MAR 1 4 1988

DALHOUSIE LAW SCHOOL HALIFAX CANADA B3H 4H9

CONFIDENTIAL

DATE: March 14, 1988

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

FROM: Archie Kaiser

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

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

A. Quantum

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

a simple foreign exchange conversion quite misleading.

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

B. Principles

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

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

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

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

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

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

C. Factors

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

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

1. Non-Pecuniary Losses

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

(ii) loss of reputation;

(iii) humiliation and disgrace;

(iv) pain and suffering;

(v) loss of enjoyment of life;

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

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

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

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

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

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

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

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

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

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

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

2. Pecuniary Losses

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

but for the mistaken conviction.

Some headings might include:

(i) loss of livelihood;

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

(iii) loss of future earning ability;

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

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

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

3. Blameworthy Conduct

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

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

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

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

D. Process

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

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

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

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

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

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

AK/lmr
Attachments

CASE/ PLACE/ DATE	AWARD	METHOD	IMPRISONMENT	FACTORS	LEGAL + OTHER COSTS	REDUCTION FOR...?	OTHER ISSUES	MISC. NOTES incl. SOURCE
NGAN, G.B., 1985	85 pending; 86 £18,500	eg Home Office	wounding 4 yrs, quashed on appeal		legal costs added	£ 4x [illegible]; + [illegible] + Justice [illegible] ←	Confession withheld by Crown resulted in 471 days more in prison	Justice 85 24-25; " 86 15; was still [illegible] [illegible]
M. + P. McDONAGH (A G.B. [illegible]) date [illegible] Justice cites →	—						C.A. rejects appeal; Justice calls for difficult cases to be resolved by special tribunal not [illegible] by lawyers.	Justice 85 26-27
E. CLARKE	85 — 86 CA referral fails		murder				H.O. [illegible] [illegible] + [illegible] review, earlier rejected C.A. ref. no [illegible] not new, but re-interpretation	85 Justice; '86 16-17 – C.A. upheld [illegible] – [illegible] + [illegible] slipping away
LIVESEY	85 — 86 CA Ref. ordered 87 " Dismissed		murder				Justice / BBC [illegible] resulting in refusal to reopen case	85 Justice acc. likely [illegible] after murder; will follow up 87 Justice – CA convicted [illegible]
Canterbury Jewellers	86 pending	appeal out of time unopposed	4 yrs sent.; 3½ mo served				confession of actual robber made before trial not passed to [illegible].	86 Justice
MYCOCK	? £11K per year expected; 20K rec'd	CA. Ref on Home Sec order quashes conv.	robbery; 5 yrs. sent; served 2 yrs, 5 mos	police misconduct [illegible], not [illegible]; poss. of causal [illegible]. [illegible]	costs add'l.		id. [illegible] defective; police [illegible] mistaken id. to [illegible]	86 Justice / BBC + [illegible] material
FOX	?	Home Sec asked for ref.	murder - W; [illegible] - [illegible]				alibi disbelieved; BBC uncovers other [illegible].	86 Just. BBC
STEEL	?	"	murder - life				police brutality [illegible] [illegible]; other [illegible] [illegible] [illegible]	86 Just. BBC
POCOCK	?	conv. + sent. quashed [illegible] [illegible]	poss. drugs (?); attempt. defeat ends of justice → 5 yrs → 2 [illegible]				p.o.'s [illegible] have seen what they described	87 Just.
LOUGHLIN	N.A.	sent appeal only	wounding [illegible] - life [illegible] – 5				[illegible] sent appeal	87 Just

CASE/ PLACE/ DATE	AWARD	METHOD	IMPRISONMENT	FACTORS	LEGAL + OTHER COSTS	REDUCTION FOR...?	OTHER ISSUES	MISC. NOTES incl. SOURCE
GB / 86 likely "recent case" NGAN	£18000	?	16 mos	£8 000 non-pec loss [illegible]				22 Dec 86 letter, Ashman
USA / 84 Texas GETER	SUIT $2 million	civil suit	19 mos / robbery					ABAJ June 86
USA / ? Tennessee FORBES	$250 K award ($1.2 mil sought) on appeal	" "	5 yrs max	- salary - loss approx hours - phys injuries - legal expenses ($41,5??) - loss liberty	included			" "
USA / 80 Calif. Granelli (Van Vanegas?) see (3) [illegible]	$1 mil	civil suit - false imp.	2½ yrs 2nd murder	int. infliction of emotional distress				3 New LJ 19 Dec 15/80 (in Dane (3)) → p. 6 / black)
USA / 1946 N.Y. Campbell	$115 K	moral obligation bill; then suit	?; long term	- loss earnings + prison misery - suffering + effects of long term				Albany LR (+) Vasden 202
USA NY Zimmerman	$1 mil (cashed for $10 mil)	moral oblig. bill; suit	11 yrs / murder		as much as $500 K deducted from award of $1 mil		victim unhappy w award; died soon after getting it; harsh prison treat; protested innocence throughout	(4) ↑ 204 + / (4) ↑ [illegible]
USA NY Dalbo	$15 K	suit; false arrest + imp	4 days					
★ NZ Thomas	$1.1 mil NZ			extensive disc.				(5)
UK / 1905 BECK	£4K	eg	7 yrs				mist. id.	Justice 1982 Report ↓
UK / 1928 SLATER	£6K	"	18½ yrs murder				didn't commit	"
" 1955 / Emery et al	£300-400	"	2 yrs [illegible]					
" 1965 Goss et al	£500-1000	"	5 mos robbery				wrong id.	
" 1974 Virag	£17.5K	"	5 yrs	[illegible]			" "	

CASE/ PLACE/ DATE	AWARD	METHOD	IMPRISONMENT	FACTORS	LEGAL + OTHER COSTS	REDUCTION FOR...?	OTHER ISSUES	MISC. NOTES incl. SOURCE
Dougherty/UK/73	£2K	eg	8 mos/theft					Justice 82 ↓
Naughton/UK/77	£10K	"	3 yrs/robbery				alibi disbel'd	"
Benjamin/UK/76	£9K	"	rape/12 yrs → not served					
Taylor/1979/UK	£21K	"	5 yrs/murder					
Preece/≈1982	£70	"	?/murder	Report contains Basic factors			discredited sci evid.	
Stevens/76	£8.5K	"	3 yrs/robbery (out of work)	see esp. p.11 – existing practice				
Burke/80	£7.0K	"	18 mos/murder	p.19+ proposals + comparative practices				
Daniels/USA 1985	$600K	civil suit; settled	6–18 yrs sex asslt att murder served 4	treated badly by other inmates as sex off.				Huff ⑧ 538
Warwick/Fox Canada/1986	$275K	eg	8 of 10 yrs for rape				$100K deduction for victim of previous rape	
Howard/USA (Illinois)/1955	$51K	special bill	17 yrs served for murder					

HOME OFFICE LETTER TO CLAIMANTS

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

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

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

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

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

following factors may thus be relevant according to circumstances:–

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

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

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

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

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

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

Friday, 29th November, 1985.

Written No. 173

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

MR. DOUGLAS HURD

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

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

/ his

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

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

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

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

/ He

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

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June 27, 1988

John E.S. Briggs
Director of Research
Royal Commission on the Donald
Marshall, Jr., Prosecution
Maritime Centre, Suite 1026
1505 Barrington Street
Halifax, Nova Scotia
B3J 3K5

Dear John:

Re: Draft of my paper Wrongful Conviction and Imprisonment: Towards an End to the Compensatory Obstacle Course

I am enclosing a copy of the current draft of my paper. As you will see on its cover, the footnotes are incomplete and some are not synchronized with those in the text. Further, I must add a conclusion. However, the bulk of the text is fairly close to its final form.

I certainly hope that the Royal Commission will take a serious look at the issues that are covered in my piece. As I understand it, the Commission has said that it will be doing this and it has heard evidence in the Marshall case dealing with compensatory matters. To be authoritative, their comments in this area will need to be informed by an understanding of the principles and law which are at stake. I trust that the Commissioners will then be in a stronger position to comment upon any lacunae or errors in this case. I hope that my paper will assist in providing the background which they will need.

Beyond the specific facts and issues of Marshall, the Commission will undoubtedly have some influence on how Canadian policy will evolve in these relatively uncharted waters. I hope that the Commissioners will take up this challenge too.

I would like to see the paper circulated among the Commissioners and I then look forward to hearing what further steps might be taken with respect to it by the Commission. For my part, I shall soon be submitting it for publication, as I am planning to complete the work by about the end of June.

Yours sincerely,

Archie Kaiser

H. Archibald Kaiser
Associate Professor Law

HAK/lmr
Enclosure

TELEPHONE: 902 424-3495 TELEX: 19-21863 FAX: 902 424-1316

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

DRAFT ONLY

1. Not for attribution or circulation.
2. Footnotes unfinished and conclusion to be added.

H. ARCHIBALD KAISER

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

[DRAFT]

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

Contents

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

[add quote from kafka]

A. Introduction

In the Canadian criminal justice system, a very high value is placed upon the various bulwarks of freedom. The Charter,[1] its constitutional and common law precursors[2] and a wide range of substantive and procedural doctrines[3] present formidable obstacles to erroneous determinations of guilt and help to bring Canada into a fairly select group of nations which emphasize the due process of law and the quality and reliability of fact-finding processes.[4] For a few individuals the system simply does not deliver on its promises, in spite of its apparent fail-safe mechanisms: innocent citizens are charged, detained, prosecuted, convicted and imprisoned. For them Franz Kafka's seemingly unthinkable and bizarre world presented in The Trial[5] becomes reality. The victims of such injustice appear hauntingly in the legal annals of each of the self same countries which so pride themselves on the protection of individual liberty.[6] What is even more startling is that where the error of the criminal justice system has been made manifest, the mechanisms for redress remain either embryonic or out of reach. Regrettably, Canada has not yet seen fit to properly fill this lacuna, in the face of sound policy, logic, compassion and international obligation.

This article focuses on the special problems raised by the cases of individuals most grievously wronged in the Canadian criminal justice system: those who have been imprisoned following a criminal conviction, which later turns out to have been reached in error. The author does not wish to discourage debate on the appropriateness of compensating other citizens whose liberty has been interfered with by agents of the state but who are

ultimately either not charged or 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 for individuals in each of the above categories and indeed some countries presently provide for such measures.[7] Conversely, it is not intended to suggest here that there should be no limits placed on the liability of the state, which factors will be discussed. Given the present lack of Canadian scholarship in the field, dicussion has been confined to compensation for the most egregious examples of wrongful conviction and imprisonment.[footnote] It is hoped that some stimulation will be provided for exploring the prospects of compensating persons who have been wrongfully detained as set forth above, even if their predicaments are less compelling from a compensatory perspective.

The number of wrongful convictions which result in imprisonment cannot be sserted with certitude. This article emphasizes the need for compensation in the worst instances, where the error of the state in convicting and imprisoning an individual is only discovered by extraordinary means. However, at many levels it is difficult to distinguish between these cases and the more common instances such as where a conviction is quashed on appeal, utilizing more conventional legal or constitutional grounds. Both groups of persons have suffered the stigma and burdens of conviction and sentencing where the determinations by the court have been unsound. The

former group is merely further along the continuum toward outrage, as the absence of solid foundations for the finding of guilt are only very belatedly discovered. Returning to the assessment of the magnitude of the problem, 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".[8] Using the same rate in Canada (arbitrarily, for present purposes), there could easily be a total of over 1,000 wrongful convictions in the most recent statistical year (1986)for the two categories of Criminal Code offences alone.[9] Of course, this figure cannot be depended upon to be accurate, but even if it grossly overstates the number of wrongful convictions, it ought not to be so inflated that anyone could state confidently that there are no such errors. Using a narrower category, a British study soon to be published by Justice guesses that there by be up to 15 cases a year of wrongful imprisonment in the United Kingdom after trial by jury. [footnote] Even if one were only dealing with these most horrendous cases where the citizen is imprisoned, the lack of adequate measures to deal with compensation would be bad enough. Considering the potential numbers of convicted innocents and 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 discusses the basic rationale for compensation and explains Canada's international obligations, while not neglecting a presentation of some of the contrary arguments. Next a sketch of potential conventional remedies is provided. Finally recent Canadian discussions and initiatives in the field will be reviewed against the background of the relevant article ofthe

International Covenant on Civil and Political Rights. At their meeting of November 22-23, 1984, 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. 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 Persond on March 17-18, 1988. [endnote] Out of the critique of the Covenant, the Task Force Report and the Guidelines (attached as Appendix A) it is hoped that a reformulation of Canadian policy on this most compelling subject will emerge.

B. Why should compensation be paid anyway and what is wrong with that status quo?

Strong language has been used so far to characterize the Canadian position on compensation for the wrongfully convicted. Although the reader, be he or she of a liberal, conservative or radical outlook may not require it, some justification should be presented for the author's perspective. This will take the form of a discussion of the reasons for suggesting that compensation is in order in the first place, including an analysis of Canada's international obligations, followed by a brief survey and critique of the options now open to the wrongfully convicted person who seeks redress.

1. The Rationale

In a sense, this should be a very short section. Perhaps it could consist merely of one sentence from the Report of the Royal Commission[10] in the Thomas case, where the accused spent 9 years in custody for two murders which he did not commit and where his convictions resulted from evidence

fabricated by the police:

> Common decency and the conscience of society at large demand that Mr. Thomas be generously compensated.[11]

The two principal issues are alluded to in this quotation: the effects on the individual and the importance of societal assumption of responsibility for miscarriages of justice. The wrongly convicted person suffers in many of the same ways as the accused who bears genuine responsibility for his crime. The individual is stigmatized by his conviction. Financial costs are imposed by the trial process in that, unless impecunious, the accused will have to pay for his or her defence. The accused may be held in custody pending trial. Imprisonment means that the accused will no longer be able to earn a living. Dependants lose their source of support and family life in general is subjected to often unsurviveable traumas. The indignities of existence in prison may cause one to loath oneself and the prospects for assimilation upon release dwindle as incarceration is extended. The despair that surrounds these distinctive processes for every convicted person is multiplied exponentially for the person who is unjustly found guilty and imprisoned. As the Royal Commission sympathetically observed in the Thomas case:

> His state of mind in hearing announced a verdict he knew to be wrong must have been one of unspeakable anguish.[12]

Being falsely accused is the stuff of nightmares for the average person, for it compounds our hidden feelings of powerlessness and shakes one's faith in the foundations of society. "Most of us dread injustice with a special fear."[13] 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. Simply put, 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 acquire "a profound right not to be convicted of crimes of which they are innocent".[14]

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.[15]

> ... a miscarriage of justice by which a man or woman loses is or her liberty is one of the gravest matters which can occupy the attention of a civilized society.[16]

When the state not only fails to protect the law-abiding citizen from harm, but assumes that a person is deprived of liberty as a result of a false accusation, a special injustice has thereby occurred. Why this is so heinous is obvious and unlikely to need further exposition. None the less, Ronald Dworkin's concept of moral harm assists in giving expression to this instinctive feeling. 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 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"[17], 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

dependants.

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 interruption of 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 and, where there is no as of right payment, with discretion retained by the executive, the state has clearly indicated the low priority it gives to the plight of the wrongly convicted.[18] 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.[19] 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 policy 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.[20] Crude individualism is even less appropriately invoked to deny compensation in the context of the unjustly imprisoned where the state has occasioned the suffering of the accused.

As with any mention of issues which bear upon the relationship of the individual to society and law, the foregoing 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. This paper is not presented as an philosophical tour de force and it is recognized that many of the ideas in this section are largely drawn from mainstream thinking. However, one is hard pressed to find general perspectives on crime and society which would be used to refute the arguments presented herein. If one takes the dominant view, 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. [footnote] Any of these notions of the origins or importance of crime can still theoretically tolerate both either the possibility of systemic or individual error and the need to provide vindication and material redress for the person who has wrongfully labelled a criminal. The more controversial issue of why a judicial malfunction occurred would probably find less agreement, but this debate is not strictly relevant to an article focussing on compensation. Convicting a person wrongfully menas that a perpetrator is still at large and that an innocent person has suffered an injury which should be rectified. On these points there is likely to be little dissent regardless of one's jurisprudential orientation.

Most of the preceding arguments are based upon what is at least proferred as good logic. Fundamentally, there is something appealingly symmetrical about a system which emphasizes due process and the presumption of innocence and compensates those whose experience falls so far short of the judicial ideal. This type of reasoning alone may not be persuasive to

the reader. Fortunately there is a world beyond, which may either inform legal analysis or inspire policy discussions.

2. Canada's International Legal Obligations.

It is submitted that Canada's position in the international legal order obliges Canada to introduce a statutory scheme for undemnifying 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. Since then "... the Covenant has constituted a binding obligation at international law not only upon the federal government, but the provincial governments as well."[21] Individuals who maintain that their Covenant rights have been violated may, by article 1 [check] 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 finally whether a violation has occurred[22] 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 about a dozen 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.

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.
>
> 2. (a) To ensure that any person whose rights or freedoms ... are violated shall have an effective remedy.
>
> (c) To ensure that the competant 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.[23] 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. [citation]

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. Although the matter will not be explored more than cursorily here, an important jurisprudential issue and it may occasionally be raised in the context of a particular legal problem or dispute. Of course, according to the theory of Parliamentary supremacy (as modified since the inception of the Charter of Rights and Freedoms) a competent legislative body may enact a statute inconsistent with an international legal obilgation. 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 [including the Covenant and other international human rights instruments] as being entirely inefficacious." [endnote] Rules and principles of international law may respectively provice assistance in interpreting constitutional guarantees, as will be more fully argued infra, at pp to . They may also be "guides to the elaboration of the common law and [as] constraints to the operation of rules of decision." [endnote b] Therefore, Article 14(6) does not immediately create a readily enforceable legal right, but it might well come into play were a court seized with a matter raising relevant issues and it must be seen as a vital reference point in any policy discussion and Canadian legal initiatives

As will be seen later, 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 which will be discussed infra, 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 on Compensation for Wrongfully Convicted and Imprisoned Persons being adopted ar the conference of ministers responsible for criminal justice held in Saskatoon on March 17-18, 1988, it remains to be seen whether Canada has yet lived up to the challenge presented to it by the Covenant. The failure by Canada (and other nations) 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.[24]

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.[25]

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. [footnote; add and renumber; Official Recordof the General Assembly, Fortieth Session, Supplement No. 40 (A/40/40) para. 206, p. 37; ibid?]

Canada's representative to the Human Rights Committee was reassuring on this point. Although one has yet to see any concrete legislative results in mid-1988, 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.[26]

Canada's next periodic report, due in April 1985, was due 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".[27] 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. As things stand at the time of writing (May 30, 1988), Canada's report will now be tabled in September, 1988. Although copies are not yet publicly available it would seem that Canada will likely rely upon the Guidelines as satisfying the onus of the Covenant.[28] It will certainly be of interest to ascertain the reaction of the Human Rights Committee, but it will later be argued herein that Canada's response, non-statutory in character, 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 will presumable be that although it has not introduced legislation, it has brought in (to use the language of Artile 2(21)) "other measures as may be necessary to give effect" to the rights guaranteed in Article 14(6). Noting the words of that latter article ("according to law") it will be suggested that this contention will probably not be accepted. In closing this section, keeping in mind that little has been written directly on the subject of Article 14(6) in Canada, one does find at least one Canadian author who appears to mainly concur with the argument advanced herein on the weaknesses of the Canadian position. Professor John Humphrey, admittedly writing pre-Guidelines, observes 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. [footnote]

3. Contrary Arguments

The foregoing discussion is couched in favourable terms concerning the appropriateness of compensating the unjustly imprisoned. Aside from Canada's position in international law 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 compensate. What follows next is a survey of the main arguments against any compensation for persons wrongfully convicted.

The one point most likely to be raised is not really a question of principle. Basically, some critics will say: "What will it cost?", implying that it will be too expensive. It could be said that there is a duty for any government to maintain the fiscal integrity of the state and to protect its funds. One might first throw back the traditional rejoinder: What price justice? This response, to which the author is inclined, 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: you do not balance justice against financial concerns. 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 cases of wrongful imprisonment. Further, if necessary, choices could be made in terms of, for example, excluding some potential recipients, providing for factors which could reduce awards or arbitrarily imposing limits on individual claims or the compensation fund in toto.[29] However, the spectre of the costs of compensating the wrongfully imprisoned being too high is really of a trifling nature in comparison to the condemnatory statement such a prospect

makes about 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. Further, it might be said that the zeal of police and prosecutors would be dampened if they saw that wrongly accused people were actually going to be rewarded when set free. What is more, juries might be less willing to acquit those who were still charged if, to illustrate, they thought that a person who had been detained pending trial would be given damages if found not guilty. The processes of the civil and criminal law would be inappropriately melded. Overall, more guilty people would go unpunished, at a time of increasing rates of crime.[footnote] These rationalizations and fears are, of course, largely untested, but the early experience of several states suggests that they are both pessimistic and groundless.[add new footnote] Indeed, 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 ..."[30] 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.

The other major argument against statutory compensation is perhaps the weakest of all. Basically, it is said, in a mature legal system such as ours, there are ample avenues for the wrongfully imprisoned to pursue. No new appendage needs to be grafted onto the existing panoply of remedies. The following section should help to demonstrate the unreality of this

argument.

C. Existing Remedies

Among independent commentators, there is virtual unanimity that the remedies available in the United Kingdom[31] and even in most of those states in the United States which have enacted legislation[32] 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, but it is the author's view that the situation is, if anything, as bad as that in the United Kingdom, as Canada's new Guidelines do not widely diverge from the British example. Some states in the United States and other countries may offer far more to the wrongfully convicted, in so far as there is a statutory basis for compensation.[add footnote on U.S. and other examples] 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, there was not even an authoritative national policy statement with respect to ex gratia payments, which the British have had for at least twenty years.[33][check] The Province of Manitoba had introduced Draft Guidelines in 1986, but they did not take on a statutory form after they were tabled in the Legislature.[endnote] The author is unaware of any other provincial guidelines, bills or legislation which may have been promulgated before the Federal-Provincial Guidelines.

There may be other remedies beyond the Guidelines which can be summoned in aid of the victim of injustice in Canada. However, they simply do not provide anything beyond the scent of redress when the actual prospects of recovery are assessed. What follows in this section is a brief survey of

avenues which might be open to an unjustly convicted person in 1988 under the Guidelines, with some summary evaluative comment. The author would be pleased to have it demonstrated that his bleak outlook on the present Canadian situation with respect to conventional remedies is unduly pessimistic.

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 and societal attitudes have only recently 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.[34] 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 its criminal justice system, in this context) and the relationship of the individual to the state and the law.

> It is our view that 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...[endnote A] Finally, in determining disputes in this context, judges must recognize that rights against the state are qualitatively different from rights against individuals. [endnote B]

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.[35] Fourthly, there are formidable barriers against the successful suit of the Crown, both in statutory and common law form.[36]

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. Thirdly, there is also the prospect of 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"[37] or "... the wrong of intentionally and without lawful justifiction subjecting another to a total restraint of movement ..."[38] "The word "false" is intended to impart the notion of unauthorized or wrongful detention."[39]

In the typical case which is the focus of this paper, there will normally be a lawful arrest either with or without warrant and "A lawful arrest is, of course, no false imprisonment ..."[40] In a general sense, the requirements for lawful arrest centre upon the police officer believing on reasonable and probable grounds that an offence has been committed.[41] Presumably where someone is brought to trial, convicted and imprisoned and it is only later discovered that the conviction was erroneous, the arrest will be able to be justified, as there are so many subsequent judicial checks on the validity of the initial allegation. Although the plaintiff benefits from the defendant's having to prove reasonable and probable

grounds[43] once intentional confinement is proved, this will not normally be a difficult hurdle in the worst case scenarios with which this essay principally deals.

However, even if the proceedings are so defective that 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.[44] 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.[45] The prospective plaintiff in false imprisonment is thereby left with little 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.[45]

Practically the false imprisonment action is ineffective for the person who is convicted and incarcerated. The results for others seeking relief in tort under other causes of action are not any more promising.

(ii) Malicious Prosecution

Theoretically, false imprisonment imposes liability for the initial wrongful act of detention. 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 in prosecution, the plaintiff must establish, once damage has been proved to his reputation, person, freedom or property, as this is an action on the case:[46]

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.[47]

There is little purpose in exploring any of these elements in detail herein. The major text writers are virtually unanimous in noting that 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."[48] Indeed, Rogers is quite conclusive:

> ... 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.[49]

Beyond the above impediments which are part of the common law heritage with respect to proof of malicious prosecution there is still a likelihood of the Attorney-General and Crown Attorneys being able to assert a claim of immunity from civil action. At present, the Nelles case [endnote A] (on appeal to the Supreme Court of Canada) stands as a forceful reassertion of the exemption of the Crown from suits over the initiation and conduct of criminal prosecutions. The Ontarion Court of Appeal also specifically rejected any qualification on this immunity, which might "jeopardize or place at risk the very substantial interest which the public has in the integrity of the prosecutorial system." [endnote B] While the Supreme Court may ultimately reject the Ontario approach for the time being the

prospective plaintiff in malicious prosecution would purely be deterred by Nelles.

Given that the two obvious tort actions are not at all promising for the wrongfully imprisoned person, one should also assess the rather less well developed law with respect to negligence in the performance of statutory duty.

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.[50] The duty in the context of criminal investigations wil 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".[51] No particular compensatory remedy is offered by this type of statute. Assuming that the police force is properly constituted (in a statutory sense) and that the police have engaged in an investigation of an offence, albeit a flawed one which has lead 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 or any liability for this basic failure to act. However, if the actions of the police were undertaken bona fides but negligently, then there would still be potential liability. Responsibility for mala fides investigations could presumably be dealt with, if at all, under the previously discussed tort of malicious prosecution.

The elements of actionable negligence in a conventional suit[52] must still be proved in the present context:

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

There is presumably 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. Not much difficulty would be encountered here.

(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,[53]

> 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.

It would not be a simple task to decide in an individual instance whether the investigator had lived up to the requisite standard of care, especially as there would be few or no similar decided cases upon which to base an opinion. 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"[54] would provide some assistance but not make the job of prediction of outcome much easier, particularly given that a high degree of deference would predictably be shown to police practices.

3. and, damage suffered by the complainant, which is causally connected with the breach of duty to take care.

Should a wrongfully convicted person overcome the first two hurdles, grave problems would be encountered with causation. As one would be dealing with the damage being 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,

just as has been discussed with the intentional torts. Of course, the negligent investigation of the police officer may have contributed to the cause[55] and in this sense, there may still be room for liability to be found, but 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.[56] 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".[57] Another barrier may be erected by this newly considered issue with respect to negligent government activity. 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,[58] Nelles none the less strongly emphasizes the value to the public of holding the prosecutor harmless.

The foregoing section should demonstrate that, while there are theoretical prospects for recovery in the law of torts, the wrongfully convicted and imprisoned person is forced, for all practical purposes, to go elsewhere to find a predictable and suitable remedy.

(2) The Charter of Rights and Freedoms

Any prospective plaintiff whose legal rights have been infringed would, in 1988, 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 warranted by the Charter has been infringed, to paraphrase 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 and 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. Further, assuming one could prove such a violation, there could be some difficulty in rebutting the government's reasonable limits argument under section 1. A full discussion of these preliminary issues is beyond the scope of this paper, but it is surely safe to say that such litigation would be unusual, if not unprecedented, and that proof of an infringement would be a formidable obstacle indeed.

Again the Nelles case contains relevant comment, although little encouragement:

> Clearly not every unsuccessful prosecution of an accused person can be looked to support a finding that that person's Charter rights have been violated, not even if it is also assumed that all of the constituent elements of a successful action for malicious prosecution are present and that the accused will succeed in such an action.[footnote]

On the other hand, the Covenant could be summoned in aid of a Charter action and interpretation of the Charter. Several Canadian authorities have presented strong arguments to this effect. [1st endnote] Basically, the close historical and testual and subject-matter relationship of the Charter and Covenant is emphasized. Then, as has been mentioned, there is the presumption that Canada has not intended to violate her international obligations and that, in the event of ambiguity, Canadian courts should interpret Canadian legislation in a manner which conforms with international law. Also, one sees increasing enthusiam 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, [2nd endnote] 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 Artile 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 also provides some guidance on the relationship of Article 14(6) to the Charter:

> 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. [3rd endnote]

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 JusticeDickson in the 1987 vsdr, Reference re Public Service Employee Relations Act (Alta.). He was concerned to emphasize the relevance of international law to the construction of the Charter. A lengthy quote is salience of the observations of the learned Chief Justice;

> The content of Canada's international human rights obligations is, in any view, an important indicia of the meaning 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 [endnote]

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". The court might think it appropriate to use some aspects of the Covenant here as well, but for the balance of this section, the essay will concentrate on the general prospects of recovering substantial damages for the infringement or denial of a Charter-guaranteed right or freedom.

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[59] and juristic writing[60] have both consistently confirmed this basic proposition, which should not be surprising given the apparent breadth of the remedies portion of the Charter.

Cases brought under the Charter where damages are awarded for wrongful conviction and imprisonment should compensate a person both for losses which arise out of the Charter breach but also for the infringement itself. Professor Pilkington's article[61] provides a useful summary of the elements of a damages claim, some aspects of which have already been noted:

> ... that an interest of the plaintiff, which is constitutionally protected, has been infringed or denied; that the defendant caused or is otherwise responsible for the infringement, and if compensation for actual injury is claimed, that the infringement caused the damage; further, that the defendant's actions, which constitute the infringement, are subject to the Charter; that damages are an appropriate and just remedy for the infringement; and, finally, the appropriate measure of damages. The defendants can, of course, contest the plaintiff's claim on each of these bases and, in addition, raise whatever defences are available to them to limit or mitigate their liability. [footnote references in original text omitted]

Many factors in the above list will interrupt the plaintiff's progress toward an effective remedy. The principal impediments would appear to relate to the issues of causation and responsibility and type and extent of

loss to be compensated.

It would be necessary to establish that some person or institution caused the infringement of the plaintiff's rights. The infringing party would have to have been exercising a governmental power at the time. The courts are unlikely to order an award upon mere proof of the violation without being able to attribute it to a responsible entity.[62] Causation issues are notoriously difficult in the fields of tort and criminal law, but perhaps in the constitutional realm where the eyes of the court are supposed to constantly be on the purpose of the constitutional guaranty,[63] a more liberal perspective can be properly invoked for the wrongfully convicted and imprisoned. A simple finding that the plaintiff was mistakenly convicted under a public law and thereby wrongfully detained by a correctional authority might be sufficient to bring liability home to an identifiable locus and to provide enough inferential association with government to cause an award to be made. Other commonplace considerations such as the intention of the infringing party should be irrelevant given the importance of the interests being protected, the nature of the responsible actor or institution and the self-evident hardship suffered by the victim.

The type and extent of loss to be compensated could be problematic on the issue of 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. Again, 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. Further, 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, although plausible, is not intended to leave the impression that a Charter action is the panacea for the person who has been wrongfully convicted and imprisoned. Despite the promise of a constitutional suit, several problems are immediately obvious. Firstly, considering the appropriate direction for governmental policy as with the claim in tort, it is not likely that leaving the issue of compensation with the courts satisfies Canada's obligations under the International covenant, as the Federal-Provincial Task Force Report has admitted:

> The International Covenant, however, appears to suggest that entitlement to compensation should be based on a statute.[64]

Secondly, the observations made earlier concerning civil litigation in general are just as apt with respect to a Charter action. Indeed, for a relatively novel form of damages suit, with many substantive and remedial wrinkles these basic characteristics are more daunting barriers. Therefore, compensation would be, not much closer in a Charter action than in a conventional torts case, especially as the courts are relative novices with respect to such types of cases and the spectre of the old remedial ghosts still stalks the modern section 24(1) courtroom.

(3) Ex gratia compensation

Despite the theoretical availability of a remedy in tort or under the

Charter, actual payments of compensation in Canada (and other countries) have come about 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".[65] Further, "Being in the nature of an ex gratia payment, there are no principles of law applicable which can be said to be binding."[66] Even in the United Kingdom where there have been authoritative policy statements on the existence of the ex gratia scheme since 1956,[67] which were strengthened in 1985,[68] judicial review of a refusal to make a payment has been unsuccessful.[69] Obviously, the observations made here in concerning the failure of the common law and Charter Actions to meet the International Covenant standards echo a fortiori with respect to such discretionary awards.

A proper legislative scheme such as will be recommended in this paper need not prohibit a discretionary payment by government to a deserving recipient. Indeed, there may be instances where such flexibility as is accorded by ex gratia compensation may be quite appropriate and laudatory. Government might well decide to pay compensation sooner, or more generously than the statutory scheme might permit. Further, although it will be argued that any new regime should be liberal in its conception and administration, it is possible that some claimants might be excluded, in which case a voluntary payment should 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 are no guiding principles for the decision-maker. Thirdly, even if guidelines are introduced, they could be circumvented or flouted. Fourthly, the process is

or may be shrouded in secrecy, which 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.

Ex gratia payments by government undoubtedly will always have their place in state/individual relations in this and other settings, but primacy should be given to a legislative scheme.

The 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 offerred 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 is merely that the relevant government "would undertake to act on the report submitted by the commissionof 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 criticized in other jurisdictions.

(4) The Special Bill

There is a prospect of compensation being ordered upon the passage of a special bill dealing with the circumstances of a single case. Normally, this would come about, if at all, through a private member's bill in the appropriate legislative forum. A government bill would persumably not be required, as the executive could always order an ex gratia payment, if it

were minded to.

This technique has not been used in Canada and its chances of success are highly dubious. In some jurisdictions 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 is attributable to the fact that a moral claims bill, once submitted, is vulnerable to the problems facing any other bill thrust into the legislative process. 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.[70] [footnotes references from original text ommitted]

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[71] 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.[72]

There would seem to be little reason to import a compensatory tool which has already been found wanting in a similar jurisdiction. 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. Other than these secondary effects, however salutary in an individual instance, the special bill carries little hope for the wrongfully convicted and imprisoned.

(D) Towards a New Regime of Compensation

It should now be apparent that the existing conventional alternatives for the payment of compensation to the wrongfully convicted and imprisoned are woefully inadequate. Therefore, to merely adapt current legal doctrine or state practice would be to attempt to rehabilitate the unsuitable and perhaps discredited. 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. To the extent that interested persons may find the presentation of the issues contentious, then it is at least hoped that alternative proposals will be advanced.

Article 14(6)[73] of the International Covenant on Civil and Political Rights is used as the organizing device for this portion of the paper. This seems appropriate 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 in a succinct and comprehensible manner. 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. However, 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 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. [Add section/paragraph on general objectives of 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.[74]

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. None the less, the Federal-Provincial Report notes that the person's dependants and possibly even business associates might also have some right to present a claim, although they finally recommend that only the person directly wronged be able to proceed. The Report does concede that dependants 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 not to add others who have suffered injury as parties to the principal action, and who might thereby be ultimately able to recover independantly once the accused's cause has been established. The Study itself notes that other countries "allow for such a broadly based compensation scheme".[75] The 1982 Justice Report similarly recommends that dependants should recover expenses or losses reasonably incurred upon imprisonment.[76] Family members (who are not dependants) 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 (of which more later). The Thomas Commission wrestled with these issues, but finally decided to recommend payments to Mr. Thomas (who was the exclusive subject of their compensatory jurisdiction, according to their terms of reference) to cover legal and investigative services and services "rendered by relatives to meet a need caused by his arrest and imprisonment".[77]

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 on his or her behalf. Although only ex post facto, society may come to understand the suffering of the victim. Similarly there should be special attention given to the others who have

been affected by the wrong. It is often a solitary quest for justice by family members and others that finally brings a miscarriage to light.

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.[78] [endnote]

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. Such a specification is both necessary and desirable to make the section efficacious, but of course 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 conviction (and presumably sentence) or (ii) once all ordinary methods of review have been exhausted (and the adverse decision remains) and opts for the latter interpretation.[79] This view is taken despite the acknowledgment in the report that "the Covenant proposes to cover both types of final decision" [emphasis added].[80]

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, this should not obscure the proper interpretation of the article, which surely mandates an expanded basis for recovery. It is argued that whether finality is considered as

arising on conviction and sentence or after all conventional means of redress have been exhausted, then compensation ought to be paid, assuming that the other stipulations of the article are satisfied. [Maybe here review miscarriage of justice material.] This interpretation is consistent with the purposive approach which ought to be used to fill in lacunae in the Covenant:[81] the remedial goal of article 14(6) is to provide compensation for persons who have suffered punishment as a result of a conviction which is reversed or for the special category of victims of miscarriages of justice. The Task Force, in its explanation of this portion of the article, seems more concerned to vindicate the criminal justice system, than to supply a construction within the objectives of the article:

> In our view, however, a wrongful conviction which is reversed in the normal course of appeal is an indication that the criminal justice procedure has worked and that ultimately no error was committed.[82]

Defining "final decision", as it is suggested herein, would not block claims at the premature stage for which the Task Force has argued. Rather, persons convicted as a result of an alleged miscarriage of justice would still be able to request compensation, even if it is merely a trial decision which has been reversed on the basis of a regular appeal. This is broadly consistent with the recommendations of the Justice Report[83] and interprets the article in a manner consistent with the text and the purpose of the article.

An arguable interpretation of Article 14(6) is that it is intended to compensate for miscarriages of justice only. Thus reading the conventional reversal and extraordinary pardon provisions would be read conjunctively with "shows conclusively that there has been a miscarriage of justice." The article would thus be concerned principally with miscarriages of justice and many appeals against conviction which succeed in the normal course of

proceedings might not permit the accused to qualify for compensation. Indeed, this view may have been implicitly adopted in some of the questions and answers noted with respect to the Human Rights Committee, supra, where the phrase "miscarriage of justice" was used repeatedly. In reply, it is submitted that such distinctions, between persons whose convictions have been reversed and citizens who have been victims of miscarriages of justice, are too fine to reliably guide governments concerning who should be compensated and that the article really envisions two separate streams of compensation. This more generous approach to construing Article 14(6) which is advanced here is also supported 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 would be 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.

At any rate, in this paper the concentration is on the exceptional case where the miscarriage of justice is manifest, but anyone who writes in this field will probably be sympathetic to compensation being paid on a more liberal basis than the Task Force Report and Guidelines advocate. Therefore, a broader conception of entitlement under Article 14(6) is not only not objectionable; it is strongly preferable.

Regrettably, the Guidelines opt for the more confining straits of a free pardon or Ministerial referral (under sections 683(2) and 617(b) respectively of the Criminal code) having to show that there has been a miscarriage of justice. Specifically excluded are circumstances where the reversal occurs in the regular stream of appeals. These latter potential

avenues of access to compensation will be treated more thoroughly infra.[84]

3. Convicted of a Criminal Offence

In Canada this expression could be read narrowly and out of context to require compensation to be paid only where the offence for which the person was wrongfully convicted was "criminal in the true sense".[85] 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"[86] and all federal offences, for which a penalty may be provided but which are not normally considered criminal. [cite example]

The Task Force Report quite appropriately took the view that such an approach appears "too narrow" and "would inadequately reflect the spirit of the International Covenent", given that in a federal state such as Canada penal measures including the possibility of imprisonment attach to federal and provincial statutes.[87] 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"[88] and finally recommends that compensation be available to persons unjustly convicted under either federal or provincial penal legislation.[89]

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.[90] One can only speculate that the provincial ministers responsible for criminal justice must have objected to the inclusion of provincial offences under the rubric of compensation. This alteration is lamentable. 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 he or she did not commit under a provincial head of power? When an erroneous conviction under a potentially similar infraction within federal competance could result in compensation, it would be a difficult chore indeed.

4. Conviction Has Been Reversed or He Has Been Pardoned

It has previously been argued (supra, at pp.? 26-27) that compensation ought to be available to the person whose wrongful conviction is redressed in the normal course of an appeal. However this understanding of the Covenant may ultimately not be compelling to Parliament and indeed has already been rejected by the Task Force and the Guidelines. At any rate, there may be instances where the conventional appeal process has been exhausted and the usual appeal periods have expired, so that it is important to provide some mechanism for the circumstances of the purportedly wrongfully convicted person to be addressed on an extraordinary basis, in order to provide the foundations of a compensation award according to the Covenant.

It should be 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.[91] None the less, these sections offer small comfort to the person who has already pursued all relevant levels of appeal, so that

the courts are now functus officio. [check]

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 617. Also, under section 683, 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 617 be extended to summary offences and that provisions mirroring it and section 683 be adopted by the provinces to deal with provincial penal law.[92] Although these latter suggestions are worthwhile it is maintained that a broader perspective ought to be taken on the general issues of asking for a reversal of a conviction or a pardon, which would extend their availability and make any residual discretionary powers more open. The Guidelines have not taken this direction, as noted before.

As the Covenant is concerned in Article 14(6) with providing compensation for persons whose convictions have been reversed or who have been victims of a miscarriage of justice, any interpretative chores with respect to this article should be infused with these purposes. Even taking the narrower 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 617 and 683 do not adequately protect article 14(6) rights.

Two suggestions are made herein: (i) with respect to the second stream of Article 14(6), appeal provisions should be broadened to include the right to bring an application for leave to appeal where a new or newly discovered facts tends to show that there has been a miscarriage of justice and (ii) there should be guidelines for the Minister of Justice and Governor in Council with respect to the employment of powers under sections 617 and 683, assuming there would be the prospect of a remaining discretionary use of these sections.

The first recommendation would give to a provincial court of appeal an expanded right to commence to reopen an appeal, where new facts are uncovered. 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, where he or she (or the Crown) could point to a new fact which would suggest that there has been an erroneous conviction. 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 was inconsequential or irrelevant and it would still preserve 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, but this would not be a major cost in the face of the prospect of uncovering more miscarriages of justice sooner and at the instance of the accused. The fact that this improved right of appeal would be included in the Criminal Code (or its provincial counterparts) would seem to ensure closer compliance with article 14(6) than in the regime envisaged in the Task Force Report. [check and maybe footnote Smith, 405]

The second recommendation deals with the utilization of the type of powers presently available under sections 617 and 683. Given the first proposal for an expanded right of appeal, the Minister of Justice would have fewer occasions when section 617 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 617 powers is reviewable by the courts.[93]

The two devices forming the bases of intitlement under the Guidelines, the special ministerial reference power and its companion, the power of pardon, have ancient roots. Duker traces the prerogative of mercy as far back as Mosaic, Greek and Roman law, but develops a detailed history from about (c 700 A.D.) in England.[94] 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 to the Letters Patent constituting the Office of the Governor General. [footnote]

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.[95] (Expand either text or footnote with reference to new materials)

There are several conceptually different uses to which the prerogative of mercy is put, which sometimes cause confusion if not separated clearly. "Sometimes, the aim of the pardoner is to be merciful, by declining to exact the full penalty ..."[96] Occasionally the public interest is "no longer furthered by having an offender serve the full penalty that the law has imposed".[97] Finally, and most importantly for this paper, the pardoning power is an acknowledgement of the fallibility of the judicial process, "... that the rules of procedure and evidence do not always give rise to a correct decision about guilt or innocence ..."[98] In this latter case, it is maybe more appropriately called "the prerogative of correcting judicial mistakes".[99] It is argued that even with expanded rights of appeal injustices will be done and that this executive safety net must be retained.

The problems with all similar executive power are revisited in the prerogative of mercy, despite its benevolent potential. There is the prospect of abuse by an unethical minister.[100] In Canada, particularly with the regular interposition of the National Parole Board, such a spectre does not loom as threateningly. However, the published guidelines for the deployment of this special executive jurisdiction, are slim indeed although the Parole Board defends this vagueness:

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

The parts of the guidelines relevant for present purposes seem to reject the salience of the last use mentioned above of the power of mercy, that of correcting judicial mistakes:

> Clemency is concerned solely with the person. It sould be

> used to bring into scrutiny the merits of an individual case and not to judge the system under which we operate... It should be applied in exceptional circumstances only. E.g. when no other remedy exists in law... The independence of the judiciary must be maintained. Clemency should not be used to "second-guess" the judiciary... A free pardon is granted only when the innocence of a convicted person is clearly established. [endnote]

Perhaps these guidelines for obtaining a pardon are framed in this manner so as to minimize the affront to th notion of the infallibility of the judicial process by wrongful convictions. If that is the case, it is hard to square them with what has been seen as a major use of the prerogative of mercy and which acknowledges the error creating capability of hte criminal justice system. Especially as the pardon will also begin serving compensatory purposes, the time has come for some rethinking of this power. No less in Canada than in Britain, as one observer recently remarked, "The principles according to which justice is administered should be openly articulated and where necessary defended."[101]

The manner of presenting such principles should retain some flexibility, but there should be an overriding dedication to being thorough and open. It may be that a careful ministerial statement made in Parliament and available to convicted persons would be the best vehicle to deal with this way of compensating the wrongfully convicted. Better reporting of both pardons and denials would also assist.

With a better right of appeal and a ministerial reference power and prerogative of many invigorated by the duty of publication, convicted persons would have increased chances to have a conviction reversed or to obtain a pardon, 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 the eligibility criteria a free pardon under Section 683(2) or an acquittal pursuant to a Ministerial

referral under Section 617(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.[102]

The only sign of flexibility in the Guidelines appears in their willingness to allow the individual to be considered eligible for compensation in some cases where section 617 and 683 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 for any reversal 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.

The foregoing discussion on the main avenues of access to compensation under the Covenant, requiring a conviction to have been reversed or a pardon to have been obtained, admittedly approaches the procedure through fairly conventional channels, that is the Minister of Justice and Courts of Appeal. It would be advisable to remain somewhat skeptical about the role of either

entity 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[103] and function,[104] conservative institutions. They may be reluctant to interfere with matters which have already apparently been settled by trial courts or 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 on 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 strains of problems may be to simply expand the jurisdiction of an Imprisonment Compensation Board but it should be recognized that such a decision would require further careful study, as it would be a major departure from the existing patterns of dealing with these

rights and could well encounter division of powers problems. It could be that with the proposed guidelines and statutory changes noted above, any vestigial reservations that one might justifiably have with respect to the offices of the Minister of Justice and Court of Appeal could be overcome in practice, but it is not felt that the Guidelines have gone far enough or dealt with issues in the right order.

5. On the ground that a new or newly discovered fact ... the non-disclosure of which in time is not wholly or partly attributable to him

In analysing this section of Article 14(6), the assumption continues to be that the article provides two streams by which compensation ought to be paid. The first operates when the conviction has been reversed. The second would come into play when a person is pardoned "on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice...unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him." If the author is in error and the two channels of compensation are both modified by the part dealing with the responsibility for non-disclosure, then one should simply read the following discussion mutatus mutandis.

The first part of this portion of Article 14(6) demands that the pardon must have been the result of a fact previously unknown to the authoritative entity 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. The further prerequisite that the new fact must show "conclusively that there has been a miscarriage of justice" will be discussed in the next section of this paper.

It should be reiterated here that nothing prevents the appropriate government(s) from extending the entitlement to compensation beyond that

apparently under 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. A good example would thereby be set for the international community and other nations with similar legal traditions might follow suit. Particularly with respect to the second section section of the Article, the Guidelines may well indicate some such softening, as will be seen.

i) New or newly discovered fact

Payment of compensation under the Covenant turns on the pardon being due to a new or newly discovered fact, assuming a claim proceeds under the second stream. The Task Force Report proclaims this element as being "straightforward"[105] 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 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 fully or partially being 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. Especially in times of social unrest or with an unpopular defendent, one can see how such factors could have brought about the conviction of an innocent person. 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.[106]

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 would be appropriately inserted in any scheme providing for compensation for the unjustly convicted. It would provide that the reversal or pardon may have been obtained "on the ground that <u>either</u> a new or newly discovered fact <u>or any other factor</u> shows ..." This amplified basis would be more consistent with an overall dedication to providing compensation for wrongfully convicted persons.

The Guidelines take the conjunctive approach to the Article and insist that the pardon <u>or</u> 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 have been relatively simple to broaden the basis for recovery.

ii) <u>... unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him</u>

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"[107] and it recommends that not all such behaviour should automatically bar a person from obtaining redress. Instead, 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 these observations in the Report, as will be seen.

In its initial perspective on this part of Article 14(6), the Report may be expressive of a rather unnecessarily literalist approach in its interpretation. Surely, the drafters of the Convention could have expressed themselves better and gone 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 is consistent with its apparent purpose. The stricter construction presented in the Report does not allow for this curative approach and potentially causes an absurdity. Thus, it might be maintained as a proposition that every non-disclosure is "partly attributable" to the convicted person: he or she should have hired private investigators, he or she should have chosen more astute counsel, he or she should not have lied about an immaterial matter which caused the accused's credibility to be reduced, he or whe should have been more forceful, articulate or coherent in testimony, and so on. The Article should not be read as permitting disentitlement for minor falls from judicial grace, which may be wholly beyond the reasonable grasp of the accused. This interpretation avoids a manifest absurdity and, as in the domestic sphere, given that the text is not clear on its face, the framers should be presumed not to have intended

such a meaning.[108]]

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".[109] Moreover, the overall conclusion of the Report that Canada's best course is to merely discount awards where appropriate is quite satisfactory, but this result could have been reached by sound techniques of textual interpretation. Be that as it may, the Report previously comments favourably upon the basic policy of reducing awards to take into account contributory acts by the applicant, citing the illustrations of "his own perjury or failure to disclose an alibi or facts or other evidence in his own defence that contributed at least in part to his conviction". It would have been laudatory to have included some counter-balancing statements at this juncture in the Report as well, so as not to inflate the importance of the accused's behaviour in calculating any reduction. This would also have been consistent with the general perspective of the Report on the proper Canadian approach.[110]

Most compensation schemes envisage some reduction or exclusion for the person who has contributed to or brought about his or her own conviction.[111] 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 should be reserved for the fradulent claimant or the reckless participant in a criminal trial, but this feature of a compensation scheme (or award) should not be used to punish the naive, the youthful, the feeble-minded, the powerless, the members of racial minorities, the frightened, or the stigmatized, among others.

Actual awards seldom recite specifically why (or if) they may have been reduced due to this type of factor.[112] Again, if fairness and reasonableness are the bywords and full compensation the desired end, the state should err on the side of generosity. Meanness, vindictiveness, small-mindedness, or intellectual laziness should not allow the importance of the victim's conduct to be overblown.

The Guidelines evince cognizance of these arguments on the rigidity 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

..."

The centrality of this part of Article 14(6), at least for the pardon stream of compensation, has been mentioned previously in this paper. The Federal-Provincial Task Force Report and the Guidelines have been noted as applying the criterion to both kinds of entitlement mentioned in the Covenant. The authors of the Federal-Provincial Task Force Report see it as "the cornerstone of the right to compensation created by the Covenant".[113] The Guidelines do not advert specifically to the Covenant nor do they use this phrase at all, although they must be taken as the best effort to date by the Federal and Provincial governments to come to grips with the obligation to "relieve the consequences of wrongful conviction and imprisonment".[114] Giving a definition to "miscarriage of justice" is no easy exercise[115] it must be concluded and this may account in part for the relatively narrow interpretation given to the concept in the Report and, by inference, in the Guidelines. 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 may just be too daunting for current policy makers. Perhaps this reluctance has caused a tactical retreat to the strictures of the Guidelines. None the less, some effort will be made herein both to explicate the phrase and to suggest directions for policy revision.

The usual route to any definitional chore would be to find a similar phrase in a statute of the same genre and to examine how the words have been either defined in the legislation or interpreted in the cases. These avenues appear fruitful at first in Canadian criminal law but the endeavour soon founders. Therefore, s. 613(1)(b)(iii) of the Criminal Code[116] states that where an appeal might otherwise be decided in favour of the appellant

on the basis of a wrong decision on a question of law, the Court of Appeal may none the less dismiss the appeal where "it is of the opinion that no substantial wrong or miscarriage of justice has occurred".[117] The cases have indicated that this paragraph can only relieve against issues of law and that mixed fact and law questions are to be determined under another provision of the Code,[118] so that the judicial interpretations of the relevant phrase are likely to be unhelpful where the Covenant directs one to the salience of new or newly discovered facts. Further, although one might still think present usage of the term to be informative because both the Code and Covenant seem to refer to the result of the error (of whatever kind) being a miscarriage of justice, precedent provides little real guidance on the context[119] and applicability[120] of the concept. Fundamentally, the cases seem "to indicate a basic division within the appellate judiciary itself as to what values are fundamental".[121]

The Federal-Provincial Report recognized the breadth and inferentially the indeterminacy of the concept of injustice. Indeed the Report identified the two possibilities of specifying what the notion meant as being (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".[122] The Report concluded that compensation should be available only upon proof (on the civil standard) of innocence: proof that the party did not commit the offence, or that he 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 the idea of establishing innocence to our system of criminal justice, the authors of the Report thought it appropriate to opt for this alternative, as

the claimant would be seeking compensation, and other jurisdictions similar to ours take a comparable stance.

In the Guidelines there is only one reference to miscarriage of justice, that the new fact must tend to show that there has been a miscarriage of justice. There is no effort to define the term, but it is clear from several references that the governments have adopted the same position 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) ...

It is further specified that any pardon (under s. 683) or favourable verdict following a ministerial reference (s. 617) would have to include a statement that the person did not commit the offence.[123] Otherwise compensation would only be available where a similar certification could be made where there has been an acquittal following an extension of time.

It has already been argued that Article 14(6) should admit of a broader interpretation of "final decision" than the Report and Guidelines suggest. Further, it has been posited that the Covenant should be read as permitting recovery for the person acquitted following a normal appeal as well as the extraordinary procedures of ss. 617 and 683 and that compensation (and the finding of miscarriage of justice) should not be predicated solely on its emergence from a new fact. In the same vein, the view taken of the content of miscarriage of justice should be expanded beyond that advocated in the Report and Guidelines, especially as there is little support offered in the respective documents.

The Report and Guidelines insist that a distinction be made between two broad types of acquittees: those found not guilty on legal (often referred to as "technical" grounds) grounds and those who are somehow truly unjustly

convicted as they were "in fact, innocent" where the initial verdict has been overturned through sections 617 or 683. These are not categories which are readily seperable legally and it has been urged in this paper that compensation under the Covenant is due to both groups. 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."[124] It might be said that the remarks of Lamer, J. were made in the context of the contemplation of subsequent criminal proceedings, but they are none the less indicative of the importance of a not guilty verdict in Canadian law.

Persons who have been wrongfully convicted and imprisoned are ipso facto victims of a miscarriage of justice and should be entitled to be compensated, should one adopt the conjunctive interpretation advocated in the Report and Guidelines. To maintain otherwise is to attempt to introduce a 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."[125]

The additional 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 for the wrongfully convicted and imprisoned person. The minor concession that he or she would only have to demonstrate innocence on a preponderance of evidence does little to alleviate the affront otherwise offered to the status of the not guilty.

The many potential junctures at which there should be some right to compensation were alluded to earlier in this paper, in the Introduction and in the discussion of the interpretation of the necessity of there being a "final decision" according to the language of Article 14(6) of the Covenant. Attention has been focussed on the extreme cases of wrongful imprisonment, where the state error is uncovered with the aid of extraordinary procedures. This choice was made because it 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 as is argued here? If the latter route is ultimately to be taken, assuming governments can be persuaded that the present policy is wrong, what procedures could be established to provide some reasonable compromise between the poles?

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

> 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.[126]

Here, the presumption would be twofold: (1) that the person whose conviction is overturned, whether by the rarely used devices of ss. 617 and/or 683 as required in the Guidelines or by other more conventional legal techniques argued for as proper bases in this essay is ipso facto wrongfully convicted (or is a victim of a miscarriage of justice, if the interpretative approach taken in the Report and Guidelines is utilized); (2) this unjustly convicted (and imprisoned) person would be presumptively entitled to compensation. The presumption of a right to compensation would be able to be displaced by evidence adduced at a special proceeding convened at the instance of the Crown and wherein the Crown must establish that both limbs of the presumption have been displaced on a preponderance of evidence, the civil standard. If the Crown succeeded in displacing the presumption, it would be in a position to argue for a reduction or elimination of compensation. Even if the Crown so persuaded the tribunal, 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 keeps alive the presumption of innocence so important to the common law and under the Charter. It avoids the systemic ignominy of requiring a wrongfully convicted person to prove his innocence as is decreed in the Federal-Provincial Report and is implicit in the Guidelines, which demand a statement that the person did not commit the offence. It allows every wrongfully convicted person to continue to benefit from that presumption for compensatory purposes as well. It forces the Crown in a separate proceeding to prove that the presumption 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, 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 presumption suggested here. Finally, as was earlier argued this interpretation of Article 14(6) is also consonant with the existence and meaning the other similar section of the Covenant, Article 9(5). [Add comparative data]

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

When dealing with a law which creates an offence and a sanction for an accused person who is found to have committed the offence, any finding of guilt must be followed by a form of sentence to which the accused must submit. In the recent Report of the Canadian Sentencing Commission [127], a distinction is made between sentencing ("the judicial determination of a legal sanction to be imposed on a person found guilty of an offence" [footnote, p.115] 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") [footnote, p.109]. 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 Commision cites "an absolute discharge and, to a lesser degree, a restitution order without any punitive damages" [footnote, p.115] 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 (which the Commission claims

to have rebutted) 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 (given the usual tendency to equate the term with sentencing) is none the less 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.[128]

It is a matter of some regret, therefore, that the Guidelines specify that "B.(1) The wrongful conviction must have resulted in imprisonment, all or part of which has been served."[129] Of course, those who are imprisoned suffer the strongest sanction of the panoply available to the state, given the consequences which inure for the accused and his or her close associates as a result of incarceration. Indeed this class of wrongfully convicted persons is the focus of this paper. However, this is not to deny that other people who have been wrongfully convicted have also suffered punishment as a result of a conviction and that, especially given the Covenant, they too should receive compensation. A broader interpretation should be given to the phrase than governments appear to find acceptable, as evidenced in the Guidelines. Their rationale is not spelled out in the text of the Guidelines, so one can only speculate on their reasons. However, if the reservation is cost, then one may observe that the actual incidence of claims may be quite low (depending in part upon the meaning given to other

portions of the text of Article 14(6)). Further, other techniques may be used to hold down expenditures, such as statutory maxima for certain types of offences, punishments or costs associated with the conviction and release.[130] Some rethinking is surely appropriate with respect to the requirement of imprisonment under the Guidelines.

8. "shall be compensated according to law"

The point has been made previously in this paper that the existing channels via which compensation might flow are inadequate. From the perspective of ensuring that compensation will be paid in appropriate cases and given the obligations imposed by Section 2 of the Covenant (which normally requires the adoption of legislation) the status quo is unacceptable. 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"[131] [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".[132] The relevant government "would undertake to act on the report submitted by the Commission of Inquiry".[133] 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 present regime in the United Kingdom. There, proposals for a

statutory scheme of compensation were rejected and a modified ex gratia program was introduced in 1985 in the form of a Ministerial statement in Parliament.[134] It provides that in cases of wrongful imprisonment where there has been a pardon by the Queen, or a quashing of conviction by the Court of Appeal or House of Lords after a reference by the Minister or following an extended time for filing an appeal or where the Home Secretary was satisfied that there had been a serious default by the state, 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."[135]

Further, a decision made by the Secretary of State under even these new provisions was not reviewable by the courts, according to R. v. Secretary of State for the Home Office ex p. Chubb.[136]

As was discussed supra (at pp. 27-28) 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 and there are still broad discretionary powers at all levels of the scheme (e.g. on the issue of when there shall be a grant of a free pardon, or a reference to a Court of Appeal by the Minister). Even assuming the eligibility criteria are satisfied and an inquiry states that compensation should be paid, 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, given the broad remedial powers of section 24(1) of the Charter, but this does not alter the fundamental character of the Guidelines as not creating an obligation in the same manner that an appropriate statute would. The Guidelines do not, therefore, resolve the issues of compensation in Canada and do not bring about the fundamental changes required by the Covenant and a sense of fairness and justice.

9. The Payment of Compensation: Forum and Quantum

(a) Forum

In a previous section of this paper (supra, at pp. 28-34) 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. In the main, it was recommended that a reform of the Ministerial reference power and improved rights of appeal should assist in making just decisions on these threshold issues. However, some reservations were noted on the efficaciousness of such devices and it was suggested that an Imprisonment Compensation Board might be the appropriate forum for such determinations. No final position is taken on this issue in this paper and additional research should be undertaken particularly on th relevance of the jurisprudence related to s.96 of the Constitution Act 1867. [should this be revised?] 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 decision on the amount to be paid on the claim?

The Task Force Report reviewed[137] 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.

A similar approach has been taken, criticized and then reaffirmed by the Government of the United Kingdom. The position of the wrongfully convicted person seeking compensation has been the subject of several Explanatory Notes[138] and Parliamentary statements,[139] the net result of which leaves the decision with the Home Secretary, albeit latterly with the Minister agreeing to accept the assessor's recommendations as binding. Over the years the whole framework for treating such cases has been the subject of trenchant criticism by organizations and, independent observers[140] and

even Parliamentary Committees,[141] but to no avail, as the traditional approach was upheld.[142] In many senses, it is regrettable that Canada has chosen a path which to many has been discredited in the United Kingdom. [Note: Refer to comment on Draft U.K. Bill - File 14]

In proposing the creation of an Imprisonment Compensation Board, one is mindful of the questions concerning the breadth of interests which could (and in many ways should) be protected and be the subject of compensation by the state, as was noted at p. 2 -supra. It is consistent with the focus of this paper that the Board be mainly concerned with those who have been imprisoned, but there are still powerful arguments for compensating persons who have not served such a sentence (see supra, pp. 44) and the jurisdiction of the Board could readily be expanded if the decision were made to compensate a wider range of claimants.

The advantages (and disadvantages) of using an independent tribunal for the assessment of damages are not dissimilar to those which might have been cited in the creation of other similar entities in various contexts. Having made this statement, it is obvious that an extensive debate should be commenced on the rationale for the utilization of a tribunal here, although it is not proposed to explore these controversies now. Briefly, 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 strongly prejudice a claim. [Insert U.S. example] 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. An experienced tribunal should be able to perform its function quickly, especially if it is established as a lean and efficient body. [Find one or two major articles on virtues/vices of specialized tribunals and alter text or footnote appropriately]

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 would be binding on the Crown who had initiated the prosecution."[143] The 1982 Justice Report did not go so far in its position as have Task Force and this paper. Justice would impose a higher level of finality: "its decisions will not be subject to ministerial review or appeal save to the High Court by way of judicial review."

However, no compelling reasons are cited for this reticence and, except for a shared restriction on ministerial review, there are strong grounds for providing the expanded ambit of appeal posited herein, [Upgrade this section with discussion of general principles guiding finality and review issues], particularly as one ought to see the creation of a legislated right to compensation.

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[144] and an overriding concern with the purpose 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[145] as a way of avoiding any impasse, a solution which has been employed successfully elsewhere[146] where there is a shared legislative aim and arguable divided jurisdiction. There would appear to be ample reason to believe that such cooperation could infuse any discussion of the creation of a new tribunal. 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. Analysis will be presented concerning the limiting factors in the Guidelines and the other considerations relating to non-pecuniary and pecuniary losses. However, before commencing these chores and as a type on invocation, a few brief extracts from Thomas provide some sense of the spirit and purpose to which a compensation regime might aspire when dealing with determination of quantum.

> 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.[147]
>
> 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.[148]

Finally, previously quoted (at p. 4) but 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.

These are statements of principle and policy which should be kept in relief as one surveys the Report and Guidelines.

The Guidelines specify that assessments are to take into account "Blameworthy conduct or other acts on the part of the applicant which contributed to the wrongful conviction."[149] and "Due diligence on the part of the claimant in pursuing his remedies."[150] The first issue has already been discussed at pp. 36-38. If anything, some of the criticisms previously made could be reiterated but stated more forcefully in examining the Guidelines. It has been noted that they are progressive in the sense of removing 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 and his or her award thereby reduced 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. Even if the wrongly convicted person had some responsibility for his or her plight, the extension to other acts beyond "blameworthy conduct" seems harsh.

The second general reducing factor in the Guidelines requires that the claimant show due diligence "in pursuing his [sic] remedies." Although no explanation is given in the Guidelines for this clause, it is apparently derived from a discussion in the Task Force Report. 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,"[151] while 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."[152] It is laudable indeed that the Report and Guidelines reject the limitation period. In the Report itself 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.[153]

What is puzzling is why this same liberal spirit did not continue to be in the foreground when the authors of the Report determined to insert the due diligence requirement. It is said to be less restrictive but it is no more appropriate when dealing with wrongful convictions. Obviously one cannot say what "due diligence" demands from the Report itself. Experience with a similar requirement in other areas does not make one any more convinced of the applicability of the factor. [Expand] One should not forget the plight of the wrongfully convicted person. Being incarcerated or recently released does not enhance one's credibility or facilitate access to legal services to assist in gathering evidence or pursuing a remedy. Indeed, imprisonment itself, 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 keeping in mind the preceding discussion of the paucity of existing legal responses. 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. Paraphrasing the

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

(i) Non-pecuniary losses

Conventional portrayals of this category of damages usually include a list of headings and, in this, the Report and Guidelines are no exception, with the latter itemizing:

> (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 insert in (b) that the assessment would take into account any previous criminal record. A more thorough and tailored set of headings, based upon Thomas and other sources, might include:

> (i) loss of liberty, which may be particularized in some of the following heads; indeed some overlap is inevitable;
>
> (ii) loss of reputation;
>
> (iii) humiliation and disgrace;
>
> (iv) pain and suffering;
>
> (v) loss of enjoyment of life;
>
> (vi) loss of potential normal experiences, such as starting a family;
>
> (vii) other foregone developmental experiences, such as education or social learning in the normal workplace;

(viii) loss of civil rights such as voting;

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

(x) physical assaults while in prison by fellow inmates 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 future advancement, employment, marriage, social status, physical and mental health and social relations generally;

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

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

Therefore, beyond the factors noted in this section, special levels of compensation need to be considered for this chronic social handicap. The Thomas Royal Commission explicitly recognized and relied upon this theme in examining compensation for that victim of miscarriage of justice who spent approximately nine years in custody.

> 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.[154]

In light of the foregoing, it is puzzling that the Guidelines settle upon a ceiling of $100,000 as compensation for non-pecuniary losses, qualified only by the statement that the damages "should not exceed 100,000." [Emphasis added.] The Task Force Report had discussed the possibility of a ceiling, referring to the Andrews v. Grand and Toy Alberta Ltd.[155] 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". Surely Andrews should not apply. As was noted in the same paragraph as in the foregoing quotation, it was a case which concerned a young adult quadriplegic. It arose our 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, 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. [endnote A]

Later in the decision, [endnote B] some reference is made to the social

burden of large awards, but these comments should not be seen as 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:

> - the wrongful conviction and imprisonment of an innocent person is such a serious error that the state, according to some views, should fully compensate the injured party;
>
> - the number of potential claims would appear to be small so that there is no justifiable fear of a drain on the public purse;
>
> - the fact of imposing a ceiling on the amount of the award would appear to be contrary to the general philosophy of wanting to provide redress for an injured party;
>
> - the state very rarely imposes a limit on the awards available resulting from damage to property. Limiting compensation in the case of unjust convictions could appear as if the state valued property right to a greater extent than the freedom of its citizens.[156]

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 be cautious in this regard, however, in assessing compensation, for it may be that the wrongfully convicted person's pre-existing marginality contributed to his or her being found guilty and kept in prison. If full compensation is one of the guiding principles, then each claimant should be given the benefit of the doubt on what his or her life would have held out but for the mistaken conviction.

Some headings might include:

(i) loss of livelihood;

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

(iii) loss of future earning ability;

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

The Guidelines indicate acceptance of the above headings and separately provide for reasonable legal costs incurred by the applicant in obtaining a pardon or acquittal being included in the award.[157] It would presumably be a reasonable extension to add expenses with respect to the original trial and appeal and the compensation application itself. All of these provisions are based on the belief that the wrongfully convicted person ought not to have to pay to defend himself or herself when he or she was and remains a victim. 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.

The Guidelines do not contemplate claims for even pecuniary losses by third parties to the wrongful conviction. Some discussion has already been presented on this point (at pp. 24-26) and it might only be added here that a potential compromise between inclusion and exclusion of coverage for persons other than the accused could be to provide for pecuniary losses only. As with any compromise, this is not ideal if one's aim is to provide full compensation for a miscarriage of justice, but this solution would at least be more generous than the Guidelines.

[130] Supra, note , at pp. 26-27.

[131] See Home Office Letter to Claimants, Appendix C of A Report by Justice, supra, note , at pp. 31-32.

[132] See the November 29, 1985 statement, supra, note 32.

[133] For example A Report by Justice, supra, note 7. Further, the Criminal Bar Association (Sixth Report from the Home Affairs Committee, Session 1981-82, Miscarriages of Justice, at pp. vi-viii, et sep) 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 32 at p.1)

[134] 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.

[135] 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. "The stand was reiterated in the 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."

[136] Supra, note , 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."

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

[138] Supra note , at p. 43.

[139] [Give examples]

[140] Supra , note 6, at p. 115, para. 484.

[141] Ibid, at p. 117, para 492.

[142] Supra, note , at p. 3.

[143] Ibid, at p. 4.

[144] Supra, note , at p. 34.

[145] Ibid.
[146] Ibid, at p. 35.

[147] Supra, note 6, at p. 115, para. 487.

[148] (1978), 25 S.C.R. 229 [Add citation]

[149] Supra, note , at p. 4.

1.

2.

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4. "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. . This classic article presents typologies of the Due Process and Crime Control Models which highlight systemic ideological characteristics aimed at avoiding error.

5. [Cite Kafka quote]

6. [Discuss (as examples) Zimmerman, U.S.
and refer to cites Thomas, N.Z.
Christie, U.K.
Marshall, Canada]

7. "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.

8. Rattner and Sugarin, "Guilty Until proven Innocent: Wrongful Conviction and Public Policy", 32 Crime and Delinquency 578-544 (1986), at p. 523.

9. [Check States Can. Just. Stats records and show calculations as per p. 523, and comment]

10. See supra, footnote 6.

11. Ibid., p. 115, para. 486.

12. Ibid., p. 116, para. 490.

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

14. Ibid., p. 193.

15. O'Neil v. Ohio (1984) 83 AP-104 (10th Dist.), at p. ____.

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

17. Supra, The Thomas Inquiry, footnote 6, at p. 120.

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

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

20. 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.

21. Mr. Justice W.S. Tarnopolsky, "A Comparison Between the Canadian Charter of Rights and Freedoms and the International Covenant on Civil and Political Rights", ____ Queen's Law Journal 211-231, at p. 211.

22. 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.

23. It is possible that mere inaction might be argued to be neutral in effect, but for Articles using mandatory or prohibitory language appears to be an ? 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.

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

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

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

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

28.

29. 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 fiction 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 individualsin Ohio, the burdens on the state seem to be at best, minimal." Hope Dere, "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 7, at pp. 29-39 or Rosenn, footnote 19, at pp. 275-726.

30. New Yrok State Liability for Wrongful Imprisonmentj: A Statutory Model", 49 Albany L.R. 201-243, at p. 235, maintains that the New York district attorney's office supported liability for wrongful imprisonment. Shelbourn, supra, footnote 7, at p. 30 claims that in those countries which operate statutory schemes of compensation, there has been no "... danage to the prestige of the judicial system".

31. See, for example, Shelbourne, supra, footnote 7 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 7) maintained tht "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, footnote 16.

32. 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 21, at 264.

Rosen'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 19, at p. 705.

One state has recently introduced a special statutory scheme which has attracted some favourable comment (see Kasdan, footnote 22). 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?

33. See the Home Office Letter to Claimants, Appendix C, the Justice Report (1982), supra, footnote 7, at pp. 31-32 and the November 29, 1985 statement to the 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 it ex gratia character: review by the courts on Parliament seems more or less precluded and it can be changed without leave having to be received from any person of institution. These and other problems are discussed infra.

34. 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 limitiations of the law of tort. "The present problems of tort are not so much matters of law on internal consistency as sociological, depending on what we want to achieve and at whose expense."

35. 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 think you are asking me to put myself in the shoes of a solicitor ... The short answer is that I do not know what advice he would give. 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]

36. See ss. 25 and 717, the Criminal Code, R.S.C. 1970, Chapter C-34, 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. [add discussion of common law immunity]

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

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

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

40. Supra, footnote 36, at p. 62.

41. See Linden, "Defences to Intentional Torts: Legal Authority", supra, footnote 38, at pp. 76-82. For a discussion of the general la of arrest, see Bruch P. Archibald, "The Law of Arrest", in Del Bueno (ed.), Criminal Procedure in Canada (Toronto: Butterworths, 1982), at pp. 125-168 or Roger E. Salbary, The Police Manual of Arrest Seizure and Interrogation (Toronto: Carswell, 1986), pp. 21-80.

42. Supra, footnote 36, at p. 64. See also Harry, Law of Torts (London: Butterworths, 1983) at p. 82.

43. "Once a judicial act interposes, liability for false imprisonment ceases." See Street, ibid., at p. 27. Similarly, according to Rogers, supra, footnote 36, 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."

44. See the defintion of warrant in s. 448 of The Criminal Code, R.S.C. 1970, Chap. C-34 and also s. 456, 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)

45. See Kasden, supra, footnote 22, at p. 211.

46. See Rogers, supra, footnote 36, at p. 552.

47. This list is an amalgam of Rogers, ibid., at p. 553 and Fleming, supra, footnote 37, at pp. 576-577, but these prerequisites appear to be generally accepted.

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

49. Supra, footnote 36, 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 Kaskan, supra, footnote 22, at p. 214. [Check NELLES]

50. See Bux v. Slough Metals Ltd. [1973] 1 W.W.R. 1358 (Court?) and Kamloops v. Nielsen [1984] 5 W.W.R. 1 (S.C.C.).

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

52. These elements are summarized in R.A. Percy, Charlesworth on Negligence (Sixth Edition), (London: Sweet and Maxwell, 1977), p. 11 (later edition?).

53. Blyth v. Birmingham Waterworks (1856) 11 Ex. 781, at 784 (court?).

54. Morris v. West Hartlepod Steam Navigation Co. Ltd. [1956] A.C. 552 (524) (Check cite & court?).

55. See Charlesworth, supra, footnote 51 at pp. 150-152.

56. Ibid., pp. 231-2.

57. Supra, footnote 49, at p. 16.

58. David Jones and Anne S. de Villars, Principles of Administrative Law, (Carswell, 1985) p. 388.

59. [Here list several basic cases, including F.C.A. and S.C.C.]

60. [Note Pilkington and others, include texts. One or two sample quotes

> likely Section 24(1) of the Charter makes it clear that Canadian courts are entitled to award remedies on the basis of their justness and appropriateness, and are not limited by existing remedial principles.

[from p. 534, Pilkington]

61. Supra, note 59, at pp. 542-543.

62. [Perhaps quote from Pilkington, 547 or cases.]

63. [See Big M or other similar authority.]

64. [Likely supra, note ___, at p. 26 - from the Fed. Prov. study.]

65. Ibid.

66. Report of the Royal Commission to Inquire Into the Circumstances of the Conviction of Arthur Alan Thomas, (Government Printer, Wellington, New Zealand, 1980), at p. 113.

67. 584 H.C. Deb. C.C. 32147.

68. Supra, note 32.

69. 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".

70. See Hope Dene, "Wrongful Incarceration in Ohio ...", supra, note 28, at p. 260.

71. Supra, note 29, at p. 216.

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

73. Supra, page 8.

74. Supra, note ___, at pp. 18-19.

75. Ibid., p. 18.

76. Supra, note 7, at p. 20.

77. Supra, note 6, at p. 119.

78.

79. Supra, note ___, at p. 19.

80. Ibid.

81. [Explanation and reference on purposive approach - see Wade's writing.]

82. Supra, note 78.

83. Supra, note ___, at p. 22.

84.

85. 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.

86. See Dickson, J. in R. v. City of Sault Ste. Marie, 40 C.C.C. (2d) 353, at p. or [1978] 2 S.C.R. 1299, at p. .

87. Supra, at p. 20.

88. Ibid.

89. Ibid.

90.

91. See ss. 770, 607(2), 618(1)(b) and 620(3)(b), all of which basically provide for extending the usual time period, typically for special reasons.

92.

93. 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 [check].

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

95. 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 (and 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.

96. 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.

97. Supra, note 90, Smith, at p. 399.

98. Ibid.

99. Supra, note 90, Hodge, at p. 163.

100. See supra note 89, at pp. 535-538. Also, L.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, (Fall, 1976) (check).

101. Supra note 90, Smith, at p. 428. [See Sebba survey]

102.

103. [Cite Griffiths on Brit judiciary. Maybe also Friedenburg or cases.]

104. [Note function of courts as ...]

105. Supra note , at p. 22.

106. Supra note , Huff et al., p. 531.

107. Supra, footnote at p. 30.

108. [Quote from Maxwell on Interpretation of Statutes, or similar, on presumption of avoidance of absurdity.]

109. Supra, footnote 101.

110. Ibid., at p. 27.

111. [Cite a couple of examples and comment.]

112. [Try to find an example or two.]

113. Supra, note , at p. 22.

114. Supra, note , at p. 1, Part A, "Rationale".

115. The 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".

116. [Citation].

117. Ibid.

118. See Fanjoy v. The Queen (1985), 21 C.C.C. (3d) 312, 48 C.R. (3d) 113 (S.C.C.) [check]

119. The leading authority, Colpitts v. The Queen, [1966] 1 C.C.C. 146 (S.C.C.) seems to require the appellate court to say that the verdict would necessarily have been the same, if the charge had been correct, [check] before the curative provision can be invoked, which the author maintains only presents more questions than direction.

120. "... the apparent degree of inconsistency [in the application of the proviso] is a cause for concern. It invites, if not cynicism, then at least every 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.

121. Ibid.

122. Supra, note 107.

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ROYAL COMMISSION ON THE DONALD MARSHALL, JR., PROSECUTION

MARITIME CENTRE, SUITE 1026, 1505 BARRINGTON STREET, HALIFAX
NOVA SCOTIA, B3J 3K5 902-424-4800

CHIEF JUSTICE T. ALEXANDER HICKMAN
CHAIRMAN

ASSOCIATE CHIEF JUSTICE LAWRENCE A. POITRAS
COMMISSIONER

THE HONOURABLE
MR. JUSTICE GREGORY THOMAS EVANS
COMMISSIONER

September 24, 1987

BY HAND

Professor H.A. Kaiser
Associate Professor of Law
Dalhousie Law School
Halifax, Nova Scotia
B3H 4H9

Dear Professor Kaiser:

I acknowledge receipt of your letter of September 17, 1987 addressed to W. Wylie Spicer, Associate Counsel to the Commission.

Since your letter was written, we have discussed the matters raised therein and I look forward to pursuing the subject further during the course of our meeting today.

Thank you for your interest in the work of the Commission. I remain,

Yours truly,

John E.S. Briggs
Director of Research

JESB:jrc

cc: W. Wylie Spicer

SEP 24 1987

DALHOUSIE LAW SCHOOL HALIFAX CANADA B3H 4H9

September 17, 1987

Mr. W. Wylie Spicer
Associate Counsel
Royal Commission on the Wrongful
Conviction of Donald Marshall, Jr.
1505 Barrington Street, Suite 1026
Maritime Centre
Halifax, Nova Scotia
B3J 3K5

Dear Wylie:

I spoke to you several weeks ago concerning my ongoing research on the issue of compensation for wrongful conviction and imprisonment. At that time, I explained that I had been working in the area off and on for a couple of years and had recently agreed to share the results of my unfolding research with counsel for Mr. Marshall. After some reflection and discussion with me, Marlys Edwardh has suggested that I also make my paper available to the Commission, as it is clear that it will be taking an interest in such matters. I am pleased to be able to assist the Commission, should you think there might be any benefits accruing from consulting me.

I would attach two conditions only. First, as I have always insisted with Mr. Marshall's lawyers, I am writing independently and accept no direction from any party to the proceedings.

Second, I am not writing with the idea of accepting any professional fees from the Commission directly or indirectly. Other than any necessary expenses, which might be incurred, I do not want anything from the Marshall case.

At present, I am writing an article which will be submitted for publication. It may be of relevance to the Commission. It examines the nature of the problem of wrongful conviction from a compensatory perspective, reviews existing remedies and suggests a framework for dealing with such cases. It does not specifically address these issues in the context of the Marshall case -- I do not have the necessary facts and I am intending in the first instance to write on the topic at a more general level, covering mainly philosophy, policy and procedure.

Regardless of any position you may take on my becoming more directly involved with the case, I shall forward a copy of the article upon completion and you can make use of it or not, as you wish.

.../2

I know you are busy with the hearings, so I am not surprised that I have not heard from you. At least now, you have this letter to jog your memory and I assume that you shall be in touch.

Best wishes.

Yours sincerely,

Archie

H. Archibald Kaiser
Associate Professor of Law

c.c. - Mr. Clayton Ruby
Ms. Marlys Edwardh
Ms. Anne Derrick