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March 20, 1990

By Hand

Hon. Gregory T. Evans, Q.C.
Commissioner
Commission on Conflict of Interest
101 Bloor St. West, 4th Floor
Toronto, Ontario

Dear Greg,

Re: Compensation for Donald Marshall Jr.

Under cover of this letter I am enclosing material that I hope will be of assistance to you in determining the level of compensation to be awarded to Donald Marshall Jr. by the Government of Nova Scotia.

(1) From the Home Office, London

This is a letter, with enclosures, from the Branch that handles compensation for wrongful conviction in England and Wales. Until very recently this was an ex gratia scheme under the prerogative powers of the Crown. This has become a statutory scheme under the provisions of the Criminal Justice Act, 1988, s. 133. According to the Legal Adviser to the Secretary of State, Mr. A.H. Hammond, the English legislation (which I am assuming does not extend to Scotland) is based on the United Nations Covenant relating to Civil and Political Rights, Article 14(6).

I have already acknowledged and thanked the Home Office officials for their prompt cooperation. Copies of my letters are enclosed for your information.

(2) From the Centre of Criminology, University of Toronto

There is a substantial package of material resulting from the library search by Cathy Matthews, Head Librarian, and Jane Gladstone, Reference Librarian, at the Centre of Criminology. The covering letter from the Head Librarian dated yesterday, March 19th, and the accompanying summary of the contents of the binder, describe how the research material has been arranged. Needless to say I have not had an opportunity to do more than get a feel for the dimensions of the subject but I trust that this exercise will prove to be useful to you.

Cathy Matthews has emphasised her indebtedness to Archie Kaiser at Dalhousie Law School with good reason. Let me know if there is anything else I can do to help.

With kindest personal regards,

Sincerely,

John.

/dw

J.Ll.J. Edwards
Professor Emeritus

March 8, 1990

A. H. Hammond, Esq.
Legal Adviser
Home Office
Queen's Gate
LONDON, SW1H 9AT

Just a short note to thank you sincerely for responding so readily to my telephone inquiry regarding the scheme for compensating persons wrongfully convicted in England and Wales.

I have now received from Mr. K. MacKenzie, C3 Division, the kind of helpful material that I was looking for and which I shall transmit to the Hon. Gregory T. Evans, the Commissioner who has the task of determining the level of compensation to be paid to Donald Marshall Jr. by the Government of Nova Scotia.

Because of the extraordinary circumstances revealed in the handling of the Marshall case you may be interested in the Report of the Royal Commission which has recently been published by the Government Printer in Nova Scotia. The main part of the report, with the Commissioners' findings and recommendations, is contained in Volume 1. Its relevance to the Guildford bombing Tribunal of Inquiry will readily become apparent as the circumstances of the two cases are compared. I shall follow the English inquiry with great interest.

Thanks again for your help,

With my best wishes,

Yours sincerely,

/dw

John Ll.J. Edwards
Professor Emeritus

March 8, 1990

Mr. K. MacKenzie
C3 Division
Home Office
Queen Anne's Gate
London SW1H 9AT
United Kingdom

Dear Mr. Mackenzie,

I write to thank you for your letter of 8th March 1990 and the enclosures which I have read with interest.

The papers you brought together for me explain the current system in England and Wales clearly and, I hope, fully enough for the purposes of the Commissioner appointed by the Government of Nova Scotia to perform, in the Donald Marshall case, a similar task to that performed by your independent assessors.

With best wishes,

Sincerely,

J.

/dw

J.Ll.J. Edwards
Professor Emeritus

I also attach a copy of three different types of case where compensation has been paid, following the advice of the assessor. Each case has to be dealt with on its merits, because of the widely varied circumstances; and there is no tariff as such.

I hope you will find these attachments useful. If we can be of any further assistance, please do not hesitate to let me know.

Yours sincerely

Keith MacKenzie

K MacKenzie
C3 Division

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Professor John Edwards
Faculty of Law
University of Toronto
TORONTO
CANADA

Your reference

Our reference

Date
6 March 1990

Dear Professor Edwards

I understand from Bob Baxter that you would like some guidance on how compensation for wrongful conviction is assessed in England and Wales.

The assessment itself is determined by an independent person experienced in the assessment of damages. The Home Secretary will always accept such advice and accordingly will offer the recommended sum in settlement of the claim.

Compensation falls to be assessed under two headings - pecuniary loss and non-pecuniary loss. Pecuniary loss will cover any loss of earnings brought about by the period of detention in custody,

COMPENSATION FOR MISCARRIAGES OF JUSTICE

NOTE FOR SUCCESSFUL APPLICANTS

Procedure for assessing the amount of the payment

A decision to pay compensation in accordance with the provisions of Section 133 of the Criminal Justice Act 1988, or to make an ex gratia payment from public funds in accordance with the arrangements otherwise set out in the Home Secretary's statement of 29 November 1985 (except for the arrangements relating to Article 14.6 of the International Covenant on Civil and Political Rights which S.133 supersedes) does not imply any admission on the part of the Secretary of State of legal liability. Such decisions are not based on considerations of liability, for which there are appropriate remedies at civil law. The payment is offered in recognition of the hardship caused by a miscarriage of justice or a wrongful charge, and notwithstanding that the circumstances may give no grounds for a claim for civil damages.

2. The amount of the payment to be made is decided on the advice of an independent assessor experienced in the assessment of damages. An interim payment may be made before the final amount is determined.

3. The independent assessment is made on the basis of written submissions setting out the relevant facts. When the claimant or his solicitor is first informed that a payment will be offered in due course, he is invited to submit any information or representations which he would like the assessor to take into account in advising on the amount to be paid. Meanwhile, a draft

4.2 **Non-pecuniary loss**

Damage to character or reputation; hardship, including mental suffering, injury to feelings, and inconvenience.

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

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

7. The Home Secretary will regard himself as bound by the independent assessor's recommendation on the amount of compensation, or ex gratia payment. The claimant is not bound to accept the offer finally made; it is open to him instead to pursue the matter by way of a legal claim for damages, if he considers he has grounds for doing so.

EX-GRATIA PAYMENT TO MR A

Circumstances leading to the conviction

On 17 March 1985 Mrs B reported to the police that the previous evening she had been assaulted by Mr A (resulting in the blackening of both eyes) after she had allowed him into her home. She alleged that later the same evening he had returned to her flat, and again (with her permission)

8. In the interests of a successful claimant, the Home Office will not normally make any public or other statement about the amount of an award in a particular case. Nor will any individual claimant be identified by name. The Home Office will advise enquirers, for example from the press, to contact the claimant, his solicitors or other agent. The Home Office should be advised whether or not the claimant wishes this practice to be followed. Government Ministers have responsibility for accounting for public expenditure and the Home Secretary must therefore be ready to answer any such specific queries by Members of Parliament. However, it is not normal practice to reveal the names of individuals receiving payments of compensation. Nevertheless, the Home Office cannot undertake to prevent press queries or reports.

Home Office

7. The medical evidence offered confirmed that Mrs B suffered from arthritis. Confirmation of facial injuries to Mrs B was also provided. Doubt was expressed as to whether intercourse had taken place on a regular basis as claimed by Mr A.

8. The jury returned a unanimous verdict of guilty upon the count of assault occasioning actual bodily harm. By a majority of 10 to 2 they also found Mr A guilty of rape. The judge remanded Mr A in custody for the provision of medical reports.

Sentence

9. On 18 October 1985 Mr A again appeared before the Court when medical evidence was presented. After consideration, the judge expressed the view that he would not be justified in passing any sentence other than imprisonment. For the offence of assault occasioning actual bodily harm Mr A was sentenced to two years' imprisonment. For that of rape he received five years' imprisonment concurrent. Mr A lodged no appeal.

Subsequent developments

10. On 4 January 1986 Mrs B reported to the police that over the Christmas period she had been raped by D . She claimed that she first met him in October 1985 when he followed her home forced his way into the flat and raped her. At this time two police officers called on another matter and D got dressed. She made no report of the incident. On 21 December 1985 Mrs B claimed that D returned and gained admission to the flat. He forced her upstairs where she became unconscious. Later D commited a number of indecent attacks upon her including rape, until he left on 22 December 1985.

11. D was arrested and appeared before the Court in January 1987 on three counts of rape and one of attempted rape. Mrs B again gave detailed evidence of the alleged assaults upon her. During the course of the proceedings the prosecution agreed to enter a number of admissions about other allegations made by Mrs B . These included allegations of attempted murder by her husband; that her husband was the "Ripper"; that she was being poisoned by carbon monoxide; that she had been struck by lightening; and that she was a member of the WRVS (when she was not). Additionally the prosecution accepted that Mrs B had made continued allegations of different assaults dating back to an alleged rape in 1979; that in 1984 she was referred to a psychiatrist; and that in 1986 it was suggested that she suffered from a paranoid illness.

12. The jury returned a verdict of not guilty on all charges and D was released.

13. Following this trial the Judge expressed concern to the Home Secretary about the safety of Mr A's convictions. After enquiries into the matter, the Home Secretary referred the case to the court of Appeal on 21 September 1987 (section 17 of the Criminal Appeal Act 1968).

Appeal

14. The case was considered by the Court of Appeal on 8 December 1987. A copy of the judgement is attached (Annex A). On the basis of the developments in the D case and the various admissions made by the prosecution during the proceedings, the court ruled that they had no hesitation in reaching the conclusion that both convictions of Mr A should be set aside on the grounds that they were unsafe. The convictions were therefore quashed.

Time spent in custody

15. Mr A was detained by the police on 19 March 1985 and remanded into custody the following day. The Court of Appeal quashed the conviction on 8 December 1987. This period of time - 2 years 9 months - is the subject of the claim for compensation.

Previous history

16. At the time of his arrest Mr A was 49 years of age. The transcript of the trial shows that Mr A came to the UK in 1957 and was employed for many years as a bus driver until he had an accident and received injuries which rendered him unfit for work. He has been unable to work since 1972 apart from some temporary jobs such as loading and unloading lorries, mopping floors etc. At the time of the offence he was separated from his family.

17. No claim against loss of earnings has been advanced on Mr A's behalf.

Previous convictions

18. Mr A has been convicted on four previous occasions for minor offences, the last occurring in 1983. All resulted in either a small fine or a conditional discharge and are spent under the Rehabilitation of Offenders Act 1974. Prior to this conviction of rape and actual bodily harm, Mr A had never been detained in prison.

Interim awards

19. There has been no interim payment.

Submission by solicitors

20. The solicitors in their letter of 24 May (Annex B) indicate that Mr A requires no specific compensation against pecuniary or non-pecuniary loss, except with regard to the period of imprisonment.

Legal costs

21. The solicitors asked for their costs of £230, inclusive of VAT, to be met.

MEMORANDUM FOR INDEPENDENT ASSESSOR
PAYMENT OF COMPENSATION TO MR S.
CIRCUMSTANCES LEADING TO THE CONVICTION

1. On or about 2 February 1982 police enquiries commenced into allegations of serious corruption of British Rail employees involving the disposal of redundant scrap mental, and the contracts awarded to companies involved in such matters. Two areas were at the centre of the investigation, one of which was -

2. Arising from enquiries made by the British Transport Police, Mr S. , who at the time was a self-employed contractor involved in the collection and subsequent disposal of scrap metal from British Rail, was arrested on 14 July 1982 along with two others. He was released the same day.

3. Subsequently two files were submitted to the Director of Public Prosecutions for consideration of offences of corruption surrounding 16 British Rail employees and 6 civilians. Having considered the files, the Director of Public Prosecutions authorised proceedings against 4 British Rail employees and 5 civilians for various offences.

4. Mr S. , along with a Mr F. (his business manager), a Mr Sh

Home Office Reference:

Mr. A

ASSESSMENT

The compensation which I am required to assess is in respect of the Claimant's imprisonment for about 2¾ years. There is no claim for pecuniary loss.

In addition to the period of imprisonment, I take account of the fact that the period of 5 years imprisonment which the Claimant faced was substantial, thereby adding to his distress, and also that it was not until December 1987 that the convictions were quashed by the Court of Appeal, so that the Claimant suffered the stigma of the

admissible evidence had been submitted on which the case could proceed to be considered by the jury. Counsel on behalf of Mr W. advanced a similar line of argument. In response Crown Counsel accepted that the original charges of conspiracy between the four accused and others was, in the light of developments, now only a conspiracy between Mr S. and Mr W. . In giving his ruling, the Judge stated that the charge of conspiracy to obtain pecuniary advantage could not be proceeded with, but that of conspiracy to obtain an exemption of abatement of liability should be placed before the jury with amendments to confine the alleged conspiracy to that between Mr S. and Mr W. . The other two defendants - Mr F. and Mr Sh. - were then acquitted.

8. The defence offered no evidence in respect of either Mr Simpson or Mr W. . The jury were unable to agree a unanimous verdict and, after receiving a majority direction, found the case proved against both men by a majority of 10 to 2. Of the six charges of theft against Mr S. , the court record shows the jury to have returned two verdicts of 'not guilty' by direction. In respect of the remaining four counts, the jury were discharged from reaching a verdict and the matters ordered to lie upon file.

9. On 25 February 1986 Mr S. was sentenced to 9 months' imprisonment. Mr W. was sentenced to 6 months' imprisonment suspended for one year.

Appeal

10. On 17 March 1986 Mr S. applied for leave to appeal against conviction on the grounds of errors made by the Judge in the conduct of the trial by refusing to accede to the defence case of there being no case to answer, and also errors in his subsequent rulings and directions to the jury. The following day - 18 March 1986 - an application for leave to appeal against conviction was submitted by Mr W. citing similar grounds. Leave to appeal was granted to both men on 12 May 1986. In the case of Mr S. , an application for bail was refused.

11. Mr S. appeared before Crown Court on 9 June 1986 charged with seven counts of corruption. These offences arose out of the same enquiry conducted by the British Transport Police, although the matters concerned related to the area. Mr S. entered a plea of guilty to four of the seven counts and was sentenced to 9 months' imprisonment, six months of which was ordered to be suspended for a year.

12. Following this decision, on 19 June 1986, Mr S. abandoned his appeal against the February conviction. The withdrawal led to Counsel for Mr W. requesting a delay on his client's appeal, in order that the matter could be reconsidered.

13. The appeal by Mr W. was finally heard by the Court of Appeal on 13 October 1986. The judgement (Annex A) records the Court accepting that many of the documents used at the trial had been inadmissible. The Court indicated that the case had been one which bristled with such uncertainties as to make it somewhat tenuous and that the judge had made some unfortunate remarks. They also found the judge had failed to give proper directions on how to treat certain of

the documentary evidence. On those grounds the Court allowed the appeal by Mr W. and quashed his conviction. The Court said that their decision would result in Mr S's conviction having to be quashed. They directed he be advised to submit an appropriate application. Solicitors on behalf of Mr S. made their application on 21 October 1986 and the conviction was quashed on 23 February 1987.

Application for Compensation

14. An application for compensation was made to the Home Secretary on 17 September 1987. After enquiries into the matter the Home Secretary decided on 22 April 1988 that the circumstances of the case were such as to justify him authorising a payment of compensation.

Time Spent in Custody

15. Mr S. was sentenced to imprisonment on 25 February 1986 and released on 27 August 1986. However, on 9 June 1986, he was sentenced to imprisonment for further offences. In respect solely of the February conviction therefore, Mr S. was detained for 104 days. The remaining 80 days were accounted for by both sentences.

Previous History

16. At the time of his appearance for trial in 1986 Mr S. was aged 62 (date of birth 14 July 1923). He had been a self-employed contractor whose main business was with British Rail, but the company went into liquidation around 1983. Further information will be offered, when dealing with matters raised as items for which compensation should be assessed.

Loss of Earnings

17. In their letter of 14 July 1988 (Annex B) solicitors claim loss of earnings for the period 1981-1988. This is on the basis that British Rail contracts were "withdrawn from Mr S. because of the police investigation (not because of the conviction) and consequently his business went into liquidation".

18. Accounts have been forwarded in support of the claim (Annex B). This shows that for the period 1978/79-1981/82 inclusive, drawings by Mr S. were £12,803, £17,160, £19,377 and £17,389 respectively. In the same period net profits for the company were £10,435, £18,934, £17,980, - £5,864 (ie net loss). In Annex C, solicitors offer comments on the way contracts between British Rail and Mr S. operated in particular the "cost plus" contract. According to them, this was a continuing contract but one dependent upon British Rail providing the materials for Mr S. to make use of. British Rail would have given Mr S. the contract apparently because of his tender for hourly rates would have been competitive and satisfactory. The contracts continued until March 1983 when they were stopped as a result of the court case, although before then it became clear that British Rail were denying him access to further materials. The loss of this source of revenue caused the company to go into liquidation. A request was made for accounts in respect of the year ending March 1983 but apparently none were produced because, according to the solicitors, it "seems to be accepted practice in the [accountancy] profession not to proceed to prepare accounts when a client has been arrested". No documentary

evidence is available dealing with the withdrawal of contracts by British Rail. However the solicitors say that after 14 July 1982 (the date of Mr S.'s arrest) it was clear he was not being invited to tender for the disposal of scrap materials.

19. From enquiries made it would appear that the sale of redundant assets by British Rail is governed by strict procedural rules laid down by the British Railways Board. The system was that as and when any service was required by an outside firm, a contract would be issued for tender. In the case of scrap metal, yearly contracts should have been awarded to the most suitable firm with tenders and bids being made in February/March each year. It would appear that Mr S. had been able to secure three different contracts covering the Newcastle area for the removal and sale of scrap metal and was always successful in maintaining them, to the extent that they were amended to three year contracts.

20. Following the obtaining of evidence to show senior railway employees had been involved in corruption, and arising from their admissions, the tendering procedures of British Rail were tightened which no doubt caused British Rail to take the action they did over the awarding of contracts.

21. Mr S.'s company relied heavily on work from British Rail to keep it solvent. There was of course no obligation on British Rail to continue with these contracts, as they were on an annual basis only and therefore subject to termination. The loss of business to Mr S. was not due to his conviction in 1986, but allegedly associated with enquiries made in 1982 into large scale corruption within British Rail and evidence then obtained. Furthermore enquiries into those matters which led Mr S. to enter a plea of guilty in June 1986 to four charges of corruption, would in themselves have had an adverse effect on the business. In these circumstances, no claim for loss of earnings arising out of the circumstances of the conviction in February 1986 of Mr S. can be met, other than with regard to the period spent in custody.

Arrest of Mr S.

22. The solicitors enter a claim for compensation in respect of Mr S being detained by the police "in communicado" on 14 July 1982 ie the day of his arrest. On this date fell Mr S's birthday.

23. Enquires of the police have established that Mr S. was arrested at 10.40am on 14 July 1982 and released at 7.30pm. During that period he was not held incommunicado; being offered all the conditions of section 62 of the Criminal Law Act 1977, upon arrival at the office of the British Transport Police. At 2pm the same day Mr S. was taken to his home address, which was searched. Prior to entry by the police, Mr S was allowed to talk privately with his wife. This is a matter which should, if proved, be the subject of separate representations to the police. Ex gratia payment here is in recognition of the quashed conviction and its effects; there is no indication or evidence that Mr S. was wrongly or unlawfully arrested, nor of any default by the police.

Family Relationship

24. Solicitors seek compensation for the breakdown in the marriage between Mr S and his wife, due to his change in character brought about by the pressures placed upon him during the police investigation, the threat of prosecution and the threat of conviction. After his release Mr S moved away to an address at , where he apparently remained for some 18 months before returning home. There is no evidence offered in support of these assertions.

Medical Effects of the Conviction and Sentence

25. Compensation is sought for the worry and upset caused by the police investigation, the effort and time put into preparing for the defence and duress of the trial. In addition a claim is presented in respect of Mr S's deterioration in health caused by the conviction and sentence. Upon request a medical report from Mr S's doctor has been provided (Annex D). This shows Mr S suffered from depression and an anxiety state in 1979. In August 1981 and February 1983 he showed further symptoms of an anxiety state which necessitated treatment with tranquillisers. He continued to take the treatment on an 'as necessary' basis until September 1987, when a recurrence of his anxiety related chest pain arose for which tranquillisers were prescribed.

Effects on Social Life

26. Compensation is sought for the "stigma" of having served a prison sentence. Until his appearance for trail in February 1986, Mr S had no previous convictions. The resultant conviction therefore led to the first occasion he had been committed to prison.

27. Reference is made by the solicitors to the subsequent conviction of Mr S in that he pleaded guilty to four counts of corruption a) because his health could not suffer a further trial similar to the previous one and b) the Judge gave an indication that if he pleaded guilty he would not receive any additional time in prison. There is no evidence to support these assertions.

28. The proceedings in June 1986, although arising out of the same enquiry, dealt with matters surrounding British Rail operations in the area (the February 1986 convictions related to the area) and involved corruption at very senior levels within British Rail. While the solicitors suggest that had the first convictions not occurred Mr S would have fought the subsequent charges and may have probably been acquitted, at these latter hearings British Rail officials admitted corruption charges in the form of gifts from Mr S .

General Matters

29. Solicitors seek compensation to offset the fact that because Mr S's business went into liquidation he was adjudged bankrupt for an approximate sum of £70,000 and that because of his age, this debt will continue. They suggest that if police enquiries had been conducted in a more "sensitive fashion" the debt would not have arisen. The conduct of a police investigation however is not a matter for which compensation by the Home Secretary may be considered.

Out of Pocket Expenses

30. Expenses under this heading are limited to costs incurred by Mr S travelling to and from his solicitor's office. The solicitors report that Mr S wishes to make no claim for these (Annex E).

Interim Awards

31. There has been no interim award.

Legal Costs

32. The solicitors ask for their costs of £200 plus VAT (ie £230) to be met (Annex E). This Annex also contains comments on the memorandum.

Wrongful Conviction and Imprisonment: Towards an End to the Compensatory Obstacle Course

H. ARCHIBALD KAISER

Associate Professor,
Dalhousie Law School,
Halifax, Nova Scotia.

Wrongful Conviction and Imprisonment:
Towards an End to the Compensatory Obstacle Course

Contents

of justice. There are others whose liberty has been interfered with by agents of the state but who are ultimately either not charged or who are found not guilty of an offence including:

(a) persons detained for questioning and released without being charged;

(b) persons detained after being arrested and before their first appearance before a court, who are eventually found not guilty;

(c) persons detained in custody following judicial refusal of release before trial, who are found not guilty;

(e) persons whose convictions are set aside and who are released through the regular appeal process.

Many of the arguments which follow could be used to argue for payment of compensation in each of the above categories and indeed some countries presently provide for such measures.[5] Conversely, it is not intended to suggest here that there should be no limits placed on state liability. However, given the present lack of Canadian scholarship in the field, discussion has been mainly confined to compensation for the most egregious examples of wrongful conviction and imprisonment.[6] It is hoped that some stimulation will be provided for exploring the prospects of compensating the broader group of persons noted above. Even if their predicaments are less compelling from a compensatory perspective, they have suffered some of the same stigma and burdens. Those whose wrongful conviction and imprisonment are discovered by extraordinary means are merely further along the continuum toward outrage, as the absence of solid foundations for the finding of guilt are only belatedly discovered.

How many people fall into this unfortunate category? It is extremely difficult to provide a reliable assessment of the magnitude of the problem in Canada. A recent study completed in the United States estimated that one-half of 1% to 1% of convictions for serious crimes could be erroneous and that "the frequency of error may well be much higher in cases involving less serious

felonies and misdemeanors".[7] Using a much narrower category than was employed in the American research, a British study estimates that there are at least 15 cases a year of wrongful imprisonment in the United Kingdom after trial by jury.[8] There are insufficient data available in Canada to determine if similar rates or gross numbers obtain. However, it is manifestly clear that some innocent people are convicted. Even if one were only dealing with the most horrendous cases where the citizen is imprisoned, the lack of adequate measures to deal with compensation would be bad enough. Considering that the potential numbers of judicial errors could be as high as noted in the foregoing studies and in light of the arguments below, the inadequacies of the Canadian approach become disturbing indeed.

Given the present dearth of writing on wrongful conviction and compensation, the paper will serve to introduce many of the major issues. It first discusses the basic rationale for compensation and explains Canada's international obligations, noting some of the contrary arguments. Next a sketch of the main potential conventional remedies is provided. Finally recent Canadian discussions and initiatives in the field will be reviewed against the background of the relevant article of the International Covenant on Civil and Political Rights to which Canada is a signatory. From the perspective of how policy is formulated, it is most significant that at their meeting of November 22-23, 1984 in St. John's, Newfoundland, the Federal-Provincial Ministers Responsible for Criminal Justice established a Task Force to examine the question of compensation for persons who are wrongfully convicted and imprisoned. The Task Force Report was completed in September, 1985 and is available from the office of the Minister of Justice.[9] It would appear to have been influential when the same group of Ministers adopted the Federal-Provincial Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons on March 17-18, 1988 (attached as

sympathetically observed in the Thomas case:

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

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

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

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

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

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

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

With respect to the criminal justice system and beyond, to society at large, payment represents a partial fulfillment of the obligations of the state in the face of its unjust interference with the liberty of the accused. Public respect for the system may thereby be restored or heightened by this admission of error and assumption of responsibility. Conversely, where compensation is either unavailable or ungenerous or where there is no as of right payment and discretion is retained by the executive, the state has clearly indicated the low priority it gives to the plight of the wrongly convicted.[17] The costs of legal errors of such huge proportions are thereby borne by individuals and not by the state, which thus conceals the financial and policy implications of its malfunctioning criminal justice system.[18] Compensation for the accused, however, may actually lead to some improvements in the operation of the criminal justice system by encouraging norms of caution and propriety in police and prosecutors. From a compensatory viewpoint, the wrongfully imprisoned qua victims are essentially similar to those who are already offered some redress through criminal injuries compensation boards. For that matter, both of these classes of victims are not readily differentiated from other groups where society has decided to assume the costs of either natural disaster or more aptly here, social malaise.[19] Crude individualism is even less appropriately invoked to deny compensation in the

context of the unjustly imprisoned where the state itself has intentionally, if mistakenly, occasioned the suffering of the accused.

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

2. Canada's International Legal Obligations

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

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

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

> 1. ... to respect and to ensure to all individuals ... the rights recognized in the present Covenant.
>
> 2. Where not already provided for by existing legislative or other measures ... to take the necessary steps ... to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
>
> 3. (a) To ensure that any person whose rights or freedoms ... are violated shall have an effective remedy.
>
> (e) To ensure that the competent authorities shall enforce such remedies when granted.

Violations of the Covenant either arise from laws or actions which are contrary to the Covenant or from failure to enact laws, where required to do so

by the language of the Covenant.[25] For the purposes of this paper, Article 14(6) is of direct relevance:

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

There is always a legitimate question to be asked concerning the extent to which international law, in general and this article of the Covenant in particular, may be seen as valid law within Canada or for that matter in the domestic law of any other country. Of course, according to the theory of Parliamentary supremacy, a competent legislative body may enact a statute inconsistent with an international legal obligation. However, in the face of statutory ambiguity, the courts will construe legislation as if the country has not intended to legislate in violation of its international commitments and to try to save the international position if possible. Beyond this rule of statutory construction at the very least, "It would be to take an unduly cynical view of international legal arrangements to regard these provisions as being entirely inefficacious."[26] Rules and principles of international law may respectively provide assistance in interpreting constitutional guarantees, as argued infra. They may also be authoritative "as guides to the elaboration of the common law and as constraints to the operation of rules of decision."[27] Therefore, even if Article 14(6) does not immediately create a readily enforceable legal right, it might well come into play were a court seized with a matter raising relevant issues. It must also therefore be seen as a vital reference point in any policy discussion and critical to the assessment of Canadian legal initiatives.

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

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

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

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

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

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

Canada's representative to the Human Rights Committee was reassuring on this point. Although one has yet to see any concrete legislative results there has been a Federal-Provincial Task Force and subsequently the introduction of the Guidelines so that the following comment may be partially justified in retrospect.

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

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

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

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

3. Contrary Arguments

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

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

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

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

Finally, it might be said that in the mature Canadian legal system, there

are ample avenues for the wrongfully imprisoned to pursue and that no new appendage needs to be grafted on to the existing panoply of remedies. The following discussion should help to demonstrate the unreality of this argument.

C. Existing Conventional Remedies

It is difficult to find evaluative material, but among independent commentators there is virtual unanimity that the regular remedies available in the United Kingdom[39] and in many states in the United States[40] are woefully inadequate for the special circumstances of one who has been wrongfully convicted and imprisoned. In Canada, one is not likely to be able to find any comprehensive discussion of the issue. However, it is the author's view that the Canadian situation is, if anything, as bad as it is in other states which do not have statutory schemes. Sadly, no Canadian government has provided relief on this foundation as seems to be required by the International Covenant on Civil and Political Rights. Until the Guidelines were introduced in 1988 (which will be assessed infra), there was not even an authoritative national policy statement with respect to ex gratia payments, which the British have had for at least thirty years.[41] At the provincial level, Manitoba had introduced Draft Guidelines in 1986, but they did not take on a statutory form after they were tabled in the Legislature.[42] Also, it is of interest to note that in 1983 Quebec was said to have set up a task force to examine the question of compensation, which made recommendations to the Minister of Justice. By 1989, no legislation had emerged, from Quebec or any other Province or Territory.[43] The author is unaware of any other provincial guidelines, bills or legislation which may have been promulgated before the new Guidelines.

The conventional remedies outside the Guidelines do not provide anything beyond the scent of redress when the actual prospects of recovery are assessed. What follows in this section is an overview of the avenues which might be open to

an unjustly convicted person in 1989 beyond the Guidelines, with some summary evaluative comment. Although, it might be urged that the attention of government in Canada was only very recently focussed on the issue of compensation, Canada's neglect of the area should be seen as having created a pent up policy demand for progressive action.

1. Torts

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

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

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

against the successful suit of the Crown, both in statutory and common law form.[48]

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

(i) False imprisonment

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

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

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

(ii) Malicious Prosecution

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

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

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

> ... it is so much hedged about with restrictions and the burden of proof upon the plaintiff is so heavy that no honest prosecutor is ever likely to be deterred by it from doing his duty. On the contrary ..., the law is open to the criticism that it is too difficult for the innocent to obtain redress. It is notable how rarely an action is brought at all, much less a successful one, for this tort.[58]

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

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

(iii) Negligence

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

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

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

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

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

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

The usual reference points of "the likelihood of an accident happening and

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

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

Grave problems would be encountered with causation. As the damage would be the wrongful conviction and imprisonment, it becomes extremely difficult to establish the causal connection where a judge or jury have interposed their independent decision making to enter a conviction. Of course, the negligent investigation of the police officer may have contributed to the cause.[66] None the less the verdict of a neutral third party supplies the novus actus interviens which may break the chain of causation between the act of negligence and the injury.[67] Beyond this factor is the general flexibility with which "operational decisions" containing within them some element of discretion may be viewed by the court, what Wilson J. in Kamloops called "policy considerations of the secondary level".[68] Finally, in light of Nelles (albeit not argued in negligence), Crown immunity could again be the ultimate defence to an otherwise successful action. Although there may have been some erosion of earlier law in the context of negligence, even where there is some discretionary power, Nelles none the less emphasizes the forcefulness of the statutory protections for the Crown when discharging responsibilities of a judicial nature.[69]

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

2. The Charter of Rights and Freedoms

(i) General Principles: Interpretation and the International Covenant

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

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

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

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

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

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

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

(ii) The Prospect of Substantial Damages

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

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

and highlighting the significance of the constitutional loss for the society as a whole.

The above discussion, is not intended to leave the impression that a Charter action is the panacea for the wrongfully convicted and imprisoned. Firstly, at a policy level it is not likely that leaving the issue of compensation with the courts satisfies Canada's obligations under the International covenant, which the Federal-Provincial Task Force Report has recognized.[77]

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

3. Ex gratia compensation

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

Finally, it is possible that some claimants might be excluded, in which case a voluntary payment might be made.

However, the disadvantages of an ex gratia scheme are sufficient to confine it to such exceptional use, outside a statutory framework. Firstly, there is no obligation to pay, as both international law and an inherent sense of fairness and justice require. Secondly, there may be few or no guiding principles for the decision-maker. Thirdly, even if adequate guidelines are introduced, they could be circumvented or flouted. Fourthly, the process is or may be shrouded in secrecy. This is surely unsuitable, given the openness of much of the criminal process and the general public interest in seeing why and how government makes decisions. Fifthly, an exclusively voluntary scheme tends to trivialize the nature of the potential claims, making the interests affected seemingly suitably responded to by largesse or charity.

The Federal-Provincial Guidelines will be studied more closely in this paper, but parenthetically it might well be questioned at this juncture whether anything more than ex gratia compensation is really being offered in them. Clearly, they are not legislatively enacted by any level of government and the obligation if any, to appoint an inquiry only arises once the eligibility criteria, themselves problematic, are met. The final procedural stipulation (at p. 3 of the Guidelines) is merely that the relevant government "would undertake to act on the report submitted by the commission of Inquiry" [emphasis added]. There is little more by way of obligation added by these aspects of the Guidelines and surely not enough to distinguish them fundamentally from the features of simple ex gratia compensation, so often decried in other jurisdictions.

4. The Special Bill

Compensation could be ordered upon the passage of a special bill dealing

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

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

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

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

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

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

to the extent that a special bill contributes to this outcome, it could be a useful instrument. Under a statutory formula, the private member's bill could highlight and advance a marginal case.

D. Towards a New Regime of Compensation

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

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

For convenience, Article 14(6) is reproduced below, with emphasis added to

indicate the specific areas which will be reviewed:

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

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

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

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

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

With respect to the position of the Report on the survivorship of claims,

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

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

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

to apply.[92]

2. "By a final decision"

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

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

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

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

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

> There was no need for a lengthy definition of the term "final decision", since that concept existed in all legal systems. It would be preferable to leave it to each country to specify

which decisions had the force of res judicata.[98]

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

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

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

However, why should persons convicted wrongfully not still be able to request compensation especially if they have been imprisoned, even if it is merely a trial decision which has been reversed on the basis of a regular appeal? This is broadly comparable with the recommendations of the Justice Report[100] and interprets the function of compensation sympathetically: to restore to wholeness, in so far as it is possible, those who have been wrongfully convicted and to indicate the acceptance of societal responsibility..

The most supportable interpretation of Article 14(6) is that it is intended to compensate for miscarriages of justice only, omitting for the moment the imprecision of this concept. Thus the conventional reversal and extraordinary pardon provisions would be read conjunctively with "shows conclusively that there has been a miscarriage of justice." Indeed, this view has been adopted in the deliberations of the Commission on Human Rights and in the Human Rights Committee, where the phrase "miscarriage of justice" was used repeatedly. In

reply, it is submitted that such distinctions, between persons whose convictions have been reversed in the normal process and citizens who have been victims of miscarriages of justice, are too stringent. A more generous approach to compensation is lent support by an examination of Article 9(5) of the Covenant: "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." It seems illogical to provide redress for one who has merely been unlawfully arrested, although perhaps never even charged or detained beyond the initial arrest, and to refuse compensation to a person who may have been convicted and sentenced to prison, but where the conviction is set aside in a regular appeal.[101]

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

3. "Convicted of a criminal offence"

In Canada this expression could be read narrowly to require compensation to be paid only where the offence for which the person was wrongfully convicted was "criminal in the true sense".[102] This interpretation would therefore exclude from the ambit of the Covenant all provincial offences, because the provinces "cannot possibly create an offence which is criminal in the true sense".[103] Also excluded would be all federal offences, for which a penalty may be provided but which are not normally considered criminal.

The Task Force Report quite appropriately took the view that such an approach "would inadequately reflect the spirit of the International Covenant", given that in a federal state such as Canada penal measures including the

possibility of imprisonment attach to federal and provincial statutes.[104] The Report also refers to the French version which uses the expression "'condemnation pénale' which suggests compensation should not be limited to wrongful criminal convictions"[105] and finally recommends that compensation be available to persons unjustly convicted under either federal or provincial penal legislation.[106]

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

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

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

(i) Improving Access to Appellate Review

Although the focus of this paper is the wrongfully convicted person whose plight is discovered and addressed through extraordinary devices, it has also been argued that compensation ought to be available to the person whose conviction is reversed in the normal course of an appeal and possibly to other

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

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

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

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

It should be further noted at the outset that there are provisions in the Criminal Code which allow for the extension of time in which to commence an appeal against conviction and that some flexibility is thereby accorded to the

convicted person.[110] None the less, these sections offer small comfort to the person who has already pursued all relevant levels of appeal, so that the courts have no other basis upon which to assume jurisdiction.

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

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

The first remedial suggestion would give to a provincial court of appeal an expanded right to commence or reopen an appeal, where new facts are uncovered or for other analogous reasons which tend to point to a miscarriage of justice. This leave to appeal application would be able to be brought by the convicted person at any time, even where the same court had already disposed of the case. The revised provision could also include a statement of purpose permitting some relaxation of normal rules of evidence or procedure commensurate with the occasion. This would have the advantage of giving the accused another as of right avenue with which to seek justice. It would preserve for the courts some flexibility to deny leave where the supposed new or newly discovered fact or other ground was inconsequential or irrelevant and it would leave intact some discretionary powers for the executive. The denial of leave or of the appeal could be the subject of a further appeal to the Supreme Court of Canada. What is sacrificed somewhat in this scenario is the present finality of convictions. It is urged that this would not be a major cost in the face of the prospect of uncovering more miscarriages of justice sooner. Nor should there be a deluge of appeals in this vein. However, it must be conceded that the effects on the appellate court system require further consideration. The fact that this improved right of appeal would be included in the Criminal Code (or any provincial counterparts for non-criminal matters) would seem to ensure closer compliance with article 14(6) than in the regime envisaged in the Task Force Report. Of course it is arguable that similar entitlements already exist in the Criminal Code. Section 675(1)(a)(iii) permits an appeal on any ground not mentioned in the other subsections (which basically require a question of law alone or question of mixed law and fact). The suggestion contemplated herein would merely make explicit one special ground of appeal relating to a miscarriage of justice. Given that section 686(1)(a)(iii) now permits the court of appeal to

allow an appeal "on any ground there was a miscarriage of justice", the opening of the appellate doors for a consistent purpose seems to be both a modest and reasonable suggestion.

(ii) A Structuring and Rejuvenation of Executive Powers

The second recommendation deals with the utilization of the type of powers presently available under sections 690 and 749, to order appellate review and to grant a pardon, respectively. Given the first proposal for an expanded right of appeal, the Minister of Justice would have fewer occasions when section 690 would have to be invoked. None the less, it is not suggested that such discretionary authority be dispensed with entirely. Rather it should be relegated to a less prominent place among the devices available for the correction of injustice and should be circumscribed by declared guidelines. As it stands, the Charter may already require that the refusal of a Minister to exercise his section 690 powers is reviewable by the courts,[112] at least with respect to the process followed by the Minister.

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

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

Applications for the Royal Prerogative of Mercy are passed on to the National Parole Board for investigation and recommendation (pursuant to section 22(2) of the Parole Act) and the Governor in Council or the Governor General may finally pardon persons convicted of offences.[115]

dedication to being thorough and open. It may be that a careful ministerial statement made in Parliament and available to convicted persons would be the best vehicle to deal with this way of compensating the wrongfully convicted. Better reporting of both pardons and denials would also assist.

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

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

The only sign of flexibility in the Guidelines appears in their willingness in Part B to allow the individual to be considered eligible for compensation in some cases where sections 749 and 690 do not apply. The example chosen in the Guidelines mentions the situation of an acquittal being entered by an Appellate Court after an extension of time. There the Guidelines provide that compensation should be payable if an investigation shows that the individual did not commit the offence. That this provision allows for some relaxation of the otherwise rather harsh standards of the Guidelines is to be welcomed. However, it would be

preferable had the Guidelines started out by permitting compensation on a more liberal basis, or, failing that, had they proposed a liberalization of the appeal provisions in the Code and generally provided for higher levels of visibility and predictability in the use of the pardon and reference powers.

(iii) Alternative Approaches

The foregoing discussion on the main avenues of access to compensation under the Covenant, admittedly approaches the procedure through fairly conventional channels. It would be advisable to remain somewhat skeptical about the role of courts or ministers in the determination of the issue of compensation. Later, it will be argued that actual quantum of compensation could perhaps best be determined by an Imprisonment Compensation Board, but it should not be assumed that such alternative structures would be wholly inappropriate to involve in the threshold matters explored in this section as well. It is surely obvious that a Minister of Justice is also an elected official with partisan interests. Of course, in many instances these very features of his or her responsibilities may augur well for the wrongfully convicted person. Public pressure may build to the point where a Minister feels that a positive response is necessary to a plea for a pardon or a reference to a Court of Appeal. On the other hand, some cases may not become cause célèbres or worse, may be the focus of antipathy despite their merits. In these instances a Minister may be reluctant to use any extraordinary powers. Similarly, Courts of Appeal are fettered with respect to the tasks at hand. They are, by their membership and function, very cautious institutions. They may be reluctant to interfere with matters which have already apparently been settled by trial courts or previous appellate review. They may, in the absence of a statutory directive to the contrary, be hampered by strict codes of evidence and procedure. Given that cases may come to a Court of Appeal either at the direction of the Minister of Justice or by way of an as of right application

for leave to appeal by a convicted person, these reservations about the courts' performance of the unusual tasks at hand in reviewing a potential miscarriage of justice may become further barriers to redress.

One response to both types of problems may be to simply expand the jurisdiction of an Imprisonment Compensation Board to permit it to actually investigate cases where there is a reasonable suspicion that a miscarriage of justice has occurred. This would be a major departure from the existing patterns of dealing with these matters and could encounter division of powers problems.[123] Nonetheless, with some of the above changes being made in the rules of appellate courts and powers of clemency, such a body ought not to have an enormous caseload. Further, its comparative flexibility and special purpose might well lead to the earlier discovery of injustices.

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

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

It should be reiterated that nothing prevents the appropriate government(s) from extending the entitlement to compensation beyond that mandated by the Covenant. Neither the Human Rights Committee or any other body could criticize Canada for being more liberal in its interpretation of its Covenant obligations or providing rights superior to these standards. Particularly with respect to the second section part of this portion of article 14(6), the Guidelines may well indicate such a softening, as will be seen.

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

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

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

This illustration may seem strained particularly as it could be said that a reinterpretation of the social climate of the trial would be a "newly discovered fact". Further, it is likely that nearly all findings of guilt overturned outside the usual appeal process will be able to be classified as deriving from new facts, consistent with the wording of the Covenant and the thrust of the Report. The point of this reservation is that some residual clause ought to be inserted in any scheme providing for compensation for the unjustly convicted, thereby providing that the reversal or pardon may have been obtained "on the ground that either a new or newly discovered fact or any other factor shows ..."

This amplified basis would be more consistent with an overall dedication to providing compensation for wrongfully convicted persons.

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

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

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

It is a pity that the drafters of the Convention did not go on to add the logically appropriate clause to the Article, "in which case compensation may be eliminated or reduced commensurately". However, the implication of this addendum

to the Article by Canada is consistent with its apparent purpose. The stricter construction of the text of the Article does not allow for this approach. Thus, it might be maintained as a proposition that every non-disclosure is "partly attributable" to the convicted person: private investigators should have been hired, more astute counsel should have been chosen, immaterial matters should not have been lied about thereby causing the accused's credibility to be questioned, testimony should have been more forceful, articulate or coherent and so on. The text of the Article should not be used as a justification for permitting disentitlement for minor falls from judicial grace, which may be wholly beyond the reasonable grasp of the accused. Further, a careful examination of the development of Article 14(6) demonstrates that additional support for this more flexible attitude in Canada might have been found in some of the framers. One of the preceding versions of the Article provided that there should be no entitlement to compensation "if the miscarriage of justice causing his conviction were in any way attributable to his own neglect or misconduct."[128] When some discussants objected that it was "difficult to conceive of" such a situation, the present phrase was substituted on a relatively close vote.[129]

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

It is not unreasonable to provide support for the prospect of some reduction or exclusion for the person who has contributed to or brought about his or her own conviction. The obvious example would be the person who eagerly but fancifully confesses to a crime for which he or she was not responsible. Even there, caution is in order, for the criminal justice system is supposed to find

the truth of allegations, even if the accused has been partly to blame for a particular falsehood or an atmosphere of untruth. Further, there is great imprecision in many statements to the effect that "the accused is the author of his or her own fate". How often can anyone confidently say that the accused's conduct is to be held to account to the tune of a 10% reduction of the total award? Finally, the spectre of the state simultaneously evading and projecting responsibility, in effect scapegoating and blaming the victim for its errors, must loom large in the mind of any conscientious person when it comes to assessing the relevance of the victim's behaviour.

By all means, some escape hatch or rationale reducing state liability should be reserved for the fraudulent claimant or the reckless participant in a criminal trial. Nonetheless, this feature of a compensation scheme should not be used to punish the naive, the youthful, the feeble-minded, the powerless, the members of racial minorities, the frightened, or the stigmatized, among others. If fairness and reasonableness are the bywords and full compensation the desired end, the state should err on the side of generosity. Meanness, vindictiveness, small-mindedness, or intellectual laziness should not allow the importance of the victim's conduct to be overblown.

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

sense, the Guidelines have refined and improved one of the more severe aspects of Article 14(6).

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

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

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

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

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

In Canada, two Criminal Code provisions contemplate miscarriage of justice. Section 686(1)(a)(iii) permits an appeal to be allowed "on any ground there was a miscarriage of justice." One of the few Supreme Court cases on point recently stated:

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

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

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

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

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

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

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

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

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

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

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

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

(ii) A Presumptive Direction for Compensation

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

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

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

The presumption could be twofold: (1) that the person whose conviction is overturned is ipso facto wrongfully convicted or is a victim of a miscarriage of justice (2) this unjustly convicted (and imprisoned) person would be presumptively entitled to compensation upon application. The presumption of a right to compensation would be able to be displaced at a special proceeding convened at the instance of the Crown, wherein the Crown would have to establish that both limbs of the presumption have been shown to be inapplicable on a

preponderance of evidence. If the Crown succeeded in displacing the first part of the presumption, it would be in a position to argue for a reduction or elimination of compensation, but the wrongfully convicted person would then still have the ability to show that he or she ought to receive compensation, on the civil standard, albeit now without the benefit of the presumption.

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

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

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

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

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

It is most regrettable, therefore, that without any explanation the Guidelines specify in Section B(1) that "The wrongful conviction must have resulted in imprisonment, all or part of which has been served." A broader interpretation should be given to the phrase than Canada now finds acceptable.

If the reservation is cost, then one may observe that the actual incidence of claims may be quite low. Further, other techniques could be used to hold down expenditures, such as statutory maxima for certain types of punishments or costs associated with the conviction and release.[149]

8. "shall be compensated according to law"

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

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

Firstly, it should be noted that the Canadian Guidelines are very similar to the former and current regime in the United Kingdom. In 1985, proposals for a statutory scheme of compensation were rejected and a modified ex gratia program was introduced in the form of a Ministerial statement in Parliament.[153] It provided that in some cases of wrongful imprisonment compensation would be

payable. The Minister would be bound by the decision of an independent assessor concerning quantum. The scheme was said by the Government to meet international obligations in spirit and purpose, but was not so viewed by commentators:

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

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

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

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

appropriate statute.

9. The Payment of Compensation: Forum and Quantum

(a) Forum

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

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

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

> When an individual meets the eligibility criteria, the Provincial or Federal Minister Responsible for Criminal Justice will undertake to have appointed, either a judicial or

> administrative inquiry to examine the manner of compensation in accordance with the considerations set out below.
>
> [Emphasis added]

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

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

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

The reasons for using an independent tribunal for the assessment of damages are not dissimilar to those which might have been cited in the creation of similar entities in other contexts. An extensive debate should be commenced on

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

Some type of review should be available to both the claimant and the state, although it should not be of a ministerial character. Rather, the legislation should provide for a mechanism for errors of fact and law to be re-examined, perhaps by another parallel panel of assessors or more obviously by an appellate branch of the tribunal. Judicial review for jurisdictional error, abuse of discretion or breach of natural justice should not be precluded. Experience in other realms might illuminate an appropriate hierarchy of decision makers. In these recommendations on reviewability, the Task Force Report mainly concurred, adding that the "final decision on compensation (presumably following appellate review) would be binding on the Crown who had initiated the prosecution."[166]

As usual, in Canada there are delicate questions relating to division of powers issues which must be kept in mind in any recommendation. Article 50 of the Covenant[167] and an overriding concern with the purposes of Article 14(6) suggest that such matters ought not to obstruct a workable mechanism for compensating the wrongfully convicted. The Task Force Report suggests

dovetailing legislation[168] as a way of avoiding any impasse. Given that the Guidelines were adopted by Federal and Provincial Ministers responsible for criminal justice, there would seem to be a sufficiently strong consensus already that joint legislative action is not an unreasonable expectation.

(b) Quantum

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

> This Commission is privileged to have been given the task of righting wrongs done to Thomas, by exposing the injustice done to him by manufactured evidence. We cannot erase the wrong verdicts or allow the dismissed appeals.[169]

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

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

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

(i) Limiting Factors

The Guidelines specify in Section D(2) that assessments are to take into account "Blameworthy conduct or other acts on the part of the applicant which contributed to the wrongful conviction." and "Due diligence on the part of the claimant in pursuing his remedies." It has been noted that the Guidelines are progressive in the sense that they remove the disentitlement specified in the Covenant if non-disclosure of the unknown fact is attributable to the accused. However the Guidelines tend to expand the range of conduct for which the claimant may be held responsible by the reference to "other acts..." It is surely objectionable if wrongfully convicted persons are to be further penalized for

what many people would say instead are serious systemic failures.

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

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

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

and the Guidelines mandate. Paraphrasing the Report, fairness suggests that anyone who was wrongfully convicted should be able to obtain redress, regardless of the argument that he or she let a potential remedy go unpursued or looked for it in a dilatory fashion.

(ii) Non-pecuniary losses

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

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

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

> (i) loss of liberty. This may be particularized in some of the following heads. Indeed some overlap is inevitable.
>
> (ii) loss of reputation;
>
> (iii) humiliation and disgrace;
>
> (iv) pain and suffering;
>
> (v) loss of enjoyment of life;
>
> (vi) loss of potential normal experiences, such as starting a family;
>
> (vii) other foregone developmental experiences, such as education or social learning in the normal workplace;
>
> (viii) loss of civil rights;
>
> (ix) loss of social intercourse with friends, neighbours and family;
>
> (x) physical assaults while in prison by fellow inmates and staff;

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

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

(xiii) adverse effects on the claimant's future, specifically the prospects of marriage, social status, physical and mental health and social relations generally;

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

Surely few people need to be told that imprisonment in general has very serious social and psychological effects on the inmate. For the wrongfully convicted person, this harm is heightened, as it is hardly possible for the sane innocent person to accept not only the inevitability but the justice of that which is imposed upon him. For the person who has been subjected to a lengthy term of imprisonment, we approach the worst case scenario. The notion of permanent social disability due to a state wrong begins to crystallize. The longer this distorting experience of prison goes on, the less likely a person can ever be whole again. Especially for the individual imprisoned as a youth, the chances of eventual happy integration into the community must be very slim. Therefore, beyond the factors noted in this section, special levels of compensation need to be considered for this chronic social handicap. The Thomas Royal Commission explicitly recognized this theme.

> Quite apart from the various indignities and loss of civil rights associated with his deprivation of liberty, we consider he will for the rest of his life suffer some residual social disabilities attributable to the events of the last 10 years.[175]

In light of the foregoing, it is puzzling that the Guidelines in Section D(1) settle upon a ceiling of $100,000 as compensation for non-pecuniary losses, qualified only by the statement that the damages "<u>should</u> not exceed $100,000."

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

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

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

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

One should not expect that the ceiling mentioned in the Guidelines will be taken as a genuine upper limit by either a government or board seriously

concerned with making an equitable award in an appropriate case.

(ii) Pecuniary losses

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

Some headings might include:

(i) loss of livelihood;

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

(iii) loss of future earning ability;

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

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

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

E. Conclusion

This article has attempted to cover many vital issues concerning compensation of the wrongfully convicted. In so doing, it is certainly recognized that there is some danger of the discussion becoming too thinly spread. On the other hand, the present situation in Canada seems to drive one towards a comprehensive effort. Too little has been written on the subjects of who are the wrongfully convicted and how to provide redress for them. Governmental responses are also late and inadequate, compared to the significance of the problem. The main dedication of this article was and remains the plight of those who have been wrongfully convicted and imprisoned. However, it is conceptually awkward and dangerous to the overall integrity of the criminal justice system to try to stop state responsibility at those junctures. Sound arguments can be made to extend compensation to wider ranges of potential claimants. Indeed, immersion in the rationale, international law and fundamental principles of compensation for the wrongfully convicted fairly compels one to support an extension.

In deciding upon the appropriate compensatory regime, there are now at least some base points in Canada. The International Covenant on Civil and Political Rights provides a relevant and authoritative standard upon which to found domestic legislation. Perhaps the Covenant could be more clearly drafted and in some places it is rigid and unsympathetic. None the less, it helps to organize

discussion and it ought to inspire further governmental attention as well. The Federal-Provincial Guidelines provide some assurance that, if nothing else, wrongfully convicted people have been noticed by responsible ministers. In this paper it is hoped that the shortcomings of the Guidelines have been made fairly apparent. A re-evaluation should start at the level of first principle and, having done so, the prospects for liberalization and statutory protections should increase. The present Guidelines are plainly too narrow, rigid and discretionary and nowhere has there been adequate support given for this lamentable policy choice.

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

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

suffered more superficial wounds at the hands of the state and not merely for those who are the victims of society's worst outrages. The failure to address the position of the wrongfully convicted in a sensitive and principled manner should be a continuing embarrassment to Canada.

ENDNOTES

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1. This two extract and the original chapter title is drawn from Franz Kafka, The Trial, (Vintage Books edition, New York, 1969), at page 7.

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

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

4. Every nation has its examples of such judicial horrors. Without attempting to certify that these are the worst cases, one might usefully review: (a) in the United States, Isidore Zimmerman spent 24 years in prison for a murder that he did not commit and was eventually awarded U.S. $1 million as compensation, less legal fees of $500,000. See Corrections Digest, June 15, 1983, p. 9; (b) in New Zealand, Arthur A. Thomas served nine years in custody on two charges of murder, which were later the subject of a free pardon, investigation and report by a Royal Commission and the payment of about N.Z. $1 million as compensation. See the Report of the Royal Commission to Inquire into the Circumstances of the Convictions of Arthur Allan Thomas (Government Printer, Wellington, 1980); (c) in the United Kingdom, Timothy John Evans was executed in 1949 for murder. The likely real killer was subsequently convicted and executed for related murders and Evans was pardoned posthumously as a result of an inquiry. See Ludovic Kennedy, Ten Rillington Place (London; Gollancz, 1961) (d) in Canada, Donald Marshall, Junior spent eleven years in penitentiary for a murder which he did not commit and of which he was finally acquitted. Mr. Marshall received compensation of $270,000, less legal fees of about $100,000. This wrongful conviction is currently the subject of a Royal Commission. See Michael Harris, Justice Denied: The Law Versus Donald Marshall (Toronto; Macmillan, 1986).

5. "Other jurisdictions go further and also compensate for detention in custody pending final disposal of the case. These include Sweden, Norway, Denmark, Austria, France, West Germany, Holland, Belgium, Hungary and some of the Swiss Cantons." Justice, the British Section of the International Commission of Jurists, Compensation for Wrongful Imprisonment, (London, 1982), p. 24. "The German provisions or the question of compensation are

perhaps widest in their scope, for they encompass not only custody awaiting trial and wrongful conviction but also in some cases arrest, detention in a hospital or asylum, and disqualification from driving." Carolyn Shelbourn, "Compensation for Detention", [1978] Crim. L.R. 22, at p. 25.

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

7. Huff, Rattner and Sagarin, "Guilty Until proven Innocent: Wrongful Conviction and Public Policy", 32 Crime and Delinquency 518-544 (1986), at p. 523.

8. Justice, the British Section of the International Commission of Jurists, Miscarriages of Justice (London: 1989), at p. 5.

9. The Federal-Provincial Task Force Report was sent to the Deputy Minister of Justice on September 19, 1985. In the letter of transmittal (p.v. of the Report), the Coordinator of the Task Force indicates sentiments not dissimilar to those of the author on the then and current state of Canadian law:

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

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

10. Supra, note 4, p. 115, para. 486.

11. Ibid., p. 116, para. 490.

12. Ronald Dworkin, "Principle, policy, procedure", in Tapper, ed., Crime Proof and Punishment: Essays in Memory of Sir Rupert Cross, (Butterworths, London, 1981), p. 207.

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

14. O'Neil v. Ohio (1984) 83 AP-104 (10th Dist.). The case is also reported at 13 Ohio App. 3d 320 and 13 O.B.R. 398. The full quotation is worthy of repetition, although as only a Westlaw print-out was able to be located, a precise page number cannot be given.

> No society has developed a perfect system of criminal justice in which no person is ever treated unfairly. The American system of justice has developed a myriad of safeguards to prevent the type of miscarriage to which the claimant herein was subjected, but it, too, has its imperfections. Fortunately, cases in which courts have unlawfully or erroneously taken a person's freedom by finding him or her guilty of a crime which he or she did not commit are infrequent. But, when such a case is identified, the legislature and the legal system have a responsibility to admit the mistake and diligently attempt to make the person as whole as is possible where the person has been deprived of his freedom and forced to live with criminals. Indeed the legal system is capable of creating few errors that have a greater impact upon an individual than to incarcerate him when he has committed no crime. It is in this context that we review the trial court's judgment and the record in this case.

15. Peter Ashman, "Compensation for Wrongful Imprisonment", New Law Journal, May 23, 1986, 497, at p. 498.

16. Supra, The Thomas Inquiry, footnote 4, at p. 120, para. 514.

17. See Jonathan Caplan, "Compensation for Wrongful Imprisonment", 1983 Public Law 34-36, Spring, 1983, at p. 34.

18. See Keith S. Rosenn, "Compensating the Innocent Accused", 37 Ohio State L.J. 705-726, at p. 726.

19. For a discussion of the gradual acceptance of victims of crime as being appropriate recipients of compensation, see Richard Murphy, "Compensation for Victims of Crime: Trends and Outlooks", Dalhousie L.J. 530-549, esp. pp. 534-536.

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

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

22. Mr. Justice W.S. Tarnopolsky, "A Comparison Between the Canadian Charter of Rights and Freedoms and the International Covenant on Civil and Political Rights", (1982) 8 Queen's Law Journal 211-231, at p. 211. See also M. Ann Hayward, "International Law and the Interpretation of the Canadian Charter of Rights and Freedoms: Uses and Justifications" (1985), 23 Univ. of Western Ontario Law Review 9-20.

23. The process for submission and consideration of complaints may be both complicated and protracted. For an introduction see Tarnopolsky, ibid., footnote 23, at pp. 211-213 and "Brief description of the various stages in the consideration of communications under the Optimal Protocol to the International Covenant on Civil and Political Rights", Official Records of the General Assembly, Thirty-Seventh Session, Supplement No. 40 (A/37/40), paras. 397-397.8. Also see M.E. Tardu, Human Rights; The International Petition System (3 Binders), (Oceana Publications, Inc., Dobbs Ferry, N.Y., 1985), esp., "The Communication Procedure Under the Optional Protocol to the United Nations Covenant on Civil and Political Rights", Binder 2. See also, John Claydon, "International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms" (1982), 4 Supreme Court Law Review, 287-302 and Matthew Lippman, "Huamn Rights Revisited: The Protection of Human Rights Under the International Covenant on Civil and Political Rights" (1980), 10 California Western International Law Journal, 450-513.

24. > ...international institutions may, at first blush, seem remote from domestic compliance. Involving an international institution means invoking a forum that may be a long way away, presided over by foreigners, with no direct domestic jurisdiction. Yet these institutions, when in place and properly used, can be an important step towards domestic compliance."

    David Matas, "Domestic Implementation of International Human Rights Agreements," [vol./date] Canadian Human Rights Yearbook, 91-117, at 103.

25. It is possible that mere inaction might be argued to be neutral in effect, but for Articles using mandatory or prohibitory language this appears to be an untenable position, as it involves a contravention of a standard of the Covenant. See Tarnopolsky, supra, footnote 23, at p. 212 and 231 and the discussion of Article 14(6), infra.

26. Alan Brudner, "The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework" (1985), 35 University of Toronto Law Journal, 219-254, at p. 219.

27. Ibid., at 254. See also, Donald F. Woloshyn, "To What Extent Can Canadian Courts Be Expected to Enforce International Human Rights Law in Civil Litigation?" (1985-86), 50 Saskatchewan Law Review 1-11.

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

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

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

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

32. Ibid., para. 193 at p. 34. Canada's request was acceded to by the Human Rights Committee and was to be submitted on April 8, 1988. See ibid., para. 17 at p. 146.

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

34. John Humphrey, "The Canadian Charter of Rights and Freedoms and International Law" (1985-86), 50 Saskatchewan Law Review, 13-19, at p. 17.

35. There is ample support for these assertions in the small body of scholarly writing on the subject. "It would seem that a state with such already existent resources, and one which has taken serious steps to address itself to such concerns as crime victims 'reparation' awards, could allow itself the luxury of compensating an individual who has turned out to be no less a victim of the criminal justice system than the person who brought the initial charge ... In view of the less than numerable cases of wrongful incarceration of innocent individuals in Ohio, the burdens on the state seem to be at best, minimal." Hope Dene, "Wrongful Incarceration in Ohio: Should There Be More Than A Moral Obligation to Compensate?", 12 Capital University Law Review 255-269, at p. 265. See also, in the same vein, Shelbourn, supra, footnote 5, at pp. 29-39 or Rosenn, supra, footnote 19, at pp. 725-726. On the other hand, some observers are somewhat more uncertain about the costs issue. Professor Peter MacKinnon writes that the expense of a program of compensating all acquitted persons for their costs could be prohibitive or "Perhaps it would be, but we don't know because the proposal has never been costed." See "Costs and Compensation for the Innocent Accused," 67 The Canadian Bar Review (1988), 489-505, at 500.

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

> Grave reservations were expressed by the Province of Ontario about institutionalizing such compensation if the net effect would be to:
>
> 1) confuse the processes of the criminal law and civil law;

2) make the criminal prosecutions more difficult; and

3) result in greater compensation to wealthy people thereby lessening the liability of the state to poor accused persons.

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

37. Supra, note 7, at p. 540.

38. Shelbourn, supra, footnote 5, at p. 30.

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

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

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

Supra, footnote 35, at 264.

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

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

Supra, footnote 18, at p. 705.

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

> The legislature finds and declares that innocent persons who have been wrongly convicted of crimes and subsequently

> imprisoned have been frustrated in seeking legal redress due to a variety of substantive and technical obstacles in the law and that such persons should have an available avenue of redress over and above the existing tort remedies to seek compensation for damages.

The Unjust Conviction and Imprisonment Act of 1984, Section 1 of L. 1984, c. 1109, eff. Dec. 21, 1984. Quaere, will Canada ever see such a frank preamble? For comment, largely favourable, on the New York statute, see David Kasdan, "A Uniform Approach to New York State Liability for Wrongful Imprisonment: A Statutory Model", 49 Albany L.R. 201-243.

41. See the Home Office Letter to Claimants, Appendix C, the Justice Report (1982), supra, footnote 5, at pp. 31-32 and the November 29, 1985 statement to the British House of Commons, in the form of a written reply (No. 173) to a question by Tim Smith, M.P. Being in the nature of a Ministerial statement, there are still considerable weaknesses to this approach, beyond its ex gratia character: review by the courts or Parliament seems more or less precluded and it can be changed without leave having to be received from any person or institution. These and other problems are discussed infra at pp. 59-60 in light of more recent British developments which attempt to combine a legislative approach with vestiges of the old ex gratia scheme.

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

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

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

In June 1989, the author sent a questionnaire to all the relevant Federal and Provincial Ministers which asked for information on pre- and post-Guidelines experience on compensation for wrongful conviction. Replies were received from British Columbia, Alberta, New Brunswick, Newfoundland, Saskatchewan, Nova Scotia, Manitoba and the Northwest Territories, and the Government of Canada. No respondent indicated that legislation had been introduced. Some provinces referred to additional measures which had been

taken to make the Guidelines effective in the jurisdiction, either by way of adoption by resolution of the legislature (e.g. New Brunswick), a ministerial statement (e.g. New Brunswick) or the establishment of a permanent or ad hoc inquiry (e.g. Alberta). Some respondents indicated that no steps had been taken since the Guidelines were agreed upon (Newfoundland and Labrador and Nova Scotia). Two governments noted that a final Memorandum of Agreement between the Province and the Government of Canada would be prepared (New Brunswick and Saskatchewan). The Federal government noted that it had "initiated discussions with the provinces with a view to reaching cost-sharing agreements with them...", which is presumably what was referred to in the New Brunswick and Saskatchewan references.

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

45. David Cohen and J.C. Smith, "Entitlement and the Body Politic: Rethinking Negligence in Public Law" (1986), 64 The Canadian Bar Review 1-57, at p. 5.

46. Ibid., at p. 12.

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

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

48. See ss. 25 and 783, the Criminal Code, R.S.C. 1985, Chapter C-46, the Proceedings Against the Crown Act, R.S.N.S. 1967, Chapter 239, ss. 2(2)(e), 4(2) and 4(6), and the Liberty of the Subject Act, R.S.N.S., 1967, c. 164, s. 12. In Nelles v. Ontario, S.C.C., August 14, 1989, unreported, Lamer, J., for the Court, concluded that a section in the Ontario Proceedings Against the Crown Act (similar to s. 4(6) of the Nova Scotian counterpart) ensured that the "Crown is rendered immune from liability", but observed that "the constitutionality of s. 5(6) of the Act is still an open question". Other bases for claims of immunity have been weakened or eliminated by Nelles. See infra, pp. 18-19.

49. W.V.H. Rogers, Winfield and Tolowicz on Tort (Twelfth Edition), (London: Sweet and Maxwell, 1984), p. 58.

50. John G. Fleming, The Law of Torts (Sixth Edition), (Agincourt, Ontario: Carswell/The Law Book Co. Ltd., 1983), p. 26.

51. Allen M. Linden, Canadian Tort Law (Third Edition) (Toronto: Butterworths, 1982), p. 44.

52. "Once a judicial act interposes, liability for false imprisonment ceases." See Street, ibid., at p. 27. Similarly, according to Rogers, supra, footnote 49, at p. 66, "There can, however, be no false imprisonment if a discretion is interposed between the defendant's act and the plaintiff's detention."

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

54. See Kasdan, supra, footnote 40, at p. 211.

55. See Rogers, supra, footnote 49, at p. 552.

56. This list is an amalgam of Rogers, ibid., at p. 553 and Fleming, supra, footnote 50, at pp. 576-577, but these prerequisites appear to be generally accepted.

57. See Fleming, ibid., at p. 576.

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

    Lamer, J., in Nelles, supra, note 48, not only acknowledges the difficulties, "... a plaintiff bringing a claim for malicious prosecution has no easy task", but later seems to welcome them for their inhibiting effects, countering "this "flood-gates" argument": "... there exist built-in deterrents on bringing a claim for malicious prosecution ... the burden on the plaintiff, is onerous and strict".

59. Supra, note 48.

60. Ibid.

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

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

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

64. Blyth v. Birmingham Waterworks (1856), 11 Ex. 781, at 784.

65. Morris v. West Hartlepool Steam Navigation Co. Ltd., [1956] A.C. 552, at p. 524 (H.L.).

66. See Charlesworth, supra, footnote 63 at pp. 150-152.

67. Ibid., pp. 231-2.

68. Supra, footnote 61, at p. 16.

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

70. Supra, note 48, per Lamer, J.

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

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

73. Supra, Tarnapolsky, note 22, at pp. 218-219.

74. (1987), 38 D.L.R. (4th) 161, at 185 (S.C.C.). Also reported at (1987), 74 N.R. 99 at 171-172 and (1987), 51 Alta. L.R. (2d) 97 at 124.

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

76. For example, see Dale Gibson, The Law of the Charter: General Principles (Carswell: 1986), at pp. 211-212; Marilyn L. Pilkington, "Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms" (1984), 62 Canadian Bar Review 517-576; Ken Cooper-Stephenson, "Tort Theory for the Charter Damages Remedy", (1988), 52(1) Saskatchewan Law Review 1-87, who at p. 3 observes: There appears no doubt that a damage award in some form will be available as a remedy for infringement or denial of constitutional guarantees under the Canadian Charter...

77. Supra, note 9, at p. 26.

78. Ibid.

79. Supra, the Thomas Commission, note 4, at p. 113.

80. 584 H.C. Deb. C.C. 32147. With the passage of the Criminal Justice Act 1988 (1988 c. 33), significant changes were made in the British position. In particular, s. 133 provides for a statutory framework for compensation for miscarriages of justice, although under s. 133(3) "The question of whether there is a right to compensation under this section shall be determined by the Secretary of State." This amendment is addressed more fully at p. 55.

81. Supra, note 41.

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

83. See Dene, "Wrongful Incarceration in Ohio ...", supra, note 35, at p. 260.

84. Supra, note 40, at p. 216.

85. Ibid., at pp. 218-219.

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

87. Report of the Eighth Session of the Commission on Human rights, Ibid., para. 221. The vote to reconsider was 8 in favour, 8 against and 1 abstention.

88. As the delegate from Ceylon observed

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

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

89. Supra, note 9, at p. 18.

90. Supra, note 5, at p. 20.

91. Supra, note 4, at p. 119.

92. See Appendix A, Section B(2).

93. Supra, note 9, at p. 19.

94. Ibid.

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

96. Supra, note 86, para. 218, of the 1952 Report.

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

98. Supra, note 88, 969th meeting, 27 November 1959, para. 20, p. 294.

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

100. Supra, note 5, at p. 22.

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

> There was no reason why the same right should not be granted to a person who had been convicted although innocent; such a person had suffered far more serious material and moral injury.

Supra, note 88, 964th meeting, 23 November 1959, para. 24 at page 273 Morocco later advanced the same position,

Ibid., 967th meeting, 25 November 1959, para. 17, at p. 286.

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

103. See Dickson, J. in R. v. City of Sault Ste. Marie (1978), 40 C.C.C. (2d) 353, at 374-375 or [1978] 2 S.C.R. 1299, at 1327. Not all federal statutes which specify a penalty including the prospect of imprisonment are clearly criminal in nature. For example, consider the Migratory Birds Convention Act, R.S., c. 179, s. 1, which includes in s. 12 a general penalty provision where a fine or up to six months imprisonment or both can be levied. The Territorial Lands Act, R.S., c. 263, s. 1, in s. 17 provides for similar penalties for trespassing on territorial lands after having been ordered to vacate.

104. Supra, note 9, at p. 20.

105. Ibid.

106. Ibid.

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

108. Supra, note 93, para. 218, p. 32.

109. Ibid., para. 219, p. 32.

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

111. Supra, note 9, at p. 21.

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

113. William F. Duker, "The President's Power to Pardon: A Constitutional History" (1977), 18 William and Mary Law Review 475-538, at p. 476.

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

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

116. A.T.H. Smith, "The Prerogative of Mercy, The Power of Pardon and Criminal Justice" 1983, Public Law 398-439, at p. 398. See also William C. Hodge, "The Prerogative of Pardon" 1980, New Zealand Law Journal 163-168.

117. Supra, note 116, Smith, at p. 399.

118. Ibid.

119. Supra, note 116, Hodge, at p. 163.

120. See supra, note 113, at pp. 535-538. Also, Leonard B. Boudin, "Presidential Pardons of James R. Hoffa and Richard M. Nixon: Have the Limitations on the Pardon Power Been Exceeded?" 48 University of Colorado Law Review, 1-39, (1976-77).

121. Supra, note 114, at p. 66.

122. Supra note 116, Smith, at p. 428.

123. The Task Force Report, supra, note 9, at p. 43 provides the following caution:

> There would appear to be very serious constitutional difficulties in having a tribunal, board or designated person determine the question of innocence in respect of a criminal

> conviction if they are not already superior, district or county court judges. The determination of innocence is inexorably tied up with section 96 of the Constitution Act, 1867. The function of determining guilt (and by extension innocence) was performed at the time of confederation by country, district or superior court judges. Since McEvoy v. Attorney General of New Brunswick (1983), 1 S.C.R. 709, section 96 is known to bar alterations to the constitutional scheme envisaged by the judicature sections of the Constitution Act, 1867.

Justice, in its 1989 Report, Miscarriages of Justice, supra, note 8 at p. 69, makes a similar suggestion for the establishment of an independent review body, which would have powers to "advise the Home Secretary either not to intervene or to invoke the Royal Prerogative in order to remit the sentence or to set aside the conviction." Justice circumvented the problem of the body being an alternative Court of Appeal by recommending (at p. 71) that it not have a power to quash a conviction or alter a sentence, but only to "establish the truth in a case and to advise the Secretary of State accordingly." This conceptualization of the tribunal might obviate some federal-provincial difficulties.

124. Supra note 9, at p. 22.

125. Supra, note 7, Huff et al., p. 531.

126. Supra, note 95.

127. Supra, note 9, at p. 30.

128. Supra, note 86, at para. 218, p. 32 of the 1952 Session.

129. Ibid, para. 219, p. 32.

130. Supra, footnote 127.

131. Supra, note 9, at p. 22.

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

133. People v. Geibel, 208 P. 2d 743, at 762, 93 Cal. App. 2d. 146.

134. People v. Wilson, 138 P. 971, 975, 23 Cal. App. 513.

135. Fanjoy v. The Queen, (1985) 21 C.C.C. (3d) 312, at p. 318, per McIntyre, J.

136. R. v. Hayes, (1985) 67 N.S.R. (2d) 234, at p. 236.

137. Supra, note 135.

138. "...the apparent degree of inconsistency [in the application of the proviso] is cause for concern. It invites, if not cynicism, then at least wry parody of a kind indicated in the following question put to a Court of Appeal judge

at a lawyer's workshop: "What is the greatest miscarriage of justice in an appeal that your Lordship has ever dismissed under the 'no substantial miscarriage of justice' proviso?" See Ronald R. Price and Paula W. Mallea, "Not by Words Alone: Criminal Appeals and the No Substantial Miscarriage of Justice Rule", in Del Bueno, ed., Criminal Procedure in Canada, (Butterworths: Toronto, 1982) pp. 453-497, at p. 494.

139. Supra, note 9, at p. 22.

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

141. Ibid.

142. Grdic v. R. (1985), 19 C.C.C. (3d) 289 S.C.C., at p. 293.

143. Supra, note 35, at pp. 497-498.

144. James C. ~~Martin~~ MORTON and Scott C. Hutchison, The Presumption of Innocence, (Toronto: Carswell, 1987), at p. 14.

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

146. Ibid., at 109.

147. Ibid., at 115.

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

149. See supra, note 88: 961st Meeting, 19 November 1959, para 8, p. 260; 965th Meeting, 23 November 1959, para. 3, p. 275; 967th Meeting, 25 November 1959, para. 37 pp. 287-288.

150. Supra, note 10, at p. 26.

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

152. Ibid.

153. Supra, note 41.

154. Supra, note 15, at p. 498.

155. Supra, note 80.

156. Halsbury's Statutes Service: Issue 24, Criminal Justice Act 1988, Volume 12, Criminal law, at p. 290.

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

158. Supra, note 9, at pp. 26-27.

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

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

161. Supra, note 80.

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

163. In their Sixth Report, ibid. at p. xi, the Committee recommended that all qualifying petitions be referred to an independent review body charged with advising the Home Secretary.

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

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

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

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

168. Supra, note 9, at p. 43.

169. Supra, note 4, at p. 115, para. 484.

170. Ibid., at p. 117, para. 492.

171. Ibid., at p. 115, para. 486.

172. Supra, note 9, at p. 34.

173. Ibid.

174. Ibid., p. 35.

175. Supra, note 4, at p. 115, para. 487.

176. (1978), 83 D.L.R. (3d) 452.

177. Ibid., at p. 478.

178. Ibid., at p. 475.

179. Ibid., at p. 476.

180. Supra, note 9, at pp. 33-34.

181. Ibid., at p. 44.

COMPENSATION FOR WRONGFULLY CONVICTED AND IMPRISONED PERSONS

GUIDELINES

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

A. RATIONALE

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

B. GUIDELINES FOR ELIGIBILITY TO APPLY FOR COMPENSATION

The following are prerequisites for eligibility for compensation:

1) The wrongful conviction must have resulted in imprisonment, all or part of which has been served.

2) Compensation should only be available to the actual person who has been wrongfully convicted and imprisoned.

3) Compensation should only be available to an individual who has been wrongfully convicted and imprisoned as a result of a Criminal Code or other federal penal offence.

4) As a condition precedent to compensation, there must be a free

pardon granted under Section 683(2) [749(i)] of the Criminal Code or a verdict of acquittal entered by an Appellate Court pursuant to a referral made by the Minister of Justice under Section 617(b) [690(b)].

5) Eligibility for compensation would only arise when Section 617 and 683 were exercised in circumstances where all available appeal remedies have been exhausted and where a new or newly discovered fact has emerged, tending to show that there has been a miscarriage of justice.

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

a) If a pardon is granted under Section 683 [749], a statement on the face of the pardon based on an investigation, that the individual did not commit the offence: or

b) If a reference is made by the Minister of Justice under Section 617(b) [690], a statement by the Appellate Court, in response to a question asked by the Minister of Justice pursuant to Section 617(c) [690(c)], to the effect that the person did not commit the offence.

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

C. PROCEDURE

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

D. CONSIDERATIONS FOR DETERMINING QUANTUM

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

1. Non-pecuniary losses

a) Loss of liberty and the physical and mental harshness and indignities of incarceration:

b) Loss of reputation which would take into account a consideration of any previous criminal record;

c) Loss or interruption of family or other personal relationships.

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

2. Pecuniary Losses

a) Loss of livelihood, including loss of earnings, with adjustments for income tax and for benefits received while incarcerated;

b) Loss of future earning abilities;

c) Loss of property or other consequential financial losses resulting from incarceration.

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

a) Blameworthy conduct or other acts on the part of the applicant which contributed to the wrongful conviction;

b) Due diligence on the part of the claimant in pursuing his remedies.

3. Costs to the Applicant

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

TERM OF REFERENCE 6

"What sum, if any, should be paid by way of Compensation to Arthur Allan Thomas Following upon the Grant of the Free Pardon?"

474. Compensation is not claimable as of right. It is in the nature of an ex gratia payment, sometimes made by the Government following the granting of a free pardon, or the quashing of a conviction. Being in the nature of an ex gratia payment, there are no principles of law applicable which can be said to be binding.

475. We have obtained as much information as possible from other Commonwealth countries concerning this subject. Even in England there is no other case we can find to be at all similar to that of Arthur Allan Thomas, i.e., of a man who served 9 years in prison not because of a mistake, but because of evidence fabricated by the Police.

476. However, the Home Office in England has provided for our information the guidelines under which compensation is usually assessed there and these have been very helpful.

477. There, following a decision from the Home Secretary that compensation should be offered in a particular case, an explanatory note is sent to the claimant. We quote from its contents:

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

"In making his assessment, the assessor will apply principles analogous to those governing the assessment of damages for civil wrongs. The assessment will take account of both pecuniary and nonpecuniary loss arising from the conviction and/or loss of liberty, and any or all of the following factors may thus be relevant according to the circumstances:

Pecuniary loss.
Loss of earnings as a result of the charge or conviction.
Loss of future earning capacity.
Legal costs incurred.
Additional expense incurred in consequence of detention, including expenses incurred by the family.
Nonpecuniary loss.
Damage to character or reputation.
Hardship, including mental suffering, injury to feelings and inconvenience."

"When making his assessment, the assessor will take into account any expenses, legal or otherwise, incurred by the claimant in establishing his innocence or pursuing the claim for compensation."

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

"The claimant is not bound to accept the offer finally made; it is open to him instead to pursue the matter by way of a legal claim for damages, if he considers he has grounds for doing so. But he may not do both. While the offer is made without any admission of liability, payment is subject to the claimant's signing a form of waiver undertaking not to make any other claim whatsoever arising out of the circumstances of his prosecution or conviction, or his detention in either or both of these connections."

478. The free pardon granted to Arthur Allan Thomas on 17 December 1979 included the following words:

"And whereas it has been made to appear from a report to the Prime Minister by Robert Alexander Adams-Smith QC, that there is real doubt whether it can properly be contended that the case against the said Arthur Allan Thomas was proved beyond reasonable doubt."

479. Section 407 of The Crimes Act 1961 states:

"**Effect of free pardon**. Where any person convicted of any offence is granted a free pardon by Her Majesty, or by the Governor-General in the exercise of any powers vested in him in that behalf, that person shall be deemed never to have committed that offence: provided that the granting of a free pardon shall not affect anything lawfully done or the consequences of anything unlawfully done before it is granted."

480. We have now been given some guidance by a full Court of the High Court of New Zealand concerning the effect of this pardon. In their decision dated 29 August 1980 the full Court stated:

"In the terms of the pardon Thomas is to be considered to have been wrongly convicted, and he cannot be charged again with the murder of either Harvey or Jeanette Crewe."

"He is, by reason of the pardon, deemed to have been wrongly convicted."

"The language of section 407 does not indicate any intention to create any such radical departure from the normal effect of a prerogative pardon as would be involved in reading into the language an intention to create a statutory fiction, the obliteration by force of law of the acts of the person pardoned. It is much more sensibly read to be as, first a reaffirmation of the basic effect of the prerogative pardon, and, secondly, an attempt to minimise residual legal disabilities or attainders."

481. We approach the question of the compensation in the light of that guidance, and also in the light of our findings as set out earlier in this report.

482. The pardon alone makes it clear that Mr Thomas should never have been convicted of the crimes, since there was a real doubt as to his guilt. He should accordingly have been found not guilty by the juries. Our own findings go further. They make it clear that he should never even have been charged by the Police. He was charged and convicted because the Police manufactured evidence against him, and withheld evidence of value to his defence.

483. At our hearings there have been often repeated statements about whether Mr Thomas can be proved innocent. Such a proposition concerns us. It seems to imply that there falls on to him some onus positively to prove himself innocent. Such a proposition is wrong and contrary to the golden thread which runs right through the system of British criminal

justice, namely that the Prosecution has the duty to prove the accused guilty and until so proved he had to be regarded as innocent. Once we are satisfied the Prosecution case against Mr Thomas has not been proved (and we are so satisfied on the totality of evidence before us) then, just as a Court would acquit him and the community thereafter accept his innocence, so we believe we are entitled to proclaim him innocent and proceed accordingly. Mr Thomas has always asserted his innocence. Taking all these factors into account, along with the pardon, it is our view that Mr Thomas is entitled to have the question of compensation determined on the basis that he is innocent. To determine it on any other basis would be to do him the gravest injustice.

484. This Commission is privileged to have been given the task of righting wrongs done to Thomas, by exposing the injustice done to him by manufactured evidence. We cannot erase the wrong verdicts or allow the dismissed appeals.

485. The British system of criminal justice is an adversary system. It receives only such facts as are put before it by the parties, discovering only so much of the truth as this permits. Any such system to function properly is dependent upon fair and truthful information being put before it. Like a computer, given the wrong facts it will without doubt produce the wrong answers, and this it did in the Thomas case.

486. This Commission is not in an adversary situation. We have searched for the truth, probed, inquired, and interrogated where we thought necessary; made our displeasure apparent at prevarication and reluctance to speak the truth. We have not been content with so much of the truth as some saw fit to put before us. With the aid of scientists we were able to demolish the cornerstone of the Crown case, exhibit 350, and demonstrate that it was not put in the Crewe garden by the hand of the murderer. It was put there by the hand of one whose duty was to investigate fairly and honestly, but who in dereliction of that duty, in breach of his obligation to uphold the law, and departing from all standards of fairness fabricated this evidence to procure a conviction of murder. He swore falsely, and beyond a peradventure, was responsible for Thomas being twice convicted, his appeals thrice dismissed, and for his spending 9 years of his life in prison; to be released as a result of sustained public refusal to accept these decisions. The investigation ordered by the Government led finally to his being granted a free pardon and released by the ultimate Court of a democratic system—what Lord Denning calls 'The High Court of Parliament.' Common decency and the conscience of society at large demand that Mr Thomas be generously compensated.

487. Arthur Allan Thomas was arrested on 11 November 1970 and remained in custody until 17 December 1979. During that time he was held in three prisons—Mount Eden, Auckland (commonly known as Paremoremo), and Hautu. We heard evidence from Mr Thomas and others concerning the conditions of his imprisonment and its effects on him. Evidence was also brought of the tribulations and anguish attaching to the judicial procedures. We accept that his formerly happy marriage was destroyed by this whole affair. Quite apart from the various indignities and loss of civil rights associated with his deprivation of liberty, we consider he will for the rest of his life suffer some residual social disabilities attributable to the events of the last 10 years.

488. We now consider the amount of compensation to be awarded to him to compensate him for all the damage, suffering, and anguish he has sustained mentally and physically as a consequence of his wrongful

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convictions and subsequent years in prison. His learned counsel has listed these:

(a) Loss of reputation.
(b) Humiliation.
(c) Pain and suffering.
(d) Loss of wife.
(e) Physical assaults whilst in prison, and degradation.
(f) Loss of enjoyment of life.
(g) Loss of potential family (the Thomas couple had commenced the procedures for adopting a child).
(h) Deprivation of liberty.
(i) Loss of civil rights such as voting rights.
(j) Loss of social intercourse with his friends and neighbours in particular at Pukekawa.
(k) The indignation of being imprisoned for an offence of which he was innocent.
(l) The harm and pain caused to him in the destruction of his reputation by press coverage and any other media broadcasting and disseminating false and incorrect information about his alleged involvement in the said homicides.
(m) The anguish of judicial proceedings and in particular hearing wrong verdicts being announced.
(n) The ignominy of prison visitation and all matters relating to being a prisoner, including prison dress, prison diet, maximum security conditions, and all matters relating to his life in prison. It should be borne in mind that Arthur Thomas had always been an outdoor man and his first 7 years were spent in Paremoremo where he never was outside on any occasion except to attend Court proceedings.
(o) Adverse effects on future advancement, employment, marriage, social status, and social relations generally.

489. It is clear that at the outset, Mr Thomas put his trust in the Police. That trust must have been shaken when the Police arrested him. Even then, he may have seen the arrest as an honest mistake. Such trust as remained must have been shattered when exhibit 350 was produced as an exhibit. Mr Thomas must have known from the first that it had been planted by the Police. He must then have realised that the Police were determined to convict him. It is undoubtedly a deep form of mental anguish to listen to false evidence being given against oneself.

490. At that stage, Mr Thomas put his faith in the judicial system. It is clear that he expected the charges against him to be dismissed at the preliminary hearing. They were not. He must then have relied on the commonsense and the fairness of the jury at the first trial. They convicted him. His state of mind in hearing announced a verdict he knew to be wrong, must have been one of unspeakable anguish.

491. Mr Thomas spent 9 years in prison. That a man is locked up for a day without cause has always been seen by our law as a most serious assault on his rights. That a man is wrongly imprisoned for 9 years, is a wrong that can never be put right. The fact that he is imprisoned on the basis of evidence which is false to the knowledge of Police Officers, whose duty it is to uphold the law, is an unspeakable outrage.

492. Such action is no more and no less than a shameful and cynical attack on the trust that all New Zealanders have and are entitled to have in their Police Force and system of administration of justice. Mr Thomas

suffered that outrage; he was the victim of that attack. His courage and that of a few very dedicated men and women who believed in the cause of justice has exposed the wrongs which were done. They can never be put right. In a civil claim exemplary damages may be awarded where there has been oppressive, arbitrary, or unconstitutional action by the servants of the Government. If ever there was a situation where such an award was warranted, it is this case. However, in awarding compensation this is only one of many features to which regard will be had in arriving at the final figure.

493. In assessing compensation one purpose is to put the claimant back in the financial position in which he would have been but for the wrongs which were done to him. Accordingly, we now consider Mr Thomas's pecuniary losses. In June 1966 he leased from his father, for a term of 5 years, three blocks of land at Pukekawa formerly run as one farm unit. Two of these blocks were owned by his father who leased the third block from the Maori Affairs Department. Arthur Thomas and his wife both worked on the farm. They ran dairy cows, dairy beef, and sheep. Various improvements were made during the term of the lease. There is clear evidence in documentary form establishing that, at the time some of the improvements were carried out, Arthur Thomas discussed with his father the possibility of acquiring an interest in the land at the conclusion of the lease in June 1971. Their discussion envisaged the acquiring of the freehold of the Maori Affairs land, the transferring of the titles to all three properties to a company, the stock (owned by Arthur Thomas) also to be transferred to the company, with Arthur's share in the company to be calculated in accordance with the value of the stock transferred and value of improvements carried out by him during the term of the lease. In evidence it was suggested that the company may also have proceeded to acquire other adjoining blocks of land. However, it has also been suggested that instead of using the suggested company as a vehicle, Arthur Thomas might alternatively have simply purchased the farm from his father.

494. Mr P. D. Sporle, Farm Appraiser and Valuer, gave helpful evidence in relation to the Thomas farming operation. In 1971 a fair valuation of the whole farming unit was $45,200. We also accept the financial feasibility of Arthur Thomas being able to purchase this land in June 1971 if events had so transpired.

495. At the time of his arrest in 1970 Arthur Thomas owned his own stock (milking cows, replacements, dairy beef, and sheep) and farm plant, in addition to which he had an interest in certain substantial improvements carried out by him under the terms of the lease which we have already referred to. Following his arrest, although his wife with assistance from other members of the family did manage to carry on the farming operation for some time, these assets have clearly been dissipated by the expenses incurred in the judicial procedures.

496. Since 1970, as is well known, the value of farm land has increased very substantially. Mr Sporle considered that present day values for this or a comparable farm are in the region of $380,000 to $400,000. He also set forth a realistic progression for such a farm in the intervening 9 years, particularly in terms of stock and plant. In the result we accept that by 1980 such a farming operation would be likely to have involved stock, plant, and other necessary investments such as dairy company shares all to the value of approximately $100,000. The acquisition of personal effects and chattels is also borne in mind.

497. There are various contingencies which are to be borne in mind. At the time of Arthur Thomas's arrest no decisions had in fact been made about the future of the farm. Arthur was one of nine children. While it seems clear that his father was satisfied to see Arthur acquire the farm, we do not believe this would have been done on a basis which would have disadvantaged the other eight children. We have formed a view of Arthur Thomas as being a capable farmer who, unless prevented by some unknown contingencies of life, would be likely to have proceeded to acquire the farm or an interest in it. It seems reasonable to suggest that from the value of the farm, stock, and plant, we should allow for the likelihood of there being some mortgage commitments at this stage of his life. We consider a reasonable sum to put him back in the position where he would have been, in respect of the farm, stock and plant, and personal effects, is $450,000.

498. Mr Thomas incurred liabilities relating to his arrest and prosecution, in the form of legal and other expenses. In addition, further outgoings have been incurred in preparing his claim for compensation for presentation before us. Details of these outgoings are set out in appendix III attached.

499. We have received claims for compensation from the parents of Arthur Thomas, all his brothers and sisters (including their spouses), a cousin, two members of the Arthur Allan Thomas Retrial Committee (one of whom is related by marriage to the former Mrs Thomas), and the former Mrs Vivien Thomas (now Mrs Harrison).

500. These claims raise three questions of principle:

(a) Does Term of Reference 6 envisage or allow us to consider them either directly or indirectly as part of Arthur Allan Thomas's own claim?

(b) Apart from the Terms of Reference does experience elsewhere in the Commonwealth or any principle of law by analogy suggest that such claims should be entertained?

(c) If such claims are to be considered favourably, who should be regarded as eligible to make them, and in what respect?

501. We proceed to deal with each of those questions, and it is convenient first to deal with (b).

502. Reference has already been made to the explanatory note forwarded to all claimants by the English Home Office. That note states that one of the factors which is relevant to the assessors' consideration of the claim is—'Additional expense incurred in consequence of detention, including expenses incurred by the family.' It seems to us that this specifically envisages as falling within the claim of the detained person, expenses incurred by his family in consequence of his detention.

503. We have also given consideration to a number of cases in the field of claims in tort for damages arising from personal injuries, where there are to be found successful claims by the injured person to recover damages for himself which included amounts for nursing and other services provided by relations. In these cases the loss has been regarded as the plaintiff's loss.

504. We consider that both the direction in the English explanatory note, and the personal injury cases to which we have referred, support the concept that within the claim of Arthur Allan Thomas there should be considered certain expenditure incurred and services rendered by members of his family.

505. It being accepted that the need for relatives' services about which we are speaking is to be regarded as part of the claimant's own loss, then it is within Term of Reference 6 to include such amounts in the award made.

506. The third question concerns the persons from whom such claims should be entertained and the nature of those claims. We must immediately make clear that in our view there is no question of anyone other than Arthur Allan Thomas recovering compensation for non-pecuniary losses. We sympathise with the plight of some of the family, particularly the parents, in the physical and mental injury they have suffered. But we are bidden to determine the amount of compensation to be paid to Arthur Allan Thomas; subject to the limited extent of services rendered by relatives to meet a need caused by his arrest and imprisonment, there is no other category of compensation included.

507. The expenses and services of the family which we believe should be regarded as within the claim of Arthur Allan Thomas are:

(a) Help on the farm after his arrest.

(b) Expenses incurred in visiting him in prison (which we consider to have been an assistance to his well-being).

We do not feel able to include any sum for the time spent, or out of pocket expenditure, in searching for further evidence, attending judicial hearings, or attending meetings, etc., aimed at securing his release.

508. The above statements of principle largely answer the question of whose services and expenditure should be regarded as falling under this category. It also seems reasonable to limit it to members of the immediate family.

509. On the above basis we set out in appendix IV the sums which we consider should be paid to Arthur Allan Thomas in recompense for the physical help and services rendered by members of the family.

510. Finally on this topic, we turn to consider the position of Dr T. J. Sprott, the man who in our view more than any other was responsible for the eventual release of Mr Thomas. It was well summed up by senior counsel for the DSIR in his final submission when he said 'I say without qualification that his dedication to, and development of, the categories theory, which has played such a large part in this inquiry invokes any impartial observer's admiration. . . . It is difficult to single out anyone who has been more committed or effective in advancing (Mr Thomas's) case than Dr Sprott.'

511. Dr Sprott himself acknowledges that his work was not carried out under any contractual arrangement with Mr Thomas or his legal advisors. On the other hand, the researches which he carried out over a number of years were directly related to a key issue of the question of Thomas's guilt or innocence, and were as essential to the findings of this Commission in regard to the identification of the fatal bullets as they were to the events leading to the pardon. The guidance from the Home Office states, 'When making his assessment, the assessor will take into account any expenses, legal or otherwise, incurred by the claimant in establishing his innocence, or pursuing the claim for compensation.'

512. Dr Sprott has entered a formal claim for $150,000 compensation based on the hours which he estimates were spent in this scientific work.

513. By a majority (Mr Gordon dissenting) we consider that some financial recompense for this scientific work is justified and recommend the payment of an amount of $50,000.

514. Money cannot right the wrongs done to Mr Thomas or remove the stain he will carry for the rest of his life. The high-handed and oppressive actions of those responsible for his convictions cannot be obliterated. Nevertheless all these elements are to be reflected in our assessment, as also are his suffering, loss of enjoyment and amenities of life, and his pecuniary loss.

515. We recommend that the following sums be paid to Arthur Allan Thomas as compensation:

	$
(a) In repayment of the expenditure set out in appendix III the sum of	49,163.35
(b) In repayment of the services of members of his family set out in appendix IV the sum of ...	38,287.00
(c) By a majority, in payment of the services rendered by Dr Sprott, the additional sum of	50,000.00
(d) To cover all those matters referred to in paragraphs 497–507 the additional sum of ...	950,000.00
Total	$1,087,450.35

516. We draw attention to the immense labour of Mr Patrick Booth in the field of investigative journalism. This was carried out as a private enterprise and at some considerable sacrifice to family life. He has formally claimed only a token $1. We are more than glad to include our recognition of the devotion of Mr Booth to this cause.

Addendum of the Right Honourable J. B. Gordon to Term of Reference 6.

517. Our report is unanimous except for one aspect in which a majority decision is recorded. I set out hereunder the reasons I could not support my fellow Commissioners in relation to a payment of compensation through Arthur Allan Thomas for recognition of a suggested debt owed by him to Dr Sprott.

518. The Term of Reference is specific:

"6. What sum if any should be paid by way of compensation to Arthur Allan Thomas following upon the grant of a free pardon?"

519. My fellow Commissioners here decided to follow the Home Office advice (which is not binding in any case):

"When making his assessment the assessor will take into account any expenses, legal or otherwise, incurred by the claimant in establishing his innocence or pursuing the claim for compensation."

520. My colleagues believe that the term 'otherwise' can be loosely interpreted as covering any expenses. My reading of the paragraph as a whole, including particularly the words 'incurred by the claimant' suggests that it in fact covers legal costs or contractual debts, and to this extent Dr Sprott's claim, in which he very fairly states there is no contractual or legal liability, cannot be accepted. In my view he was under no such obligation to Thomas, the claimant.

521. It is with some regret that I must make this decision, but find it in line with the Commission's unanimous finding that it cannot within the Terms of Reference compensate Arthur Allan Thomas's parents for their own pecuniary loss or debilitation. I find that the Home Office advice on these particular matters is quite distinct from the Commission's decision to recompense Thomas for the costs incurred to the family for care and solicitude. While I can sympathise with Dr Sprott and several other claimants, it was Dr Sprott himself who told us he saw his monumental task 'as a crusade'. My opinion is, I respectfully suggest, enhanced by Mr Booth's claim for $1.

522. We have had many 'crusaders' in New Zealand attempting to right a wrong or fight for a principle (with some success in both) at great personal sacrifice in time and money. Some have been rewarded in other ways, and this in my opinion is the only avenue open for this Commission to make a recommendation within our Terms of Reference.

523. I do so recommend.

IDENTIFICATION OF EXHIBIT 350

Before the Commission continues hearing evidence relating to Term of Reference 1(a), it is desirable to identify and define the cartridge case (exhibit 350) (8 July 1980).

1. Exhibit 350 was a dry primed brass long rifle cartridge case, manufactured by IMI Australia Ltd.

2. Such dry primed cartridge cases as exhibit 350 were made by IMI with a steel tool known as a bumper, which stamped the lettering ICI on the base of the cartridge case as it formed its rim. The bumper was in turn manufactured from a steel tool known as a hob, which had the letters ICI engraved on its surface.

3. The engravers of hobs used by IMI were C. G. Roeszler & Son Pty Ltd., and Mr Leighton of that company gave evidence that from a practical point of view, two hobs engraved on different occasions would have lettering of distinguishable shape and overall appearance. His opinion was supported on a theoretical basis by Professor Mowbray's eloquent exposition.

4. Mr Cook's evidence, confirmed by that of Dr Sprott from his examination of the IMI records, was that:

(a) Two hobs engraved by Roeszlers arrived at IMI on 1 October 1963;

(b) Retained samples of cartridge cases consistent with those hobs, and with exhibit 350, and of the type called by Dr Sprott category 4, first appeared in the retained samples of IMI in March 1964. We are satisfied that the hobs which arrived on 1 October 1963 were the source of Dr Sprott's category 4, and of exhibit 350.

5. Some of the ·22 long rifle cartridge cases manufactured by IMI were then shipped to Auckland, New Zealand where the Colonial Ammunition Co. Ltd., (CAC) then loaded them with projectiles and distributed them to the New Zealand market as full cartridges. Until 10 October 1963 ·22 brass cartridge cases were loaded by CAC with their pattern 8 projectiles, bearing 3 cannelures. After that date pattern 18 or 19 projectiles bearing 2 cannelures were used. It follows that exhibit 350 was loaded with a pattern 18 or pattern 19 projectile.

6. At the conclusion of his evidence, Mr MacDonald, the senior DSIR witness accepted that it was less than probable that exhibit 350 contained a pattern 8 bullet.

7. Therefore, the Commission identifies exhibit 350 as a dry primed, ·22 long rifle brass cartridge case, manufactured by IMI in Australia after March 1964, bearing the headstamp 'ICI', and loaded by CAC in Auckland with a 2 cannelure pattern 18 or 19 projectile. It was fired in the Thomas rifle, exhibit 317, but when and where we are unable to say at this stage.

8. This identification of exhibit 350 will enable those who are concerned with the first paragraph of the Terms of Reference to be aware of the subject matter and area of the inquiry into 'Whether there was any impropriety on any person's part in the course of the investigation or subsequently, in respect of the cartridge case, Exhibit 350.'

AFFIDAVIT BY MR DAVID YALLOP

IN THE MATTER of a Royal Commission to enquire into and report upon the convictions of Mr A. A. Thomas for the murder of Harvey and Jeanette Crewe

I, DAVID ANTHONY YALLOP of 6 Gladwell Road, London N.8, England, author and playwright, solemnly and sincerely affirm as follows:

1. I am the author of the book *Beyond Reasonable Doubt?* published in October 1978.

2. Chapter 8 of that book is an open letter to the Prime Minister of New Zealand and refers to another, private, letter which I wrote to the Prime Minister. In that private letter, a copy of which is annexed hereto and marked with the letter "A", I identified the woman who, I believed, had fed Rochelle Crewe between the 17th and 22nd June 1970 and had been seen by Mr Roddick outside the Crewe house on the morning of 19th June 1970.

3. The source of my information was a discussion which Mrs June Donaghie had with Mr. Roddick on my behalf in Sydney in November 1977. I did not go to Sydney myself because I could not afford to do so. Attached hereto and marked with the letter "B" is a copy of the photograph of the woman who, as I understand, was identified by Mr. Roddick as the woman he saw on 19th June 1970.

4. On 15th October 1980 I was shown by Mr. M. P. Crew, Counsel assisting the Royal Commission, a copy of an Affidavit sworn on 16th November 1978 by June Donaghie in relation to this matter. I had not previously seen the Affidavit. I confirm that it accurately reflects what June Donaghie told me had occurred during her discussion with Mr. Roddick. I understand that there are in existence further Affidavits sworn by witnesses confirming June Donaghie's account.

5. Attached hereto and marked with the letter "C" is an undated letter postmarked 17th November 1977 which June Donaghie wrote to me from Australia following her discussion with Mr Roddick. The terms of that letter are consistent with what June Donaghie told me had occurred and with her Affidavit dated 16th November 1978.

6. Following the publication of my book, Mr P. J. Booth visited Mr Roddick in Australia. I had previously told Mr Booth the name of the woman Mr Roddick had identified and given him the source of the photograph. I made it clear to Mr Booth that Mr Roddick should not be told the name of the woman to avoid his becoming frightened by the implications of the identification. I am aware, however, that Mr Booth did tell Mr Roddick the name of the woman.

7. I understand that Mr Roddick said in evidence before the Royal Commission that the woman in the photograph was similar only to the woman he saw. I further understand that he denied ever positively identifying the woman in the photograph as the woman he saw on 19th June 1970. It is my belief that realisation of the implications of his evidence may have caused Mr Roddick to modify his evidence, as I feared might happen. This is confirmed to some degree by paragraph 21 of the first report made to the Prime Minister by Mr Adams-Smith Q.C. I would not have been categoric regarding the identity of this woman if Roddick had not previously been as equally categoric.

8. Other than Mrs Donaghie's reports to me, I had no direct information as to the identity of the woman seen by Mr Roddick on 19th June 1970. I am, however, of the view that the identification is supported to some extent by:

(a) Mr Roddick's original description of the woman he saw in his statement to the Police dated 23rd June 1970;

(b) Mr MacLaren's comment set out in the fourth to last paragraph of my letter to the Prime Minister attached hereto and marked with the letter "A".

Affirmed at London by the said DAVID ANTHONY YALLOP this 28th day of October 1980.

"David A. Yallop".

Before me,

"G. W. Shroff", Commonwealth Representative, New Zealand High Commission, London.

APPENDIX III

EXPENSES

	$
W. J. Bridgman and Co.	2,600.00
P. D. Sporle	5,542.28
Gerald Ryan	500.00
Prof. B. J. Brown	750.00
R. L. McLaren	2,671.07
A. G. Thomas (refund legal fees paid)	16,500.00
K. Ryan (legal fees outstanding)	8,500.00
P. A. Williams (legal fees outstanding)	12,100.00
	$49,163.35

APPENDIX IV

	$
Mr and Mrs Hooton	1,350.00
Mr and Mrs Stuckey	2,100.00
Raymond Thomas	5,400.00
Lloyd Thomas	5,322.00
Desmond Thomas (including costs of preparation of claim $300.00)	5,420.00
Richard Thomas	1,800.00
Lyrice Hills (including costs of preparation of claim $150.00)	3,050.00
Rita Tyrrol	1,275.00
Allan G. Thomas	2,250.00
Vivien Harrison	10,500.00
	$38,467.00

BY AUTHORITY:
P. D. HASSELBERG, GOVERNMENT PRINTER, WELLINGTON, NEW ZEALAND—1980

56087H—80PT

Pierre Nadeau *Appellant*;

and

Her Majesty The Queen *Respondent*.

File No.: 17596.

1984: November 21; 1984: December 13.

Present: Dickson C.J. and Beetz, Estey, McIntyre, Chouinard, Lamer and Le Dain JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Criminal law — Murder — Charge to jury — Burden of proof — Two versions of events surrounding homicide presented in evidence — Self-defence — Misdirection — New trial ordered — Criminal Code, R.S.C. 1970, c. C-34, s. 613(1)(b)(iii).

Appellant was charged with first-degree murder. At trial, two different versions of the circumstances surrounding the homicide were presented in evidence: that of the accused, corroborated by his concubine, and that of the witness for the Crown. The trial judge directed the jury on the rules of law governing self-defence—one of the defences presented by the accused—and told them the standard and the burden of proof on the Crown with regard to establishing the facts which constitute the essential components of the offence, and the standard applicable to any accused with regard to his defence arguments. Appellant was convicted of second-degree murder and the Court of Appeal upheld the conviction. This appeal is to determine whether the trial judge erred in his directions to the jury.

Held: The appeal should be allowed and a new trial ordered.

The trial judge erred in law on the question of the burden of proof regarding the contradictory versions of the facts in issue. An accused benefits from any reasonable doubt at the outset, not merely if the two versions of the facts are equally consistent with the evidence or valid. Moreover, the jurors are not limited to choosing between the two versions. Even if they do not believe the accused, they cannot accept the other version of the facts unless they are satisfied beyond all reasonable doubt that the events in fact took place in the manner in which the witness for the Crown related them. Otherwise the accused is entitled to the finding of fact more favourable to him provided that it is based on evidence in the record and not mere speculation.

Pierre Nadeau *Appelant*;

et

Sa Majesté La Reine *Intimée*.

N° du greffe: 17596.

1984: 21 novembre; 1984: 13 décembre.

Présents: Le juge en chef Dickson et les juges Beetz, Estey, McIntyre, Chouinard, Lamer et Le Dain.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit criminel — Meurtre — Exposé du juge au jury — Fardeau de la preuve — Deux versions des événements entourant l'homicide offertes en preuve — Légitime défense — Directives erronées — Nouveau procès ordonné — Code criminel, S.R.C. 1970, chap. C-34, art. 613(1)b)(iii).

L'appelant a été accusé de meurtre au premier degré. Au procès, deux versions différentes des circonstances qui ont entouré l'homicide ont été présentées en preuve: celle de l'accusé, corroborée par sa concubine, et celle du témoin de la poursuite. Le juge du procès a instruit le jury sur les principes de droit qui régissent la légitime défense—l'un des moyens de défense invoqués par l'accusé—et il leur a indiqué la norme et le fardeau de preuve qui incombe à la poursuite relativement à la détermination des faits constitutifs de l'élément matériel de l'infraction ainsi que la norme dont bénéficie tout accusé en ce qui concerne ses moyens de défense. L'appelant a été déclaré coupable de meurtre au deuxième degré et la Cour d'appel a confirmé la déclaration de culpabilité. Le présent pourvoi vise à déterminer si le juge du procès a erré dans ses directives au jury.

Arrêt: Le pourvoi est accueilli et un nouveau procès est ordonné.

Le juge du procès a erré en droit sur la question du fardeau de la preuve relativement aux versions contradictoires des faits en litige. Un accusé bénéficie du doute raisonnable au départ et pas seulement si les deux versions des faits sont également concordantes ou valables. De plus, les jurés ne sont pas limités à choisir entre les deux versions. Même s'ils ne croient pas l'accusé, ils ne peuvent retenir l'autre version des faits que s'ils sont convaincus hors de tout doute raisonnable que les événements se sont effectivement passés comme le témoin de la poursuite les a relatés. À défaut l'accusé a droit à la détermination de fait qui lui est la plus favorable en autant qu'elle repose sur une preuve au dossier et n'est pas pure spéculation.

Furthermore, the trial judge also erred in law on the question of the burden of proof when he told the jurors that the accused had to prove his defence of self-defence beyond all reasonable doubt. The accused was entitled to the benefit of any reasonable doubt raised by the evidence respecting this defence.

Finally, section 613(1)(*b*)(iii) of the *Criminal Code* should not be applied in this case. The Crown did not show that, if it had been directed in accordance with the law, the jury would necessarily have brought in a verdict of guilty.

APPEAL from a judgment of the Quebec Court of Appeal[1], dismissing appellant's appeal from his conviction of second-degree murder. Appeal allowed.

Michel Proulx and *Richard Masson*, for the appellant.

Robert Lévesque, for the respondent.

English version of the judgment of the Court delivered by

LAMER J.—In this appeal, the applicable principles of law are well-known and are not in any way at issue. Rather, the question is whether the trial judge erred in law in his directions to the jury, and if so, whether his error was such that a new trial should be held. The Court of Appeal of Quebec considered that it should not. While agreeing with this conclusion, the Crown is asking this Court, if necessary, to apply the provisions of s. 613(1)(*b*)(iii) of the *Criminal Code*.

Appellant killed a man named Francœur with a rifle shot. He was charged with first-degree murder, and convicted of second-degree murder by a jury in New Carlisle, in the Gaspé area.

The incident occurred in the apartment of the accused's concubine, Miss Linda Caissy. One Landry, who said he was present in the apartment when the incident occurred, testified as to the circumstances surrounding the homicide. According to the accused and his concubine, Landry was not there, and they both gave the same version of the events leading to the killing of Francœur, but one which differed from that of Landry.

[1] Que. C.A., No. 200-10-000136-81, March 11, 1983.

De plus, en instruisant les jurés que l'accusé devait prouver sa défense de légitime défense hors de tout doute raisonnable, le juge du procès a de nouveau erré en droit sur la question du fardeau de la preuve. L'accusé devait bénéficier de tout doute raisonnable soulevé par la preuve relativement à cette défense.

Enfin, il ne convient pas en l'espèce d'appliquer l'art. 613(1)(*b*)(iii) du *Code criminel*. La poursuite n'a pas démontré que, instruit conformément à la loi, le jury aurait nécessairement conclu à un verdict de culpabilité.

POURVOI contre un arrêt de la Cour d'appel du Québec[1] qui a rejeté un appel de l'appelant déclaré coupable de meurtre au deuxième degré. Pourvoi accueilli.

Michel Proulx et *Richard Masson*, pour l'appelant.

Robert Lévesque, pour l'intimée.

Le jugement de la Cour a été rendu par

LE JUGE LAMER— Dans ce pourvoi, les principes de droit qui s'appliquent sont bien connus et ne sont nullement remis en question. Il s'agit plutôt de savoir si le juge de première instance a erré en droit dans ses instructions au jury, et ce, le cas échéant, au point de requérir un nouveau procès. La Cour d'appel du Québec fut d'avis que non. La Couronne tout en abondant dans ce sens, nous invite, au besoin, à appliquer les dispositions de l'art. 613(1)*b*)(iii) du *Code criminel*.

L'appelant a tué d'un coup de carabine un dénommé Francœur. Accusé de meurtre au premier degré, il fut déclaré coupable par un jury de New Carlisle, en Gaspésie, de meurtre au deuxième degré.

L'incident s'est produit à l'appartement de la concubine de l'accusé, M^lle^ Linda Caissy. Un dénommé Landry, qui s'est dit présent dans l'appartement lors de l'incident, a témoigné quant aux circonstances entourant l'homicide. Selon l'accusé et sa concubine, Landry n'y était pas, et tous deux donnent une même version différente de celle de Landry des événements qui ont abouti à l'homicide de Francœur.

[1] C.A. Qué., n° 200-10-000136-81, 11 mars 1983.

Appellant presented five grounds, each charging that the judge had erred in his directions to the jury. In my opinion, the first ground, having regard to the burden of proof in criminal proceedings, succeeds, and requires that this Court order a new trial; it is therefore unnecessary to deal with the others.

For reasons which it is not necessary to elaborate, the judge had a duty, which he discharged, to direct the jurors on the rules of law governing "self-defence". He also had a duty, as in all cases, to inform them of the standard and the burden of proof applicable to the Crown, with regard to establishing the facts which constitute the essential components of the offence, as well as the standard applicable to any accused with regard to his defence arguments, in particular that of self-defence.

Appellant argues that he erred in law on these questions when he dealt with the burden of proof regarding the two versions of the incident, and regarding self-defence.

The Two Versions

After telling them they had to choose between the two versions, the judge explained the jury's task to them as follows:

[TRANSLATION] You have heard the analysis given of the two (2) versions throughout the day, and I do not intend to repeat it. I will simply say that in deciding how you make your choice, you must have one thing clearly in mind: you must choose the more persuasive, the clearer version, the one which provides a better explanation of the facts, which is more consistent with the other facts established in the evidence.

You must keep in mind that, as the accused has the benefit of the doubt on all the evidence, if you come to the conclusion that the two (2) versions are equally consistent with the evidence, are equally valid, you must give - you must accept the version more favourable to the accused. These are the principles on which you must make your choice between the two (2) versions.

(Emphasis added.)

With respect, this direction is in error. The accused benefits from any reasonable doubt at the outset, not merely if "the two (2) versions are

L'appelant soulève cinq motifs, chacun reprochant au juge des erreurs dans ses directives au jury. Le premier de ces moyens, qui est en regard du fardeau de la preuve en matières criminelles, est, à mon avis, fondé, et requiert que nous ordonnions un nouveau procès; il n'est donc pas nécessaire de traiter des autres.

Pour des raisons qu'il n'est pas nécessaire d'expliciter en l'espèce, le juge devait, comme il l'a d'ailleurs fait, instruire les jurés sur les principes de droit qui gouvernent la «légitime défense». Il devait aussi, comme dans toutes les causes, leur indiquer la norme et le fardeau de preuve qui incombe à la Couronne en regard de la détermination des faits constitutifs de l'élément matériel de l'infraction ainsi que la norme dont bénéficie tout accusé en regard de ses moyens de défense, et plus particulièrement, en regard de la légitime défense.

L'appelant dit qu'il a erré en droit sur ces questions lorsqu'il a traité du fardeau de preuve en regard des deux versions de l'incident, et en regard de la légitime défense.

Les deux versions

Après leur avoir dit qu'ils devaient choisir entre les deux versions, voici comment le juge explique au jury leur tâche, face à celles-ci:

Vous avez entendu l'analyse des deux (2) versions au courant de la journée, je n'ai pas l'intention d'y revenir. Je veux simplement vous dire que dans la recherche du choix que vous allez faire, vous devez avoir un objectif principal: c'est de choisir la version la plus probante, la plus claire, celle qui explique mieux les faits, celle qui est plus concordante avec les autres faits qui ont été prouvés dans la preuve.

Vous devez vous rappeler que l'accusé, ayant le bénéfice du doute sur l'ensemble de la preuve, s'il arrivait que vous en arriviez à la conclusion que les deux (2) versions sont également concordantes, sont également valables, vous devrez accorder - vous devrez retenir la version qui est la plus favorable à l'accusé. Alors, ce sont en vertu de ces principes-là que vous devez faire le choix entre les deux (2) versions.

(C'est moi qui souligne.)

Avec respect, cette directive est erronée. L'accusé bénéficie du doute raisonnable au départ, et non pas seulement si «les deux (2) versions sont

equally consistent with the evidence, are equally valid". Moreover the jury does not have to choose between two versions. It is not because they would not believe the accused that they would then have to agree with Landry's version. The jurors cannot accept his version, or any part of it, unless they are satisfied beyond all reasonable doubt, having regard to all the evidence, that the events took place in this manner; otherwise, the accused is entitled, unless a fact has been established beyond a reasonable doubt, to the finding of fact the most favourable to him, provided of course that it is based on evidence in the record and not mere speculation.

Self-Defence

The judge told the jurors more than once that the accused had the benefit of a reasonable doubt at all times, and that the Crown had a duty to prove each of the component parts of the crime. Dealing with self-defence, he told them:

[TRANSLATION] I should tell you that here too, on self-defence, as on all the other defences which he may present, the accused is entitled to the benefit of the doubt in the event you are undecided whether any one component of the crime has been established.

Further, he said:

[TRANSLATION] In the event you conclude that the version of Nadeau and that of Linda Caissy should be accepted, you must examine self-defence: if you accept self-defence, you may bring in a verdict of acquittal.

In the event you conclude that self-defence was not established beyond all doubt, then you must examine the evidence to determine whether, at the time he fired this shot in the particular circumstances of the case, the accused could have formed—was capable of forming the specific intent of murder.

(Emphasis added.)

Although the jury requested and received further directions on other aspects of the law applicable in the circumstances, this direction was the final one given by the judge on self-defence. With respect, it is in error. Any reasonable doubt as regards his being in self-defence raised by the evidence enures to the accused, and he certainly

également concordantes, sont également valables». Les jurés ne sont pas limités à choisir entre deux versions. Ce n'est pas parce qu'ils ne croiraient pas l'accusé qu'ils seraient pour autant limités à agréer la version de Landry. Les jurés ne peuvent retenir sa version, ou portion de celle-ci, que s'ils sont, en regard de toute la preuve, satisfaits hors de tout doute raisonnable que les événements se sont passés comme tels; à défaut de quoi, et à moins qu'un fait ne soit prouvé hors de tout doute raisonnable, l'accusé a droit à la détermination de fait qui lui est la plus favorable, en autant, bien sûr, qu'elle repose sur une preuve au dossier et n'est pas pure spéculation.

La légitime défense

Le juge a dit aux jurés plus d'une fois que l'accusé devait bénéficier en tout temps du bénéfice du doute raisonnable, et qu'il incombait à la Couronne de prouver chacun des éléments constitutifs du crime. Traitant de la légitime défense il leur a dit:

Je dois vous dire qu'également ici, sur la légitime défense, comme sur toutes les autres défenses qu'il peut présenter, l'accusé a le droit au bénéfice du doute dans le cas où vous êtes indécis à savoir si l'un ou l'autre des éléments ont été prouvés.

Et plus loin:

Dans le cas où vous en veniez à la conclusion d'accepter la version de Nadeau et de Linda Caissy, vous devez examiner la légitime défense; si vous acceptez la légitime défense, vous pouvez rapporter un verdict d'acquittement.

Dans le cas où vous en venez à la conclusion que la légitime défense n'est pas prouvée hors de tout doute, eh bien vous pouvez examiner la preuve de façon à vous demander si l'accusé, au moment où il a tiré à ce moment-là dans les circonstances particulières, pouvait se former—était capable de se former une intention spécifique du meurtre.

(C'est moi qui souligne.)

Quoique le jury ait reçu, à sa demande, des directives additionnelles sur d'autres aspects du droit applicable en l'espèce, cette directive fut la dernière qu'il donnait en ce qui a trait à la légitime défense. Avec respect, elle est erronée. L'accusé bénéficie de tout doute raisonnable soulevé par la preuve à l'effet qu'il était placé en situation de

does not have to show beyond all reasonable doubt that he was placed in a position of self-defence.

In all fairness to the judge, I assume he meant to tell the jurors that, if they were satisfied beyond all reasonable doubt that the accused was not in a position of self-defence, they should not thereupon immediately conclude that he was guilty, but should consider whether he "was capable of forming the specific intent of murder". I feel certain that this is what the judge intended and thought he was telling the jury, since the judge in question is one of experience and great ability. Unfortunately, this is not what he said, and I can only conclude that the jurors could have been given the wrong impression as to the burdens of proof; particularly with regard to the preliminary choice which they could make, and might even have been required to make, of "the more persuasive . . . version".

The Crown suggested that this Court apply s. 613(1)(*b*)(iii). I have read the evidence in the record, and I am of the opinion that the Crown did not show the Court that, if it had been properly instructed in law, the jury would necessarily have brought in a verdict of second-degree murder, as it did.

I would allow the appeal, set aside the judgment of the Court of Appeal dismissing the appeal, and order a new trial on a charge of second-degree murder.

Appeal allowed.

Solicitors for the appellant: Proulx, Barot, Masson, Montréal.

Solicitor for the respondent: Robert Lévesque, New Carlisle.

légitime défense et n'a sûrement pas à le prouver hors de tout doute raisonnable.

En toute justice pour le juge, je crois qu'il voulait plutôt dire aux jurés que, s'ils étaient satisfaits hors de tout doute raisonnable que l'accusé n'était pas en situation de légitime défense, ils ne devaient pas pour autant conclure tout de go à sa culpabilité mais devaient se demander s'il «était capable de se former une intention spécifique du meurtre». C'est, j'en suis sûr, puisqu'il s'agit d'un juge d'expérience et de grande compétence, ce qu'il a voulu et a pensé leur dire. Hélas, ce n'est pas ce qui a été dit, et je ne peux que conclure que les jurés ont pu être laissés sous une impression erronée quant aux fardeaux de preuve; surtout en regard du choix préalable qu'ils pouvaient faire et même, le cas échéant, devaient faire de «la version la plus probante».

La Couronne nous suggère l'application de l'art. 613(1) *b*)(iii). J'ai lu la preuve au dossier et je suis d'avis que la Couronne ne nous a pas démontré que, instruit conformément à la loi, le jury eût nécessairement conclu, comme il l'a fait, à un verdict de culpabilité de meurtre au second degré.

J'accueillerais le pourvoi, infirmerais la décision de la Cour d'appel rejetant l'appel, et ordonnerais un nouveau procès, sur une accusation de meurtre au deuxième degré.

Pourvoi accueilli.

Procureurs de l'appelant: Proulx, Barot, Masson, Montréal.

Procureur de l'intimée: Robert Lévesque, New Carlisle.

Edward Martin Fanjoy *Appellant*;

and

Her Majesty The Queen *Respondent*.

File No.: 17172.

1985: January 25; 1985: October 10.

Present: Dickson C.J. and Beetz, Estey, McIntyre, Chouinard, Lamer and Le Dain JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Powers of Court of Appeal — Errors at trial — Trial judge failing to limit cross-examination of accused and misdirecting jury on alibi defence — Errors prejudicial to accused — Section 613(1)(b)(iii) of the Code inapplicable to uphold conviction — Criminal Code, s. 613(1)(a)(iii), (b)(iii).

The Court of Appeal dismissed appellant's appeal against his conviction for gross indecency under s. 157 of the *Criminal Code*. Because of the strength of the Crown's circumstantial case against the appellant, the Court of Appeal applied the proviso of s. 613(1)(*b*)(iii) of the *Code* to uphold the conviction despite its findings (1) that the Crown's cross-examination of appellant dealing with his previous sexual conduct was improper and "could only unfairly prejudice the appellant" and (2) that the trial judge's direction with respect to appellant's alibi evidence was wrong and also prejudicial to him. This appeal is to determine whether the Court of Appeal erred in the application of s. 613(1)(*b*)(iii) of the *Code*.

Held: The appeal should be allowed.

The Court of Appeal erred in applying s. 613(1)(*b*)(iii) of the *Code* to uphold the conviction. The proviso of s. 613(1)(*b*)(iii) applies only where a court of appeal is of the opinion that on the ground of a wrong decision on a question of law an appeal might be decided in favour of the appellant, and where it is also of the opinion that no substantial wrong or miscarriage of justice has occurred. Here, the trial judge's failure to limit the cross-examination was an error of mixed law and fact and, accordingly, the conviction could not be saved by the application of the proviso. Having found that the abusive cross-examination was unfairly prejudicial to the appellant, the Court of Appeal should have allowed the appeal on the basis that there had been a

Edward Martin Fanjoy *Appelant*;

et

Sa Majesté La Reine *Intimée*.

N° du greffe: 17172.

1985: 25 janvier; 1985: 10 octobre.

Présents: Le juge en chef Dickson et les juges Beetz, Estey, McIntyre, Chouinard, Lamer et Le Dain.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit criminel — Pouvoirs de la Cour d'appel — Erreurs du juge du procès — Omission de limiter le contre-interrogatoire de l'accusé et directives erronées quant à la défense d'alibi — Erreurs préjudiciables à l'accusé — Non-applicabilité de l'art. 613(1)b)(iii) du Code pour confirmer la déclaration de culpabilité — Code criminel, art. 613(1)a)(iii), b)(iii).

La Cour d'appel a rejeté l'appel interjeté par l'appelant contre sa déclaration de culpabilité de grossière indécence prononcée en vertu de l'art. 157 du *Code criminel*. À cause de la force de la preuve circonstancielle du ministère public contre l'appelant, la Cour d'appel a appliqué le sous-al. 613(1)*b*)(iii) du *Code* pour maintenir la déclaration de culpabilité malgré ses conclusions selon lesquelles (1) le contre-interrogatoire de l'appelant par le ministère public portant sur sa conduite sexuelle antérieure était inapproprié et «ne pouvait que porter injustement préjudice à l'appelant» et (2) les directives du juge du procès relatives à la preuve d'alibi de l'appelant étaient erronées et causaient un préjudice à l'appelant. Le présent pourvoi vise à déterminer si la Cour d'appel a commis une erreur dans l'application du sous-al. 613(1)*b*)(iii) du *Code*.

Arrêt: Le pourvoi est accueilli.

La Cour d'appel a commis une erreur en appliquant le sous-al. 613(1)*b*)(iii) du *Code* pour maintenir la déclaration de culpabilité. Le sous-alinéa 613(1)*b*)(iii) ne s'applique que lorsqu'une cour d'appel estime que, étant donné une décision erronée sur une question de droit, l'appel pourrait être décidé en faveur de l'appelant, mais qu'elle estime également qu'aucun tort important ou aucune erreur judiciaire grave ne s'est produit. En l'espèce, l'omission du juge du procès de limiter le contre-interrogatoire constitue une erreur mixte de fait et de droit et, par conséquent, la déclaration de culpabilité ne pouvait être maintenue par l'application de la disposition. La Cour d'appel, ayant conclu que le contre-interrogatoire abusif portait injustement préjudice à

miscarriage of justice under s. 613(1)(*a*)(iii) of the *Code*.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1970, c. C-34, ss. 156, 157, 613(1)(*a*)(iii), (*b*)(iii).

APPEAL from a judgment of the Ontario Court of Appeal, dated June 2, 1982, dismissing the accused's appeal from his conviction for gross indecency under s. 157 of the *Criminal Code*. Appeal allowed.

Clayton C. Ruby, for the appellant.

Susan G. Ficek, for the respondent.

The judgment of the Court was delivered by

MCINTYRE J.—This is an appeal against the judgment of the Ontario Court of Appeal, dated June 2, 1982, which dismissed the appellant's appeal against his conviction for gross indecency under s. 157 of the *Criminal Code*. The appeal was dismissed by the application of s. 613(1)(*b*)(iii) of the *Code* after findings that the cross-examination of the appellant by Crown counsel at trial "could only unfairly prejudice the appellant", and that an error in charging the jury to the effect that "mere disbelief in the alibi evidence could be used as evidence of guilt itself" was wrong and was prejudicial to the accused.

The appellant was charged with committing an act of gross indecency with one Kenneth Jodoin, contrary to s. 157 of the *Criminal Code*, and with indecent assault on Kenneth Jodoin, contrary to s. 156 of the *Code* (since repealed). He was tried at Hamilton before His Honour Judge Clare and a jury and convicted on both counts. His appeal to the Court of Appeal (Jessup, Brooke and Cory JJ.A.) was allowed in part. The conviction under s. 156 of the *Code* was quashed but the appeal against the gross indecency conviction under s. 157 was dismissed.

l'appelant, aurait dû accueillir l'appel en vertu du sous-al. 613(1)*a*)(iii) du *Code* pour le motif qu'il s'est produit une erreur judiciaire.

Lois et règlements cités

Code criminel, S.R.C. 1970, chap. C-34, art. 156, 157, 613(1)*a*)(iii), *b*(iii).

POURVOI contre un arrêt de la Cour d'appel de l'Ontario, en date du 2 juin 1982, qui a rejeté l'appel de l'accusé contre sa déclaration de culpabilité de grossière indécence prononcée en vertu de l'art. 157 du *Code criminel*. Pourvoi accueilli.

Clayton C. Ruby, pour l'appelant.

Susan G. Ficek, pour l'intimée.

Version française du jugement de la Cour rendu par

LE JUGE MCINTYRE—Le présent pourvoi est interjeté contre l'arrêt de la Cour d'appel de l'Ontario, en date du 2 juin 1982, qui a rejeté l'appel de l'appelant contre sa déclaration de culpabilité de grossière indécence prononcée en vertu de l'art. 157 du *Code criminel*. L'appel a été rejeté en application du sous-al. 613(1)*b*)(iii) du *Code* après qu'on eut conclu que le contre-interrogatoire de l'appelant par le substitut du procureur général lors du procès [TRADUCTION] «ne pouvait que porter injustement préjudice à l'appelant» et qu'une directive du juge au jury selon laquelle [TRADUCTION] «le simple refus de croire la preuve d'alibi pouvait être utilisé comme une preuve de la culpabilité elle-même» était erronée et portait préjudice à l'accusé.

L'appelant a été accusé d'avoir commis un acte de grossière indécence avec un nommé Kenneth Jodoin, contrairement à l'art. 157 du *Code criminel* et d'avoir attenté à la pudeur de Kenneth Jodoin contrairement à l'art. 156 du *Code* (abrogé depuis lors). Il a subi son procès à Hamilton devant le juge Clare et un jury et a été déclaré coupable à l'égard des deux chefs d'accusation. Son appel à la Cour d'appel (les juges Jessup, Brooke et Cory) a été accueilli en partie. La déclaration de culpabilité en vertu de l'art. 156 du *Code* a été annulée mais l'appel interjeté contre la déclaration de culpabilité de grossière indécence en contravention de l'art. 157 a été rejeté.

On May 27, 1981, the complainant was attacked in his apartment at about 1:00 a.m. He had been undergoing hormone treatment in preparation for what was described as a "sex-change operation", and was dressed as, and had assumed the appearance of, a woman. He was planning to leave his apartment when he heard a motor vehicle stop in front of the building. He saw a man, whom he later identified as the appellant, enter the building. The man asked Jodoin for a beer. The complainant said he had no beer, but at the visitor's request he allowed entry to his apartment because the visitor wished to use the washroom. When in the apartment the visitor attacked the complainant. There was a struggle and a forced act of fellatio by the complainant. The assailant then left.

There was evidence of identification of the appellant, including evidence relating to his clothing, and also evidence identifying the licence number of the motor vehicle which was correct to within one digit of the licence number of the appellant's vehicle. There was, as found by the Court of Appeal, a very strong circumstantial case against the appellant. The appellant gave evidence on his own behalf. He denied having been the attacker and swore he was not at the complainant's apartment building on that occasion though he had visited another tenant of the block on another occasion. He gave an account of his movements on the night in question, which placed him elsewhere than the scene of the crime and which was supported by witnesses called on his behalf. The jury, having heard all the evidence, clearly disbelieved the appellant and convicted him.

During the trial, Crown counsel (not counsel on this appeal) conducted a repetitive and improper cross-examination of the appellant. The trial judge interfered on two occasions cautioning Crown counsel but did not prevent the continuation of the examination. Evidence of previous sexual conduct of the appellant unrelated to the offence charged had been admitted as part of the Crown's case. The Court of Appeal considered that its admission was improper. The cross-examination dealt exten-

Le 27 mai 1981, vers une heure du matin, le plaignant a été attaqué dans son appartement. Il suivait un traitement hormonal préparatoire à ce qui a été décrit comme une «opération de transformation sexuelle»; il était habillé en femme et en avait pris l'apparence. Il allait sortir de son appartement lorsqu'il a entendu un véhicule s'arrêter devant l'immeuble. Il a vu un homme, qu'il a par la suite identifié comme l'appelant, entrer dans l'immeuble. L'homme a demandé à Jodoin de lui donner une bière. Le plaignant a dit qu'il n'avait pas de bière mais, à la demande du visiteur, il lui a permis d'entrer dans son appartement parce qu'il désirait utiliser les toilettes. Une fois dans l'appartement, le visiteur a attaqué le plaignant. Il y a eu une bagarre et le plaignant a été forcé d'exécuter un acte de fellation. L'agresseur a alors quitté les lieux.

Des éléments de preuve relativement à l'identité de l'appelant ont été présentés, y compris des éléments relatifs à ses vêtements et également des éléments identifiant la plaque du véhicule qui correspondait à un chiffre près au numéro de la plaque du véhicule de l'appelant. Il y avait, comme l'a conclu la Cour d'appel, une preuve circonstancielle très forte contre l'appelant. L'appelant a témoigné pour son propre compte. Il a nié avoir été l'attaquant et a déclaré sous serment qu'il ne se trouvait pas dans l'immeuble du plaignant à ce moment-là, bien qu'il ait rendu visite à un autre locataire de l'immeuble à un autre moment. Il a fait état de ses déplacements au cours de la nuit en question, qui le situaient ailleurs que sur la scène du crime et qui étaient appuyés par des témoins qu'il avait cités. Le jury, après avoir entendu toute la preuve, a clairement refusé de croire l'appelant et l'a déclaré coupable.

Au cours du procès, le substitut du procureur général (qui n'est pas l'avocat dans le présent pourvoi) a contre-interrogé l'appelant de façon répétitive et inappropriée. Le juge du procès est intervenu à deux reprises pour avertir le substitut sans toutefois l'empêcher de continuer l'interrogatoire. Des éléments de preuve relatifs à la conduite sexuelle antérieure de l'appelant, non reliés à l'infraction dont il était accusé, ont été admis dans le cadre de la preuve à charge. La Cour d'appel a

sively with that evidence. The appellant was challenged to explain away or account for the evidence of Crown witnesses, and it is apparent from a reading of the transcript that the appellant became upset and emotionally disturbed by the constant repetition of questions which he had already answered. These facts appear to have led the court to interfere. The Court of Appeal was of the view that the cross-examination was improper. Brooke J.A., with whom Cory J.A. agreed, after noting that the case for the defence depended on the jury's view of the evidence of the appellant and his witnesses to his alibi, said:

> As to the cross-examination, while the evidence led in the cross-examination was to some extent relevant to show that the appellant was in the building where the complainant resides and at the hour that she says that he was there, it went too far when the appellant's sexual conduct on another occasion was introduced in the cross-examination and, in particular, when Crown counsel persisted in this regard over the accused's denial. Crown counsel sought and was permitted to lead that evidence which was not really relevant to the issue and could only unfairly prejudice the appellant. Nothing further need be said about the misdirection that mere disbelief in the alibi evidence could be used as evidence of guilt itself. This Court has dealt with such matters on a number of other occasions. The direction was wrong and, of course, was prejudicial to the accused.

He concluded because of the strength of the Crown's circumstantial case it was a proper case for the application of the proviso in s. 613(1)(*b*)(iii) of the *Code*.

In this Court it was contended by the appellant that the application of the proviso was improper and that it constituted reversible error. It was contended that the impropriety of the cross-examination raised at most a question of mixed law and fact and, accordingly, it could not be the subject of the application of the proviso. Furthermore, the error found by the Court of Appeal to be "unfairly prejudicial", even if considered an error of law, was not such an error that the proviso should have been applied. The Crown argued that

jugé que cette admission était abusive. Le contre-interrogatoire portait en grande partie sur cette preuve. L'appelant a été mis au défi de se justifier ou de se disculper face aux dépositions des témoins à charge et, à la lecture des notes sténographiques, il ressort que l'appelant a été bouleversé et perturbé émotionnellement par la répétition constante de questions auxquelles il avait déjà répondu. Ces faits paraissent avoir incité la cour à intervenir. La Cour d'appel a estimé que le contre-interrogatoire était inapproprié. Le juge Brooke, avec l'appui du juge Cory, après avoir fait remarquer que la preuve de la défense dépendait de l'opinion que le jury s'était faite des dépositions de l'appelant et de ses témoins relativement à son alibi, a dit:

> [TRADUCTION] En ce qui a trait au contre-interrogatoire, bien que les éléments de preuve présentés dans le contre-interrogatoire soient dans une certaine mesure utiles pour démontrer que l'appelant se trouvait dans l'immeuble où réside la plaignante et à l'heure à laquelle elle dit qu'il s'y trouvait, il est allé trop loin lorsqu'il a introduit en contre-interrogatoire la conduite sexuelle de l'appelant à une autre occasion et, en particulier, lorsque le substitut a persisté à cet égard malgré le démenti de l'accusé. Le substitut a cherché à présenter cet élément de preuve qui n'était pas réellement pertinent à l'égard de la question et ne pouvait que porter injustement préjudice à l'appelant et on lui a permis de le faire. Il n'y a rien d'autre à ajouter au sujet de la directive erronée selon laquelle le simple refus de croire la preuve d'alibi pouvait être utilisé comme une preuve de la culpabilité elle-même. Cette Cour a déjà traité de ces questions à plusieurs reprises. La directive était erronée et, évidemment, portait préjudice à l'accusé.

Il a conclu que, à cause de la force de la preuve circonstancielle du ministère public, l'affaire se prêtait à l'application du sous-al. 613(1)*b*)(iii) du *Code*.

Devant cette Cour, l'appelant a soutenu que l'application de la disposition n'était pas appropriée et qu'elle constituait une erreur donnant lieu à cassation. Il a soutenu que le caractère abusif du contre-interrogatoire soulevait tout au plus une question mixte de droit et de fait et que, par conséquent, on ne pouvait lui appliquer la disposition. En outre, l'erreur dont la Cour d'appel a dit qu'elle portait [TRADUCTION] «injustement préjudice» même si elle est considérée comme une erreur de droit, n'était pas telle qu'elle commande-

the impugned cross-examination viewed in the context of the admissibility of evidence did raise a question of law, and one to which the proviso could apply. It was also argued that, apart from questions of admissibility of evidence, the impugned cross-examination could raise questions concerning the fairness of the proceedings. The nature or manner in which cross-examination is conducted does not necessarily raise a question of law to which the proviso may apply, but does raise an issue whether a miscarriage of justice has occurred under s. 613(1)(*a*)(iii). However, the Court of Appeal, it was said, made no error in law in holding that there had been no miscarriage of justice.

The relevant portions of s. 613 of the *Criminal Code* are set out hereunder:

613. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit, on account of insanity, to stand his trial, or against a special verdict of not guilty on account of insanity, the court of appeal

(*a*) may allow the appeal where it is of the opinion that

. . .

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or

(iii) on any ground there was a miscarriage of justice;

(*b*) may dismiss the appeal where

. . .

(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (*a*)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred;

The proviso may be applied by the Court of Appeal only where it has formed the opinion that the appeal might be decided in favour of the appellant because of a wrong decision on a question of law, and where it is also of the opinion that no substantial wrong or miscarriage of justice has occurred. This is clear from the wording of the statute and, indeed, was accepted by the Crown in its factum.

rait l'application de la disposition. Le ministère public a soutenu que le contre-interrogatoire contesté, considéré dans le contexte de l'admissibilité de la preuve, soulevait bien une question de droit à laquelle la disposition pouvait s'appliquer. Il a également soutenu que, outre les questions d'admissibilité de la preuve, le contre-interrogatoire contesté pouvait soulever des questions relatives à l'équité des procédures. La nature du contre-interrogatoire ou la manière dont il a été mené ne soulève pas nécessairement une question de droit à laquelle peut s'appliquer la disposition, mais soulève en fait la question de savoir s'il y a eu une erreur judiciaire au sens du sous-al. 613(1)*a*)(iii). Toutefois, on a dit que la Cour d'appel n'a commis aucune erreur de droit lorsqu'elle a jugé qu'il n'y avait pas eu d'erreur judiciaire.

Les parties pertinentes de l'art. 613 du *Code criminel* sont les suivantes:

613. (1) Lors de l'audition d'un appel d'une déclaration de culpabilité ou d'un verdict portant que l'appelant est incapable de subir son procès, pour cause d'aliénation mentale, ou d'un verdict spécial de non-culpabilité pour cause d'aliénation mentale, la cour d'appel

a) peut admettre l'appel, si elle est d'avis

. . .

(ii) que le jugement de la cour de première instance devrait être écarté pour le motif qu'il constitue une décision erronée sur une question de droit, ou

(iii) que, pour un motif quelconque, il y a eu erreur judiciaire;

b) peut rejeter l'appel, si

. . .

(iii) bien que la cour estime que, pour tout motif mentionné au sous-alinéa *a*)(ii), l'appel pourrait être décidé en faveur de l'appelant, elle est d'avis qu'aucun tort important ou aucune erreur judiciaire grave ne s'est produit;

La Cour d'appel ne peut appliquer la disposition que lorsqu'elle est d'avis que l'appel pourrait être décidé en faveur de l'appelant à cause d'une décision erronée sur une question de droit et lorsqu'elle est également d'avis qu'aucun tort important ou aucune erreur judiciaire grave ne s'est produit. C'est ce qui ressort clairement du texte de la loi et, en fait, ce qui a été accepté par le ministère public dans son mémoire.

The errors at trial were enumerated by Jessup J.A. in his short judgment "for the judge's future guidance". They were stated to be that:

(1) He charged the jury that mere disbelief of the alibi evidence could be used as evidence of guilt itself.

(2) He permitted evidence of the appellant's sexual conduct unrelated to this offence, although it was not similar fact evidence and he permitted the Crown to cross-examine on that evidence.

(3) The trial judge erred when he said to the jury "It is your duty to give the benefit of the doubt to the accused, but having done so, to convict if you believe guilt is established."

Points (1) and (3) are errors of law. Point (2) is the error on which the appellant bases the principle part of his argument. The appellant raises two propositions. He argues, firstly, that the Court of Appeal has found that the abusive cross-examination was unfairly prejudicial to the appellant: The Court of Appeal should, therefore, have allowed the appellant's appeal on the basis that there had been a miscarriage of justice under s. 613(1)(*a*)(iii). The application of the proviso, it was argued, was reversible error because the Court of Appeal had no power to apply the proviso unless an error of law could be shown. The error in permitting the abusive cross-examination was, at most, one of mixed law and fact and, accordingly, the conviction could not be saved by the application of the proviso. Secondly, the appellant contended that, even if the error with respect to the cross-examination could be considered to be an error of law, it was of such a nature that the Court of Appeal erred in applying the proviso to dismiss the appeal.

Was the failure of the trial judge to restrain the abusive cross-examination an error of law? Of course, a legal element was involved in the decision which faced the trial judge. The question of admissibility of evidence is a question of law. Crown counsel has a right in law to cross-examine the accused and, accordingly, to deny that right or unduly limit it raises considerations of law. There

Le juge Jessup a énuméré les erreurs commises lors du procès dans son bref jugement [TRADUCTION] «à titre d'indication pour le juge». Ce sont les suivantes:

[TRADUCTION]

(1) Il a exposé au jury que le simple refus de croire la preuve d'alibi pouvait être utilisé comme une preuve de la culpabilité elle-même.

(2) Il a admis la preuve de la conduite sexuelle de l'appelant qui ne se rapportait pas à la présente infraction, bien qu'il ne s'agissait pas d'une preuve de faits similaires et il a permis au ministère public de contre-interroger à cet égard.

(3) Le juge du procès a commis une erreur lorsqu'il a dit au jury «Vous avez l'obligation de donner le bénéfice du doute à l'accusé mais, lorsque vous l'avez fait, de le déclarer coupable si vous croyez que la culpabilité est établie.»

Les points (1) et (3) sont des erreurs de droit. Le point (2) est l'erreur sur laquelle l'appelant fonde la principale partie de sa plaidoirie. L'appelant soulève deux arguments. En premier lieu, il soutient que la Cour d'appel a jugé que le contre-interrogatoire abusif portait injustement préjudice à l'appelant. Par conséquent, la Cour d'appel aurait dû accueillir son appel sur le fondement qu'il y avait eu erreur judiciaire en vertu du sous-al. 613(1)*a*)(iii). Il soutient que l'application de la disposition constitue une erreur donnant lieu à cassation parce que la Cour d'appel n'avait pas le pouvoir d'appliquer la disposition à moins qu'une erreur de droit ne puisse être démontrée. L'erreur que constitue l'autorisation du contre-interrogatoire abusif est, tout au plus, une erreur mixte de fait et de droit et, par conséquent, la déclaration de culpabilité ne pouvait être maintenue par l'application de la disposition. En second lieu, l'appelant soutient que, même si l'erreur relative au contre-interrogatoire peut être considérée comme une erreur de droit, elle est d'une telle nature que la Cour d'appel a commis une erreur en appliquant la disposition pour rejeter l'appel.

Le juge du procès a-t-il commis une erreur de droit en n'empêchant pas le contre-interrogatoire abusif? Évidemment, la décision à laquelle le juge du procès était confronté comportait un élément juridique. La question de l'admissibilité de la preuve est une question de droit. Le substitut du procureur général est autorisé en droit à contre-interroger l'accusé et, par conséquent, lui refuser

are, however, limits to the extent of the cross-examination and the manner in which it may be conducted, and there is always a discretion in the trial judge and a duty to confine the cross-examination within proper limits. There is, of course, no doubt that in cross-examination in criminal cases, particularly where questions of credibility of witnesses are in issue, a wide latitude is accorded to counsel and too fine a line should not be drawn to confine or limit a detailed and searching inquiry into the matters raised by the evidence given by the accused and other witnesses. The discretion to intervene in a cross-examination must, of course, be exercised judicially. Its exercise does not rest on legal considerations alone, but will depend as well on the facts and circumstances in each case, and will not be determined by the simple application of a fixed rule of law. The decision to exercise the discretion to intervene in cross-examination, or to refrain from intervention, is one involving considerations of both law and fact and cannot be said to be a question of law alone. Each case will depend on its own circumstances, and no doubt there will frequently be difficulty in deciding from case to case whether the point has arrived in a cross-examination where the trial judge should intervene. It is in this case abundantly clear, however, that that point was reached and passed. The trial judge was obviously concerned at the course the cross-examination was taking. He did intervene on at least two occasions to caution counsel and to attempt to restrict counsel within proper limits, but this did not affect the cross-examination in any significant way. That he was in error in this regard was found by the Court of Appeal and it was noted by Brooke J.A. that it "could only unfairly prejudice the appellant".

ce droit ou le restreindre indûment soulève des considérations de droit. Toutefois, il y a des limites à l'étendue du contre-interrogatoire et à la manière dont il peut être mené; le juge du procès possède toujours un pouvoir discrétionnaire et l'obligation de maintenir le contre-interrogatoire dans des limites acceptables. Évidemment, il n'y a aucun doute que lors de contre-interrogatoires dans des affaires criminelles, particulièrement lorsque des questions de crédibilité des témoins sont en cause, le procureur dispose d'une grande latitude et il ne faudrait pas tracer une frontière trop précise pour restreindre ou limiter un interrogatoire détaillé et rigoureux sur des points soulevés dans les dépositions de l'accusé et d'autres témoins. Le pouvoir discrétionnaire d'intervenir dans un contre-interrogatoire doit, il va sans dire, être exercé avec discernement. Son exercice ne repose pas seulement sur des considérations juridiques, mais dépend également des faits et des circonstances de chaque affaire et ne sera pas déterminé par la simple application d'une règle de droit établie. La décision d'exercer ou non le pouvoir discrétionnaire d'intervenir dans un contre-interrogatoire comporte des considérations de droit et de fait et on ne peut dire qu'il s'agit seulement d'une question de droit. Chaque affaire dépendra de ses propres circonstances et il sera sans doute fréquemment difficile de décider d'une affaire à l'autre si, dans un contre-interrogatoire, on est parvenu au point où le juge du procès devrait intervenir. Toutefois, en l'espèce, il est évident que ce point a été atteint et même dépassé. Le juge du procès était manifestement préoccupé par le déroulement du contre-interrogatoire. Il est intervenu à au moins deux reprises pour mettre en garde le substitut et pour tenter de le garder dans des limites appropriées, mais cela n'a eu aucun effet important sur le contre-interrogatoire. La Cour d'appel a conclu qu'il avait commis une erreur à cet égard et le juge Brooke a fait remarquer que cela [TRADUCTION] «ne pouvait que porter injustement préjudice à l'appelant».

Held

The Court of Appeal, despite its finding of prejudice, relied on the provisions of s. 613(1)(*b*)(iii) of the *Criminal Code*. It applied the proviso to dismiss the appeal. In this, it is my view that they were in error. Section 613(1)(*b*)(iii) permits of the application of the proviso only where it is of the opinion that on the ground of a wrong decision on a question of law an appeal

Tout en concluant au préjudice, la Cour d'appel s'est fondée sur les dispositions du sous-al. 613(1)*b*)(iii) du *Code criminel*. Elle a appliqué la disposition pour rejeter l'appel. À cet égard, je suis d'avis qu'elle a commis une erreur. Le sous-alinéa 613(1)*b*(iii) ne peut s'appliquer que lorsque la cour estime que, étant donné une décision erronée sur une question de droit, l'appel pourrait être décidé

might be decided in favour of the appellant, but it is also of the opinion that no substantial wrong or miscarriage of justice has occurred. Here no error of law alone is relied upon, and the error in failing to limit the cross-examination may not be relieved against by the application of the proviso. Prejudicial error had been found and the appellant, in my view, was entitled to have the court consider whether the appeal should have been allowed under the provisions of s. 613(1)(*a*)(iii) of the *Code* on the ground that a miscarriage of justice had occurred.

I find it impossible to conclude that no miscarriage of justice occurred as a result of the appellant's cross-examination. A person charged with the commission of a crime is entitled to a fair trial according to law. Any error which occurs at trial that deprives the accused of that entitlement is a miscarriage of justice. It is not every error which will result in a miscarriage of justice, the very existence of the proviso to relieve against errors of law which do not cause a miscarriage of justice recognizes that fact. However, I am not able to say that an error which, in the words of Brooke J.A., "could only unfairly prejudice", would not by itself cause a miscarriage of justice. It would be wholly inconsistent with a finding of unfair prejudice in a trial to find, nonetheless, that no miscarriage of justice occurred. In my opinion, the Court of Appeal, having found as it did, ought to have allowed the appeal under s. 613(1)(*a*) (iii) of the *Criminal Code*. For these reasons, s. 613(1)(*b*)(iii) of the *Code* could not influence the decision and further exploration of that section in dealing with the second or alternative argument raised by the appellant is unnecessary.

I would allow the appeal.

Appeal allowed.

Solicitor for the appellant: Clayton C. Ruby, Toronto.

Solicitor for the respondent: The Attorney General for the Province of Ontario, Toronto.

en faveur de l'appelant, mais qu'elle estime également qu'aucun tort important ou aucune erreur judiciaire grave ne s'est produit. En l'espèce, on ne s'est pas fondé sur une erreur de droit seulement et on ne peut, par l'application de la disposition, corriger l'erreur qui résulte de l'omission de limiter le contre-interrogatoire. On a conclu qu'il y avait eu une erreur causant un préjudice et, à mon avis, l'appelant avait le droit d'exiger que la cour examine la question de savoir si l'appel aurait dû être accueilli en vertu des dispositions du sous-al. 613(1)*a*)(iii) du *Code* pour le motif qu'il s'est produit une erreur judiciaire.

J'estime qu'il est impossible de conclure que le contre-interrogatoire de l'appelant n'a entraîné aucune erreur judiciaire. Une personne qui est accusée d'un crime a droit à un procès équitable selon la loi. Toute erreur qui se produit au cours du procès et qui prive l'accusé de ce droit constitue une erreur judiciaire. On ne peut pas dire que toute erreur est une erreur judiciaire; d'ailleurs l'existence même de la disposition pour remédier aux erreurs de droit qui ne causent pas une erreur judiciaire reconnaît ce fait. Toutefois, je ne peux pas dire qu'une erreur qui, selon les termes du juge Brooke [TRADUCTION] «ne pouvait que porter injustement préjudice» ne serait pas en elle-même une erreur judiciaire. Il serait tout à fait incompatible avec une conclusion selon laquelle il y a eu un préjudice injuste dans un procès que de conclure néanmoins qu'il ne s'est produit aucune erreur judiciaire. À mon avis, la Cour d'appel ayant conclu comme elle l'a fait aurait dû accueillir l'appel en vertu du sous-al. 613(1)*a*)(iii) du *Code criminel*. Pour ces motifs, le sous-al. 613(1)*b*)(iii) du *Code* ne peut pas avoir d'effet sur la décision et il est inutile d'examiner plus avant cet article dans le contexte du second argument de l'appelant ou argument subsidiaire.

Je suis d'avis d'accueillir le pourvoi.

Pourvoi accueilli.

Procureur de l'appelant: Clayton C. Ruby, Toronto.

Procureur de l'intimée: Le procureur général de la province de l'Ontario, Toronto.

CHAPTER P-39

PUBLIC INQUIRIES ACT
cited as
R.S.N.S., 1967, Chapter 250

Inquiry

1 The Governor in Council may whenever he deems it expedient cause inquiry to be made into and concerning any public matter in relation to which the Legislature of Nova Scotia may make laws. R.S., c. 250, s. 1.

Commissioner

2 In case such inquiry is not regulated by any special law, the Governor in Council may appoint a person or persons as a commissioner or commissioners to inquire into and concerning such matter. R.S., c. 250, s. 2.

Witnesses and Evidence

3 The commissioner or commissioners shall have the power of summoning before him or them any persons as witnesses and of requiring them to give evidence on oath orally or in writing (or on solemn affirmation if they are entitled to affirm in civil matters), and to produce such documents and things as the commissioner or commissioners deem requisite to the full investigation of the matters into which he or they are appointed to inquire. R.S., c. 250, s. 3.

Powers, Privileges, Immunities

4 The commissioner or commissioners shall have the same power to enforce the attendance of persons as witnesses and to compel them to give evidence and produce documents and things as is vested in the Supreme Court or a judge [Judge] thereof in civil cases, and the same privileges and immunities as a judge [Judge] of the Supreme Court of Nova Scotia. R.S., c. 250, s. 4.

Council of Maritime Premiers

5 **(1)** The Governor in Council may vest in any board,

commission, tribunal or other body or person established or appointed by, under or in relation to the Council of Maritime Premiers for the purpose of studying, investigating or hearing and determining any matter of common concern among the Provinces of Nova Scotia, New Brunswick and Prince Edward Island, all of the powers and privileges that a commissioner under this Act has.

Jurisdiction

(2) The powers and privileges vested pursuant to subsection (1) may be exercised by the board, commission, tribunal or other body or person in relation to persons, organizations and documents resident or situated within Nova Scotia wherever the study, investigation or hearing is conducted or held within the region comprised of the Provinces of Nova Scotia, New Brunswick and Prince Edward Island. 1973, c. 53, s. 1.