EX II

WRONGFUL CONVICTION AND IMPRISONMENT: TOWARDS AN END TO THE COMPENSATORY OBSTACLE COURSE

H. Archibald Kaiser*

When an individual is wrongfully convicted of an offence, there are compelling reasons for awarding compensation efficiently and generously. However, conventional remedies hold little promise of relief for those who have already suffered through the inadequacies of the justice system. Recent initiatives by the Federal and Provincial governments are critically examined against the background of Article 14(6) of the International Covenant on Civil and Political Rights. *The author argues that Canada should offer more to those who become victims of miscarriages of justice and presents some alternative policies and procedures which seem more appropriate in a society which places a high value on individual liberty and the avoidance of erroneous determinations of guilt.*

La condamnation et l'emprisonnement injustifiés: pour une procédure d'indemnisation moins hérissée d'obstacles

Il y a de bonnes raisons pour décerner promptement une indemnisation généreuse à quiconque est condamné à tort pour un crime. Malheureusement, les remèdes classiques offrent peu de chances de redressement à ceux qui ont déjà souffert des insuffisances du système judiciaire. L'auteur examine d'un oeil critique les initiatives récentes des gouvernements fédéral et provinciaux à cet égard, en confrontant celles-ci au paragraphe 14(6) de la Convention internationale sur les droits civils et politiques. Il prétend que le Canada devrait offrir davantage aux victimes des erreurs judiciaires fondamentales, et il présente des politiques et procédures alternatives qui semblent plus appropriées à une société qui respecte la liberté individuelle et s'efforce d'éviter les condamnations injustifiées.

---

* The author is a member of the Faculty of Law, Dalhousie University, Halifax, Nova Scotia. The research assistance of Glen Johnson, Rosie Smith, Sally Hill, Paul Bachand and Tom Nepjuk is gratefully acknowledged as is the secretarial support of Marilee Matheson, Lynn Richards and Sandra Giffin. The article is a shorter version of the one which was originally submitted for publication and which was also considered by the Royal Commission on the Donald Marshall, Jr. Prosecution. Limited numbers of the original edition are available from the author.

THE ARREST

> Who could these men be? What were they talking about? What authority could they represent? K. lived in a country with a legal constitution, there was universal peace, all the laws were in force; who dared seize him in his own dwelling?[1]

A. Introduction: The Extent of the Problem and the Approach of the Paper

In the Canadian criminal justice system, a very high value is placed upon the various bulwarks of freedom. The *Charter*, its constitutional and common law precursors and a wide range of substantive and procedural doctrines[2] present formidable obstacles to erroneous determinations of guilt. They help to bring Canada into a fairly select group of nations which emphasizes the due process of law and the quality and reliability of fact-finding processes.[3] For a few individuals the system simply does not deliver on its promises, in spite of its apparent fail-safe mechanisms: innocent citizens are charged, detained, prosecuted, convicted, imprisoned and may have even been executed. The victims of such injustice appear hauntingly in the legal annals of each of the countries which so pride themselves on the protection of individual liberty.[4] What is even more startling is that where the error of the criminal justice system has been made manifest, the mechanisms for redress remain either embryonic or out of reach. Regrettably, Canada has not yet seen fit to properly fill this *lacuna*, in the face of sound policy, logic, compassion and international obligation.

This article focuses on the special problems raised by the cases of individuals most grievously wronged in the Canadian criminal

---

[1] This extract and the original chapter title are drawn from Franz Kafka, *The Trial*, (New York: Vintage Books edition, 1969), 7.

[2] For a concise introduction to these important protections, see J.C. Morton and S.C. Hutchison, *The Presumption of Innocence* (Toronto: Carswell, 1987), especially Chapters 1-3.

[3] "The Due Process Model resembles a factory that has to devote a substantial part of its input to quality control." Packer, *The Limits of the Criminal Sanction* (California: Stanford Univ. Press, 1968), 165. This classic study presents typologies of the Due Process and Crime Control Models which, in the former case, highlight systemic characteristics aimed at avoiding error.

[4] Every nation has its examples of such judicial horrors. Without attempting to certify that these are the worst cases, one might usefully review: (a) in the United States, Isidore Zimmerman spent 24 years in prison for a murder that he did not commit and was eventually awarded (U.S.) $1 million as compensation, less legal fees of $500,000. See *Corrections Digest*, June 15, 1983, 9; (b) in New Zealand, Arthur A. Thomas served nine years in custody on two charges of murder, which were later the subject of a free pardon, investigation and report by a Royal Commission and the payment of about (N.Z.) $1 million as compensation. See the *Report of the Royal Commission to Inquire into the Circumstances of the Convictions of Arthur Allan Thomas* (Wellington, N.Z.: Government Printer, 1980) (hereafter, the Thomas Inquiry); (c) in the United Kingdom, Timothy John Evans was executed in 1949 for murder. The likely real killer was subsequently convicted and executed for related murders and Evans was pardoned posthumously as a result of an inquiry. See Ludovic Kennedy, *Ten Rillington Place* (London; Gollancz, 1961);

justice system: those who have been imprisoned following a criminal conviction (and an unsuccessful appeal), which verdict later turns out to have been reached in error. These citizens would be seen by most people as victims of a miscarriage of justice. There are others whose liberty has been interfered with by agents of the state but who are ultimately either not charged or who are found not guilty of an offence including:

(a) persons detained for questioning and released without being charged;
(b) persons detained after being arrested and before their first appearance before a court, who are eventually found not guilty;
(c) persons detained in custody following judicial refusal of release before trial, who are found not guilty;
(d) persons whose convictions are set aside and who are released through the regular appeal process.

Many of the arguments which follow could be used to argue for payment of compensation in each of the above categories and indeed some countries presently provide for such measures.[5] Conversely, it is not intended to suggest here that there should be no limits placed on state liability. However, given the present lack of Canadian scholarship in the field, discussion has been mainly confined to compensation for the most egregious examples of wrongful conviction and imprisonment.[6] It is hoped that some stimulation will be provided for exploring the prospects of compensating the broader group of persons noted above. Even if their

---

(d) in Canada, Donald Marshall, Junior spent eleven years in penitentiary for a murder which he did not commit and of which he was finally acquitted. Mr. Marshall received compensation of (Can.) $270,000, less legal fees of about $100,000. This wrongful conviction was currently the subject of intense scrutiny. See the seven volumes of the *Royal Commission on the Donald Marshall, Jr. Prosecution* (Province of Nova Scotia, 1990). See also Michael Harris, *Justice Denied: The Law Versus Donald Marshall* (Toronto: Macmillan, 1986).

[5] "Other jurisdictions go further and also compensate for detention in custody pending final disposal of the case. These include Sweden, Norway, Denmark, Austria, France, West Germany, Holland, Belgium, Hungary and some of the Swiss Cantons." Justice, the British Section of the International Commission of Jurists, *Compensation for Wrongful Imprisonment*, (London: 1982), 24. "The German provisions or the question of compensation are perhaps widest in their scope, for they encompass not only custody awaiting trial and wrongful conviction but also in some cases arrest, detention in a hospital or asylum, and disqualification from driving." Carolyn Shelbourne, "Compensation for Detention", [1978] *Crim. LR* 22, 25.

[6] It should be noted that there are contemporary proposals for compensating accused persons for some of the out of pocket costs associated with some categories of not guilty persons similar to the ones noted above. Included might be counsel fees and disbursements necessary to participate in the proceedings. See, for example, Law Reform Commission of Saskatchewan, *Tentative Proposals for Compensation of Accused on Acquittal*, (Saskatoon, 1987). That study encounters many of the same problems faced in this article, particularly on eligibility and entitlement, although their resolution is more restrictive than is discussed herein.

predicaments are less compelling from a compensatory perspective, they have suffered some of the same stigma and burdens. Those whose wrongful conviction and imprisonment are discovered by extraordinary means are merely further along the continuum toward outrage, as the absence of solid foundations for the finding of guilt are only belatedly discovered.

How many people fall into this unfortunate category? It is extremely difficult to provide a reliable assessment of the magnitude of the problem in Canada. A recent study completed in the United States estimated that between one-half of 1% and 1% of convictions for serious crimes could be erroneous and that "the frequency of error may well be much higher in cases involving less serious felonies and misdemeanors".[7] Using a much narrower category than was employed in the American research, a British study estimates that there are at least 15 cases a year of wrongful imprisonment in the United Kingdom after trial by jury.[8] There are insufficient data available in Canada to determine if similar rates or gross numbers obtain. However, it is manifestly clear that some innocent people are convicted. Even if one were only dealing with the most horrendous cases where the citizen is imprisoned, the lack of adequate measures to deal with compensation would be bad enough. Considering that the potential numbers of judicial errors could be as high as noted in the foregoing studies and in light of the arguments below, the inadequacies of the Canadian approach become disturbing indeed.

Given the present dearth of writing on wrongful conviction and compensation, the paper will serve to introduce many of the major issues. It first discusses the basic rationale for compensation and explains Canada's international obligations, noting some of the contrary arguments. Next a sketch of the main potential conventional remedies is provided. Finally recent Canadian discussions and initiatives in the field will be reviewed against the background of the relevant article of the *International Covenant on Civil and Political Rights* to which Canada is a signatory. From the perspective of how policy is formulated, it is most significant that at their meeting of November 22-23, 1984, in St. John's, Newfoundland, the Federal-Provincial Ministers Responsible for Criminal Justice established a Task Force to examine the question of compensation for persons who are wrongfully convicted and imprisoned. The Task Force Report was completed in September, 1985 and is available from the office of the Minister of Justice.[9] It would appear to have been influential when the same group of Ministers adopted the Federal-Provincial Guidelines on Compensation for Wrongfully Convicted

---

[7] Huff, Rattner and Sagarin, "Guilty Until Proven Innocent: Wrongful Conviction and Public Policy" 544, (1986), 32 *Crime and Delin.* 518, 523.

[8] Justice, the British Section of the International Commission of Jurists, *Miscarriages of Justice* (London: 1989), 5.

[9] *The Federal-Provincial Task Force Report on Compensation of Wrongfully Convicted and Imprisoned Persons* was sent to the Deputy Minister of Justice on September 19, 1985. In the letter of transmittal (page v. of the Report),

and Imprisoned Persons on March 17-18, 1988 (attached as Appendix A.). Out of a combined critique of the Task Force Report and the Guidelines it is hoped that some directions for a reformulation of Canadian policy on this most compelling subject will emerge. This article advocates a more liberal approach to compensation than has as yet been adopted by the federal and provincial governments.

B. Why should compensation be paid?

1. The Rationale

In a sense, this should be a very short section. Perhaps it could consist merely of one sentence from the Report of the Royal Commission in the Thomas case, where the accused spent 9 years in custody for two murders which he did not commit and where his convictions resulted from evidence fabricated by the police:

> Common decency and the conscience of society at large demand that Mr. Thomas be generously compensated.[10]

The two principal issues are alluded to in this quotation: the effects on the individual and the importance of societal assumption of responsibility for miscarriages of justice. The wrongly convicted person suffers in many of the same ways as the accused who bears genuine responsibility for his crime. The individual is stigmatized by his conviction. Financial costs are imposed by the trial process in that, unless impecunious, the accused will have to pay for his or her defence. The accused may be held in custody pending trial. Imprisonment means that the accused will no longer be able to earn a living. Dependents lose their source of support and family life in general is subjected to often unsurvivable traumas. The indignities of existence in prison may cause one to loath oneself and the prospects for assimilation upon release dwindle as incar-

---

the Coordinator of the Task Force indicates sentiments not dissimilar to those of the author on the then and current state of Canadian law:

> As you know, Canada lacks a proper legislative mechanism for compensating the innocent person who is unjustly convicted and imprisoned. We hope that our Report will bring Canada closer to a resolution of this problem.

The Task Force was composed of the Coordinator (a lawyer with the Federal Department of Justice) and seven other provincial counterparts. Its terms of reference (pages 1-2) included: (1) to examine legislation comparatively; (2) to examine the use, effectiveness and shortcomings of such legislation; (3) to examine existing compensatory schemes to see if any could be adapted for this special purpose; and (5) to explore legislative options, costs, and division of powers, among other concerns. In the author's view the 44 page Report is an equivocal document. As shall be seen, it wavers from quite liberal stands on some issues to unnecessarily rigid attitudes on others. On the whole, however, it can be said that it is a pity that more of the policies identified and to some extent advocated in the Report were not finally reflected in the Guidelines which have much less to commend them.

[10] *Supra* note 4, 115, para. 486.

ceration is extended. The despair that surrounds these distinctive processes for every convicted person is multiplied exponentially for the person who is unjustly found guilty and imprisoned. As the Royal Commission sympathetically observed in the Thomas case:

> His state of mind in hearing announced a verdict he knew to be wrong must have been one of unspeakable anguish.[11]

Being falsely accused is the stuff of nightmares for the average person, for it compounds hidden feelings of powerlessness and shakes one's faith in the foundations of society. "Most of us dread injustice with a special fear."[12] The relationship of the individual to society and law must be explored to elaborate upon this theme, although herein the treatment will be very brief. According to the liberal mainstream contractarian view, as members of society we are all required to submit to the law. In return, people are supposed to receive protection from the criminal acts of fellow citizens and acquire "a profound right not to be convicted of crimes of which they are innocent".[13]

This right is one of the cornerstones of an orderly society. Where it has been trampled upon by the criminal justice system, the individual and society are fundamentally threatened:

> Indeed the legal system is capable of creating few errors that have a greater impact upon an individual than to incarcerate him when he has committed no crime.[14]

---

[11] *Id.*, 116, para. 490.

[12] Ronald Dworkin, "Principle, Policy, Procedure", in Tapper, ed., *Crime Proof and Punishment: Essays in Memory of Sir Rupert Cross*, (London, Butterworths, 1981), 207.

[13] *Id.*, 193. It is interesting to note that Finnis, speaking from a contemporary natural law perspective, has also chosen to accord a special prominence to related rights. In Lloyd and Freeman, *Lloyd's Introduction to Jurisprudence*, (Toronto: Carswell, (5th ed.) 1985), 141-142 it is emphasized that Finnis, unlike utilitarians, does believe in some absolute human rights, even if they are not generally recognized in society. Among these rights is the right not to be condemned on knowingly false charges. See J. Finnis, *Natural Law and Natural Rights*, (Oxford: Clarendon, 1980), esp. 225.

[14] *O'Neil* v. *The State of Ohio* (1984) 83 AP104 (10th Dist.). The case is also reported at 13 Ohio App. 469 NE2d 1010, 13 Ohio App. 3d 320 and 13 O.B.R. 398. The full quotation is worthy of repetition, although as only a Westlaw print-out was able to be located, a precise page number cannot be given.

> No society has developed a perfect system of criminal justice in which no person is ever treated unfairly. The American system of justice has developed a myriad of safeguards to prevent the type of miscarriage to which the claimant herein was subjected, but it, too, has its imperfections. Fortunately, cases in which courts have unlawfully or erroneously taken a person's freedom by finding him or her guilty of a crime which he or she did not commit are infrequent. But, when such a case is identified, the legislature and the legal system have a responsibility

> . . . a miscarriage of justice by which a man or woman loses his or her liberty is one of the gravest matters which can occupy the attention of a civilized society.[15]

When the state not only fails to protect the law-abiding citizen from harm, but permits a person to be deprived of liberty as a result of a false accusation, a special injustice has thereby occurred. Ronald Dworkin's concept of moral harm assists in giving expression to the instinctive feelings which such situations evoke. Basically, he maintains that we distinguish in our own moral experience between bare harm, such as loss of liberty, and the further injury or moral harm which is inflicted when one suffers the same consequences as a result of injustice. What is already unpleasant becomes unbearable to the individual whose experience has unjust roots.

What good does the payment of compensation do once such a miscarriage of justice has been shown? Obviously, mere money "cannot right the wrongs done" or "remove the stain that [the accused] will carry for the rest of his life"[16], but compensation can have some ameliorative effects. It can minimize the social stigma under which the accused has existed and contribute to a feeling of vindication for the innocent accused. It can help the accused to be integrated with mainstream society and can assist in planning for a brighter future, while contributing to the sustenance of dependents.

With respect to the criminal justice system and beyond, to society at large, payment represents a partial fulfillment of the obligations of the state in the face of its unjust interference with the liberty of the accused. Public respect for the system may thereby be restored or heightened by this admission of error and assumption of responsibility. Conversely, where compensation is either unavailable or ungenerous, or where there is no payment as of right, and discretion is retained by the executive, the state has clearly indicated the low priority it gives to the plight of the wrongly convicted.[17] The costs of legal errors of such huge proportions are thereby borne by individuals and not by the state, which thus conceals the financial and policy implications of its malfunctioning criminal justice system.[18] Compensation for the accused, however, may actually lead

---

> to admit the mistake and diligently attempt to make the person as whole as is possible where the person has been deprived of his freedom and forced to live with criminals. Indeed the legal system is capable of creating few errors that have a greater impact upon an individual than to incarcerate him when he has committed no crime. It is in this context that we review the trial court's judgment and the record in this case.

[15] Peter Ashman, "Compensation for Wrongful Imprisonment" (1986), 136 *New Law Journal* 497(2) 497, 498.

[16] The Thomas Inquiry, *supra* note 4, 120, para. 514.

[17] See Jonathan Caplan, "Compensation for Wrongful Imprisonment (Great Britain)" [1983] *Public Law*, 34.

[18] See Keith S. Rosenn, "Compensating the Innocent Accused", (1976), 37 *Ohio State L.J.*, 705.

to some improvements in the operation of the criminal justice system by encouraging norms of caution and propriety in police and prosecutors. From a compensatory viewpoint, persons wrongfully imprisoned *qua* victims are essentially similar to those who are already offered some redress through criminal injuries compensation boards. For that matter, both of these classes of victims are not readily differentiated from other groups where society has decided to assume the costs of either natural disaster or more aptly here, social malaise.[19] Crude individualism is even less appropriately invoked to deny compensation in the context of the unjustly imprisoned where the state itself has intentionally, if mistakenly, occasioned the suffering of the accused.

As with any mention of issues which bear upon the relationship of the individual to society and law, this discussion contains many implicit ideological assumptions, particularly in its allusions to a contractual connection between state and citizen. Further speculations of a jurisprudential character are to be welcomed, both on the significance of wrongful conviction and on the justifiability of compensation. However, one is hard pressed to find general perspectives on crime and society which would be used to refute the arguments presented on the appropriateness of compensation. If one dominant view is taken, then crime might be said to originate in basic economic calculations by criminals, or in some people just being bad types or making evil choices. Alternative outlooks might relate criminality to the need of the elite to criminalize threats or to the problem of crime being overstated, especially if crime can be seen as excusable or justifiable.[20] Any of these notions of the origins or importance of crime can still theoretically tolerate both the possibility of systemic error and the need to provide vindication and material redress for the person who has been wrongfully labelled a criminal. Ultimately, convicting a person wrongfully means that a perpetrator is still at large and that an innocent person has suffered an injury which should be rectified. Fundamentally, there is something appealingly symmetrical about a system which emphasizes due process and the presumption of innocence and compensates those whose experience falls short of the judicial ideal. However, international law may also inform legal analysis and inspire policy discussions.

2. Canada's International Legal Obligations

It is submitted that Canada's position in the international legal order obliges it to introduce a statutory scheme for indemnifying victims of miscarriage of justice. Canada ratified the *International*

---

[19] For a discussion of the gradual acceptance of victims of crime as being appropriate recipients of compensation, see Richard Murphy, "Compensation for Victims of Crime: Trends and Outlooks" (1984), 8 *Dalhousie L.J.* 530, esp. 534-536.

[20] See Mark Kelman, "Criminal Law: The Origins of Crime and Criminal Violence", in Kairys, ed., *The Politics of Law: A Progressive Perspective*, (New York: Pantheon, 1982), 214-229 for a succinct review of the major perspectives on the etiology of crime.

Covenant on Civil and Political Rights and the *Optional Protocol to the Covenant* on August 19, 1976.[21] Since then "... the *Covenant* has constituted a binding obligation at international law not only upon the federal government, but the provincial governments as well."[22] Individuals who maintain that their Covenant rights have been violated may, by article 1 of the Optional Protocol, complain ("bring a communication") to the Human Rights Committee (established in Article 28 of the *Covenant*). The Human Rights Committee considers and determines whether a communication is admissible and if so whether a violation has occurred[23] and publishes the results of its deliberations (its "views") in its Annual Report to the General Assembly. According to the various Reports, Canada has been the subject of approximately 22 such communications between the Thirty-Second (1977) and Forty-First (1986) Sessions, although none have directly raised Article 14(6) noted below. No decision of the Committee carries any power of enforcement, but publication may cause the conduct of the state party to be impugned in the international community.[24]

The *Covenant* imposes three important obligations on the signatories, under Article 2:

> 1. ... to respect and to ensure to all individuals ... the rights recognized in the present *Covenant.*

---

[21] The Covenant and Optional Protocol were adopted and opened for signature ratification and accession by United Nations General Assembly (U.N.G.A.) resolution 2200A (XXI) on December 16, 1966. Canada acceded to both instruments in 1976. See *International Instruments In The Area of Human Rights To Which Canada Is A Party*, prepared by the Human Rights Directorate of the Department of the Secretary of State, December, 1987.

[22] Mr. Justice W.S. Tarnopolsky, "A Comparison Between the Canadian Charter of Rights and Freedoms and the International Covenant on Civil and Political Rights", (1982), 8 *Queen's L. J.* 211, 211-231. See also M. Ann Hayward, "International Law and the Interpretation of the Canadian Charter of Rights and Freedoms: Uses and Justifications" (1985), 23 *U.W.O.L. Rev.* 9.

[23] The process for submission and consideration of complaints may be both complicated and protracted. For an introduction see Tarnopolsky, *id.*, 211-213 and "Brief description of the various stages in the consideration of communications under the Optimal Protocol to the International Covenant on Civil and Political Rights", *Official Records of the General Assembly, Thirty-Seventh Session, Supplement No. 40* (A/37/40), paras. 397-397.8. Also see M.E. Tardu, *Human Rights; The International Petition System* (3 Binders), (Oceana Publications, Inc., Dobbs Ferry, N.Y., 1985), esp., "The Communication Procedure Under the Optional Protocol to the United Nations Covenant on Civil and Political Rights", Binder 2. See also, John Claydon, "International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms" (1982), 4 *Sup. Ct. L. Rev.*, 287 and Matthew Lippman, "Human Rights Revisited: The Protection of Human Rights Under the International Covenant on Civil and Political Rights" (1980), 10 *Calif. W. Int'l L. J.* 450.

[24] ... international institutions may, at first blush, seem remote from domestic compliance. Involving an international institution means invoking a forum that may be a long way away, presided over by foreigners, with no direct domestic

2. Where not already provided for by existing legislative or other measures ... to take the necessary steps ... to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. (a) To ensure that any person whose rights or freedoms ... are violated shall have an effective remedy.

   (b) To ensure that the competent authorities shall enforce such remedies when granted.

Violations of the *Covenant* either arise from laws or actions which are contrary to the *Covenant* or from failure to enact laws, where required to do so by the language of the *Covenant*.[25] For the purposes of this paper, Article 14(6) is of direct relevance:

> 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.

There is always a legitimate question to be asked concerning the extent to which international law, in general and this article of the *Covenant* in particular, may be seen as valid law within Canada or for that matter in the domestic law of any other country. Of course, according to the theory of Parliamentary supremacy, a competent legislative body may enact a statute inconsistent with an international legal obligation. However, in the face of statutory ambiguity, the courts will construe legislation as if the country has not intended to legislate in violation of its international commitments and to try to save the international position if possible. Beyond this rule of statutory construction at the very least, "It would be to take an unduly cynical view of international legal arrangements to regard these provisions as being entirely inefficacious."[26] Rules and principles of international law may respectively provide assistance in interpreting constitutional guarantees, as argued *infra*.

---

jurisdiction. Yet these institutions, when in place and properly used, can be an important step towards domestic compliance.

David Matas, "Domestic Implementation of International Human Rights Agreements" [1987], *Canadian Human Rights Yearb.* 91, 103.

[25] It is possible that mere inaction might be argued to be neutral in effect, but for Articles using mandatory or prohibitory language this appears to be an untenable position, as it involves a contravention of a standard of the Covenant. See Tarnopolsky, *supra* note 22, 212, 231 and the discussion of Article 14(6), *infra*.

[26] Alan Brudner, "The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework" (1985), 35 *U.T.L.J.*, 219.

They may also be authoritative "as guides to the elaboration of the common law and as constraints to the operation of rules of decision."[27] Therefore, even if Article 14(6) does not immediately create a readily enforceable legal right, it might well come into play were a court seized with a matter raising relevant issues. It must also therefore be seen as a vital reference point in any policy discussion and critical to the assessment of Canadian legal initiatives.

Canada presently has no legislation whereby victims of miscarriages of justice will certainly ("shall") and as of right ("according to law") be compensated. Before the recent promulgation of the Guidelines everything was left to common law remedies, to executive decisions to grant *ex gratia* payments or to the mainly unexplored use of the courts' power to award damages for a constitutional violation. With the Guidelines being adopted, it remains to be seen whether Canada has yet lived up to the challenge presented to it by the *Covenant*. The failure by Canada to implement laws which would give expression to Article 14(6) was noted by the Human Rights Committee in their review of Canada's initial report in 1980:

> It was noted that Canada provided only for *ex gratia* compensation in the event of a miscarriage of justice whereas compensation, according to the Covenant, was mandatory.[28]

By 1984, the Committee in its General Comments noted that this gap was pervasive among States' parties:

> Article 14, paragraph 6, provides for compensation according to law in certain cases of a miscarriage of justice as described therein. It seems from many States' reports that this right is often not observed or insufficiently guaranteed by domestic legislation. States should, where necessary, supplement their legislation in this area in order to bring it into line with the provisions of the Covenant.[29]

In its comments on Canada's supplementary report in 1985, Canada's somnolence was again a subject of discussion:

> Finally, observing that, by not providing compensation in cases of miscarriage of justice, Canada was failing to comply with article 14, paragraph 6, of the Covenant, one member considered that the situation should be remedied.[30]

Canada's representative to the Human Rights Committee was reassuring on this point. Although one has yet to see any concrete legislative results there has been a Federal-Provincial Task Force

---

[27] *Id.*, 254. See also, Donald F. Woloshyn, "To What Extent Can Canadian Courts Be Expected to Enforce International Human Rights Law in Civil Litigation?" (1985-86), 50 *Sask. L. Rev.* 1.

[28] *Official Records of the General Assembly, Thirty-Fifth Session, Supplement No. 40* (A/35/40), para. 166.

[29] *Official Records of the General Assembly, Thirty-Ninth Session, Supplement No. 40* (A/39/40) 146, para. 18.

[30] *Official Records of the General Assembly, Fortieth Session, Supplement No. 40* (A/40/40), 37, para. 206.

and subsequently the introduction of the Guidelines so that the following comment may be partially justified in retrospect:

> The matter of compensation for miscarriages of justice, which had been raised by members, was of great concern to Canada. The matter was being given active consideration at both the federal and provincial levels and article 14, paragraph 6, of the Covenant was a very significant element in the analysis being carried out by the federal authorities.[31]

Canada's next periodic report, first due in April 1985, was rescheduled to be received in April 1988, the postponement being at Canada's request to "enable it to present in that report a better evaluation of the impact of the *Canadian Charter of Rights and Freedoms* on Canadian laws and administrative practices".[32] It would surely be to Canada's embarrassment if the reminders of the Human Rights Committee and the remarks of Canada's representative were to again come to nothing compared to the expectations of the Committee. Canada's report had not been tabled by the date when the latest Human Rights Committee Report was prepared, September 27, 1988.[33] Canada will likely rely upon the Guidelines as satisfying the onus of the *Covenant*. It will be argued herein that Canada's non-statutory response is deficient both when measured against the *Covenant* and, accepting that the *Covenant* is a baseline only, when compared to what ought to be done to compensate the wrongfully convicted. Canada's defence vis-à-vis the covenant will presumably be that it has brought in (to use the language of Article 2(2)) "other measures as may be necessary to give effect" to the rights guaranteed in Article 14(6). It will be suggested that this contention will probably not be accepted by the Human Rights Committee. One does find at least one author who appears to concur with the argument advanced herein on the weaknesses of the Canadian position. Professor John Humphrey, admittedly writing before the Guidelines were agreed upon by the ministers responsible for criminal justice, observed that:

> There is no provision in the Charter [of Rights and Freedoms] corresponding to articles 9(5) and 14(6) of the Covenant on Civil and Political Rights which say that persons who have been victims of unlawful arrest or detention or falsely convicted of a criminal offense shall have an enforceable right to compensation. It may be,

---

[31] *Official Records of the General Assembly, 40th Session, Supplement No. 40* (A/40/40), 43, para. 238.

[32] *Id.*, 34, para. 193. Canada's request was acceded to by the Human Rights Committee and was to be submitted on April 8, 1988. See *id.*, 146, para. 17.

[33] Official Records of the General Assembly, Forty-Third Session, Supplement No. 40 (A/4340), 176. The simple notation was that the report was "Not Yet Received." In a letter from the Department of the Secretary of State, dated June 5, 1989, the author was advised that the report should be submitted by September, 1989.

indeed, that in Canada such rights are not even guaranteed by the ordinary law. If that is so Canada is in default under article 2(2) of the Covenant.[34]

3. Contrary Arguments

There are serious issues which must be confronted before any state can put a plan into statutory form, especially on the matter of the range of potential recipients who will be compensated. What follows next is an introduction of the main arguments against compensation being paid to persons who have been wrongfully convicted.

One point likely to be raised is not really a question of principle. Basically, some critics will say that there are practical problems in projecting the extent and frequency of liability. Others will be more prosaic and say simply, "What will it cost?", implying that it will be too expensive, given the duty of government to maintain the fiscal integrity of the state. One might first throw back the traditional rejoinder: What price justice? This response involves a rejection of the question and does not permit any middle ground involving assessment and minimization of costs. This position is based on an assumption that it is simply imperative that the state make amends for its infliction of harm on innocent citizens. More pragmatically, the answer to the judicial cost accountants might be a prediction that the outlay would not be great in any event, at least if one is only dealing with the extreme cases of miscarriage of justice.[35] If it is necessary to compromise, choices could be made in terms of, for example, excluding some potential recipients, or providing for factors which could reduce awards. However, the worries over the extent and frequency of liability and concomitant costs are really of a trifling nature in comparison to the condemnatory statement such prospects make about the reliability of the criminal justice system.

---

[34] John Humphrey, "The Canadian Charter of Rights and Freedoms and International Law" (1986), 50 *Sask. L. Rev.*, 13.

[35] There is ample support for these assertions in the small body of scholarly writing on the subject. "It would seem that a state with such already existent resources, and one which has taken serious steps to address itself to such concerns as crime victims 'reparation' awards, could allow itself the luxury of compensating an individual who has turned out to be no less a victim of the criminal justice system than the person who brought the initial charge ... In view of the less than numerable cases of wrongful incarceration of innocent individuals in Ohio, the burdens on the state seem to be at best, minimal." Hope Dene, "Wrongful Incarceration in Ohio: Should There Be More Than A Moral Obligation to Compensate?", (1982-83), 12 *Capital U.L. Rev.* 255-269, 265. See also, in the same vein, Shelbourn, *supra* note 5, 29-39 or Rosenn, *supra* note 18, 725-726. On the other hand, some observers are somewhat more uncertain about the costs issue. Professor Peter MacKinnon writes that the expense of a program of compensating all acquitted persons for their costs could be prohibitive or "Perhaps it would be, but we don't know because the proposal has never been costed." See "Costs and Compensation for the Innocent Accused" (1988), 67 *Can. Bar Rev.* 489-505, 500.

Next, one might expect it to be said that errors are both inevitable and excusable in a legal regime which defends the citizenry against crime. The argument would urge that the discovery of mistakes shows the vigour of the system and that the person who is wrongfully found guilty and imprisoned is adequately dealt with by being pardoned and released. This rationale hardly seems defensible unless one is content with the patent inadequacies of the *status quo*.

The issues of the effects of various types of compensation schemes on the many actors within the criminal justice system are more challenging, but should not daunt policy makers. For example, would police and prosecutors be less vigorous in their work, with the spectre of liability for the state looming over their deliberations or would apparently extraneous considerations come to be built into decisions on prosecutions? Would juries be less willing to acquit, if the acquittee might be entitled to compensation? Would an already overburdened criminal justice system in a complicated federal state grind to a halt under the weight of a whole new range of factors relating to compensation? None of these questions can be answered with precision in advance of the creation of a liberal compensatory scheme. However, the early experience of several states suggests that these fears[36] are both pessimistic and groundless. Indeed, according to reports, just the opposite forces may be at work. False convictions "may instill in the minds of many jurors and other citizens' doubts as to the guilt of large numbers of accused. . ."[37] and in those countries which operate statutory schemes of compensation, there has been no "damage to the prestige of the judicial system".[38] As has been earlier observed, it is at least as plausible that there would be increased reporting, more reliable prosecutions and higher general public regard for the criminal justice system if serious errors were admitted and redressed.

Finally, it might be said that in the mature Canadian legal system, there are ample avenues for the wrongfully imprisoned to pursue and that no new appendage needs to be grafted on to the existing panoply of remedies. The following discussion should help to demonstrate the unreality of this argument.

---

[36] These kinds of arguments were advanced by Ontario in 1983 concerning the prospect of statutorily protected rights of compensation:

> Grave reservations were expressed by the Province of Ontario about institutionalizing such compensation if the net effect would be to:
>
> 1) confuse the processes of the criminal law and civil law;
> 2) make the criminal prosecutions more difficult; and
> 3) result in greater compensation to wealthy people thereby lessening the liability of the state to poor accused persons.

Supplementary Report of Canada on the Application of the Provisions of the International Covenant on Civil and Political Rights in Response to Questions Posed by the Human Rights Committee in March 1980, (Department of the Secretary of State, March 1983), 39.

[37] *Supra* note 7, 540.

[38] Shelbourne, *supra* note 5, 30.

C. Existing Conventional Remedies

It is difficult to find evaluative material, but among independent commentators there is virtual unanimity that the regular remedies available in the United Kingdom[39] and in many states in the United States[40] are woefully inadequate for the special circumstances of one who has been wrongfully convicted and imprisoned. In Canada, one is not likely to be able to find any comprehensive discussion of the issue. However, it is the author's view that the Canadian situation is, if anything, as bad as it is in other states which do not have statutory schemes. Sadly, no Canadian government has provided relief on this foundation as seems to be required by the *International Covenant on Civil and Political Rights*. Until the Guidelines were introduced in 1988 (which will be assessed *infra*),

---

[39] See, for example, Shelbourne, *supra* note 5, 22: "In practical terms the only real relief which an ex-accused can hope to receive is an *ex gratia* payment from government." A lead editorial in the New Law Journal, concurring with the 1982 Justice Report on the issue (*supra* note 5) maintained that "this provision is inadequate": "Compensation for Imprisonment" (1982), 132 *New LJ.* 733. By 1986, the outlook in Britain was no better. "The present scheme has been through none of those procedures, statutory on customary by which words or deeds become recognized in our society as law ... that sentiment [that miscarriage of justice is one of the gravest matters which a civilised society can consider] does not appear to be shared by the Home Office." Ashman, *supra* note 15.

[40] For example, in Ohio, where a claimant may seek to have the legislature waive its immunity through a special bill, which permits the state to be sued, Hope Dene recently condemned the *status quo*:

> In view of the obstacles placed in the convicted innocent's path, it seems fair to point out that no genuine remedy exists for him ..... Ohio has no qualms about permitting suits against it for common torts, but for bizarre and unfounded criminal injustices, the state regresses to an imperium which evades responsibility for its mistakes.

Supra, note 35, 264.

Rosenn's reaction to the overall American position is typical:

> The United States has lagged far behind many nations in its failure to compensate the innocent victims of erroneous criminal accusations.

Supra, note 18, 705.

One state has recently introduced a special statutory scheme which has attracted some favourable comment. The New York State Legislature had the collective humility to admit the weakness of its previous legal regime:

> The legislature finds and declares that innocent persons who have been wrongly convicted of crimes and subsequently imprisoned have been frustrated in seeking legal redress due to a variety of substantive and technical obstacles in the law and that such persons should have an available avenue of redress over and above the existing tort remedies to seek compensation for damages.

The Unjust Conviction and Imprisonment Act of 1984, (1984) *N.Y. Law* ch. 1009 (to be codified at N.Y. Ct. CL. Act 8-b, 9(3-a)). *Quaere*, will Canada ever see such a frank preamble? For comment, largely favourable, on the New York statute, see David Kasdan, "A Uniform Approach to New York State Liability for Wrongful Imprisonment: A Statutory Model" (1984-85), 49 *Albany L.Rev.* 201.

there was not even an authoritative national policy statement with respect to *ex gratia* payments, which the British have had for at least thirty years.[41] At the provincial level, Manitoba had introduced Draft Guidelines in 1986, but they did not take on a statutory form after they were tabled in the Legislature.[42] Also, it is of interest to note that in 1983 Quebec was said to have set up a task force to examine the question of compensation, which made recommendations to the Minister of Justice. By 1989, no legislation had emerged, from Quebec or any other Province or Territory.[43] The author is unaware of any other provincial guidelines, bills or legislation which may have been promulgated before the new Guidelines.

The conventional remedies outside the Guidelines do not provide anything beyond the scent of redress when the actual prospects of recovery are assessed. What follows in this section is an overview of the avenues which might be open to an unjustly convicted person in 1989 beyond the Guidelines, with some summary evaluative comment. Although, it might be urged that the attention of government in Canada was only very recently focussed on the issue of compensation, Canada's neglect of the area should be seen as having created a pent up policy demand for progressive action.

---

[41] See the *Home Office Letter to Claimants*, Appendix C, the Justice Report (1982), *supra* note 5, 31-32 and the November 29, 1985 statement to the British House of Commons, in the form of a written reply (No. 173) to a question by Tim Smith, M.P. Being in the nature of a Ministerial statement, there are still considerable weaknesses to this approach, beyond its *ex gratia* character: review by the courts or Parliament seems more or less precluded and it can be changed without leave having to be received from any person or institution. These and other problems are discussed *infra* in light of more recent British developments which attempt to combine a legislative approach with vestiges of the old *ex gratia* scheme.

[42] The Attorney General of Manitoba tabled draft Guidelines in the Legislature on July 8, 1986. In the main, they mirror the Federal-Provincial Guidelines which were introduced almost two years later. The major differences appear in the Manitoba Guidelines making explicit reference to the International Covenant on Civil and Political Rights in the "Background" section and in their indicating that compensation should be available for provincial offences as well. It is reasonable to assume that the Manitoba Guidelines still obtain in that Province, despite Manitoba having apparently acceded to the Federal-Provincial Guidelines. This assumption is based upon the two sets of guidelines being so similar anyway. Further, there is not likely to be any objection by other provinces to Manitoba retaining its more generous eligibility criteria in admitting provincial offences.

[43] A letter requesting an update of the 1983 statements was sent by the author to the Minister of Justice, Mr. Herbert Marx. The reply, dated June 6, 1988, contained the following information:

> Unfortunately, we cannot give you any further follow-up since the studies already done on this subject are at preliminary stages and, because they are being used as working documents, they must remain confidential.

In June 1989, the author sent a questionnaire to all the relevant Federal and Provincial Ministers which asked for information on pre- and post-

1. Torts

Three preliminary observations should be made before any nominate torts are discussed. Firstly, the law of torts, while it may have slowly evolved in line with changes in society in other areas, has not developed a recovery mechanism which would effectively compensate a person who has been wrongfully convicted and imprisoned. Relatively new obligations have been imposed on Canada as a result of the *International Covenant on Civil and Political Rights*. Societal attitudes have latterly begun to move in the direction of the victim of miscarriage of justice. The common law of torts has lagged behind and it has been left, probably appropriately, for Parliament and the legislatures to intervene.[44] Secondly, as Professor Cohen and Smith have argued, private law in general and torts in particular are singularly ill-suited to deal with issues which fundamentally concern the nature of the state and the relationship of the individual to the state and the law:

> . . . the legislatures and courts, in developing rules of public conduct and responsibility premised on private law tort concepts, have failed to consider a wide range of factors which should be recognized in articulating the relationship of the private individual and the state. . .[45]
>
> . . . rights against the state are qualitatively different from rights against individuals.[46]

Guidelines experience on compensation for wrongful conviction. Replies were received from British Columbia, Alberta, New Brunswick, Newfoundland, Saskatchewan, Nova Scotia, Manitoba, Ontario, Prince Edward Island, the Northwest Territories, and the Government of Canada. No respondent indicated that legislation had been introduced. Some provinces referred to additional measures which had been taken to make the Guidelines effective in the jurisdiction, either by way of adoption by resolution of the legislature (e.g. New Brunswick), a ministerial statement (e.g. New Brunswick) or the establishment of a permanent or *ad hoc* inquiry (e.g. Alberta). Some respondents indicated that no steps had been taken since the Guidelines were agreed upon (Newfoundland, Labrador and Nova Scotia). Two governments noted that a final Memorandum of Agreement between the Province and the Government of Canada would be prepared (New Brunswick and Saskatchewan). The Federal government noted that it had "initiated discussions with the provinces with a view to reaching cost-sharing agreements with them. . .", which is presumably what was referred to in the New Brunswick and Saskatchewan references.

[44] Dean C.A. Wright, in his essay "The Adequacy of the Law of Torts", Linden, ed., *Studies in Canadian Tort Law*, (Toronto: Butterworths, 1968), 579-600, 584, obviously took the same position on the limitations of the law of tort. "The present problems of tort are not so much matters of law or internal consistency as sociological, depending on what we want to achieve and at whose expense."

[45] David Cohen and J.C. Smith, "Entitlement and the Body Politic: Rethinking Negligence in Public Law" (1986), 64 *Can. Bar Rev.* 1, 5.

[46] *Id.*, 12.

Thirdly, civil litigation is almost by definition complicated, protracted, uncertain and expensive, *a fortiori* where the cause of action is both nascent and brought against a defendant such as the Crown, with bottomless pockets and a strong need to vindicate itself.[47] Fourthly, there are formidable barriers against the successful suit of the Crown, both in statutory and common law form.[48]

The two torts which spring to mind as having some relevance to the person who has been wrongfully convicted and imprisoned are false imprisonment and malicious prosecution, the latter as one species of abuse of legal procedure. The third prospect in tort is maintaining an action for negligence in the performance of a statutory duty.

(i) False imprisonment

False imprisonment begins to appear unsuitable even at the definitional stage where it is variously described as ". . . the infliction of bodily restraint which is not expressly or impliedly authorised by the law"[49] or ". . . the wrong of intentionally and without lawful justification subjecting another to a total restraint of movement. . ."[50] "The word 'false' is intended to impart the notion of unauthorized or wrongful detention."[51]

However, even if the initial arrest is fundamentally flawed there are still limits on the usefulness of this action for the wrongfully

---

[47] The Home Affairs Committee of the House of Commons of the United Kingdom held special sittings with respect to Miscarriages of Justice, eventually comprising its Sixth Report of the 1981-82 Session. In the Minutes of Evidence, on June 23, 1982, 26, an exchange took place between Mr. Dubs, an M.P. and Mr. A.J.E. Brennan, Deputy Under-Secretary, which in the British context highlights the lack of utility of pursuing a conventional civil action over a special remedy:

> (Mr. Dubs) 88. In your memorandum you mention the possibility of civil action as well as the possibility of ex gratia payments . . . if one is asked to advise somebody which to do, what ought the advice to be?
>
> (Mr. Brennan) . . . I suppose if it was clear that an ex gratia payment of a substantial sum could be obtained from the Home Office *that might well be seen as a better way of proceeding than the expensive and tortuous process of litigation* . . . [emphasis added]

[48] See ss. 25 and 783, the *Criminal Code*, R.S.C. 1985, chapter C-46, the *Proceedings Against the Crown Act*, R.S.N.S. 1967, chapter 239, ss. 2(2)(e), 4(2) and 4(6), and the *Liberty of the Subject Act*, R.S.N.S., 1967, c. 164, s. 12. In *Nelles* v. *Ontario*, [1989] 2 S.C.R. 170, Lamer, J., for the Court, concluded that a section in the *Ontario Proceedings Against the Crown Act* (similar to s. 4(6) of the Nova Scotian counterpart) ensured that the "Crown is rendered immune from liability", but observed that "the constitutionality of s. 5(6) of the Act is still an open question". Other bases for claims of immunity have been weakened or eliminated by *Nelles*.

[49] W.V.H. Rogers, *Winfield and Jolowicz on Tort* (Twelfth Edition), (London: Sweet and Maxwell, 1984), 58.

[50] J.G. Fleming, *The Law of Torts* (Sixth Edition), (Agincourt, Ontario: Carswell/The Law Book Co. Ltd., 1983), 26.

[51] A.M. Linden, *Canadian Tort Law* (Third Edition) (Toronto: Butterworths, 1982), 44.

incarcerated. Any interposition of judicial discretion effectively ends liability for the person who subsequently confines the citizen.[52] This means that the arrest, if made pursuant to a warrant is not actionable, as warrants are issued only under the authority of a judicial officer.[53] The prospective plaintiff in false imprisonment is thereby left with little even in the case of an unjustifiable arrest without warrant, where the proceedings otherwise take their judicial course:

> Thus, a claimant may be able to advance a false imprisonment claim for the very small period of time between the warrantless arrest and the arraignment if no probable cause existed at the time of the arrest.[54]

(ii) Malicious Prosecution

Where the basic procedural formalities have been observed, there may still be liability for abuse of legal procedure in general and for malicious prosecution in particular, where the plaintiff has been subjected to unjustifiable litigation. To succeed, the plaintiff must establish, once damage has been proved:[55]

1. Institution of criminal proceedings by the defendant; and
2. The prosecution ended in the plaintiff's favour; and
3. The prosecution lacked reasonable and probable cause; and
4. The defendant prosecutor acted in a malicious manner or for a primary purpose other than carrying the law into effect.[56]

The major text writers are virtually unanimous in noting, in respect of this tort, that such primacy is given to the protection of the perceived societal interest in the efficient administration of the criminal law that the action is for all practical purposes defunct. "... the action for malicious prosecution is held on tighter rein than any other in the law of torts."[57]

> ... it is so much hedged about with restrictions and the burden of proof upon the plaintiff is so heavy that no honest prosecutor is ever likely to be deterred by it from doing his duty. On the contrary ..., the law is open to the criticism that it is too difficult for the innocent

---

[52] "Once a judicial act interposes, liability for false imprisonment ceases." See also Harry Street, *Law of Torts* 7th ed. (London: Butterworth's, 1983), 27. Similarly, according to Rogers, *supra* note 49, 66, "There can, however, be no false imprisonment if a discretion is interposed between the defendant's act and the plaintiff's detention."

[53] See the definition of warrant in s. 493 of *The Criminal Code*, R.S.C. 1985, chap. C-46 and also s. 511, where in the description of the contents of the warrant to arrest, it is said that the accused shall be "brought *before the judge or justice who issued the warrant*". (Emphasis added)

[54] See Kasdan, *supra* note 40, 211.

[55] See Rogers, *supra* note 49, 552.

[56] This list is an amalgam of Rogers, *id.*, 553 and Fleming, *supra* note 50, 576-577, but these prerequisites appear to be generally accepted.

[57] See Fleming, *id.*, 576.

> to obtain redress. It is notable how rarely an action is brought at all, much less a successful one, for this tort.[58]

Once the above impediments have been surmounted, at least the plaintiff will not be further stymied by the assertion of absolute immunity for the Attorney-General and his or her agents, the Crown attorneys, which the *Nelles* case has determined "is not justified in the interests of public Policy".[59] The Supreme Court of Canada noted that the former doctrine of absolute immunity had

> the effect of negating a private right of action and in some cases may bar a remedy under the Charter. As such, the existence of absolute immunity is a threat to the individual rights of citizens who have been wrongly and maliciously prosecuted.[60]

(iii) Negligence

That breach of a statutory duty may give rise to a civil action is now quite well established as is the related principle that damages may be awarded for negligent government activity.[61] The duty in the context of criminal investigations will normally be specified in legislation and will typically say that the police ". . . are charged with the enforcement of the penal provision of all the laws of the Province and any penal laws in force in the Province".[62] Assuming that the police have engaged in an investigation of an offence, albeit a flawed one which has led to the wrong person being convicted of an offence, how might liability attach? The police would have performed their statutory duty, so that there would be no breach of the obligation to enforce the law. However, if the actions of the police were undertaken *bona fides* but negligently, then there would still be potential liability. The elements of actionable negligence in a conventional suit[63] must still be proved in the present context:

---

[58] *Supra* note 49, 551-552. Some American commentators are even more forceful. "Thus, it is impossible for a victim of wrongful imprisonment arrested pursuant to valid judicial process to establish a prima facie case of malicious prosecution." See Kasdan, *supra* note 40, 214.

> Lamer, J., in *Nelles*, *supra* note 48, not only acknowledges the difficulties, ". . . a plaintiff bringing a claim for malicious prosecution has no easy task", but later seems to welcome them for their inhibiting effects: "I am of the view that this 'floodgates' argument ignores the fact that one element of the tort of malicious prosecution requires a demonstration of improper motive or purposes; errors in the exercise of discretion and judgement are not actionable. Furthermore, there exists built-in deterrents on bringing a claim for malicious prosecution. As I have noted, the burden on the plaintiff is onerous and strict", 27.

[59] *Supra* note 48.

[60] *Id.*

[61] See *Bux* v. *Slough Metals Ltd.*, [1973] 1 W.W.R. 1358 (C.A. Civil Div.) and *Kamloops* v. *Nielsen*, [1984] 5 W.W.R. 1 (S.C.C.).

[62] The Police Act, S.N.S., 1974, c. 9, s. 1, ss. 11(4). (See also the statutory counterparts in other provinces and federally.)

[63] These elements are summarized in R.A. Percy, *Charlesworth on Negligence* (Seventh Edition), (London: Sweet and Maxwell, 1983), 14, para. I — 19.

(a) the existence of a duty to take care owed to the complainant by the defendant;

There is a duty to take care in the performance of the statutory obligation of enforcing the law which is owed to all citizens and specifically to those who are suspects.

(b) failure to attain that standard of care prescribed by the law, thus committing a breach of the duty to take care;

The statutes do not elucidate a standard of care, although the common law concept of the reasonable person would be able to be adapted here as it has been in so many other areas. To paraphrase Alderson, B.'s classic words,[64]

> Negligence is the omission to do something which a reasonable police officer, guided by those considerations which ordinarily regulate the conduct of criminal investigations, would do, or doing something which a prudent and reasonable police officer would not do.

The usual reference points of "the likelihood of an accident happening and the possible seriousness of the consequences if an accident does happen, and, on the other hand, the difficulty and expense and any other disadvantage of taking the precaution"[65] would provide some assistance. Predicting the resolution of this issue is still not rendered much easier, particularly given that a high degree of deference would likely be shown to police practices and that there are few precedents.

(c) damage suffered by the complainant, which is causally connected with the breach of duty to take care and which is recognized by the law.

Grave problems would be encountered with causation. As the damage would be the wrongful conviction and imprisonment, it becomes extremely difficult to establish the causal connection where a judge or jury have interposed their independent decision making to enter a conviction. Of course, the negligent investigation of the police officer may have contributed to the cause.[66] None the less the verdict of a neutral third party supplies *the novus actus interviens* which may break the chain of causation between the act of negligence and the injury.[67] Beyond this factor is the general flexibility with which "operational decisions" containing within them some element of discretion may be viewed by the court, what Wilson J. in *Kamloops* called "policy considerations of the secondary level".[68] Finally, in light of *Nelles* (albeit not argued in negligence), Crown immunity could again be the ultimate defence to an otherwise successful action. Although there may have been some erosion of

---

[64] *Blyth* v. *Birmingham Waterworks* (1856), 11 Ex. 781, 784.
[65] *Morris* v. *West Hartlepool Steam Navigation Co. Ltd.*, [1956] A.C. 552, 524 (H.L.).
[66] See *Charlesworth*, *supra* note 63, 150-152.
[67] *Id.*, 231-2.
[68] *Supra* note 61, 16.

earlier law in the context of negligence, even where there is some discretionary power, *Nelles* nonetheless emphasizes the forcefulness of the statutory protections for the Crown when discharging responsibilities of a judicial nature.[69]

While there are ostensible prospects for recovery in tort, the wrongfully convicted person is forced for all practical purposes to go elsewhere to find a predictable and suitable remedy.

2. The Charter of Rights and Freedoms

(i) General Principles: Interpretation and the International Covenant

Any prospective plaintiff whose rights have been infringed would, in 1989, certainly turn to the *Charter* for relief when conventional common law channels seem to be unpromising. The first obligation is obviously to demonstrate that a right or freedom as guaranteed by the *Charter* has been infringed, according to section 24(1). There are several sections which may have been offended in the instance of a person who has been wrongfully convicted as a result of a miscarriage of justice. One thinks readily of the umbrella protections offered by section 7 as well as some of the relevant particular guarantees, such as sections 9, 11(d) or 12. Assuming one could prove such a violation, there could be some difficulty in rebutting the government's attempt at showing that the applicant's right or freedom was subject to a reasonable limit under section 1. A full discussion of these preliminary issues will not be attempted in this paper. Nonetheless, it is surely safe to say that such litigation would be novel and that proof of an infringement would be a formidable obstacle indeed. The *Nelles* case does offer some encouragement, at least in the extreme instances where the elements of malicious prosecution are made out:

> . . . it should be noted that in many, if not all cases of malicious prosecution by an Attorney General or Crown Attorney, there will have been an infringement of an accused's rights as guaranteed by ss. 7 and 11 of the Canadian Charter of Rights and Freedoms.[70]

Further, the *International Covenant on Civil and Political Rights* could be summoned as an aid to the interpretation of the *Charter*, which might have quite salutary results. Several Canadian authorities have presented strong arguments to this effect.[71] Basically, the close historical, textual and subject-matter relationship of the *Charter* and the *Covenant* is emphasized. Further, there is the presumption that Canada has not intended to violate its international obligations.

---

[69] In David Jones and Anne S. de Villars, *Principles of Administrative Law*, (Carswell, 1985), 388, the authors note that *ultra vires* actions might remove the usual immunity. *Nelles*, *supra* note 48, *per* McIntyre, J., highlights the Crown's immunity for the judicial function of prosecution, although the Attorney General or Crown Attorney may still be held accountable.

[70] *Supra* note 48, per Lamer, J.

[71] See Tarnapolsky and Hayward, *supra* note 22; Claydon, *supra* note 23, and Humphrey, *supra* note 34.

In the event of ambiguity, Canadian courts should interpret Canadian legislation and presumably the *Charter* in a manner which conforms with international law. Also, one sees increasing enthusiasm on the part of Canadian courts to go outside national boundaries to assist in deciding issues arising under the *Charter*. Of course, the *Charter* does not provide explicit protection of Article 14(6) rights,[72] but there are good prospects for believing that a *Charter* case would have to be more than cognizant of Canada's being a signatory to the *Covenant*. For example, commenting upon Article 9(5) of the *Covenant* which, like Article 14(6), obliges the state to ensure that a person who has been unlawfully arrested or detained "shall have an enforceable right to compensation", Mr. Justice W.S. Tarnopolsky notes:

> There is no explicit constitutional or statutory provision in Canada to this effect. However, surely this right must be considered to be a requirement of section 7, as a "principle of fundamental justice" when a person has been deprived of liberty.[73]

Therefore, the courts should infuse a *Charter* suit with some of the compensatory entitlements of the International Covenant. That this approach ought to be taken to the interpretation of *Charter* provisions was given powerful support by the dissenting judgement of Chief Justice Dickson in the 1987 case, *Reference re Public Service Employee Relations Act (Alta.)*.[74] He was concerned to emphasize the relevance of international law to the construction of the *Charter*:

> The content of Canada's international human rights obligations is, in any view, an important indicia of the meaning of "the full benefit of the Charter's protection". I believe that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.
>
> In short, though I do not believe the judiciary is bound by the norms of international law in interpreting the Charter, these norms provide a relevant and persuasive source for interpretation of the provisions of the Charter, especially when they arise out of Canada's obligations under human rights conventions.[74a]

---

[72] In a publication obtained from the Department of the Secretary of State, *Implementation of the International Covenant on Civil and Political Rights by the Constitution Act, 1982*, a type of table of concordance is presented with three headings at the top of each page: Right, Covenant and Charter. No corresponding Charter reference is noted for Article 14(6) of the Covenant.

[73] Tarnapolsky, *supra* note 22, 218-219.

[74] (1987), 38 D.L.R. (4th) 161 (S.C.C.); (1987), 74 N.R.99; (1987), 51 Alta. L.R. (2nd) 97.

[74a] *Id.*, 185 (D.L.R.); 171-172 (N.R.); 124 (Alta.L.R.).

(ii) The Prospect of Substantial Damages

Assuming that a wrongfully convicted person has met the initial challenges noted above with respect to showing an infringement of a *Charter* right or freedom, he or she would then (under section 24(1)) have to apply "to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances".

Although there is a relative dearth of cases dealing with damages as a remedy for a *Charter* violation, it is by now beyond question that this is part of the remedial arsenal with which the courts are equipped under section 24(1). Cases[75] and juristic writing[76] have both consistently confirmed this basic proposition, which should not be surprising given the apparent breadth of the remedies portion of the *Charter*. The principal impediments would appear to relate to the issues of causation and responsibility for the infringement and the type and extent of loss to be compensated. Problems could therefore be encountered concerning whether only direct, consequential and provable injuries would be compensated or whether the right infringement *per se* would also be the subject of an award. The typical requirements of precisely showing a link between the denial and the loss should be minimized in the context of constitutional litigation, once the right has been shown to have been violated. The protection of constitutional guarantees should be considered to be more important than the usual compensatory interests. Finally, the violation of the right itself should deserve special protection in the award, above and beyond paying damages for the heads related to actual suffering. For the wrongfully convicted and imprisoned, the foregoing general statements can be made with greater force, as the loss of liberty and all the attendant deprivations speak volumes on the issue of the reality of the injury. The infringement itself deserves extraordinary treatment, given the importance of vindicating the victim and highlighting the significance of the constitutional loss for the society as a whole.

The above discussion, is not intended to leave the impression that a *Charter* action is the panacea for the wrongfully convicted

---

[75] Several cases have clearly indicated that damages may be recovered under section 24(1). See *Banks et al.* v. *The Queen* (1983), 83 D.R.S. 33, 965 (F.C.T.D.); *R.* v. *Esaw* (1983), 4 C.C.C. (3d) 530, 536 (Man. C.A.); *Crossman* v. *The Queen* (1984), 12 C.C.C. 547, 558-559 (F.C.T.D.); *Vespoli et al.* v. *M.N.R.* (1984), 55 N.R. 269, 272 (F.C.A.); *R.* v. *Germain* (1984), 53 A.R. 264, 274-275 (Q.B.); *Scorpio Rising Software Inc. et al.* v. *A.G. Saskatchewan et al.* (1986), 46 Sask. R. 230, 235 (Q.B.).

[76] For example, see Dale Gibson, *The Law of the Charter: General Principles* (Carswell: 1986), 211-212; Marilyn L. Pilkington, "Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms" (1984), 62 *Can. Bar Rev.* 517; Ken Cooper-Stephenson, "Tort Theory for the Charter Damages Remedy", (1988), 52 *Sask. L. Rev.* 1, 3, observes: "There appears no doubt that a damage award in some form will be available as a remedy for infringement or denial of constitutional guarantees under the Canadian Charter. . .".

and imprisoned. Firstly, at a policy level it is not likely that leaving the issue of compensation with the courts satisfies Canada's obligations under the *International Covenant*, which the Federal-Provincial Task Force Report has recognized.[77]

Secondly, and more relevant to an applicant, the observations made earlier concerning civil litigation in general are just as apt with respect to a *Charter* action, especially as it remains a relatively unusual form of damages suit, with many additional substantive and remedial wrinkles. Therefore, compensation would be no closer in a *Charter* action than in a conventional torts case.

3. Ex gratia compensation

Actual payments of compensation in Canada (and other countries) have come about most often as a result of the decision of government to make an *ex gratia* payment. These payments "are made at the complete discretion of the Crown and involve no liability to the Crown".[78] Further, "being in the nature of an *ex gratia* payment, there are no principles of law applicable which can be said to be binding."[79] Even in the United Kingdom where there have been authoritative policy statements on the existence of the *ex gratia* scheme since 1956,[80] which were strengthened in 1985,[81] judicial review of a refusal to make a payment has been unsuccessful.[82] Obviously, the standards of the *International Covenant* are not met by such discretionary awards. A proper legislative scheme need not prohibit a discretionary payment by government to a deserving recipient. Indeed, there may be instances where the flexibility accorded by *ex gratia* compensation may be quite appropriate and laudatory. Government might well decide to pay compensation sooner, or more generously than a statutory scheme might permit. Finally, it is possible that some claimants might be excluded, in which case a voluntary payment might be made.

However, the disadvantages of an *ex gratia* scheme are sufficient to confine it to such exceptional use, outside a statutory framework. Firstly, there is no obligation to pay, as both international law and

---

[77] *Supra* note 9, 26.

[78] *Id.*

[79] The Thomas Commission, *supra* note 4, 113.

[80] 584 H.C. Deb. C.C. 32147. With the passage of the *Criminal Justice Act 1988* (U.K.) (1988), significant changes were made in the British position. In particular, s. 133 provides for a statutory framework for compensation for miscarriages of justice, although under s. 133(3) "The question of whether there is a right to compensation under this section shall be determined by the Secretary of State." This amendment is addressed more fully at page 55.

[81] *Supra* note 41.

[82] In *R.* v. *Secretary of State for the Home Office ex p. Chubb*, [1986] *Crim. L.Rev.* 809, the court held that the Secretary of State in respect of *ex gratia* payments was not subject to the review of the courts and had complete discretion, although Maggy Pigott, Barrister, commented in the same report that some review would potentially be available "on the basis of abuse of discretion".

an inherent sense of fairness and justice require. Secondly, there may be few or no guiding principles for the decision-maker. Thirdly, even if adequate guidelines are introduced, they could be circumvented or flouted. Fourthly, the process is or may be shrouded in secrecy. This is surely unsuitable, given the openness of much of the criminal process and the general public interest in seeing why and how government makes decisions. Fifthly, an exclusively voluntary scheme tends to trivialize the nature of the potential claims, making the interests affected seemingly suitably responded to by largesse or charity.

The Federal-Provincial Guidelines will be studied more closely in this paper, but parenthetically it might well be questioned at this juncture whether anything more than *ex gratia* compensation is really being offered in them. Clearly, they are not legislatively enacted by any level of government and the obligation if any, to appoint an inquiry only arises once the eligibility criteria, themselves problematic, are met. The final procedural stipulation (of the Guidelines) is merely that the relevant government "would *undertake to act* on the report submitted by the commission of Inquiry" [emphasis added]. There is little more by way of obligation added by these aspects of the Guidelines and surely not enough to distinguish them fundamentally from the features of simple *ex gratia* compensation, so often decried in other jurisdictions.

4. The Special Bill

Compensation could be ordered upon the passage of a special bill dealing with the circumstances of a single case. Normally, this would come about through a private member's bill in the appropriate legislative forum. A government bill would presumably not be required, as the executive could always order an *ex gratia* payment, if it were so inclined.

In some states in the United States, similar devices are employed, often as a way of circumventing state immunity and thereby permitting an otherwise unpursuable claim to be advanced. The results have not been viewed favourably. In Ohio, Hope Dene has commented:

> Assuming that the claimant can clear all of these hurdles, there is simply no guarantee that the bill will pass... This severe unpredictability inherent in such claims is antagonizing for the individual seeking relief, and is definitely not mitigated by the awareness of the fact that no cause of action exists against the legislature for failure to act on a bill.[83] [footnote references from original text omitted]

In New York, the experience has been no more satisfactory. David Kasdan has criticized the ad hoc and arbitrary nature of such fact-specific bills[84] and further notes that:

---

[83] See Dene, "Wrongful Incarceration in Ohio . . .", *supra* note 35, 260.
[84] *Supra* note 40, 216.

> Because the bills virtually concede state liability, they are often vetoed. Thus, moral obligation bills usually fail in their essential purpose — the creation of a forum in which to litigate fairly a wrongful imprisonment cause of action against the state.[85]

Due to the publicity inherent in the legislative process, some of the potential deficiencies of the *ex gratia* scheme are avoided. However, many of its disadvantages are simply replicated especially in that the special bill still depends on a type of government support and issues of principle and obligation may never be faced. If anything, the special bill may have some residual significance, both now and under a new statutory framework. Although a private member's bill may be doomed to legislative failure, it does force a case into the open and may occasion legislative and public debate. Under the current system, public pressure may be crucial to the decision to make an *ex gratia* payment and to the extent that a special bill contributes to this outcome, it could be a useful instrument. Under a statutory formula, the private member's bill could highlight and advance a marginal case.

D. Towards a New Regime of Compensation

Existing conventional alternatives for the payment of compensation have been seen as woefully inadequate. What is called for is a fresh start. The Federal-Provincial Task Force Report and more importantly the Federal-Provincial Guidelines are measured against this perceived need for innovation. They represent an important government initiative, even if they do not, as is concluded, represent much of a departure from previous practice or policy. Further, as befits the circumstances, the following discussion attempts to establish norms of state conduct with respect to this most egregiously treated group of citizens.

Article 14(6) of the *International Covenant on Civil and Political Rights* is used as the organizing device for this portion of the paper for a number of reasons. Firstly, the *Covenant* is binding upon Canada and its standards must *at a minimum* be met by signatory nations. Secondly, it raises many of the material points which must be addressed. Thirdly, the Federal-Provincial study used a similar approach and as it has presumably been influential on governments, it is expedient to choose the same base. It should be stressed that although Canada must adhere to the *Covenant*, it is really only a point of departure. There are some areas where Canada ought to diverge, either to improve the compensation scheme to a level beyond the rigid strictures of the *Covenant* or to adapt it better to the Canadian legal and constitutional environment. Wherever appropriate, analysis of the Guidelines will be integrated into the following discussion.

For convenience, Article 14(6) is reproduced below, with emphasis added to indicate the specific areas which will be reviewed:

---

[85] *Id.*, 218-219.

> 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.*

1. "Person" — Should only the imprisoned person be compensated?

The *Covenant* seems to provide for compensation being payable only to the individual who has been convicted and suffered punishment. However, an examination of some of the debates which led to the present version of the *Covenant* provides some support for a more liberal interpretation. Through several discussions of the Commission on Human Rights prior to the acceptance of the final incarnation of Article 14(6), there was explicit mention of persons other than the accused, albeit for the limited category of cases where the accused was put to death.[86]

The provision was deleted, but there were second thoughts on the issue as there was an unsuccessful attempt to revive the article.[87] Much later (1959) in the evolution of Article 14(6) there were still concerns over the extent to which dependents should be compensated, which were never resolved in the text or debates.[88]

In the same spirit as some of the old United Nations debates evince, the Federal-Provincial Report notes that the person's dependents and possibly even business associates might also have some right to present a claim, although the Report finally recommends that only the person directly wronged be able to proceed. The Report concedes that dependents should be able to apply after the death of the wrongly accused person.

With respect to the position of the Report on the survivorship of claims, there can be little disagreement. Further, it is not unreasonable that the convicted person should be required to present

---

[86] See the *Report of the Seventh Session of the Commission on Human Rights*, 16 April-19 May 1951, Economic and Social Council, Official Records: Thirteenth Session, Supplement No. 9, Annex 1, *Draft International Covenant on Human Rights*, Article 10(3), 22; and also see the *Report of the Eighth Session of the Commission on Human Rights*, 14 April-14 June 1952, Economic and Social Council, Official Records: Fourteenth Session, Supplement No. 4, 32, para. 220.

[87] *Report of the Eighth Session of the Commission on Human Rights, id.*, para. 221. The vote to reconsider was 8 in favour, 8 against and 1 abstention.

[88] As the delegate from Ceylon observed:

> ... it should be made clear whether the phrase "the person who has suffered punishment" meant only the person who had been convicted or whether it might in some cases apply to his dependents.

United Nations, General Assembly, Fourteenth Session, Official Records, Third Committee, 963rd. Meeting, 20 November 1959, 268, para 7.

the primary claim. However, there are no compelling reasons to refuse to add others who have suffered injury as parties to the principal action, and who might thereby be ultimately able to recover independently once the accused's cause has been established. The Task Force Report notes that other countries "allow for such a broadly based compensation scheme".[89] The 1982 Justice Report similarly recommends that dependents should recover expenses or losses reasonably incurred upon imprisonment.[90] Family members (who are not dependents) and friends, who have suffered losses directly as a result of the imprisonment should be able to make a claim. So should those who have rendered services to assist in securing the individual's release and vindication, although some items in this latter category could legitimately be included as expenses recoverable by the actual victim in the pecuniary loss category. The *Thomas Commission* wrestled with these issues, but finally decided to recommend payments to Mr. Thomas to cover legal and investigative services and services "rendered by relatives to meet a need caused by his arrest and imprisonment".[91]

This more open posture with regard to those eligible to claim recognizes a number of important factors. Firstly, it accepts the interdependence of individuals in society and the clear fact that people seldom suffer misfortune alone. Secondly, it offers a sense of legitimacy and encouragement to those who have been hurt by the plight of the wrongly convicted person or who have laboured, often solitarily, on his or her behalf.

There are thus sound underpinnings for a decision to widen the possible recipients of compensation beyond the narrow wording of the Convention. Unfortunately, the Guidelines do not view the issue so expansively and would permit only the "actual person who has been wrongfully convicted and imprisoned" to apply.[92]

2. "By a final decision"

Article 14(6) requires some definite point in the criminal justice process to have been crossed before the other elements in the article must be considered. The difficulty is in giving meaning to the phrase "final decision". The Federal-Provincial Task Force Report states that the words could mean either (i) once the decision is reached at trial to enter a conviction (and presumably hand down a sentence) or (ii) once all ordinary methods of review have been exhausted (and the adverse decision remains). The Report opts for the latter interpretation.[93] This view is taken despite the observation that an examination of Article 14(6) when read as a whole suggests that "the *Covenant* proposes to cover *both* types of final decision" [emphasis added].[94]

---

[89] *Supra* note 9, 18.
[90] *Supra* note 5, 20.
[91] *Supra* note 4, 119.
[92] See Appendix A, Section B(2).
[93] *Supra* note 9, 19.
[94] *Id.*

Once again, some limited assistance in interpretation may be derived from a study of the history of the *Covenant.* An earlier version of Article 14(6) was more generous than the current provision:

> Everyone who has undergone punishment as a result of an erroneous conviction of crime shall have an enforceable right to compensation.[95]

The reference to a "final decision" came later with other more restrictive stipulations. What is clear is that "many representatives thought that the wording of [the current article] would only cause great uncertainty in its present form."[96]

Representatives eventually rejected[97] the insertion of any explanatory clause with respect to the issue of finality in either Articles 14(6) or 14(7). Despite these uncertainties, it appears there is some evidence of acceptance of a core meaning of "final decision". In the words of the Venezuelan delegate:

> There was no need for a lengthy definition of the term "final decision", since that concept existed in all legal systems. It would be preferable to leave it to each country to specify which decisions had the force of *res judicata.*[98]

Similar results seem to have been arrived at with respect to the interpretation of the same words in a European convention where a decision was said to be final:

> . . . if, according to the traditional expression it has acquired the force of res judicata. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies. . .[99]

In this paper, the determination was made to limit the discussion to those worst affected by a malfunctioning of the criminal justice process — the wrongfully convicted and imprisoned person whose plight is only exposed through exceptional means, beyond the regular appeal process. The case for compensation in these instances is beyond question either pursuant to Article 14(6) or on broader principles.

However, why should persons convicted wrongfully not still be able to request compensation especially if they have been imprisoned, even if it is merely a trial decision which has been reversed

---

[95] *Report of the Fifth Session of the Commission on Human Rights*, 9 May — 20 June 1949, Economic and Social Council, Official Records: Fourth Year, Ninth Session, Supplement No. 10., Annex 1, *Draft International Covenant on Human Rights*, Article 13 (3), 20.

[96] 1952 Report, *supra* note 86, para. 218.

[97] Official Records of the General Assembly, 14th Session, 15 Sept.-13 Dec., 1959, Annexes, Agenda Item 34, 12, para. 62.

[98] *Supra* note 88, 969th meeting, 27 November 1959, 294, para. 20.

[99] Commentary on Article 1(a), *Explanatory Report of the European Convention on the International Validity of Criminal Judgments*, Publication of the Council of Europe, 1970, 22.

on the basis of a regular appeal? This is broadly comparable with the recommendations of the Justice Report[100] and interprets the function of compensation sympathetically: to restore to wholeness, in so far as it is possible, those who have been wrongfully convicted and to indicate the acceptance of societal responsibility.

The most supportable interpretation of Article 14(6) is that it is intended to compensate for miscarriages of justice only, omitting for the moment the imprecision of this concept. Thus the conventional reversal and extraordinary pardon provisions would be read conjunctively with "shows conclusively that there has been a miscarriage of justice." Indeed, this view has been adopted in the deliberations of the Commission on Human Rights and in the Human Rights Committee, where the phrase "miscarriage of justice" was used repeatedly. In reply, it is submitted that such distinctions, between persons whose convictions have been reversed in the normal process and citizens who have been victims of miscarriages of justice, are too stringent. A more generous approach to compensation is lent support by an examination of Article 9(5) of the Covenant: "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." It seems illogical to provide redress for one who has merely been unlawfully arrested, although perhaps never even charged or detained beyond the initial arrest, and to refuse compensation to a person who may have been convicted and sentenced to prison, but where the conviction is set aside in a regular appeal.[101]

There are strong reasons to be sympathetic to compensation being paid on a more liberal basis than the *Covenant*, Task Force Report and Guidelines advocate. Regrettably, the Guidelines opt for the more confining straits of a free pardon or Ministerial reference being required to show that there has been a miscarriage of justice. Specifically excluded are circumstances where the reversal occurs in the regular stream of appeals.

3. "Convicted of a criminal offence"

In Canada this expression could be read narrowly to require compensation to be paid only where the offence for which the person was wrongfully convicted was "criminal in the true sense".[102] This interpretation would therefore exclude from the ambit of the

---

[100] *Supra* note 5, 22.

[101] These sentiments were forcefully expressed in some of the original debates, first by France:

> There was no reason why the same right should not be granted to a person who had been convicted although innocent; such a person had suffered far more serious material and moral injury. *Supra* note 88, 964th meeting, 23 November 1959, 273, para. 24. Morocco later advanced the same position, *id.*, 967th meeting, 25 November 1959, 286, para. 17.

[102] See Ritchie, J., in *Queen* v. *Pierce Fisheries*, [1970] 5 C.C.C. 193, 199; 12 D.L.R. (3d) 591, 597.

Covenant all provincial offences, because the provinces "cannot possibly create an offence which is criminal in the true sense".[103] Also excluded would be all federal offences, for which a penalty may be provided but which are not normally considered criminal.

The Task Force Report quite appropriately took the view that such an approach "would inadequately reflect the spirit of the *International Covenant*", given that in a federal state such as Canada penal measures including the possibility of imprisonment attach to federal and provincial statutes.[104] The Report also refers to the French version which uses the expression "'condemnation pénale' which suggests compensation should not be limited to wrongful criminal convictions"[105] and finally recommends that compensation be available to persons unjustly convicted under either federal or provincial penal legislation.[106]

These conclusions are laudable and are well-supported in the Task Force Report. The only additional factor to which attention should be drawn is Article 50 of the *Covenant* which specifically mandates that "the provisions of the present *Covenant* shall extend to all parts of federal states without any limitations or exceptions." The authors of the Task Force Report do not cite this article, but it surely makes the construction urged in the Report and herein more or less unassailable.

The Guidelines considerably dilute the recommendations in the Report. There, only a person "imprisoned as a result of a *Criminal Code* or other federal penal offence" is eligible.[107] This alteration is lamentable, although there is no obstacle to a province extending the Guidelines to cover provincial offences. How could one explain the restrictive nature of the policy behind the provision to a person who has served six months in jail for an offence which he or she did not commit under a provincial head of power? When an erroneous conviction under a potentially similar infraction within federal competence could result in compensation, it would be a difficult chore indeed.

---

[103] See Dickson, J. in *R.* v. *City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353, 374-375; [1978] 2 S.C.R. 1299, 1327. Not all federal statutes which specify a penalty including the prospect of imprisonment are clearly criminal in nature. For example, consider the *Migratory Birds Convention Act*, R.S., C.M-12, s.1, which includes in s.12 a general penalty provision where a fine or up to six months imprisonment or both can be levied. The *Territorial Lands Act*, R.S., C.T-6, s.1, in s.21 provides for similar penalties for trespassing on territorial lands after having been ordered to vacate.

[104] *Supra* note 9, 20.

[105] *Id.*

[106] *Id.*

[107] See Appendix A, Section B(3).

4. "Conviction has been reversed or he has been pardoned"

(i) Improving Access to Appellate Review

Although the focus of this paper is the wrongfully convicted person whose plight is discovered and addressed through extraordinary devices, it has also been argued that compensation ought to be available to the person whose conviction is reversed in the normal course of an appeal and possibly to other claimants. Both the Task Force and the Guidelines take the position that a condition precedent to compensation be a free pardon under Section 749(2) or an acquittal by an Appellate Court following a Section 690(b) Ministerial reference. Regardless of whether the more expansive view of compensation is taken as is argued for herein, there will be instances where the conventional appeal process has been exhausted and the usual appeal periods have expired. In those situations it is important to provide some mechanism for the circumstances of the purportedly wrongfully convicted person to be addressed in order to provide the foundations of a compensation award. This section will attempt to make suggestions for improvement of these special avenues of access to justice. The proposed reforms are also relevant if the status quo of the Guidelines is maintained, in that the Section 749(2) free pardon or Section 690(b) acquittal will be more readily obtainable.

Before discussing this aspect of Article 14(6) in detail, it is noteworthy that there was some considerable skepticism in the early debates on the Covenant about the inclusion of the requirement of a reversal or pardon as an additional qualifying condition.

> The requirement that the reversal of conviction should be a condition precedent to the payment of compensation was regarded by many representatives as unduly restrictive, and also as requiring, in effect, the payment of compensation in the case of convictions reversed on appeal.[108]

The ultimate phraseology was adopted somewhat less than enthusiastically by the Commission on Human Rights.[109] Therefore, there is a good foundation for interpreting this portion of the article and Canada's international obligations in a sympathetic manner.

It should be further noted at the outset that there are provisions in the *Criminal Code* which allow for the extension of time in which to commence an appeal against conviction and that some flexibility is thereby accorded to the convicted person.[110] Nonetheless, these sections offer small comfort to the person who has already pursued all relevant levels of appeal, so that the courts have no other basis upon which to assume jurisdiction.

Extraordinary powers to direct that a new trial be held or that an appeal be heard or that a reference be provided are available

---

[108] *Supra* note 93, 32, para. 218.

[109] *Id.*, 32, para. 219.

[110] See ss. 838 and 678 which basically provide for extending the usual time period reasons.

to the Minister of Justice under section 690. Also, under section 749, the Governor in Council may grant a free or conditional pardon to a person convicted of an offence. The Task Force Report maintains that the discretionary component of both sections does not offend Article 14(6) of the *Covenant*, as the article provides a right to compensation, not a right to a hearing to obtain the prerequisite reversal or pardon. The Report merely recommends that section 690 be extended to summary offences and that provisions mirroring it and section 749 be adopted by the provinces to deal with provincial penal law.[111] Although these latter suggestions are worthwhile it is maintained that a broader perspective ought to be taken which would extend the availability of re-investigations, appeals and pardons and make any residual discretionary powers more open. The Guidelines have not taken this direction.

Even taking the view of the Task Force Report that only those whose convictions were left intact by the conventional system of appeals and who are later found to have been wrongly convicted are deserving of reparations, the question remains whether the existing avenues of redress are adequate. Given that a reversal or pardon is the *sine qua non* of compensation and given, as noted earlier, that the *Covenant* requires, under Article 2(2), that each State Party take necessary steps "to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present *Covenant*", it is submitted that the discretionary aspects of sections 690 and 749 do not adequately protect Article 14(6) rights.

The first remedial suggestion would give to a provincial court of appeal an expanded right to commence or reopen an appeal, where new facts are uncovered or for other analogous reasons which tend to point to a miscarriage of justice. This leave to appeal application would be able to be brought by the convicted person at any time, even where the same court had already disposed of the case. The revised provision could also include a statement of purpose permitting some relaxation of normal rules of evidence or procedure commensurate with the occasion. This would have the advantage of giving the accused another as of right avenue with which to seek justice. It would preserve for the courts some flexibility to deny leave where the supposed new or newly discovered fact or other ground was inconsequential or irrelevant and it would leave intact some discretionary powers for the executive. The denial of leave or of the appeal could be the subject of a further appeal to the Supreme Court of Canada. What is sacrificed somewhat in this scenario is the present finality of convictions. It is urged that this would not be a major cost in the face of the prospect of uncovering more miscarriages of justice sooner. Nor should there be a deluge of appeals in this vein. However, it must be conceded that the effects on the appellate court system require further consideration. The fact that this improved right of appeal would

[111] *Supra* note 9, 21.

be included in the *Criminal Code* (or any provincial counterparts for non-criminal matters) would seem to ensure closer compliance with Article 14(6) than in the regime envisaged in the Task Force Report. Of course it is arguable that similar entitlements already exist in the *Criminal Code*. Section 675(1)(a)(iii) permits an appeal on any ground not mentioned in the other subsections (which basically require a question of law alone or question of mixed law and fact). The suggestion contemplated herein would merely make explicit one special ground of appeal relating to a miscarriage of justice. Given that section 686(1)(a)(iii) now permits the court of appeal to allow an appeal "on any ground there was a miscarriage of justice", the opening of the appellate doors for a consistent purpose seems to be both a modest and reasonable suggestion.

(ii) A Structuring and Rejuvenation of Executive Powers

The second recommendation deals with the utilization of the type of powers presently available under sections 690 and 749, to order appellate review and to grant a pardon, respectively. Given the first proposal for an expanded right of appeal, the Minister of Justice would have fewer occasions when section 690 would have to be invoked. Nonetheless, it is not suggested that such discretionary authority be dispensed with entirely. Rather it should be relegated to a less prominent place among the devices available for the correction of injustice and should be circumscribed by declared guidelines. As it stands, the *Charter* may already require that the refusal of a Minister to exercise his section 690 powers is reviewable by the courts,[112] at least with respect to the process followed by the Minister.

The other of the devices forming the bases of entitlement under the Guidelines, the power of pardon has ancient roots. Duker traces the prerogative of mercy as far back as Mosaic, Greek and Roman law, but develops a detailed history from about 700 A.D. in England.[113] Canada retains a form of this power:

> Pursuant to sections 683 and 685 of the *Criminal Code*, a free pardon may be granted which will result in the person being deemed to have not committed the offence... Pardons may also be granted pursuant to the Letters Patent constituting the Office of the Governor General.[114]

Applications for the Royal Prerogative of Mercy are passed on to the National Parole Board for investigation and recommendation (pursuant to section 22(2) of the Parole Act) and the Governor

---

[112] See *Wilson* v. *Minister of Justice* (1985), 20 C.C.C. (3d) 206, 46 C.R. (3d) 91 (F.C.A.D.), leave to appeal to S.C.C. refused 62 N.R. 394.

[113] William F. Duker, "The President's Power to Pardon: A Constitutional History" (1977), 18 *W.M.L.R.* 475, 476.

[114] National Parole Board, *Briefing Book For Members of the Standing Committee on Justice and Solicitor General*, v.1, (November, 1987), 64.

in Council or the Governor General may finally pardon persons convicted of offences.[115]

There are several conceptually different uses to which the prerogative of mercy is put, which sometimes cause confusion if not separated clearly. "Sometimes, the aim of the pardoner is to be merciful, by declining to exact the full penalty. . ."[116] Occasionally the public interest is "no longer furthered by having an offender serve the full penalty that the law has imposed".[117] Finally, and most importantly for this paper, the pardoning power is an acknowledgement of the fallibility of the judicial process, ". . . that the rules of procedure and evidence do not always give rise to a correct decision about guilt or innocence. . ."[118] In this latter case, it is maybe more appropriately called "the prerogative of correcting judicial mistakes".[119] It is argued that, even with expanded rights of appeal, injustices will be done and that this executive safety net must be retained.

The problems with all similar executive power are revisited in the prerogative of mercy, despite its benevolent potential. There is the prospect of abuse by an unethical minister.[120] In Canada, particularly with the regular interposition of the National Parole Board, such a spectre does not loom as threateningly. However, the published guidelines for the deployment of this special executive jurisdiction are slim indeed, although the Parole Board defends this vagueness:

> Given its exceptional nature, the Royal Prerogative of Mercy cannot be exercised realistically by strict adherence to rigid criteria. However, general guidelines have been developed in order to structure decision-making.[121]

Especially as under the new Federal-Provincial Guidelines the pardon will also begin serving compensatory purposes, the time has come for some rethinking of this power. No less in Canada than in Britain, as one observer recently remarked, "the principles

---

[115] In its Report for the fiscal 1982-83 year, the National Parole Board noted, at page 49, that pardons were granted in 14 cases and 7 applications were denied. In 1983-84, the Board cited 17 pardons and 10 denials, at page 48. Of course, the Royal Prerogative is to be distinguished from the statutory pardon under the *Criminal Records Act*, which is used with far greater frequency (275 pardons granted in 1983-84, according to the Parole Board Report) and which does not relate to the issue of whether the conviction was wrongful.

[116] A.T.H. Smith, "The Prerogative of Mercy, The Power of Pardon and Criminal Justice", [1983], *Public Law* 398, 398. See also William C. Hodge, "The Prerogative of Pardon", (1980), *N.Z.L.J.* 163.

[117] Smith, *supra* note 116, 399.

[118] *Id.*

[119] Hodge, *supra* note 116, 163.

[120] See *supra* note 113, 535-538. Also, Leonard B. Boudin, "Presidential Pardons of James R. Hoffa and Richard M. Nixon: Have the Limitations on the Pardon Power Been Exceeded?" (1976), 48 *U.Colo.L.Rev.*, 1.

[121] *Supra* note 114, 66.

according to which justice is administered should be openly articulated and where necessary defended."[122] The manner of presenting such principles should retain some flexibility, but there should be an overriding dedication to being thorough and open. It may be that a careful ministerial statement made in Parliament and available to convicted persons would be the best vehicle to deal with this way of compensating the wrongfully convicted. Better reporting of both pardons and denials would also assist.

With enhanced rights of appeal and ministerial reference powers and a prerogative of mercy invigorated by the duty of publication, convicted persons would have increased chances to have a conviction reversed or to obtain a pardon, which are the two major procedural strains under the *Covenant.*

The changes proposed above become all the more important when one recalls that the Guidelines adopt quite strictly as eligibility criteria a free pardon under Section 749(2) or an acquittal pursuant to a Ministerial reference under Section 690(b). The Guidelines also stipulate that a new or newly discovered fact must have emerged, tending to show that there has been a miscarriage of justice, obviously again precluding recovery where there has been a reversal as a result of a regular appeal. To further narrow the range of eligible claims, the Guidelines demand that the pardon includes a statement that the individual did not commit the offence or that the Appellate Court acting on a reference makes a similar finding. The Guidelines do not propose any amendments with respect to either pardons or references.

The only sign of flexibility in the Guidelines appears in their willingness in Part B to allow the individual to be considered eligible for compensation in some cases where sections 749 and 690 do not apply. The example chosen in the Guidelines mentions the situation of an acquittal being entered by an Appellate Court after an extension of time. There the Guidelines provide that compensation should be payable if an investigation shows that the individual did not commit the offence. That this provision allows for some relaxation of the otherwise rather harsh standards of the Guidelines is to be welcomed. However, it would be preferable had the Guidelines started out by permitting compensation on a more liberal basis, or, failing that, had they proposed a liberalization of the appeal provisions in the Code and generally provided for higher levels of visibility and predictability in the use of the pardon and reference powers.

(iii) Alternative Approaches

The foregoing discussion on the main avenues of access to compensation under the *Covenant*, admittedly approaches the procedure through fairly conventional channels. It would be advisable to remain somewhat skeptical about the role of courts or ministers in the determination of the issue of compensation. Later, it will

[122] Smith, *supra* note 116, 428.

be argued that actual quantum of compensation could perhaps best be determined by an Imprisonment Compensation Board, but it should not be assumed that such alternative structures would be wholly inappropriate to involve in the threshold matters explored in this section as well. It is surely obvious that a Minister of Justice is also an elected official with partisan interests. Of course, in many instances these very features of his or her responsibilities may augur well for the wrongfully convicted person. Public pressure may build to the point where a Minister feels that a positive response is necessary to a plea for a pardon or a reference to a Court of Appeal. On the other hand, some cases may not become *cause célèbres* or worse, may be the focus of antipathy despite their merits. In these instances a Minister may be reluctant to use any extraordinary powers. Similarly, Courts of Appeal are fettered with respect to the tasks at hand. They are, by their membership and function, very cautious institutions. They may be reluctant to interfere with matters which have already apparently been settled by trial courts or previous appellate review. They may, in the absence of a statutory directive to the contrary, be hampered by strict codes of evidence and procedure. Given that cases may come to a Court of Appeal either at the direction of the Minister of Justice or by way of an as-of-right application for leave to appeal by a convicted person, these reservations about the courts' performance of the unusual tasks at hand in reviewing a potential miscarriage of justice may become further barriers to redress.

One response to both types of problems may be to simply expand the jurisdiction of an Imprisonment Compensation Board to permit it to actually investigate cases where there is a reasonable suspicion that a miscarriage of justice has occurred. This would be a major departure from the existing patterns of dealing with these matters and could encounter division of powers problems.[123] Nonetheless, with some of the above changes being made in the rules of appellate

---

[123] The Task Force Report, *supra* note 9, 43 provides the following caution:

> There would appear to be very serious constitutional difficulties in having a tribunal, board or designated person determine the question of innocence in respect of a criminal conviction if they are not already superior, district or county court judges. The determination of innocence is inexorably tied up with section 96 of the *Constitution Act, 1867*. The function of determining guilt (and by extension innocence) was performed at the time of confederation by country, district or superior court judges. Since *McEvoy* v. *Attorney General of New Brunswick* (1983), 1 S.C.R. 709, section 96 is known to bar alterations to the constitutional scheme envisaged by the judicature sections of the *Constitution Act, 1867*.
>
> Justice, in its 1989 Report, *Miscarriages of Justice*, *supra* note 8, 69, makes a similar suggestion for the establishment of an independent review body, which would have powers to "advise the Home Secretary either not to intervene or to invoke the Royal Prerogative in order to remit the sentence or to set aside the conviction." Justice circumvented the problem of the body being an alternative Court of Appeal by recommending (at page 71) that it not have a power to quash a conviction or alter a sentence, but only to "establish the truth in a case and to advise the Secretary of State accordingly." This conceptualization of the tribunal might obviate some federal-provincial difficulties.

courts and powers of clemency, such a body ought not to have an enormous caseload. Further, its comparative flexibility and special purpose might well lead to the earlier discovery of injustices.

5. "On the ground that a new or newly discovered fact . . . unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him"

The first part of this portion of Article 14(6) demands that the reversal or pardon must have been the result of a fact previously unknown to the court which found the accused guilty and sentenced him or her. The second aspect of this part of the Article, as paraphrased above, demands that the non-disclosure not be attributable at all to the accused.

It should be reiterated that nothing prevents the appropriate government(s) from extending the entitlement to compensation beyond that mandated by the *Covenant*. Neither the Human Rights Committee nor any other body could criticize Canada for being more liberal in its interpretation of its *Covenant* obligations or providing rights superior to these standards. Particularly with respect to the second section part of this portion of Article 14(6), the Guidelines may well indicate such a softening, as will be seen.

(i) "On the ground that a new or newly discovered fact"

Payment of compensation under the *Covenant* turns on the reversal or pardon being due to a new or newly discovered fact. The Task Force Report proclaims this element as being "straightforward"[124] and in a sense this phrase is readily interpretable from the text of the *Covenant* as simply requiring the change in verdict to be the result of new evidence. There is nothing objectionable about previously unknown facts now overturning a finding of guilt. However, the Task Force Report and for that matter the *Covenant* itself may cause some discontent in the demand that the pardon be of *this* special character, rather than being fully or partially attributable to other factors. Perhaps it is contemplated that other reasons for judicial error will be uncovered sooner and in conventional proceedings, but is this always a safe assumption? For example, it could be that the tribunal had all the facts before it, but none the less returned the wrong verdict due to extraordinary community pressure for a conviction. The court would have heard all the evidence and everyone would be implicitly aware of the social context of the trial, but a mistaken verdict could still ensue.

> Public pressure, then, is a two-edged sword. It may be democratic pressure for social and criminal justice, or it may simply reflect public vengeance and fears, easily manipulated by demagogues who are ready and willing to oblige.[125]

This illustration may seem strained particularly as it could be said that a reinterpretation of the social climate of the trial would

---

[124] *Supra* note 9, 22.

[125] Huff, *et al.*, *supra* note 7, 531.

be a "newly discovered fact". Further, it is likely that nearly all findings of guilt overturned outside the usual appeal process will be able to be classified as deriving from new facts, consistent with the wording of the *Covenant* and the thrust of the Report. The point of this reservation is that some residual clause ought to be inserted in any scheme providing for compensation for the unjustly convicted, thereby providing that the reversal or pardon may have been obtained "on the ground that *either* a new or newly discovered fact *or any other factor* shows. . . ." This amplified basis would be more consistent with an overall dedication to providing compensation for wrongfully convicted persons.

The Guidelines take a stricter approach to the issue and insist that the pardon or acquittal be based upon a new or newly discovered fact, tending to show that there has been a miscarriage of justice. No new explanation is given in the Guidelines, so it is a fair inference that the ministers merely adopted the reasoning of the Task Force Report. This may seldom be a problem, as has been seen, but it would be relatively simple to broaden the basis for recovery. Finally, it is at least of historical interest that one of the initial drafts of the Article providing for compensation for wrongful conviction made no reference to the present requirement for the reversal or pardon being due to a new or newly discovered fact.[126]

(ii) ". . . unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him"

According to the Task Force Report, this final phrase in the text of Article 14(6) appears to remove any entitlement to compensation if blame for the non-disclosure of the material new fact is to be laid partly or fully at the feet of the accused. Thus, the Report remarks that the *Covenant* has adopted "a very hard line in respect to blameworthy conduct"[127] and it recommends that not all such behaviour should automatically bar a person from obtaining redress. In the more moderate view of the Report, the accused's actions should be evaluated and compensation still awarded, assuming that there is not a complete erosion of the claim on this basis. The Guidelines seem to be sympathetic to the tenor of these observations in the Report, as will be seen.

It is a pity that the drafters of the *Convention* did not go on to add the logically appropriate clause to the Article, "in which case compensation may be eliminated or reduced commensurately". However, the implication of this addendum to the Article by Canada is consistent with its apparent purpose. The stricter construction of the text of the Article does not allow for this approach. Thus, it might be maintained as a proposition that every non-disclosure is "partly attributable" to the convicted person: private investigators should have been hired, more astute counsel should have been chosen, immaterial matters should not have been lied about thereby

---

[126] *Supra* note 95.
[127] *Supra* note 9, 30.

causing the accused's credibility to be questioned, testimony should have been more forceful, articulate or coherent and so on. The text of the Article should not be used as a justification for permitting disentitlement for minor falls from judicial grace, which may be wholly beyond the reasonable grasp of the accused. Further, a careful examination of the development of Article 14(6) demonstrates that additional support for this more flexible attitude in Canada might have been found in some of the framers. One of the preceding versions of the Article provided that there should be no entitlement to compensation "if the miscarriage of justice causing his conviction were in any way attributable to his own neglect or misconduct."[128] When some discussants objected that it was "difficult to conceive of" such a situation, the present phrase was substituted on a relatively close vote.[129]

Fortunately, the Report does adopt a more sympathetic line in, for example, its observation that the accused "may be very nervous and tense and as a result may not act as one might otherwise expect or in his best interest".[130] Moreover, the overall conclusion of the Report is that Canada's best course is to merely discount awards where appropriate, which is quite satisfactory.

It is not unreasonable to provide support for the prospect of 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 extent of a 10% reduction of the total award? Finally, the spectre of the state simultaneously 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 or rationale reducing state liability should be reserved for the fraudulent claimant or the reckless participant in a criminal trial. Nonetheless, this feature of a compensation scheme should not be used to punish the naive, the youthful, the feeble-minded, the powerless, the members of racial minorities, the frightened, or the stigmatized, among others. 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

---

[128] *Supra* note 86, para. 218, 32 of the 1952 Session.
[129] *Id*, 32, para. 219.
[130] *Supra* note 127.

should not allow the importance of the victim's conduct to be overblown.

The Guidelines evince cognizance of these arguments on the ostensibly unyielding nature of the *Covenant*. Firstly, the narrow issue of non-disclosure and responsibility for such conduct is not mentioned explicitly. Secondly, there is nothing in the eligibility provisions to indicate disentitlement based upon the behaviour of the wrongfully convicted person. Thirdly, the reference to "blameworthy conduct or other acts on the part of the applicant" which have "contributed to the wrongful conviction" occurs only in the short list of factors to be taken into account in determining quantum, thereby leaving open the prospect of merely having one's award diminished rather than eliminated. In this sense, the Guidelines have refined and improved one of the more severe aspects of Article 14(6).

6. "shows conclusively that there has been a miscarriage of justice"

(i) The Elusiveness of "Miscarriage of Justice": One Way Out of the Dilemma

The authors of the Federal-Provincial Task Force Report appropriately portray this part of Article 14(6) as "the cornerstone of the right to compensation created by the *Covenant*",[131] although the Guidelines do not advert specifically to the *Covenant* and use this phrase only once. Giving a definition to "miscarriage of justice" is no easy exercise.[132] However, rather than having been constrained by this inherent difficulty of conceptualization, it may be that giving full effect to the phrase for compensatory purposes is just too daunting for current policy makers and possibly for the public at large.

It is clear from an examination of the few cases which have attempted to analyse of the notion of miscarriage of justice that the phrase is used to label many different types of judicial errors. As was commented in one American case, "The phrase 'miscarriage of justice' has no hard or fast definition".[133] Indeed many United States cases go on to say that this phrase:

> does not merely mean that a guilty man has escaped, or an innocent man has been convicted, but is also applicable where an acquittal or conviction has resulted from a form of trial in which the essential rights of the accused or the people were disregarded.[134]

In Canada, two *Criminal Code* provisions contemplate miscarriage of justice. Section 686(1)(a)(iii) permits an appeal to be allowed

---

[131] *Supra* note 9, 22.

[132] *The Task Force Report*, 22, refers to the element of miscarriage of justice as being "considerably more complex" and "the source of considerable concern and discussion".

[133] *People* v. *Geibel*, 208 P. 2d 743, 762; 93 Cal. App. 2d. 146 (1949).

[134] *People* v. *Wilson*, 138 P. 971, 975; 23 Cal. App. 513 (1913).

"on any ground there was a miscarriage of justice." One of the few Supreme Court cases on point recently stated:

> A person charged with the commission of a crime is entitled to a fair trial according to law. Any error which occurs at trial that deprives the accused of that entitlement is a miscarriage of justice.[135]

The other provision, section 686(1)(b)(iii), is curative in nature and appears "to have no application where an appeal against a conviction is based on a miscarriage of justice."[136] As was noted in *Fanjoy*, the proviso has a special function:

> It is not every error which will result in a miscarriage of justice, the very existence of the proviso to relieve against errors of law which do not cause a miscarriage of justice recognizes that fact.[137]

Judicial comment on the concept has not significantly clarified it. The cases seem "to indicate a basic division within the appellate judiciary itself as to what values are fundamental."[138]

The Federal-Provincial Task Force Report recognized the breadth and inferentially the indeterminacy of the concept of miscarriage of justice. The Report identified the two interpretative possibilities: (i) unjust conviction being able to be found regardless of whether the person did commit the offence or (ii) the label of "unjustly convicted" only attaching to the person who did not commit the offence, where the person was "in fact, innocent".[139] The Report concluded that compensation should be available only upon proof of innocence: proof that the party did not commit the offence, or that he or she did not commit the acts for which a conviction was entered, or that the acts did not constitute an offence or that the acts charged were not committed. Despite the foreignism of establishing innocence to our system of criminal justice, the authors of the Report thought this alternative appropriate, as the claimant would be seeking compensation and as other similar jurisdictions take a comparable stance.

In the Guidelines the only reference to miscarriage of justice is that the new fact must tend to show that there has been a miscarriage of justice. It is clear from several references that the same position was adopted as was seen in the Report:

---

[135] *Fanjoy* v. *The Queen* (1985), 21 C.C.C. (3d) 312, 318, per McIntyre, J.

[136] *R.* v. *Hayes* (1985), 67 N.S.R. (2d) 234, 236.

[137] *Supra* note 135.

[138] ". . . the apparent degree of inconsistency [in the application of the proviso] is cause for concern. It invites, if not cynicism, then at least wry parody of a kind indicated in the following question put to a Court of Appeal judge at a lawyer's workshop: "What is the greatest miscarriage of justice in an appeal that your Lordship has ever dismissed under the 'no substantial miscarriage of justice' proviso?" See Ronald R. Price and Paula W. Mallea, "Not by Words Alone: Criminal Appeals and the No Substantial Miscarriage of Justice Rule", in Del Bueno, ed., *Criminal Procedure in Canada*, (Toronto: Butterworths, 1982), 453, 494.

[139] *Supra* note 9, 22.

> . . . compensation should only be granted to those persons who did not commit the crime for which they were convicted, (as opposed to persons who are found not guilty). . .[140]

It is also specified in the Guidelines that any pardon or favourable verdict following a ministerial reference or an appeal beyond time limits would have to include a statement that the person did not commit the offence.[141] This view of the content of miscarriage of justice should be expanded.

Both documents insist that a distinction be made between two broad types of acquittees: those found not guilty on legal grounds and those who are somehow truly unjustly convicted as they were "in fact, innocent" where the initial verdict has been overturned through sections 690 or 749. These are not categories which are readily distinguishable legally. Indeed, adverting to the meaning given by the judiciary to miscarriage of justice, the distinction does not seem quite viable. The compartmentalization present in the Report and Guidelines calls into question the basic meaning attributed to a not guilty verdict, inviting a hierarchy of acquittees. As Lamer, J. noted in *Grdic* v. *R.*,[142] there are not two different kinds of acquittal in the Canadian system and "To reach behind the acquittal, to qualify it, is, in effect, to introduce the verdict of 'not proven', which is not, has never been and should not be part of our law."[142a]

It is argued that persons who have been wrongfully convicted and imprisoned are *ipso facto* victims of a miscarriage of justice and should be entitled to be compensated. To maintain otherwise introduces the third verdict of "not proved" or "still culpable" under the guise of a compensatory scheme, supposedly requiring higher threshold standards than are necessary for a mere acquittal. As Professor MacKinnon forcefully maintains:

> . . . one who is acquitted or discharged is innocent in the eyes of the law and the sights of the rest of us should not be set any lower. . . There is a powerful social interest in seeing acquitted persons do no worse than to be restored to the lives they had before they were prosecuted.[143]

The requirement of the Report and Guidelines that the claimant must prove that he or she falls into the special stream of not guilty persons who are truly innocent exacerbates an already unfair situation. The concession that innocence would only have to be demonstrated on a preponderance of evidence does not alleviate the affront otherwise offered to the status of the not guilty.

---

[140] See Appendix A. Section B(5), 2.

[141] *Id.*

[142] *Grdic* v. *R* (1985), 19 C.C.C. (3d) 289 (S.C.C.).

[142a] *Id.*, 293.

[143] *Supra* note 35, 497-498.

(ii) A Presumptive Direction for Compensation

Attention has been focussed on the extreme cases, where the state error is uncovered with the aid of extraordinary procedures, because this represents the most universally acceptable stratum for compensatory purposes. The question remains, wherever the boundary line is drawn, as to how to deal with a claim for compensation in a procedural sense. Should the person be forced to prove his or her innocence as the Report and Guidelines mandate or should a more liberal stance be taken?

The often used device of presumptions may serve to provide a viable median in the difficult matter of establishing that compensation should flow. Enough ink has been spilt on defining "presumption". Its use here is intended to be simple:

> Whether one calls a presumption a rule of evidence or of reasoning, the result is the same; in the absence of enough evidence the rule, however classified, will dictate the result.[144]

The presumption could be twofold: (1) that the person whose conviction is overturned is *ipso facto* wrongfully convicted or is a victim of a miscarriage of justice (2) this unjustly convicted (and imprisoned) person would be presumptively entitled to compensation upon application. The presumption of a right to compensation would be able to be displaced at a special proceeding convened at the instance of the Crown, wherein the Crown would have to establish that both limbs of the presumption have been shown to be inapplicable on a preponderance of evidence. If the Crown succeeded in displacing the first part of the presumption, it would be in a position to argue for a reduction or elimination of compensation, but the wrongfully convicted person would then still have the ability to show, on the civil standard, that he or she ought to receive compensation, albeit now without the benefit of the presumption.

This formulation has a number of attractions. It helps sustain the presumption of innocence and allows every wrongfully convicted person to continue to benefit from that presumption for compensatory purposes. It avoids the systemic ignominy of requiring a wrongfully convicted person to prove his innocence as is decreed in the Report and is implicit in the Guidelines. It forces the Crown to prove that the twin presumptions of innocence and of a right to compensation should no longer operate and that there should be a partial or full disentitlement. It avoids having to give a hard definition to the notions of wrongful conviction or even more elusively, to miscarriage of justice. It is more consistent with the language of the *Covenant* to provide an entitlement to compensation ("shall be compensated") which can be removed only upon proof of the inapplicability of the presumptions suggested here. Canada would thus be, if not in the vanguard, at least beyond the stragglers.

---

[144] James C. Martin and Scott C. Hutchison, *The Presumption of Innocence*, (Toronto: Carswell, 1987), 14.

On the other hand, it must be recognized that a disentitlement proceeding would explicitly be questioning the plenitude of the accused's innocence. In a sense, the validity of an appellate proceeding or a pardon would be being scrutinized and some issues could be relitigated. Would this be too great a price to pay, given that the suggestion for the presumption and disentitlement formulation arose out of a prediction that some compromise was inevitable? The author is inclined to say that even recognizing the costs the proposal is the most viable alternative.

7. "the person who has suffered punishment as a result of such convictions"

In the recent Report of the Canadian Sentencing Commission, a distinction is made between sentencing ("the judicial determination of a legal sanction to be imposed on a person found guilty of an offence"[145]) and punishment ("the imposition of *severe* deprivation on a person found guilty of wrongdoing . . . associated with a certain harshness" and "not to be confused with a mere 'slap on the wrist').[146] Although the Commission concedes that all sentencing connotes obligation or coercion, only the more severe forms of coercion are seen as being identical with punishment. The Commission cites "an absolute discharge and, to a lesser degree, a restitution order without any punitive damages"[147] as instances of sentences which do not impose severe enough deprivation to be called punishment. While this author may have preferred an identification of sentencing with punishment and while it could be said that the definitional work of the Commission was influenced by their own ends (to give priority to the notion of obligation over punishment), the conception of punishment promulgated by the Commission is useful for present purposes. It would seem to contemplate punishment as including, for example, a fine, most probation orders and obviously any incarceration. This somewhat restricted definition of punishment is appropriate when examining Canada's responsibilities under the *Covenant.* The Task Force Report accepts this outlook on punishment and states quite unequivocally:

> In our view any compensatory scheme which requires imprisonment as a prerequisite for compensation would likely fail to satisfy Canada's obligation under the *International Covenant.*[148]

It is most regrettable, therefore, that without any explanation the Guidelines specify in Section B(1) that "The wrongful conviction

---

[145] *Sentencing Reform: A Canadian Approach, Report of the Canadian Sentencing Commission,* (Ottawa: Canadian Government Publishing Centre, 1986), 115.

[146] *Id.*, 109.

[147] *Id.*, 115.

[148] *Supra* note 9, 25. It is also noteworthy that the new British scheme does *not* require imprisonment. See s. 133(6). For the purposes of this section a person suffers punishment as a result of a conviction when sentence is passed on him for the offence of which he is convicted.

must have resulted in imprisonment, all or part of which has been served." A broader interpretation should be given to the phrase than Canada now finds acceptable. If the reservation is cost, then one may observe that the actual incidence of claims may be quite low. Further, other techniques could be used to hold down expenditures, such as statutory maxima for certain types of punishments or costs associated with the conviction and release.[149]

8. "shall be compensated according to law"

To ensure that compensation will be paid in appropriate cases and given the obligations imposed by Section 2 of the *Covenant* the status quo without a legislative foundation is unacceptable. In addition, scrutiny of some of the discussions in the United Nations which led to the promulgation of Article 14(6) of the *Covenant* demonstrates that the parties clearly intended that legislation should be adopted. In rejecting *ex gratia* payments, the Task Force Report reflected these principles: the wrongfully convicted person "... should be entitled *by legislation* to make a claim for redress against the state, as of right"[150] [emphasis added]. Again, the Guidelines are disconcerting and to some degree sustain the undesirable features of the present *ex gratia* regime.

Basically, they provide that when a person meets the eligibility criteria, the appropriate Minister responsible for criminal justice "will undertake to have appointed a judicial or administrative inquiry to examine the matter of compensation".[151] The relevant government "would undertake to act on the report submitted by the Commission of Inquiry".[152] Would this procedure be sufficient to satisfy Canada's obligations under the *Covenant* and particularly Articles 14(6) and 2? The short answer is that the Guidelines are probably inadequate.

Firstly, it should be noted that the Canadian Guidelines are very similar to the former and current regime in the United Kingdom. In 1985, proposals for a statutory scheme of compensation were rejected and a modified *ex gratia* program was introduced in the form of a Ministerial statement in Parliament.[153] It provided that in some cases of wrongful imprisonment compensation would be payable. The Minister would be bound by the decision of an independent assessor concerning quantum. The scheme was said by the Government to meet international obligations in spirit and purpose, but was not so viewed by commentators:

> ... the revised scheme clearly fails to meet the U.K.'s international obligations.[154]

---

[149] See *supra* note 88: 961st Meeting, 19 November 1959, para 8, 260; 965th Meeting, 23 November 1959, para. 3, 275; 967th Meeting, 25 November 1959, para. 37, 287.

[150] *Supra* note 10, 26.

[151] See Appendix A, Section C, p. 2.

[152] *Id.*

[153] *Supra* note 41.

[154] *Supra* note 15, 498.

In the *Criminal Justice Act, 1988*,[155] the British government ostensibly "put on a statutory basis the payment of compensation for miscarriages of justice."[156] The new procedure requires a determination of eligibility by the Secretary of State and again provides for an assessor to determine the amount of an eligible claim. Again, the response by Justice has been unenthusiastic:

> We also welcomed the Government's change of mind in agreeing to introduce a statutory scheme.... However, the details of the scheme were disappointing. It would only extend to convictions overturned after an appeal out of time, or after a reference back to the Court of Appeal.... The present *ex gratia* scheme would continue to be used for all other kinds of miscarriages of justice which qualify for compensation.... The continued existence of two schemes seems to us to be illogical and unsatisfactory and we will continue to press for a change.[157]

As was discussed, the Canadian Guidelines are subject to many of the same criticisms levelled against the British position on the issue of whether compensation is payable thereunder "according to law". There is no statutory base (which at least the British have come recently, if half-heartedly, to accept) and there are still broad discretionary powers at all levels of the scheme. Even assuming the eligibility criteria are satisfied and an inquiry states that compensation should be paid, under the Guidelines the relevant level of government would have only undertaken "to act on the report". Thereby the government implicitly preserves some right if not to reject the recommendation, at least to interpret it in a manner contrary to the claimant's interest. There may be some expanded right of judicial review in Canada compared to the United Kingdom, but this does not alter the fundamental character of the Guidelines. They do not create an obligation with the force and predictability of an appropriate statute.

9. The Payment of Compensation: Forum and Quantum

(a) Forum

In a previous section the questions of which entity should make the determination that a person should have his or her conviction reversed or that there should be a pardon were discussed. It was suggested that an Imprisonment Compensation Board might be the appropriate forum for such determinations. Additional research should be undertaken particularly on the relevance of the jurisprudence related to s.96 of the *Constitution Act, 1867* and the more practical concerns of intergovernmental relations. However, even assuming that the basic decisions have been taken with regard to

---

[155] *Supra* note 80.

[156] *Halsbury's Statutes Service: Issue 24, Criminal Justice Act 1988, Volume 12, Criminal Law*, 290.

[157] (1988) *31st. Annual Report, Justice*, the British Section of the International Commission of Jurists, (London: 1988), 28.

the qualifying conditions for compensation, the question remains as to who should make the final decision on the amount to be paid on the claim?

The Task Force Report reviewed[158] three basic alternatives without directly advocating a specific choice: the civil courts, a special board or tribunal and the Court of Appeal which also may have considered a reference case. The existing courts were seen as having the advantages of experience in damage awards and incurring little or no costs. The boards or tribunals were viewed as being familiar devices to governments, although perhaps having been too frequently resorted to. The Courts of Appeal were noted as possibly objecting to having such an original jurisdiction and being inappropriate where there has been a pardon as opposed to a decision by a court.

In Section C (*Procedure*) of the Guidelines a somewhat elastic position is adopted:

> When an individual meets the eligibility criteria, the Provincial or Federal Minister Responsible for Criminal Justice will undertake to have appointed, either a *judicial or administrative inquiry* to examine the manner of compensation in accordance with the considerations set out below. [Emphasis added]

The Guidelines do not provide any further explanation of what is intended by this section. They would appear to preclude using the regular civil courts or the Courts of Appeal, if not their judicial personnel. On the other hand, it is apparent that the Guidelines do not envisage the establishment of a permanent board or tribunal and rely instead on *ad hoc* inquiries.

In the United Kingdom, a similar approach has been taken, criticized and then reaffirmed by the Government. There, the position of the wrongfully convicted person seeking compensation has been the subject of several Explanatory Notes,[159] Parliamentary statements,[160] and finally legislation,[161] the net result of which leaves the decision on eligibility with the Secretary of State, albeit latterly with compensation being assessed by an assessor appointed by the Minister. Over the years the whole framework for treating such cases has been the subject of trenchant criticism by organizations and, independent observers[162] and even Parliamentary Committees,[163] but to no avail, as the traditional approach was upheld.[164]

---

[158] *Supra* note 9, 26-27.

[159] See Home Office Letter to Claimants, Appendix C of the Justice Report, *supra* note 5, 31-32.

[160] See the November 29, 1985 statement, *supra* note 41.

[161] *Supra* note 80.

[162] For example, the Criminal Bar Association (Sixth Report from the Home Affairs Committee, *supra* note 47, vi-viii, *et seq.*) and apparently the Prison Reform Trust and the Labour Party Civil Liberties Group have joined in these criticisms (See November 29, 1985 statement, *supra*, note 41, 1.)

[163] In their *Sixth Report*, *id.*, xi, the Committee recommended that all qualifying petitions be referred to an independent review body charged with advising the Home Secretary.

It is regrettable that Canada has chosen a path which to many has been discredited in the United Kingdom.

In proposing the creation of an Imprisonment Compensation Board, one is mindful of the questions concerning the breadth of interests which should be protected and be the subject of compensation by the state. It is consistent with the focus herein that the Board be mainly concerned with those who have been imprisoned. However, the jurisdiction of the Board could readily be expanded if the decision were made to compensate a wider range of claimants.

The reasons for using an independent tribunal for the assessment of damages are not dissimilar to those which might have been cited in the creation of similar entities in other contexts. An extensive debate should be commenced on the rationale for the utilization of a tribunal in Canada, although it is not proposed to explore these controversies now.[165] Briefly, the argument would hold that decisions on compensation ought *not* to be left with a legislative body. Such questions are too fact-specific and may be peculiarly subject to political sensitivities, which might prejudice a claim. Having set broad principles in legislation, the job of interpretation in individual cases should be delegated. Flexibility should be maintained in the assessment of applications, which a tribunal may exhibit more readily than a superior court or legislature. A specialized tribunal would at least have the prospect of being innovative or even experimental in its decisions on the entitlement of victims of miscarriage of justice. Finally, speed in handling claims should be the hallmark of any structure set up to deal with this kind of problem.

Some type of review should be available to both the claimant and the state, although it should not be of a ministerial character. Rather, the legislation should provide for a mechanism for errors of fact and law to be re-examined, perhaps by another parallel panel of assessors or more obviously by an appellate branch of the tribunal. Judicial review for jurisdictional error, abuse of discretion or breach of natural justice should not be precluded. Experience in other realms might illuminate an appropriate hierarchy of decision makers. In these recommendations on reviewability, the Task Force Report mainly concurred, adding that the "final decision on compensation (presumably following appellate

---

[164] Therefore, the *Government Reply to the Sixth Report* from the Home Affairs Committee, Session 1981-82 HC 421, para. 15 contains the conclusion "that it [the Government] should not establish an independent review body as proposed by the Committee." This stand was reiterated in 29 November, 1985 letter to Justice, which commented at page 2 upon the contemporaneous Ministerial statement: "We have seen no strong case for creating an independent body to decide on whether and how much compensation should be paid."

[165] Most administrative law texts will address these issues. For example, see Jones and DeVillars, *supra* note 69, especially Chapters 3 and 4.

review) would be binding on the Crown who had initiated the prosecution."[166]

As usual, in Canada there are delicate questions relating to division of powers issues which must be kept in mind in any recommendation. Article 50 of the *Covenant*[167] and an overriding concern with the purposes of Article 14(6) suggest that such matters ought not to obstruct a workable mechanism for compensating the wrongfully convicted. The Task Force Report suggests dovetailing legislation[168] as a way of avoiding any impasse. Given that the Guidelines were adopted by Federal *and* Provincial Ministers responsible for criminal justice, there would seem to be a sufficiently strong consensus already that joint legislative action is not an unreasonable expectation.

(b) Quantum

The Report and Guidelines provide a framework within which to consider issues pertaining to the quantum of compensation. However, before commencing any analytical chores and as a type of invocation, a few extracts from *Thomas* provide some sense of spirit and purpose.

> 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.[169]
>
> His [Mr Thomas'] courage and that of a few very dedicated men and women who believed in the cause of justice has exposed the wrongs that were done. They can never be put right.[170]

Finally, aptly reiterated at this juncture is the keynote sentence for the Thomas Report:

> Common decency and the conscience of society at large demand that Mr. Thomas be generously compensated.[171]

(i) Limiting Factors

The Guidelines specify in Section D(2) that assessments are to take into account "Blameworthy conduct or other acts on the part of the applicant which contributed to the wrongful conviction." and "Due diligence on the part of the claimant in pursuing his remedies." It has been noted that the Guidelines are progressive in the sense that they remove the disentitlement specified in the

---

[166] *Supra* note 9, 41. See also page 34 of the Report: "We favour the view that an appeal or judicial review, depending on the nature of the forum in which the award is made, be available to both the claimant and the state."

[167] "The provisions of the present Covenant shall extend to all parts of federal states without any limitations or exceptions."

[168] *Supra* note 9, 43.

[169] *Supra* note 4, 115, para. 484.

[170] *Id.*, 117, para. 492.

[171] *Id.*, 115, para. 486.

Covenant if non-disclosure of the unknown fact is attributable to the accused. However, the Guidelines tend to expand the range of conduct for which the claimant may be held responsible by the reference to "other acts. . . ." It is surely objectionable if wrongfully convicted persons are to be further penalized for what many people would say instead are serious systemic failures.

Although no explanation is given in the Guidelines for the insertion of the due diligence clause, it is apparently derived from a discussion in the Task Force Report. There, a statutory limitation period for filing claims was counterposed to a due diligence test as a pre-requisite to the granting of an award. The former device was seen as being "imposed for reliability purposes or simply to prevent stale claims."[172] The latter was posited as providing greater flexibility while still protecting "the Crown against stale claims which might be difficult to rebut due to the passage of time."[173] It is laudable indeed that the Report and Guidelines reject the limitation period. In the Report one finds adequate refutation of this technique of controlling the pool of claimants, when it is said that retroactive applications should be permitted:

> Fairness would suggest that anyone who was wrongfully convicted should be able to obtain redress, regardless of when convicted.[174]

What is puzzling is why this same liberal spirit did not continue to be in the foreground? The due diligence requirement is said to be less restrictive but it is no more appropriate when dealing with wrongful convictions. One cannot say what is demanded from the Report itself, but in considering the phrase the plight of the wrongfully convicted person should not be forgotten. Being incarcerated or recently released does not enhance one's credibility nor does it facilitate access to legal services to assist in gathering evidence in pursuit of a remedy. Indeed imprisonment may well break one's spirit, excising clumsily both insight and determination. Even if the wrongfully convicted person were able to overcome all of these barriers, what remedy would the mythical cool, rational, determined and financially able person pursue anyway? Surely the social context of the victim of a miscarriage of justice militates against the imposition of the due diligence requirement. The Crown does not need protection, as the Report urges and the Guidelines mandate. Paraphrasing the Report, fairness suggests that anyone who was wrongfully convicted should be able to obtain redress, regardless of the argument that he or she let a potential remedy go unpursued or looked for it in a dilatory fashion.

(ii) Non-pecuniary losses

Conventional portrayals of this category of damages usually include a list of headings as do the Report and Guidelines in Section D(1):

---

[172] *Supra* note 9, 34.
[173] *Id.*
[174] *Id.*, 35.

(a) loss of liberty and the physical and mental harshness and indignities of incarceration;
(b) loss of reputation which would take into account a consideration of any previous criminal record;
(c) loss or interruption of family or other personal relationships.

Other than for its brevity, this list is not seriously objectionable, although it does seem somewhat gratuitous to dictate that the assessment would take into account any previous criminal record. A more thorough and tailored set of headings might include:

(i) loss of liberty. This 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;
(ix) loss of social intercourse with friends, neighbours and family;
(x) physical assaults while in prison by fellow inmates and 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 the claimant's future, specifically the prospects of 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 social and psychological effects on the inmate. For the wrongfully convicted person, this harm is heightened, as it is hardly possible for the sane innocent person to accept not only the inevitability but the justice of that which is imposed upon him. 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 longer this distorting experience of prison 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 community must be very slim. Therefore, beyond the factors noted in this section, special levels of compensation need to be considered for this chronic social handicap. The Thomas Royal Commission explicitly recognized this theme:

> 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.[175]

In light of the foregoing, it is puzzling that the Guidelines in Section D(1) settle upon a ceiling of $100,000 as compensation for non-pecuniary losses, qualified only by the statement that the damages "*should* not exceed $100,000." [Emphasis added]. The Task Force Report had discussed the possibility of a ceiling, referring to the *Andrews* v. *Grand and Toy Alberta Ltd.*[176] case, a 1978 Supreme Court of Canada decision which held that $100,000 "[s]ave in exceptional circumstances, ... should be regarded as an upper limit of non-pecuniary loss in cases of this nature".[177] Surely *Andrews* should not apply. It was a case which arose out of a dispute between private parties, for personal injury in a traffic accident. *Andrews* is not an example of the state discharging a moral and legal duty to one of *its* victims. Even if the case were relevant, other portions of it would tend to assist the argument that there should be no upper limit on non-pecuniary losses for wrongful conviction and imprisonment:

> There is no medium of exchange for happiness. There is no market for expectation of life. The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one.[178]

Later in the decision,[179] some reference is made to the social burden of large awards, but these comments should not be a moderating influence in the context of wrongful conviction where presumably the instances requiring very substantial sums will be few in number. Beyond the inapplicability of *Andrews*, the Report itself provides reasons for such a limit not being imposed:

> — wrongful conviction and imprisonment ... is such a serious error that the state, ... should fully compensate the injured party;
> — the number of potential claims would appear to be small so that there is no justifiable fear of a drain on the public purse;
> — ... imposing a ceiling on the amount of the award would appear to be contrary to the general philosophy of wanting to provide redress for an injured party;
> — the state very rarely imposes a limit on the awards available resulting from damage to property. Limiting compensation in the case of unjust convictions could appear as if the state valued property rights to a greater extent than the freedom of its citizens.[180]

One should not expect that the ceiling mentioned in the Guidelines will be taken as a genuine upper limit by either a government or board seriously concerned with making an equitable award in an appropriate case.

---

[175] *Supra* note 4, 115, para. 487.
[176] (1978), 83 D.L.R. (3d) 452.
[177] *Id.*, 478.
[178] *Id.*, 475.
[179] *Id.*, 476.
[180] *Supra* note 9, 33-34.

(iii) Pecuniary losses

There will be considerable variability here, reflecting in part the person's skills and employability at the time of incarceration. One should still be cautious in assessing compensation. 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. . . .

The Guidelines indicate acceptance of the above headings. There is separate provision in Section D(3) for reasonable legal costs incurred by the applicant in obtaining a pardon or acquittal. It would presumably be a reasonable extension to add expenses with respect to the original trial and appeal and the compensation application itself, based on the belief that the wrongfully convicted person ought not to have to pay to defend himself or herself. One might also add that any payment for legal costs ought to be enough to ensure that lawyers are not positively discouraged from taking an interest in such time-consuming and challenging cases. There should be no ceiling, as it should be recognized that the worse the injustice, the more substantial will be the costs. To impose undue restrictions might be seen as penalizing the victim or obstructing his or her eventual vindication.

The Guidelines do not contemplate claims for even pecuniary losses by third parties to the wrongful conviction. A potential compromise between inclusion and exclusion of coverage for these persons could be to provide for pecuniary losses only. This is not ideal if one's aim is to provide full compensation to all the victims of a miscarriage of justice, but this solution would at least be more generous than the Guidelines.

E. Conclusion

This article has attempted to cover many vital issues concerning compensation of the wrongfully convicted. In so doing, it is certainly recognized that there is some danger of the discussion becoming too thinly spread. On the other hand, the present situation in Canada seems to drive one towards a comprehensive effort. Too little has been written on the subjects of who are the wrongfully convicted and how to provide redress for them. Governmental responses are also late and inadequate, compared to the significance of the problem. The main dedication of this article was and remains the plight of those who have been wrongfully convicted and imprisoned. However, it is conceptually awkward and dangerous to the overall

integrity of the criminal justice system to try to stop state responsibility at those junctures. Sound arguments can be made to extend compensation to wider ranges of potential claimants. Indeed, immersion in the rationale, international law and fundamental principles of compensation for the wrongfully convicted fairly compels one to support an extension.

In deciding upon the appropriate compensatory regime, there are now at least some base points in Canada. *The International Covenant on Civil and Political Rights* provides a relevant and authoritative standard upon which to found domestic legislation. Perhaps the *Covenant* could be more clearly drafted and in some places it is rigid and unsympathetic. None the less, it helps to organize discussion and it ought to inspire further governmental attention as well. The Federal-Provincial Guidelines provide some assurance that, if nothing else, wrongfully convicted people have been noticed by responsible ministers. In this paper it is hoped that the shortcomings of the Guidelines have been made fairly apparent. A re-evaluation should start at the level of first principle and, having done so, the prospects for liberalization and statutory protections should increase. The present Guidelines are plainly too narrow, rigid and discretionary and nowhere has there been adequate support given for this lamentable policy choice.

As the *Covenant* and Guidelines are reconsidered, it should always be remembered that any mechanism for redress, ". . . should be as responsive as possible to the injured party given that he [sic] is the victim of the state's criminal justice system".[181] Admittedly, these sentiments were put forth in the Report in support of a smaller range of claimants than the author would pose as appropriate, but the fundamental point of the state dealing with its own victims is succinctly made.

Once one accepts that the state has responsibilities flowing out of the failure of the system and its many actors, then compensation should flow fairly, generously and as of right. The spectre of injustice assumes terrible proportions in the wrongful convictions of people like Donald Marshall, Jr. or Arthur Thomas. The further failure to promptly and adequately compensate such citizens exacerbates the severity and shame of the actions of the state. However, miscarriages at the level of the verdict and subsequently when compensation is considered need not be of these historic proportions to spur governments to act. For every such horrific incident, thousands of other smaller injustices may be regularly perpetrated by the state in the criminal justice system. Compensation should be more readily available for those who have suffered more superficial wounds at the hands of the state and not merely for those who are the victims of society's worst outrages. The failure to address the position of the wrongfully convicted in a sensitive and principled manner should be a continuing embarrassment to Canada.

---

[181] *Id.*, 44.

APPENDIX "A"

GUIDELINES

The following guidelines include a rationale for compensation and criteria for both eligibility and quantum of compensation. Such guidelines form the basis of a national standard to be applied in instances in which the question of compensation arises.

A. RATIONALE

Despite the many safeguards in Canada's criminal justice system, innocent persons are occasionally convicted and imprisoned. Recently three cases (Marshall, Truscott, and Fox) have focussed public attention on the issue of compensation for those persons that have been wrongfully convicted and imprisoned. In appropriate cases, compensation should be awarded in an effort to relieve the consequences of wrongful conviction and imprisonment.

B. GUIDELINES FOR ELIGIBILITY TO APPLY FOR COMPENSATION

The following are prerequisites for eligibility for compensation:

1) The wrongful conviction must have resulted in imprisonment, all or part of which has been served.
2) Compensation should only be available to the actual person who has been wrongfully convicted and imprisoned.
3) Compensation should only be available to an individual who has been wrongfully convicted and imprisoned as a result of a *Criminal Code* or other federal penal offence.
4) As a condition precedent to compensation, there must be a free pardon granted under Section 683(2) [749(i)] of the *Criminal Code* or a verdict of acquittal entered by an Appellate Court pursuant to a referral made by the Minister of Justice under Section 617(b) [690(b)].
5) Eligibility for compensation would only arise when Section 617 and 683 were exercised in circumstances where all available appeal remedies have been exhausted and where a new or newly discovered fact has emerged, tending to show that there has been a miscarriage of justice.

As compensation should only be granted to those persons who did not commit the crime for which they were convicted, (as opposed to persons who are found not guilty) a further criteria would require:

a) If a pardon is granted under Section 683 [749], a statement on the face of the pardon based on an investigation, that the individual did not commit the offence: or
b) If a reference is made by the Minister of Justice under Section 617(b) [690], a statement by the Appellate Court, in response to a question asked by the Minister of Justice pursuant to Section 617(c) [690(c)], to the effect that the person did not commit the offence.

It should be noted that Sections 617 [690] and 683 [749] may not be available in all cases in which an individual has been convicted of an offence which he did not commit, for example, where an individual had been granted an extension of time to appeal and a verdict of acquittal has been entered by an Appellate Court. In such a case, a Provincial Attorney General could make a determination that the individual be eligible for compensation, based on an investigation which has determined that the individual did not commit the offence.

C. PROCEDURE

When an individual meets the eligibility criteria, the Provincial or Federal Minister Responsible for Criminal Justice will undertake to have appointed, either a judicial or administrative inquiry to examine the matter of compensation in accordance with the considerations set out below. The provincial or federal governments would undertake to act on the report submitted by the Commission of Inquiry.

D. CONSIDERATIONS FOR DETERMINING QUANTUM

The quantum of compensation shall be determined having regard to the following considerations:

1. *Non-pecuniary losses*

a) Loss of liberty and the physical and mental harshness and indignities of incarceration;
b) Loss of reputation which would take into account a consideration of any previous criminal record;
c) Loss or interruption of family or other personal relationships.

Compensation for non-pecuniary losses should not exceed $100,000.

2. *Pecuniary Losses*

a) Loss of livelihood, including loss of earnings, with adjustments for income tax and for benefits received while incarcerated;
b) Loss of future earning abilities;
c) Loss of property or other consequential financial losses resulting from incarceration.

In assessing the above mentioned amounts, the inquiring body must take into account the following factors:

a) Blameworthy conduct or other acts on the part of the applicant which contributed to the wrongful conviction;
b) Due diligence on the part of the claimant in pursuing his remedies.

3. *Costs to the Applicant*

Reasonable costs incurred by the applicant in obtaining a pardon or verdict of acquittal should be included in the award for compensation.