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FEDERAL-PROVINCIAL TASK FORCE REPORT ON COMPENSATION OF WRONGFULLY CONVICTED AND IMPRISONED PERSONS

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September 19, 1985

Mr. Roger Tassé
Deputy Minister of Justice
Department of Justice
3rd Floor
Justice Building
239 Wellington Street
Ottawa, K1A 0H8

Dear Mr. Tassé:

At their meeting of November 22-23, 1984, the Federal-Provincial Ministers Responsible for Criminal Justice agreed to establish a Task Force to examine the question of compensation for persons who are wrongfully convicted and imprisoned. At a subsequent Federal-Provincial Deputy Ministers meeting concerning this matter, the Task Force was directed to examine foreign legislation and its frequency of use in compensating wrongfully convicted persons, to examine existing Canadian compensatory regimes to determine their applicability in the area of compensation for wrongfully convicted persons and finally to explore possible legislative options directed towards the creation of a system to compensate persons who are wrongfully convicted and imprisoned.

I have the pleasure of attaching the Report of that Task Force.

In preparing the Report, we met on several occasions to discuss the material available and to exchange views, knowledge and experience on this matter. 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.

In submitting the Report, I wish to express my sincere appreciation to the members of the Task Force who, under severe time constraints, have worked hard and with dedication on this project. I would also like to thank the jurisdictions they represented for allowing and supporting their participation.

Yours sincerely,

P. Saint-Denis

Paul Saint-Denis
Coordinator
Federal-Provincial Task Force
on Compensation of Wrongfully
Convicted and Imprisoned Persons

Sask. N.B. PEI. not involved

FEDERAL-PROVINCIAL TASK FORCE ON COMPENSATION OF WRONGFULLY CONVICTED AND IMPRISONED PERSONS

Coordinator

Paul Saint-Denis
Legal Counsel
Criminal Law Policy and Amendments Section
Department of Justice

Alberta

David W. Axler
Acting Director
Civil Law Section
Ministry of the Attorney General

British Columbia

Lynn Langford
Legal Officer
Criminal Justice Branch
Ministry of the Attorney General

Manitoba

John Guy
Assistant Deputy Attorney General
Criminal Prosecutions Branch
Ministry of the Attorney General

Newfoundland

John Rorke
Counsel
Department of Justice

Nova Scotia

Reinhold M. Endres
Assistant Director (Civil)
Department of Attorney General

Ontario

Howard Morton
Director
Crown Law Office
Ministry of the Attorney General

Quebec

Gaston Pelletier
Avocat
Direction de la Recherche
Ministère de la Justice

INTRODUCTION

Despite the procedural safeguards found in our criminal justice system, and through no fault of their own, persons are sometimes convicted and imprisoned for a crime they did not commit. While such occurrences are rare, they do in fact happen. Innocent persons who have thus been convicted and imprisoned should have available an avenue of redress which, to the extent possible, compensates them for the damages they have suffered.

Although legislation recognizing the right to compensation for someone who is unjustly convicted is widespread in Europe and in other parts of the world, Canada, like most Commonwealth countries, does not possess a statutory scheme providing for the compensation of persons who have been wrongfully convicted and imprisoned. In Canada, the only method whereby an individual who has been wrongfully convicted and imprisoned can be compensated is through ex gratia payments by the Crown.

As a result of three unusual cases, the Marshall, Fox and Truscott cases, public attention has recently been focussed on this lacuna in Canadian law. This issue was discussed at the Federal-Provincial Conference of Ministers Responsible for Criminal Justice and Juvenile Justice, held in St. John's, Newfoundland, in November 1984. The Minister of Justice and Attorney General of Canada made the following statement at the Conference:

> "Ministers recognize the injustice committed to those who are wrongfully convicted and imprisoned. I believe the federal government has a responsibility in this area, a view welcomed by my provincial colleagues. Ministers agreed to set up a Federal-Provincial Task Force of officials to review the matter and develop options for ministerial consideration."

At a Federal-Provincial Deputy Ministers meeting concerning persons who have been wrongfully convicted and imprisoned, held in January 1985, the terms of reference for the Task Force were finalized and approved. These were:

1. To examine U.S. and European legislation aimed at compensating wrongfully convicted persons.

2. To examine the frequency of use of such legislation and to determine its effectiveness and shortcomings in providing a proper compensatory scheme.

3. To examine existing Canadian compensatory schemes (such as the Criminal Injuries Compensation Board) to determine if such models could be applied in the area of compensation for wrongfully convicted persons.

4. To explore appropriate legislative options and the components thereof, cost implications, federal and provincial responsibilities, participation and cooperation, and other related issues which may be considered important to the development of a system to compensate the wrongfully convicted person.

It should be noted that Canada is a party to the United Nations International Covenant on Civil and Political Rights. Article 14(6) of the Covenant establishes the following right:

> 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.

The expression "...shall be compensated according to law..." would appear to lead to the conclusion that entitlement to compensation should be based on a statute. This view is re-enforced by the general thrust of article 2 of the Covenant which states that:

> "...each State Party to the present Covenant undertakes 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."

Canada acceded to the International Covenant on May 19, 1976. The International Covenant came into force on August 19, 1976.

At the direction of the Ministers and the Deputy Ministers, the Task Force has focussed its attention on the particular problem of persons who have been wrongfully convicted and imprisoned. The broader question of compensating wrongfully convicted persons who, as the International Covenant states, have "suffered punishment" (other than imprisonment) was not examined. It should be noted, therefore, that a

compensation scheme which limits claims to those who have been wrongfully imprisoned may not meet entirely Canada's obligations under the International Covenant.

The Federal-Provincial Task Force consisted of officials from the federal Department of Justice and the provinces of British Columbia, Alberta, Manitoba, Ontario, Quebec, Nova Scotia and Newfoundland.

The Task Force would like to acknowledge the important work that had already been accomplished in this area by Québec. The documents they provided us with were extremely useful in generating ideas for discussions on this subject.

The following is the Report of the Federal-Provincial Task Force.

CHAPTER I

BACKGROUND

1. Risk of Wrongful Conviction

The number of cases in which persons are convicted for offences they did not commit cannot be estimated with any degree of reliability. However, as indicated in the introduction of this report, three cases have recently focussed public attention on the issue of persons who were wrongfully convicted and imprisoned.

The first case is that of Donald Marshall Jr. who, in 1971, was convicted by a jury of non-capital murder and sentenced to life imprisonment. In late 1981, the Royal Canadian Mounted Police was asked to look into the matter, when new concerns over the conviction were raised by Marshall's counsel. The R.C.M.P. produced substantial evidence casting doubt upon Marshall's guilt and as a result, the Minister of Justice exercised his special prerogative under section 617 of the Criminal Code and referred the case back to the Nova Scotia Court of Appeal for a special hearing. Fresh evidence was called and Marshall was acquitted. The court found, however, that Donald Marshall's "untruthfulness through this whole affair contributed in large measure to his own conviction". Marshall launched a suit against the police responsible for the original investigation and whose conduct of the matter was alleged to have left much to be desired. The suit was not ultimately pursued. Marshall addressed instead, a general claim for compensation to the federal and provincial governments. The provincial government, which had prosecuted Marshall, appointed a judge from Prince Edward Island to inquire into and report to the Governor in Council respecting ex gratia payments of compensation, including legal costs. The claim was resolved when the Attorney General and Marshall agreed on a figure and Marshall was paid a sum of two hundred and seventy thousand dollars to which the provincial and federal governments contributed equally.

The second case is that of Kenneth Norman Warwick (Warwick had his name legally changed to Fox). Mr. Fox was convicted in Vancouver, in 1976 of rape, causing bodily harm with intent to wound, maim or disfigure and buggery. He was sentenced to ten years imprisonment and his parole on a previous rape conviction was revoked. His appeal to the

British Columbia Court of Appeal and to the Supreme Court of Canada were unsuccessful. Subsequently, newly disclosed evidence suggested that he had been mistakenly identified as the assailant and that another man had committed the offences. He was granted a free pardon October 11, 1984, by the Governor in Council pursuant to section 683(2) of the Criminal Code. The Attorney General of British Columbia announced the appointment of a Commissioner of Inquiry to look into the matter of compensation for Mr. Fox.

The third case is that of Wilfred Truscott. In February, 1984, in Leduc, Alberta, Mr. Truscott was convicted of assault, and mischief by causing damage to private property. His girlfriend testified that he had entered her dwelling house, punched her, and smashed some furniture. Truscott's alibi, that he was in Winnipeg, was neither given in advance to the police or Crown nor substantiated at the trial by any witnesses. Truscott was sentenced to 18 months incarceration. Subsequently, at the request of the Crown, the Winnipeg City Police interviewed certain witnesses referred to the Crown by Truscott's Counsel. When his alibi appeared to be supported, the R.C.M.P. called in the complainant, questioned her and suggested that she take a poligraph test, whereupon she confessed to the fabrication of her complaint. Truscott's conviction has since been quashed and the province is considering the matter of his compensation.

The fallibility of the judicial process has been amply demonstrated particularly in respect of convictions based on mistaken identifications. On February 8, 1984, Senator Metzenbaum of Ohio, read into the Congressional Record references to forty-eight American cases in which the accused was convicted of murder and later found innocent. In Britain, the cases of Adolf Beck, twice convicted of fraud on the basis of erroneous identification and, Oscar Slater who spent twenty years in a Scottish jail for a murder he did not commit, are text book examples of such errors. In 1966, Queen Elizabeth awarded a posthumous free pardon to Timothy Evans, hanged in 1950 for a killing to which the notorious mass-murderer Christie ultimately confessed.

It is difficult to ascertain the number of persons who may have been wrongfully convicted and cases of wrongful conviction may never come to light. In 1932, Professor Edwin Bouchard, in his pioneering book Convicting the Innocent, presented an account of sixty-five cases of wrongful convictions. In each instance the innocence of the person convicted was later conclusively established, but often only after that person had spent considerable time in prison. In about half the cases, mistaken identification

was the cause of the conviction. Unjust convictions were also attributable to perjured testimony, some of which was presented with the knowledge of the prosecutor, mistaken inferences from circumstantial evidence, over-zealous prosecutions, prior convictions and unsavory records, unreliability of expert opinion and frame-ups.

2. Existing Legal Remedies for Wrongful Convictions

i) Appeals

A right of appeal against conviction for an indictable offence is provided by section 603 of the Criminal Code by right on any ground of appeal that involves a question of law alone or, with leave of the court of appeal or a judge thereof, on any ground of appeal that involves a question of fact or of mixed law and fact. Section 613 of the Criminal Code provides that on hearing an appeal against a conviction, the court of appeal may allow the appeal where the evidence cannot support the verdict, where there was a wrong decision on a question of law or where there was a miscarriage of justice. Convictions affirmed by a court of appeal may be appealed to the Supreme Court of Canada under Section 618 of the Code on any question of law on which a judge of the court of appeal dissented or on any question of law for which leave to appeal is granted by the Supreme Court.

ii) Prerogative of Mercy

Under Section 617 of the Code, the Minister of Justice may exercise the prerogative of mercy and direct a new trial before any court in any case of a person convicted of an indictable offence or sentenced to preventive detention as a dangerous offender, if, after inquiry, he is satisfied that such is warranted in the circumstances. The Minister may alternatively refer any question to the court of appeal for its opinion on the matter or refer the case for a hearing as if it were an appeal by the convicted person. The rehearing by the Nova Scotia Court of Appeal of the evidence in the Donald Marshall case is an example of the use of this section.

The prerogative of mercy is also expressed in statutory form in section 683 of the Code which provides for the grant of remission of sentence, free pardons and conditional pardons. Where a free pardon is granted, the person is deemed never to have committed the offence in respect of which the pardon is given.

iii) Criminal Records Act

A form of pardon may also be granted under subsection 4(5) of the Criminal Records Act. This is the normal route used [illegible] convictions of persons who have served their

sentences and have redeemed themselves over time following conviction. This pardon seals the record but does not eliminate the fact of the conviction. Applications for pardon under this provision and under section 683 of the Code are administered by the Clemency and Criminal Records Section of the National Parole Board.

iv) Civil Remedies

Tort law, of course, may provide a remedy for someone who was wrongfully convicted and/or imprisoned by way of an action in malicious prosecution and/or false imprisonment.

While successful actions based on false or wrongful imprisonment are not uncommon, actions in malicious prosecutions seldom succeed because:

a. it has been and continues to be the policy of the courts that it is essential to the criminal justice system, and in the public interest, that prosecutors, especially the Crown, should not be impeded by the fear of external influences, such as the possibility of a civil action, when properly invoking judicial process; and

b. the onus on the plaintiff in such an action creates a very heavy burden on him (he must establish that the proceedings complained of were instituted without reasonable and probable cause and for an improper purpose).

Indeed, success in such civil actions against Attorneys General and their agents is unheard of because the courts recognize the principle of general immunity of Crown officials (most recently affirmed in the Ontario case of **Nelles**).

CHAPTER II

INTERNATIONAL COMPENSATORY SCHEMES

Recognition that there is a need for legislation to deal specifically with the claims of persons who has been unjustly convicted is not a recent development. The need to provide such legislation has been recognized from the time of Voltaire. Enactment of legislation did not generally occur, however, until the late nineteenth century, a delay which was attributable to a dispute among legal philosophers who could not agree as to whether compensation was a duty of the sovereign or only a moral obligation. Legislation recognizing the government's obligation to compensate those who have been unjustly convicted is now widespread in Europe and in other parts of the world.

The Scandinavian Countries

The Scandinavian countries, Sweden, Norway and Denmark, first enacted, in 1886, 1887 and 1888 respectively, extensive and elaborate laws on the subject of compensation for errors of criminal justice. In considerable detail they worked out the conditions under which the right to compensation would be exercised, its various limitations and the procedure for giving it effect as a remedy to the injured individual.

In Norway, sections 469-471 of the Criminal Procedures Act provides for compensation from the state in cases of errors of criminal justice (similar provisions are found in Sweden's 1974 Act on Compensation in Case of Deprivation of Liberty - section 2 and Denmark's Administration of Justice Act - section 1918 (d).

Section 469 of the Norwegian legislation provides for compensation in three situations. The first provides for compensation where the accused has suffered a "material loss" through the prosecution per se, that is, if the accused was wrongfully charged with a crime. The second covers compensation for damages suffered by the accused through being subjected to detention during the police investigation of the case. The third situation concerns compensation for financial losses sustained by a convicted person because he has suffered a punishment which is later found to have been wrongfully imposed. In this case, to be able to lay a claim for compensation, the wrongfully convicted person must be acquitted of the crime for which the penalty was imposed.

NORWAY The Criminal Procedure Act imposes two conditions which must be met before the person who was wrongfully convicted can claim compensation. Section 470 bars an award of compensation if in some way - for example, by a false confession or as a result of perjury - the accused himself has brought about the conviction. The second condition precedent to compensation is that the individual must file a timely claim. Section 471 provides that, in cases of a wrongfully convicted person, the claim must be filed within one month of the acquittal. If the accused overlooked this time limitation he loses the right to compensation.

Compensation may be awarded only for financial loss; damages of a non-financial nature are not compensative. The provisions for the assessment of compensation vary according to the reasons for the claim. When compensation is awarded in the case of the wrongfully convicted, the award may be made only in respect of the pecuniary loss suffered from the time the sentence is served. In spite of the wording of the legislation which indicates that awards are to be made for damages that "have been suffered", it would appear that compensation is also given for losses which the person is likely to suffer by reason of his conviction.

Under Swedish legislation, compensation may be paid for expenses, loss of earnings from employment, interference with business or the suffering caused. Compensation payments will cover losses caused by loss of liberty which can be verified by the person concerned. Relatively small sums are paid for compensation for suffering.

Amount of Compensation

The payments awarded to the wrongfully convicted under section 469 of Norway's Criminal Procedure Act would appear to be very infrequent. From 1953 to 1958, the only period for which figures are available, compensation was paid out to a wrongfully convicted person on only two occasions: one award of approximately $11,000 and another of about $35,000.

A comparison with Denmark which has a population roughly equivalent to that of Norway's, reveals that, for the same five-year period, about $12,000 was disbursed by way of compensation for wrongful prosecution for detention, as well as for wrongful conviction.

Holland

Compensation can be granted to persons detained in custody who are ultimately acquitted, and for persons whose sentence is annulled after it has been fully or partly served.

Compensation is available for both pecuniary and non-pecuniary loss and there is no limit to the amount of compensation that can be awarded. An application for compensation must be made within three months of the close of the case. The applicant has a right to be heard and to have legal representation. So far as possible, the court dealing with the claim for compensation will have the same composition as the trial court. There is a full right of appeal against all decisions on compensation.

Compensation is awarded where the court is of the opinion that, taking all the circumstances into account, it is fair and reasonable to make an award. The applicant is not required to prove his innocence, but he will not automatically get compensation in every case covered by the criteria set out above.

A claim for compensation may be made by the dependants of the person innocently detained as an alternative to a claim by the person directly concerned. If the claimant dies after having submitted an application or lodged an appeal, compensation is paid to his heirs.

France

In 1895, France passed a law creating a procedure for the review of judgments and providing for compensation for victims of wrongful convictions. Now included in sections 622 to 626 of the French Criminal Procedure Code, this procedure for review and consequent claim to compensation is limited to the field of criminal law.

The application for review is further limited to four specific instances:

- evidence establishing the continuing existence of the alleged victim after a conviction for homicide;

- contradictory judgments, where two decisions are irreconcilable because each has convicted a different person for the same crime;

- perjury against the accused;

- and finally, a new circumstance of factual or legal significance disclosed after the conviction, and which makes probable the innocence of the accused.

In the first three instances, the persons empowered to initiate proceedings of review are the Minister of Justice or the accused, or if the latter is incompetent or deceased, his duly appointed representative or estate. Only the Minister of Justice may apply for review on the basis of a new fact.

An application for review does not necessarily result in compensation. There must exist a conviction and it must be set aside as a result of the review. Only the victim, his spouse or his ascendents or descendents are entitled to compensation and it must be applied for rather than being granted of the court's own motion. And lastly, compensation is not granted where the victim himself was the cause of the mistake.

If compensation is granted it is not limited to financial loss but covers all non-pecuniary loss suffered by the victim. There is no limit on the amount of compensation which can be awarded. The award is payable by the State which may thereafter claim over against the person in fact responsible for the mistake. If the applicant so requests, the court decision setting aside his conviction is posted in the city when the conviction occurred, in the place where the offence was committed and in the town where the applicant lived.

The American Experience

In contrast to Europe, legislatures in the United States have shown a general apathy to the predicament of those who have been unjustly convicted. Only a few jurisdictions, including the federal government, have enacted legislation providing some measure of redress.

The earliest instance of an attempt to enact such legislation in the United States occurred in 1912 when a bill was introduced in the Senate for the relief of persons unjustly convicted of crimes against the State. California was the first State to enact legislation when a bill similar to the one introduced in the Senate became law in 1913.

The existing compensation legislation in the U.S. can be separated into two distinct categories. One consists of those which provide that the claim of one who alleges to be unjustly convicted is to be heard in an administrative agency. The other consists of statutes that create a cause of action in the courts for one who claims to have been unjustly convicted. Within these categories there are considerable differences.

The California, Tennessee, and Wisconsin statutes place the claims in an administrative agency. With respect to one who may file a claim, California and Wisconsin provide that the claimant may be any person who, having been imprisoned, claims to be innocent. Additionally, California provides that the claimant may be one who is granted a pardon on the ground of innocence. In both states, there is no requirement that the original conviction must have been reversed or set aside. Tennessee, on the other hand, provides that a claim may be filed only by one who is granted a pardon on the ground of innocence. In California and Wisconsin the burden of proof is placed upon the claimant to establish innocence. Only in Wisconsin is the standard of persuasion set forth, "clear and convincing evidence." So far as the amount of compensation that can be awarded, California places a maximum of $10,000. Wisconsin imposes a limit of $25,000, but not over $5,000 per year of imprisonment. However, in Wisconsin the administrative board may recommend a larger amount to the legislature. Tennessee does not restrict the amount recoverable. Unlike the other states, California limits the damages to pecuniary harm. In all three states, the State is the party which is liable for any damages recoverable.

The legislation of the federal government, District of Columbia, Illinois, New York, and Texas statutes create a cause of action. Illinois, New York and Texas require as a prerequisite to a suit that a person seeking relief has been granted a pardon. The federal government and District of Columbia statutes, on the other hand, require some form of official acknowledgement - not limited to a pardon - that an error has occurred as a prerequisite to a suit. Three methods of meeting this requirement are specified. They are proof that: (1) the criminal conviction has been reversed or set aside on the ground that the person convicted was not guilty of the offence; (2) the person seeking relief was found not guilty of the offence at a new trial or rehearing; (3) a pardon has been granted on the ground of innocence. The federal government and District of Columbia statutes

further require proof that the person seeking relief did not commit any of the acts charged. The District of Columbia requires that this proof be made by "clear and convincing evidence." The federal statute restricts the proof that may be admitted; proof of the required facts can only be made by a certificate of the trial court or pardon. The federal statute places a maximum of $5,000 on the level of compensation. Illinois imposes a limit based on the amount of years in prison, the maximum being $35,000 for imprisonment over 14 years; it will award up to $15,000 for up to five years in prison and $30,000 for five to fourteen years. Texas provides for a maximum of $25,000 for "physical and mental pain and suffering" and $25,000 for any medical expenses incurred. The District of Columbia and New York do not restrict the amount recoverable. In each instance, the sovereign government is the party who is liable for any damage recoverable.

In New York, the Law Revision Commission, in a recent report to the Governor of the State of New York on the issue of redress for persons unjustly convicted and imprisoned, expressed the view that the most appropriate way to provide a meaningful form of relief to one who was unjustly convicted is to create legislatively a new claim, and to have it asserted against the State. The Commission indicated that in view of the inherent nature of the Governor's power to pardon and the stringent requirement limiting the granting of a pardon on the ground of innocence, the existing mechanism for redress could not be considered a realistic remedy.

Amount of Compensation

In the U.S., there have been few claims made under the compensatory statutes. The information available on this question indicates that in California, there have been thirty claims in the past ten years, five of which were sustained; in the District of Columbia, there have been two claims filed in the past three years, one of which was successful and settled for a small dollar amount; and in Wisconsin, there have been eighteen claims filed in the past twenty years, three of which were sustained. New York recently awarded one million dollars to a person who had served more than 20 years in prison after being wrongfully convicted in 1938 of murdering a New York City policeman.

Japan

The rules governing compensation of persons wrongfully convicted and punished or wrongfully detained are found in the Criminal Compensation Act. Further, if a person's conviction was caused by a public official's intentional misconduct or negligence, the victim has a right to claim for damages in accordance with the State Redress Act.

After the normal appeal procedure has been exhausted, a conviction may be reviewed if the documentary evidence or the testimony upon which the conviction was based is found to be false or if new evidence comes to light which would have resulted in the accused's acquittal or in a lighter sentence imposed on the accused by the court. An application for review may be requested by a public prosecutor, the convicted person or his legal representative, or his spouse or family if the convicted individual has died.

If a conviction review results in an acquittal, the victim, or his successor if he has died, may make a claim for compensation against the government. The amount to be awarded, however, is determined by the court. Compensation for time spent in prison is calculated at the rate of not less than $3 a day and not more than $7 a day. In determining the amount to be awarded, the court must take into consideration the type of physical restraint i.e. simple detention or forced labour, the duration of the imprisonment, damages to the property of the victim, loss of benefits which were to be obtained by him, mental suffering and physical injuries suffered while in prison and the possible fact of intentional misconduct or negligence by the police, prosecutor or judicial authorities.

With respect to the compensation in the case of an accused who has been executed, the court may award up to approximately $16,000.

A person receiving a compensatory award based on the Criminal Compensation Act is not precluded from claiming damages in accordance to the State Redress Act if the conviction resulted from intentional misconduct or negligence of a public official.

CONCLUSION

Proof of innocence is a necessary element in many of the compensatory schemes examined in this section. The burden of proving innocence in the compensation proceeding is placed upon the claimant. The presumption of innocence afforded to the accused in a criminal proceeding is not

applicable in the subsequent statutory compensation proceeding. The time elapsed between the original trial and the time when the wrongfully convicted person is released may impede his attempt to prove his innocence. It could be argued that errors in past proceedings and evidentiary difficulties should not fall upon the shoulders of the claimant in his action for compensation, especially in view of the greater fact-finding resources of the government and the difficulty a claimant faces in proving a negative: that he did not commit a certain act. If proof of innocence is to constitute a key element in establishing a claim for compensation, the standard of proof to be met could be a less demanding standard of proof than the criminal law standard of proof beyond a reasonable doubt.

In a number of jurisdictions compensation is limited solely to pecuniary losses. In many cases it is precisely the mental anguish and loss of reputation which have most affected the wrongfully convicted person and it would appear reasonable to make amends for these injuries by way of financial recompense. The ability to award for non-financial damages could prove especially desirable where the person has suffered no financial loss whatever through the imprisonment. In such cases it is only through the award of compensation for non-financial damages that a wrongfully convicted person can receive the necessary redress resulting from a wrongful conviction.

Several jurisdictions have imposed a statutory ceiling on the amount of damages recoverable. Some of these limits are extremely low and, measured against any standard of decency, would fail to provide for any kind of adequate compensation. It has been argued that the wrongful conviction and imprisonment of an innocent person is such a serious invasion of civil liberties that the state should fully compensate such persons and consequently that no limit on compensation should exist. Opposing this view is the argument that failing to impose some limit on compensation would result in too great a drain on the public purse. It should be noted, however, that in the jurisdictions where there is no limit on compensation, this absence of a limit does not appear to have caused serious problems. This may be explained by the fact that generally there are very few claims for compensation, and where claims have been made, awards have been very conservative. The effect of limiting compensation would be that some people would be fully compensated and others would not. The more the claimant was damaged the less adequately, in proportionate terms, would he be compensated.

Lastly, certain jurisdictions impose unrealistically short time limits for filing compensation claims against the state. It is recognized that a time limitation should exist for filing a claim after which a claimant would be barred from filing. The time limitation, however, should be such as to appropriately balance the state's interest in avoiding stale claims and the wrongfully convicted and imprisoned person's interest in a fair opportunity to assert his claim.

CHAPTER III

ISSUES ARISING FROM ESTABLISHING A COMPENSATORY SCHEME FOR WRONGFULLY CONVICTED AND IMPRISONED PERSONS

A number of important policy questions must be addressed when contemplating the implementation of a compensatory system for individuals who have been wrongfully convicted and imprisoned. Who should be entitled to lay a claim? The imprisoned person, certainly, but should his family be entitled or should third parties who are able to show damages be entitled to present an independent claim? What prerequisites should be met by the claimant before he is awarded compensation? How should awards be calculated and should there be limits to the amounts which can be awarded? Who should determine the amounts? Who should pay the compensation? These questions and other related matters will be discussed in this section.

At this point, certain preliminary observations can be made with respect to this entire matter. First, our criminal justice system is not perfect and, in spite of many safeguards, errors will occur. Second, although these errors may occur at any given step of the criminal justice process, the most regrettable, the most unfortunate, and certainly the error which is most deserving of redress is the error resulting in an innocent person being convicted and imprisoned. Imperfect as our criminal justice system may be, it tends to progressively filter out those who have been erroneously involved in it such that the number of wrongful arrests will be greater than the number of wrongful prosecutions and so on. Our third observation, therefore, is that in trying to provide options for a system of redress for persons wrongfully convicted and imprisoned we are mindful that we are trying to provide a system which deals with freak occurrences. The rarity of such cases leads us to our last observation which is that whatever the compensatory scheme chosen, it should be simple and responsive to the injured person's claim for compensation.

Mindful that Canada is a party to the United Nations International Covenant on Civil and Political Rights and that article 14(6) of the Covenant provides for the compensation of unjustly convicted persons who have suffered punishment, the Task Force was of the view that the wording of article 14(6) would provide a useful framework within which this issue could be discussed. What follows is an examination of the wording of article 14(6) within the Canadian context. We wish to stress that article 14(6) of the Covenant provides that an unjustly convicted person who has suffered punishment shall be compensated. At the

request of Ministers and Deputy Ministers, our examination of the punishment suffered will focus on the narrower question of imprisonment.

The following underlined words and expressions of Article 14(6) of the Covenant will be examined:

> 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.

PERSON

Who should be compensated? Under the Covenant, the actual person who has directly suffered punishment unjustly appears to be the only one entitled to compensation. In developing a compensatory scheme, however, it can legitimately be asked if relief should be provided to any person capable of demonstrating a loss or injury as a result of another's wrongful conviction. Not only the unjustly punished person serving his term in prison suffers from the wrongful imprisonment; his spouse, his children or other persons who are dependent on him may suffer financial and other damages. In some instances, damages may also be suffered by his employer or persons who are in a business relationship with him. If all these people have suffered damages as a result of the wrongful conviction and imprisonment, it is arguable that they should have a claim in damages. A number of foreign jurisdictions allow for such a broadly based compensation scheme.

Another dimension to the question of who should be compensated is whether the right to claim compensation should survive the death of the unjustly punished person. Should this person's claim for compensation survive so that it can be pursued by his dependents or representative? It would seem appropriate that at least his dependents be able to claim; but should his estate?

In our view, the purpose of a state compensatory scheme of the kind being examined is to provide redress to the person who, as a result of a wrong inflicted on him by the state, is imprisoned and deprived of his liberty. The right to lay a claim should therefore be limited to the person who was directly wronged by the state. If the injured party dies

while imprisoned, or after imprisonment and before redress is obtained, it would seem fair that the right to claim should be available to those surviving members of his immediate family who were wholly or partly dependent upon the deceased for support. But the compensation which the dependents may claim should be limited exclusively to the damages suffered by the deceased.

FINAL DECISION

At what point in the criminal justice process should the decision to convict and imprison be considered an error for which compensation should be awarded? Article 14(6) of the Covenant suggests that it is when "...a person has by a final decision been convicted of a criminal offence...". The expression "final decision" could be interpreted as meaning one of two things: because a sentence is enforceable from the moment it is imposed, it could mean the decision reached at trial; or it could be interpreted as that decision which remains after a person has exhausted all ordinary methods of judicial review and appeal or all waiting periods have expired.

An examination of article 14(6) when read as a whole suggests that the Covenant proposes to cover both types of final decision. Indeed, the Covenant would seem to impose an obligation to compensate when a wrongful conviction is corrected by reversal or pardon due to some newly discovered fact. Thus a conviction reversed at any level of appeal could, when based on a newly discovered fact, result in compensation being awarded if the person has suffered punishment. Compensation could also be awarded if, as a result of a new fact, the wrongfully convicted individual is pardoned.

In our view, however, a wrongful conviction which is reversed in the normal course of appeal is an indication that the criminal justice procedure has worked and that ultimately no error was committed. Compensation should only be awarded when a clear failure of the criminal justice system has resulted in a person being wrongfully imprisoned. In our estimation, compensation should be awarded only where the aggrieved party has exhausted all ordinary methods of judicial review and appeals. An exception may have to be made in the case of someone who has not exhausted his rights to appeal but where the time limits for an appeal have expired. In our view, this person should be compensated if he were wrongfully convicted and imprisoned despite his failure to appeal.

CONVICTED OF A CRIMINAL OFFENCE

In Canada the above expression is usually taken to mean convictions resulting from the commission of offences provided by federal legislation and enacted pursuant to federal criminal law powers under section 91(27) of the Constitution Act, 1867. This interpretation would necessarily exclude all wrongful convictions resulting from penal or quasi-criminal offences provided by provincial and federal legislation. Compensation limited to redressing wrongful conviction and imprisonment resulting from criminal legislation may meet the obligation set out in article 14(6) of the Covenant. In our view, however, redress restricted only to wrongful convictions resulting from federal criminal offences would appear too narrow an approach and would inadequately reflect the spirit of the International Covenant.

Canada's federal system of government, with legislative powers divided between the federal parliament and provincial legislature, has resulted in a distinction being made between federal criminal laws and provincial statutes to which penal measures including the possibility of imprisonment are attached. In unitary states this distinction between criminal and penal offences does not exist. In these countries, therefore, the Covenant would apply to all offences which can result in a wrongful conviction. It may be argued, therefore, that the intent of the Covenant is to provide compensatory relief for wrongful convictions arising out of criminal and penal offences. Moreover, the French version of article 14(6) uses the expression "condamnation pénale" which suggests that compensation should not be limited to wrongful criminal convictions.

For these reasons we believe that compensation should be made available to persons who have been wrongfully convicted and imprisoned pursuant to either federal (indictable and summary offences) or provincial penal legislation.

CONVICTION HAS BEEN REVERSED OR HE HAS BEEN PARDONED

Article 14(6) of the International Covenant provides that someone who is convicted of a criminal offence and subsequently has his conviction reversed or is granted a pardon shall be compensated. The Criminal Code already provides the means whereby a final decision resulting in a conviction may be reversed or where a wrongfully convicted person may be pardoned. Under section 617 of the Code, the Minister of Justice may, upon an application for the mercy of the Crown by or on behalf of someone who has been convicted of an indictable offence, direct a new trial. He may also refer the matter to the court of appeal for hearing or obtain an opinion from the court of appeal on any question upon which he desires assistance. Under section 683, the Governor in Council may grant a free pardon to any person who has been convicted of an offence. A person who is granted a free pardon is deemed never to have committed the offence in respect of which the pardon is granted.

The Interpretation Act provides that all the provisions of the Criminal Code relating to indictable offences and summary conviction offences apply also to all federal non-Criminal Code offences. Section 617, therefore, would be available as a mechanism to reverse wrongful convictions at the federal level generally. Insofar as we believe that any compensation scheme should be available for both summary conviction and indictable offences, section 617 of the Criminal Code, which presently applies only to indictable offences, would have to be amended to include summary conviction offences. A reading of section 683 of the Code suggests that the Governor in Council may grant a pardon in respect of any conviction resulting from federal legislation. If deemed necessary, provisions corresponding to sections 617 and 683 of the Criminal Code could be enacted by the provinces to address wrongful convictions and imprisonment resulting from provincial legislation. It should be noted that Quebec already possesses legislation - the Executive Power Act, permitting the granting of a pardon in respect of a conviction under its legislation.

A reading of article 14(6) of the Covenant indicates that the right being created is a right to compensation after a reversal or a pardon. It is not a right to have a hearing in respect of a final decision for the purpose of obtaining a reversal or pardon. In our view the discretionary element attached to the Minister of Justice's power to refer a case back for a new hearing or in the Governor in Council's ability to grant a pardon does not offend the intent nor the spirit of article 14(6).

NEW OR NEWLY DISCOVERED FACT SHOWS CONCLUSIVELY THAT THERE HAS BEEN A MISCARRIAGE OF JUSTICE

In our view the above expression is the cornerstone of the right to compensation created by the Covenant. There are two basic elements contained in the expression: the discovery of a new fact and conclusive proof showing a miscarriage of justice.

i) New or Newly Discovered Fact

The element dealing with the discovery of a new fact is straightforward. The new fact or evidence must not have been available to the accused before or during the regular criminal proceedings (this is more fully discussed below). The discovery of the new evidence must occur after the conviction has been reached by way of a final decision. The new fact can be any new evidence showing conclusively that the person was wrongfully convicted. It could be by way of evidence of perjured testimony leading to the conviction or the discovery of a new witness or new evidence showing that the offence was either not committed, or if committed, was not committed by the person who was convicted. In short, the new fact can be anything which could lead to a pardon or a reversal of the conviction and which conclusively demonstrates that there has been a miscarriage of justice.

ii) Miscarriage of Justice - Innocence

The element concerning miscarriage of justice is considerably more complex. This issue was the source of considerable concern and discussion among the members of the Task Force. We recognize that the concept of miscarriage of justice is very broad and can include a great number of types of injustices. We concluded that the concept of miscarriage of justice, within the context of a compensatory scheme for persons wrongfully convicted and imprisoned, should mean one of two things:

i) the injured party was unjustly convicted regardless of the objective fact that he did or did not commit the offence for which he was convicted; or

ii) the aggrieved person was unjustly convicted because he did not commit the offence in question; that he was, in fact, innocent.

The first interpretation would allow compensation in situations where a conviction was reversed because of a mistake in law or an error resulting from a mixture of fact and law. The question of innocence under this interpretation would not be in issue and would not be directly resolved. In this situation, it would be possible

for someone who committed the offence, but whose conviction was reversed because of a defect in the procedure, for example, through the admission of illegally obtained evidence, to claim compensation. In this situation the question of innocence could be indirectly examined by the hearing forum determining the amount of compensation when blameworthy conduct could be assessed. With the second interpretation, compensation would be available only on the presentation of evidence demonstrating that the aggrieved party did not commit the offence.

We recognize that proving innocence is foreign to our system of criminal justice. Nonetheless, we tend to believe that the creation of a new right allowing a claim against the state by way of compensation for a wrongful conviction and imprisonment should only be available to the claimant who is innocent.

It should be pointed out that proof of innocence is a key element in a number of jurisdictions where compensation for wrongful conviction is available. Some of these jurisdictions include several States of the United States where the criminal justice system is similar to Canada's.

Innocence may be established by a number of methods: by proving that the claimant did not commit the acts for which he was convicted; by proving that the acts which were committed did not constitute an offence; or by proving that the acts charged were not committed. Since the claimant is seeking compensation from the state, it would appear appropriate that he carry the burden of proving his innocence. At first glance this burden may appear unreasonable, especially when one considers that the claimant must prove a negative - that he did not commit the offence. It should be remembered, however, that this process of compensation is predicated on the discovery of a new fact. If the claimant is indeed in possession of new evidence showing that he was unjustly convicted, the burden of having to prove his innocence will have been at least partially established. Moreover, the standard of proof should be on a preponderance of evidence (the civil law standard); the criminal law standard of proof beyond a reasonable doubt would appear to be too harsh given the issue which must be determined. It would seem to us, therefore, that the burden of proving innocence may appropriately rest upon the claimant.

iii) Forum

The final question which needs to be addressed with respect to miscarriage of justice is the deciding forum. How should the question of innnocence be settled? Although there are a number of possibilities, the likeliest methods are through

the use of the criminal appeal court, a Governor in Council pardon, or by a tribunal, board or designated person.

As mentioned earlier, the determination of innocence is a concept foreign to our criminal justice system. However, we do not believe this to be an insurmountable obstacle. Indeed, subsection 617(c) of the Criminal Code which allows the Minister of Justice to obtain an opinion from the court of appeal on any question upon which he desires assistance could be interpreted as being broad enough for that court to determine the matter of innocence. Failing this, the subsection could be amended to allow the court to make such a determination. Section 613 which sets out certain powers of the court of appeal may also open the door for that court to rule on the issue of innocence. This section could be used where a wrongfully convicted and imprisoned person has not exhausted his rights to appeal but where the time limits for an appeal have expired and the court of appeal has granted an extension of the time within which an appeal may be heard. Under section 613 the court of appeal may allow an appeal on the ground that there was a miscarriage of justice. This section of the Code could be amended to allow a court of appeal to determine the issue of innocence when it proposes to reverse a conviction on the basis of a miscarriage of justice.

Subsection 683(2) of the Criminal Code provides that the Governor in Council may grant a free pardon to anyone convicted of an offence. This subsection would obviously apply to someone who was wrongfully convicted. Historically, however, this subsection has not been used exclusively to pardon persons who were wrongfully convicted. It has been used to terminate parole and, in cases of hardship, been used where the Criminal Records Act normally applied. When an application for a pardon on the basis of innocence is considered we were informed by officials of the Department of Justice that an intensive and exhaustive examination is carried out before the pardon is granted. We were also informed that the pardon may specify, on the document itself, that it was obtained because the person was innocent. A person who is granted a free pardon from the Governor in Council under 683(2) on the basis that he was innocent of the offence for which he was convicted would then be eligible for compensation.

Another possibility and perhaps the least desirable, is to have the matter of innocence resolved by an administrative tribunal, a board or a designated person such as a justice of a superior court of criminal jurisdiction. The selected forum would determine whether the person had in fact committed the act for which he was convicted. Using such an approach to decide the question of innocence in this manner would result in the curious situation of a tribunal reviewing in essence decisions made by the courts. Moreover, as between a court and a tribunal or administrative body, it is arguable that a court is the more appropriate body to decide the question of innocence.

SUFFERED PUNISHMENT

The expression is self explanatory and within the context of the International Covenant would include any type of punishment imposed on an individual following conviction. Although the International Covenant speaks of punishment in relation to a conviction, it is our view that punishment should include conditions prescribed in a probation order where the court chose not to convict the accused and direct that he be discharged conditionally. As indicated earlier, Ministers and Deputy Ministers Responsible for Criminal Justice have directed the Task Force to examine the problem of wrongfully convicted persons who have been imprisoned. 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.

The decision to limit compensation to cases of wrongful conviction and imprisonment, however, is not totally indefensible. In particular, the deprivation of liberty and civil rights, the separation from family and friends and the sufferance of the hardship of prison life are indeed the most serious consequences of a wrongful conviction. It is also the most serious failure of the administration of justice as a whole. For those reasons it is reasonable to single out imprisonment from other forms of punishment for the purpose of compensation.

Should compensation be limited to cases of imprisonment, we believe that imprisonment for default of fines should not be distinguished from regular imprisonment.

COMPENSATED ACCORDING TO LAW

a) According to Law

As mentioned earlier in this Report, in Canada, compensation for someone who has suffered punishment as a result of a wrongful conviction may only be obtained from the state via

an ex gratia payment. By its nature, ex gratia payments are made at the complete discretion of the Crown and involve no liability to the Crown.

The International Covenant, however, appears to suggest that entitlement to compensation should be based on a statute. This interpretation is strengthened by article 2 of the Covenant which states that:"...each State Party to the present Covenant undertakes 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."

Consequently, we believe that once a person has established that he has been wrongfully convicted and imprisoned, he should be entitled by legislation to make a claim for redress against the state, as of right.

b) Compensation

Two general questions need to be addressed in respect of the compensation itself: who decides on the quantum of the award and how is the quantum calculated.

(i) Deciding Forum

With respect to the first question, a number of avenues are available. The most likely among them are the civil courts, tribunals, boards or designated persons or the court of appeal.

If a civil court is contemplated, a cause of action could be created giving the person whose conviction was reversed or who was granted a pardon a right to claim compensation against the Crown in right of Canada or a province. The benefit of this approach is that it uses an existing court system which is experienced in determining and calculating damages. Another advantage is that there would be virtually no costs involved in implementing this approach because it would make use of existing court and judicial officials.

The second possibility is to permit the matter to be referred to a tribunal, a board or a designated person which would determine the quantum to be paid. The advantage of this approach is that it would use mechanisms with which all jurisdictions in Canada are familiar. The provincial and federal governments have long and frequently used tribunals, boards or designated persons to examine and settle certain issues. The disadvantage is that this avenue would create yet another recourse to an administrative or quasi-judicial forum when most governments are attempting to reduce their use.

The last possibility is to have the matter of the quantum determined by the court of appeal which has determined that there has been a wrongful conviction. In this case, the powers of the court of appeal under section 613 of the Criminal Code could be expanded such that when the court reversed a wrongful conviction, it could determine, upon request by the individual, the quantum to be awarded. The advantage of this approach is that it would employ the existing framework in the Criminal Code and would permit the issues of wrongful conviction and compensation to be resolved at the same time by the same court. Although there does not appear to be a constitutional bar preventing the use of this approach, the propriety of such an approach may be questioned. Appeal court judges hearing a criminal case may object to the exercise of such an original jurisdiction and of having to order the Crown in right of Canada or a province to compensate someone who was wrongfully convicted and imprisoned. A clear disadvantage of this approach is that the court of appeal would not be able to consider those cases where an individual was granted a pardon.

(ii) Calculating Quantum

The second general question deals with how the quantum is calculated. Generally, the cost of the compensation itself is difficult to determine because it involves estimating actual awards. Normally, however, determining compensatory damages includes evaluating blameworthy conduct and assessing non-pecuniary and pecuniary losses.

Blameworthy Conduct

The inquiring forum would determine the degree to which, if any, the claimant's conduct contributed or brought about his conviction, and any award otherwise made would be adjusted accordingly. Awards would take into account contributory acts by the applicant which might involve his own perjury or failure to disclose an alibi or facts or other evidence in his own defence that contributed at least in part to his conviction. His refusal to retain counsel in serious circumstances might also have been a factor leading to the conviction which should be addressed in the context of contributory conduct by the applicant.

Non-pecuniary Losses

In the quadriplegic injury case Andrews v. Grand and Toy Alberta Ltd. found at (1978), 2 S.C.R. 229, the Supreme Court of Canada held that for non-pecuniary losses a rough upper limit of $100,000 should be adopted as the appropriate award for all non-pecuniary damages, including such factors as pain and suffering, loss of amenities and loss of expectation of life. "Save in exceptional circumstances,

this should be regarded as an upper limit of non-pecuniary loss in cases of this nature". However even if $100,000 were to be similarly applicable as the maximum limit for non-pecuniary damage including loss of liberty, and all mental and physical stress - and it is somewhat unclear as to whether the Andrews case would apply to lengthy imprisonments - the loss of reputation and attendant non-pecuniary damages would vary greatly; an upper limit of $100,000, or some other amount could be set or alternatively this could remain unstated, with the award in the Andrews case left as a possible precedent for such a limit. The headings for non-pecuniary damages include:

- loss of liberty and the physical and mental harshness and indignities of incarceration (including mental anguish);

- loss of reputation;

- family breakup (including mental anguish) etc.

Pecuniary Losses

Certainly the pecuniary loss aspect of the compensation would vary immensely depending, for example, upon whether the person imprisoned was untrained and unemployable or a highly trained professional person. These factors could increase or decrease the total compensation by large amounts. Therefore it is anticipated that in the very few cases for such compensation as would arise, the awards for compensation would vary greatly from case to case. The headings for pecuniary damages include:

- loss of livelihood including loss of earnings, less certain deductions;

- loss of future earning ability;

- loss of property resulting from incarceration - possibly involving foreclosure on a mortgage, or other consequential financial losses, etc.

In addition to the compensation for damages, consideration would have to be given to compensating the applicant with respect to the legal costs incurred for counsel to assist him in gaining compensation. Consideration would have to be given as to whether all solicitor/client costs would be paid or whether some limit for legal costs would be imposed at some reasonable per diem rate for a solicitor to reflect his time spent with respect to preparing and representing his client before the inquiring tribunal or court. Legislation could provide for a limit with respect to the legal costs and consideration could also be given as to whether there

should be some dollar limit upon contigency fee arrangements which would be paid by the applicant to the solicitor out of the compensation award.

Legislation for the compensation program could also consider whether compensation should be by lump sum or in monthly payments or a combination of both; or to provide for the expenses of retraining programs and other similar assistance. At the present time there may be a divergence of views among the jurisdictions involved as to whether large monetary lump sum awards should be avoided in favour of monthly assistance toward re-training coupled with some form of lump sum payment or pension scheme payments.

Generally, pecuniary and non-pecuniary compensation would be awarded to the period that runs from the commencement of imprisonment rather than from any period of interim custody. In those cases where a judge specifically counts the interim custody as punishment served towards sentence imposed, this arguably could be considered for inclusion within the period of punishment imprisonment for which compensation is being awarded.

NON-DISCLOSURE OF THE UNKNOWN FACT IN TIME IS WHOLLY OR PARTLY ATTRIBUTABLE TO HIM

This expression is discussed briefly in the previous section. We understand it to mean blameworthy conduct of the person in relation to his wrongful conviction. Assuming that the person did not commit the act for which he was convicted, it would seem reasonable that the more an individual's behavior was responsible for his conviction - either through his perjury during trial or his failure to disclose information which could have resulted in his acquittal, the less he should receive. The International Covenant adopts a very hard line in respect to blameworthy conduct: it states that the person who is partly or wholly responsible for the non-disclosure of the new fact showing that there was a miscarriage of justice should not be compensated.

The Task Force recognizes the rationale behind this approach. However, we are mindful that an accused who faces and endures the hardship of a trial may find himself in an extremely stressful situation. We accept that under such circumstances an accused may be very nervous and tense and as a result may not act as one might otherwise expect or in his best interest. We believe, therefore, that not all blameworthy conduct should automatically bar the wrongfully convicted and imprisoned person from obtaining redress. Rather, blameworthy behavior should be determined and evaluated and compensation, if any, awarded accordingly.

OTHER ISSUES

The wording of the International Covenant was useful in providing a framework within which a number of issues concerning compensation for persons wrongfully convicted and imprisoned could be discussed. There still remain, however, a number of areas which need to be examined in order to give this subject a proper airing.

1. Parties at Compensation Hearings

Regardless of whether a court or tribunal is chosen to hear the compensation claim, the process chosen may be either adversarial or upon hearing evidence produced only by the applicant. Since public funds are involved, the provincial Attorney General (or federal Attorney General in federal compensation matters) could be given party status to produce evidence and make legal submissions relating to compensation quantum and the blameworthy behaviour of the applicant, if any.

2. Costs

It should be noted at the outset that precise empirical data is lacking with respect to the number of wrongful convictions; there is simply no way of knowing how many innocent persons have been convicted. Based on past experience, however, the chances of numerous successful claims would seem slight. Costs related to the administration of this type of compensatory regime would not be extensive especially if the courts decide the claims. The cost of the actual awards themselves would be higher.

a) Administration costs

If such a compensation program is to be dealt with through applications to the courts, which would hear and determine the amount of compensation, it would appear that no additional expense would be involved in view of the very few applications for such compensation anticipated in any year in any one jurisdiction. Court services could be utilized either through the courts of each province or the Federal Court depending upon which government was responsible to answer to the claim. The administrative cost of processing the application (either through some government department or court services) and for having it heard by a judge could likely be born as part of the existing overhead and salaries. This would not necessitate any additional personnel or judges or additional salaries.

If, on the other hand, a tribunal is chosen to receive the application, to hear the matter and tribunal members are persons appointed for the task, it could be anticipated that for a tribunal of three comprising a chairman, vice-chairman and third member, costs would be approximately $1,000 to $1,200 per day. A hearing of approximately one half day would entail preliminary review and preparation by the tribunal members. Costs of a one half day hearing also taking into account preparation time would cost approximately $2,100 in per diem payments inclusive of disbursements to the tribunal. If the tribunal is an existing body performing other functions, then it would have in place support staff that would be in position to provide organizational and typographical services as part of the existing overhead. Since very few applications would be anticipated in any one given year, there would be no additional staffing requirements.

If however the tribunal is an ad hoc tribunal and no support staff is in place one would anticipate similar per diem costs for the tribunal members and possibly temporary staff expenses unless permanent government staff services can be provided for those few occasions when claims are presented. If outside stenographic services are required the rate per hour ranges from $9.00 to $11.00 which results in daily rates ranging from approximately $69.00 to $80.00. A single tribunal member sitting alone would likely require a per diem rate ranging from $350 to $500 per day. There may of course be travel and meal disbursements for the tribunal members, room rentals and the like.

b) Responsibility for Payment of Administration Costs and Awards

The provincial governments alone for the province in which the conviction was entered could fund the total cost of administering and compensating persons wrongfully convicted and imprisoned under a provincial law.

The federal government could solely fund the total cost of administering and compensating persons wrongfully convicted and imprisoned under a federal law and involving a federal prosecution.

For convictions under the Criminal Code there are at least three options:

i) The provincial governments could each fund the total cost of administration and compensation.

ii) The federal government alone could fund the total cost of administration and compensation.

iii) The federal government and the provinces could cost-share the compensation, leaving the administration costs to the provinces.

c) Cost Sharing

For wrongful convictions under the Criminal Code leading to compensation, a federal/provincial cost sharing program could be based upon a simple percentage split respecting

total cost of compensation payments made by a province in a fiscal year; the percentage could be split at 50% or some other suitable percentage as between the respective province and the federal government. Alternatively, a more complex cost sharing formula could be considered. Under the Criminal Injuries Compensation programs, for example, the initial cost sharing formula for provinces was that the federal government would pay the lesser of 5 cents per capita of the provincial population or 90% of the compensation awarded. Effective April 1, 1977, a new formula was implemented by which the federal government contributes the larger of 10 cents per capita or $50,000 but not in excess of 50% of the compensation paid. Provinces may, however, claim according to the old formula if it should be to their advantage to do so.

For the Territories the arrangement has been for the federal government to compensate them for 75% of the compensation awarded subject to certain maximum amounts for individual awards. The Northwest Territories has a new cost sharing formula under which the federal government pays 90% on the first $15,000, 75% on the next $15,000, 50% on the next $50,000 and 40% on all amounts in excess of $80,000.

There are a number of other agreements concerning federal-provincial cost sharing, such as legal aid and criminal legal aid agreements, which could be used as examples.

3. Ceiling on Awards

In an earlier section we noted that the Supreme Court of Canada held that the amount of $100,000 should be adopted as the appropriate upper limit for non-pecuniary losses. It is unclear, however, if this maximum would apply in instances of lengthy imprisonments. Many jurisdictions, especially in the United States have imposed maximum amounts which can be awarded. Conversely a number of jurisdictions have chosen not to set a ceiling.

In deciding whether a ceiling should apply, a number of elements should be considered:

- the wrongful conviction and imprisonment of an innocent person is such a serious error that the state, according to some views, 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;

- the fact of 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.

4. Statutory Limitation for Filing Claim

Most compensatory schemes prescribe a limitation period for the making of a claim. Such limitation periods are imposed for reliability purposes or simply to prevent stale claims. Should a limitation period be incorporated into the scheme under consideration, two issues will have to be determined.

1. When should the limitation period commence to run, e.g. on discovery of the new fact, on the granting of a pardon or finding of innocence, on release from imprisonment?

2. The duration of such limitation period?

An alternative to a limitation period would be to incorporate a due diligence test as a prerequisite to the granting of an award. Such a test would provide greater flexibility than a limitation period yet, at the same time, would protect the Crown against stale claims which might be difficult to rebut due to the passage of time.

On balance, we favour the less restrictive limitation of a due diligence test because of the extraordinary nature of the remedy.

5. Appeal

Awards might be final or not. 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. If compensation is to be determined by the courts, appeals should be available in the ordinary way to the parties involved. If a tribunal is to decide on the matter of compensation, a review mechanism should be provided.

As concerns the decision to recommend to the Governor in Council that a free pardon be granted, the decision to grant a pardon and the Minister of Justice's decision to refer a case back to the courts for review pursuant to section 617 of the Criminal Code, these decisions are exercised under the prerogative of mercy and cannot be appealled. We recommend that this not be changed.

6. Subrogation

To the extent that subrogation is an issue in this matter and to the extent that the state believes it necessary to be substituted to the claimant to seek redress against a third party who was responsible for the miscarriage of justice, subrogation rights should be clearly laid out in the compensatory scheme.

7. Retroactivity

Should the compensatory scheme apply only to those persons wrongfully convicted after its implementation or should it apply to those convicted before? Fairness would suggest that anyone who was wrongfully convicted should be able to obtain redress, regardless of when convicted.

CHAPTER IV

PROVINCIAL COMPENSATORY SCHEMES

As per its terms of reference, the Task Force considered provincial compensatory schemes to determine whether any of these could be used to administer the scheme to compensate wrongfully convicted and imprisoned persons. After an initial examination, the Task Force concluded that provincial compensation models were generally unsuitable as vehicles for providing redress for persons who were wrongfully convicted. They were either too complex or too narrow in their application to be adaptable to other tasks or did not exist in enough provinces to be of general use, with the exception of the Criminal Injuries Compensation schemes.

Criminal Injuries Compensation legislation exists in most jurisdictions (it does not exist in Prince Edward Island or at the federal level). The programs are funded through a federal-provincial cost-sharing arrangement. They deal with matters related to the criminal law and allow for the evaluation of blameworthy conduct. The schemes are not overly complex and show the possibility of flexibility in approach with a common goal.

In examining the provincial criminal injuries compensation legislation, we became aware of a Statistics Canada publication entitled Criminal Injuries Compensation 1993. We have made generous use of the publication's text in order to describe the framework, mechanisms and workings of the provincial laws on this matter.

Criminal Injuries Compensation

There is in each province, except Prince Edward Island, and territory a program to compensate innocent persons for injury or death as a result of (a) some specified or defined crime committed by another person, (b) an effort to prevent crime and (c) an effort to arrest an offender or a suspect.

The crimes for which compensation can be paid are, as a rule, listed in the legislation establishing the program, and they are for the most part violent in nature.

The aim is to compensate innocent victims of violent crime, and a distinction is drawn between those who participated in committing the crime, and those who contributed to their own

misfortune as victims. Those who committed crimes are, of course, not compensated; the actions of those who contributed to their misfortune are taken into account, and depending on the degree of culpability, compensation may be on a reduced scale or refused entirely.

Criminal injuries compensation legislation has been in effect in some provinces (Newfoundland, Ontario, Saskatchewan and Alberta) from the late 1960's.

Funds for the payment of awards and for the administration of the program come from the consolidated revenue fund in each jurisdiction. All programs are cost shared with the federal government, and all cost sharing agreements contain special provisions on qualification, disqualification, publicizing of the program, etc.

Administration of the legislation is, depending on the jurisdiction, either in the hands of the Minister of Justice, the Workers Compensation Board, the courts or administrative tribunals.

Grounds for Compensation

There are three grounds for making an award: (a) a person was injured while making an arrest or assisting a peace officer in doing so; (b) a person was injured while preventing an offence or assisting a peace officer in doing so and (c) a person was injured as an innocent victim of crime other than under circumstances described in (a) or (b).

Application for Compensation Eligibility

Application may be made by or on behalf of crime victims within the scope of the provincial or territorial legislation. If the victim has been killed, application may be made by or on behalf of surviving dependents. There are others who may apply with respect to pecuniary loss and expenses arising from the victim's death; but this varies depending on the jurisdiction.

Time Limit for Application

In all jurisdictions applications must be brought within one year, except in Manitoba, which allows two years for a claim to be brought.

Co-operation With the Police

It is expected that persons who apply for compensation report the crime to the police within a reasonable time.

Proof of Criminal Injury

A claim is established on the balance of probabilities as opposed to a reasonable doubt. Thus, the legislation of most jurisdictions authorizes the acceptance as evidence of statements, documents, information or matter that may assist in dealing effectually with applications, whether or not they would be admissible as evidence in a court of law. A conviction is not a necessary condition for the granting of an award, for a conviction may not take place at all. The offender may not be found, or the charge may have been dismissed on account of the higher standard of proof applied by the courts.

Quantum

In Quebec and Manitoba, victims are compensated as if they had been injured in a work situation. In British Columbia, the basis for decisions is similar to that used in civil courts for personal injury arising from negligence. In New Brunswick, awards are made as if damages were being assessed in a civil action, although to a maximum of $5,000.

In all other jurisdictions, there is no prescribed guiding principle for determining the quantum of compensation other than that compensation be awarded for factors such as expenses incurred as a result of injury or death, pecuniary loss, pain and suffering, and maintenance of a child born as a result of rape. In addition, financial need is specified in Saskatchewan as a further factor of consideration.

Minimum and Maximum

In all jurisdictions, other than Quebec and Ontario, there is a minimum of about $100 below which no compensation is paid. All jurisdictions, except Saskatchewan and Alberta, have a maximum whether payments are made monthly or in a lump sum.

There is in some programs a limit on compensation payable for any one occurrence regardless of the number of victims.

When injury or death occurs in the process of attempting to enforce the law, the maximum payable to any one victim is raised to $10,000 in New Brunswick. It is waived completely in Nova Scotia, Ontario and British Columbia.

Alberta imposes a limit of $10,000 for general damages for compensating persons who were attempting to arrest a person, preserve the peace or assist a peace officer in carrying out his duties.

Deductible Amounts

All jurisdictions have provisions for the deduction of monies which the victim recovered from various other sources.

Manner of Award

Awards may be in the form of lump sum awards, periodic awards or a combination of both.

Seeking a Civil Remedy

In all jurisdictions victims may proceed, simultaneously, to seek another civil remedy. Those who launch a civil action and recover are required to reimburse the authority concerned for any award under the program. If they do not launch a civil remedy, the authority concerned, upon the conferring of an award, is subrogated to the rights of the persons to whom payments were made.

Appeal and Review

In some jurisdictions there is a limited right to appeal on a question of law or law and jurisdiction.

The Quebec, Manitoba and British Columbia laws provide for an administrative review of decisions taken.

Conclusion

Criminal Injuries Compensation exists in most juridictions and it may provide the basic framework and mechanisms for the administration and adjudication of claims based on wrongful convictions and imprisonment. The cost-sharing agreements are flexible enough to allow each jurisdiction to deal with compensation as it sees fit (e.g. determination of quantum by judges, worker's compensation boards or specialized tribunals). In our view this type of legislation could, with amendments as needed, provide the necessary mechanism for determining quantum in cases of wrongful conviction and imprisonment. But, as indicated earlier, this is only one of several alternatives.

CHAPTER V

OPTIONS ON COMPENSATION FOR PERSONS WRONGFULLY CONVICTED AND IMPRISONED

Several options are possible in order to compensate persons who have been wrongfully convicted and imprisoned. In our view, the following pre-requisites must be met before a wrongfully convicted person can be compensated:

1. a conviction resulting in imprisonment (pursuant to federal or provincial legislation) all or part of which must be served;

2. a newly discovered fact showing that a wrongful conviction occurred;

3. the reversal of a conviction as a result of the case being referred back to the courts by the Minister of Justice pursuant to section 617 of the Criminal Code or after the court of appeal has extended the time within which an appeal may be heard (or similar provincial legislation in the case of a conviction for a provincial offence) or the granting of a pardon to a convicted person pursuant to section 683 of the Criminal Code (or similar provincial legislation for a conviction for a provincial offence).

If it is decided that a reversal of the conviction or a pardon is sufficient for the injured party to obtain compensation and that the matter of innocence need not be addressed, the question of determining quantum and blameworthy conduct may be resolved by:

1. The Courts

   a) The quantum could be determined by the court of appeal which reversed the original conviction after a reference by the Minister of Justice pursuant to section 617 of the Criminal Code or after it extended the time within which an appeal may be heard. This option would require amendments to sections 613 and 617 of the Code (and to corresponding provincial legislation) allowing the person whose conviction was reversed to claim compensation and permitting the court of appeal to hear the claim and to determine the

quantum to be awarded based on the evidence presented before it. This approach, however, would fail to provide a forum for persons who are granted a pardon.

b) A civil court could determine the quantum. Legislation would be required to create a cause of action allowing the person whose conviction was reversed or who had been granted a pardon to claim compensation. The court would determine the compensation to be awarded based upon evidence and the general principles of damages in tort law.

2. A Tribunal, Board or Designated Person

Existing tribunals or boards (or newly established ones) could be used as the forum for determining the quantum. Alternatively, the claim could be referred to a designated person, such as a justice of a superior court of criminal jurisdiction, appointed on a permanent or ad hoc basis.

A right of appeal or review would be available in all cases. The final decision on compensation would be binding on the Crown who had initiated the prosecution.

If, on the other hand, it is considered necessary to settle the matter of innocence before a claim can be made, then an initial hearing must be held to resolve that issue. Once the matter of innocence is resolved, the issue of compensation, could be addressed as outlined above.

The issue of innocence could be settled by:

1. a) The individual receiving a free pardon pursuant to a recommendation made to the Governor in Council by the Minister of Justice under section 683 of the Criminal Code (or similar provisions enacted by the provinces). Officials at the Department of Justice assured us that before a pardon is granted on the basis of innocence the case is thoroughly investigated and the recommendation to grant a pardon is only made when it is a certainty that the person did not commit the offence for which he was convicted. A free pardon, granted on the basis of innocence, could so specify on the face of the document.

b) The court of appeal which is reviewing a case pursuant to a referral by the Minister of Justice under section 617 of the Criminal Code or is reviewing a case after it has extended the time within which an appeal may be heard. If the court sets aside the conviction and directs a judgement or verdict of acquittal to be entered, it could, as part of its review, determine the question of innocence. This procedure may require amendments to Sections 613 and 617 of the Code. A similar procedure could be used by the provinces for provincial offences.The advantage of this approach is that it employs an existing framework within the Criminal Code to review the conviction and determine innocence. A major difficulty with this is that it would force the court of appeal into making two types of acquittals; acquitted and innocent; and simple acquittal with the consequent stain on the person's character resulting from a failure of the court to declare him innocent. Another disadvantage is that the court of appeal would have to address a question which to date is not part of our criminal justice system, and to act as an original fact finder.

c) A tribunal, board or designated person. An existing tribunal or board could review and determine the question of innocence. Alternatively, a new tribunal or board could be created to carry out this function. Lastly, a designated person could be appointed to review the case and decide the issue of innocence. The main disadvantage to this option is that the tribunal, board or designated person may be viewed as dealing with criminal law matters and thereby usurping the function of a criminal appeal court. For this reason, we believe this option should be rejected.

Constitutional Implications of Options

There does not appear to be a constitutional bar to having provisions in the Criminal Code for a court of appeal to make a determination of innocence, in respect of a Criminal Code conviction and of having that court determine the quantum to be paid. Care would have to be taken to draw the line on what the court of appeal could do in terms of criminal law and what could fall within the scope of

property and civil rights. In the absence of dovetailing legislation, difficulties could arise in having a determining forum established by one level of government making an enforceable order for another level of government to pay compensation. There does not appear to be a constitutional bar to a tribunal, board or designated person determining the quantum of compensation to be paid by the Crown (federal or provincial). Such a tribunal, board or designated person could be empowered to order payment by the level of government which established it by legislation or authorized it by legislation to be established.

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 county, 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.

CONCLUSION

Despite the many safeguards in Canada's criminal justice system, innocent persons are sometimes convicted and imprisoned. In this Report we have attempted to examine methods of providing redress to those who have been wrongfully convicted and imprisoned. In so doing, the Task Force examined redress mechanisms in foreign jurisdictions, looked at Canadian compensatory schemes, highlighted a number of significant issues, and suggested a number of options whereby a wrongfully convicted and imprisoned person could be compensated.

Whatever the redress mechanism ultimately chosen, it should be relatively simple in its application because there will not likely be many cases, and it should be as responsive as possible to the injured party given that he is the victim of the state's criminal justice system.