

# Justice denied, again?

BY RAWNDA ABRAHAM

**D**ONALD Marshall, Jr. symbolizes the systemic injustice plaguing aboriginal youth and the wrongfully convicted in Canada. While a teenager, Donald Marshall, Jr. was falsely accused, unjustly tried, wrongfully convicted for killing Sandy Seale, and subsequently served 11 years for a murder he did not commit. The Royal Commission on the Donald Marshall, Jr., Prosecution, 1989, found that "The criminal justice system failed Donald Marshall, Jr. at virtually every turn from his arrest and wrongful conviction for murder in 1971 up to, and even beyond, his acquittal by the Court of Appeal in 1983."

A case involving an aboriginal youth in Thunder Bay bears many similarities to the Donald Marshall, Jr. case, but a publication ban on evidence remains in effect and the Youth Criminal Justice Act protects the identity. Instead, comparisons from the royal commission and information from the Association in Defence of the Wrongfully Convicted (AIDWYC) will be referenced. The most compelling causes of wrongful convictions include systemic discrimination, tunnel vision, and professional misconduct through disclosure of exculpatory evidence.

Systemic racism is the main reason for Marshall's wrongful conviction. Aboriginal people, more than any group in Canadian society, are consistently put on trial. There is no reasonable doubt when aboriginal people comprise just 4 per cent of the population, but almost 23 per cent of prison inmates. Commissioners concluded that the failure of the justice system "should have been prevented, or at least corrected quickly, if those involved in the system had carried out their duties in a professional and/or competent manner. That they did not is due, in part



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**Thunder Bay's Anti-Racism Advisory Committee produces this monthly column to promote greater understanding of race relations in Northwestern Ontario.**

at least, to the fact that Donald Marshall, Jr. is a Native."

Tunnel vision, a significant problem under the umbrella of professional misconduct, played a critical role in Marshall's conviction. Police and prosecutors sought and presented only evidence that fit their theory as opposed to developing a theory based on all existing evidence. According to AIDWYC, the primary explanation for Marshall's wrongful conviction was obvious: "The Sergeant of Detectives who headed the initial investigation into Seale's death decided Marshall was the prime suspect, despite a lack of evidence" and in the face of evidence to the contrary, because he believed "that Indians were not 'worth' as much as whites."

Professional misconduct concerns how the police and prosecution handle a case. An example of professional misconduct is the withholding of evidence from the defence. Commissioners found several errors in law; the most serious was the misinterpretation of the Canada Evidence Act, which prevented a thorough examination of a Crown witness' dramatic recanting of his statement against Marshall outside the courtroom. AIDWYC explains that the accused and defence counsel

are entitled to access all evidence the Crown has, including exculpatory evidence which would indicate the defendant did not commit the crime.

The Supreme Court of Canada holds that "the Crown has a legal duty to disclose all relevant information to the defence. The fruits of the investigation which are in its possession are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done."

The willingness of Canadians to take ownership of the 'racism' issue yields meaningful change. Racism is not a personality quirk or an outlier statistic; it is systemic. Racism is ingrained in our perceptions of others, and in our institutions of justice. Anyone could be wrongly accused and virtually anyone could be on a jury that wrongfully convicts. Initiatives to prevent miscarriages of justice through education about the justice system benefit all Canadians.

In the case of this accused Thunder Bay aboriginal youth, the possibility of being wrongfully convicted remains a reality. This youth belongs to a group that has historically and stereotypically been linked to criminal activity. The defendant is an "outsider" being tried in a predominantly White city where jury members may have formed opinions prior to trial. Even after exoneration, many barriers face the wrongly accused and convicted, including the court of public opinion and the battle for financial compensation.

The education and prevention of a wrongful conviction would save this aboriginal youth from wasting years incarcerated for a crime someone else committed.

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