in computing the taxpayer's income from an office or employment, normally under section 5, 6 or paragraph 56(1)(*a*) (other than subparagraph 56(1)(*a*)(viii)). As a rule, these taxable amounts include payments of salaries, wages, compensation for accrued vacation or sick leave credits, retiring allowances, payments in lieu of earnings for the period of a reasonable notice, or any other payments made by virtue of the terms of his employment (explicit or implied). However, if any payment received in respect of a termination of employment is not required to be included in income under any other provision of the Act such a payment will, if received in respect of a termination after November 16, 1978, be included in computing income under subparagraph 56(1)(*a*)(viii) to the extent it represents a "termination payment" as described in 3 and 4 below.

3. "Termination payment" for a taxation year, as defined by subsection 248(1), is the lesser of

(a) the aggregate of all amounts received in the year in respect of a termination of an office or employment, whether received pursuant to a judgment of a competent tribunal or otherwise, other than

(i) an amount required by any provision of the Act (excluding subparagraph 56(1)(*a*)(viii)) to be included in computing the income of a taxpayer for a year,

(ii) an amount in respect of which an election has been made under ITAR 40(1), and

(iii) an amount received as a consequence of the death of an employee, and

(b) the amount by which 50% of the taxpayer's total remuneration from the office or employment for the 12 months period preceding the date of the termination or the date of an agreement in respect of the termination, whichever is the earlier, exceeds the amount (if any) included under (a) above, in the determination of a "termination payment" for each previous year in respect of the same termination of employment.

4. The Act does not define what constitutes "an amount received in respect of a termination of an office or employment". The Department will consider any amount that is received in consequence of a termination of employment (other than an amount included in income under another provision of the law or the exceptions listed in 3(*a*)(ii) or (iii) above) to be an amount received in respect of a termination of an employment. Examples of payments that may sometimes qualify as a termination payment are a payment as damages for a breach of an employment contract or for loss of future job opportunity, a payment as damages for failure to give reasonable or adequate notice of termination or an amount paid in respect of a wrongful dismissal or loss of reputation, provided it is not included in income under another provision of the law as in 2 above. The following characteristics should be present in order that a payment not be included in income under another provision of the law:

(a) The employee must have been dismissed without cause (or with insufficient cause) and/or without due notice.

(b) The employer must not have agreed voluntarily at any time to compensate the employee.

(c) There must have been a breach of the employment contract or terms of employment (some contracts may allow dismissal at any time).

(d) Subject to subparagraph (*f*) below, there must have been litigation wherein the court found that there had been a breach of the employment contract from which damages flowed.

(e) The settlement awarded by the court must be damages and not salary for the period for which the notice should have been given.

(f) Where the case is settled out of court there must be clear evidence that the employer was prepared to breach the employment contract but settled to

avoid a court case by paying a lump sum. To the extent that the settlement cannot be identified as being X month's salary it may be treated as damages.

Where the employee has an employment contract which specifies what he is to be paid in the event of termination, any payment received by the employee up to the amount specified is income under the employment contract and therefore taxable. It is a question of fact whether any additional money received is something that arose under the contract or is in the nature of damages. Where the employer accepts his obligation to give the employee money in lieu of notice but there is an argument about the amount, the final settlement is considered to be made under the employment contract and is totally taxable.

Receipts in Respect of Personal Injuries

5. Amounts in respect of personal injuries or death may be received on account of any of the following:

(a) Special damages—examples are compensation for

(i) out-of-pocket expenses such as medical and hospital expenses, and

(ii) accrued or future loss of earnings;

(b) General damages—examples are compensation for

(i) pain and suffering,

(ii) the loss of amenities of life,

(iii) the loss of earning capacity, and

(iv) the shortened expectation of life;

(c) Amounts as compensation for loss of support may be paid to the dependents of the deceased.

All amounts in (a), (b) and (c) above will be treated as non-taxable receipts provided that they can reasonably be considered as compensation in respect of personal injuries and not income from employment or a termination payment. (See IT-202R Workmen's Compensation Payments; Injury Leave Pay or Similar Payments.) An amount of such a compensation is non-taxable even though the quantum of the compensation is determined with reference to accrued loss of earnings to the date of award or settlement or to future loss of earnings.

6. The method of payment (periodic or lump sum) is not an important factor in determining the taxability of an award or settlement for personal injuries or death. However, where an amount that has been determined to be non-taxable is paid on a periodic basis, see 13 below for taxing of interest element, if any.

Receipts in Respect of Non-Performance of Business Contracts

7. An amount received by a taxpayer in lieu of the performance of the terms of a business contract by the other party to that contract may, depending on the facts, be either an income or capital receipt. If the receipt relates to the loss of an income-producing asset, it will be considered to be a capital receipt; on the other hand, if it is compensation for the loss of income, it will constitute business income. Again, while it is a question of fact as to whether a receipt is an income or capital amount, the following factors are important in making this distinction:

(a) if the compensation is received for the failure to receive a sum of money that would have been an income item if it had been received, the compensation will likely be an income receipt.

(b) "where for example, the structure of the recipient's business is so fashioned as to absorb the shock as one of the normal incidents to be looked for and where it appears that the compensation received is no more than a surrogatum for the future profits surrendered, the compensation received is in use to be treated as a revenue receipt and not a capital receipt", and

(c) "when the rights and advantages surrendered on cancellation are such as to destroy or materially to cripple the whole structure of the recipient's profit-making apparatus, involving the serious dislocation of the normal commercial organization and resulting perhaps in the cutting down of the staff previously required, the recipient of the compensation may properly affirm that the compensation represents the price paid for the loss or sterilization of a capital asset and is therefore a capital and not a revenue receipt." (The wording in (b) and (c) above represents quotations from the judge-

ment in *Commissioner of Inland Revenue v. Fleming and Co. (Machinery) Ltd.*, 33TC57 (House of Lords).)

8. Where an amount received by a taxpayer in compensation for a breach of a business contract is a capital amount according to the comments in 7 above, that amount would relate either to a particular asset of the taxpayer or to the whole structure of his profit-making apparatus. If, on the basis of the facts of the case, such as the terms of a contract, settlement or judgment, the amount received relates to a particular asset (tangible or intangible) which is sold, destroyed or abandoned as a consequence of the breach of contract, it will be considered proceeds of disposition of that asset or a part thereof, as the case may be. Where the amount of compensation relates to a particular asset that was not disposed of, the amount will serve to reduce the cost of that asset to the taxpayer. On the other hand, where the amount of compensation is of a capital nature but it does not relate to a particular asset as indicated above, the amount will be considered as compensation for the destruction of, or as damages to, the whole profit-making apparatus of the taxpayer's business. Such compensation may result in an "eligible capital amount" for the purpose of subsection 14(1) and subparagraph 14(5)(*a*)(iv).

9. A number of provinces make crime-compensation awards pursuant to the authority of criminal-injury compensation acts. The Department considers that such crime-compensation awards are non-taxable.

10. A taxpayer who is a victim of a crime may receive compensation from a source other than the person who committed the crime or a crime compensation board. For example, a taxpayer who is an employee of a bank is kidnapped and upon his release the bank pays the employee an amount to compensate for "damages" inflicted on him. Where the amount of money or benefit received is compensation for damages the Department will normally consider the amount to be a non-taxable receipt even if the damages are computed with reference to the victim's salary. To qualify as a non-taxable receipt, the amount must not be in excess of a fair evaluation of the damages suffered by the employee having regard to all relevant facts of the case. The amount of the receipt will ordinarily be accepted as a fair evaluation unless there are indications (such as the employer and employee not dealing at arm's length) that the receipt includes an amount for services rendered by the employee to the employer. Any part of an amount received by a taxpayer from his employer, or former employer, that is compensation for loss of earnings (e.g. an amount paid in lieu of regular wages or benefits) resulting from a disability of short duration will be included in the income of the taxpayer.

11. Where a taxpayer, other than an employee, is in receipt of an amount that has not been awarded by a court or a crime-compensation board (a payment by a bank to a customer, for example) for "damages" inflicted on him as a result of a crime, the total amount is considered to be a non-taxable receipt.

Compensation for Loss of Business Income or Business Properties

12. Amounts received by a taxpayer with respect to the loss of business income or business property may fall into one of the following categories:

(a) a non-taxable receipt,

(b) an income receipt,

(c) a receipt resulting from the disposition of a capital property, or

(d) an eligible capital amount.

See IT-182 for a discussion of the factors that determine the tax status of a given receipt.

Interest Element in Awards for Personal Damages

13. Where payments for damages that have been awarded by a Court or resolved in an out-of-court settlement, in respect of personal injuries or death, are paid on a periodic basis, the payments will not be considered to be annuity payments for the purposes of paragraphs 56(1)(*d*) and 60(*a*). Accordingly, no part of such payments will be treated as interest income. However, where an award for damages has been used by the taxpayer or his representative to purchase an annuity, the amounts received will be considered as annuity payments under paragraphs 56(1)(*d*) and 60(*a*) and Regulation 300. A bulletin on the subject of annuities is presently being prepared for publication and will comment on annuity

payments in greated detail. Where awards for damages are held on deposit, the amount of interest earned will usually be determined and included in the taxpayer's income annually. Where an award for damages is held in trust, any interest earned on the funds that is retained by the trust is income of the trust or of the beneficiary depending on the circumstances.

14. Under paragraph 81(1)(*g*.1) any income or taxable capital gain received before a taxpayer attains the age of 21 years is excluded from income to the extent it represents income from property or taxable capital gains from disposition of property that was acquired as damages in respect of physical or mental injury or that is property substituted for property so acquired. Paragraph 81(1)(*g*.2) applies to extend this exclusion to income received before the taxpayer attains the age of 21 years that represents income on the income or taxable capital gains excluded under paragraph 81(1)(*g*.1). Paragraph 81(1)(*g*.3) excludes from income interest paid in respect of a period during which the taxpayer was under 21 years of age where it represents interest paid by certain third parties on property or income from property referred to above which has been held by such parties on behalf of the taxpayer.

15. Where a periodic payment is determined to include an interest element which is included in the taxpayer's income pursuant to the provisions of paragraphs 56(1)(*d*) and 60(*a*), the amount of interest may be deducted in arriving at the taxpayer's taxable income pursuant to the provisions of section 110.1.

[¶ 52,371] [Interpretation Bulletin No. IT-366] Principal residence—Transfer to spouse or spouse trust.

[Interpretation Bulletin No. IT-366 *dated March 28, 1977, issued by the Department of National Revenue, Taxation, discusses the principal residence exemption in respect of property transferred to a taxpayer's spouse or a spouse trust.* CCH.]

Reference: Subsection 40(4) (also subsection 40(5) and paragraph 54(*g*)).

1. This bulletin outlines the effect of subsection 40(4) on the computation of the principal residence exemption under paragraph 40(2)(*b*) or (*c*) where a taxpayer's spouse (or former spouse) or a spouse trust disposes of property which was acquired from the taxpayer under the conditions described in 2 below, In the bulletin the "taxpayer" is assumed to be the husband, but, of course, the same comments would apply if the taxpayer was the wife. Interpretation Bulletin IT-120R, "Principal Residence", discusses other matters concerning the principal residence exemption.

2. The provisions of subsection 40(4) may apply only where the rollover provisions in subsection 70(6), in the case of a transfer on death, or those in subsection 73(1), in the case of an *inter vivos* transfer, applied to the transfer of the taxpayer's property to his spouse or a spouse trust.

3. In accordance with subsection 40(4), for the purpose of computing the gain under paragraph 40(2)(*b*) or (*c*) on the subsequent disposition of the property by the spouse (or former spouse) or spouse trust, the property is deemed

(a) to have been owned by the spouse or trust for the period during which it was owned by the taxpayer, and

(b) to have been the principal residence of the spouse or trust for any year in the period in (a) above if the taxpayer, in respect of the year,

(i) has designated it to be his principal residence, in the case of an *inter vivos* transfer to the spouse or trust, or

(ii) was eligible to designate it to be his principal residence, in the case of a transfer on death, to the spouse or trust.

4. Pursuant to the provisions described in 3 above, the years of ownership by the taxpayer are included in the denominator of the fraction illustrated in 12 of IT-120R when computing the exemption under paragraph 40(2)(*b*) or subparagraph 40(2)(*c*)(i) on the disposition of the property by the spouse or spouse trust. Also, the numerator of that fraction (or where subparagraph 40(2)(*c*)(ii) applies, the number of years for which the spouse or trust is entitled to the $1,000 per year exemption) includes each year of ownership by the taxpayer for

NDP campaign manager Gayle Cromwell said her party is also ready for the campaign, expected to be called Friday or Saturday for Nov. 6, and hopes to win more ridings than the one it now holds.

even nominated.

Miss Robertson said party workers are rested after the federal election and are prepared to hit the campaign trail again this fall.

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THE CHRONICLE~

VOLUME 36, NO. 230 HALIFAX, CANADA, THURSDAY, SEPT

'Nightmare' for Marshall over

By ALAN JEFFERS
Provincial Reporter

Provincial government compensation of $270,000 will not pay Donald Marshall Jr. for the "nightmare of the last 13 years," his lawyer said Wednesday.

Mr. Marshall has been under strain that has been "incalculable and at times intolerable," Felix Cacchione told a press conference in Halifax.

The Nova Scotia Micmac, who received national attention after spending 11 years in prison on a wrongful conviction of murder, was awarded the compensation as an acknowledgement by the province that an innocent man was mistakenly imprisoned, he said.

Mr. Marshall will be left with about $170,000 after paying legal bills of $100,000, he said. Another $45,000 was raised by a Montreal minister and will go to Mr. Marshall.

"You could have given this man $10 billion and that would not have been enough to make up for the outrage and the injustice he's had to live through," Mr. Cacchione said.

Mr. Marshall did not attend the press conference, seeking instead to "retire from public view."

"The situation that Donald wishes to avoid is walking out his front door every morning with a camera crew standing there."

He wants to "get on with living the private life which was denied him for so long," he said. "It is with a view to putting behind him the nightmare of the last 13 years that Donald has chosen to accept the offer of compensation."

Mr. Marshall is "relieved" the matter has finally come to an end, Mr. Cacchione said, relating how he and Mr. Marshall drafted a prepared statement Tuesday night which was read to reporters.

The compensation agreement, completed about two weeks ago, comes as a result of negotiations between the province and Mr. Cacchione.

The agreement was then approved by Prince Edward Island Supreme Court Justice Alex Campbell who, in March, was appointed by the provincial government as a one-man commission of inquiry to determine only the amount of compensation to be awarded and not to probe into events surrounding the conviction.

See NIGHTMARE page 2

Lawyer says inquiry needed

By ALAN JEFFERS
Provincial Reporter

Nova Scotians and Canadians "must demand an inquiry into why it occurred in the first place."

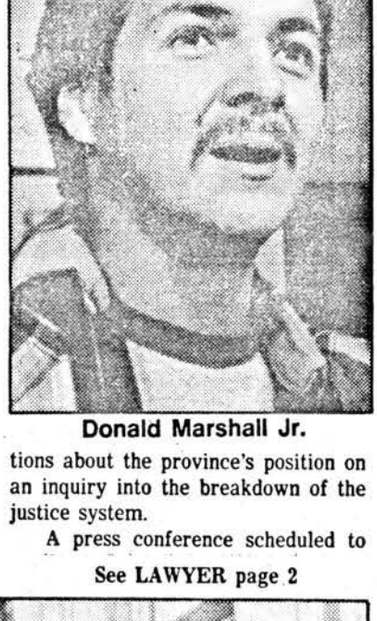
That's the feeling of Donald Marshall Jr., through his lawyer, Felix Cacchione.

"The case of Donald Marshall Jr. shows us very clearly how long it can take to correct a mistake made in the criminal justice system," he told a press conference in Halifax Wednesday.

It's up to the citizens of Nova Scotia and Canada to decide "whether there should be an accounting to them for the failure of our system of justice."

While Mr. Cacchione said he thinks government is obligated to investigate the events surrounding that night in 1971 in Sydney's Wentworth Park, the provincial government has not been so clear in its thinking.

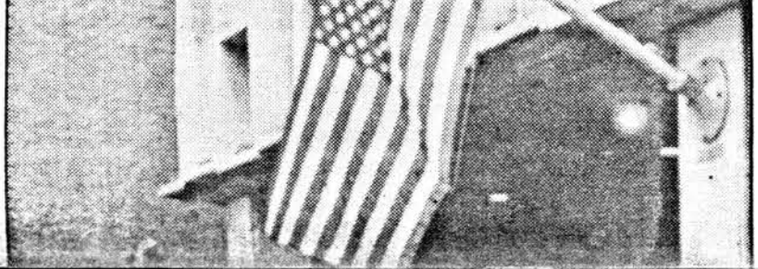
Attorney-General Ron Giffin has not been available to answer questions about the province's position on an inquiry into the breakdown of the justice system.



Donald Marshall Jr.

A press conference scheduled to

See LAWYER page 2



Today

Winning numbers

Ticket number 339489 was the unofficial winner of the $800,000 jackpot in the Atlantic Lottery Corp.'s A-Plus draw held Wednesday. Ticket number 995645 was the unofficial winner of the $100,000 grand prize. Prizes of $25,000 each went to ticket numbers 809421, 860165, 768423 and 483147. Prizes of $5 each went to tickets

Queen Elizabeth and
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By JIM MEEK
and The Canadian Pr

OTTAWA — Queen
told Canadians Wednesday
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of a troubled world.

In a brief address to a
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Nightmare

(Continued from page 1)

But because of the limited scope of the inquiry, negotiations were agreed to be a quicker and cheaper way to proceed.

It was 13 years ago that Mr. Marshall was convicted of murdering his companion Sandy Seale in a Sydney park. An RCMP investigation in 1981 turned up new evidence in the case, and as a result Mr. Marshall was paroled the next year. He was acquitted of murder last year by the appeals division of the Nova Scotia Supreme Court.

Another man, Roy Ebsary, was convicted of manslaughter in Seale's death but recently won a new trial on the grounds that the judge misdirected the jury on the law of self-defence. It has not yet been decided whether the attorney-general's department will order a new trial for the 72-year-old Ebsary, whose health is failing.

Mr. Cacchione said that as a condition for compensation, Mr. Marshall agreed not to take any court action against the province of Nova Scotia.

But he does maintain the right to sue the City of Sydney, the Sydney police department and the two policemen who were responsible for his wrongful conviction, Mr. Cacchione said.

"The matter of pursuing the matter further is up to Donald and judging from Donald's comments ... he would like the matter to end at this point."

The compensation money will not be the only funds Mr. Marshall receives for his 11 years in prison.

Mr. Marshall, his original lawyer Stephen Aronson, and Globe and Mail reporter Michael Harris are the principles in a company established to control the book and movie rights of the Marshall story.

Lawyer says

(Continued from page 1)

announce the Marshall compensation was cancelled and in its place a three-paragraph statement was sent over the government's news wire.

And Mr. Giffin could not be reached at his office by telephone after the announcement was released. His secretary said he would not be in until Tuesday.

When the Marshall issue came up during the last session of the legislature, the Conservatives took the political pressure off by appointing Prince Edward Island Supreme Court Justice Alex Campbell to examine how much compensation should be awarded Mr. Marshall, but not the events surrounding his wrongful conviction.

"Without the public pressure brought to bear by the committee of concerned citizens, the fund-raising efforts of Rev. (Bob) Hussey of Montreal and by those individual citizens who wrote to their newspapers, their MPs and their MLAs, we must wonder whether or not a commission would have been established to inquire into the question of compensation for Donald Marshall Jr.," Mr. Cacchione said.

Mr. Justice Campbell was "instrumental" in bringing the government to the bargaining table.

Before the former P.E.I. premier was appointed "a certain impasse was reached whereby the government wouldn't talk to us."

German SS unwittingly

MIAMI BEACH, Fla. (AP) — The mayor of this heavily Jewish city says he wants back the medal he unwittingly presented to a former sergeant in the German SS who once worked in a concentration camp.

The gold city medallion was presented Friday to Franz Hausberger, mayor of a ski village in the Austrian Alps, as part of a tourism promotion. Miami Beach Mayor Malcolm Fromberg did not know at the time Hausberger, 64, was part of the First SS Infantry Brigade during the Seond World War.

"I will write him and ask for it back," Fromberg said. "He took it under false pretenses."

The mayor also said he had composed a plan to prevent such "embarrassing" events from happening again

Monitoring program introduced

WATERLOO, Ont. (CP) — Group home residents may become part of a provincial government program used by inmates to alert authorities about problems in prisons and mental institutions, says Ontario's community and social services minister.

"We have to find a vehicle whereby a child will know that if something is untoward, he will have a remedy," Frank Drea said in an interview Wednesday.

The minister's comments follow an incident Sunday in which a group home operator in Sunderland, Ont., about 70 kilometres northeast of Toronto, was charged with sexually assaulting two former residents of the home. Residents have been removed and the home closed pending outcome of the case.

Drea said he is considering including group home residents in the distress signal program, which provides special envelopes for mailing complaints to the ministry. Home operators would be required to mail the sealed envelopes immediately or risk losing their licences, he said.

Sept 26/84

09-84-0256-01

ON BUSINESS

NEP, FIRA face major overhaul

Saying that Canada must be seen as a good place to invest, International Trade Minister James Kelleher says the national energy program and FIRA will be changed. /B1

Quote of the day

"We'd be ordering ink by the truckload." — **Keith McCormick**, a New Brunswick prosecutor, offers an explanation for poor identification of the multitude of people accused of drinking and driving offences. /12

Old labels lose meaning

Recent Government reforms instituted by the French President Francois Mitterrand's Socialists show that the party is bursting out of its old ideological seams. /11

Ontario PCs embarrassed

The Ontario Government is scrambling to fix an embarrassing mistake. It named a Catholic school trustee to a commission studying its policy of financing Catholic high schools. /12

Review planned in census case

Justice Minister John Crosbie says he will review the case of a Vancouver-area woman whose acquittal in refusing to answer census questions goes to appeal today. /5

REPORT ON CROFT

The normally quiet capital city of 40,000 turned out in full force to greet the Royal couple for their one-day visit.

A crowd estimated at 20,000 attended their afternoon "walka bout" at a children's picnic marking the province's bicentennial in a downtown park. Dozens of buses brought the children from throughout the province.

Some, like Jennifer Phillips of Fredericton, waited five hours to

Earlier in the day, the Queen, wearing a rose-pink coat, white silk hat and pink and white print dress, sat in a gazebo in Wilmot Park with her husband, as they listened to two choirs and the New Brunswick Youth Orchestra. A group of girls performed a gymnastics routine using a rainbow-colored parachute and a group of teen-age boys demonstrated break-dancing.

The picnic came at the end of a long, hot day of official events.

The Royal couple began by flying from Moncton to attend an hour-long church service at Christ Church Cathedral, where the Queen and the Duke signed a Bible first presented to the city by Edward, Prince of Wales, in 1860.

Their names were added to the bottom of a page that included the faded signatures of King George VI and Queen Elizabeth, who signed it in 1939, and those of Princesses Marina, Alexandra and Margaret.

Prince Philip read the second lesson, Matthew 13:14-23, a New Testament passage that contains

THOUSANDS — Page 2

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N.S. awards $270,000 to Marshall

By MICHAEL HARRIS
Globe and Mail Reporter

HALIFAX — Donald Marshall Jr., who spent 11 years in prison for a murder he did not commit, has been awarded $270,000 by the province of Nova Scotia for his wrongful imprisonment.

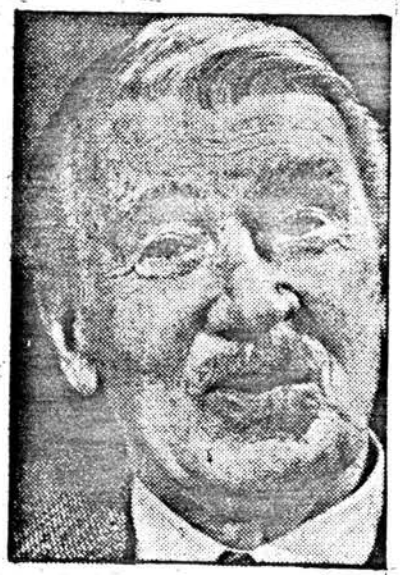
In return, Mr. Marshall has agreed to waive any further legal action against the Crown for his ordeal.

The *ex gratia* payment, confirmed yesterday by Mr. Marshall's lawyer, Felix Cacchione of Halifax, will be made this week and will bring to an end Mr. Marshall's 2½-year struggle to clear his name.

"I had to do it," Mr. Marshall said in an interview. "There's a lot about this thing I don't like, but to go on fighting would mean more legal bills and more time in court. I've had enough court."

The Micmac Indian was 17 when he was convicted of the 1971 murder of a 17-year-old black youth, Sandy Seale, in Sydney, N.S. — a crime Mr. Marshall repeatedly denied

MARSHALL — Page 4



Walter Pidgeon
The New Brunswick-born veteran actor died yesterday in California at 86.

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Hopes poor for jobless as times improve, OEC

By PETER COOK

Canada's unemployment rate, now 11.2 per cent, will not move lower, despite continuing growth in the economy, and will average 11 per cent for the rest of this year and through 1985, according to the Orga-

The Organization also focuses on the plight of young people who form a disproportionately large segment of the unemployed now, compared with the years before the 1981-82 recession.

In the case of Canada, the fore-

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people in Edmonton leave their snowshoes behind and come to the jewel of the West — Nanaimo."

A total of 102 Vancouver Island residents took the low-fare charter flight from Comox to the 450-store West Edmonton Mall for the huge shopping spree.

Alexis Hamilton, one of the eager shoppers attracted by the $139.99 return-trip air fare, estimates she

well.

"I think we've got a good thing going here," she said.

The invasion by the long-distance shoppers was good for business, said mall president Nader Ghermazian. He estimated the average shopper spent $345 on Saturday alone.

"They came, spent money, and had the absolute time of their lives," he said.

six-month investigation of Hydro's accounts. However, the Liberals and New Democrats insisted yesterday that the auditor's probe was crippled by a Conservative amendment that restricted access to information.

Mr. Wildman said the auditor's inquiries "were far too limited to shed any light," while Liberal researcher Gary Gallon added: "We submitted 100 questions, and we were really angry that 20 per cent . . . were rejected by the auditor."

Marshall award low, lawyer says

● From Page One

committing during his years in prison.

In 1981, new evidence in the precedent-setting case was uncovered by Mr. Marshall and his original lawyer, Stephen Aronson, which led to a new RCMP investigation.

The new investigation resulted in Mr. Marshall's release from Dorchester Penitentiary on March 29, 1982, and his subsequent acquittal on May 10, 1983.

Shortly after that decision was announced, 72-year-old Roy Ebsary, a former vegetable cutter at a Sydney hotel, was charged with the murder of Mr. Seale.

Last November, Mr. Ebsary was convicted of manslaughter in the stabbing death of Mr. Seale, but that conviction was subsequently overturned by the Nova Scotia Supreme Court Appeals division on the grounds that the presiding judge misdirected the jury on the law of self-defence.

Nova Scotia Attorney-General Ronald Giffin is currently considering whether to order a new trial for Mr. Ebsary.

Mr. Cacchione, who has represented Mr. Marshall since the Nova Scotia Supreme Court acquitted him in 1983, said the award was "definitely in the low range," but that he had to consider his client's wishes and his general state of mind. Mr. Cacchione said he has an actuary's report that shows Mr. Marshall's jail term cost him more than $330,000 in lost wages alone.

"Donald made very clear to me that he wanted this thing settled by the end of summer and that's what we've done. Apart from his personal wishes in the matter, one of my greatest concerns was his general state of mind. I don't think it bears saying that, after 11 years in prison and 2 years in the public eye since his release, that this man has been under incredible amounts of pressure. It's time to begin a new life."

Tomorrow, Mr. Marshall will receive a cheque for $245,000. Earlier this year, he was given a $25,000 interim payment that the Government considered as part of his over-all compensation of $270,000.

Mr. Marshall will have to pay the legal costs incurred in proving his innocence, and Mr. Cacchione says that his client will be left with approximately $173,000 after the bills are paid.

In addition, Mr. Marshall will receive about $45,000 from a trust fund set up by a United Church minister Robert Hussey of Montreal, who took an interest in Mr. Marshall's plight after it became a national issue in 1982.

Among other things, the settlement means that the one-man inquiry into the Marshall case by Chief Justice Alex Campbell of the Prince Edward Island Supreme Court will be disbanded without a report being issued. The inquiry was set up last summer by the Nova Scotia Government.

Judge Campbell was charged specifically with inquiring into the compensation issue surrounding the case and nothing else — including the role played by the Sydney police in originally charging Mr. Marshall in Mr. Seale's murder.

Two alleged eyewitnesses to the murder swore in affidavits in 1982 that the Sydney police had pressed them into giving perjured evidence at the 1971 trial that resulted in Mr. Marshall's conviction. The policemen involved have denied the allegations and neither of the two witnesses was charged with perjury.

Ferguson Jenkins, the former Chicago Cubs baseball star, will switch to a new game this fall — politics.

Mr. Jenkins, a pitcher who won 284 games during a 19-year career in the major leagues, said yesterday he will seek the Liberal nomination for the provincial riding of Windsor—Riverside.

Born in Chatham, Ont., Mr. Jenkins now makes his home in the nearby farming community of Blenheim in the riding of Kent—Elgin. Liberal James McGuigan holds Kent—Elgin and former MP Maurice Bossy is expected to win the Liberal nomination for Chatham—Kent, held by Conservative Andrew Watson.

Mr. Jenkins said officials in Liberal Leader David Peterson's office looked at a number of ridings for him to run in and decided that Windsor—Riverside, held since 1977 by New Democrat David Cooke, was the best bet.

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Doctors can't predict outcome

Smallwood resting aft

By PAT ROCHE
Special to The Globe and Mail

ST. JOHN'S — Former Newfoundland premier Joey Smallwood was resting comfortably in hospital yesterday after a stroke that left him unable to speak, according to his doctors.

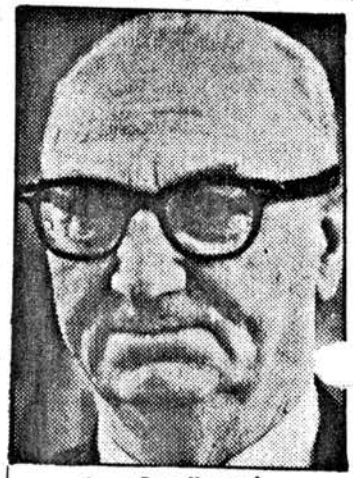
"It's much to early to make any prediction of his eventual outcome or degree of recovery," neurologist Dr. Mark Sadler told a press conference yesterday.

Mr. Smallwodd, 83, was taken to hospital Monday after he became ill at the St. John's offices of his publishing company.

The former premier was experiencing "weakness" in his right arm and the right side of his face but was fully alert, Dr. Sadler said.

The extent of his stay in hospital "depends to a good deal on his progress (and) his response to therapy . . . but after a cerebrovascular accident like this one, one has to measure hospitalization in terms of weeks," said neurologist Dr. William Pryse-Phillips, who also examined Mr. Smallwood.

Since his retirement from



Joey Smallwood

Newfoundland. The second volume of what is intended to be a seven-volume work was published in July.

As was his practice, Mr. Smallwood had been working long hours and had not taken a vacation. He showed no previous signs of ill health, however, apart from a mild degree of high blood pressure, according to a grandaughter, Dale Fitzpatrick.

Mrs. Fitzpatrick, who is also manager of Mr. Smallwood's

07-84 0258-01

November 18, 1983

The Honourable Ronald C. Giffin, Q.C.
Attorney General & Provincial Secretary,
Government of Nova Scotia,
Provincial Building,
P.O. Box 7,
Halifax, Nova Scotia.
B3J 2L6

Dear Mr. Giffin:

When will justice finally be done in your jurisdiction regarding the case of Donald Marshall, who spent 11 years of a life sentence in prison for a crime he did not commit?

If Marshall had not been a Canadian Indian, would he have been convicted in the first place? Probably not.

If Marshall was not a Canadian Indian, would he be stuck with an $82,000 legal bill defending his innocence? I think not.

It seems the infectious bigotry of the Maritimes' dear old Senator Richard Donahoe has poisoned even the justice system of Nova Scotia.

The old saying "justice delayed is justice denied" couldn't be more true. First the Indian is arrested; the Indian is sentenced; the Indian spends 11 years behind bars; the Indian is proven innocent; and finally the Indian is expected to pay $82,000 for this monstrous injustice. I don't know how the Crown involved in the prosecution (it should be persecution) can sleep at night, even after 11 years. If the legal people of Nova Scotia who managed this despicable conviction were really interested in justice, they would now quickly see that Marhall's legal bills are paid, arrange some compensation for the 11 innocent years of incarceration, and allow this Canadian Indian, who has enjoyed Nova Scotian "justice" for 11 years, to get on with rebuilding his life.

I happen to be a Canadian Indian who is sick and tired of seeing Indians across this country being harassed and persecuted by the bigotted "meat head" mentality so prevalent with police; the judiciary and three levels of government. I also believe that had Marshall been a visible minority immigrant rather than Canadian Indian, he would not have suffered this savage injustice which has angered every fair minded Canadian, Indian and non-Indian. Each of us is forced to wonder how we could elect and support a system which allows such callous representation and action.

..../2

Attached are clippings from just one day in Toronto's newspapers, along with a Globe and Mail editorial. One day the state and its representatives will answer for the ongoing crimes against humanity perpetrated on Canadian Indians since the Europeans brought their peculiar civilization to this country. I am certain, however, Indians and other citizens would settle for the brand and quality of justice, which might be meted out to any white middleclass politician from the party in power in any province, even Nova Scotia.

Your comments please or, better still, some action to right this wrong.

H. Ross Charles

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Thornhill, Ontario
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copy to: The Honourable Richard Hatfield
The Right Honourable Pierre E. Trudeau
The Honourable Brian Mulroney
The Honourable John C. Munro
The Honourable Mark MacGuigan
Senator Richard Donahoe
The Honourable George W. Taylor
The Honourable R. R. McMurtry
Mr. John McDermid, M.P.
The Honourable David Collenette
The Honourable John Roberts
The Honourable Nicholas G. Leluk

Letters to the Editor, The Chronicle-Herald
The Mail-Star

Letters to the Editor, Cape Breton Post

HE GLOBE AND MAIL, WEDNESDAY, NOVEMBER 16, 1983

Ottawa has sympathy for Marshall but no aid

By CHARLOTTE MONTGOMERY
Globe and Mail Reporter

OTTAWA — One federal Cabinet minister says he is "moved" by the legal debts saddling a Nova Scotia man who spent 11 years in jail for a murder he didn't commit. Another admits he is "troubled" by the case. But neither is prepared to offer financial assistance.

For the Government to pay the $82,000 that Donald Marshall owes his lawyer for managing his legal route from prison to freedom would simply not be "very good federalism," Justice Minister Mark MacGuigan told the House of Commons yesterday.

In 1971, Mr. Marshall, then 17, was sentenced to life in prison for the murder of a teen-ager in a Sydney, N.S., park. This month, a Nova Scotia jury found a 71-year-old man guilty of manslaughter in that slaying.

The process of vindication began in June, 1982, when Jean Chretien, then federal justice minister, granted a new hearing to Mr. Marshall. After the hearing in December, 1982, at which two witnesses admitted lying at the original trial because of police pressure and a new witness came forward to support him, he was acquitted.

Mr. Marshall now works as a plumber on an Indian reserve near Halifax. His lawyer plans to meet the provincial Attorney-General to discuss compensation for the years he was in jail.

Yesterday, NDP Indian affairs critic James Manly raised the issue of compensation in the Commons.

He said Indian Affairs Minister John Munro had reportedly promised to "do his damnedest" to get Mr. Marshall compensation for his legal costs and asked whether there is a source of federal money "to help pay for the tragedy that this young man has suffered, at least to cover his legal costs."

First, Mr. Munro noted that the statement cited by Mr. Manly refers to a quote "of somebody else."

He went on to say that he had talked to Mr. Marshall's father, had met his lawyer on several occasions and had heard representations of "a very moving nature" about the legal costs and other losses Mr. Marshall had suffered because of this "atrocious occurrence."

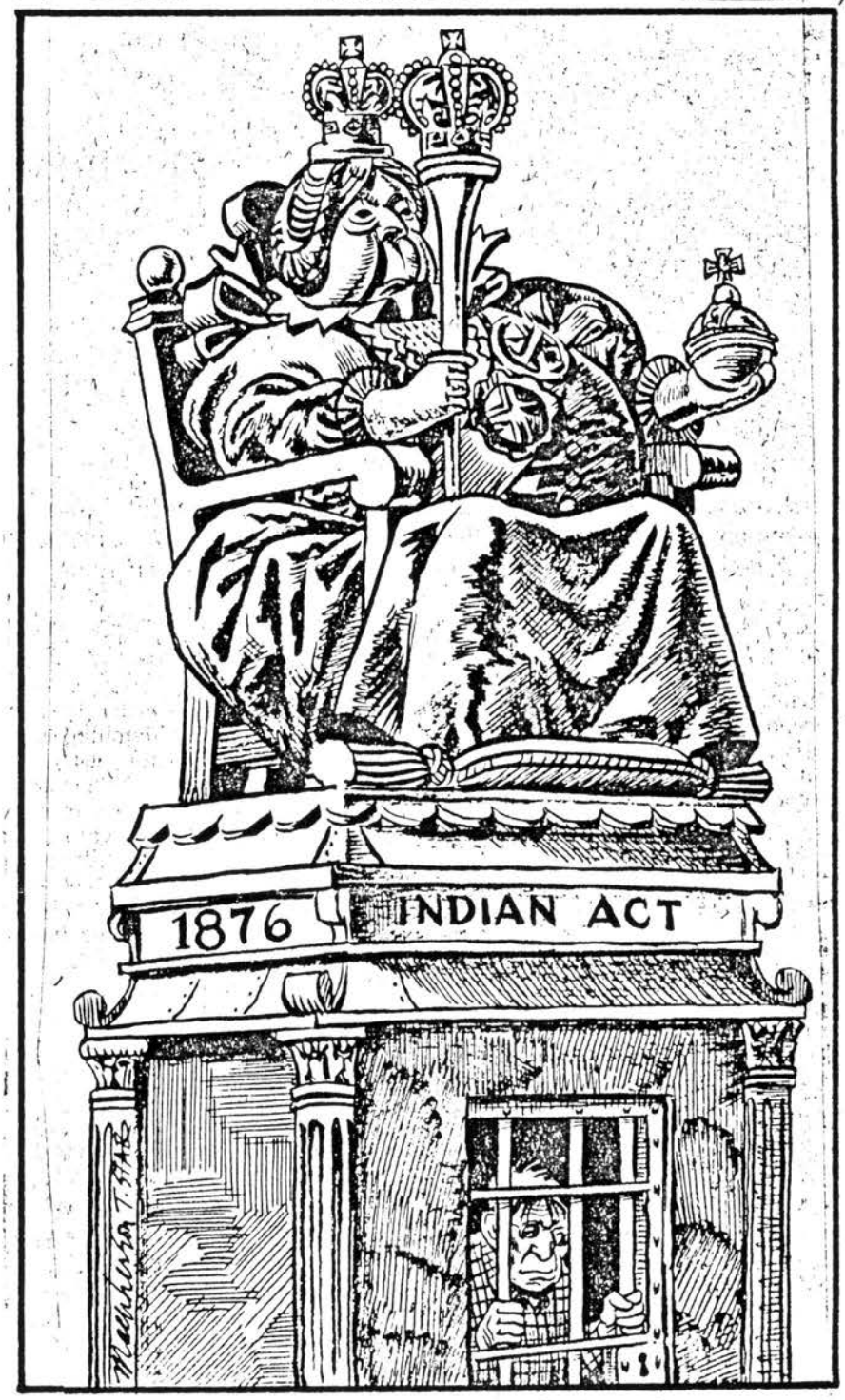
"There is absolutely no authority in my department for payment. . . . I did write to the province on at least two occasions urging it to look with compassion on the situation. As well, I examined other areas in Government that might provide funding. There is none. I regard this very much as an obligation on the part of the provincial Government."

Mr. Munro said his department aranged a job for Mr. Marshall to "alleviate some of the hardship" when he got out of jail.

Allan Lawrence, Conservative justice critic, put the same question about compensation to Mr. MacGuigan.

But Mr. MacGuigan said that because he is "troubled" by the situation, he plans to discuss it with Nova Scotia's Attorney-General.

★ TORONTO STAR, WEDNESDAY, NOVEMBER 16, 1983



Not good federalism to pay Marshall fees MacGuigan claims

By Bruce Ward Toronto Star

OTTAWA — "It would not be very good federalism" for Ottawa to pay the $82,000 in legal fees Donald Marshall built up trying to prove he was innocent of murder, Justice Minister Mark MacGuigan says.

Ottawa cannot pay Marshall's legal bills because the matter falls under provincial jurisdiction, MacGuigan told the House of Commons yesterday.

But Marshall has Ottawa's sympathy, MacGuigan said.

Marshall, a Micmac Indian, spent nearly 11 years in prison for the murder of a Cape Breton youth in Sydney, N.S., in 1971. A court declared Marshall innocent last May and released him.

Roy Ebsary, 72, has since been convicted of manslaughter in the case and will be sentenced on Nov. 24.

There "is no precedent for payment," MacGuigan said, adding Marshall's wrongful conviction was the fault of the Nova Scotia government. Ottawa is pressing the province to pick up the legal fees, he said.

But the provincial attorney-general's department has said Nova Scotia bears no legal responsibility or moral obligation to pay the legal bills.

MacGuigan came under fire from Conservative justice critic Allan Lawrence, who said the minister was splitting hairs.

The fact that Marshall is a status Indian gives the federal govenment a stake in his case, Lawrence said. Also, Lawrence argued, Marshall won a new trial because of intervention by the Royal Canadian Mounted Police.

But MacGuigan called such arguments "astonishing" and said they were without merit.

MacGuigan also argued that Indian Affairs Minister John Munro has never committed Ottawa to paying Marshall's legal costs, as had been claimed earlier.

We must find a way to bring Indians dignity

Barney Danson: Former federal Indian affairs minister says problem can be solved, even with some failures.

Richard Gwyn's article, (Nov. 8) zeroed in on what the heading (Our greatest failure is in dealing with Indians) rightly identified as our greatest failure, but blame cannot be easily assigned.

When I was in government, I seized every opportunity to work closely with native people on developing programs that would bring them dignity and self-reliance. Native people responded, but sometimes initial success proved sadly temporary. On leaving government, I was left with a gnawing conviction we must find a better way.

The recommendation (of the Commons special committee on Indian affairs) for optional self-government is attactively simple, perhaps deceptively so, but it does have some sensible safeguards. I have never met a native person who did not recognize the complexity of the situation, but they were virtually without hope of achieveing solution or even real progress.

It is highly unlikely they would give up exisiting benefits unless they were reasonably certain they could elect accountable leaders and manage their own affairs in the hope they could achieve a better life for themselves, but more so for their children, to whom they do not wish to leave a legacy of despair. Many sophisticated bands already are operating more effectively than many municipal governments.

Implementation of the committee's recommendations is not without considerable risk. Indeed, we can expect some failures, but that's nothing new in the history of native and government relations. If there is a reasonable balance of successes, we will have made progress.

Keith Penner and his committee have produced that "one good idea" I found so elusive. A clergyman before he entered Parliament and representing a constituency with a large native population (Cochrane) he has special credibility. The entire committee however deserves acclaim. We are not looking at a panacea for all native situations; conditions of non-status Indians, Metis and Inuit may prove at least as challenging. But what we have is a refreshing alternative to unacceptable failure.

Penner

BARNEY DANSON
Toronto

THE GLOBE AND MAIL, FRIDAY, NOVEMBER 18, 1983

Righting the wrong

Donald Marshall, a Nova Scotia Indian of the Micmac Nation, was sentenced to life and served 11 years in prison for a murder he did not commit. He was convicted in Cape Breton in 1971 at the age of 17 of the murder of his 16-year-old friend, Sandy Seale. The conviction was gained with perjured evidence, and the witnesses who gave false testimony contended that they were under pressure from the police.

Mr. Marshall protested his innocence throughout his years in prison. On one occasion he reports that he was denied a Christmas parole with his family because he refused to admit guilt. He appealed for help to the Nova Scotia Ombudsman, politicians and a lawyer. Eventually the Royal Canadian Mounted Police reopened investigation of the case, and reported enough evidence to charge another man.

A five-judge panel of the Supreme Court of Nova Scotia reheard the case and unanimously acquitted Mr. Marshall. A charge was laid against Roy Ebsary in the death of Sandy Seale, and a jury of seven men and three women this month convicted him of manslaughter.

Mr. Marshall's legal bill of $82,000 remains unpaid, not to mention any compensation for those 11 years in jail. The lawyer who carried his case through to freedom has quit private practice to work for the federal Government, saying that he cannot carry the bill for the Marshall case. Mr. Marshall now works as a plumber on an Indian reserve near Halifax.

Indian Affairs Minister John Munro says that he has heard representations of "a very moving nature" about the legal costs and other losses Mr. Marshall suffered in this "atrocious occurrence," but that "there is absolutely no authority in my department for payment." Federal Justice Minister Mark MacGuigan has said that he is "troubled" by the situation, but for Ottawa to pay the costs would not be "very good federalism." In this he is correct; administration of the law in this case belongs to the province of Nova Scotia. He said he would confer with Nova Scotia authorities.

Mr. Marshall's present lawyer will meet Nova Scotia's new Attorney-General, Ronald Giffin, today to discuss compensation.

This is one of the most serious miscarriages of justice that Canada has known in many years. The man robbed of 11 years of freedom is an Indian. Roy Gould of the Membertou Reserve in Sydney and publisher of the Micmac News has said of the circumstances surrounding the first trial of Mr. Marshall, "There was a lot of racial tension in the air, Sydney was a very uptight place." Three hundred delegates from across Canada to the Indian National School Conference demonstrated during the trial by marching down Sydney's main street and occupying a Department of Indian Affairs office.

Nova Scotia Attorney-General Giffin and his Government have the power to present special legislation providing compensation to Mr. Marshall. They should do so.

QUEBEC

Crackdown on public servants

Premier René Lévesque is determined to keep the Quebec government's deficit from soaring above the $3-billion mark by recouping $426 million in public sector wages paid out since July 1. And last week he issued an ultimatum. If 300,000 public and parapublic workers do not accept wage rollbacks and freezes for the first three months of 1983, his government will unilaterally determine not only their salaries but also working conditions for the next two years. Then, he threw university campuses across the province into a tailspin by announcing that educational grants will be reduced. And he suggested that any financial shortfalls should be covered through cutting staff salaries by the same amounts as those threatened for the government's direct employees.

The current problems had their origins in the run-up to the 1980 referendum on sovereignty-association, when the Quebec government signed three-year sweetheart contracts with its employees. But, by last summer, the provincial deficit was rising so quickly that the province asked union members to forgo a scheduled July 1 increment. When they refused, Lévesque vowed to get the money back when the contracts ran out at the end of the year. To that end, he introduced Bill 70, which rolls back wages for the first three months of 1983 and then freezes them.

Although the province softened its stand last week, freezing but not rolling back wages for those paid less than $16,583 a year and limiting cuts to 10 per cent for those making up to $20,033, unions were still seething. That was because top-bracket hourly wage rates will be cut back as if recipients worked a full year, whereas many (most of them women) are part-timers whose yearly incomes are well below the $16,583 limit.

While the unions seemed willing to avoid any drastic action for the time being, an ingenious work-to-rule campaign is scheduled to begin Jan. 1. In, among other places, the revenue department, where Quebeckers' provincial income tax is collected, a union memo urges employees to go by the rule book, checking every return most meticulously to "indicate to all taxpayers every possibility they have for saving money." The unions thus hope to slow down the machinery—and redistribute some of the cash the government wants to retrieve from their wages.

—ANNE BEIRNE *in Quebec City.*

VAN HORNE/CP

Marshall leaving court: a witness ignored, another turned away

NOVA SCOTIA

The question of innocence

Donald Marshall's fight to prove his innocence has been a brutally discouraging struggle. Convicted of murdering his friend 11 years ago, Marshall has broken both hands fighting off other inmates in federal penitentiaries while struggling to convince an inattentive legal establishment that he was not guilty. Then, the system finally began to respond. And last week he won partial vindication when a Halifax courtroom heard overwhelming testimony to his innocence. In a dramatic reversal, key witnesses changed their testimony, claiming that the Sydney, N.S., police forced them to incriminate Marshall at his 1971 trial. Further evidence clearly indicated that an ultraviolent 60-year-old man with a passion for sharp knives was most likely the killer.

From the beginning, the handsome and reserved Marshall, a Micmac Indian from the Membertou reserve near Sydney, maintained that Sanford Seale, his 16-year-old black friend, was stabbed to death on the evening of May 28, 1971, by one of two older men whom they met on a Sydney sidewalk. Last week, for the first time on the legal record, an eyewitness backed him up. James McNeil, 37, told a Nova Scotia Supreme Court appeal hearing that he and a companion, then 50-year-old Roy Ebsary, had been accosted that night by Seale and Marshall, who asked for money but were unarmed. He heard Ebsary say, "I've got something for you," saw him stab Seale hard in the stomach and slash Marshall's arm before the youth could flee. Later, McNeil and Ebsary's 13-year-old daughter, Donna, watched Ebsary clean the knife. A forensic expert told the hearing that one of Ebsary's knives had fibres on it that matched the coats Seale and Marshall had worn that night.

Although their testimony would almost certainly have spared Marshall, neither McNeil nor Donna Ebsary testified in 1971. A week after the conviction, a guilt-ridden McNeil told the police what he had seen, but they ignored him. Donna Ebsary, who said that her childhood had been tormented by a volatile father who killed her pets and "beat up the household" when he was angry, also went to the police but was turned away. The police force's reputation was shaken further and the Crown's case weakened when last week two key witnesses from the 1971 trial retracted their original testimony. Both said that the police had intimidated them into lying to incriminate Marshall.

In the next two months the five Supreme Court justices who heard the new evidence will listen to more legal arguments before deciding whether to order a new trial, grant an acquittal, or uphold the original verdict. For Marshall, the wait is not over yet. Meanwhile, Sydney residents are questioning the integrity of the other central figures in the case: their own police.

—MICHAEL CLUGSTON *in Sydney.*

Keys tendered by Prosecution. 09-85-0181

Ex 10 (a) - P 493

Chronicle - Herald
April 4/84

09-84-0256-4

Marshall to receive $25,000

By PETER MOREIRA
and ESTELLE SMALL

Donald Marshall will receive a $25,000 advance as part of compensation for serving 11 years in jail for a murder he did not commit, Attorney-General Ron Giffin announced Tuesday.

The advance will be paid "in the next few days" to hold Mr. Marshall over until a one-man inquiry into the compensation issue reports in the fall.

Mr. Justice Alex Campbell, head of the inquiry, privately recommended last week the province pay $25,000 toward a final settlement.

Premier John Buchanan appointed Mr. Justice Campbell, a former P.E.I. premier, to the inquiry last month after intense political and public pressure.

Mr. Marshall, 30-year-old Cape Breton Micmac, served the time for the 1971 slaying of Sandy Seale in Sydney's Wentworth Park, but the Nova Scotia Supreme Court appeal division ruled last year he was innocent.

His lawyer, Felix Cacchione, said last night he is happy the government is acting "for the first time in positive fashion" since last May's ruling. He added the compensation should not divert attention from the need to know how Mr. Marshall was wrongly convicted.

"It was a politically astute move to ease public pressure on the government to act," said Mr. Cacchione of the $25,000. "It will alleviate a heavy financial burden, but that should not detract from the fact an innocent man was convicted of murder."

The government had been reluctant to say anything about the Marshall case early in the session because any statements would prejudice the appeal of Roy Ebsary, who was later convicted in Seale's death.

Mr. Giffin said Mr. Justice Campbell made his preliminary recommendation without any prompting from the province and the government accepted it.

Mr. Giffin had said the province would not be bound by the commission's findings. He said yesterday the final report won't be binding just because an interim recommendation has been accepted.

Marshall to receive

(Continued from page one)

Premier Buchanan yesterday refused to speculate on what would happen if the final report recommended a compensation package of less than $25,000. "That's an assumption that I'm not going to work on. And I'm not going to prejudge the judge."

Mr. Cacchione said Mr. Justice Campbell is not looking into the circumstances that led to wrongful conviction.

"It doesn't say anything about how Donald Marshall came to be convicted in the first instance, how he came to lose his first appeal because evidence was witheld," he said. "These are questions Nova Scotians and Canadians ask themselves and need to have answered."

Opposition leader Sandy Cameron said he is pleased with the recommendation, which was made initially by a number of opposition members.

Cape Breton Labor Party leader Paul MacEwan said last month the province should pay Mr. Marshall part of his compensation while the inquiry was being carried out.

Having originally called for the commission to be dismantled, he wrote Mr. Justice Campbell and proposed an initial payment of $100,000.

"This is what I had in mind," Mr. MacEwan said yesterday. "I know I had mentioned a ballpark figure of $100,000 but I'm not going to quibble over figures."

Entitled to $328,000 compensation

eath row convict innocent

KYO (AP) — A death row convict ent 34 years behind bars and faced lows for allegedly killing a black rice dealer was freed today by a ecision that nullified his sentence lared him not guilty.

porters cheered when the outcome etrial for Shigeyoshi Taniguchi, 53, outside the district court in Takaon Japan's main southwestern is- Shikoku.

verything I see is glittering," Tani- aid in a news conference outside rthouse. "All I want to do now is to to my village and till the land."

e Kyodo News Service said Tanigu- ntitled to receive the equivalent of 0 in indemnity for the years he prison.

"In my first years (in prison), I was very angry at the prosecutors, policemen and judges in my case," Taniguchi said. "Now, I have no feeling of hatred against them."

Among the crowd at the courthouse was Sakae Menda, 57, the first man to be declared not guilty in Japan in a retrial. His conviction was reversed in July, also after spending 34 years in prison.

In Taniguchi's case, the second such reversal, district Chief Judge Kiyoshi Furichi ruled that prosecutors' evidence was inadequate for a conviction.

Taniguchi was accused of the February 1950 robbery-slaying of a 63-year-old black market rice dealer. The equivalent of $36 was taken from the victim.

Taniguchi, then 19, was arrested a month after the killing and has been in prison ever since. He was convicted and condemned to death by hanging in 1951.

Police said he confessed during four months of questioning, and that blood on his trousers matched that of the victim. Taniguchi said in court he was coerced into making a confession and challenged the results of the blood tests.

Taniguchi's initial appeals were rejected, and the death sentence was upheld by a 1957 Supreme Court ruling. He continued to wage a legal battle for a new trial and, in 1976, the Supreme Court finally granted his request, sending the case back to the district court.

Today's ruling came after 33 sessions of testimony in the retrial.

...pt to ...man embryos to provide ... "spare parts," ... said yesterday.

Prof. Carl Wood said his team had been asked to help research into the use of organs and tissue from embryos in transplant and graft surgery.

Prof. Wood, head of the Queen Victoria Medical Centre in vitro fertilization team, did not say who made the requests, but said: "We've had two overseas approaches from people who believe the IVF techniques could be used to grow embryos beyond the five- or seven-day

"There w... to consider being ... in the work."

Prof. Wood said although spare-parts procedures might benefit the sick, they would result in the death of the embryo.

IVF involves fertilizing an egg outside the body and reinserting it in the womb.

The Government of Victoria state has lifted an eight-month ban on certain techniques being developed by the Melbourne team — a ban imposed partly because of the possible consequences.

...Gulf ... telephone ... Kuwait. S... attacks might solve of the six-... tion Council, form... as a result of the ...

The Council is ma... wait, Saudi Arabia, Bahrain, ... the United Arab Emirates ... Oman.

Mr. Griffin said U.S. fire ... experts were coming to Kuwa... investigate the bombing.

He said one U.S. company moved its American personnel dependents yesterday "but this not done upon recommendatio... the U.S. Embassy."

The U.S. business commu... numbers about 2,500 in Kuwait.

AROUND THE WORLD

Canadian given suspended sentence

1-09-84 0 2560/

ANKARA — A Canadian accused of insulting Turkish President Kenan Evren has been sentenced to a suspended 10-month prison term in the western city of Denizli, his lawyer, Veli Devecioglu, said. Bernard Beaulieu, a Quebec Government computer technician, is expected to be able to leave Turkey when the appeal process becomes final in a week's time, Mr. Devecioglu said. The defence does not plan to appeal, but prosecutors can file an appeal within a week after the court's verdict. Mr. Beaulieu was charged with insulting General Evren while watching the President on television in the lobby of a hotel in Denizli.

Dec 14/83

Man is set free on new evidence

LONDON — Two legal appeals, a television documentary and years of campaigning by pressure groups have finally resulted in the release from prison of a man wrongly convicted of murder. Mervyn Russell, 39, may get as much as $100,000 in compensation for the six years he spent in prison. Mr. Russell was jailed for life in 1977 for stabbing 20-year-old Alison Bigwood to death. Last week the court set him free after hearing new pathological evidence that showed the handful of hair found in the victim's hand could not have been Mr. Russell's.

Yugoslav minister is dismissed

BELGRADE — The Yugoslav Government has announced that Finance Minister Joze Florijancic will be dismissed, but said he will be given another Government post. It gave no reason for what Western diplomats consider a highly unusual move, but sources said Mr. Florijancic had resigned because of a dispute over next year's budget and planned financial reforms.

Bolivia paralyzed by general strike

LA PAZ — Bolivia was virtually paralyzed yesterday by the second general strike in three weeks, union sources said. Public transport was working to some extent in the capital, but other public services and virtually all private business came to a halt at the start of the 48-hour stoppage. Unions want the Government to raise the minimum monthly wage to $240 from the current $62 to cope with sharp price increases.

100 Nicaraguan rebels accept amnesty offer

MANAGUA — More than 100 U.S.-backed rebels have handed themselves over to Nicaraguan authorities, accepting an amnesty offer from the Sandinista Government, Victor Tirado of the ruling junta said yesterday. He said the rebels, who were presented to reporters at the city of Esteli, had been [illegible] ... On Dec. 4 the Govern... rebels fighting ...

said those accepting will be allowed to take ... in 1985 elections.

Dynamite bombs rock U.S. recruiting office

EAST MEADOW, N.Y. — Two dyna... bombs hidden in attache cases rocked a ... Island building that houses a U.S. Navy rec... ing station moments after 170 occupants fle... response to a telephone threat. No injuries ... reported. A group calling itself the United F... dom Front claimed responsibility for the bla... the four-story building in East Meadow, offi... said. The group also issued a communique ... cizing U.S. actions in South and Central Ame...

Two bombs planted in British cities

LONDON — A small bomb ... ished unoccupied telephone booth last night in Oxf... a few hours after polie cleared out thousand... shoppers so the bomb squad could det... ate a kilogram charge planted in a busy L...don str... Police blamed the Irish Republican ... for the London bomb, but there was no imm... ... cation as to who was responsible for the ... sion in Oxford. No group immediately ... responsibility for either bomb.

Four bombs exploded on Chilean protest ...

SANTIAGO — Terror... exp... yesterday, including one that ... train, on a Day of National In... protest against the Chil... ment's new mining law. A lowe... ... of an 18-car freight ... ... but both ... San Antonio, ... in Santiago ...

79 Edmund Street
Sudbury, Ontario
P3E 1L4

5 December 1983

Attorney General of Nova Scotia
The Honourable Harry W. How, Q.C.
Department of the Attorney General
Provincial Building
Halifax, Nova Scotia
C3L 2L6

Dear Sir:

Re: The Trial of Roy Ebsary

It seems wrong to me that a sixty year old man would be jailed for defending himself against two able-bodied teenagers who were attempting to rob him. This was a potentially life threatening situation for Mr. Ebsary, who had every right to defend himself to the best of his abilities rather than politely hand over his billfold to these two young men.

I do not understand why Mr. Ebsary was not acquitted on the grounds of self-defence. The jailing of Mr. Marshall although unfortunate, should have no bearing on the manslaughter charge as Judge Rogers seems to imply.

I would appreciate an explanation of this matter as I feel very strongly about it.

Sincerely,

Ron Mulholland

Ron Mulholland

Chronicle Herald
Sat Jan. 12/85

29-82-0311-08

Marshall testifies Ebsary stabbed Seale

SYDNEY — Claiming that parts of testimony he had given at previous trials were untrue, Donald Marshall Jr. told a Supreme Court jury here Friday that Roy Newman Ebsary of Sydney stabbed the late Sandy Seale near this city's Wentworth Park on the night of May 29, 1971.

Marshall, acquitted of murdering Seale by the Nova Scotia Appeal Court in May, 1983, after serving 11 years in penitentiary, said during the first day of testimony in Ebsary's third manslaughter trial that he heard Ebsary ask the victim if he "wanted everything he had."

Ebsary, he added, put one hand on Seale's shoulder, removed the other hand from his pocket and then stabbed the teenager. He said Seale "bent over and fell down."

In the meantime, Marshall said he grabbed Jim MacNeil, who was with Ebsary, and "threw him down."

After striking Seale, he testified that Ebsary said, "I got something for you too, Indian," and the accused came toward him with something in his hand. With the Crown prosecutor using a ruler as a knife, Marshall demonstrated to the jury how he pushed Ebsary's hand aside, and how the accused stabbed him in the lower arm, leaving a five-inch scar.

Marshall said that neither he or Seale was armed, and that the whole thing started when either Ebsary or MacNeil had asked him for a cigarette.

Under cross-examination by Ebsary's lawyer, Luke Wintermans, Marshall said that most of a statement he gave to the RCMP in penitentiary in 1982 was not true, particularly the portion in which Marshall said he and Seale had agreed to "roll somebody" in the park on the night of the incident.

Marshall also said references made by Wintermans to evidence he gave on previous occasions were also untrue. When asked by Wintermans why his testimony was different from other court appearances, Marshall replied that he stuck to his story for eight or nine years and nobody believed what had happened, so he changed his story to what he thought people wanted to hear.

"I told the truth the first time," he said. "I didn't go there to rob them. I was forced to say that. I didn't roll or rob anybody, a person bummed a cigarette and that's what happened."

The frail-looking 31-year-old Micmac, bothered by a cold that often made his voice inaudible, was one of 10 witnesses heard by the seven-woman, five-man jury.

Among the others who took the stand were Ebsary's son Greg, who identified 10 knives seized from the Ebsary home by the RCMP in 1982, and Maynard Chant of Louisbourg. Chant, who was 14 at the time of the stabbing, admitted to giving a false statement in 1971 in which he said he saw Marshall stab Seale. The witness said that when he tried to tell the truth, city police would not accept it. He went on to testify that when approached by RCMP in 1982 he had come to realize that "I did wrong and felt it was time to tell the truth."

When the trial resumes Monday, Marshall will be back on the stand for redirect examination by Edwards.

09-82-0311-09

[redacted]

AG — Wilma left this with me to prepare a reply for you. Frankly I do not think it should be replied to as the appeal period is still running.

O.K.

Box 11, Glen Lasch,
Richmond Co., N. S.,
BOE 1V0,

Jan. 31st, 1955.

Mr. Ron Giffin,
Attorney General,
Province of Nova Scotia,
House of Legislative Assembly,
Halifax, N. S.

Dear Mr. Giffin:

A young friend of mine has a saying: "If it were not for the BAD victim, there would be no poor, unfortunate criminals!"

Certainly this would seem so, in the case of aged Mr. Ebsary, accused and found "guilty" of murdering Sandy Seal.

All Mr. Ebsary was guilty of, was sitting in a park with a friend, when he was the victim of a robbery by two young thugs.

Now that this aging war veteran (many times decorated) has been virtually crucified by the Law, we

2/ is it that Donald Marshall is not tried on the crime he DID commit? Why let him go Scott-free and a large sum of money to boot?

It seems to me that Propaganda, beginning in Ontario, and working its way East, already had freed Marshall of his crime and largely was responsible for convicting Ebsary, before the book came to trial.

There are Firms in Ontario, which can be hired, to conduct any kind of money-raising campaign. Did Marshall hire one & these to act on his behalf?

The words of Mr. Seal, senior, father of Sandy Seal, should not be taken lightly. No Indian would be that much outspoken (white versus Indian where an injury is concerned) unless he had a good, solid reason.

Mr. Seal Sr. had been a taxi driver in the Sydney area for a number of years.

In this Province we have always treated our Indians well. I don't like the inference that we throw innocent

3/

Indians in jail, for years and years, for crimes they do not commit.
But it is now on legal record that we do - and did.

All for Ontario - started propaganda that freed Marshall and convicted Ebsary.

Therefore, to vindicate this Province, not only for the Present but for the Future, Donald Marshall must be brought to Trial for the crime he very well did commit.

Now, had Mr. Ebsary given them his knife, at their demand, when he was ordered to empty his pockets, is there any assurance that they would not have used the knife on him? Is it logical to give a pair of criminals - younger and much stronger than the victim - A WEAPON that they could use against him? In the actual occurance of the robbery?

What is the matter with the Brains or Thinking-Power, of our Juries, anyway? Didn't they judge on the merit, or Mass Media Propaganda — and not on the Merits of the Trial?

Is there Proof is there that young Seal was Marshall's accomplish, and not someone else, or was Seal Murdered and left there? The words of Mr. Seal, sr., make me suspicious, although I know only what I read in the papers, or hear on T.V.

As the thing stands, I can feel only disgust and grief, at this whole miscarriage of justice, right here in my own Province.

It is a horrendous and cowardly crime, for any younger person, to attack, rob (or murder) the aging, old or infirm.
There has been altogether too much of these kinds of acts of late.
Such crimes should be subject even up to the Death Penalty, along with such attacks on policemen and prison guards. It should be stopped right out,

5

Please see that Donald Marshall — who is not an innocent man — be brought to Trial for the crime he DID commit — Even if so much time has gone by that it takes a special Act of the Legislature to do it.

Let Justice properly be done!

Re Mr. Edsary: If he does not — or has exhausted his Appeals, where will an old man like this be placed, for his 3 year sentence? Jail would probably kill a man this old, and he was not given Execution, but a 3 year ~~time~~ term In my opinion, if not set free, he should be incarcerated in some kind of home, rather than a jail.

I don't know the man, but I, too, am growing old. And I speak as a Senior Citizen who, also, grew up in the Depression and then into the Second World War. As a resident of Halifax, I did all I could or knew how, to bring that War to an end,

Hungry, as a little child, I walked Halifax Streets, but never once entered a store to steal so much as a cookie. We just COULDN'T do it.

I do not go along with the theory that deprivation causes the young to act that way of robberies and other crimes. It's how they are disciplined. And what rules of life they are taught.

Who has a better right than a war veteran, to sit quietly in a Public Park, of an evening, with a friend? Without molestation of any kind! The indignity and insult of being robbed by two young punks would cause anyone to lash back! Also, he must have been scared. Yours truly,

Edith H. Smith.

Cape Breton Post

EIGHTY-THIRD YEAR, NO. 112 SYDNEY, NOVA SCOTIA, FRIDAY, MAY 13, 198

Roy N. Ebsary Charged With Murder Of Seale

A grizzled, 71-year-old war veteran Thursday was charged with second-degree murder in the death 12 years ago of sixteen-year-old Sandy Seale.

Roy Newman Ebsary remained motionless when Judge Charles O'Connell read the charge at the accused's bedside in City Hospital where he has been confined for several weeks with a fractured neck, an injury suffered when he fell down a flight of stairs in his apartment house.

Ebsary was remanded until Thursday for preliminary hearing. He is in a head to waist cast but will be released from hospital this week-end and taken to the Correctional Centre until his court appearance on Thursday.

On Tuesday, Donald Marshall, Jr., 29, was acquitted of the 1971 murder of Seale after spending 11 years in Dorchester Penitentiary for the crime he always maintained he did not commit.

During a review of the case by the Nova Scotia Supreme Court, ordered by the federal government, a number of witnesses said they had lied at the original trial and one said he had seen another man stab Seale in Wentworth Park.

Rev. Captain Roy Newman Ebsery, as he likes to be called, says he is a seadog, a fanatical knife collector and a minister in the Universal Life Church, Inc.

He is well known in Sydney for walking the streets in a black cape and a captain's hat.

Ebsary must appeal to the Supreme Court for bail, a hearing that probably will not take place for a couple of weeks.

Ebsary, whose daughter told a court last December her father once "ripped the head" off her pet budgie, was remanded in custody until next Thursday. Hospital officials said they expect him to be discharged Monday.

Ebsary's name came up during the Supreme Court's review of Marshall's conviction late last year.

James MacNeil, 37, told the court that he and Ebsary had been walking through a city park when Marshall and Seale tried to rob them. MacNeil said that while he wrestled with Marshall, Ebsary stabbed Seale.

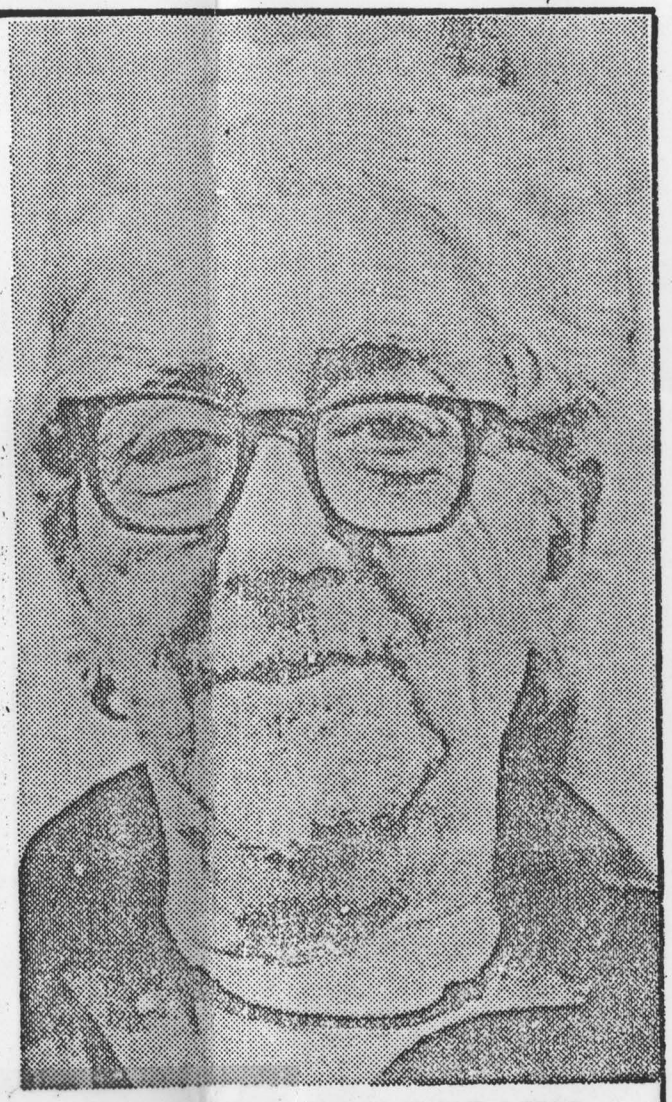
MacNeil said he heard Ebsary tell Seale: "I've got something for you," and then saw him drive a small knife into the young black man.

MacNeil, who didn't testify at Marshall's original trial, said he accompanied Ebsary to the older man's home where he watched him wash the blood from his knife and hands.

MacNeil said he went to Sydney police about two weeks after Marshall was convicted and gave a statement about what had happened.

Last year the RCMP uncovered new evidence and then-justice minister Jean Chretien instructed the Supreme Court to review Marshall's conviction. The court decided to hear seven witnesses, including some from the original trial.

One so-called eyewitness from the original trial told the court he lied when he said he saw Marshall stab Seale. He said he was scared and felt under pressure to give an untrue statement.



ROY NEWMAN EBSARY

Courts Should Be Given Power To Order Reimbursement On Acquittals Says Bar

OTTAWA (CP) — The courts should be given the discretionary power to order reimbursement by the Crown of legal expenses incurred by people who have been discharged or acquitted of an indictable offence, the Canadian Bar Association said Thursday.

"It can be argued that complete justice has been done" in such cases as Donald Marshall of Sydney, and Susan Nelles of Toronto who both had to pay substantial legal expenses and were ultimately cleared of murder charges by the courts, said association president Yves Fortier in a news release.

"It seems unfair that courts should have no power to compensate them for such expenses."

Marshall, 29, was acquitted Tuesday by the Nova Scotia Supreme Court of a 1971 muder after spending 11 years behind bars for a crime he always maintained he did not commit.

The case was reviewed by the Supreme Court on order by the federal government after new evidence was uncovered by the RCMP in Sydney. Another man was charged Thursday with second-degree murder in the death of a teen-aged youth 12 years ago.

In May, 1982, Nelles was cleared in provincial court of murdering four infants with drug overdoses at the Hospital for Sick Children following a 44-day preliminary hearing. Police and provincial authorities are still unable to explain the deaths of the babies.

However, it was estimated that Nelles's defence expenses would cost $200,000.

And Ontario Attorney General Roy McMurtry said at the time that the province would not compensate Nelles. He said no request for compensation had been made and that the issue is complicated by the operation of the justice system.

"A preliminary hearing is not set up in such a way as to demonstrate the probable innocence of the accused," he said. The hearing is set up to determine whether there is enough evidence to put a person on trial.

But lawyers and jurists are "very much concerned with inequalities in the existing legal system," Fortier said.

"Courts should have the discretion to order compensation by the Crown in cases of obvious inequity."

The association, which has been studying the issue since its annual meeting last summer, will hear the recommendations of its criminal law section at the meeting in August.

"Once the recommendations are approved by the CBA, they will be forwarded to federal and provincial governments."

Five Fishermen Arrest Supply Officers Firear

WEST PUBNICO, N.S. (CP) — Five fishermen were arrested Thursday following a dispute over lobster traps that exploded this week, turning this tiny southwestern Nova Scotia fishing community into a war zone.

The men were scheduled to appear in court in nearby Yarmouth today in connection with a rampage by more than 100 fishermen on Wednesday.

During the outburst, the men chased two boats under lease to the federal Fisheries Department to a local wharf. Fishermen aboard 30 boats then rammed, burned and sank the two vessels, worth $60,000 and $30,000, while RCMP stood by helplessly.

RCMP would not say Thursday night what charges would be laid, but a police spokesman earlier said charges relating to piracy and arson were being drafted.

The dispute, which started this spring when the department stepped up regulation of the lobster fishery, took another sober twist Thursday when the department said it had supplied some officers with firearms.

Pierre Comeau, regional director of operations for the department, said officers aboard the 40-metre patrol vessel Louisburg had been armed with handguns and shotguns.

"They have been trained to use these arms and they have been trained to use them for defensive purposes in extreme emergency cases only."

The action caused concern among fishermen and local politicians. Nova Scotia Fisheries Minister Ken Streatch, who said he could not support the fishermen's actions, also said he did not agree with the arming of fisheries officers.

Streatch said he believed the federal Fishe
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Court - Martial Verdi Against Cadet Quas

TORONTO (CP) — The Deprtment of National Defence has quashed a court-martial verdict against a 20-year-old female cadet who was found sharing a marijuana cigarette with a classmate at Royl Military College in Kingston, Ont.

Citing legal advice from the federal Department of the Judge Advocate-General, the Defence Department quashed all charges against Carol Ann Murphy of Renfrew, Ont., who had been convicted by a military tribunal Feb. 2 of trafficking in a narcotic.

The department refused to give details on what legal advice led it to quash the verdict, but Murphy's lawyer, Michael O'Connor, said it might have been "internal irregularities" in the way the matter was investigated and tried.

"About six days or more elapsed before he was made aware that she as facing charges, and she wasn't aware till it was too late," he said Thursday in a telephone interview from Ottawa. "She had already said things that worked against her — the right to re-

Cadet Murphy

said. "I thought maybe it was to do with the appeal."

Murphy's father, Garry, a car salesman in her home town near Ottawa, said he "felt terrific" about the decision.

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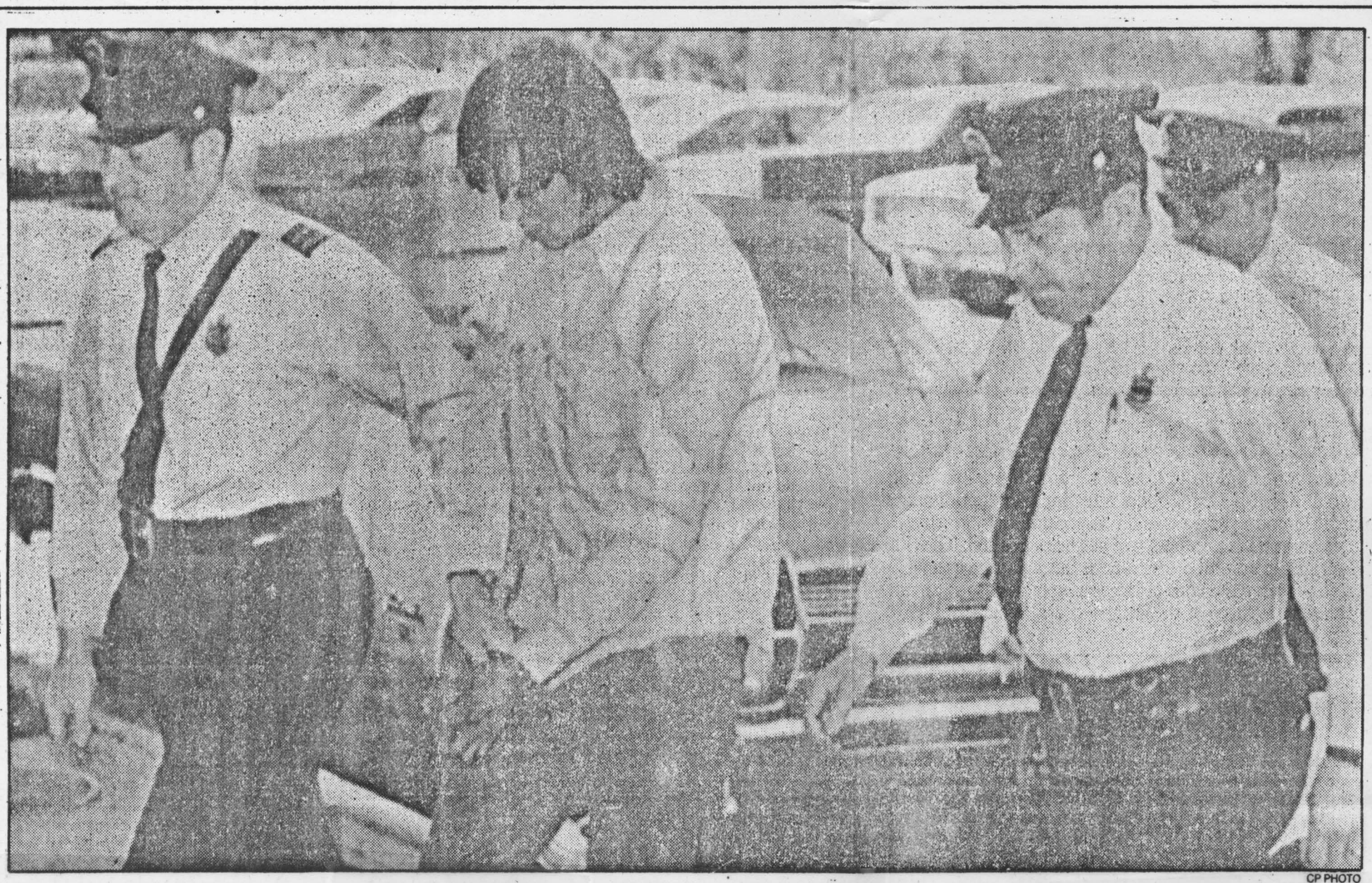


CP PHOTO

Back in 1971: Donald Marshall, accused of fatally stabbing a 16-year-old black teenager in a park, is led into a Sydney, N.S., courtroom 13 years ago. A jury later convicted him, and the Micmac Indian served nearly 11 years for a murder he never committed. Evidence indicated police pressured young witnesses at the trial and attempted to cover up mistakes made in the case. Nova Scotia opposes holding a public inquiry.

Calls grow for Marshall inquiry

No justice until his 11-year ordeal gets full hearing supporters say

By Alan Story Toronto Star

While most of the facts are already know, the Donald Marshall saga can never end until it is examined by a full, public inquiry, his friends and supporters say.

Marshall, who spent nearly 11 years in prison for a killing he didn't commit, recently accepted compensation of $270,000 from the Nova Scotia government.

But the calls continue for an official inquiry into the circumstances of his 1971 arrest and conviction for the stabbing death of his friend, 16-year-old Sandy Seale.

Proponents argue that a public inquiry could hear all relevant witnesses, fill in remaining gaps in testimony and assign blame for the miscarriage of injustice.

Full disclosure

The probe could also suggests ways of preventing such tragic mistakes in the future.

Yet once again — during the current Nova Scotia provincial election campaign — Premier John Buchanan and Attorney-General Ron Giffin have refused to hold such an inquiry.

"As I appreciate from Donald Marshall's own comments, he would pretty well like the matter to go to rest," Buchanan said.

But it won't go to rest.

Felix Cacchione, Marshall's Halifax lawyer, said his client realizes an inquiry would be painful and put him back in the public limelight. But the Micmac Indian, now 31, wants a full disclosure of errors and cover-ups that he believes led to his imprisonment, Cacchione added.

The 1971 knifing occurred as Marshall and Seale tried to mug two men in a Sydney, N.S., park, according to later testimony. Marshall's murder conviction was reversed last year and he was freed.

UPC PHOTO

Happy ending: An ecstatic Donald Marshall flashes a victory sign in May, 1983, after learning that he has been acquitted of murder and will soon be freed from prison. He recently accepted compensation of $270,000.

All of the characters in the dramatic story, except the crown attorney who handled Marshall's original prosecution, are still alive.

All have told their stories — except for a few details — of what happened in the park when the black teenager was fatally stabbed. They have related how Sydney police grilled 13-, 14- and 15-year-old witnesses, how lies were told during Marshall's trial and how, a week after the trial, a man told officers they had the wrong man.

Rev. Robert Hussey, a Moncton, N.B., United Church minister, has personally raised $49,000 from concerned Canadians wanting to help Marshall. He said he is "dedicated to forcing the government to come forward with the answers . . . Their silence is outrageous."

Of the 2,600 letters Hussey has received about the case, 1,800 support an inquiry. Micmac Indian leaders and Nova Scotia NDP leader Alexa McDonough also favor a fresh investigation.

Even members of the original jury that convicted Marshall want to know how they were "betrayed" into reaching a guilty verdict more than 13 years ago.

"The thing should be hashed out from the very beginning until the time he went to prison . . . They've got to go from the bottom to the top of the system," one Marshall juror said yesterday from Louisbourg, N.S. He did not want to be identified.

Buchanan refuses to establish an inquiry or discuss the Marshall case because he fears his comments might prejudice the prosecution of Roy Ebsary, 72, of Sydney, charged with manslaughter in Seale's death.

The Premier has stuck to this position since May, 1983, when Ebsary was first charged. The accused was tried twice, successfully appealing his conviction. A third trial is scheduled for March, 1985.

With Buchanan's government expected to win re-election on Nov. 6, it seems unlikely that the Premier will be forced to comment on the distinction between Ebsary's guilt or innocence and Marshall's original conviction until the Ebsary case is over. With appeals, that could take until next fall.

But at least a partial inquiry into the Marshall affair could be held early next year, thanks to a libel suit launched last February. The suit was brought by John MacIntyre, Sydney's recently retired police chief and the main investigator of the Seale killing in 1971.

MacIntyre maintains that comments made on the CBC program *Sunday Morning* on Nov. 27, 1983, about his handling of the Marshall case were defamatory and injured his reputation.

If the libel case goes to trial as expected, the corporation's lawyers will likely ask most of the youthful witnesses who testified against Marshall at his 1971 trial to repeat why they lied under pressure from Sydney police.

Nervous breakdown?

Some new revelations may also emerge.

But until there is a full inquiry — ideally, it should be conducted by someone from outside the Nova Scotia power structure — people like Hussey will keep writing letters to the editor and asking questions.

Among their queries: Is it true that John Pratico, then 16, one of the main witnesses at the Marshall trial, suffered a nervous breakdown as a result of investigators' pressure and was taken to hospital under police escort.?

What was the role of the province's then attorney-general, Leonard Pace, in the November, 1971, revelation that Marshall didn't kill Seale?

Pace was one of the five justices of the Nova Scotia Supreme Court's appeal division who, in May, 1983, concluded that Donald Marshall was "the author of his own misfortune."

Donald Marshall -

Inquiry

09-84-0256-01

NOTES FOR A STATEMENT

BY THE HON. R. ROY MCMURTRY, Q.C.
ATTORNEY GENERAL FOR ONTARIO

AT THE CONSIDERATION
OF THE ESTIMATES OF
THE MINISTRY OF THE ATTORNEY GENERAL
BEFORE THE ONTARIO LEGISLATURE STANDING COMMITTEE
ON THE ADMINISTRATION OF JUSTICE

1000 HOURS
DECEMBER 1ST, 1982

WITH THE ADMINISTRATION OF JUSTICE AND DELIBERATE CONDUCT LIKELY TO IMPEDE THE ADMINISTRATION OF JUSTICE".

WE IN THE MINISTRY ARE MONITORING THESE DEVELOPMENTS CLOSELY. WE BELIEVE THAT MUCH CAN BE DONE, IN CO-OPERATION WITH THE PRIVATE BAR, TO DEVELOP STANDARDS OF BEHAVIOUR WHICH WILL RESULT IN ACCUSED BEING SATISFACTORILY REPRESENTED, AND THE TRIAL PROCESS EXPEDITED AT THE SAME TIME.

THE LAST ITEM I WOULD LIKE TO DISCUSS THIS MORNING IS A VERY IMPORTANT AND SENSITIVE ONE. I REFER TO THE QUESTION OF WHETHER AN ACCUSED INDIVIDUAL ACQUITTED AT TRIAL, OR DISCHARGED AT A PRELIMINARY HEARING, SHOULD BE COMPENSATED BY THE STATE FOR THEIR LEGAL EXPENSES, AND PERHAPS FOR OTHER EXPENSES INCURRED AS A RESULT OF THE TRIAL OR PRELIMINARY HEARING. THIS SUBJECT WAS RAISED MOST RECENTLY BY THE DISCHARGE OF MISS SUSAN NELLES AFTER A LENGTHY PRELIMINARY HEARING. I HAVE NO WISH TO DISCUSS HER CASE, PARTICULARLY IN VIEW OF THE FACT THAT THERE ARE CIVIL CASES PENDING CONCERNING COMPENSATION. WHAT I WOULD LIKE TO DO, HOWEVER, IS TO BRIEFLY DISCUSS SOME OF THE VERY DIFFICULT ISSUES OF PRINCIPLE RAISED BY THIS ISSUE.

AS HONOURABLE MEMBERS MAY BE AWARE, I HOPE TO TABLE IN THE LEGISLATIVE ASSEMBLY, WITHIN THE NEAR FUTURE, A DISCUSSION PAPER SETTING OUT IN MORE DETAIL THE OPTIONS AVAILABLE TO THE PROVINCE IF IT WISHES TO INSTITUTE A MECHANISM FOR

COMPENSATING THOSE ACQUITTED OR DISCHARGED. THE CHALLENGE WILL BE TO DEVISE A SCHEME THAT IS FAIR AND WORKABLE. IT WOULD BE COMPLETELY UNACCEPTABLE IF WE WERE TO SET UP A SCHEME WHICH HAD THE EFFECT OF INTRODUCING MIDDLE VERDICTS OF "NOT QUITE INNOCENT" INTO CANADIAN LAW. FOR THOSE WHO HAD PERSUADED THE JURY THAT THERE WAS A REASONABLE DOUBT ABOUT THEIR GUILT, BUT WHO NEVERTHELESS HAD NOT PERSUADED THE JURY THAT THEY WERE SUFFICIENTLY INNOCENT AS TO MERIT COMPENSATION.

NOR WOULD I WANT A COMPENSATION SCHEME TO DISTORT THE FUNDAMENTAL BALANCE OF THE CRIMINAL TRIAL. I AM NOT SPEAKING SOLELY OF THE INTERESTS OF THE CROWN. I THINK THAT AN ILL-DESIGNED COMPENSATION SCHEME MIGHT HAVE THE EFFECT OF BEING GROSSLY UNFAIR TO THE ACCUSED. LET ME GIVE YOU TWO EXAMPLES. WE HOLD THE RIGHT AGAINST SELF-INCRIMINATION VERY HIGHLY. NO ACCUSED SHOULD BE COMPELLED TO TESTIFY IN HIS OWN DEFENCE. HOWEVER, IN SOME JURISDICTIONS WHICH HAVE COMPENSATION SCHEMES, THE PRACTICAL EFFECT IS TO COMPEL THE ACCUSED TO TESTIFY, SINCE WITHOUT AN AFFIRMATIVE DEFENCE, HE IS UNLIKELY TO RECEIVE COMPENSATION. I HAVE NO WISH INDIRECTLY TO FORCE THE ACCUSED TO TESTIFY. SECONDLY, INTRODUCING QUESTIONS OF COMPENSATION MAY MAKE IT DIFFICULT FOR A JURY TO WEIGH AS SCRUPULOUSLY AS JURIES NOW DO, THE QUESTION OF THE GUILT OF THE ACCUSED. WOULD A JURY BE MORE LIKELY TO CONVICT, IN A BORDERLINE CASE, IF IT FELT OUTRAGED BY THE FACT THAT THE ACCUSED WOULD NOT MERELY GO FREE, BUT WOULD BE COMPENSATED AS WELL? I DO NOT KNOW, BUT THE EXPERIENCE

OF OTHER JURISDICTIONS LEADS ME TO BELIEVE THAT WE HAVE TO CONSIDER THIS AS A SERIOUS POSSIBILITY.

LET ME SPEAK A LITTLE ABOUT THE OPTIONS WE ARE CONSIDERING. THE QUESTION OF COMPENSATION FOR ACQUITTED ACCUSED HAS BEEN CANVASSED IN A NUMBER OF COMMISSION REPORTS ACROSS CANADA. TO DATE, HOWEVER, NO JURISDICTION HAS IMPLEMENTED ANY SCHEME. I THINK THAT THERE ARE BASICALLY SIX ALTERNATIVES WHICH HAVE TO BE CONSIDERED.

THE FIRST IS A FORMALIZED SYSTEM OF EX-GRATIA PAYMENTS. THIS WAS THE SUGGESTION OF CHIEF JUSTICE MCRUER IN HIS CIVIL RIGHTS REPORT, AND HE SUGGESTED HAVING A PANEL OF SUPREME COURT JUSTICES TO ADVISE THE CABINET ABOUT EX-GRATIA PAYMENTS TO MERITORIOUS ACQUITTED ACCUSED.

THE SECOND AND THIRD ALTERNATIVES GIVE THE JUDGE POWER TO MAKE A COMPENSATION OR COSTS AWARD FOLLOWING THE CONCLUSION OF THE TRIAL OR PRELIMINARY HEARING. SOME JURISDICTIONS GIVE THE JUDGE A VIRTUALLY UNFETTERED DISCRETION: THIS IS THE SECOND ALTERNATIVE. THE THIRD ALTERNATIVE IS FOR THE LEGISLATURE TO LAY DOWN RIGID AND FORMAL GUIDELINE TO ASSIST THE JUDGE IN DETERMINING WHETHER AN INDIVIDUAL OUGHT TO RECEIVE COMPENSATION. THE MAJOR PROBLEM WITH FORMAL GUIDELINES IS THAT THEY COMPLICATE THE JUDGES CONSIDERATION OF THE FACTS OF THE CASE AS IT IS PROCEEDING. THE JUDGE MUST NOT SIMPLY FOCUS ON THE GUILT, OR OTHERWISE, OF THE ACCUSED, BUT WEIGH IN HIS MIND A WHOLE SERIES OF OTHER FACTORS, RELEVANT ONLY TO

THE COMPENSATION QUESTION. THE EXPERIENCE OF OTHER JURISDICTIONS WITH HEAVILY STRUCTURED GUIDELINES IS THAT FEW AWARDS IF ANY ARE MADE.

THE FOURTH ALTERNATIVE IS TO SET UP A BROAD BASED COMPENSATION SCHEME ADMINISTERED BY A TRIBUNAL. I SUPPOSE THE NEAREST ANALOGY WOULD BE THE CRIMINAL INJURIES COMPENSATION BOARD. UPON PRESENTATION OF A CERTIFICATE OF ACQUITTAL OR DISCHARGE, AN INDIVIDUAL WOULD BE ENTITLED TO MAKE APPLICATION FOR AN AWARD TO COVER HIS EXPENSES INCURRED AS A RESULT OF HIS DEFENCE.

THE FIFTH ALTERNATIVE SUGGESTED IN ONE MINORITY REPORT OUT IN BRITISH COLUMBIA IS AN EXPANSION OF LEGAL AID, TO COVER RETROACTIVELY ACQUITTED ACCUSED, EVEN THOUGH THEY MIGHT NOT, INITIALLY, HAVE MET THE ELIGIBILITY GUIDELINES. I HAVE SOME VERY REAL CONCERNS ABOUT THIS ALTERNATIVE.

THE FINAL ALTERNATIVE WE ARE CONSIDERING IS MAKING CHANGES TO OUR TORT LAW TO FACILITATE THE BRINGING OF CIVIL LAW ACTIONS FOR BOTH COSTS AND DAMAGES. THIS HAS THE ADVANTAGE OF ENABLING THE CIVIL COURTS TO ANALYSE THE ISSUES SEPARATELY FROM THE PROCESS OF THE CRIMINAL TRIAL, AND ALSO TO BE ABLE TO ARTICULATE GUIDELINES FOR LAW ENFORCEMENT AUTHORITIES.

MR. CHAIRMAN, WE ARE REVIEWING ALL THESE OPTIONS IN CONSIDERABLE DETAIL, ANALYZING THE EXPERIENCE OF OTHER JURISDICTIONS, AND ATTEMPTING TO DETERMINE WHAT THE LIKELY COST OF SUCH A SCHEME WOULD BE TO THE TAXPAYER. I AM LOOKING FORWARD TO TABLING THE DISCUSSION PAPER IN THE NOT-TOO-DISTANT FUTURE, AND TO DISCUSSING THESE MATTERS AT LENGTH WITH MY COLLEAGUES IN THE ASSEMBLY.

09-84-0257-01

July 15, 1983

Mr. Jonathan Rose
10 Glory Crescent
WEST HILL, Ontario
M1E 2B8

Dear Mr. Rose:

I have your letter, of July 4th, and advise that if and when Mr. Marshall, or someone on his behalf, makes an application for compensation we will give it our earnest consideration.

Thank you for writing.

Yours sincerely,

Harry W. How, Q. C.

EXECUTIVE COUNCIL

NOVA SCOTIA

Certified to be a true copy of an Order of his Honour the Lieutenant Governor of Nova Scotia in Council made the 9th day of August A. D. 1977.

N. S. Regulation 77/77

FILED

Date: August 9 1977

Patricia A. Hyland
REGISTRAR OF REGULATIONS

77-954

The Governor in Council on the report and recommendation of the Attorney General dated the 21st day of July, A.D., 1977, and pursuant to Section 7 of Chapter 151 of the Revised Statutes of Nova Scotia, 1967, the Interpretation Act, and Section 26 of Chapter 11 of the Acts of 1977, the Legal Aid Act, is pleased to make regulations in the form set forth in the Schedule attached to and forming part of the report and recommendation.

H. F. G. [illegible], Q.C.,
CLERK OF THE EXECUTIVE COUNCIL.

Approved by the Lieutenant Governor of Nova Scotia in Council on the 2nd day of March, 1978

CLERK OF THE EXECUTIVE COUNCIL

77-954

REGULATIONS MADE BY THE GOVERNOR IN COUNCIL PURSUANT TO SECTION 26 OF CHAPTER 11 OF THE ACTS OF 1977, THE LEGAL AID ACT

ELIGIBILITY

1(1) Subject to the Act, an applicant is eligible to receive legal aid:

(a) when he receives all or part of his income pursuant to a program of municipal or provincial social assistance;

(b) when he does not receive any of his income pursuant to a program of municipal or provincial social assistance and he has an income equal to or less than that which he would be entitled to receive under Provincial Social Assistance; or

(c) when the obtaining of legal services outside of the legal aid plan would reduce the income of an applicant to a point whereby he would become eligible for the benefits under Provincial Social Assistanc

(2) A client who is eligible pursuant to subsection (1)(c) may be required by the Commission to make a contribution towards the payment of the costs of the legal services rendered on his behalf.

(3) An applicant shall not be required to dispose of his principal place of residence or assets necessary to maintain his livelihood.

2 Notwithstanding Section 1, where the income of an applicant for legal aid exceeds the amounts specified in Section 1, the applicant may be declared eligible for legal aid if the applicant cannot retain counsel at his own expense without him or his dependents, if any, suffering undue financial hardship such as incurring heavy indebtedness or being required to dispose of modest necessary assets.

APPLICATION

3 Applications for legal aid shall be made in the form shown in Schedule A

4 Applications for legal aid shall be accepted or rejected by a solicitor employed by the Commission or the Executive Director.

APPEALS TO THE COMMISSION

5 Where an applicant or client wishes to appeal to the Commission pursuant to Section 24 of the Act concerning refusal, suspension or withdrawal of legal aid or concerning cancellation or amendment of a certificate of legal aid, or concerning required contributions toward the cost of legal aid, the applicant or client shall submit to the Commission a written request for a review.

6 When the Commission receives a written request for a review, the solicitor or Executive Director who made the decision to be reviewed shall forthwith submit a written report to the Commission giving reasons for his action.

7 The Commission shall consider the report of the solicitor or the Executive Director and, upon the request of the applicant or client, the Commission shall hear the applicant or client in person regarding the review.

LEGAL AID SERVICES

8 An appeal against a decision, judgment, verdict or sentence of a Court may be taken where, in the opinion of a solicitor employed by the Commission and the Executive Director, the appeal has merit or where the Court appealed to requests the appointment of counsel.

9 Legal aid may be granted in such manner and in such matters as may from time to time be provided pursuant to any agreement respecting legal aid in force between the Government of the Province of Nova Scotia and the Government of Canada.

TERMS OF EMPLOYMENT BY THE COMMISSION

10 Salaries and pension, health plan, group insurance, sick leave, vacation and other benefits shall be provided to employees of the Commission on the same basis and scales as these are provided in the Department of the Attorney General.

11 The Executive Director shall be classified at the level of a Director in the Department of the Attorney General.

12 No person employed by the Commission may be a candidate in a municipal, provincial or federal election or otherwise engage in any activity which would interfere with his employment by the Commission without prior approval from the Commission.

13 No person who is a member of a city, town or municipal council, shall be employed by the Commission unless the Commission indicates by resolution it is satisfied that the duties of that office would not interfere with his employment.

14 No person who is a member of the House of Assembly or the House of Commons shall be employed by the Commission.

TARIFF OF FEES

15 Where the Executive Director determines that legal aid should be provided by a barrister in private practice who is to be compensated by the Commission, a certificate of eligibility shall be issued by a solicitor employed by the Commission.

16 Compensation paid pursuant to a certificate of eligibility issued in a non-criminal matter shall be at the rate of twenty-five dollars per hour to a maximum for the case determined by the solicitor who issued the certificate and agreement to this maximum shall be a condition of the retainer.

17 The fees in Schedule B shall be the Tariff of Fees and Disbursements for barristers in private practice engaged by the Commission to conduct criminal cases.

18 An account submitted by a barrister in private practice may be taxed by the Executive Director who may determine the proper fees and disbursements to be paid by the Commission.

19 A barrister who is not satisfied with the determination of fees and disbursements may appeal to the Commission and the Commission may make a determination of proper fees and disbursements as the Commission sees fit.

SCHEDULE A

Lawyer's Use Only

(Where advice only required)

NOVA SCOTIA LEGAL AID
Application for Legal Aid

Your Name: _____

Full Address: _____

Telephone: _____

Office Use Only

Accepted
Rejected
Referred

Reasons .....

.....

.....

Office: _____

Staff Lawyer: _____

STATUS: Male ☐ Female ☐ Age ☐ | Married ☐ Not Married ☐ Widowed ☐ | Separated ☐ Deserted ☐ Divorced ☐ | Common Law ☐ Dependents ☐ No Dependents ☐ | Employed ☐ Unemployed ☐ Unable to Work ☐

Name of Husband or Wife _____

Address of Husband or Wife _____

Have you ever received legal aid services before? Yes ☐ No ☐

Do you receive Social Assistance or other Public Assistance? Yes ☐ No ☐

Dependents living at home ☐

DEPENDENTS
(Spouse, child or person supported by Applicant)

Dependents Living apart ☐

Names:	Relationship	Age

Describe purpose of application or problem: _____

Name of person who can assist: _____

Can be contacted _____

If criminal matter or court proceeding, what is the charge or proceeding? _____

Next Court Appearance? _____

	Yes	No
Was bail granted?	☐	☐
Have you elected?	☐	☐
Did you plead?	☐	☐
Did you have preliminary?	☐	☐
Did you have a trial?	☐	☐
Were you sentenced?	☐	☐
Are you in custody?	☐	☐

Court or Judge .....

Financial Data: Name of Person who can verify ..... Address .....

Monthly Income:
Salary, Wages, Tips $ _____
Unemployment Ins. ... _____
Social Assistance .... _____
Other Public Asst. .... _____
Family Allowance .... _____
Old Age Asst. ..... _____
Pension ..... _____
Other Income ..... _____

Total Income .... _____

Monthly Expenses:
Rent ..... $ _____
Payments on home _____
Heat/Fuel ..... _____
Taxes/Ins. ..... _____
Electric ..... _____
Water ..... _____
Telephone ..... _____
Food ..... _____
Clothing ..... _____
Babysitter/Hsehld _____
Medical/Drugs ... _____

Total Expenses _____

Motor Vehicle
Year _____ Model _____
Make _____ Value $ _____
Financed at .....
.....
Amount Owing $ _____

Home Ownership
Value $ _____ No. Rooms _____
Condition _____
Total Debt $ _____
Name of Mortgagee .....
.....

Total Value or Amount of Assets $ _____
Cash $ _____
Bonds $ _____
Securities $ _____
Real Estate $ _____
Other (specify) $ _____

Summary of Debts

Creditor	Amount	Monthly Charge
	$	$
	$	$
	$	$
	$	$
Totals		

READ DECLARATION AND AUTHORIZATION CAREFULLY

Applicant Declares:
Information herein is true and complete. Applicant will furnish additional information as required. Applicant consents to have information investigated for verification and will notify of any change.

Applicant Authorizes:
Nova Scotia Legal Aid to represent and act for Applicant in the matter mentioned or any related matter and further authorizes Nova Scotia Legal Aid to take any necessary action or obtain required assistance.

Signature of Applicant: _____ Date: _____

Please Ask for Assistance

Do Not Complete If Unsure.

SCHEDULE B

Tariff of Fees and Disbursements
for Barristers in Private Practice
Engaged by the Commission to
Conduct Criminal Cases

All fees in this Schedule shall be reduced by twenty-five percent.

INDICTABLE OFFENCES

Indictable Offences within the exclusive jurisdiction of the Supreme Court under Section 427 of the Criminal Code (Canada) -

1. Preparation for preliminary hearing and trial, including interviews with the accused and witnesses - per hour _____ $35.00

Subject to the maximum in each case set out below

First degree murder	1,500.00
Second degree murder	1,000.00
All others	750.00

2. Counsel fee at preliminary inquiry - per day _____ 175.00

3. Counsel fee at trial - per day _____ 250.00

Junior Counsel in First Degree murder cases or with the approval of the Director in Second Degree Murder cases - per day _____ 100.00

Indictable Offences other than those within the exclusive jurisdiction of the Supreme Court under Section 427 of the Criminal Code (Canada) -

4. Preparation for preliminary hearing, where applicable, and trial including interviews with the accused and witnesses - per hour _____ 25.00

Subject to the maximum in each case set out below

Armed robbery, manslaughter, rape	750.00
All other indictable offences	500.00

5. Counsel fee at preliminary inquiry - per day _____ 125.00

6. Counsel fee at trial in Supreme Court - per day _____ 250.00

7. Counsel fee at trial before a County Court Judge without a jury or before a Provincial Judge under Part XVI of the Criminal Code (Canada) - per day _____ 200.00

Application for Bail or Reduction of Bail on behalf of a person charged with any Indictable Offence -

8. Application to a Justice of the Supreme Court for all services incidental to the application, including drawing notice of motion, affidavits, attendances, justifications by surety or sureties or entering into recognizance _____ 150.00

9. When application for bail is made before a County Court Judge for the above services _____ 75.00

10. When application for bail is made before a Provincial Judge for the above services _____ 35.00

Adjournments -

11. Attendance on any necessary adjournment before a Justice of the Supreme Court _____ 35.00

12. Attendance on any necessary adjournment before a Justice of the Supreme Court _____ 35.00

13. Attendance on any necessary adjournment or adjournments before a Provincial Judge requested by the accused, in all _____ 35.00

Attendance on any adjournment before a Provincial Judge requested by the Crown _____ 35.00

(A Solicitor shall not be entitled to a fee for more than one adjournment before the same Provincial Judge obtained during the same half day, unless otherwise approved by the Executive Director)

Preventive Detention -

14. Preparation on an application under Part XXI of the Criminal Code (Canada) including interviews and other necessary services - per hour _____ 35.00

Subject to a maximum fee of $750.00

15. Counsel fee on application - per day _____ 250.00

Appeals to the Appeal Division of the Supreme Court -

16. Drawing and filing Notice of Appeal and Preparation of Appeal Book _____ 100.00

17. Preparation, including Statement of Points of Law and Fact intended to be argued, where appeal is against sentence only _____ 125.00

18. Preparation, including Statement of Points of Law and Fact intended to be argued and including supplementary Notice of Appeal, where appeal is against conviction and sentence or conviction only _____ 250.00

19. Attendance to set down _____ 35.00

20. Counsel fee on appeal from conviction - per day or portion thereof _____ 250.00

21. Counsel fee on appeal from sentence only - per day or portion thereof _____ 150.00

Appeals to the Supreme Court of Canada in respect of all Indictable Offences -

22. Application for Leave to Appeal including preparation of the Notice of Motion, Statement of Points of Law and Fact and the case and other necessary proceedings _____ 200.00

23. Counsel Fee on application for Leave to Appeal _ 250.00

24. Application before the Chief Justice of Nova Scotia or other Judge designated by him for admission to bail including drawing of Notice of Motion, Affidavits, attendances incidental to the application, preparation of recognizances, execution thereof and justification of surety or sureties _____ 150.00

25. Drawing, filing and serving Notice of Appeal and preparing case _____ 100.00

26. Preparation, including factum _____ 300.00

27. Counsel fee on appeal - per day or portion thereof _____ 350.00

OTHER MATTERS

28. Counsel shall be allowed all reasonable and necessary disbursements in full subject to being approved by the Executive Director or a solicitor employed by the Commission.

29. The Executive Director or such other person as he shall designate may allow a fee to a solicitor for the preparation of an opinion, for an additional opinion or for his attendance to make further submissions when requested by the Commission.

30. Except where the tariff item applicable to the services is a block fee item covering fees for all services, an allowance of $25.00 per hour, to a maximum of six hours per day may be made for the time spent in travelling where the distance is fifteen miles or more one way, and the solicitor satisfies the Executive Director that such travel was reasonable and necessary under the circumstances.

31. In any matter, proceeding, action or appeal, not dealt with by this Schedule of fees, the Executive Director shall allow a reasonable fee and in determining the fee properly payable in respect of such matter, proceeding, action or appeal, the Executive Director shall have regard to the Schedule of fees herein for comparable services.

This Schedule is a legal aid tariff reflecting fees customarily paid by a client of modest means and the fees provided for herein shall normally apply for the legal aid covered thereby, including block fees and maximum fees for preparation, provided that,

(a) such fees may be increased by the Commission in those cases where in its opinion an increase is justified, having regard to all the circumstances including the nature of the offence charged, the complexity of the case and any other factor which would warrant an increased fee;

(b) such fees may be decreased by the Commission in those cases where in its opinion a decrease is appropriate; and

(c) where a solicitor represents two or more persons charged with the same or a similar offence arising out of the same occurrence, or where a solicitor represents a person charged with two or more offences, and in either case where the trials or pleas of guilty occur in the same court at approximately the same time, for the purposes of this Schedule, the solicitor shall be entitled to fees as for one client on one charge and such additional fees as may be approved as herein provided.

EXECUTIVE COUNCIL

NOVA SCOTIA

Certified to be a true copy of an Order of his Honour the Lieutenant Governor of Nova Scotia in Council made the 27th day of May A. D. 1982

N. S. Regulation 128/82

FILED

Date: May 31 1982

REGISTRAR OF REGULATIONS

82-675

The Governor in Council on the report and recommendation of the Attorney General dated the 18th day of May, A.D., 1982, on the recommendation of the Nova Scotia Legal Aid Commission, and pursuant to Section 26 of Chapter 11 of the Statutes of Nova Scotia, 1977, the Legal Aid Act, is pleased to make regulations in the form attached to and forming part of the report and recommendation as Appendix "A".

H. F. G. STEVENS, Q.C.,
CLERK OF THE EXECUTIVE COUNCIL.

REGULATIONS MADE BY THE GOVERNOR IN COUNCIL PURSUANT TO SECTION 26 OF CHAPTER 11 OF THE ACTS OF 1977, THE LEGAL AID ACT

1 Sections 1 and 2 of the Regulations made pursuant to Section 26 of Chapter 11 of the Acts of 1977, the Legal Aid Act, by Order in Council 77-954 are repealed and the following substituted therefore:

ELIGIBILITY

1 (1) Subject to the Act, an applicant is eligible to receive Civil Legal Aid and Criminal Legal Aid:

(a) when an applicant qualifies for benefits under the Provincial Social Assistance Act, Part II, or benefits under the Family Benefits Act; or

(b) when the obtaining of legal services outside of the legal aid plan would reduce the income of an applicant to a point whereby the applicant would qualify for benefits as per subsection 1(1)(a).

(2) A client who is eligible pursuant to subsection (1)(b) may be required by the Commission to make a contribution towards the payment of the costs of the legal services rendered on the applicant's behalf.

(3) An applicant shall not be required to dispose of his principal place of residence or assets necessary to maintain his livelihood.

2 Notwithstanding Section 1, where the income of an applicant for legal aid exceeds the amounts specified in Section 1, the applicant may be declared eligible for legal aid if the applicant cannot retain counsel at his own expense without him or his dependants, if any, suffering undue financial hardship such as incurring heavy indebtedness or being required to dispose of modest necessary assets.

Approved by the Lieutenant Governor of Nova Scotia in Council on the

27th day of May 19 82

CLERK OF THE EXECUTIVE COUNCIL

82-675

09-84-0260-01

704 - 2075 Comox St.
Vancouver, B.C. V6G 1S2.

February 12 1984.

Mr Ron Giffin.
Attorney General of Nova Scotia.
Halifax. N.S.

Dear Sir:

Re: The Donald Marshall case.

I refer to the lack of compassion in this case and, to a precedent in Commonwealth law regarding compensation to person wrongfully charged, imprisoned and released.

This precedent involved Arthur Alan Thomas who was awarded about 1.3 million dollars about four or five years ago. The country = New Zealand. The case involved to be known as the "CRIME MURDERS" which took place about twelve years prior to the imprisonment of Thomas.

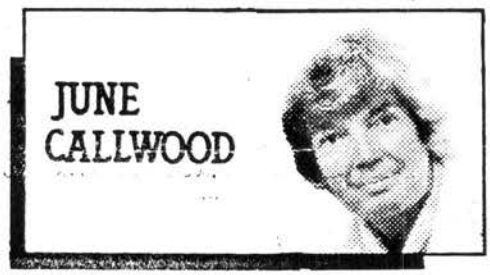
If your department was aware, or now they are notified of this - would you be good enough to make further investigations with the intention of some heavy compensation for Don Marshall?

Cordially,
I. Mosley.

Acquittal puts justice on trial

DONALD MARSHALL Jr. sits uneasily on the conscience of Canadian justice, an unskilled, tormented Micmac Indian who served 11 years in prison for a murder he did not commit. Since his release he has become the abolitionist's ultimate argument. If the country can be fair to Mr. Marshall, it is possible to believe that it has the capacity to be fair to everyone. So far, it isn't even close.

The most publicized elements of the Donald Marshall story are his innocence in the 1971 death of a 16-year-old knifed in a scuffle in a Sydney, N. S., park; and the $270,000 in compensation that an eminent judge from Prince Edward Island awarded him a few weeks ago for legal fees and the loss of his youth. What remains almost wholly unexamined is the process which put an innocent man in prison and the conduct of Sydney police and the Nova Scotia Attorney-General's department.



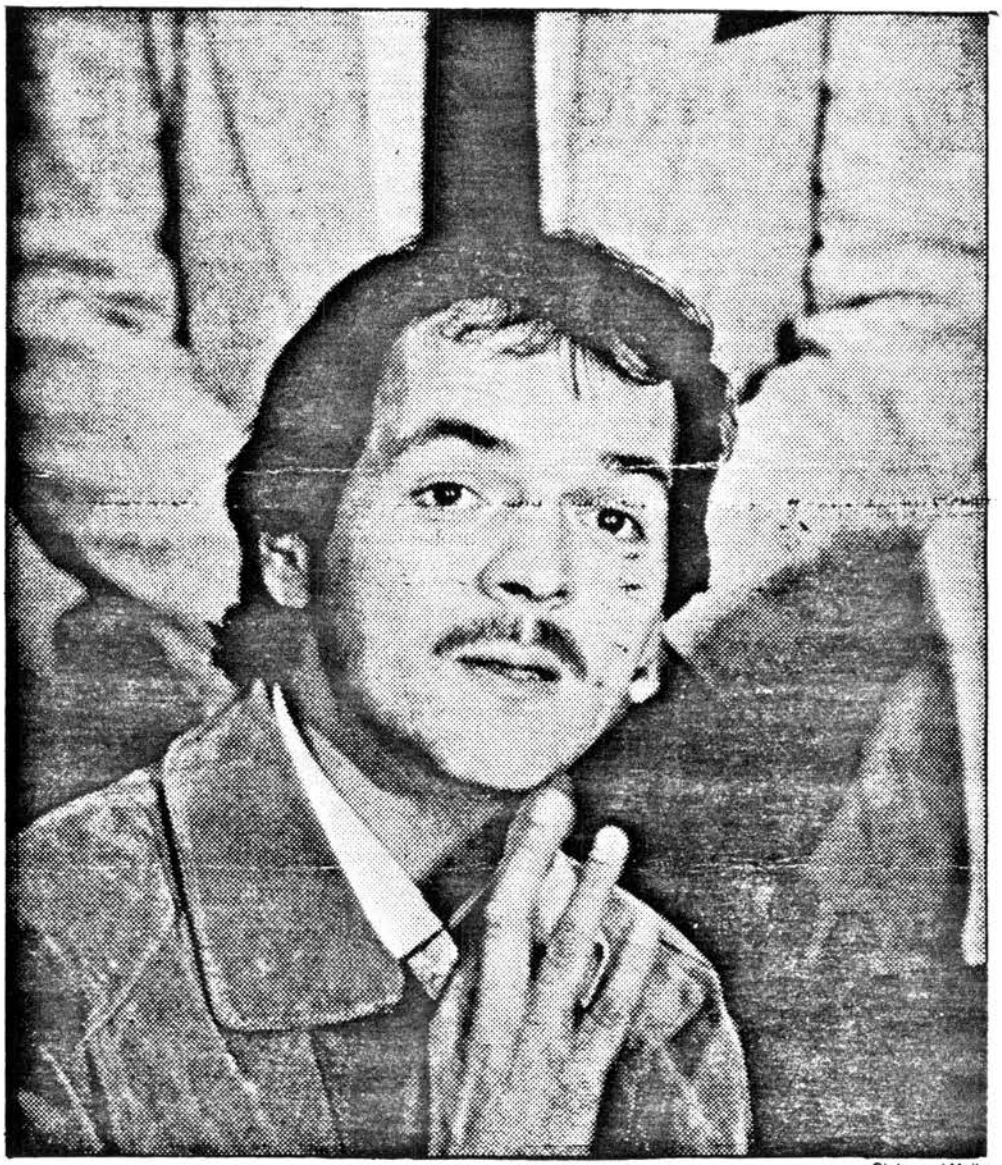
The most compelling evidence of questionable behavior by law-enforcement people comes in a report filed by Staff-Sgt. Harry Wheaton of the Royal Canadian Mounted Police. The officer, stationed in Halifax, led an investigation in 1982 into the circumstances surrounding the arrest and trial of Mr. Marshall. He discovered that key Crown witnesses, two 14-year-olds, were questioned for hours at a stretch by Sydney police until, said the report, they finally changed stories that exonerated the accused native into testimony that convicted him.

One of them, a woman by the time she was requestioned in 1982, told the RCMP that "the police had me so scared . . . I felt pressured and agreed with things I should not have agreed with . . ."

The RCMP presented its report, highly critical of Sydney police, to Nova Scotia's Attorney-General's department, whose intervention prompted the RCMP to curtail the investigation. The report remained secret until last month when Kirby Grant, a Liberal candidate in Nova Scotia's provincial election, obtained a copy of it and held a press conference calling for a public inquiry. No such inquiry has been ordered.

Ten days after Mr. Marshall's conviction on Nov. 15, 1971, a man came forward to tell police the wrong person was going to prison and that he knew the identity of the real murderer. Although Mr. Marshall's case was being appealed, his lawyer said he was not notified by the Nova Scotia attorney-general of this new evidence. The appeal was accordingly lost and an innocent 17-year-old Donald Marshall was led away in shackles to serve 11 years in jail.

It was only because the RCMP — given new evidence by Mr. Marshall and his first lawyer, Stephen Aronson — started a new investigation and concluded the conviction was not substantiated by the evidence that he was released in March, 1982. A new trial was held and he was acquitted in May, 1983.



Globe and Mail

Donald Marshall: no apologies forthcoming for 11 years spent in a penitentiary.

Roy Ebsary, who has been charged with the murder for which Donald Marshall served time, is currently facing a third trial. His first ended in a hung jury. A year ago he was found guilty of manslaughter, but the conviction was overturned after it was ruled the jury had been improperly instructed. A new trial has been ordered.

Donald Marshall's present lawyer, Felix Cacchione, a bearded 35-year-old who grew up in Montreal's tough east end, says that when he looks at what happened to his client he thinks: "There but for the grace of God go I." What he sees as needing to be addressed by all Canadians, not just those who live in Nova Scotia, is police power against those who appear to be insignificant and friendless. "What happened to Junior can happen to anyone," he says earnestly. "You can be walking along the street and suddenly you're scooped up."

The lawyer doesn't really mean that the police can put any Canadian behind bars. He does mean that if the law does not treat everyone equally, if justice is reserved for those with good wardrobes and education, the country might as well dispense with the courts and go straight from arrest to sentencing.

Many people in Nova Scotia are demanding an impartial investigation into what happened to Donald Marshall. They are distressed that there has not even been an apology from the police or the Nova Scotia Government. But Felix Cacchione doesn't want the inquiry to become another harsh examination of Mr. Marshall's character and broken life. There is some doubt that the young man, wracked as he is by nightmares and bouts of weeping, could tolerate more sessions in a witness box. Indeed, he should not be subjected to them.

It is not Mr. Marshall who is on trial, not any more. It is justice itself which must take the stand. And justice has a lot of explaining to do.

This Open Letter appeared in The Chronicle-Herald and Mail-Star on April 11th and April 15th, 1989 on Page 5.

AN OPEN LETTER TO PREMIER BUCHANAN

Donald Marshall spent eleven years in prison for a crime he didn't commit.

Eleven years.

Why?

And what can we do about it?

At last someone is doing something. The province has appointed Mr. Justice Alex Campbell of the Prince Edward Island Supreme Court to conduct an inquiry on compensation for Marshall.

But only on compensation.

We applaud the choice of a jurist like Alex Campbell and we are pleased by his proposal to make an interim payment of $25,000.00 to Marshall. We welcome his promise to bring down recommendations by the end of the summer.

But that does not explain the whys.

Why Donald Marshall lost eleven years of his life.

Why we owe him compensation.

Many questions remain about the Marshall case.

Either the scope of Mr. Justice Alex Campbell's inquiry must be broadened, or another public inquiry must be launched into the circumstances surrounding the wrongful conviction and imprisonment of Donald Marshall.

Why do we need such an inquiry?

Because by knowing at last what really happened to Donald Marshall and why, we can try to stop it from ever happening again.

Arthur Andrew
Meredith Annett
George Bain
Kerstin Black
Lorraine Black
Harry Bruce
June Callwood
Anna Cameron
Lynne Carter
Mary Clancy, L.L.B.
Constance Cooke
Dr. and Mrs. J. McD. Corston
Barry Cowling
Ray Creery
Christine Currie
Donald E. Curren
James G. Eayres
Judith Fingard
Dr. Edgar Friedenberg
John Fryer
Professor Ruth Gamberg
Dr. John Godfrey
Senator John Godfrey
Ruth Goldbloom
Maxie Grant
Professor Les Haley
Gordon Hammond & Charlotte Hammond
Kenneth Harrington
Rt. Rev. L. F. Hatfield
Rev. G. Russell Hatton
G. P. Hebb
Kevin Keefe
Toni Laidlaw
Marilyn MacDonald
Sheilagh MacKenzie
Kenneth McGrattan
Dr. and Mrs. J. D. McLean
Frank Metzger
Sister Dorothy Moore, CSM
Dr. Donald Morris & Mora Morris
Nelly Novac
Heather Robertson, LL.B
Dennis Ryan
George and Christina Shaw
Robbie Shaw
Mary Sparling
Walter Thompson, LL.B
Nancy and Chris Wilcox
DALHOUSIE LAW FACULTY
Pattie Aller
Susan M. Ashley, LL.B
Vaughan Black, LL.B
R. L. Evans, LL.B
Ian Townsend Gault, LL.B
Wade McLauchlin, LL.B.
Faye Woodman, LL.B
John A. Yogis, LL.B
Dalhousie Law Students Society

THIS SPACE HAS BEEN PAID FOR BY DONATIONS TO THE COMMITTEE OF CONCERNED NOVA SCOTIANS FOR JUSTICE

Nova Scotia

Department of
Attorney General

PO Box 7
Halifax, Nova Scotia
B3J 2L6

Our File No. 09-84-0261-01

November 22, 1984

Mr. Frank E. Belliveau
9 Pictou Road
Apt.12
Bible Hill
Truro, Nova Scotia
B2N 2R9

Dear Mr. Belliveau:

I wish to acknowledge your letter to the Attorney General of October 27, 1984.

I enclose a copy of your letter dated June 26, 1983 to the then Attorney General, Harry W. How, which touches upon the Donald Marshall case.

A review of our files does not disclose any additional correspondence forwarded by you concerning the case of Donald Marshall during the terms of office of either Attorney General Leonard Pace or Attorney General Harry How.

Yours very truly,

Martin E. Herschorn
Assistant Director (Criminal)

MEH:if
Encl.

To: The Attorney General
Hon. Harry How
P.O. Box 7
Halifax, N.S

June 26th 1983

Hon. Sir;-

In May 1977 I was sentenced to nine (9 years) and won a new trial on appeal and remained into Custody, then in May 1978 I was sentenced to nine (6 years) I do believe that I am entitled to be released from Prison with remission off my Sentence, would your good office investigate as to "why" I am still in the Dorchester Prison still serving my sentence, it could be due to the fact that I worked on the "Marshall Case" the Young indian Chap "who" spent eleven years in Prison, and the appellate Court for the Province of Nova Scotia proved the Young man to be innocent, as you are aware the Prison People, and the Parole officals don't like me for my stand on "Human Rights" Please Come back to me in regards to these matters.

I Remain
Frank L. Billiteau
Human Rights associate
P.O. Box A-B
Dorchester, N.B
Canada - E0A 1M0

To Martin
to handle
+ reply to -

09-84-0261-01

9 Pictou RD, APT-12
Bible Hill
Truro, NS - B2N 2R7

October 27, 1984

The Honourable
mr. Ron Giffin
34 Broad Street
Truro,
N.S.

Honourable Sir;

Re: Donald Marshall;

The Writer request for your office to foward to me all correspondence that I sent on behalf of mr. Marshall "when"

(a) The Honourable mr. Lunord pace was attorny General.

(b) The Honourable mr. Harry How was attorny General.

It was "i" Who worked on the Marshall Case for several years, and Copies of Document should be in the Halifax office, and it would be appreciated "if" Copis were sent to me at the above address

James Tuplin
Frank L. Bellveau

cc/ File
/fbr

lada officials met in tions were made before receiving broad options for future use and development of the parks. The op- scale expansion and construction of new facilities. the deadline for public comment "established a basic framework, and we checked public comments be held by invitati and December in and possibly Vanco

onald Marshall

1982 RCMP probe of police conduct

Marshall inquiry blocked: report

By DEBORAH JONES
Special to The Globe and Mail

HALIFAX — The intervention of the Nova Scotia Attorney-General's Department prompted the RCMP to stop an investigation into conduct by the Sydney Police Department in the Donald Marshall case, a confidential 1982 RCMP report shows.

The document, released at a Halifax press conference yesterday by lawyer and Liberal Party candidate Kirby Grant, says the RCMP wanted to investigate allegations that Sydney police officers had forced three witnesses at the 1971 Marshall trial to lie during court testimony.

However, even though the RCMP had already determined that two of the witnesses lied during the trial, the Mounties were advised by officials within the Attorney-General's Department not to proceed with their investigation.

Mr. Marshall was convicted in 1971 of the second-degree murder of Sandy Seale and spent 11 years in prison for the crime before being acquitted after a new trial in May, 1983.

The 1982 RCMP report also says there was pressure on Crown witnesses during Mr. Marshall's trial to change their original statements to police.

Miss Grant, who is running against Attorney-General Ronald Giffin for the riding of Truro-Bible Hill in next month's provincial election, added her voice yesterday to widespread calls for a public inquiry into why Mr. Marshall was convicted and into the conduct of the Sydney police force.

While the Nova Scotia Government has not ruled out a public inquiry, Mr. Giffin has repeatedly said he will not discuss the issue until criminal proceedings against Roy Ebsary, who is facing his second trial for the Seale murder, have been dealt with by the courts.

The RCMP report was "given to me, and I can't say where I got it," Miss Grant said, adding that she released the report to the media "because I'm a lawyer as well as a candidate . . . and to me, there's been wrongdoing in the administration of justice."

In an interview with The Globe and Mail last night, Mr. Giffin said: "There was no attempt at any time to tell the RCMP to stop an investigation. . . . That's just political nonsense.

"The immediate concern of the (Attorney-General's) Department at that point in time (May, 1982) was not to pursue side issues, but to deal with main issues."

Mr. Giffin said his department was seeking a new trial for Mr. Marshall at the time of the RCMP investigation of the Sydney police, and said the "side issues" included "people comitting perjury, questions about the police conduct."

The photocopied report distributed by Miss Grant, signed by Inspector D. B. Scott of the Sydney subdivision of the RCMP, says in part: "It would appear from this investigation that our two eyewitnesses to the murder lied on the stand, and that the other main witness, (Patricia) Harris, lied as well, under pressure from the Sydney city police."

Another part of the RCMP report, signed by Staff Sergeant H. F. Wheaton, notes: "Discussions were held with Crown prosecutor Frank C. Edwards in regards to interviewing Chief (J. F.) McIntyre and Inspector W. A. Urquhart in regards to the allegations (of three witnesses) that they were induced to fabricate evidence in the original trial in this matter.

"Mr. Edwards has advised me that he further discussed the matter with Gordon Gale of the Attorney-General's Department and it was felt that these interviews should be held in abeyance for the present. The file will be held open pending further instructions."

Miss Grant told reporters yesterday that "what happened to Donald Marshall is the result of the mishandling of the administration of justice in this province. Surely it is the duty of the Attorney-General's Department to take action when they are apprised of a situation inundated with serious allegations and apparent omissions.

"The crux of this issue is that this Government has not been prepared to look farther into this matter and, worse, they have instructed the RCMP investigators not to delve further into what occurred in the original police investigation."

Mr. Marshall's lawyer, Felix Cacchione, said in an interview yesterday that he had previously seen the report released by Miss Grant, but is still waiting to see a further RCMP report. Mr. Cacchione said the other report makes recommendations to the Attorney-General's Department.

Hees supp further stu on radiat

OTTAWA (CP) — A study for the Government shows the among members of the ar exposed to low-level nuclear the 1950s is "quite similar" to people not exposed to radiatio Affairs Minister George H

Further research, ho to determine whether the radi sure increased the incidence and other diseases among ve living, Mr. Hees said yesterday

The mortality study, con University of Ottawa scientis department, found the rate of d cancer among the exposed ar personnel was slightly lower comparison groups.

The research only studied p have died, and ignored disease among living people who had posed to radiation, the scientis out.

"What came out of this stu it's a very simple fact, that higher death rate in the group been subjected to radiation th group that had not been subjecte ation," Mr. Hees said.

He said he has sent a Minister Jake Epp, asking tha partment study the rate of disea cially cancer, among living vete were exposed to radiation.

"The next thing is to find out being subjected to radiation incr chance of being afflicted by vari of illness," he said.

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Kay says

— The federal Cabinet has not scuss whether a free vote on t should be held in the House itor-General Elmer MacKay

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ROYAL HUDSON AT CHATHAM

By Wentworth D. Folkins

The 1985

09-84-0261-01

Giffin, How deny halting Marshall probe

KIRBY GRANT, the Liberal trying to unseat Attorney General Ron Giffin, charged yesterday that the wrongful conviction of Donald Marshall is one example of "political considerations" interfering with the administration of justice in Nova Scotia. Giffin denied the charge. (Moran)

by FRANCIS MORAN

The provincial attorney general's department has been accused of bringing "political considerations" to bear by halting a 1982 RCMP investigation into allegations that the Sydney police department forced witnesses to lie at the 1971 murder trial that wrongfully sent Donald Marshall to jail.

The government denied the charge.

Kirby Grant, a Truro lawyer trying to unseat Attorney-General Ron Giffin, told a press conference yesterday that Gordon Gale, the AG's director of prosecutions, ordered the RCMP not to interview two Sydney police officers about charges they forced witnesses to lie.

On the basis of the evidence these witnesses gave, Marshall was convicted of stabbing his friend Sandy Seale in a Sydney park and was sentenced to life in jail for the crime. Eleven years later, when the witnesses changed their stories, Marshall was acquitted and released from Dorchester.

Disturbing

Grant said the Marshall case is "one example of how the administration of justice is not being properly handled" and she criticized the Buchanan government for their "disturbing" attitude towards it.

But both Giffin and county court judge Harry How, who was attorney general in 1982, denied the charges of political interference and said the RCMP were hauled off the investigation so they could concentrate on gathering the evidence needed to clear Marshall.

Giffin said Gale told him "his primary concern was to get the Marshall case before the court. The RCMP is free to proceed in any inquiries they wish."

How confirmed that his department asked the RCMP not to continue their investigations into the charges that J. F. MacIntyre, now chief of police in Sydney, and Insp. William Urquhart pressured the critical witnesses to lie.

Priority

In fact, How said, his department asked the RCMP to conduct the 1982 investigation into the question of Marshall's guilt after it became a public issue. He added that the purpose of the investigation was to clear Marshall, if he deserved it, and that took priority over any other aspect of the investigation.

As for Grant's charges of political interference, How said, "That is totally, and I underline 'totally', without foundation."

Grant also called for a full inquiry into the circumstances that saw Marshall wrongfully convicted in the first place, something the government has consistently refused to do because, they say, they do not want to influence a retrial for Roy Ebsary, who has been charged with manslaughter in connection with Seale's death.

Donald Marshall

Marshall won't come out against noose

OTTAWA (UPC) — Donald Marshall, who spent 11 years in prison for a murder he did not commit, refused Thursday to take a stand on the death penalty.

"It's up to the people of Canada, it's not up to me," Marshall told a packed news conference. "It depends on the circumstances. I don't think I can go on either side."

Marshall's case has often been cited by abolitionists as proving the possibility for error in the judicial system that could lead to execution of an innocent person.

Marshall, 31, was brought to Ottawa from Nova Scotia to speak on the issue by the Canadian Office of Human Rights, an independent prisoners' rights group based in Hull, Que.

Group spokesmen said they were not surprised by his ambivalent stand. However, a press release prepared for the news conference said Marshall "arrived in Ottawa by airplane this morning to protest against capital punishment."

Marshall was convicted of second-degree murder in Sydney, N.S., in 1971 in the slaying of a teenager. He was aquitted in 1983 after the trial was reopened. Marshall recently received $270,000 compensation from the Nova Scotia government for the years he spent in jail.

Before the death penalty was abolished in 1972, only first-degree murder was punishable by capital punishment. First-degree murder was limited to the killing of prison guards or police officers but that was later eliminated.

During the news conference, Marshall was nervous and often appeared confused by the barrage of questions from reporters and replied hesitantly in a low voice.

Marshall said he would not vote if a referendum was held on capital punishment.

He said if capital punishment were brought back, it should apply to all murder convictions, and not just those who kill police officers.

Marshall did hedge on his view of life sentences and prison conditions.

"I'd sooner be dead than go back to where I came from," he said.

He added that he knew a number of prisoners serving life sentences who would prefer to die than spend more time in jail.

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by COLIN McG

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Daily News, Friday, October 19, 1984

HALIFAX

THE CHRONICLE-HERALD
Friday, October 19, 1984

09-84-0261-01

AG Kelly

Marshall report 'implicates' department

By BILL POWER
Staff Reporter

Liberal candidate Kirby Grant released details of a confidential RCMP report on the Donald Marshall case Thursday and called for a complete investigation of the judicial "bungling" which led to the Micmac Indian's 11-year imprisonment for a murder he did not commit.

The 30-year-old Truro lawyer, a political newcomer endeavoring to shake Attorney-General Ron Giffin's firm grip on the Truro-Bible Hill constituency, said contents of the 1982 RCMP report into the Marshall case clearly implicate the attorney-general's department in what constitutes "a serious miscarriage" of justice.

"I am concerned about the proper administration of justice in Nova Scotia and I believe that this case is one example of how the administration of justice is not being properly handled (here)," she said.

Among other things, the report indicates investigating RCMP officers discovered Crown witnesses were pressured by police to change original statements and that files from the original 1971 murder investigation are incomplete.

Ms. Grant claimed the attorney-general's department deliberately stifled the RCMP probe by requesting the investigating officers to discontinue interviews with witnesses who testified at the original trial.

"The crux of this issue is that this government has not been prepared to look further into this matter, and worse, they have instructed the RCMP investigators not to delve further into what occurred in the original police investigation," she said.

However, Mr. Giffin has suggested his Liberal opponent in Truro-Bible Hill has only the Nov. 6 provincial election in mind by releasing the officially "uncompleted" finding of the RCMP probe in the midst of the campaign.

Contacted late Thursday, he said his department never at any time endeavored to impede the RCMP probe. "In fact, it was just the opposite. We encouraged it and co-operated fully."

Moreover, he said the possibility of a complete public inquiry into the case has not been ruled out by his department, "but any decision in this regard has been delayed until the related court proceedings wrap up."

Ms. Grant contended the department should have demonstrated greater concern when investigating RCMP heard allegations that 14-year-old witnesses were pressured by police to change their statements.

"Surely it is the duty of the attorney-general's department to take action when they are apprised of a situation (that is) inundated with serious allegations and apparent omissions."

She asked why the department had not demonstrated greater concern about the apparent incompleteness of the original police report.

Irregularities with the case extend right back to 1971 and should have been reviewed at the time, she said.

Quoting a memorandum prepared by the investigating RCMP, she noted the 1982 probe was hampered due to a general lack of information and procedural irregularities in the original murder investigation headed up by Sydney Police Department.

The memorandum indicates some standard police reports were not prepared, that there was no autopsy performed on the deceased, and that there were no photographs taken during the investigation.

The investigators determined the standard police "lineup" was arranged, but were unable to determine who was in the lineup or who viewed it.

The Truro lawyer suggested "political expedience" prompted the attorney-general's department to stop the investigation when the RCMP heard allegations by some Crown witnesses that they had been pressured to change their testimony, testimony that led to the conviction and subsequent imprisonment of Marshall.

09-84-0257-01

~~09-82-0236-00~~

September 7, 1983

Mrs. Noreen Provost
4058 St. Georges Ave.
NORTH VANCOUVER
British Columbia
V7N 1W8

Dear Mrs. Provost:

My sincere apologies for not replying sooner to your letter of May 15th which reached my office on May 24th. It came during the closing week of the Provincial Legislature when I was very much involved in the wrap-up of our legislative program. In addition, during the session, I got somewhat behind in my personal correspondence and am just now getting to many of the letters which came in in the latter part of May.

I very much share your view that we have not given enough attention to the victims of crime. Since taking office in 1978, I have had the satisfaction of proclaiming legislation providing for compensation to victims of crime in this Province which the former Government had enacted some three years before we took over but never implemented. It does not provide all of the compensation that I would like, but at least is a very significant beginning and all we can do at the moment within the resources at our disposal.

With respect to the Marshall case, you will understand that most of the media, in their simplistic approach, portray Mr. Marshall as a victim of injustice. In fact, our Supreme Court, Appeal Division, in reviewing his case and hearing evidence from witnesses who reversed their evidence that they had testified eleven years ago, came to the conclusion that there was now such a doubt of the whole of the evidence that no jury would convict in the event of a retrial. The Court therefore felt obliged to find Mr. Marshall not guilty. This should not be

--2

interpreted as finding him innocent and indeed the Court took pains to point out that had he been truthful in the orginal trial and to the police before the trial, his original conviction might not have happened. The Court took pains to say how unsatisfactory his evidence was even before the Appeal Division.

One of the penalties in public life is the target you are for prublic criticism. Much of this comes from biased individuals who use the politician as a focus of their hostility or rage. That is why it is so refreshing to receive a letter, such as yours, from a person who tries to see both sides of a question and be restrained in their comments. I appreciate therefore receiving letters such as yours and I wish you the best in your personal endeavours and as a member of Citizens United for Safety and Justice.

Very sincerely,

Harry W. How, Q.C.

Nova Scotia

Department of Attorney General

Office of the Minister

PO Box 7
Halifax, Nova Scotia
B3J 2L6

902 424-4044
902 424-4020

File Number 09-84-0257

August 29, 1983

Miss Ruth Cordy
28 - 1545 Oxford St.
HALIFAX, Nova Scotia
B3H 3Z3

Dear Miss Cordy:

I appreciate your letter, of July 26th, with respect to Donald Marshall.

I would remind you that the Appeal Division was critical of Mr. Marshall stating that he was untruthful before them and before the trial court in 1971. As a result the five judges of our Appeal Division considered that Mr. Marshall was, in large part, the author of his own imprisonment and that if he had been truthful with the police and the court before and at his original trial, that he may well have established his innocence of the murder charge at that time.

One has to remember as well that Mr. Seale and Mr. Marshall were both in the park at Sydney on the night of the murder and planned to rob somebody and indeed were in the course of robbing Ebsary when he allegedly struck at both Seale and Marshall with a knife and in the case of Seale, this proved fatal. I may add that I have made it publicly clear that despite this if Mr. Marshall or someone on his behalf makes a formal claim for compensation it will be given sympathetic consideration by me and the Department.

Yours sincerely,

Harry W. How, Q. C.

Nova Scotia

Department of Attorney General

Office of the Minister

PO Box 7
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Yours sincerely,

Harry W. How, Q. C.

ROYAL COMMISSION

INQUIRY INTO CIVIL RIGHTS

REPORT NUMBER ONE

VOLUME 2

1968

RECOMMENDATIONS

1. No changes should be made in the law concerning privileged communications.[47]
2. Section 143 of the Highway Traffic Act[48] should be repealed.
3. Any compulsion to make statements imposed on those involved in highway traffic accidents should go no further than to require them to report the accident and give the names of persons involved and known witnesses, together with a statement of injury sustained, if any.
4. All other statements concerning the accident should be on a voluntary basis, open to inspection and admissible in any proceedings according to the relevant laws of evidence.
5. The names of witnesses and statements made by them should likewise be open to inspection, and there should be no special statutory restraint on their admissibility in evidence in any proceedings.

[47]The British Law Reform Committee came to the conclusion that, with the exception of limited privilege for patent agents, no further statutory privileges should be created in respect of other confidential relationships. Report of the Law Reform Committee (1967), Comnd. 3472.
[48]R.S.O. 1960, c. 172.

CHAPTER 54

Reimbursement of Innocent Persons Suffering Wrongful Convictions

THE only statutory provisions which offer any form of redress to a person who is charged with a crime and who is subsequently found to be not guilty, are in the form of certain limited costs which may be awarded to him in provincial and federal summary conviction cases or in the case of proceedings by indictment for defamatory libel.

Under both the Summary Convictions Act[1] and the Criminal Code, the summary conviction court may, on dismissing an information, order the informant to pay reasonable costs to the defendant, which are not inconsistent with the schedule of fees in respect of items set out under section 744 of the Criminal Code.[2] In respect of provincial summary conviction offences, the costs awarded to the defendant at trial may include a counsel fee of not more than $10.[3]

On appeal to the county or district court by way of trial *de novo*, the court is empowered to award reasonable costs to the defendant, including, in respect of provincial summary conviction offences, counsel fees and all necessary disbursements.[4] In the event of further appeal to the Court of Appeal,

[1]R.S.O. 1960, c. 387.
[2]Summary Convictions Act, R.S.O. 1960, c. 387, s. 9(2); Crim. Code, s. 716(1)(b).
[3]Summary Convictions Act, R.S.O. 1960, c. 387, s. 9(5).
[4]*Ibid.*, s. 17(4); Crim. Code, s. 730.

the court may make any order with respect to costs which it considers proper.[5]

Other than the foregoing and in cases of defamatory libel, no costs may be awarded either for or against a defendant in respect of trials or appeals in criminal cases.

But costs awarded in the discretion of the court do not constitute compensation or reimbursement to an accused person who is found to be innocent. Even the costs that may be allowed under the Summary Convictions Act, or Part XXIV of the Criminal Code, do not reflect the actual costs which may be incurred by an accused person in successfully defending himself. He is never entitled to costs against the Crown, and even when he is awarded costs against a private prosecutor they are inadequate. The $10 counsel fee, which is the maximum stipulated by the Act, and the statutory tariff of scheduled items bear little relation to the financial outlay of the accused. Although on appeal by way of trial *de novo* the judge is empowered to make an order as to costs which he considers "just and reasonable", in practice the usual order is $25 plus disbursements.[6]

Whatever may be said about the inadequacy of costs, the question remains: Should an innocent person receive *compensation* for being wrongfully convicted, and particularly if he suffers imprisonment as a result of a wrongful conviction?

There is presently no statutory scheme in Ontario similar to the schemes of many European countries, and those adopted federally and in many of the states of the United States. Denmark enacted compensation legislation as early as 1886, and Norway and Sweden passed similar legislation in 1887 and 1888 respectively. The United States enacted legislation in 1940. Individual states which have compensation legislation are New York, California, Illinois and Wisconsin. North Dakota had a scheme, modelled on the Wisconsin statute, but repealed it in 1965. In addition, Massachusetts has legislation awarding compensation for overlong detention before trial and acquittal.

[5]Crim. Code, s. 743(3).

[6]On appeals under the Summary Convictions Act, R.S.O. 1960, c. 387, s. 17(4), a judge hearing the appeal may award "reasonable costs . . . including counsel fees and all necessary disbursements".

As is the case with respect to compensation for victims of crime,[7] an accused or convicted person who has been proved to be innocent has little hope of obtaining redress by any civil remedy. Three relevant causes of action lie: actions for false arrest, false imprisonment and malicious prosecution. But these causes of action are hedged about with so many safeguards that it is only in rare cases that one who has been arrested, charged with a crime and convicted, can succeed in recovering damages. The onus is on the plaintiff to prove want of reasonable and probable cause or to prove malice or both. This onus is usually insurmountable.

Two principal arguments are usually advanced to support compensation for innocent persons who have been prosecuted or convicted for crimes:

(1) The right to compensation is analogous to that where private property has been expropriated. In such cases it is conceded that the owner is entitled to a reasonable compensation for his loss. In the case of wrongful conviction and imprisonment, the innocent person is deprived of his liberty and should be compensated for his loss of income and the cost of defending himself. The public interest involves the need to enforce the criminal law and the enforcement entails occasional errors, resulting in the punishment of innocent persons.

(2) The problem is analogous to that raised in industrial insurance. In the administration of the criminal law there are bound to be unavoidable accidents, and just as we have a scheme to compensate workmen who have been injured in the operation of industry, there should be a scheme to compensate the injured where accidents occur in the enforcement of law. It is contended that the costs of such accidents should fall on the whole community which benefits from the administration of the criminal law, rather than on the individuals suffering as a result of the accident.[8]

In the jurisdictions providing for compensation in the case of errors in the administration of criminal justice, the

[7]See Chapter 55 *infra*.

[8]See Borchard, *State Indemnity for Errors of Criminal Justice*, 21 Boston U. L. Rev. 201 (1942).

legislation varies widely. In the United States, and in those individual states which have dealt with the matter, compensation, within statutory limits, is awarded only to those who have been wrongfully convicted *and* imprisoned. At the other extreme, in the Scandinavian countries legislation makes provision for compensation for any material loss that may ensue from a charge or prosecution against an innocent person, whether or not a conviction results or imprisonment or detention is a consequence.

In Norway (in Denmark and Sweden the law is virtually identical) the Criminal Procedure Act of 1887 provides for compensation in three situations:[9]

(1) Compensation may be awarded where the accused has suffered a "material loss" through a prosecution *per se*; that is, simply and solely because he has been wrongfully accused of a crime.

Under this heading he may, in the discretion of the court, recover compensation, even though the charge may be dropped or he is acquitted at trial. Compensation has been awarded under this heading, even where an accused has been acquitted on grounds of insufficiency of evidence, notwithstanding that he is suspect and may in fact be guilty.

(2) Compensation may be awarded for any detention that an accused may undergo following a remand into custody.

This heading of compensation does not apply to an arrest itself or to detention consequent upon arrest and prior to remand. Thus, if a person is released without being remanded into custody, he is not entitled to compensation under this heading. He may, however, receive compensation in respect of any material loss which he may have suffered under the first heading.

If he is remanded into custody and the charge is later dropped or the accused is acquitted, he has, under this heading, an unconditional claim for compensation, provided only that he shows that it is "unlikely" that he committed the crime charged.

[9]Bratholm, *Compensation of Persons Wrongfully Accused or Convicted in Norway*, 190 U. Pa. L. Rev. 833 (1961).

(3) If an accused has been actually convicted and has suffered a penalty as a result (not necessarily imprisonment) and he is later found not guilty of the crime for which the penalty was imposed, he apparently has an automatic right to compensation, even though grounds for suspicion of complicity may still exist.

This specific heading only covers the period for which punishment was imposed—that is, after sentence—but any prior detention or any material loss suffered as a consequence of the prosecution or charge may, in proper cases, be recovered under the other headings.

The statute does, however, provide for an overriding safeguard against abuse by stipulating that, in all cases, a condition precedent to compensation is that an accused, even though he may be innocent, shall not by any fault of his own cause a prosecution to be brought against him, or by his own fault have been responsible for any detention in custody. Thus, making a false confession or seeking to escape or seeming to tamper or influence witnesses, will all constitute absolute bars to compensation.

The Scandinavian schemes are administered by the courts themselves. This leads to some invidious consequences, such as two types of verdicts of acquittal. Thus, the court may acquit an accused at trial but, in its discretion, refuse to award compensation. The verdict of acquittal therefore carries a stigma, which would not be the case if compensation were granted in addition. Of necessity, too, there must be a reinvestigation of all the evidence, in the case of appeals, both from the point of view of the legality of a conviction, and as to whether compensation can or should be awarded.

The rules, conditions and procedures which have been adopted in the United States are more realistic than the Scandinavian schemes.[10] Since 1911, Massachusetts has made pro-

[10]The following schemes and legislation have been considered—United States: Unjust Conviction and Imprisonment Statute, 28 U.S.C., ss. 1495, 2513 (1940). New York: Court of Claims Act, s. 9(3a), McKinney Con. Laws of N.Y., Book 29A, Part 2. California: Cal. Penal Code, ss. 4900-06 (1913). Illinois: Illinois Annual Statutes, c. 37, s. 4378(c), (Smith-Hurd Supp. 1960). Wisconsin: Wis. Stat. Title 27 (1957), s. 285.05 (1913). North Dakota: North Dakota Century Code, c. 12-57 (enacted in 1917 but repealed in 1965).

vision for compensation to persons kept in confinement for more than six months awaiting trial, where they are eventually acquitted or discharged, if the delay in trial was not at their request or with their consent.[11]

Any law providing for compensation for persons prosecuted for crimes and found not guilty must provide safeguards against its abuse.

The schemes that are in effect in other countries must be considered in the light of constitutional realities in Canada. The criminal law and criminal procedure are subjects over which the Parliament of Canada has exclusive legislative power,[12] while the civil right to compensation for wrongful prosecution or imprisonment is a subject over which the legislature of the province in question has exclusive legislative power.[13]

The problem is further complicated by the fact that under our system a verdict of acquittal, whether rendered by the court of first instance or by a court of appeal, is not a judgment declaring the accused innocent. In a criminal trial the accused is presumed to be innocent. That presumption may be rebutted only by proper evidence that establishes guilt beyond a reasonable doubt. The verdict of not guilty merely establishes that the onus imposed by law has not been met.

In the American jurisdictions, compensation may only be awarded if the accused is both convicted and imprisoned for an offence which he did not commit. This last condition does not mean the same thing as an offence for which he is eventually acquitted, or in respect of which his conviction is quashed or set aside. On applications for compensation the onus is upon the applicant to show that he was innocent in fact; i.e., either that the crime with which he was charged was not committed at all, or, if committed, was not committed by him. Under the various American schemes, this must be evidenced by a pardon of the Governor granted upon the stated ground of innocence, or by a certificate of the court rendering the verdict of acquittal, stating that the accused

[11] See General Laws of Massachusetts, 1921, c. 277, s. 73.
[12] B.N.A. Act, s. 91(27).
[13] *Ibid.*, s. 92(13).

was innocent in fact as well as in law. Alternatively, in certain tain states, e.g., California, the claimant may establish his claim by proof before a special court or tribunal.

In addition, under the American scheme, it is a condition to a successful application that the accused show that he did not, by any act or omission on his part, either intentionally or negligently contribute to the events which brought about his arrest or conviction. This the applicant must establish either by proof before the tribunal authorized to award compensation, or in some cases by the production of a certificate of the court rendering the verdict of acquittal.

Except in New York State, an upper limit is placed upon the amount that may be awarded. Under the Federal Act it is $5,000; under the Wisconsin statute, not more than $1,500 for each year of imprisonment, with an aggregate not exceeding $5,000; in North Dakota the respective limits were $1,500 and $2,000 under its former legislation; in California, $5,000; in Illinois ". . . the court shall make no award in excess of the following amounts. For imprisonment of 5 years or less, not more than $15,000; for imprisonment of 14 years or less but over 5 years, not more than $30,000; for imprisonment of over 14 years, not more than $35,000; and provided further the court shall fix attorney fees not to exceed 25 percent of the award granted".

The Federal statute, the Unjust Conviction and Imprisonment Act,[14] is representative of the type of scheme which has been followed, but not precisely, where legislation has been adopted in the United States. The claims are heard by the United States Court of Claims, which is a special court vested with jurisdiction to entertain claims against the United States.[15] A claimant must allege and prove that:

(a) (1) His conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted . . . as it appears from the record or certificate of the court setting aside or reversing such conviction, or that he has been pardoned upon the stated ground of innocence and unjust conviction, and

[14] 28 U.S.C., ss. 1495, 2513 (1940).
[15] *Ibid.*, s. 1495

(2) He did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution.

(b) Proof of the requisite facts shall be by a certificate of the court or pardon wherein such facts are alleged to appear, and other evidence thereof shall not be received.

(c) No pardon or certified copy of a pardon shall be considered by the Court of Claims unless it contains recitals that the pardon was granted after applicant had exhausted all recourse to the courts and that the time for any court to exercise its jurisdiction had expired.

(d) The Court may permit the plaintiff to prosecute such action in *forma pauperis*.

(e) The amount of damages awarded shall not exceed the sum of $5,000.[16]

The jurisprudence under the Federal statute indicates that these conditions of compensation are strictly construed. A reversal of a conviction on grounds of insufficiency of evidence does not, therefore, entitle the claimant to compensation because it does not prove that he did not commit any of the acts of which he was charged.[17]

The administration of the Wisconsin and California schemes, which were introduced as early as 1913, differs somewhat from the Federal scheme (and from the New York scheme which also designates its Court of Claims as the court to entertain applications for compensation). In these states, administrative boards are constituted to hear the applications. These boards do not sit in review of the decisions of the courts confirming or reversing the convictions in question. Only evidence or circumstances discovered or arising after the conviction are open for consideration. In Wisconsin the onus is specifically laid on the accused to prove his innocence "beyond a reasonable doubt". Likewise the claimant must

[16] *Ibid.*, s. 2513.
[17] *U.S. v. Keegan*, 71 F. Supp. 623 (1947).

prove that he did not by his act or failure to act contribute to or bring about the conviction and imprisonment for which he seeks compensation. The North Dakota scheme, enacted in 1917 and repealed in 1965, was the same as the Wisconsin scheme. The final decision is not, as in Scandinavia, left to the court or courts originally involved in the case, nor are their decisions as such open to review or revaluation by the court or board entertaining applications for compensation. The American schemes have been designed to eliminate defects in the Scandinavian schemes.

The fact that so many jurisdictions in Europe and in the United States have passed legislation providing for compensation for innocent persons who have been accused of crime would indicate that there is need for some remedial legislation. The solutions of the problem that have been adopted in other countries do not indicate that they have imposed any heavy financial burdens on the state. Compensation seems to have been confined to the most flagrant instances of injustice.

When one has regard for the total number of convictions and acquittals in the United States, it would appear that the American schemes are so seldom employed that the efficacy of such schemes is considerably exaggerated. There have been no recoveries under the Federal statute of the United States in recent years. There was an award in the maximum amount of $5,000 in 1954, and another in the amount of $4,000 in 1955. At the time of writing this would appear to be the last case in which compensation was awarded.

The North Dakota scheme was never used from its enactment in 1917 to its repeal in 1965. Under the Wisconsin scheme, no compensation has been paid out since its enactment in 1913. Nothing has been paid out under the statutory scheme of New York, although the Attorney General of that state advises us that there have been cases where compensation has been paid under the authority of special legislation enacted by the legislature.

No awards have been made under the Illinois statute, but we were advised that several cases are now under consideration. There have been numerous instances in which

the legislature made awards to persons wrongfully imprisoned, but no figures relative to the amounts are available.

In California, in three of the last five years, no awards were made. In 1962 an award of $5,000 was made, and in 1965 four awards were made, amounting to $5,000, $2,640, $5,000 and $5,000 respectively.

In Norway, where grounds for compensation are much broader, and where acquittal rather than innocence is often all that it is necessary to prove, the amount paid out in compensation is small. Over the five-year period from 1956 to 1961, only thirty-five persons were awarded compensation, and the total amount paid was the equivalent of $45,000, or an average of $1,300 for each claimant.[18]

Constitutional problems, to which we have referred, present real difficulties in establishing in Ontario any scheme patterned on those in effect in the United States and the Scandinavian countries.

In Canada, civil procedure could not be integrated with the criminal procedure, even if it should be considered desirable. The Federal Government defines the procedure to be followed in the criminal courts. It might well be that the Province could provide by appropriate legislation that a right to compensation should flow from a verdict of acquittal; but legislation providing for a second verdict or certificate that the court is satisfied that the accused is innocent—as distinct from the verdict "not guilty"—would engraft a civil procedure on to the criminal procedure which, in our view, would be beyond the power of the Legislature and undesirable. The Federal Government has prescribed the procedure to be followed in criminal cases. The Province cannot involve it in any procedure to establish civil liability.

Even if the Legislature had power to provide for a verdict of innocent or for a certificate of innocence to be issued by the court trying the case, the exercise of the power would create chaos in criminal trials. A two-pronged trial would have to be conducted: one prong pointing to a verdict of acquittal, and another to a certificate or verdict of innocence

[18]Bratholm, *Compensation of Persons Wrongfully Accused or Convicted in Norway*, 109 U. Pa. L. Rev. 833, 839 (1961).

for the purpose of founding a claim for damages. The onus of proof on the first branch would be on the Crown to establish guilt beyond a reasonable doubt. On the second branch, the onus would be on the accused to establish his innocence, either on a preponderance of evidence or beyond a reasonable doubt.

Another formidable objection to the introduction into a criminal trial of any other issue than the issues of guilty or not guilty according to law, is that there would in fact be three verdicts possible:

(1) Guilty;

(2) Not guilty without compensation; and

(3) Not guilty with a certificate for compensation.

Wherever an accused has failed to get a certificate on which to base a claim for compensation, he is left with a blight on his character, notwithstanding that he has been found not guilty. It could be said of him that the court found that his guilt had not been established beyond a reasonable doubt, but it was not convinced that he was innocent.

The alternative to the adoption of the Scandinavian scheme, or the Federal scheme of the United States, would be to establish a board of claims to which applicants might apply for compensation. For reasons given elsewhere in this Report, we do not think that such a board should be set up. If the right to compensation for wrongful prosecution, conviction or imprisonment is to be conferred, matters for judicial decision are raised of a character that should be decided in the courts. If trials of such matters cannot be disposed of in the courts, it is undesirable that administrative tribunals should be put in the position of reviewing the decisions of the courts.

The question remains: What procedure should be provided to compensate individuals who have been imprisoned through manifest error in the administration of justice? The answer to this question should be prefaced by a statement that all steps possible should be taken to see that manifest error does not occur. Adequate safeguards to prevent unnecessary imprisonment pending trial, an adequate legal aid system both at trial and on appeal, and a proper climate in

which to conduct criminal trials would all do much to reduce the incidence of error in the administration of justice. Where there is manifest error, provision should be made for compensation.

RECOMMENDATION

We recommend that statutory authority be conferred on the Lieutenant Governor in Council to make *ex gratia* payments on the recommendation of an *ad hoc* tribunal, consisting of judges of the Supreme Court of Ontario appointed from time to time to consider cases where it is claimed that a person has been imprisoned and that his innocence can be clearly established.

The few awards in those jurisdictions where compensation schemes have been in force for many years would indicate that any elaborate procedure which would tend to create confusion in the administration of justice is not warranted. Real injury to civil rights could result from the introduction into criminal procedure of any element of a civil claim for compensation.

CHAPTER 55

Compensation for Victims of Crime

THE subject of the compensation for victims of crime is divisible into two parts:

1. Compensation by the State for persons who have suffered injury as a result of the commission of crime;
2. Compensation by the State for those who have sustained injury or loss while engaged in law enforcement.

The idea of compensating victims of crime is not new. The penal codes of Babylon, Israel, Greece and Rome all required the criminal to compensate his victim with property or money. Compensable offences ranged from robbery and burglary to libel, slander, assault and murder. Compensation reached its zenith in Anglo-Saxon England during the seventh century. As the years progressed, kings eager to extend their authority, and with an eye on revenue, entered the field by imposing fines and imprisonment. A system of criminal law and criminal procedure developed, but it did not entirely extinguish the older system of personal feud. With the absorption of the concept of sin and penance into the penal law, punishment gradually replaced compensation as an expiation for crime, leaving to the victim of crime a remedy that, more often than not, is useless, that is, the right to proceed against the aggressor in a civil action.

The assumption that claims of the victim are sufficiently satisfied if the offender is punished by society becomes less

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

REPORT OF CANADA
on Implementation of the Provisions of the Covenant

March 1979

Secretary of State / Secrétariat d'État

right to personal security and inviolability. Section 4 affirms that "Every person has a right to the safeguard of his dignity, honour or reputation". Section 25 states that "Every person arrested or detained must be treated with humanity and with the respect due to the human person".

Section 19 of the Civil Code reaffirms the inviolability of the human person and adds that "No one may cause harm to the person of another without his consent or without being authorized by the law to do so".

Finally, under section 20 of the Police Act, the Police Commission may "make an inquiry respecting the Police Force or any municipal police force and as to the conduct of any member of the Police Force, municipal policeman or special constable, of its own motion or whenever a citizen requests it to do so in writing and gives it sufficient reasons to support his request".

Article 9

Québec law fulfills the requirements of paragraphs 1 - 5 of article 9 of the Covenant. Paragraph 5 is interpreted to mean that recourse must be provided for the victim of

illegal arrest or detention, to enable him to establish his right to compensation. Such recourse is available under Québec civil, disciplinary and penal law.[2]

Article 10

The rights recognized in paragraphs 1 and 2 are protected by ss. 25, 26 and 27 of the Charter of Human Rights and Freedoms:

> "25. Every person arrested or detained must be treated with humanity and with the respect due to the human person.
>
> 26. Every person confined to a house of detention has the right to separate treatment appropriate to his sex, his age and his physical or mental condition.
>
> 27. Every person confined to a house of detention while awaiting the outcome of his trial has the right to be kept apart, until final judgment, from prisoners serving sentence."

Similarly, s. 17 of the Probation and Houses of Detention Act (SQ 1969, c. 21 as amended by the 1978 statutes, Bill 85) states that:

> "Every house of detention shall be equipped in such a way that the persons who are there pending the conclusion of their trial are kept separate from those who are serving sentences there."

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2. See also the comments on article 7 above.

09-84 0256 01

Compensation for Marshall interesting legal question

By JIM VIBERT
Staff Reporter

The acquittal of Donald Marshall Tuesday on a murder charge for which he served 11 years in prison presents some interesting and new legal considerations for the provincial attorney general's department.

Attorney-General Harry How said in an interview Tuesday the question of compensation being paid to Mr. Marshall for the 11-year loss of freedom will be a totally new experience for the Nova Scotia justice community.

Mr. How said in order for compensation to be considered an application for compensation would have to be made by the complainant.

And from that point on, Mr. How said, any action taken would be "totally new, a fresh start, legally so to speak, in Nova Scotia."

There has never been a case in Nova Scotia where a person incorrectly imprisoned has applied for compensation.

The attorney general said his department will have to examine precedents in other jurisdictions, both in Canada and the United States, to see how the question of such compensation has been handled there.

He said another question that will arise is who should be responsible to pay compensation, Ottawa or the province.

Mr. How said that Ottawa has a degree of responsibility because of its jurisdiction in areas concerning native people — Mr. Marshall is a Micmac Indian.

The province on the other hand has the prime responsibility for the administration of justice.

Mr. How also said his department will now consider whether criminal charges or other action should be taken respecting any individual or group of individuals who may have been involved in the death of Sandy Seale, for which Mr. Marshall was originally convicted 11 years ago.

The attorney general said that during the new trial before the provincial Supreme Court there was new evidence given that indicated another person was responsible for Mr. Seale's death.

In handing down its decision, the Supreme Court suggested that Mr. Marshall may have contributed to his own problems by not being truthful during the first trial.

Mr. How said that matter could also come into play when the issue of compensation is considered. "If you are partially the author of your own misfortune, that is a factor."

NATIONAL SECURITY

STATEMENT ON APPLICATION OF OFFICIAL SECRETS ACT

Hon. Ron Basford (Minister of Justice): Mr. Speaker, during the past several weeks, considerable attention has been given in the House and in the country to the conduct of the hon. member for Leeds (Mr. Cossitt) involving highly sensitive national security information. This House is also aware of an article published in the Toronto *Sun* on March 7, 1978, which made detailed and explicit references to a secret document containing national security information. While the two events may appear to have been related, I wish to indicate at the outset that I have not been made aware of any information that would relate the hon. member for Leeds to the article which appeared in the Toronto *Sun*.

In each of these instances, it is clear that certain documents and information of the most sensitive nature have been unlawfully released by, or obtained from, someone authorized to have them. Unfortunately, the person or persons responsible for this unlawful release of information have not been identified. The investigation into the circumstances of the release of this information will continue to be vigorously pursued and appropriate action will be taken when possible.

In some circles, the public servant who leaks sensitive information has some approval and "glamour". In my view, they have none. Such actions are contemptible and cowardly.

If a person in the service of this country is so dissatisfied, as is that person's fundamental right, with the conduct of public business by a duly elected government, their remedy is not in skulking about delivering brown envelopes and thereby discrediting their associates who serve Canada with devotion and integrity. Their remedy is to resign and endeavour, through our free institutions, to influence public affairs and public opinion. That, Mr. Speaker, in my view, is the lawful, proper and courageous way.

Because of the importance of the issues involved in these matters, I think that this House and the people of Canada are entitled at the first opportunity to know the decisions that I have reached on whether prosecutions should be instituted under the provisions of the Official Secrets Act against the hon. member for Leeds or against others in connection with the publication of the article in the Toronto *Sun*.

The privilege of free speech in this chamber and the freedom of the press are matters which are fundamental to our democratic system. Decisions on issues which tend to draw these fundamental principles into conflict with the protection of our national security interests must be taken with great care. What may be seen by some as a matter to be decided with speed has therefore been seen by me as a matter that demanded decision with careful thought and consideration.

What I have had to face, and resolve to my satisfaction, is whether and under what circumstances to authorize prosecutions under the Official Secrets Act. I have been guided by those parliamentary, constitutional, and legal principles which should be taken into account by the Attorney General in the discharge of this particular responsibility. Mr. Speaker, it might be useful to set some of those out.

In arriving at these I have been guided by recognized authorities such as Lord Shawcross, Edwards, Erskine, May and Bourinot, and more recently and very helpfully, my valuable discussions with Commonwealth attorneys general in Winnipeg last summer on the office of attorney general, and more particularly my personal conversations at that time with the Attorney General of England and Wales and the Lord Chancellor.

I am aware that, since the enactment of the Official Secrets Act, this would appear to have been the first occasion in Canada where consideration has to be given to the provisions of the Official Secrets Act and the right of a member of the House to freely express his views in the House in the course of carrying on his parliamentary business.

The first principle, in my view, is that there must be excluded any consideration based upon narrow, partisan views, or based upon the political consequences to me or to others.

In arriving at a decision on such a sensitive issue as this, the Attorney General is entitled to seek information and advice from others but in no way is he directed by his colleagues in the government or by parliament itself. That is not to say that the Attorney General is not accountable to parliament for his decisions, which he obviously is.

Clearly, I am entitled to seek and obtain information from others, including my colleague, the Solicitor General (Mr. Blais), and the Commissioner of the Royal Canadian Mounted Police on the security implications of recent disclosures. This I have done.

In my view, the special position of the Attorney General in this regard is clearly entrenched in our parliamentary practice. Based on the authorities and on my own experience as a member of the government for ten years, which has included my three immediate predecessors, this special position has been diligently protected in theory and in practice.

Mr. Speaker, the second principle is that every citizen is subject to the law. One of the pillars of our system of government, dating back three centuries, is that neither the King nor any other person, be he a member of this House, a member of the government, a member of the press, or someone possessed of title or position, is above the law. The law should apply to all, equally. He who breaks it must bear the consequences.

Third, with today's differing ideological viewpoints between different countries, it is essential for the preservation of our democratic way of life that there should be maintained a strong and vigorous security service. In spite of all that has been alleged and what is properly being examined by the McDonald Commission, we are being well served by a group of dedicated individuals.

• (1222)

The functioning of a security service by its very nature demands that most of its operations remain secret. Unlawful

disclosure of the details of what is known about the operations of foreign intelligence agents in this country, or provision to others of information about the operations of our security service, is to destroy and render useless the work of this service.

Fourthly, in exercising a discretion as to whether or not to consent to a prosecution under the Official Secrets Act, the Attorney General should ensure that the widest possible public interests of Canada are taken into account; that, as a member of this House, he has responsibilities toward the rights, privileges, traditions and immunities so necessary for the proper functioning of parliament; and finally that each competing public interest is weighed and balanced against the others in as responsible a way as possible.

In the present situation, the hon. member for Leeds has made statements in the House which must clearly have been based upon highly classified national security information. In my judgment, the hon. member's use of the secret information he was not entitled to have was contrary to the national interest. However, by law, his statements cannot constitute the foundation for a prosecution under the Official Secrets Act since it is well established that no charge in a court can be based on any statement made by an hon. member in this House.

The hon. member for Leeds did, however, make additional statements. In my view, these statements did not add substantially to what he had already said in the House. There is some doubt as to the extent to which a court would view these statements as being protected by any parliamentary privilege or immunity. The existence of this doubt guides me in my decision whether or not to provide my consent to a prosecution.

The obligation of the Attorney General in deciding whether or not to provide his consent under the Official Secrets Act calls into play the many factors I referred to earlier. In my view, an Attorney General should not provide such a consent unless the case is free from substantial doubt.

Having considered the evidence produced in the investigation to date, and having considered applicable legal and parliamentary principles, I have concluded that I should not consent to a prosecution against the hon. member for Leeds.

I must emphasize that in any case free from these elements of doubt, involving unlawful disclosure of information relating to national security by an hon. member, I would not hesitate to have a court of criminal jurisdiction pass upon the issue.

This House has established a committee to examine the privileges and immunities of members of parliament, including the application of the Offical Secrets Act. That examination is necessary and, in my view, urgent. It is essential to protect the position of members of parliament to continue to be able to speak freely and candidly in carrying out the responsibilities that we bear on behalf of our constituents and the country at large without any harassment.

I look forward to the report of the special committee which I hope will outline the principles that should govern a member of this House when dealing with security or other highly sensitive matters and which will, I hope, strike a balance between the imperative public interest that the national security and integrity of the state ought not to be imperilled and the equally imperative public interest that members of this House should enjoy a freedom of speech commensurate with the necessity of fulfilling our obligations. It is historic and preferable that this House, and not the courts, settle these issues.

Mr. Speaker, with the highest of immunities goes the highest of responsibilities. I would urge all hon. members, prior to asking a question, or disclosing sensitive information of any kind, to take reasonable steps to bring the matter to the attention of the responsible minister of the Commissioner of the RCMP so that the member may be fully apprised of the possible seriousness of the matter and so that measures in proper cases might be taken to protect the information from public disclosure with its attendant risk of doing serious damage to our national security. To be fair, I want to add quickly that I am advised that there are members of the House and members of the press gallery and the public who do this.

I would further commend to the attention of hon. members what was said by the 1939 United Kingdom Select Committee on the Official Secrets Act and Privileges of Members, relating to the Duncan Sandys case, and I quote:

> Your committee are of opinion that the soliciting or receipt of information is not a proceeding in parliament, and that neither the privilege of freedom of speech nor any of the cognate privileges would afford a defence of a member of parliament charged with soliciting, inciting or endeavouring to persuade a person holding office under the Crown, to disclose information which such person was not authorized to disclose or with receiving information knowing, or having reasonable grounds to believe, that the information was communicated to him in contravention of the Official Secrets Act.

With respect to the publication of the article in the Toronto *Sun*, parliament has not extended to any other person or body, the rights, privileges or immunities that are accorded by law to parliament and its members.

That is not to say that the press is not in a somewhat special position in our society, for without full and free dissemination of information through an independent and responsible press, a free society cannot continue to exist. That freedom is exercised under and pursuant to the rule of law. In that respect, members of the press are in no different a position from anyone else. I am confident that the courts are the proper forum for dealing with and defining the rights and responsibilities of the press.

Because of this special position of the press and lest any step be misconstrued as an attack on the essential freedom of the press, it is important that the process of the criminal law be invoked only after most careful and studied consideration.

It is with such consideration that I have examined the available evidence, including the extent of the information that was published, the present state of the law, the various competing public interests, and all other relevant factors in consenting, as I have done, to a prosecution under the Official Secrets Act in connection with the publication of the article in the Toronto *Sun*.

In arriving at these decisions, I have sought the opinion of the officers of the Department of Justice, and they concur in my decisions.

May I just add that because of the fact that an information was being sworn and laid, I felt it was appropriate that those people to whom it was being directed should concurrently know what I was saying before others. Therefore, I felt I should not and I did not provide to opposition House leaders or spokesmen a copy of my statement. That is not my usual practice, but I felt it was required in these circumstances. I trust they will appreciate that.

Some hon. Members: Hear, hear!

* * *

QUESTIONS ON THE ORDER PAPER

[*Translation*]

Mr. Yvon Pinard (Parliamentary Secretary to President of Privy Council): Mr. Speaker, the following questions will be answered today: Nos. 503, 504, 505, 506, 507, 527, 685, 697, 704, 881, 929, 1,027, 1,152, 1,206 and 1,209.

I ask, Mr. Speaker, that the remaining questions be allowed to stand.

[*Text*]

RESEARCH—INDUSTRIAL SECTOR OF THE ECONOMY

Question No. 503—**Mr. Howie:**

1. From January 1 to November 1, 1977, what amount was spent by the Ministry of State for Science and Technology or its supporting agencies or councils for research in the industrial sector of the economy?

2. How many research projects (a) were started (b) were concluded (c) are still ongoing?

Mr. Frank Maine (Parliamentary Secretary to Minister of Public Works and Minister of State for Science and Technology): In so far as the Ministry of State for Science and Technology is concerned: The policy of the Ministry of State for Science and Technology is to formulate and develop policies in relation to the activities of the Government of Canada that affect the development and application of science and technology. The objective is to assure the optimum use of science and technology in support of national objectives. The Ministry has no laboratories and does not award grants-in-aid of research, scholarships or fellowships.

RESEARCH AT UNIVERSITY LEVEL

Question No. 504—**Mr. Howie:**

1. From January 1 to November 1, 1977, what amount was spent by the Ministry of State for Science and Technology or its supporting councils or agencies for research at the university level?

2. How many research projects (a) were started (b) were concluded (c) are still ongoing?

Mr. Frank Maine (Parliamentary Secretary to Minister of Public Works and Minister of State for Science and Technology): In so far as the Ministry of State and Technology is concerned: The policy of the Ministry of State for Science and Technology is to formulate and develop policies in relation to the activities of the Government of Canada that affect the development and application of science and technology. The objective is to assure the optimum use of science and technology in support of national objectives. The Ministry has no laboratories and does not award grants-in-aid of research, scholarships or fellowships.

MONEY AVAILABLE FOR RESEARCH IN TRANSPORTATION

Question No. 505—**Mr. Howie:**

Since January 1, 1977, what amount has the Ministry of State for Science and Technology or its supporting agencies or councils made available to industry and/or universities for research work in the transportation field?

Mr. Frank Maine (Parliamentary Secretary to Minister of Public Works and Minister of State for Science and Technology): In so far as the Ministry of State for Science and Technology is concerned: The policy of the Ministry of State for Science and Technology is to formulate and develop policies in relation to the activities of the Government of Canada that affect the development and application of science and technology. The objective is to assure the optimum use of science and technology in support of national objectives. The Ministry has no laboratories and does not award grants-in-aid of research, scholarships or fellowships.

MONEY AVAILABLE FOR RESEARCH ON SOLAR ENERGY

Question No. 506—**Mr. Howie:**

Since January 1, 1977, what amount has the Ministry of State for Science and Technology or its supporting agencies or councils made available to industry and/or universities for research work on solar energy?

Mr. Frank Maine (Parliamentary Secretary to Minister of Public Works and Minister of State for Science and Technology): In so far as the Ministry of State for Science and Technology is concerned: The policy of the Ministry of State for Science and Technology is to formulate and develop policies in relation to the activities of the Government of Canada that affect the development and application of science and technology. The objective is to assure the optimum use of science and technology in support of national objectives. The Ministry has no laboratories and does not award grants-in-aid of research, scholarships or fellowships.

MONEY AVAILABLE FOR RESEARCH IN AEROSPACE FIELD

Question No. 507—**Mr. Howie:**

Since January 1, 1977, what amount has the Ministry of State for Science and Technology or its supporting agencies or councils made available to industry and/or universities for research work in the aerospace field?

Mr. Frank Maine (Parliamentary Secretary to Minister of Public Works and Minister of State for Science and Technology): In so far as the Ministry of State for Science and Technology is concerned: The policy of the Ministry of State