

jamais déclarée telle, n'a aucun effet juridique; elle ne fait pas partie du droit. Ce ne sont donc que des effets pratiques qu'elle produit, effets qui n'en sont pas moins considérables.

Les tribunaux ont eu recours à plusieurs techniques afin de donner effet aux conséquences pratiques des lois inconstitutionnelles, dans le but ultime de maintenir un certain ordre social. C'est en fait donner des effets contraignants à des règles qui ne sont pas censées faire partie du droit positif.

Dans l'affaire du Manitoba, on a constaté l'éclatement des bornes établies par les techniques classiques dans l'interprétation de la *rule of law* en cette matière. La Cour s'est servie du second sens de la primauté du droit pour se permettre une déclaration judiciaire dominant effet à des lois inconstitutionnelles. Cette attribution d'effet viole les termes précis de l'article 52 de la Loi constitutionnelle de 1982, en vertu d'une suprématie avouée de la *rule of law* sur le reste de la Constitution.

Cette nouvelle approche admet la primauté ou la supraconstitutionnalité de la *rule of law* d'une part; elle admet aussi qu'elle peut recevoir une application directe en matière d'attribution d'effet aux lois inconstitutionnelles d'autre part. La dangereuse imprécision du concept nous laisse cependant perplexes. Les juges pourront aisément au besoin en ajuster la compréhension, de sorte qu'elle englobe les valeurs morales diverses qu'ils voudront rendre contraignantes. Toutes les solutions que dictent le bon sens et la raison du juge pourront être imposées au justiciable comme étant de droit et à l'encontre, s'il le faut, de dispositions constitutionnelles précises. Dans cet esprit, l'attribution judiciaire d'effet aux lois inconstitutionnelles nous apparaît comme une forme d'adjudication contraignante du droit naturel.

Cela nous éloigne lentement du positivisme juridique, et à ce niveau de la hiérarchie des normes, la chose est troublante. Aussi, notre contrôle de la constitutionnalité des lois semble nourrir le germe d'une grande confusion.

COSTS AND COMPENSATION FOR THE INNOCENT ACCUSED

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This article examines the possibility that innocent accused might be compensated for the expense of defending themselves through cost awards or other payments. It reviews traditional and contemporary approaches, and challenges current Canadian thought on the subject on the basis that it does not address adequately the problem, and that it compromises unacceptably the presumption of innocence. Finally the article considers three leading cases which support the argument.

Dans cet article, l'auteur se demande s'il serait possible de compenser les accusés jugés innocents pour les frais qu'ils ont encourus pour leur défense en leur accordant le remboursement de leurs dépenses ou autre paiement. Il passe en revue les règles traditionnelles et contemporaines en la matière et suggère que la pensée actuelle sur ce sujet au Canada ne résout pas le problème de façon adéquate et qu'elle est en désaccord flagrant avec la présomption d'innocence. À l'appui de sa thèse, l'auteur examine trois décisions importantes.

Introduction

The recent and highly publicized cases of Donald Marshall,¹ Susan Nelles,² and Thomas Sophonow³ have in common the fact that the accused have sought financial compensation as a result of criminal proceedings against them. That such claims are becoming more prominent if not more common, and are attracting interest from governments and law reform bodies,⁴

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I would like to acknowledge the assistance of the Law Reform Commissions of Canada and Saskatchewan in my early work on this subject. I should add, however, that the opinions expressed here are my own.

¹ *R. v. Marshall* (1983), 57 N.S.R. (2d) 286 (N.S. App. Div.). See also M. Harris, Justice Denied: The Law versus Donald Marshall (1986). See *infra*, Part VI, for discussion.

² *R. v. Nelles*, unreported. See the Report of the Royal Commission of Inquiry into Certain Deaths at the Hospital for Sick Children and Related Matters (1984). See *infra*, Part VI, for discussion.

³ *R. v. Sophonow* (No. 2) (1986), 25 C.C.C. (3d) 415 (Man. C.A.). See *infra*, Part VI, for discussion.

⁴ In July of 1986 the Government of Manitoba announced that a compensation policy for wrongful conviction had been set; see Manitoba Information Services, Compensation Policy for Wrongful Conviction (1986). And in 1987 the Law Reform Commission of Saskatchewan produced its Report, The Cost of Innocence—Tentative Proposals for Compensation of Accused on Acquittal (1987). The Law Reform Commission of Canada is also studying the question.

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are good reasons for us to consider the principles and practices by which they are now determined and to inquire about alternatives. At issue is the position of an accused for whom, at the end of the day, the presumption of innocence has prevailed. There has been a charge and a prosecution but either no conviction or the reversal of one on appeal. The successful accused is free of the sanctions of penal law but walks away with burden enough in the ordeal through which he has passed and in the financial costs of the defence. Are these the accused's losses to bear? Should they be? It is these questions that will be explored in this article.

1. Traditional Approaches

In contemplating the successful accused's burden our tendency has been to emphasize the discharge or acquittal. At law the accused has been vindicated. As for the costs:⁵

... exposure to the risk of prosecution is one of the inevitable hazards of living in society and... there is no reason to shield the citizen against the financial consequences so long as no malice, incompetence or serious neglect can be attributed to the prosecutor.

In addition, and related to the idea of prosecution as a risk of community life, it is the nature of criminal proceedings that in theory they do not admit of winners and losers in the way that civil litigation does.⁶ And the existence of winners and losers is essential to the historical rationale of cost awards as the indemnification by the unsuccessful litigant of his successful opposite.⁷

It is therefore not surprising that we find narrow eligibility for costs in criminal proceedings or restrictive interpretation of provisions amenable to wider meaning. For summary conviction criminal offences a trial court may in its discretion award costs that are reasonable and that are not inconsistent with a very modest schedule,⁸ and an appeal court may make any order with respect to costs that it considers just and reasonable.⁹ In the prosecution of indictable offences there is no general power to award costs at trial,¹⁰ and they are explicitly precluded at the appellate

⁵ This description of the traditional view is found in the Report of Committee on Costs in Criminal Cases (New Zealand, 1968), par. 28, cited in Law Reform Commission of British Columbia, Report on Civil Rights, Part 2, Costs of Accused on Acquittal (1974), p. 28.

⁶ For a discussion of the idea that "the Crown never wins and the Crown never loses", see P. Stenning, Appearing for the Crown (1986), pp. 239-242.

⁷ *Ryan v. McGregor*, [1926] 1 D.L.R. 476 (Ont. App. Div.).

⁸ Criminal Code, ss. 744, 772.

⁹ Criminal Code, s. 758.

¹⁰ Exceptionally they may be awarded when an accused has been misled or prejudiced in his defence by a variance, error or omission in an indictment with the result that an adjournment is ordered for the purpose of amendment. And they also may be awarded

level.¹¹ Until recently there was a provision suggesting that costs might be dealt with by rules of court¹² but it was said not to confer the substantive jurisdiction to award them; rather it was confined to regulating them where a substantive right had been otherwise granted.¹³ Finally, there is authority in support of the proposition that the inherent power of superior courts to supervise and control their proceedings includes the power to award costs, but only in exceptional cases "analogous to contempt of court situations" where "necessary to censor the negligence or misconduct of a party".¹⁴

In the provinces, legislation typically makes applicable criminal code summary conviction provisions, including those relating to costs, to the trial of provincial offences.¹⁵ Otherwise, provincial laws have been directed to the recovery, through court costs, of part of the expense of the administration of justice from persons who are convicted. Only Quebec appears to extend to judges trying provincial offences a discretion to award costs on acquittal,¹⁶ but this discretion has been narrowly interpreted.¹⁷

to the successful party in proceedings by indictment for the obsolete crime of defamatory libel: Criminal Code, ss. 529(5), 656. See also Law Reform Commission of Canada, Working Paper 35, Defamatory Libel (1984).

¹¹ Criminal Code, s. 610(3).

¹² Section 428(2)(c) of the Criminal Code used to state that the court had the power to regulate the pleading, practice and procedure in criminal matters, including costs. However, the reference to costs was deleted in 1985; S.C. 1985, c. 19, s. 67(3).

¹³ *R. v. Brown Shoe Co. of Canada Ltd.* (No. 2) (1984), 11 C.C.C. (3d) 514 (Ont. H.C.). But see as well *Ruid v. Taylor* (1965), 51 W.W.R. 335 (Sask. Q.B.).

¹⁴ *Attorney-General of Quebec v. Cronier* (1981), 63 C.C.C. (2d) 437 (Que. C.A.), referred to in *R. v. Brown Shoe Co. of Canada Ltd.* (No. 2), *supra*, footnote 13, at p. 517.

¹⁵ R.S.A. 1980, c. S-26, s. 4(1); R.S.B.C. 197, c. 305, s. 122; S.M. 1985-86, c. 4, s. 3(1); Stat. Nfld. 1979, c. 35, s. 7(2); S.N.S. 197, c. 18, s. 5; R.S.P.E.I. 1974, s. 4(1); R.S.S. 1978, c. S-63, s. 3(3).

¹⁶ In New Brunswick, although Criminal Code provisions relating to summary conviction offences are incorporated into the Summary Conviction Act, cost provisions are specifically excepted and there are no other provisions as to costs: R.S.N.B. 1973, c. S-15, s. 51(1). Ontario and Quebec have their own summary conviction codes.

¹⁷ Quebec's Summary Convictions Act, R.S.Q. 1977, c. P-15, s. 51, provides as follows:

In every case of a summary conviction, or of an order issued by a justice of the peace, such justice may, in his discretion, order by the conviction or order that the defendant shall pay to the prosecutor or complainant such costs as to the said justice seem reasonable and in conformity with the tariff of fees established by law.

If the justice of the peace, instead of convicting or making an order, dismisses the information or complaint, he may, in his discretion, in and by his order of dismissal, the said justice seem reasonable and consistent with law.

¹⁸ See, for example, *Ministry of Transport of Quebec v. Lavaneur Const. Inc.*, [1969] S.C. 293 (Que. S.C.).

The limited possibilities for the compensation of innocent accused are not exhausted in the law of costs. The prerogative act of making an *ex gratia* payment is one alternative, though because prerogative is "the residue of discretionary or arbitrary authority"¹⁸ which is left to the Crown, it is by nature "uncertain and indefinite"¹⁹ and of little importance in this context. *Ex gratia* payments are usually reserved for the few high publicity cases that threaten embarrassment to government if compensation is not awarded. Another possibility is the tort of malicious prosecution which provides a remedy for wrongful prosecution where the plaintiff can make his case with respect to the very stringent elements of that tort.²⁰ However, the difficulty of doing so, coupled with the doctrine of immunity,²¹ combine to render it "virtually a dead letter"²² in the control of prosecutorial abuse. Finally, there is the potential availability of monetary compensation under section 24(1) of the Charter of Rights and Freedoms.²³ Though it is early to assess the jurisprudential boundaries of this remedy, the threshold requirement that a Charter right be infringed or denied combines with questions about the present jurisdiction of the most important criminal courts to award costs²⁴ to suggest that the Charter will not have significant impact in this area.

This summary illustrates what already is well known—the possibilities of compensating accused for the expenses incurred in successfully defending themselves have been very limited. The explanation, we have seen, is rooted in a concept of criminal proceedings that denies a public concern with defence costs. Indeed, when costs in criminal cases were first made available in England, it was to relieve private prosecutors from the expense of seeking justice.²⁵ We in Canada have inherited and perpetuated a legal tradition that has recognized only in recent times that costs might be available to an *accused*, and then only in rare cases.

The persistence of our traditional approach is attributable in part to the advent of legal aid—a development which, we shall see, has some bearing on cost awards, but which must be distinguished from them. "[T]he purpose of legal aid is not to compensate for costs that have

been incurred but rather to ensure that no one charged with an offence will be denied legal representation."²⁶ Legal aid is intended for persons whose resources are so limited that they might not otherwise have the benefit of legal representation. Cost awards, on the other hand, would compensate successful accused for at least some of the expenses they incurred in defending themselves. The financial burden of a criminal defence can bring as much or more hardship to persons of middle or high income who are ineligible for legal aid as to anyone else. It was this consideration that, in the early years of the Law Reform Commission's criminal procedure project, moved the researchers to offer this caution against viewing legal aid as a substitute for cost awards.²⁷

Not to provide for cost awards on the basis that legal aid services are generally available would discriminate against all persons who would not be entitled to legal aid. Furthermore, it would fail to provide for compensation of the various other actual costs that are frequently incurred in the defence of a criminal prosecution.

Who is to be compensated, and for what losses? These questions serve to distinguish the matter of cost awards from the subject of legal aid. They also point to issues central to our concern: when, if ever, should one who has been charged with an offence be entitled to costs? For what expenses should there be compensation? And who should pay?

II. Rethinking Traditional Approaches

We should not assume that the answer to our first question has changed much over the years. The visceral reaction of many to the idea of costs in criminal cases would lead them to argue that it would be seldom that a successful accused should receive costs. Yet most would agree that in at least some cases—such as those of Marshall and Nelles—recompense should be made. And to concede the possibility that even in rare cases costs might be appropriate is to invite reflection upon the basis for their award—an exercise which, we will see, brings into play fundamental questions about the nature of the criminal justice process.

What, then, is a principle on which a rule of costs might be based? In civil proceedings, we might recall, the party and party costs which a successful litigant is entitled to recover from his opposite "are given by the law as an indemnity to the person entitled to them; they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them."²⁸ Costs are intended as compensation for the plaintiff who comes to court and is successful in enforcing a legal right or for the defendant who successfully resists a claim to one. If this approach were adapted to criminal proceedings the rule would be

¹⁸ It is so described by A. V. Dicey, *Law of the Constitution* (8th ed., 1915), p. 420, quoted in R. Dawson, *The Government of Canada* (4th ed., 1963), p. 157.

¹⁹ Dawson, *ibid.*, p. 157.

²⁰ They are discussed in J. Fleming, *The Law of Torts* (6th ed., 1983), pp. 576-588.

²¹ See the discussion by Stenning, *op. cit.*, footnote 6, pp. 347-350.

²² *Ibid.*, p. 350.

²³ *Constitution Act, 1982, Part I.*

²⁴ Over ninety per cent of criminal cases are tried at the provincial court level, and "the jurisdiction of Provincial Courts to award costs is quite limited"; D. Gibson, *The Law of the Charter: General Principles* (1986), p. 215.

²⁵ J. Arents, P. Burns and J. Taylor, *Criminal Procedure: Canadian Law and Practice* (1983), chapter XX, pp. 12-14.

²⁶ Law Reform Commission of Canada, *A Proposal For Costs in Criminal Cases*, Study Paper (1973), p. 5.

²⁷ *Ibid.*

²⁸ Ryan v. McGregor, *supra*, footnote 7, at p. 477.

that costs would follow the event and either the prosecution or the defence would be entitled to them according to whether the accused was convicted or acquitted. The idea that a parallel can be drawn between civil and criminal cases in this regard has influenced some of the thinking on this subject, but there are considerations unique to criminal prosecutions which suggest that, in general, convicted persons should not be liable to pay costs. First, there is the very practical consideration that costs would be recoverable from few of them. More important is the argument that prosecutions should be conducted at public expense because they are carried on by the Crown in the public interest. There is also the perceived harshness of imposing costs against a convicted accused. The McRuer Commission²⁹ in Ontario put this with particular force in recommending that "[n]o person convicted of an offence should be required to subsidize the expense of his trial by having costs thereof levied against him".³⁰

And so we must inquire about approaches peculiar to criminal law. No guidance is to be found in the code provisions summarized earlier, even as a minimalist position they are flawed in that they do not rest upon any coherent rationale. While they express the idea that costs in criminal cases should rarely be available, and then only in very modest amounts, they do not identify the kinds of cases in which costs might be appropriate.

Existing schemes of compensation and law reform proposals have offered different approaches to this fundamental question. Legislation in the United Kingdom³¹ and Northern Ireland³² gives the courts wide discretionary authority to award trial and appeal costs to either a successful defendant or the prosecutor. And in the United Kingdom it is said that it should be accepted as "normal practice" to award costs where the power to do so is given.³³ In New Zealand, the discretion is structured by the enumeration of "relevant circumstances" that are to be taken into account in the award of costs to an acquitted or discharged accused.³⁴ In the State of New South Wales,³⁵ costs to an accused are dependent on the award by the court of a certificate attesting that it would not have been reasonable to institute proceedings had the prosecution been in possession of all the relevant facts before the proceeding, and that any conduct of the defendant that might have contributed to the beginning or continuation of the proceedings was reasonable in the circumstances.³⁶

²⁹ Royal Commission Inquiry into Civil Rights (1968).

³⁰ *Ibid.*, Report No. 1, Vol. 2, p. 927.

³¹ The Costs in Criminal Cases Act, 1973 (U.K.), 21 & 22 Eliz. II, c. 14.

³² Costs in Criminal Cases Act (Northern Ireland), 1968, c. 10.

³³ Practice Note, [1982] 3 All E.R. 1152.

³⁴ The Costs in Criminal Cases Act, 1967 (N.Z.), s. 5(2).

³⁵ Costs in Criminal Cases Act, 1967 (N.S.W.).

³⁶ *Ibid.*

In Canada, Professor Peter Burns prepared a study for the Law Reform Commission of Canada in 1972 and recommended that there be compensation for acquitted or accused persons "who are wrongly charged or truly innocent".³⁷ This recommendation was not carried forward in the Criminal Procedure Project of the Commission. Instead, in a study paper published in 1973, the project staff proposed that costs be paid "to all acquitted or discharged persons—or at least to those that can show economic need".³⁸ At the provincial level, a report in British Columbia³⁹ followed the New Zealand example in proposing that entitlement to costs arising from the prosecution of provincial offences should depend upon judicial discretion exercised with regard to specified factors.⁴⁰

The only Canadian jurisdiction that claims a compensation policy of any kind is Manitoba⁴¹ but the plan is not intended to provide redress for any successful accused. Rather it is intended to compensate those who were unsuccessful but whose convictions were subsequently proved to have been wrongful. Why compensation is available to those wrongly convicted but denied to those rightly acquitted is not clear. Some of the losses for which payment can be made⁴² may be suffered as much by the latter as by the former. In any event the criteria are such that the plan will have little if any impact; in particular the requirement that there be conclusive proof of innocence means payments will be rare, perhaps unheard of. For example, Susan Nelles would be ineligible because she was not convicted. Thomas Sophonow would be ineligible—as indeed he was declared to be by the Manitoba Attorney General⁴³—because "conclusive evidence of innocence" is not within his grasp. Even Donald Marshall who in 1983 was finally acquitted of the murder for which he was convicted in 1971 might not be eligible for compensation under the Manitoba plan.⁴⁴

³⁷ Law Reform Commission of Canada, *op. cit.*, footnote 26, p. V.

³⁸ *Ibid.*

³⁹ Law Reform Commission of British Columbia, *op. cit.*, footnote 5.

⁴⁰ Among the factors to be considered are the prosecutor's good faith and diligence, the reasonableness of the investigation, the reason for acquittal and the conduct of the accused: *ibid.*, p. 37.

⁴¹ The policy is not in the form of legislation and the only written description of its terms is found in a publication of Manitoba Information Services, *op. cit.*, footnote 4.

Subsequent to the completion of this article, a Federal-Provincial agreement on guidelines for compensating wrongfully convicted persons was concluded at a meeting of Attorneys General and Ministers of Justice. The guidelines perpetuate the tradition of narrow eligibility for compensation and are subject to comments similar to those I offer about the Manitoba policy.

⁴² For example, the guidelines contemplate the possibility of a general award for loss of dignity or other less concrete injuries. Such injury may occur notwithstanding an acquittal.

⁴³ *Op. cit.*, footnote 4.

⁴⁴ See *infra*, Part VI for further discussion.

The most recent proposal is advanced by the Law Reform Commission of Saskatchewan. In its "Tentative Proposals for Compensation of Accused on Acquittal"⁴⁵ the Commission proposes that "only the 'truly innocent', that is those who have been drawn into the legal system through no fault of their own"⁴⁶ should be entitled to compensation for "expenses reasonably incurred" in conducting their defences.⁴⁷ Factors relevant to the determination are: (a) whether the charge was dismissed on a technical point even though the evidence as a whole would support a finding of guilt; (b) whether the charge was dismissed because the tribunal considered the accused to be innocent in fact; (c) whether the accused did anything that contributed or might have contributed to the institution or continuation of the proceedings or that, if he did so, it was reasonable in the circumstances; (d) where the accused is acquitted on one or more charges, but is convicted on another charge or charges, the relative importance of the charges involved.⁴⁸

Subsequent discussion will suggest that the search for the "truly innocent", guided by these considerations, will be a fruitless, cumbersome and, in some respects, dangerous exercise. For the present we can simply observe that the Saskatchewan proposal, like the Manitoba plan, contemplates that few successful accused should be compensated and, if acted upon, its impact would be similar: little or none.

The restrictive eligibility for costs, combined with a judicial reluctance to award them in jurisdictions where eligibility is cast in wider terms,⁴⁹ has meant that compensation of successful accused is very rare. And neither the Manitoba plan nor the Saskatchewan proposal herald a new direction for Canada. The persistence of these approaches, in law and in reform proposals, can be explained by two considerations. One is the assumption that most of those accused who are acquitted are guilty of the offences with which they were charged, or of other offences, or at least were responsible in some way for bringing the prosecutions to which they were subjected upon themselves. Though winners in the trial process, they are owed nothing more than their acquittals. The second consideration is well known but has received little careful attention; it is the anticipated expense of wider eligibility. Both of these require analysis.

III. *The Status of Acquitted Persons*

The temptation to distinguish among different kinds of successful accused is one to which we all succumb from time to time. It may be done

⁴⁵ Law Reform Commission of Saskatchewan, *op. cit.*, footnote 4.

⁴⁶ *Ibid.*, p. 24.

⁴⁷ *Ibid.*, p. 33.

⁴⁸ *Ibid.*, pp. 37, 38.

⁴⁹ In England, despite a 1973 Practice Direction of a presumption in favour of costs, it was thought necessary to reaffirm that guidance in 1982; *supra*, footnote 33.

formally, as it is in Scotland where provision is made for separate findings of not proven and not guilty,⁵⁰ or informally in casual explanations of the results of criminal trials. "They couldn't prove it" or "he got off on a technicality" are conversational pronouncements of guilt with which we are all familiar. Cost awards might also serve to make the distinction, if the criteria are such that they are seen to separate acquitted persons into categories of vindicated innocents and the guilty but lucky. This distinction among different kinds of acquitted persons is commonly referred to as the "third verdict problem". How much of a problem it is may be open to debate, for even now most of us make a rough and ready distinction between true innocence and an acquittal or discharge. Further, if it is the case that "a criminal trial is a search for proof, not truth",⁵¹ is there harm in recognizing that as a consequence some, and perhaps most, acquittals mean not proven rather than not guilty? The recognition need not lie, as it does in Scotland, in the language in which verdicts are delivered, but it might be found in cost rules that would compensate only the truly innocent.

There is, however, a powerful argument to the contrary and it is rooted in the presumption of innocence: 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. Depending on the criteria, a not guilty verdict without costs might be a tainted acquittal, and tainted acquittals would compromise the presumption of innocence. This is the argument from principle and its power is not diminished on the level of application. How are innocent accused who are deserving of costs to be distinguished from the acquitted though undeserving ones? The distinction between "true" innocence on the one hand, and "legal" or "technical" innocence on the other, is not self evident. If it can be made at all, it must lie in the explanation for an acquittal. This presents an immediate problem in jury trials because reasons for verdicts are not given. Nor, at present, can they subsequently be disclosed by any juror.⁵² Should these objections be overcome by changing the law, we might find that the articulation of reasons for jury verdicts might prove to be a difficult matter. Jurors are required to be unanimous only on their verdict.⁵³ In

⁵⁰ *Cf.* Law Reform Commission of British Columbia, *op. cit.*, footnote 5, p. 30, n. 4.

In Scotland there are three verdict alternatives: guilty, not guilty, and not proven. Either of the latter two verdicts will ensure the freedom of the accused. The "not proven" verdict indicates that the state has not established full legal proof that the accused committed the crime, whereas the Scottish verdict of "not guilty" represents a finding that the accused is in fact innocent of the alleged crime.

⁵¹ This description was attributed to Mr. Justice Edson Haines by Madame Justice Bertha Wilson in the Shumatcher Lecture, University of Saskatchewan, March 13, 1987.

⁵² Criminal Code, s. 576.2.

⁵³ See, for example, *Thatcher v. The Queen*, [1987] 2 S.C.R. 652, (1987), 57 C.R. (3d) 97.

theory there could be as many as twelve different explanations for that result and, we can predict, at least some differences among jurors supporting the same verdict would be common.

While this difficulty of identifying reasons for an acquittal is unique to jury trials, other problems are not. On what basis are we to distinguish between the "legal" or "technical" points which mean that persons who may be guilty must be acquitted or discharged, and the presumably more substantive matters which satisfy us of "true" innocence? Legal or technical argument may be as fatal to the prosecution of one who is really innocent as to one who may be guilty. This means not only that the failure of a prosecution on a technicality should not be a determinative consideration, it means that it should not be seen even as a relevant one.

It is the merits that must be determinative, and here we are faced with alternatives of treating an acquittal—or the lack of a conviction—as the final word on the merits, or of engaging in a collateral assessment of what the Saskatchewan proposal calls "innocence in fact". It is possible, of course, to make inquiry beyond that involved in deciding if an accused should be convicted on the charge against him. That he was not proven guilty beyond a reasonable doubt does not exhaust all possibilities of his involvement or responsibility. Whether such inquiry is desirable or appropriate is another question the answer to which depends on our assessment of the status of the presumption of innocence, and on our judgment about the kind of inquiry that would be necessary.

The purpose of a criminal trial is only the most obvious reason for the presumption of innocence. If it were the *only* reason, it might be said that when the trial is over—that is, when evidence tested against the presumption and the reasonable doubt principle has been heard and a verdict reached—the presumption no longer applies. In other words the presumption exists for the important but limited purpose of indicating that it is the Crown that must establish guilt. It need not have significance in other contexts including, arguably, that in which costs are awarded. Quite simply, one presumed to be innocent for the purposes of his trial does not have to be taken as innocent for other purposes when the trial is over, even though it is concluded by an acquittal.

The presumption of innocence should not, however, be seen as limited only to establishing the burden of proof in criminal trials. It is a statement of an important social policy, one about the civil status of acquitted persons that should not be interfered with lightly. 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. We may not be able to prevent suspicion that lingers, but there ought not to be official pronouncements of probable guilt, whether implicit in assess-

ments of "innocence in fact" for the purpose of cost awards, or anywhere else.

If the purpose of attempting to distinguish the truly innocent among those merely acquitted is suspect, so too is the process by which this would likely be done. The Manitoba scheme to compensate the wrongly convicted and the Saskatchewan proposal to compensate some accused on acquittal assume this would be accomplished easily; indeed the latter contemplates, in the vast majority of cases, an informal process analogous to that involved in speaking to sentence.⁵⁴ We should not be confident that this would be the case. At least some of the legal issues involved in cost awards would be different from those involved in determining liability, and if the legal issues differ, so too does the potential ambit of relevant evidence. We can predict that, most of the time, one or the other of the parties would want to call additional evidence on the matter of compensation. In short there is a risk of protracted proceedings just to try and sort out who should get costs and who should not.

IV. *The Expense of Cost Awards*

The anticipated expense of different cost proposals is another important consideration in the debate about who should be compensated and for what losses. There is no systematic appraisal of this subject. What evidence we have suggests that existing cost schemes based on narrow eligibility, or judicial discretion with or without guidelines, have been a negligible public expense in the jurisdictions which have them.⁵⁵ It begs the question for us at this stage to observe that cases in which costs are awarded are few in number; it is why they are so few in number that is of interest. Undoubtedly the historical reluctance to award costs, and the difficulty of establishing eligibility, are two of the reasons. A third is legal aid. In New Zealand where cost awards in criminal cases have been authorized for twenty years,⁵⁶ justice department officials attribute the almost trivial expense of that program to the fact that most criminal cases are defended with the support of legal aid.⁵⁷ Needless to say successful accused whose expenses are paid by legal aid cannot and should not be permitted double recovery through an award of costs.

⁵⁴ Law Reform Commission of Saskatchewan, *op. cit.*, footnote 4, p. 32.

⁵⁵ In 1972, the Law Reform Commission of Western Australia observed that the annual cost to the government of the scheme in New South Wales was \$1,255.50 for 1969 and \$758.00 for 1970. In New Zealand the cost was \$1,154.00 for 1969-70 and \$1,306.00 for 1970-71. By 1986 the cost for the New Zealand plan was \$8,695.00. See *Payment of Costs in Criminal Cases*, Western Australia Law Reform Committee, Working Paper (1972), p. 14, and see, Law Reform Commission of Saskatchewan, *op. cit.*, footnote 4, p. 19.

⁵⁶ *Supra*, footnote 4.

⁵⁷ Law Reform Commission of Saskatchewan, *op. cit.*, footnote 4, p. 19.

Critics of the 1973 proposal that costs be paid "to all acquitted or discharged persons—or at least to those that can show economic need"⁵⁸ argued that the authors ignored the financial implications of their proposal, and thereby implied that the expense of such a program would be prohibitive.⁵⁹ Perhaps it would be, but we do not know because the proposal has never been costed. On the most recent Canadian statistics available, fewer than ten per cent of those charged with indictable offences are acquitted.⁶⁰ The percentage is even lower, it seems, for summary conviction offences.⁶¹ Given that a significant number of these cases—perhaps most of them—are supported by legal aid, we must ask if the conventional wisdom on this subject is accurate. There are other variables, of course, such as whether costs were to be based on a tariff or awarded on some other ground. But in general we can assert that until alternative proposals are subjected to cost analysis, we have only speculation on this matter of expense, and at this stage nothing of importance should depend on what is little more than guesswork.

V. *Compensating Innocent Accused: A Principled Approach*

We come now to the point at which the thesis of this article can be stated. It is this: existing provisions and current proposals for compensating innocent accused are at best inadequate. By their terms even those widely thought to deserve compensation probably would not be eligible for it. At worst they are dangerous in that determination of eligibility threatens to compromise the presumption of innocence. If it is thought desirable to compensate the innocent for expenses incurred in defending themselves, the only acceptable criterion of innocence is the absence of a conviction and the special verdict of not guilty by reason of insanity. The guiding principle should be that compensation normally would be available to one charged with an offence who is not found guilty of that offence, or an included offence, or another offence on which he was tried concurrently. Such a scheme should be compensatory in nature; costs or other awards should be based on a tariff and, so far as possible, sufficient to meet expenses reasonably incurred in conducting the defence.

The arguments against this proposal must be acknowledged. Some of them follow from earlier discussion. Perhaps the most important is

⁵⁸ Law Reform Commission of Canada, *op. cit.*, footnote 26.

⁵⁹ Arrens, Burns and Taylor, *op. cit.*, footnote 25, ch. XX, pp. 146-150, say that the authors of the 1973 Study Paper "chose to ignore the financial implications of their proposal", though there is no analysis of what those financial implications might be.

⁶⁰ Unfortunately, the last year is 1973. In that year, of the 53,964 persons charged with indictable offences, there were 4,671 acquittals. See Statistics of Criminal and Other Offences, 1973. (Stanscan, 1978), p. 28.

⁶¹ Although before 1973 the same information is not available for summary conviction offences, the lower acquittal rate for this category is based on unpublished research data of the Law Reform Commission of Saskatchewan.

the idea that it would be going too far normally to award costs to all successful accused. There are really two aspects to this position. One is the position that "most of them are guilty anyway" and the other is that, for other reasons, compensation on this basis would not be good public policy.

The argument that most successful accused are guilty is related to, but must be distinguished from, the earlier discussion on the status of acquitted persons. What it is hoped was demonstrated there is that we should not attempt to distinguish between persons who are truly innocent and those who are guilty but lucky. Just because we should not do so on an individual basis, however, does not preclude us from acknowledging that "most of them are guilty anyway" for the purpose of deciding, as a matter of public policy, whether to compensate successful defendants at all, or of attaching a priority to doing so.

Are most acquitted persons really guilty—if not of the offence charged, then of related conduct that should not comment them for compensation? Of course, the question is unanswerable in any definitive sense, but at least the lines of argument are clear. Those who would answer "yes" argue that the high burden of proof on the Crown implies that most of the prosecutions that fail do so not because the accused is innocent but because the burden of proof cannot be met. Those who answer "no" would say that the burden of proof is higher in theory than it is in practice. This, coupled with the vast resources of the state to investigate crimes, means that the odds of acquittal are low—as indeed they are—and that most acquittals mean innocence in fact as well as in law.

Naturally, treating an acquittal for what it is—a finding of not guilty—does not mean we have no further interest in the accused's conduct. Some who are acquitted were vulnerable to prosecution because of their own behaviour, for example lying or otherwise intentionally misleading investigators or the courts. It is therefore appropriate to assess the accused's contribution to the fact that a prosecution was commenced or continued and to reduce costs accordingly. The idea, however, is not without dilemma if they are seen to intrude upon the question of guilt or innocence. And so it is important that the criteria for assessing a defendant's contribution avoid the merits that must be taken to have been determined by acquittal.

Other policy concerns might arise on two accounts—the expected effect of wider eligibility on police and prosecutor, and its impact on the application of the reasonable doubt principle. Fear of adverse effects on police and prosecutor anticipates that cost awards may discourage them from bringing charges or continuing prosecutions in cases where they

⁶² *Supra*, footnotes 60 and 61.

should not be discouraged from doing so. More subtly, they might discourage the prosecution from discharging its duty to assist the court in discovering the truth, even if it means leading or disclosing evidence that might be fatal to the charge. The fear is well founded if costs are seen as real or implied censure of these officials, and the best way of avoiding this is a rule that defence costs normally follow an acquittal. Cost awards based on narrower eligibility are more likely to be taken as suggesting that the investigation or prosecution was misdirected or mishandled. In any event, we can acknowledge that cost awards may have some impact on the laying of charges and the conduct of prosecutions, but this may not be all bad. To the extent that they encourage reasonable caution on the part of police or prosecutor, they should be welcomed rather than feared.

The potential impact of cost awards on the reasonable doubt principle is the most discomfiting of the concerns about this subject. If costs are normally available to acquitted persons, so the argument might go, the benefit of reasonable doubt may not be extended as readily in cases where it should be. In short, costs would be a disincentive to acquittal. The argument envisages judges as unconscious guardians of the public treasury, reasoning that they will not acquit in some cases where otherwise they might if doing so also means that the accused will have his costs.

Empiricists might not credit so speculative an argument, but it should not be discounted readily. Reasonable doubt is a delicate concept and the principle requiring acquittal where it exists is rightly placed at the core of our criminal jurisprudence. Considerations that do not bear upon its application are to be avoided, and whether cost awards would be intrusive in this respect is problematic. Perhaps the most plausible response would acknowledge that the prospect of cost awards might occasionally be intrusive on the merits if the public expense of such a program were controversial, and this we do not know. This is, however, another consideration that underlies the need for cost analyses of alternative compensation proposals.

VI. *Three Case Studies: Marshall, Nelles and Sophonow*

The argument in support of the approach outlined here has been stated in general terms but is made clearer by returning to the cases of Donald Marshall, Susan Nelles and Thomas Sophonow.

Doubt about the soundness of Marshall's 1971 murder conviction and ensuing life sentence led the Minister of Justice, in 1982, to refer the matter to the Nova Scotia Court of Appeal for review as if it were an appeal from that conviction.⁶³ His appeal was allowed and a judgment

of acquittal was entered in his favour.⁶⁴ But this man, who in the *Globe and Mail's* estimate had "been left waiting too long for justice",⁶⁵ was not entirely vindicated in the Court of Appeal judgment. New evidence had caused the court "to doubt the correctness of the judgment at trial"⁶⁶ and to conclude "that the verdict of guilt is not now supported by the evidence".⁶⁷ The judgment is not, however, a finding of innocence—appellate judgments never are—and it would be of limited assistance in supporting a claim of innocence in a collateral inquiry for the purpose of costs. Donald Marshall was acquitted, that is all. Not only does the Court of Appeal judgment avoid a stronger statement in his favour, it criticizes Marshall on several counts and alleges that "any miscarriage of justice is . . . more apparent than real".⁶⁸ Though he received a modest *ex gratia* payment from the government of Nova Scotia—no doubt on account of the notoriety of his case and the public clamour for compensation⁶⁹—it is submitted that Marshall would not be entitled, under existing or proposed law anywhere in Canada, to compensation for his costs or for the eleven years he spent in jail. In particular, there is not the conclusive evidence of his innocence required by the Manitoba plan. Nor is there "true innocence" under the Saskatchewan proposal. Indeed, under the latter, Marshall might be ineligible for the further reason that he was found to have done something "that contributed or might have contributed to the institution or the continuation of the proceedings" against him.⁷⁰

Susan Nelles' claim for compensation might not have fared better. She was charged in May 1981 with four counts of murder with respect to the deaths of infants at the Hospital for Sick Children in Toronto. Her preliminary inquiry in 1982 ended after forty-five days in her discharge. Judge Vanik's reasons for not committing Nelles on her preliminary⁷¹ are not tantamount to a finding that she did not do it; there simply was no evidence justifying committal. No blame was attached to the police or to the Crown in the subsequent Royal Commission of Inquiry.⁷² In fact the Commissioner, Mr. Justice Grange, summarized the case in lan-

⁶⁴ *R. v. Marshall, supra*, footnote 1.

⁶⁵ *Globe and Mail* Editorial, Feb. 16, 1984, quoted in Harris, *op. cit.*, footnote 1, p. 389.

⁶⁶ *Supra*, footnote 1, at p. 321.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ Harris, *op. cit.*, footnote 1, p. 389.

⁷⁰ The Court of Appeal criticized Marshall on a number of counts for helping to secure his own conviction; Harris, *ibid.*, p. 321.

⁷¹ The reasons are summarized in the Report of the Royal Commission of Inquiry, *op. cit.*, footnote 2, p. 206.

⁷² *Ibid.*

guage attributed to defence counsel Austin Cooper in a discussion with the prosecutor after the discharge: "You did your job; I did mine. The police did theirs. The judge did his. The system worked."⁷³

Nelles would not be entitled to compensation under the "innocence" approach as conceived in the Manitoba plan or the Saskatchewan proposal. Additionally, under the latter she might be ineligible on a wide interpretation of contributing "to the institution or the continuation of the proceedings".⁷⁴ While the Commissioner concluded that she had done "nothing wrong" in her dealings with the police, her refusal to deny the charges or to explain herself when first approached, and her "selective answers" to police questions "may not in the circumstances have been wise".⁷⁵

Thomas Sophonow is our third example. At his first trial in Winnipeg on a charge of murder, the jury was unable to agree upon a verdict. A second trial ended in a conviction that was reversed by the Manitoba Court of Appeal and a new trial was ordered. That trial ended in a conviction which was also reversed, only this time the Court of Appeal entered a verdict of acquittal, in part because the accused by this time has been thrice tried and had spent nearly four years in jail. On the final appeal the court was divided on the question of whether the verdict was unreasonable.⁷⁶

Predictably Sophonow was considered ineligible for compensation under the Manitoba plan, as he would be under the "true innocence" approach proposed for Saskatchewan. While it would be open to him "if he has proof of his innocence to come forth with that proof"⁷⁷ the final result of the legal proceedings would not be taken as establishing his innocence.

These three cases—Marshall, Nelles and Sophonow—demonstrate the weakness of the so-called "innocence" approach to the question of compensation. All three received official or public support for the idea that recompense be made to the defendants,⁷⁸ yet neither in Manitoba

⁷³ *Ibid.*, p. 220.

⁷⁴ Law Reform Commission of Saskatchewan, *op. cit.*, footnote 4, pp. 37, 38.

⁷⁵ *Op. cit.*, footnote 2, page 217.

⁷⁶ *R. v. Sophonow (No. 2)*, *supra*, footnote 3. O'Sullivan J.A. concluded, at p. 421, that the verdict of guilt "was unreasonable as well as being vitiated by misdirection". Twaddle and Hubbard J.J.A. were not prepared to go that far; Twaddle J.A., at p. 460, observed that "there are so many instances of misdirection that I find the reasonableness of the jury's verdict to be a somewhat hypothetical question".

⁷⁷ Manitoba Attorney General Roland Pennet, quoted in Manitoba Information Services, *op. cit.*, footnote 4.

⁷⁸ See Harris, *op. cit.*, footnote 2. Also Mr. Justice Grange thought that compensation should be made available to Nelles; Report of the Royal Commission of Inquiry, *op. cit.*, footnote 3.

nor in Saskatchewan, it was proposed that the plan be adopted, is it clear that it would be available in even one of the cases. Who, then, is the innocent accused contemplated by this approach? Is he anything more than a hypothetical abstraction who, like the man on the Clapham Omnibus, is interesting to talk about but is not really of this world?

Conclusion

The proposition to which the argument in this article leads is this: any plan to compensate innocent persons who were subject to the criminal process should take innocent to mean that the presumption of innocence has prevailed. If the accused was not convicted of the offence charged, an included offence, or another crime for which he was tried concurrently, he should normally be entitled to compensation for the reasonable legal expenses incurred in defending himself. He would not receive compensation for expenses met from legal aid, and costs could be reduced where he contributed to the fact that the prosecution was begun or continued by lying or otherwise intentionally misleading the police or prosecution. The only exception to the idea that costs be tariff based out-of-pocket expenses should be the provision for a lump sum payment in cases, such as *Marshall*, where the accused served part of a prison term to which he was sentenced pursuant to a conviction which was subsequently reversed.

By this approach, all three of the accused discussed above—Marshall, Nelles and Sophonow—would be eligible for compensation. And so would a good many others, a fact which raises one reservation about this approach: the possible expense of making all who are acquitted eligible for costs. While this concern can only be resolved by cost analysis, there is reason to question what to date has been an assumption that it would be too expensive. But if that assumption proves to be accurate, eligibility should not be circumscribed by more restricted definitions of "innocence" such as we find in the Manitoba plan and the Saskatchewan proposal. If these examples were followed, one of two possible consequences would occur. Either the problem of proving innocence to establish eligibility would be such that compensation would virtually never be available, or the determination of eligibility would compromise the presumption of innocence. It would be preferable to have no plan than one with these possible results.

LAW REFORM COMMISSION
OF BRITISH COLUMBIA

REPORT ON CIVIL RIGHTS

(PROJECT No. 3)

1974

PART II—COSTS OF ACCUSED
ON ACQUITTAL

LRC 16



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TO THE HONOURABLE ALEX. B. MACDONALD, Q.C.,
ATTORNEY-GENERAL FOR BRITISH COLUMBIA:

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON CIVIL RIGHTS
(Project No. 3)

Part II—Costs of Accused on Acquittal

This Report has been prepared in the Commission's study on Civil Rights, which is Project No. 3 in the Commission's Approved Programme.

Strive as we may for perfection, institutions created by man are fallible. So, in the administration of criminal justice, it is inevitable that from time to time persons will find themselves before the Courts, charged with offences which they did not commit. We have concluded that the losses suffered by such persons should be borne by society as a whole.

Thus, in this Report, we recommend a scheme aimed at compensating those individuals who are charged with offences under Provincial law and subsequently acquitted or otherwise discharged.

Of the many factors, the most significant is that which is the basic purpose of the

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Although Provincial sense of the term,⁸ largely parallel those *Convictions Act*⁴ which Province are essential *Code*.⁵ Even when filled *mutatis mutandis* Provincial offences the same way as is not are concerned.

Our criminal justice conviction of innocent until convicted as though at the time the accused presumption of innocence the accused beyond extract from *Woolf* Viscount Sankey:

Throughout the to be seen, that guilt . . . If reasonable doubt, the prisoner . . . prisoner is entitled

This basic principle *Bill of Rights*,⁹ which . . . deprive presumed innocent hearing by an inferior bail without justice

Under section 59 (is contained, albeit not to be guilty of

¹ *Report of the Canadian* 11 (Queen's Printer, *Ibid.*, 12.

² For constitutional "crimes." See *British North*

⁴ R.S.B.C. 1960, c. 37

⁵ R.S.C. 1970, c. C-34

⁶ *Summary Convictions*

⁷ It was an attempt

amendments to the *Criminal*

⁸ [1935] A.C. 462, 481

⁹ S.C. 1960, c. 44.

¹⁰ Provincial Court of

Provincial offences.

CHAPTER I. INTRODUCTION

Of the many facets of Canada's judicial system perhaps the most significant is that which is concerned with the administration of criminal justice. A basic purpose of the criminal justice system is, as stated in the Ouimet Report:¹

. . . to protect all members of society, including the offender himself, from seriously harmful and dangerous conduct.

Although protection of society may be the basic purpose of the criminal law, the Ouimet Committee also took the view that it was self-evident that the innocent must be assured of recognition at all stages of the criminal process.²

Although Provincial offences are not regarded as "criminal" in the true sense of the term,³ the institutions and procedures adopted to administer them largely parallel those of the criminal law. The provisions of the *Summary Convictions Act*⁴ which govern the prosecution of Provincial offences in this Province are essentially a shorter version of those contained in the *Criminal Code*.⁵ Even where gaps occur in the *Summary Convictions Act* they are filled *mutatis mutandis* by the appropriate provisions of the *Criminal Code*.⁶ Provincial offences are, in essence, treated by our criminal justice system in the same way as is murder, so far as the rules of evidence and trial procedures are concerned.

Our criminal justice system places high value on safeguards against the conviction of innocent persons, and the accused is presumed to be innocent until convicted as the result of due process of law. Criminal proceedings start at the time the accused is arrested⁷ or brought before a Court, but the presumption of innocence means that the prosecutor must prove his case against the accused beyond a reasonable doubt. It has been expressed in the famous extract from *Woolmington v. Director of Public Prosecutions*⁸ delivered by Viscount Sankey:

Throughout the web of English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt . . . If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner . . . the prosecution has not made out the case and the prisoner is entitled to an acquittal.

This basic presumption is crystallized in section 2 (10) of the Canadian *Bill of Rights*,⁹ whereby Federal legislation is to be construed so as not to:

. . . deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or the right to reasonable bail without just cause.

Under section 59 (a) of the *Summary Convictions Act* the same proposition is contained, albeit in abbreviated form, whereby a person "shall be deemed not to be guilty of [a Provincial] offence until convicted thereof."

¹ *Report of the Canadian Committee on Corrections. Toward Unity: Criminal Justice and Corrections* 11 (Queen's Printer, Ottawa, 1969).

² *Ibid.*, 12.

³ For constitutional purposes, only the Parliament of Canada may legislate with respect to "crimes." See *British North America Act, 1867*, 30 Vic., c. 3, s. 91 (27).

⁴ R.S.B.C. 1960, c. 373.

⁵ R.S.C. 1970, c. C-34.

⁶ *Summary Convictions Act, supra*, n. 4, s. 101.

⁷ It was an attempt to give meaning to the presumption of innocence that led to the bail reform amendments to the *Criminal Code* in 1971. See S.C. 1970-71, c. 37.

⁸ [1935] A.C. 462, 481-482.

⁹ S.C. 1960, c. 44.

¹⁰ Provincial Court practice is to observe the standard criminal-trial procedures when dealing with Provincial offences.

As a corollary of the presumption of innocence, our trial process requires the prosecutor to present his case against the accused and establish beyond a reasonable doubt that the accused is guilty. This imposes no duty on the accused to answer the case against him, although he may run the risk of "non-persuasion" if he fails to explain apparently condemning evidence. If the accused is convicted, he is subject to a variety of penalties and controlled rehabilitation devices, including fines, imprisonment, and probation.

If acquitted, the accused is regarded in law as being entirely innocent of the offences with which he was charged, but whether or not an accused is convicted the machinery of criminal justice inevitably carries with it humiliation, inconvenience, and financial loss. An acquittal won in Court is a hollow victory to the innocent person if he has been financially destroyed in the process of establishing his innocence. What, then, are society's obligations to such accused and how are they to be met?

In May 1973 this Commission circulated a working paper which explored the problem. The theme of the working paper was stated to be that although suffering as a result of psychological and social damage may be one of the risks an individual member of the community may have to run as a condition of belonging to it, reasonable compensation for *financial* costs incurred in his defence should, in proper cases, be paid to him if he is charged, tried, and acquitted. This proposal, it was suggested, is a corollary of the concern of the law to protect the innocent.

The working paper set out, as a proposal for reform, a specific scheme for the award of costs to the acquitted accused. That proposal is set out in full as Appendix A to this Report.

Our working paper, which solicited comment on the proposal, was widely circulated among members of the criminal bar, groups having an interest in criminal justice, each Judge of the Supreme Court and County Courts in the Province, each member of the Court of Appeal, each Provincial Court Judge in the Lower Mainland who regularly hears criminal cases, each District Judge of the Provincial Court, and various prosecutors. The response was disappointing. We received only six replies which related to the substance of the proposals made; three from County Court Judges, one from a municipal prosecutor, one from the British Columbia Civil Liberties Association, and one from the Director of the Project on Criminal Procedure currently being carried out by the Law Reform Commission of Canada. The latter response took the form of a study paper on this topic which was circulated for comment and criticism in August 1973.

Since the circulation of our working paper there have been a number of new developments in addition to the circulation of the study paper referred to above. In England the various statutes which provided for costs in criminal cases have been consolidated into a single Act.¹¹ Consequent on that consolidation has come a new practice direction which radically alters the presumptions governing the exercise of discretion to award costs under the English legislation.¹² In British Columbia the *Crown Costs Act* has recently been repealed and the *Crown Proceedings Act* enacted.¹³

The final conclusions reached, and recommendations made in this Report are, therefore, based on the tentative conclusions set out in the working paper, re-examined in the light of the response received and the new developments referred to above.

¹¹ See Chapter V. ¹² *Ibid.* ¹³ See Chapter II.

CHAPTER I

At common law the "vanquished party" has no equitable jurisdiction.

The question of costs is merely one facet of the power of its agents toward the hands of the state.⁴

The system of costs centres around the king did not become endowed by the State; it was not the State; it was the old principle.

It was during the Middle Ages that the doctrine, evolved through the right and was, therefor, in III it was recognized as law, because they were Court.⁶ Considerable appearance of the feudal accompanied by a number of doctrine Judges to explain an sovereignty, person of the king can do no wrong.

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The king (the king) receive costs; for, the statutes, as beneath his dignity.

¹ "In expensarum causa" costs in judicial proceedings.

² *Ibid.*, 536.

³ The *Statute of Gloucester*, c. 15 and 4 Jac. 1, c. 3 as made such recovery. It was the defendant became entitled to costs.

⁴ There is an extensive community as a legal doctrine. 129, 229; (1926-27); 1, 7; *Comment Liability in Tort*, (1956) 40 Minn. L. Rev. (1963) 47 Ore. L.R. 357; *Proceedings Act, 1947* (1947).

⁵ Blanchly & Oatman (1942) 9 Law & Contemp. L.

⁶ Holdsworth, *A History of English Law*, 1, 7.

⁷ Blanchly & Oatman, *supra*.

⁸ 3 *Blackstone's Commentaries* on the Laws of England, comment of J. W. C. Tu. The common law knew no Crown—an omission which pay costs, and that it would technically at the suit of the defendant.

⁹ To this rule there is an exception. See *Blackstone's Commentaries*.

In England, until the Victorian era, the only way in which a subject could obtain a remedy against the Crown was by bringing a petition of right.¹⁰ In 1860 *The Petitions of Right Act, 1860*¹¹ was enacted regulating proceedings against the Crown and providing for costs to be awarded to and against the Crown in certain cases. This enactment, however, did not relate to criminal or tort matters. *The Petitions of Right Act, 1860* was amended by the *Administration of Justice (Miscellaneous Provisions) Act, 1933*¹² which provided that in any civil proceedings or arbitrations to which the Crown is a party the costs shall be in the discretion of the Court or arbitrator. Finally, the *Crown Proceedings Act, 1947*¹³ swept aside most of the immunities, other than immunities relating to criminal proceedings, which the Crown formerly enjoyed against its subjects. None of that legislation in any way affected criminal proceedings which, so far as indictable offences were concerned, had been largely governed by the *Costs in Criminal Cases Act, 1908*.¹⁴ That Act has been variously amplified and has been recently re-enacted as the *Costs in Criminal Cases Act, 1973*.¹⁵ The legislation upon which it is based has been followed by broadly similar legislation in New Zealand¹⁶ and New South Wales.¹⁷

In Canada the position is complicated by the constitutional division of powers. Two provinces¹⁸ require a petition of right and retain the old common law doctrine of sovereign immunity in relation to tort actions. The Federal position has almost paralleled the English developments.¹⁹ In 1875 a *Petitions of Right Act*²⁰ was passed which mirrored the rules in force in England under *The Petitions of Right Act, 1860*.²¹ The 1875 Act, which gave jurisdiction to the superior Courts of the provinces, was replaced in 1887 by legislation granting that jurisdiction to the Exchequer Court, which had been created in 1876.²² The need to apply for the Governor-General's fiat, which was discretionary, was removed in 1951.²³ In 1958 the *Crown Liability Act*²⁴ enlarged the substantive liability of the Crown and removed most of its immunities at common law.

In British Columbia a petition of right was required, and the common law doctrines of sovereign immunity were retained, until 1974. The enactment of the *Crown Proceedings Act*²⁵ altered this, and the law of British Columbia is now comparable to that which prevails Federally and in most other provinces.²⁶

¹⁰ This remedy was not available in actions in tort. 11 23 & 24 Vict., c. 34.
¹² 23 & 24 Geo. 5, c. 36, s. 7. ¹³ 10 & 11 Geo. 6, c. 44. ¹⁴ 8 Edw. 7, c. 15.
¹⁵ 21 & 22 Eliz. s. c. 14. There had been discrete instances of a statutory authority to award limited costs in summary matters. Section 18 of the *Summary Jurisdiction Act, 1848* gave the Justices a discretion toward costs as between prosecutor and defendant. The *Costs in Criminal Cases Act, 1908* "contained a very restricted power to allow costs to the defence . . .": Devlin L.J. in *Berry v. British Transport Commission*, [1962] 1 Q.B. 306, 324; [1961] 3 All E.R. 65 73.

¹⁶ Statutes of New Zealand 1967.
¹⁷ Statutes of New South Wales 1967, Act No. 13.
¹⁸ Prince Edward Island and Newfoundland. See generally Law Reform Commission of British Columbia, *Report on the Legal Position of the Crown* (LRC 9, 1972).

¹⁹ On the development of the present law of Crown immunity in Canada see Bourinot, *Petition of Right (Annotaton)*, [1928] 2 D.L.R. 625-656; French, *Rights in Contract and in Tort in Relation to the Crown*, (1956) 6 Chitty's L.J. 76; Jamieson *Proceedings By and Against the Crown in Canada*, (1948) 26 Can. B. Rev. 373; Kennedy, *Suits by and Against the Crown*, (1928) 6 Can. B. Rev. 329; McLaurin, *The Crown as Litigant*, (1936) 14 Can. B. Rev. 606; Strayer, *Crown Immunity and Judicial Review in Lang* (ed.), *Contemporary Problems in Public Law*, 79 (1968); *Liability of the Crown in Tort*, (1936) 14 Can. B. Rev. 499.

²⁰ S.C. 1875, c. 12.
²¹ Strayer, *Crown Immunity and Judicial Review in Lang* (ed.), *Contemporary Problems in Public Law*, 79 (1968).

²² Audette, *Practice of the Exchequer Court of Canada*, 84-85 (2nd ed. 1909).
²³ Section 18 (1) (c) of the *Petition of Right Act* enacted by amendment, S.C. 1952 c. 98.
²⁴ S.C. 1952-53, c. 30; Strayer, *supra* n. 21 at 80. ²⁵ S.B.C. 1974, c. 24.

²⁶ The *Crown Proceedings Act* implemented most of the recommendations which this Commission made in the *Report on Legal Position of the Crown*, *supra* n. 18.

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The specific issue of the award of costs against the Crown is one which has been readily resolved by the Courts in other provinces. The general rule formerly applied in Canada under the common law was that set out in *Johnson v. The King*.²⁷ In the absence of statutory modification or "exceptional circumstances" governing the matter, the Crown neither received nor paid costs. This rule, however, is not one which is generally adhered to by Canadian Courts today.²⁸ In summarizing contemporary judicial practice, Limerick J.A. in *R. v. Guidry* for the Appeal Division of the Supreme Court of New Brunswick stated:²⁹

. . . [T]he Appeal Court of Ontario had adopted the view that such a rule of common law is an anachronism and the Crown should receive and pay costs and do award costs against the Crown. "The rule of dignity which formerly prevailed that the Crown (and the Attorney-General acting for the Crown) neither asks nor pays costs, is practically superseded."

The Appeal Court of Manitoba in *Attorney-General for Manitoba v. Attorney-General of Canada*, 50 Man. R. 17 at p. 23 [1942] 1 W. W.R. 688, [1942] 2 D.L.R. 96 held. "Unless the Legislature intervenes, it will be for the Judges to determine whether the sensible attitude that apparently obtains in Ontario shall be followed or *Johnson v. The King, supra*, alone shall be looked at for guidance. . . ."

In summary, the former "general rule" that costs are not awarded to or against the Crown seems in some jurisdictions to have fallen into desuetude so far as judicial practice is concerned and has been reversed in a number of provinces by statutes dealing with specific subject-matter.

In British Columbia it is somewhat difficult to assess the extent to which the "general rule" prevails, because until very recently the old common law position was enshrined in section 2 of the *Crown Costs Act*,³⁰ which provided that:

No Court or Judge may adjudge, order, or direct that the Crown, or any officer, servant, or agent of and acting for the Crown, shall pay or receive any costs in any cause, matter, or proceedings except under the provisions of a Statute which expressly authorizes the Court or Judge to pronounce a judgment or to make an order or direction as to costs in favour of or against the Crown.

That provision was more stringent than the rule set out in *Johnson v. The King*,³¹ as it could not be relaxed in "exceptional circumstances."

The *Crown Costs Act* was initially passed in 1910.³² The reasons for its enactment have not been obscured with the passage of time. The immediate cause is found in the judicial policy then being applied. The practice in British Columbia concerning the award of costs in Provincial offences prior to this Act has been set out in two decisions: *R. v. Little*³³ and *In re Narain Singh*.³⁴ In *Little*, costs were awarded to the Crown in a *certiorari* application to quash a conviction under section 4 of the *Coal Mines Regulation Act*.³⁵ In dismissing the *certiorari* application, the Full Court held that costs would be

²⁷ [1904] A.C. 817, 825 (P.C.).

²⁸ For a discussion of the question whether costs may be awarded against the Crown, see *Goollah v. The Queen*, (1967) 59 W.W.R. 705, 717, 735, in which the case law on the matter was reviewed by the Manitoba Court of Appeal and in which it was held that in appropriate cases costs may be awarded against the Crown.

²⁹ [1965] 47 C.R. 375, 380; [1966] 2 C.C.C. 161. This case dealt with costs on appeal under the *Summary Convictions Act*, S.N.B. 1960, c. 72. It was held that the Court had the power to award costs against the Crown.

³⁰ R.S.B.C. 1960, c. 87. ³¹ *Supra* n. 27.

³² (1910) *Journals of the Legislative Assembly (B.C.)*, 58.

³³ (1898) 6 B.C.R. 321. ³⁴ (1908) 13 B.C.R. 477.

³⁵ R.S.B.C. 1897, c. 138. Little was charged with being the manager of a coal mine and allowing a Chinese to be employed at the mine.

awarded to the Crown stating: ". . . The old rule [that the Crown neither asks for nor pays costs] has been broken into of late years."³⁶

That decision was followed by the Full Court in *In re Narain Singh* and costs were granted against the Crown in a successful habeas corpus application where a number of immigrants had been gaoled under Provincial legislation³⁷ which was held to be *ultra vires* in the light of the existing Federal *Immigration Act*.³⁸ In delivering the judgment, Hunter C.J. held:³⁹

In this case the Court had decided to adhere to the rule of practice laid down 10 years ago in the case of *Regina v. Little* (1898), 6 B.C.R. 321, in which it was established that the Court would and should on occasion give costs either for or against the Crown. That practice as then established has never been interfered with by the authorities, although they have had frequent occasion to change the rule; and therefore it must be understood so far as we are concerned, that we will not interfere with it, especially as in our opinion the practice is reasonable.

The Journals of the Legislative Assembly do not reveal any background to the *Crown Costs Act*, but a survey of the contemporary newspapers shows that the impetus was derived from the Attorney-General's concern at the decision in *Narain Singh*.

At the second reading of the Bill on February 9, 1910,⁴⁰ one commentator summarized its effects:⁴¹

A measure which practically went through today will hit the man who may unfortunately be wrongfully prosecuted and who has to appeal to the Supreme Court in order to get relief from fine or imprisonment. This bill will effectively prevent the court from giving him costs as against the Crown, as has been what the courts themselves term the very reasonable practice in this province. H. C. Brewster protested against such a reactionary piece of legislation going through.

In outlining the policy lying behind the Bill in some detail, the same commentator reported:⁴²

Mr. Bowser [the Attorney-General], moving the second reading of a bill respecting Crown costs, said the practice of British courts, settled by the House of Lords, was that the Crown, acting for the people and in the public interest alone, could not either receive or pay costs. The B.C. courts, as he considered, were misinterpreting the law, and in a recent case the Chief Justice had laid it down that the courts did not feel like departing from the practice of ten years past. In that case an Indian agent had laid information, the magistrate in all good faith had recorded a conviction and then the Attorney-General's department was dragged in to defend a conviction, and be mulcted in costs, in a matter with which it had never had anything to do.

H. C. Brewster looked upon the bill as quite unnecessary. It placed any man who might be wrongfully brought before the courts in a position of helplessness in the matter of costs. In the recent case referred to Chief Justice Hunter, in Full Court, in stating that the court did not intend to depart from the practice of the past added: "Especially as in our opinion the practice is reasonable." Suppose the province had an inefficient Attorney-General the public accounts would show these costs being paid owing to that cause, and the people would demand a better man in the office.

"I think," added Mr. Brewster, "that what the people demand is more progressive and less reactionary legislation. I am sorry the Attorney-General has brought in this Bill, and I do not think it should pass unless he gives us some better excuse for it than he has done."

³⁶ (1898) 6 B.C.R. 321, 322 per McColl C.J.

³⁷ British Columbia *Immigration Act*, S.B.C. 1908, c. 129.

³⁸ R.S.C. 1906, c. 93. ³⁹ (1908) 13 B.C.R. 477, 481.

⁴⁰ (1910) 39 *Journals of the Legislative Assembly*, 33.

⁴¹ *Victoria Daily Times*, Thursday, February 10, 1910. ⁴² *Ibid.*

With the benefit of the Attorney-General's office then taken up by the narrower statutory provisions. As it was enacted, section 11 of the *Crown Costs Act* and subject to

Accordingly, it was awarded to an accused authority empowering Provincial offences.

In 1974 the *Crown Costs Act*.⁴⁴ If that and of Provincial offences *Act*,⁴⁵ would once

The *Crown Costs Act* section 11 (1):

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Does that provision and expressly authorize proceedings?

The plain wording. It may, however, be remedial⁴⁶ and that before its enactment a petition of right. Section 3 (2) (e), the *Crown Costs Act*, which *inter alia* "authorizes proceedings for the due enforcement of

Thus it is not governed by section 3 of the *Crown Costs Act* and every provision or to direct the doing of any punish the doing of anything fair, large, and liberal construction of the Act, and of such provisions

⁴³ R.S.B.C. 1960, c. 37 (Court), and s. 94 (Appeal Court).

⁴⁴ *Supra* n. 25, s. 17.

⁴⁵ S. 56 of the *Summa* to this Act and no others a Justices under this Act" (under a statute of general application)

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With the benefit of hindsight it is legitimate to point out that if the Attorney-General's office were concerned about private informations being laid and then taken up by the Crown resulting in the Crown being "mulcted in costs," narrower statutory provisions could have been enacted to remedy the situation. As it was enacted, section 2 (1) of the *Crown Costs Act* was of general application and subject only to specific statutory exception.

Accordingly, in prosecutions of Provincial offences no costs could be awarded to an accused or the Crown in the absence of specific statutory authority empowering the Court to grant them. Statutory authority concerning Provincial offences is contained in the *Summary Convictions Act*.⁴³

In 1974 the *Crown Costs Act* was repealed by the *Crown Proceedings Act*.⁴⁴ If that and no more were done, the law relating to costs arising out of Provincial offences, except those governed by the *Summary Convictions Act*,⁴⁵ would once more be governed by the common law.

The *Crown Proceedings Act* does, however, make provision for costs in section 11 (1):

In proceedings against the Crown and proceedings in which the Crown is a party the rights of the parties shall, subject to this Act, be as nearly as possible the same as in a suit between person and person, and the court may

- (a) make any order, including an order as to costs, that it may make in proceedings between persons; and
- (b) otherwise give such appropriate relief as the case may require.

Does that provision, in effect, oust the common law rules relating to costs and expressly authorize the Court to award them in causing criminal proceedings?

The plain wording of section 11 (1) seems to lend itself to that interpretation. It may, however, be argued that the Act is to be interpreted as being remedial⁴⁶ and that its ambit should extend only to those civil actions which, before its enactment, could not be pursued or could be pursued only through a petition of right. Some weight is lent to that interpretation by section 3 (2) (e), the *Crown Proceedings Act*, which provides that nothing in section 2, which *inter alia* abolishes the fiat and makes the Crown liable in tort, "authorizes proceedings against the Crown in respect of anything done in the due enforcement of the criminal law or the penal provisions of any Act."

Thus it is not clear whether costs arising out of Provincial offences are governed by section 11 (1) of the *Crown Proceedings Act* or are a matter of common law. If the latter is the case other difficulties emerge because it cannot be predicted with certainty how British Columbia Judges would interpret the common law and exercise such newly acquired freedom as they may have to award costs in criminal matters. It is likely, however, that the rule in *Johnson*

⁴³ R.S.B.C. 1960, c. 373, ss. 55 (Trial), ss. 79, 82, 83 (Appeals), s. 91 (e) (stated case to Supreme Court), and s. 94 (Appeal to Court of Appeal on question of law). See Ch. III *infra*.

⁴⁴ *Supra* n. 25, s. 17.

⁴⁵ S. 56 of the *Summary Convictions Act* provides: "The fees and allowances mentioned in the tariff to this Act and no others are the fees and allowances that may be taken or allowed in proceedings before Justices under this Act" [emphasis added]. This would seem to over-ride any right at common law or under a statute of general application to award costs.

⁴⁶ Rule of construction (j) of s. 23 of the *Interpretation Act*, R.S.B.C. 1960, c. 199, states: "every Act and every provision or enactment thereof shall be deemed remedial, whether its immediate purport be to direct the doing of anything that the Legislature deems to be for the public good, or to prevent or punish the doing of anything that it deems contrary to the public good; and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act, and of such provision or enactment, according to their true intent, meaning and spirit;"

v. *The King*⁴⁷ would not prevail and the liberal trends evidenced by the *Little*⁴⁸ and *Narain Singh*⁴⁹ cases at the turn of the century and contemporary judicial practice in other provinces would be adopted.

The repeal of the *Crown Costs Act* will, in fact, have a relatively narrow effect. As costs at trial and on appeal with respect to Provincial offences are the subject of special provisions of the *Summary Convictions Act*,⁵⁰ the right to award costs to the acquitted accused, either at common law or under the *Crown Proceedings Act*, is ousted in favour of the more specific provisions.⁵¹

The actual impact of the repeal of the *Crown Costs Act* would seem to be limited to proceedings relating to the extraordinary remedies of certiorari, prohibition, mandamus, and habeas corpus⁵² arising out of Provincial offences,⁵³ and costs may now be available.

⁴⁷ *Supra* n. 27. ⁴⁸ *Supra* n. 33. ⁴⁹ *Supra* n. 34. ⁵⁰ *Supra* n. 43.

⁵¹ The relevant sections of the *Summary Convictions Act* are examined in greater detail in the following chapter.

⁵² It will be recalled that it was a successful application for *habeas corpus* that prompted the enactment of the *Crown Costs Act*.

⁵³ The law relating to the availability of costs on applications for extraordinary remedies arising out of *Criminal Code* proceedings is unsettled. Section 438 (2) (c) of the *Code* confers on the Supreme Courts of the provinces the power to regulate, in criminal matters, the pleading, practice, and procedure in the Court, including proceedings with respect to mandamus, certiorari, habeas corpus, prohibition, bail, and costs; and the proceedings on an application to a summary conviction Court to state a case. The question which arises from this section is whether the right to make rules to regulate costs in criminal matters includes the substantive right to award such costs, or only gives the right to regulate the amount of such costs and the procedure under which they are awarded, taxed, and collected. This is an issue which has not been judicially resolved by the Supreme Court of Canada, and judicial practice varies among the provinces. See *Re Christanson*, (1951) 3 W.W.R. 133; *R. v. Cunningham*, (1953) 3 W.W.R. 345; *Re Bence*, [1954] 2 D.L.R. 460; *Re Ange*, [1970] 5 C.C.C. 371, 374 (per Laskin J.A.); *Re Sheldon*, (1972) 8 C.C.C. (2d) 355. *Cf. Ruud v. Taylor*, (1965) 51 W.W.R. 355; *R. v. McClenis*, [1970] 3 O.R. 791; *R. v. Smythe*, [1971] 2 O.R. 209; *Hrischuk v. Clarke and Policha*, (1970), 73 W.W.R. 236; *Evans v. Pesce*, (1969) 70 W.W.R. 321.

CHAPTER

A. Current Law

1. COSTS AT TRIAL

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CHAPTER III. COSTS OF ACCUSED UNDER THE SUMMARY CONVICTIONS ACT

A. Current Law and Practice

1. COSTS AT TRIAL

Section 55 of the *Summary Convictions Act* purports to grant the trial Court wide powers in the matter of costs:

(1) The Justice may in his discretion award and order such costs as he considers reasonable and not inconsistent with the fees established by section 56 to be paid

- (a) to the informant by the defendant, where the Justice convicts or makes an order against the defendant; or
- (b) to the defendant by the informant, where the Justice dismisses an information.

(2) An order under subsection (1) shall be set out in the conviction, order, or order of dismissal, as the case may be.

(3) For the purposes of this Act, costs awarded and ordered to be paid by a person under this section shall be deemed to be all or part, as the case may be, of a fine imposed against him.

Section 56 of the *Summary Convictions Act* provides that:

The fees and allowances mentioned in the tariff to this Act and no others are the fees and allowances that may be taken or allowed in proceedings before Justices under this Act.

Section 55 does not seem to have been the subject of any reported decisions, but its terms are relatively clear and the legislative intent apparent. Under subsection (1) the trial Justice¹ has a *discretion* to award *reasonable costs* to any of the persons outlined in paragraphs (a) and (b) so long as the conditions outlined in those paragraphs are met and if in his view the award is consistent with the fee structure established by section 56.

It is appropriate to deal with this last matter first since it highlights one of the more striking anomalies which was taken up in the *Hyde Report*² presented to the Vancouver Bar Association, Criminal Justice Subsection in 1969. In this context the Report states:³

The *Summary Convictions Act* . . . s. 55 provides that costs, not inconsistent with the fees and allowances set out in s. 56, are payable to a defendant by an information. This is discretionary in the Justice and is almost identical to the Code s. 716 [now s. 744].

Under s. 56, the fees and allowances mentioned in the Tariff and no others are the fees and allowances that may be taken or allowed in proceedings before Justices under the Act.

In 1966 [S.B.C. 1966, c. 45, s. 22 (d)] the Legislature amended the Tariff by the *Statute Law Amendment Act*, and deleted all but item 1 of the Tariff. *The result appears to be that the only costs that may now be assessed under the Summary Convictions Act is the \$5.00 costs of arrest. Insofar as a successful defendant is concerned, therefore, the costs are nil that he can recover.* (4)

This conclusion is similar to that drawn by Kerwin C.J. in *Attorney-General for Quebec v. Attorney-General for Canada*⁵ with respect to the effect of the

¹ Defined in s. 2 of the Act as being a "Justice of the Peace, and includes two or more Justices, if two or more Justices act or have jurisdiction, and also a Judge of the Provincial Court or any person having the power or authority of two or more Justices of the Peace."

² Report of Sub-Committee on Costs in Criminal Acquittals, Vancouver Bar Association, Criminal Justice subsection.

³ *Ibid.* at 6. ⁴ Emphasis added.

⁵ [1945] S.C.R. 600, 607-608. See also *R. v. Abram*, [1946] 1 C.R. 151.

identical terms of sections 735 and 736 of the former *Criminal Code* (now section 744): the costs referred to in the section are meant to be only those fees and allowances contained in the tariff.

Although the matter seems closed as a consequence of that decision, it is arguable that another construction could be placed on section 55. Section 55 refers to the award of costs which are not inconsistent with the fees established by section 56. Section 56 provides that:

The fees and allowances mentioned in the tariff to this Act and no others are the fees and allowances that may be taken or allowed in proceedings before Justices under this Act.

It can be argued that the tariff of fees and allowances is merely meant to provide a guide to setting the scale of costs and nothing more, as a distinction might be drawn between section 55, which speaks of "costs," and section 56 which refers to "fees and allowances": two different categories of expense. "Costs" have been defined as:⁶

A pecuniary allowance made to the successful party, (and recoverable from the losing party), for his expenses in prosecuting or defending a suit or a distinct proceeding within a suit.

"Fees" on the other hand are, *inter alia*:⁷

[R]ecompense for an official or professional service or a charge or emolument or compensation for a particular act or service.

The term "allowance" in this context usually refers to costs which the ordinary scale does not allow,⁸ but it is arguable that the Legislature was merely referring to paragraphs 26, 28, and 29 of the tariff: specified⁹ expenses incurred as opposed to a fee for attending and taking part in the trial. The construction of section 55 adopted in the *Hyde Report* would, in effect, render that section nugatory.¹⁰ Accordingly, the view could be taken that the discretion to award costs in section 55 is in no way contingent on the existence of a scale in the tariff to the Act except so far as the scale must be taken as a guide by the Court in assessing the *amount* of costs to be awarded. Such a view, however, clearly conflicts with the decision of the Supreme Court of Canada in *Attorney-General for Quebec v. Attorney-General for Canada*¹¹ and probably would not prevail in British Columbia Courts.

A further statutory provision for costs may be found in section 335 of the *Vancouver Charter*,¹² which provides that:

Every fine and penalty imposed by or under that authority of this Act may, unless other provision is specially made therefor, be recovered and enforced *with costs* on summary conviction before a Justice of the Peace.¹³

This leads to a paradox: "costs" are undefined in the *Vancouver Charter* and the prosecution procedure is defined in the *Summary Convictions Act*. But under the latter Act, effectively, costs at trial cannot be awarded. How then do the Courts arrive at the scale of costs in the numerous parking offence prosecutions occurring in Vancouver?

2. COSTS AGAINST INFORMANTS

The term "informant" is defined in section 2 of the *Summary Convictions Act* as "the person who lays an information." In the ordinary course of events an information will be laid by a public official, normally a police officer,

⁶ *Black's Law Dictionary* 415 (4th ed.). ⁷ *Ibid.*, at 740. ⁸ *Ibid.*, at 101.

⁹ E.g., mileage travelled and actual living expenses when away from ordinary place of residence.

¹⁰ Such an interpretation, in fact, seems to be in conflict with s. 23 (*f*) of the *Interpretation Act*, R.S.B.C. 1960, c. 199.

¹¹ *Supra* n. 5. ¹² S.B.C. 1953, c. 55. ¹³ Emphasis added.

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B. Costs of Appeal

1. TRIAL DE NOVO

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¹⁴ In private prosecu Crown, private individuals by s. 2 of the *Summary Convictions Act* and respective counsel or agents.

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¹⁶ Section 615 of the in terms to the *Summary Convictions Act* "informant" remains un-

¹⁷ *Attorney-General for Canada v. Attorney-General for Quebec*, 18 S. 55 (2).

¹⁸ S. 55 (2). ¹⁹ S. 55 (2). ²⁰ An "Appeal Court" conviction or order was ma

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although sometimes informations may be laid by private individuals.¹⁴ As section 55 provides that the costs of the acquitted accused (if awarded) shall be borne by the informant, a *de facto* limit on recovery is created that amounts to one of the Act's more obvious defects. There is a natural reluctance on the part of trial Judges to award costs against individual police officers who have acted honestly and in the ordinary pursuit of their duties.

The earlier legislation did not impose this limitation on the award of costs. Section 47 and 48 of the earlier *Summary Convictions Act*¹⁵ provided that:

47. In every case of a summary conviction or of an order made by a Justice, such Justice may, in his discretion, award and order in by the conviction or order that the defendant shall pay to the prosecutor or complainant such costs as to the said Justice seem reasonable in that behalf and not inconsistent with the fees established by law to be taken on proceedings had by and before Justices. Code, s. 735.

48. Whenever the Justice, instead of convicting or making an order, dismisses the information or complaint, he may, in his discretion, in and by his order of dismissal, award and order that the prosecutor or complainant shall pay to the defendant such costs as to the said Justice seem reasonable and consistent with law.

Under these provisions the Court has a discretion to award costs to or against the prosecutor or complainant and the defendant. The change in text was wrought in 1955, apparently to bring the language into conformity with that adopted during the revision of the *Criminal Code* in 1953.¹⁶

In summary, restricting costs to those recoverable from and by informants renders section 55 of the *Summary Convictions Act* of very little real effect. When that feature is combined with the construction placed on the comparable *Criminal Code* provision by the Supreme Court of Canada¹⁷ (that only the tariff [or other statutory items] can be recovered), then section 55 is rendered nugatory in every sense except for the informant who may be awarded the sum of \$5, that being the cost of arresting the defendant under warrant where a summons has been previously issued. The only conclusion to be drawn is that, for all practical purposes, section 55 is no more than meaningless statement of principle.

Section 55 requires the Court to set out an order as to costs in the order for conviction or dismissal,¹⁸ and such costs are deemed to be part of a fine where such is adjudged, so the remedies available on nonpayment of costs apply in the same way as to fines.¹⁹

B. Costs of Appeals

1. TRIAL DE NOVO IN COUNTY COURT

The ordinary appeal is by way of a trial *de novo* in a County Court²⁰ under section 79 of the *Summary Convictions Act*, which provides that:

Where an appeal has been lodged in accordance with this Act from a conviction or order made against a defendant, or from an order dismiss-

¹⁴ In private prosecutions it will be a private individual but, in some proceedings taken by the Crown, private individuals may also have laid the information. The term "prosecutor" is also defined by s. 2 of the *Summary Convictions Act* to mean "an informant, or the Attorney-General or their respective counsel or agents."

¹⁵ S.B.C. 1915, c. 59. These provisions applied until amended by s. 54 of the *Summary Convictions Act*, S.B.C. 1955, c. 71, which remains in force today. See now R.S.B.C. 1960, c. 373.

¹⁶ Section 615 of the *Criminal Code*, R.S.C. 1953, c. 51. The former Code provision was identical in terms to the *Summary Convictions Act* (B.C.) sections. The reason for the change from "prosecutor" to "informant" remains unclear.

¹⁷ *Attorney-General for Quebec v. Attorney-General for Canada*, supra n. 5.
¹⁸ S. 55 (2). ¹⁹ S. 55 (3).

²⁰ An "Appeal Court" under ss. 72-84 means "the County Court of the County in which the conviction or order was made or sentence passed." See s. 71.

ing an information, the Appeal Court shall hear and determine the appeal by holding a trial *de novo*, and for this purpose the provisions of section 7 and of sections 42 to 46, 50 to 55, and 67 to 70, in so far as they are not inconsistent with sections 72 to 84, apply *mutatis mutandis*.

At first sight, because section 55 seems to apply *mutatis mutandis* to the appeal, the same criticism levelled at the trial position can be made concerning appeals. The criticism levelled at the trial position must, however, be tempered with respect to the trial *de novo* as a result of section 82 (1), which provides that:

Where an appeal is heard and determined, or is abandoned or is dismissed for want of prosecution, the Appeal Court may make any order with respect to costs that it considers just and reasonable.

This provision obviously alters the effect of section 55 so far as it applies to appeals because it grants the County Court a discretion to award costs that it considers just and reasonable *without reference to a tariff or schedule*. If County Courts exercised their discretion as granted, the position with respect to costs would not be unsatisfactory.

The difficulty is that, for the purpose of ensuring uniform judicial practice in matters such as costs in criminal cases, in some Counties Judges have decided *not* to award costs in any event²¹ involving a summary conviction appeal, whether Provincial or under the *Criminal Code*. The rationale, apart from standardizing judicial practice, seems to be that since costs cannot be awarded by the Court of Appeal on indictable offence appeals under section 589 (3) of the *Criminal Code*, it would be inequitable to permit such costs in summary conviction matters, which are generally held to be of lesser social gravity, on appeal by trial *de novo*.²² This reasoning is not entirely convincing. If it is desirable to award costs in any criminal proceedings, it should not be a bar in lesser offence appeals that indictable offences are not susceptible to awards of costs. The existence of an inequity should not be a reason for extending it. At best, there is a diversity of judicial practice in the matter, and in Vancouver County, which is most concerned with such appeals, the practice is *not* to exercise the discretion at all.

2. APPEALS BY WAY OF STATED CASE

Under section 85 (1) a party to proceedings under the *Summary Convictions Act* may appeal a conviction, order, determination, or other proceeding of a Justice on the ground that it is erroneous in law or is in excess of jurisdiction. An appeal of this kind is launched by applying to the Justice to state a case outlining the facts as found and the grounds on which the proceedings are questioned. The appeal is heard in the Supreme Court²³ which, under section 91 (e), is empowered to make "any order with respect to costs that it considers proper, and that could be made by a Justice, but not against the Justice who states a case."²⁴ With respect to these appeals the discretion vested in the Supreme Court seems to be limited in the same way as that of a Justice under section 55.

²¹ This information was volunteered by a Vancouver County Court Judge who said it was the practice in that County and others.

²² This explanation was also made by the same County Court Judge.

²³ S. 91.

²⁴ Except as provided in s. 89 (2), e.g., where a Justice has refused to state a case.

3. APPEALS ON

These appeals are governed by the *Summary Convictions Act*, which provides:

94. (1) The Court, before making an order with respect to costs against a party to an appeal under section 85 (1), shall consider the interests of justice and the costs of the appeal.

(2) The Court may, in making an order with respect to costs, take into account the conduct of the parties to the appeal.

(3) The Court may, in making an order with respect to costs, take into account the financial position of the parties to the appeal.

(4) The Court may, in making an order with respect to costs, take into account the financial position of the parties to the appeal.

Section 94 (3) award costs.

C. Conclusions

In summary, the Provincial offences Act provides for an appeal from a summary conviction appeal.

(a) The Court of Appeal may award costs.

(b) The Court of Appeal may award costs.

(c) The Court of Appeal may award costs.

(d) The Court of Appeal may award costs.

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²⁵ These in no way limit the power to award costs.

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3. APPEALS ON QUESTIONS OF LAW TO THE COURT OF APPEAL

These appeals may be taken under section 94 of the *Summary Convictions Act*, which provides that:

94. (1) An appeal to the Court of Appeal may, with leave of that Court, be taken on any ground that involves a question of law alone against

- (a) a decision of a Court in respect of an appeal under section 79; or
- (b) a decision of the Supreme Court in respect of a stated case under section 91.

(2) Sections 581 to 595 [now ss. 601 to 616]²⁵ of the Criminal Code apply, mutatis mutandis, to an appeal under this section, and the Court of Appeal may grant a new trial.

(3) Notwithstanding subsection (2), the Court of Appeal may make any order with respect to costs that it considers proper in relation to an appeal under this section.

Section 94 (3) seems to give the Court of Appeal a complete discretion to award costs.

C. Conclusions

In summary the existing provisions relating to the award of costs in Provincial offences are defective in that:

- (a) The right to costs arising out of the extraordinary remedies is unsettled following the enactment of the *Crown Proceedings Act* and the repeal of the *Crown Costs Act*.
- (b) The right to costs arising out of trial under the *Summary Convictions Act*
 - (i) is conditional on an essentially nonexistent tariff;
 - (ii) is nonexistent in cases where the charge has been withdrawn by the Crown, where a stay of proceedings has been entered or where unnecessary, or a large number of remands or adjournments have caused a party to incur additional expenses;
 - (iii) provide only for payment by the informant personally if costs are awarded to the accused.
- (c) Where a wider discretion to award costs exists, such as in appeals by way of trial *de novo*, judicial practice is not uniform.
- (d) Those fees and expenses provided for in the tariff in the *Summary Convictions Act* are unrealistically low.

²⁵ These in no way relate to the power to award costs except in so far as s. 610 (3) excludes the power to award costs in appeals concerning *indictable offences*.

CHAPTER IV. JUDICIAL IMPRESSIONS OF THE EXISTING POSITION

A. Summary of Judicial Views

In the course of this study a questionnaire was prepared and circulated in an attempt to survey judicial views of the existing powers to award costs in Provincial offence proceedings. Copies of the questionnaire were sent to the 22 Provincial Court Judges and the five County Court Judges in Vancouver. Replies were received from eight Provincial Court Judges and two County Court Judges.

The following table summarizes the results of that survey:

	Provincial Court	County Court
1. Do you consider the provisions relating to the granting of costs in cases falling under the <i>Summary Convictions Act</i> , R.S.B.C., c. 373, to be adequate?		
No	8	2
Yes	-	-
2. If you feel the provisions are inadequate, does this criticism apply to costs to be awarded to:		
Witnesses	1	-
The accused	-	-
Both witnesses and the accused?	7	2
3. In the event of legislation enabling a Court to award costs to an accused in a trial involving Provincial offences being enacted, in what type of cases should it apply?		
The Court should be granted a complete discretion subject to a maximum scale [see, e.g., s. 1 of <i>The Costs in Criminal Cases Act</i> , 1952 (U.K.)]	3	1
The Court should have a discretion to be effected in the light of, but not bound by, stated statutory guidelines and subject to a maximum scale [see, e.g., s. 5 (2) of <i>The Costs in Criminal Cases Act</i> , 1967 (N.Z.)]	4	1
The Court should have no discretion and the situations in which costs should be awarded should be spelled out in such legislation	1	-
4. The nature of costs that may be awarded		
Should be left to the discretion of the Court, subject to a maximum scale	6	1
Should be clearly defined in any proposed legislation	2	1
5. Any proposed legislation should also make provision for costs to be awarded in favour of the Crown in appropriate cases.		
Yes	6	2
No	1	-
Not sure	1	-

One Provincial Court Judge took the view that:

. . . awarding of costs to either party in a criminal proceeding or quasi-criminal proceeding, . . . might delay justice and be fairly costly as regards administration. In most cases of a criminal nature where there is a trial, there are sufficient complications without bringing in the question of costs . . . there is some advantage to keep the administration of justice as simple as possible.

The same Judge was of the opinion, however, that the scale of witness fees (both Crown and defence) is too low and should be amended.

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This view regarding the scale of witness fees was repeated by another Provincial Court Judge. A further concern raised, not covered by the questionnaire, related to cases where the prosecutor has obtained an adjournment resulting in additional costs to the defendant, whether he is acquitted or not. The same concern was voiced regarding the use of a stay of proceedings by the Crown when it has been refused an adjournment. This last matter is now one that falls directly within the purview of this Report since, although there are no indictable Provincial offences, the power to stay proceedings has been extended to summary conviction offences.¹

B. Conclusions

Any conclusions to be drawn from the questionnaire must be imperfect, having regard to the small sample tested and the few responses received. At least one thing, however, stands out clearly: all those Judges responding are of the opinion that the existing provisions relating to the award of costs at trial under the *Summary Convictions Act* are inadequate or defective. Almost unanimous views were held that the defects relate to the power to award costs and expenses to the accused and witnesses (for both the Crown and the accused).

There is a diversity of views concerning the type of case which should be susceptible to an award of costs. A small majority favoured a discretion with stated guidelines and subject to a maximum scale.² Most Judges felt that the trial Court should have a discretion (subject to legislative scale maxima) as to the *nature of costs* to be awarded and, again, there was almost unanimity in the view that the Crown, too, should be capable of obtaining any type of award that may be made to an accused.

¹ See s. 732 (1) of the *Criminal Code*. This would seem to be incorporated by reference into the *Summary Convictions Act* by s. 101.

² As in s. 5 (2) of the *Costs in Criminal Cases Act, 1967 (N.Z.)*. See Appendix C.

CHAPTER V. COMPARATIVE SURVEY OF EXISTING SCHEMES

There are several statutory schemes in the Commonwealth relating to the award of costs in criminal cases.¹ It is proposed to consider briefly the three major schemes, since there are a number of features unique in each system. The practice in the United States of America will also be reviewed.

A. United Kingdom:² The Costs in Criminal Cases Act, 1973³

1. GENERAL

This Act governs the granting of costs in most criminal proceedings. Costs may be awarded by Magistrates' Courts,⁴ Crown Court,⁵ Divisional Court,⁶ Court of Appeal,⁷ and the House of Lords⁸ to either the accused or the prosecutor. Costs may also be awarded to witnesses.⁹ Provision is made in almost all cases for the payment of these costs from "central funds" provided by the Government.¹⁰ Costs may also be awarded between parties at trial Court and at various levels of appeal.

No guidelines are set out in the Act indicating when costs are appropriate. The discretion of the Judge is total. Nor is any tariff provided¹¹ beyond the general reference to costs "reasonably sufficient to compensate the [party concerned] for the expenses properly incurred by him," and to compensate any witness "for the expense, trouble or loss of time properly incurred in or incidental to his attendance."¹² The award of costs to a witness for the defence does not turn on an award of costs to the accused.¹³ The amount of costs is to be ascertained as soon as practicable by the appropriate officer of the Court.¹⁴ It seems that there must, in addition, be some evidence of the accused's ability to pay before an order will be made against him.¹⁵

In a 1968 Practice Direction by the Criminal Division of the Court of Appeal, Lord Parker C.J. made the following observations concerning section 1 of the 1952 Act:¹⁶

¹ There are four major schemes in existence at the present time: the United Kingdom (excluding Scotland), Northern Ireland, New Zealand, and New South Wales. Western Australia is in the process of reviewing the law relating to the payment of costs in criminal cases, and their Law Reform Committee has recommended that an acquitted accused should be awarded his costs subject to the discretion of the Court. See working paper *Payment of Costs in Criminal Cases* (1972). In Tasmania, legislation permits costs to be paid to an accused in respect of a new trial rendered necessary by reason of the initial proceedings having proven abortive, or because the jury's verdict was insupportable. See *Appeal Costs Fund Act, 1968* (Tas.), No. 57.

² The *Costs in Criminal Cases Act, 1973* (U.K.) does not extend to Scotland or Northern Ireland (s. 22). Northern Ireland, however, has enacted similar legislation. See *Costs in Criminal Cases Act* (Northern Ireland) 1968, c. 10.

³ 21 & 22 Eliz. II, c. 14. The Act is included as Appendix B to this Report. It merely consolidated the provisions relating to costs in a number of existing Acts, the main one being the *Costs in Criminal Cases Act, 1952*, 15 & 16 Geo. VI and 1 Eliz. II, c. 48 [hereafter referred to as the 1952 Act]. The 1952 Act was itself a consolidating Act which repealed the *Costs in Criminal Cases Act, 1908*, 8 Edw. VII, c. 15, and amended and consolidated other statutes dealing with costs. The 1952 Act was substantially amended by the *Courts Act, 1971*, c. 23. For a comprehensive study of the 1952 Act up to 1969, see G. J. Graham-Green, *Criminal Costs and Legal Aid* (2nd ed. 1969). For a general review, see (1952) 102 L.J. 580; (1956) 100 Sol. J. 255; (1959) 26 The Solicitor 184; (1960) 124 J.P. 198; 110 L.J. 679; (1961) 125 J.P. 440; (1967) 131 J.P. 504; 117 New L.J. 1373; and A. K. R. Kiralfy, *The English Legal System* (4th ed. 1967).

⁴ Ss. 1, 12. ⁵ Ss. 3, 4. ⁶ S. 5. ⁷ Ss. 7, 9-11. ⁸ Ss. 6, 10, 11. ⁹ Ss. 1, 3, 8.

¹⁰ An exception would seem to be summary trial of informations in Magistrates' Courts when costs may be awarded only between parties. See Appendix B, s. 2.

¹¹ But, "rates or scales of payments of any costs payable out of central funds" may be prescribed by the Secretary of State under s. 17 (1) (a).

¹² See, e.g., s. 3 (3).

¹³ Ss. 1 (7), 3 (8). In some cases costs may not be awarded to character witnesses. See 1 (5), 3 (5).

¹⁴ Ss. 1 (6), 3 (6), 4 (2), 5 (3), 6 (3), 7 (4), 8 (3), 9 (3), 10 (3), 11 (2), 12 (2).

¹⁵ *R. v. Pottage*, 1922 17 Cr. App. R. 33. An order may be discharged on appeal by the Court of Appeal on evidence of means: *R. v. Howard*, (1910) 6 Cr. App. R. 17; *R. v. Jones*, (1921) 16 Cr. App. R. 52. Imprisonment may not be ordered in default of payment: *R. v. McClusky*, (1921) 15 Cr. App. R. 148.

¹⁶ [1968] 1 W.L.R. 389; [1968] 1 All E.R. 778.

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Act, 1973³

criminal proceedings. In the Criminal Appeal Court,⁵ Divisional Courts, either the accused or the Crown are provided with "central funds" provided between parties at trial.

Costs are appropriate. They are provided¹¹ beyond the means of the [party compensated] to compensate any loss incurred in or incidental to the defence. The amount of costs is appropriate officer of the court. The evidence of the court is not sufficient. The decision of the Court of Appeal concerning section

United Kingdom (excluding Australia) is in the process of being reviewed. The Law Reform Commission has recommended that the discretion of the court should be removed. Legislation permits the court to award costs by reason of the initial decision. See *Appeal Costs*.

England and Northern Ireland. See *Criminal Cases Act*.

It merely consolidated the *Costs in Criminal Proceedings Act 1952*. The *1952 Act*, 1908, 8 Edw. VII, c. 12. The *1952 Act* was substantially replaced by the *1973 Act* up to 1969, see G. J. [?], review, see (1952) 102 *L.J.* 679; (1961) *The English Legal System*.

³ Ss. 1, 3, 8. ⁴ *Costs in Criminal Proceedings Act* when costs

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(2). ⁵ Appeal by the Court of Appeal, (1921) 16 Cr. App. R. 107; (1921) 15 Cr. App.

The court's attention has been drawn to several recent cases in which on an application being made on behalf of an acquitted person for costs under s. 1 of the Costs in Criminal Cases Act, 1952 the judge . . . has awarded less than the sum put forward as representing the costs of the defence. Once, however, the judge has exercised his discretion in favour of making an award of costs there is no further discretion to limit the amount awarded to a contribution, such as a percentage of the amount asked for because the section refers to payment of "the expenses properly incurred" in carrying on the defence. At the same time the acquitted person is not entitled to anything more than the costs properly incurred. The proper approach is to assume the defendant to be of adequate but not abundant means and to ask oneself whether the expenses were such as a sensible solicitor in the light of his then knowledge would consider reasonable to incur in the interests of his client, the defendant. . . .

Section 1 (5) of the Act of 1952 provides specifically that the amount of costs is to be ascertained by the proper officer of the court and, accordingly, the judge should in general refer the question of amount to the proper officer. Should however the judge have no reason to think that the sum asked for is in any way excessive there is no reason why he should not, in the interests of expedition, award that sum without referring the matter to the proper officer.

There appears to be no reason why these remarks should not apply also to the 1973 Act.

The nature of the costs recoverable under this legislation is not subject to any general limitation, and includes counsel's or solicitor's fees.¹⁷ All costs may be recovered if shown to be reasonably incurred in the prosecution or defence. The witnesses' expenses may be laid down by regulations made by the Secretary of State.¹⁸

Costs may be awarded on information or complaint which is not proceeded with or where an accused is committed for trial but the trial is not proceeded with.¹⁹

2. THE EXERCISE OF DISCRETION TO AWARD COSTS

Neither the 1952 Act nor the 1973 Act contains any guidelines concerning the circumstances in which costs should be awarded to the acquitted accused. On the face of the legislation the award is purely a matter of discretion for the Judge. In fact, this question has been the subject of a number of Practice Directions which give some insight into how the English system has operated, and will continue to operate in practice.

Shortly after the 1952 Act came into force a Practice Direction was issued by Lord Goddard C.J. which stated that costs should be awarded only in "exceptional cases."²⁰ This rule was amplified by Lord Parker C.J. in a further Practice Direction in 1959:²¹

The court's attention has been drawn to the difficult question as to the lines on which the discretion to award costs to an acquitted person should be exercised. . . . The discretion is in terms completely unfettered, and there is no presumption one way or the other as to the manner of its exercise.

In a statement issued on May 24, 1952, this court, while emphasizing that every case should be considered on its merits, said that it was only in exceptional cases that costs should be awarded. . . . While no attempt was there made to catalogue the exceptional cases in which costs might be awarded, such illustrations as were given were cases where the prosecution

¹⁷ S. 20 (2).
¹⁸ S. 17 (1). For the regulations made under the 1952 Act, see *Witnesses' Allowances Regulations*, S. I. 1971 No. 107.
¹⁹ S. 12. ²⁰ (1952) 36 Cr. App. R. 13. ²¹ [1959] 3 All E.R. 471.

could be said to be in some way at fault. On the other hand a suggestion has been canvassed that the mere fact of an acquittal should carry with it the expectation that the discretion would be exercised in favour of the acquitted person. Were either of these views correct, the effect would be to impose a fetter on the exercise of the absolute discretion conferred by the statute. As we have said, there is no presumption one way or the other as to its exercise. Each case must be considered on its own facts as a whole and costs may and should be awarded in all cases where the court thinks it right to do so. It is impossible to catalogue all the factors which should be weighed. Clearly, however, matters such as whether the prosecution have acted unreasonably in starting or continuing proceedings and whether the accused by his conduct has in effect brought the proceedings, or their continuation, on himself, are among the matters to be taken into consideration. On the other hand the court desires to make it plain that they entirely dissociate themselves from the view that the judge is entitled to base his refusal to award costs on the ground that he thinks that the verdict of the jury was perverse or unduly benevolent. The mere fact that the judge disagrees with the verdict of the jury is no more a ground for refusing to award costs to the acquitted person than the mere fact of his acquittal is a ground for awarding them.

In *R. v. Sansbury*,²² Devlin J. (as he then was) stated that the Practice Direction of Lord Parker had not laid down any new law, but had made it clearer that the Judge's discretion was rather wider than had previously been thought; and it was made quite clear that the widely held notion that an award of costs against the prosecution necessarily involved some reflection on the conduct of the prosecution was quite wrong. In other words, misconduct was not a condition precedent to an award of costs against the prosecution under the 1952 Act.²³

As the 1973 Act introduced no changes in principle, one might think that the principles set out in the 1952 and 1959 practice directions would continue to guide the exercise of discretion to award costs. That has not been the case. A further practice direction issued by Lord Widgery C.J. seems to have altered the position radically:²⁴

Although the award of costs must always remain a matter for the Court's discretion, in the light of the circumstances of the particular case, *it should be accepted as normal practice that when the Court has power to award costs out of central funds it should do so in favour of a successful defendant, unless there are positive reasons for making a different order.* Examples of such reasons are:—

- (a) where the prosecution has acted spitefully or without reasonable cause. Here the defendant's costs should be paid by the prosecutor.
- (b) where the defendant's own conduct has brought suspicion on himself and has misled the prosecution into thinking that the case against him is stronger than it really is. In such circumstances the defendant can properly be left to pay his own costs.
- (c) where there is ample evidence to support a verdict of guilty but the defendant is entitled to an acquittal on account of some procedural irregularity. Here again, the defendant can properly be left to pay his own costs.
- (d) where the defendant is acquitted on one charge but convicted on another. Here the Court should make whatever order seems just having regard to the relative importance of the two charges, and to the defendant's conduct generally.²⁵

²² [1959] 3 All E.R. 472.

²³ But the Courts in England seem to have preferred to follow the direction of Lord Goddard. In an article explaining costs in Magistrates' Courts, Dr. E. Anthony J.P. states that defence costs for the acquitted accused would normally be granted only if the Court felt that the proceedings were wrongly brought and in effect constituted a criticism of the police. See (1967) 131 J.P. 504. This is in direct conflict with *R. v. Sansbury*, *ibid.*

²⁴ [1973] 2 All E.R. 592.

²⁵ Emphasis added.

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²⁷ The fact that the costs. See *R. v. Arron*,

²⁸ See Chapter VI.

²⁹ *Costs in Criminal*

³⁰ *Ibid.*, s. 4 (1), (2)

³¹ *Ibid.*, s. 4 (3), (4)

³² *Ibid.*, s. 4 (3), (4)

The reasons for this shift in thinking are not entirely clear. It may have been a response to mounting public dissatisfaction with the former, more restrictive, practice,²⁶ or it may have been based on the fact that costs are now paid from a central fund rather than by local governments.²⁷

The principles set out in the 1973 Practice Direction have been the subject of academic comment which is discussed in a later chapter of this Report.²⁸

B. New Zealand: The Costs in Criminal Cases Act, 1967²⁹

The *Costs in Criminal Cases Act, 1967* (N.Z.) seems to be based on the English model, but has been expanded to encompass additional matters. Costs are defined as "any expenses properly incurred by a party carrying out a prosecution, carrying on a defence, or in making or defending an appeal."³⁰ Where an accused is convicted, the Court has a discretion to order him to pay a just and reasonable sum toward the prosecution's costs and use, to this end, any money taken from him on his arrest.³¹ If an accused is convicted and the prosecutor has not prepaid the Court fees, such fees may be ordered to be paid by the accused, and costs awarded to the prosecutor are recoverable in the same way as a fine.³²

If an accused is acquitted or discharged, or the information is dismissed or withdrawn,³³ the Court may order that he be paid such sum as it thinks *just and reasonable* toward the cost of his defence. This discretion is absolute and can be exercised in any way the Court considers proper. The Court must, however, in exercising its discretion, take into account all the relevant circumstances, including:³⁴

- (a) Whether the prosecution acted in good faith in bringing and continuing the proceedings;
- (b) Whether at the commencement of the proceedings the prosecution had sufficient evidence to support the conviction of the defendant in the absence of contrary evidence;
- (c) Whether the prosecution took proper steps to investigate any matter coming into its hands which suggested that the defendant might not be guilty;
- (d) Whether generally the investigation into the offence was conducted in a reasonable and proper manner;
- (e) Whether the evidence as a whole would support a finding of guilt but the information was dismissed on a technical point;
- (f) Whether the information was dismissed because the defendant established (either by the evidence of witnesses called by him or by the cross-examination of witnesses for the prosecution or otherwise) that he was not guilty;
- (g) Whether the behaviour of the defendant in relation to the acts or omissions on which the charge was based and to the investigation and proceedings was such that a sum should be paid toward the costs of his defence.

²⁶ See Comment, (1973) 123 New L.J. 555.

²⁷ The fact that the accused may be in receipt of legal aid seems to be immaterial to the award of costs. See *R. v. Arron*, [1973] 2 All E.R. 1221.

²⁸ See Chapter VI. ²⁹ See Appendix C.

³⁰ *Costs in Criminal Cases Act, 1967*, s. 2.

³¹ *Ibid.*, s. 4 (1), (2). ³² *Ibid.*, s. 4 (4).

³³ *Ibid.*, s. 4 (3), (4). ³⁴ *Ibid.*, s. 5 (2).

There is no presumption for or against the granting of costs in a particular case,³⁵ but no accused is to be granted costs merely because he has been acquitted or discharged or on the ground that the information has been dismissed or withdrawn,³⁶ nor should he be refused costs merely because the proceedings were properly brought and continued.³⁷ In practice, the Courts in New Zealand seem reluctant to award costs to acquitted persons.³⁸

Section 6 of the Act provides that if an accused is convicted, but the Court takes the view that the prosecution involves a difficult or important point of law, the Court may order that the accused be paid such sum as it considers just and reasonable in the circumstances.³⁹ This section was applied in *Simpson v. Simpson*,⁴⁰ where the Court of Appeal dismissed an appeal against conviction of the accused's driving a motor-vehicle with excessive blood alcohol concentration.⁴¹ The case turned on a very technical analysis of a directory provision contained in the *Transport (Breath Tests) Notice, 1969*.⁴² The Court of Appeal allowed appellant's counsel's disbursements,⁴³ including reasonable travelling and accommodation costs "and the costs of printing the case and all other reasonable disbursements."⁴⁴

Where the Court is of the opinion that costs should be paid to an accused because the prosecution was brought, continued, or conducted negligently or in bad faith, the Court can order the costs to be paid by the Government department, officer of the Crown, local authority, or public body on whose behalf that person was acting or by that person personally, and they are recoverable as a debt.⁴⁵ Otherwise (i.e., in the absence of negligence or bad faith), an order is to be made against the Crown (if the Crown is prosecuting) and to be paid by the Secretary for Justice from money appropriated for that purpose by Parliament, and may be recovered as a debt. If the prosecution is not by or on behalf of the Crown, the order is made against the informant and recoverable as a debt.⁴⁶

The Act provides for costs on appeal⁴⁷ and for costs in those cases where a party gives notice of an appeal and fails to pursue it.⁴⁸ If the Court which determines an appeal is of the opinion that a difficult or important point of law is involved, it may order that either party's costs may be paid, irrespective of the result of the appeal. An order for costs made by either the Supreme Court or the Court of Appeal has the effect of a judgment.⁴⁹ Before awarding costs under the Act the Court must permit any party who wishes to make submissions or call evidence relating to the matter of costs a reasonable opportunity of doing so.⁵⁰

³⁵ *Ibid.*, s. 5 (3). ³⁶ *Ibid.*, s. 5 (4). ³⁷ *Ibid.*, s. 5 (5).

³⁸ See working paper of Western Australia Law Reform Committee, *Payment of Costs in Criminal Cases*, para. 23 (1972). This statement appears to be supported by the low cost of operating the scheme. See *ibid.*, para. 45.

³⁹ Subject to any regulations made under the Act.

⁴⁰ [1971] N.Z.L.R. 393.

⁴¹ In breach of s. 59A of the *Transport Act, 1962* (N.Z.).

⁴² S.R. 1969-70 (N.Z.).

⁴³ Since the Crown had undertaken not to enforce the costs awarded in the Magistrate's Court and Supreme Court.

⁴⁴ [1971] N.Z.L.R. 393, 397-398, per North P.

⁴⁵ *Costs in Criminal Cases Act, 1967*, s. 7 (2).

⁴⁶ *Ibid.*, s. 7 (1) (a), (b).

⁴⁷ *Ibid.*, s. 8.

⁴⁸ *Ibid.*, s. 9.

⁴⁹ *Ibid.*, s. 11.

⁵⁰ *Ibid.*, s. 12.

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⁵² *Costs in Criminal*

⁵³ *Ibid.*, s. 2 (b).

⁵⁴ *Ibid.*, s. 3 (1) (a Crown was unaware of (Pt. 1) (N.S.W.) 425.

⁵⁵ *Costs in Criminal*

⁵⁶ See generally Cha Lovell, *The Case for Re Defendants Upon Acquitt. tion of Probation for Inc Fines and Costs; A New Check, Attorney's Fees; Jail Fees and Court Co Procedure*, (1967) 35 Te Rev. 1572; *Criminal Cos* 76; Smyth, *The Assessme* 13 Wyo. L.J. 178.

C. New South Wales: The Costs in Criminal Cases Act, 1967⁵¹

The *Costs in Criminal Cases Act, 1967* is less detailed than the comparable United Kingdom and New Zealand legislation. A certificate may be awarded at trial to the accused after the merits of the case have been determined and acquittal or discharge has resulted.⁵² A certificate may also be awarded to the accused where, on appeal, his conviction is quashed and he is discharged.⁵³

The certificate granted by the Court must specify that, in the Court's opinion,⁵⁴

- (a) if the prosecution had, before the proceedings were instituted, been in possession of evidence of all the relevant facts, it would not have been reasonable to institute the proceedings; and
- (b) that any act or omission of the defendant that contributed, or might have contributed, to the institution or continuation of the proceedings was reasonable in the circumstances.

A certificate granted by a Justice must also specify the amounts of costs that the Court would have ordered to be paid if an order had been made against the informant, prosecutor, or complainant, as the case may be.⁵⁵

Section 4 of the Act sets out procedure under which costs granted under a certificate are to be recovered. Application is made to the Under Secretary of the Department of the Attorney-General and of Justice for payment from the Consolidated Revenue Fund. The Under Secretary is required to furnish a report to the State Treasurer specifying the amount and any amounts that in the Under Secretary's view the defendant may have received or be entitled to receive from other sources. The Treasurer then, assuming his belief that the amount is justified, may make payment. Section 5 provides for the Under Secretary to be subrogated to all rights the defendant might otherwise have had to recover costs, once payment is made. Section 6 renders a certificate granted under this Act inadmissible in legal proceedings.

D. American Practice

There is a paucity of full discussion in American legal periodicals on the question of costs in criminal cases,⁵⁶ and particularly on the subject of costs to an acquitted accused. Many states have recently amended their criminal law and criminal procedure code provisions as a result of the draft American Model Penal Code, but the question of costs has not apparently been a matter of any significance in this process. Even the President's Commission on Law Enforce-

⁵¹ See Appendix D. The 1967 Act was amended in 1971 to enable an applicant for a certificate to adduce evidence of further relevant facts not established in the original proceedings. This amendment was prompted by the decision of the New South Wales Court of Criminal Appeal in *R. v. Williams*, (1970) 91 W.N. (N.S.W.), where it was held that "all relevant facts" under s. 3 (1)(9a) means all the relevant facts as they emerged at the trial.

⁵² *Costs in Criminal Cases Act, 1967*, s. 2 (a).

⁵³ *Ibid.*, s. 2 (b).

⁵⁴ *Ibid.*, s. 3 (1) (a), (b). S. 3 (1) (a) has been taken to apply only to those defences that the Crown was unaware of prior to drawing up the indictment. See *R. v. Lawrence*, (1969) 90 W.N. (Pt. 1) (N.S.W.) 425. See also *R. v. Spall*, (1970) 91 W.N. (N.S.W.) 327.

⁵⁵ *Costs in Criminal Cases Act, 1967*, s. 3 (2).

⁵⁶ See generally *Charging Costs of Prosecution to the Defendant*, (1971) 59 Georgetown L.J. 991; Lovell, *The Case for Reimbursing Court Costs and A Reasonable Attorney Fee to the Non-Indigent Defendant Upon Acquittal*, (1970) 49 Neb. L. Rev. 515; *Reimbursement of Defence Costs as a Condition of Probation for Indigents*, (1969) 67 Mich. L. Rev. 1404; Stein, *Imprisonment for Nonpayment of Fines and Costs; A New Look at the Law and the Constitution*, (1968-69) 22 Vand. L. Rev. 611; Cheek, *Attorney's Fees; Where Shall the Ultimate Burden Lie?* (1967) Vand. L. Rev. 1216; Harvey, *Jail Fees and Court Costs for the Indigent Criminal Defendant: An Examination of the Tennessee Procedure*, (1967) 35 Tenn. L. Rev. 74; *Criminal Law—Taxation of Court Costs*, (1964) 17 Vand. L. Rev. 1572; *Criminal Cost Assessment in Missouri—Without Rhyme or Reason*, (1962) Wash. U.L.Q. 76; Smyth, *The Assessment and Collection of the Costs of a Criminal Prosecution in Wyoming*, (1969) 13 Wyo. L.J. 178.

ment and Administration of Justice ignored the question of cost taxation in its discussion of sentencing alternatives.⁵⁷

The almost universal rule in the United States is that the accused bears the cost of his defence, whether he is found guilty or innocent. In this regard American practice follows the common law rule that no costs were recoverable in any criminal Court action except by statutory provision.⁵⁸ But those statutory provisions which do exist, in most instances, permit only the imposition of the costs of prosecution⁵⁹ upon a convicted person, and there is no reciprocal legislation to permit the award of costs to the acquitted accused.⁶⁰ In fact, one Pennsylvania statute, in force for 150 years, allowed a jury to tax costs against an acquitted accused if it felt that his conduct merited censure but not conviction on the charge.⁶¹ The United States Supreme Court, however, has held the statute to be unconstitutional.⁶²

There are two recognized rationales for awarding costs against criminal defendants, one being recovery of a portion of the expenses attributable to his wrongdoing, and the other, punishment by increasing the penalty upon conviction.⁶³

Where a convicted accused is unable to pay the costs of prosecution, in the majority of states he is imprisoned until the costs are paid, or until he has served his time in gaol to fulfil his sentence or work out his fine.⁶⁴ Fourteen states unqualifiedly require criminal defendants to work out their costs completely if they are unable to pay them.⁶⁵ Several states have recognized the inequity of requiring imprisonment for nonpayment of costs and either

- (a) have no provision for taxation of costs;⁶⁶ or
- (b) by statute exempt all criminal defendants from the payment of such costs.⁶⁷

In still other states,⁶⁸ statutes specifically exempt persons who cannot pay from payment of costs or from imprisonment for nonpayment. Eleven states⁶⁹ have statutes which empower the trial Judge to release criminal defendants from liability for costs. Apparently, however, these statutes are rarely used.⁷⁰ The Federal system⁷¹ and eight states⁷² set a relatively short period for which

⁵⁷ President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* 14-28 (1967).

⁵⁸ 20 *Corpus Juris Secundum*. See also 20 *American Jurisprudence*, s. 107 (2nd ed.).

⁵⁹ These costs generally include witness fees, transcript costs, and fees of Court officers. But at least two states include the fees for Court-appointed attorneys: Virginia and Ohio. This is not the practice of the Federal Courts: 28 U.S.C. § 1918 (b) (1964). There are six states which do not tax the costs of prosecution to the convicted defendant: California, Connecticut, Massachusetts, Michigan, New Hampshire, and New York. See Note, *Criminal Law—Taxation of Court Costs*, *supra* n. 56 at 1572, n. 3.

⁶⁰ See Reviser's Note, 28 U.S.C. § 1921 (1964) at 6013 where it states: "The acquitted defendant is not permitted to tax costs against the U.S. Indeed, the allowance of costs in criminal cases is not a matter of right, but rests completely within the discretion of the court. *Morris v. U.S.*, 1911, 185 Fed. 73, 107 C.C.A. 293."

⁶¹ *Pa. Stat. Ann.* Tit 19, § 1922 (1964).

⁶² *Giacco v. Pennsylvania*, 382 U.S. 399, 402 (1965). See generally (1966) Duke L.J. 792.

⁶³ For a complete discussion of these rationales of cost assessment in American Courts, see *Charging Costs of Prosecution to the Defendant*, *supra* n. 56 at 991-1006.

⁶⁴ Indigent defendants present special problems. In Wyoming, for example, a defendant was sentenced to less than six months' imprisonment and a fine of \$100, but the costs of prosecution were over \$900. If the defendant had been unable to pay them, he would have been in gaol for over two and a half years. See (1959) 13 *Wyo. L.J.* 178, 181.

⁶⁵ Alaska, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Minnesota, Mississippi, Montana, Nebraska, North Dakota, Ohio, Texas, and Washington. See *Criminal Law—Taxation of Court Costs*, *supra* n. 56 at 1573, n. 11.

⁶⁶ Arizona, California, Iowa, and New York.

⁶⁷ Connecticut, Massachusetts, Michigan, and New Hampshire.

⁶⁸ Colorado, Illinois, Kansas, New Jersey, South Carolina, and West Virginia.

⁶⁹ Delaware, Florida, Georgia, Montana, Pennsylvania, Rhode Island, South Dakota, Tennessee, Vermont, Virginia, and Wyoming.

⁷⁰ See Note, *Criminal Law—Taxation of Court Costs*, *supra* n. 56 at 1574.

⁷¹ 18 U.S.C. § 3569 (1958).

⁷² Alabama, Hawaii, Maine, Maryland, North Carolina, Oklahoma, Oregon, and Wisconsin.

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⁷³ For a discussion at 522-524.

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an indigent defendant may be imprisoned for nonpayment of costs. None of these provisions, however, addresses itself to the question at issue in this Report: the award of costs to the acquitted defendant.

In the United States the acquitted defendant has only one avenue of recourse available: an action in tort for malicious prosecution. This has proven to be a very limited remedy.⁷³ Many states have codified provisions which deal with proceedings in which the prosecution is malicious and without probable cause. In these instances, the complainant may be ordered by the Court to pay the costs of the action.⁷⁴

In summary, cost taxation in criminal cases in the United States is an established judicial practice, "but one of uncertain and often contradictory character."⁷⁵ For the acquitted defendant the cost of obtaining "justice" may have been extremely high, as he is certain to leave the courtroom in a weakened financial condition.⁷⁶ He may have lost his job, suffered imprisonment, and been publicly humiliated. The American legal community has shown little interest in the plight of the acquitted defendant. Prof. Edmond Cahn has summarized the case for providing relief to the acquitted defendant very ably:⁷⁷

A fair-minded society will not only provide and pay independent counsel to defend all indigent persons who are arrested on serious charges; it will also pay the necessary and reasonable defence costs of all accused persons, whatever their economic condition, who are eventually found to be not guilty. As matters now stand in the United States and most other democratic countries, the state, by recognizing no duty of reimbursement after acquittal, can compel an innocent man to choose between unjust conviction and personal bankruptcy.

⁷³ For a discussion of the limitations of an action in malicious prosecution, see Lovell, *supra* n. 56 at 522-524.

⁷⁴ See generally Deering's Penal Code, Ann s. 1447 (Calif.); Minn. Stat. Ann., s. 625.07; Mont. Rev. Codes Ann. s. 94-5114; Ore. Rev. Stat., s. 137. 210; Wash. Rev. Code Ann. § 10.46.210; Wis. Stat. Ann. § 954.12 and 960.22.

⁷⁵ *Charging Costs of Prosecution to the Defendant*, *supra* n. 56 at 1005.

⁷⁶ Lovell, *The Case for Reimbursing Court Costs*, *supra* n. 56 at 523.

⁷⁷ E. Cahn, *The Predicament of Democratic Man*, 51-52 (1961), cited in Lovell, *ibid.* at 535.

CHAPTER VI. POLICY CONSIDERATIONS ON THE QUESTION OF COSTS IN CRIMINAL CASES

There are at least two primary policy aspects to the award of costs generally. The first is the compensatory aspect whereby the law attempts to compensate the successful party for those costs he has incurred in the litigation. The second aspect is the punitive and deterrent aspect of costs. Here the law is attempting to deter frivolous actions and punish a party who brings them. It is evident, though, that neither rationale can be employed to justify the existing inadequacies in the practice of awarding costs under the relevant provisions of the *Summary Convictions Act*.

Are those considerations equally forceful in the context of criminal proceedings? In particular, should the wrongly accused person be entitled to costs?

When this question arose in New Zealand the policy issues were stated in the following way:¹

There are two possible approaches to this question. The first is that exposure to the risk of a prosecution is one of the inevitable hazards of living in society and that there is no reason to shield the citizen against the financial consequences as long as no malice, incompetence or serious neglect can be attributed to the prosecutor. This view has prevailed in the past. The second is that it is unjust for an innocent man to have to suffer financial hardship, perhaps serious hardship, in establishing his innocence. The expenses of a defended criminal case even in the lower court are often quite substantial and counsel's fees together with witnesses' expenses may often go into treble figures.

The issues were resolved by the suggestion that:²

It would we think be common ground that by accepting the benefits of an ordered society the citizen becomes subject to various dangers and risks, among them the risks of being suspected, of being arrested and of being prosecuted for offences he has not committed. These dangers are minimized by the provision of fair procedure, trained and upright police forces, and speedy and efficient access to the Courts. Nevertheless there are and will always be cases where innocent men are prosecuted without any fault being necessarily laid at the door of the police. It does not seem to us to follow that in these circumstances the citizen must also be expected to bear the financial burden of exculpating himself. Because we cannot wholly prevent placing innocent persons in jeopardy that does not mean that we should not as far as is practicable mitigate the consequences.

This conclusion would seem to apply with equal force in British Columbia.

The basic proposition that costs should, in appropriate cases, be awarded to the acquitted accused did not, however, go unchallenged by two respondents to the working paper. One respondent, a County Court Judge, wrote:

There in my view are many areas of criminal law more urgently in need of study and reform. I fear that once the door is opened to payment of costs upon acquittal the disadvantage will outweigh the benefits. Judges will be plagued by applications for payment of costs as nearly everyone who has successfully defended a criminal charge will have some reason for thinking he should be reimbursed. There are cases where law enforcement authorities are under obligation to lay charges and to leave the question of guilt or innocence to the courts without any real assurance of obtaining a conviction. Are these authorities to be discouraged in the performance of their duties by the opprobrium of having an order for costs against them?

¹ *Report of Committee on Costs in Criminal Cases*, para. 28 (1966).
² *Ibid.*, para. 30.

The other respondent

The ramifications of the [working paper] increase the principal one is insignificant matters necessitating an order. This might well be a determination of costs followed by a referral.

It would not take much time, as the

From a government's point of view has experienced the absence of "costs paid" or bad faith cases, the need for such

These reactions to innovations making costs be attacked on the basis of being opened up to deluge of predictions almost invariably with some skepticism. The other objections are not so much as the suggestion is that efficiency.

The other end of the spectrum taken by the British Columbia respondents should be awarded

We reject both positions. Justice demands that costs be awarded. In such cases costs will be awarded. In the final analysis, the government does not quarrel with the scheme of legal aid in the awarding of costs to the acquitted accused. The burden of the costs of

It still remains to be seen. Should it, for example, be awarded in broad categories of

- (1) Those who are absent from court.
- (2) Those who are convicted (or acquitted) on a charge (or charges) of a category of offenses.

³ It is evident from the study carried out in Canada in a study carried out in the absence of reasonable investigation of acquitted accused. A second study of prosecution practices.

concerned with those cases where the Court is satisfied on a balance of probabilities that the accused did not in fact commit the offence charged.

- (3) Those cases within (2) where the conduct of the accused has in some way contributed to his being charged, such as unreasonably refusing to assist in the investigation or unreasonably hindering it by his silence.
- (4) Those cases where the evidence as a whole would support a conviction, but the accused is acquitted because the Crown has not managed to prove its case beyond a reasonable doubt or as the result of a technical defence being raised.

In the face of that sort of classification the instinctive reaction of many is to say that those accused in categories (1) and (2) should be awarded costs while those in (3) and (4) should not. That was, in fact, the approach which the Commission took in the working paper. We recognized that there would be "grey areas" and therefore proposed that the Courts should have a wide discretion in the awarding of costs to the acquitted accused. That discretion would, however, be exercised in accordance with specific guidelines which would tend to draw what we then considered to be desirable distinctions between the more and less worthy accused. This approach is similar to those in New Zealand and England.

That approach has not, however, been free from criticism. The basic objection to it is that two classes of acquitted accused are created: those who receive costs and those who do not. It is argued that this gives rise to a "third verdict" such as that which exists under Scottish law,⁴ and this is undesirable for a number of reasons. The objections and the arguments in favour of awarding costs to all acquitted accused are set out in the Study Paper circulated by the Law Reform Commission of Canada.⁵ Since the conclusions contained in that study paper on this important point of principle diverge from those which we advanced in our working paper, we feel obliged to present the opposing point of view in a full and fair manner and choose to do so by quoting at length from the study paper:⁶

The most difficult question to be resolved in establishing a costs awarding scheme is just who should receive them.

Earlier we noted that one direction of the rationale for awarding compensation costs to accused persons is that where an accused is successful and "it . . . turns out that though no fault of [his own] he should never have been charged at all justice demands that . . . he should be reimbursed for all the costs and expenses which he has properly incurred." But while this view has considerable appeal it also has its problems. In our system all persons who are acquitted after a trial are adjudged innocent not just those who "should never have been charged at all." So too are all accused persons against whom charges are dropped or suspended because at the outset of the criminal process all accused persons are presumed to be innocent. Thus, in theory at least, our system is one that does not provide for different kinds of innocence yet this is precisely what this direction of the compensation rationale would accomplish. As John M. Sharp pointed out in his article "Costs on Acquittal, Some Comparisons and Criticisms":⁷ "(T)he disadvantage attached to providing that defence costs should 'not-

¹ In Scotland there are three verdict alternatives: guilty, not guilty, and not proven. Either of the latter two verdicts will ensure the freedom of the accused. The "not proven" verdict indicates that the state has not established full legal proof that the accused committed the crime, whereas the Scottish verdict of "not guilty" represents a finding that the accused is in fact innocent of the alleged crime.
² A Proposal for Costs in Criminal Cases, a Study Paper proposed by the Criminal Procedure Project of the Law Reform Commission of Canada (August 1973).
³ *Ibid.*, at 7.
⁴ (1968) 16 Chitty's L.J. 77.

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mally be awarded to the innocent' would be the creation of two classes of
innocence—innocence with costs and innocence without."

Undoubtedly, to some, Mr. Sharp's point is not a disadvantage at all
but a benefit as it would tend to inject a measure of realism into the crim-
inal law system. But clearly if that were the goal then rationally it should
be accomplished directly by adopting, as in Scotland, the third verdict of
"not proven" and not indirectly through a costs awards system. To others,
more aware of the disadvantages involved in a third verdict, the point is, if
not a real disadvantage, at least a real risk that cannot be completely
guarded against by leaving the question of costs in the discretion of the
courts. It may be conceded of course that other common law jurisdictions,
including England, have costs awards systems that compensate acquitted
accused who "should never have been charged at all," and do so without
shrouding costs applications or costs awards in secrecy, and that this fact is,
perhaps, some support for down-playing the concern that to adopt this
direction will create two classes of innocence. As well those more agree-
able to this direction of costs awards would argue that to adopt Mr. Sharp's
view would require costs to be awarded as of right to all acquitted accused
and to all accused where charges have been abandoned. They would argue
that while this may be the more academically sound position to adopt it
would likely result in no costs awards system ever being established because
(a) in all likelihood it would indeed "stick in one's (the public's) throat"
to see a man acquitted on a technicality and then receive his costs" and
(b) since all costs awards would have to come from the public purse such
a broad scheme would be too expensive. However in response to these
arguments these points might be made. First, it is very risky to place much
weight on what other jurisdictions have done particularly when an examina-
tion of them reveals that, despite the theory, it is a rare case indeed where
an acquitted accused receives costs. Obviously if that is the case there is
little need to be concerned about the risk of a third verdict. Second, it is
indeed possible to provide for a wider system of costs to more persons than
the few "truly innocent" who can demonstrate that innocence without advo-
cating an expensive system of costs for everyone. Third, the concern that it
would "stick in one's throat" to see a man acquitted on a technicality and
then receive his costs is quite unjustified and should not go unanswered.
Quite apart from the value of the general verdict of not guilty to individuals
who are acquitted, the concept of legal innocence that is accepted in that
verdict has an independent value which is central to the over-all quality of
criminal justice. The concern of our system is not to maintain the reputa-
tion of the technically innocent, but that of the system of justice itself.
Those who would object to the payment of costs to acquitted persons whose
factual innocence has not been proved would thereby appear to regard the
rule relating to proof beyond a reasonable doubt and various "technical def-
ences" such as lack of corroboration, or involuntariness in the taking of a
confession, as unfortunate obstacles to the proper administration of justice.
But while the criminal law does place a number of evidentiary barriers in
the path of the prosecution of a criminal charge, they are there as essential
safeguards in order to keep the reach of the criminal law and those charged
with its enforcement within reasonable limits. It follows therefore that
while there may be some undeserving accused who are, to use the phrase-
ology of the New Zealand Report, "lucky to get off," society as a whole
derives a substantial benefit by the maintenance of the rules that make such
a disposition possible. It is on this basis that any intrusion on the value of
the verdict of legal innocence should be resisted and upon which it may be
concluded that "all the principles of British (and Canadian) justice dictate
that a man should not be penalized, sometimes severely for defending him-
self successfully against a criminal charge in a court of law."

A second and equally important problem with the first direction of the
compensation rationale is that it is too limiting. To confine costs compen-
sation to the "truly innocent" to be determined in the exercise of discretion
by the courts may limit cost awards, as in England, to very few persons. In
England, while the principle behind the *Costs in Criminal Cases Act 1952* is
reasonably broad, in practice have only been awarded to innocent accused

persons in exceptional cases. Probably one reason for this limitation is an undue restriction by the Courts on their discretionary power. But it would seem that another reason is that it is one thing to find innocence based on a reasonable doubt but quite another to establish innocence, for example probable innocence, for purposes of costs. And while that difficulty may minimize the risk that a costs awards system in favour of "innocent" accused persons will create a third verdict—because some of those denied costs may indeed be innocent but unable to prove it—it will also result in a costs awards system of little or no benefit to the vast majority of persons who are charged in the criminal process. That is not to say that the first direction (or dimension) of the compensation rationale should be ignored as having no merit. On the contrary it has considerable force by the very fact that it is the basis of costs awards systems in other jurisdictions. But at the same time by reason of the risk of the third verdict that it raises and its somewhat limited application it is not, by itself, a substantial enough basis for a costs awards system.

The second direction of the compensation rationale, that is in compensating all accused persons for costs that should not have to be suffered, would seem to be more promising. Again, as earlier noted, a compelling argument can be made that no accused should, in addition to being charged with a crime and subject to the possibility of conviction, suffer the various economic losses that are incurred in defending that criminal allegation or in waiting for a plea of guilty to be entered. Of course in practical terms most accused cannot avoid incurring economic losses for the periods of time that may be spent either in gaol following an arrest or in court appearances. During these periods wage and other income losses occur in addition to the direct defence costs that are incurred. However the fact that such losses and costs are suffered is surely only a consequence of the criminal process not its object and an ideal system would be the one where they were not incurred at all. Thus in pursuing this direction of the compensation rationale one might even argue that every accused person, whether subsequently convicted or acquitted, should be compensated for all costs reasonably incurred from the commencement of criminal proceedings to their conclusion, that is, to the point of a verdict or other termination. And while the immediate response to such a proposal would likely be that it is both too idealistic and prohibitively expensive, it does underscore the point that a claim for costs compensation based on this direction of the compensation rationale can be made equally by all accused persons and not just those who are "truly innocent." If the concern of a costs awards scheme is to achieve greater justice for those who are processed by the criminal law system that it would seem just as important, if not more so, to focus on the economic losses that are suffered by all accused persons, or at least all of those who are not convicted, as those who might be judged "truly innocent." The ultimate purpose even of the latter direction is not to single out certain acquitted accused as being particularly innocent and therefore worthy of special mention, but to compensate these persons for economic losses incurred as a result of a prosecution. But since such losses are unfortunately borne by all accused persons it would be more just to approach that ultimate purpose directly. Thus while it would likely be prohibitively expensive to provide for costs awards to all accused persons it would be quite feasible to provide for costs to be awarded to those most in need of them. A further compromise might be made to limit such awards to acquitted or discharged accused persons, but again on the basis of need rather than on the basis of who is the most innocent. To demonstrate need it should also not be necessary to show extreme poverty. Of course the poor would be covered by such a scheme if losses and expenses had been incurred. But, to refer again to the article of John M. Sharp, "the typical sufferer under the present law is the middle-upper income bracket defendant who just fails to qualify for legal aid and to whom the costs of a necessary defence represent a severe financial blow." While there might be some disagreement as to the cut-off level for compensation being either "middle-upper income bracket" or simply "middle income," and some difficulty in defining the criteria to be applied in determining need, the point is a sound one, that is that many

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⁸ R. Thoresbym, *C*
⁹ *Supra* n. 5 at 8.

average persons, not just the poor should be compensated by a costs awards system. Thus instead of establishing a costs compensation scheme involving the courts in the exercise of discretion in favour of those acquitted accused who are "truly innocent," with the various problems thereby engendered, it would be much more worthwhile to provide for a tribunal or board to exercise discretion on costs applications in favour of all acquitted or discharged accused persons who are most in need. The value in the general criminal verdict of "not guilty" would remain uncompromised and yet substantial justice would be achieved.

In the context of the English Practice Direction of 1973 it has been argued that the discretion in the Court to award costs now undermines the role of the jury in the system of criminal justice:⁸

For many hundreds of years decisions of guilt or innocence have been taken solely by the jury; now, in startling breach of principle, after the jury has returned its verdict of not guilty a second decision is to be taken by the judge, though a determination against the successful defendant should be made only when there are "positive reasons." This is an unfamiliar standard of proof, presumably somewhere between proof on balance of probabilities and proof beyond reasonable doubt. However the discretion is exercised it is certain that there will be more abnormal cases than there were "exceptional cases" and it is inevitable that the direction will introduce first- and second-class acquittals into England.

The only conclusion possible is that the direction is indeed revolutionary. It asks judges to usurp the jury's function and apply a wholly original standard of proof in ill-defined circumstances so as to bring about a result previously unknown in English law.

While we acknowledge that these arguments are persuasive, we are not prepared to go so far as to recommend that costs be payable in all cases to the accused who is acquitted of a Provincial offence. In our opinion the "third verdict" issue is much less critical in the context of Provincial offences than in the context of "true crimes." Most of these offences carry little moral stigma, even when conviction results. That attached to acquittal without costs is minimal. It is irrelevant, moreover, to speak of usurping the function of the jury when Provincial offences are invariably tried by a Judge alone.

In the final analysis we do not believe that the principle of awarding costs to all acquitted accused would gain any widespread public acceptance. The study paper of the Law Reform Commission of Canada speaks of its "concern . . . to maintain the reputation . . . of the system of justice itself."⁹ It is our view that the automatic award of costs to the acquitted accused in every case would quite possibly achieve the opposite result. An award of costs to the accused who is acquitted on an obvious technicality when the weight of evidence would otherwise support a conviction is more likely to bring the law into disrepute in the public eye than any theoretical violation of principle.

We have concluded that the appropriate model for a scheme of costs in relation to Provincial offences is one comparable to those in force in England and New Zealand: discretion with guidelines. Details are outlined in the following chapter.

⁸ R. Thoresbym, Comment, (1973) 36 Mod. L. Rev. 643, 646.

⁹ *Supra* n. 5 at 8.

CHAPTER VII. THE COMMISSION'S CONCLUSIONS

A. Legislative Distribution

In our view it is desirable that there be a separate and distinct Act governing costs in criminal matters. Its scope should include all matters tried under the *Summary Convictions Act*, all appeals arising therefrom, and all applications for judicial review such as for writs of habeas corpus, certiorari, mandamus, and prohibition, and for declarations relating to matters arising out of Provincial offences. Those sections of the *Summary Convictions Act* which relate to costs should be repealed.

B. Who Should Receive Costs?

While we have concluded that costs should be available to the acquitted accused, this should not be the only situation in which costs should be awarded with respect to Provincial offences. Costs should also be available to the private prosecutor when he is protecting some interest of a public nature. Costs should *not* be awarded to public prosecutors carrying out their normal duties.

We have rejected the suggestion advanced by the British Columbia Civil Liberties Association that costs be paid to *all* convicted accused as well as those who are acquitted, but we do think it desirable that provision be made for payment of costs to the convicted accused in "test case" situations or those involving a difficult question of law.

A realistic award of costs should also be made to witnesses.

C. Who Should Pay Costs?

We foresee certain difficulties if legislation were to be enacted granting Courts the power to award costs only *against* informants, prosecutors, and defendants. The most obvious is based on the argument that to award costs against such persons will impede police officers and prosecutors in the fearless pursuit of their respective duties. In the absence of malice or negligence, however, an award to an accused who has been acquitted could be made from a fund established for this purpose by the Provincial Government. We have concluded that costs should be awarded *to the accused* rather than *against the Crown*. Costs should not be interpreted as a rebuke or punitive measure against the police and prosecutor, but as a means of compensating the accused for having to stand his trial. This is the situation which prevails in England, New Zealand, and New South Wales.

We cannot, however, ignore the fact that costs may have a punitive and deterrent effect which may be desirable in some situations. In awarding costs against a party the law may be able to deter frivolous actions and punish parties who bring them. This is of particular significance in private prosecutions, and may also be of importance in reinforcing proper investigative and prosecution techniques by agencies of the state.

We have concluded that the Court should have some latitude in these matters. If the Court is satisfied that any person acted negligently or in bad faith in bringing, continuing, or conducting a prosecution, it should have the power to direct that the defendant's costs be paid by the Government department, officer of the Crown, local authority, or public body on whose behalf

that person was acting. If the accused has died, costs should be awarded against the fund which

D. Presumptions

As we indicated in our report, the law should provide for the award of costs to the party who should be awarded costs should embody the following presumptions:

- (1) The presumption that the party who wins an action should be awarded costs.
- (2) The presumption that the party who is guilty of a crime should be awarded costs.

That is the basic principle which should govern the award of costs in New Zealand. Those sections of the *Summary Convictions Act* which provide for the award of costs should be any provision in the *Summary Convictions Act* for or against the award of costs. On the other hand, there has always been a presumption that the party who wins an action should be awarded costs. This presumption was again affirmed in the 1959 Practice Direction and the 1973 Practice Direction.

While we reject the suggestion that the granting of costs to the party who wins an action is desirable, we think the presumption is desirable in those cases where there should be no award of costs.

In assessing the award of costs, the Court should bear in mind the principle that the innocent party should be awarded costs. It is not desirable to draw inferences from the fact that a party has acted and whether or not he is guilty of a crime are matters for the Court to decide. The party who wins an action should be awarded costs taken at face value. The party who is "not guilty" in a criminal case should be awarded costs for the costs of the prosecution. The Court should award appropriate costs to the party who is awarded costs.

It has been urged that the award of costs to the party who wins an action should be no presumption. It is essentially a matter of discretion, and the Court should exercise its discretion in a fair and reasonable manner. It would be exercised in a fair and reasonable manner.

We are not aware of any case in which the Court has displayed a reluctance to award costs to the party who wins an action. That a similar pattern has developed in New Zealand, however, at this stage, it is not possible to say. Costs should be introduced into the law. It is possible that our recommendation will be followed. If experience shows that our recommendation is not followed, we will therefore, conclude that there should be no award of costs in any case.

¹ See Appendix C, s. 1.
² See Appendix A, s. 1.

CONCLUSIONS

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that person was acting, or if he was not so acting, by that person himself. If the accused has difficulty collecting such costs, he should be entitled to claim against the fund which could then be subrogated to his rights.

D. Presumptions

As we indicated in the previous chapter, we have concluded that a scheme for the award of costs to those accused of Provincial offences who are acquitted should embody the following principles:

- (1) The entitlement to costs should be a matter of discretion for the trial Judge.
- (2) That discretion should be exercised in accordance with specified guidelines.

That is the basic position under the schemes in force in England and New Zealand. Those schemes do, however, diverge on the question of whether there should be any presumption for or against costs in any particular case. The New Zealand legislation specifically provides that "there shall be no presumption for or against the granting of costs in any case."¹ In England, on the other hand, there has always been a presumption. Under the 1952 Act the presumption was against the granting of costs (notwithstanding the statement in the 1959 Practice Direction that there was no presumption), while under the 1973 Practice Direction it is now in favour of costs.²

While we reject the notion that there should be any presumption against the granting of costs, this leaves open the question whether the opposite presumption is desirable. In the working paper it was tentatively concluded that there should be *no* presumption.³ In that working paper it was also stated:

In assessing the proposal made in this working paper, the reader should bear in mind that the cases are few that lead to a clear cut conclusion of innocence. Most evidence is circumstantial and the Judge or jury must draw inferences about whether an accused did or did not commit a certain act and whether he did it knowingly or with a wrongful intention. These are matters for human judgment rather than scientific proof, and an accused who wins an acquittal on such judgment is entitled to have his acquittal taken at face value. . . . [T]he variety of possible meanings of the term "not guilty" indicate that need for an open mind about the problem of reimbursing the costs of accused persons on acquittal and a flexibility about the appropriate solution.

It has been urged on us that to say "an accused . . . is entitled to have his acquittal taken at face value . . ." is inconsistent with the position that there should be no presumption. We cannot agree. The statement quoted above is, essentially, a statement of the Commission's expectations that a full and unfettered discretion with respect to costs, subject only to stated guidelines, would be exercised fairly and reasonably.

We are not unaware that under the New Zealand scheme the Courts have displayed a reluctance to award costs to the acquitted accused,⁴ and recognize that a similar pattern could develop in British Columbia. We are not, however, at this stage, prepared to recommend that a presumption in favour of costs be introduced into a Provincial scheme simply to guard against the possibility that our Judges might exercise their discretion in a restrictive manner. If experience under a scheme such as that which we recommend demonstrates that our faith has been misplaced, the scheme can be altered. We have, therefore, concluded that there should be no presumption for or against costs in any case.

¹ See Appendix C, s. 5 (3).

² See Chapter V.

³ See Appendix A (m).

⁴ See n. 38 to Chapter V *supra*.

E. Discretion Guidelines

We adopt, with minor modifications, the guidelines established under the New Zealand scheme which set out the factors to be considered in exercising the discretion to award costs.⁵ We do not, however, regard the New Zealand guidelines as being exhaustive, and further criteria seem desirable.

We have recommended that when a private prosecution is determined the Court be given a discretion to award costs to the prosecutor personally and against him personally if he acts negligently or in bad faith. We feel that a relevant factor to be taken into account in such cases is whether the proceedings were privately commenced because a publicly appointed prosecutor refused to proceed. Where the accused is acquitted that refusal may, in some cases, be regarded as having put the complainant on notice that the charge was ill-founded, and so an award of costs against him personally may be in order. Conversely, the private party who successfully prosecutes a charge may be more worthy of an award of costs if he had first, unsuccessfully, attempted to persuade the proper authorities to take proceedings than if he had proceeded on his own in the first instance.

We have also concluded that when a Court is considering the award of costs to a successful private prosecutor it should also look at the nature of the offence to determine if the prosecution is to enforce a "private right" or to protect some broader public interest. For example, section 23 of the *Hairdresser's Act*⁶ prohibits the advertising of prices for hairdressing. Prosecutions for offences under that section are normally carried out privately by The Hairdresser's Association of British Columbia. It seems to us that such proceedings are more akin to enforcing internal discipline in a trade organization than protecting a broad public interest and it is doubtful if the public purse should bear their cost.

The 1973 Practice Direction recognized that problems might arise when an accused is charged with more than one offence and is acquitted on one or more counts. The Practice Direction suggests that a positive reason for depriving the accused of costs might be:

Where the defendant is acquitted on one charge but convicted on another. Here the Court should make whatever order seems just having regard to the relative importance of the two charges, and to the defendant's conduct generally.

That criteria, in modified form, should form the basis of a further guideline.

F. Amount and Scope of Costs

While we would leave the entitlement to costs as a matter for the discretion of the Judge, we have concluded that calculation of the actual amount should be left to a taxing officer of the Court as in civil matters. Costs recoverable should include counsel fees, witnesses' expenses, travel and accommodation costs, other disbursements properly incurred, and compensation for loss of wages.

Uniform practice in the matter of costs is desirable and, to that end, a tariff or schedule of costs should be developed, with provision for the award of costs on a higher scale where the complexity of the case warrants it.

⁵ See Appendix C, s. 5 (2).

⁶ R.S.B.C. 1960, c. 169.

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CHAPTER VIII. SUMMARY OF RECOMMENDATIONS

For convenience the Commission's conclusions and recommendations may be summarized as follows:

The Commission recommends that:

1. *Those provisions of the Summary Convictions Act relating to costs be repealed.*
2. *New legislation be enacted governing costs arising out of prosecutions for Provincial offences (hereafter referred to as "the proposed Act").*
3. *In particular, the proposed Act should provide for the award of costs to a party*
 - (a) *arising from prosecutions under the Summary Convictions Act;*
 - (b) *on applications for writs of habeas corpus, certiorari, mandamus, and prohibition or actions for declarations and injunctions relating to matters arising out of Provincial offences;*
 - (c) *on appeals arising out of (a) and (b).*
4. *For the purposes of these recommendations the term "party" includes informants (other than the Crown in the right of the Province of British Columbia, or its agents), prosecutors (other than the Crown in the right of the Province of British Columbia and its agents), witnesses, and the accused.*
5. *The proposed Act establish a Provincial fund, appropriated annually and administered by the Department of the Attorney-General out of which costs awarded under the proposed Act may be paid.*
6. *The entitlement to an award of cost of the acquitted or successful accused should be a matter of discretion for the Court or Judge hearing the matter, but that discretion should be exercised having regard to the following factors:*
 - (a) *Whether the prosecution acted in good faith in bringing and continuing the proceedings:*
 - (b) *Whether, when the proceedings began, the prosecution had sufficient evidence to support the conviction of the defendant in the absence of contrary evidence:*
 - (c) *Whether the prosecution took proper steps to investigate any matter coming into its hands tending to show that the defendant might not be guilty:*
 - (d) *Whether, generally, the investigation into the offence was conducted in a reasonable and proper manner:*
 - (e) *Whether the evidence as a whole would support a finding of guilt, but the charge was dismissed on a technical point:*
 - (f) *Whether the charge was dismissed because the tribunal considered the accused to be innocent in fact:*
 - (g) *Whether the conduct of the accused, in relation to the acts or omissions on which the charge was based and to the investigation and proceedings, was such that on acquittal costs should be awarded to him:*
 - (h) *Where the application for costs is made by a private informant or private prosecutor, whether the proceedings were privately commenced because of a refusal of the Crown-appointed prosecutor to proceed:*

- (i) *Where the application for costs is made by a private informant or private prosecutor, whether the nature of the offence was such that the proceedings were essentially to protect a private right:*
- (j) *Where the accused is acquitted on one or more charges but is convicted on another or others, the relative importance of the charges involved.*

7. *Costs awarded to a party be payable out of the fund, except where the Court is satisfied that any person acted negligently or in bad faith in bringing, continuing, or conducting a prosecution, in which case it should have the power to direct that the costs of the accused be paid by the Government department, officer of the Crown, local authority, or public body on whose behalf that person was acting, or, if he was not so acting, by that person himself.*

8. *Any award of costs, except those payable out of the fund, should be recoverable as a civil debt, but the Court should also be empowered to award the accused his costs from the fund, subrogating the fund to his rights against the person or department liable.*

9. *Where an action, appeal, or application is stayed, withdrawn, or abandoned by the prosecutor, costs be available to the accused on the same basis as if the proceedings had resulted in an acquittal.*

10. *The calculation of the amount of costs awarded should be by a taxing officer of the Court in accordance with a prescribed schedule of costs which includes*

- (a) *counsel fees;*
- (b) *witness fees;*
- (c) *travel and accommodation costs;*
- (d) *compensation for loss of wages; and*
- (e) *other disbursements reasonably incurred.*

11. *Provisions should be made for a higher scale of costs in complex cases.*

12. *Before an award of costs is made a Court should permit any party affected to make submissions.*

ACKNOWLEDGMENTS

The Commission wishes to express its appreciation to Prof. Peter Burns, whose research formed the basis of the working paper which preceded this Report. We also wish to thank those who took the time and trouble to respond to that working paper, giving us the benefit of their views.

RONALD C. BRAY
Chairman

ALLEN A. ZYSBLAT
Commissioner

PAUL D. K. FRASER
Commissioner

June 24, 1974.

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¹ Majority Report, Appendix

² Majority Report, Record

³ Majority Report, Record

⁴ At 34. ⁵ At 30-33.

⁶ Majority Report, Record

⁷ Majority Report 30.

DISSENT OF PETER FRASER

I dissent from the recommendations of the majority Report. I believe the scheme proposed in the Report to be an awkward one which would bring little actual benefit to persons who are acquitted of Provincial offences.

The most important shortcoming of the scheme is that the terms of eligibility will tend (in practice if not in theory) to exclude all but a handful of the potential recipients. The proposal is that a person (a) who is acquitted and (b) whose trial satisfies certain criteria may, but not necessarily will, be reimbursed for part but not all of the legal fees he or she has been called upon to pay. Presumably it is restricted to cases where no scheme of legal aid has assisted the accused.

I see no reason why the experience in British Columbia under this scheme would differ from the experience of New Zealand and New South Wales,¹ where the actual expenditure of money is negligible. The paucity of successful applications for costs in these two jurisdictions suggests that the entire scheme is unnecessary or that, if necessary, unworkable.

The awkwardness of the scheme lies in the fact that it calls for a judicial inquiry into costs which could easily be lengthier and more complex than the trial itself, putting both the accused and the state to an effort hardly justified by the stakes.

I am dubious about the proposition that, as part of the inquiry, the Court will scrutinize the behaviour and motives of the prosecution² and the conduct of the police.³ It may be that both Crown counsel and the police need their actions reviewed from time to time, but I question whether this is the context in which review should take place. I do not think the Judges of the Provincial Court will be happy if they are obliged to examine prosecution and police files; and it does seem to run counter to the efforts which have been made in British Columbia over the last several years to emphasize the separation of the judicial from the police and prosecutorial functions. Finally, I doubt that a system of judicial review, through costs, would have the effect of "reinforcing proper investigative and prosecution techniques," as the Report suggests.⁴

I am concerned, too, that the scheme would create a middle ground between guilt and innocence. The principle that one is innocent until proven guilty is not so sacrosanct as to be beyond question, but dilution of the principle is not something that should be undertaken lightly. On this question, I am in general agreement with the extract from the Law Reform Commission of Canada Study Paper reproduced in the majority Report.⁵

Is it sufficiently straightforward to distinguish the person who is "innocent in fact"⁶ from the person who is acquitted on a "technicality"⁷ or because of "reasonable doubt?"⁸ Identifying what is and what is not a technicality is not an exercise I wish to embark upon here. Opinions differ: what some may regard as a technicality would be considered by others to be an absence of reliable information or a legitimate legal deficiency in the charge, such as charging an offence unknown to the law.

¹ Majority Report, Appendix E.

² Majority Report, Recommendation 6, subparagraphs a, b, and c.

³ Majority Report, Recommendation 6, subparagraph d.

⁴ At 34. ⁵ At 30-33.

⁶ Majority Report, Recommendation 6, subparagraph f.

⁷ Majority Report 30. ⁸ Majority Report 30.

Even if there were a consensus as to the meaning of "technicality," the majority Report errs in the apparent assumption that a person who is acquitted on a "technicality" is probably guilty of the offence charged. That is not a reliable indicator of guilt. Even where a defence is based on evidence tending to show innocence, it is standard practice for defence counsel to seek an acquittal on a "technicality."

The majority Report also seems to assume that the accused person is probably guilty where acquittal is based upon reasonable doubt. But "reasonable doubt," both in law and in the daily experience of Judges, connotes a real and tangible apprehension that the accused person is innocent, despite the best efforts of the whole apparatus of the state to demonstrate otherwise.

Two justifications are offered by the majority Report for this truncated system of costs.

The first is that most Provincial offences carry "little moral stigma even when conviction results."⁹ The number of Provincial offences is very large and some of them proscribe behaviour to which many people would attach moral stigma. There are, for example, laws in this Province concerning the employment of child labour,¹⁰ practising medicine without a licence,¹¹ questionable practices in selling stock to the public,¹² and protection of the environment.¹³

In addition, the "moral stigma" argument avoids the fact that people defend themselves for practical reasons, of which stigma is unlikely to be the most important. Besides the punishment imposed by the Court, conviction often carries with it a significant indirect punishment, e.g., suspension or revocation of a licence or payment of increased insurance premiums.

The second justification offered in the majority Report is that payment of legal fees to persons who are "guilty" but acquitted would be unacceptable to the public.¹⁴ This is, in my opinion, disproved by the absence of public criticism of the legal aid scheme presently in effect in British Columbia.

Finally, how does the scheme of the majority Report fit into the context of a system in which legal aid already exists? The principles of the majority Report scheme are certainly different from those of legal aid. Legal aid is offered to persons charged with both Federal and Provincial offences, without regard to guilt or innocence but with regard for the financial situation of the accused person. Legal aid, moreover, pays the full amount of the legal fees, whereas the majority Report appears to contemplate part payment only.¹⁵

The legal aid concept and the majority Report concept cannot co-exist comfortably. The legal aid approach, which avoids difficult and sensitive determinations of guilt and innocence and which appears administratively more efficient, is the one I prefer. If British Columbians are now being called upon to pay legal fees when it is not fair that they should do so, I believe that the solution lies in expansion of legal aid.

PETER FRASER
Commissioner

⁹ Majority Report 33.

¹⁰ *Control of Employment of Children Act*, R.S.B.C. 1960, c. 75.

¹¹ *Medical Act*, R.S.B.C. 1960, c. 239, s. 71.

¹² *Securities Act*, S.B.C. 1967, c. 45, s. 134.

¹³ *Pollution Control Act*, S.B.C. 1967, c. 34, s. 20A.

¹⁴ Majority Report 33.

¹⁵ In the Report, Appendix E, reference is made to an average payment of \$200 which, by current standards, would fall well short of the actual cost to the accused.

A. Proposal in W

It is proposed that the law be amended to encompass the whole range of offences. Such legislation would encompass:

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APPENDICES

A. Proposal in Working Paper

It is proposed that separate legislation be enacted by the British Columbia Legislature encompassing the whole matter of costs in judicial proceedings concerned with Provincial offences. Such legislation should be binding on the Crown and include provisions encompassing:

- (a) The award of costs at the judicial hearing of any Provincial offence matter to either party (parties) to the proceedings. The term "party" for the purpose of costs should include the informant(s) (other than the Crown in the right of the Province of British Columbia, or its agents), the prosecutor(s) (other than the Crown in the right of the Province of British Columbia and its agents), and the defendant(s).
- (b) Eligibility for costs should be determined by the trial or hearing Court. The calculation of quantum should be left to a taxing officer of the Court in the same way as in civil matters.
- (c) The costs should be confined to those properly [reasonably] incurred by the party or parties concerned and include counsel fees.
- (d) Although the nature of the costs to be awarded should be left in the discretion of the trial or hearing Court, provision should be made for a uniform schedule of costs to be laid down by regulation if considered desirable. These should include
 - (i) counsel fees;
 - (ii) witnesses' expenses;
 - (iii) loss of wages, etc.; and
 - (iv) travel and accommodation costs.Provision should also be made for the award of costs in excess of any scheduled scale if higher costs are desirable, e.g., established complexity of the case.
- (e) Although the Court should have a discretion in the matter of an award of costs, a provision should be enacted detailing factors that should be taken into account in exercising that discretion. This may be of assistance in ensuring uniformity of judicial practice. These factors would include
 - (i) whether the prosecution acted in good faith in bringing and continuing the proceedings;
 - (ii) whether, when the proceeding began, the prosecution had sufficient evidence to support the conviction of the defendant in the absence of contrary evidence;
 - (iii) whether the prosecution took proper steps to investigate any matter coming into its hands tending to show the defendant might not be guilty;
 - (iv) whether, generally, the investigation into the offence was conducted in a reasonable and proper manner;
 - (v) whether the evidence as a whole would support a finding of guilt but the charge was dismissed on a technical point;
 - (vi) whether the charge was dismissed because the tribunal considered the accused to be innocent in fact;
 - (vii) whether the conduct of the accused, in relation to the acts or omissions on which the charge was based and to the investigation and proceedings, was such that on acquittal costs should be awarded to him (this means that it would be significant if the defendant refused to assist the investigation or hindered it by his silence or otherwise); and
 - (viii) where the application for costs is made by a private informant or private prosecutor, whether the proceedings were privately commenced because of a refusal of the Crown-appointed prosecutor to proceed.
- (f) The same principles that apply to the trial situation should apply to an appeal by way of trial *de novo* and include not merely those cases where an appeal is heard and determined but also where it is abandoned or dismissed for want of prosecution.
- (g) Again, appeals to the Supreme Court and Court of Appeal should give rise to the possibility of any "party" obtaining reasonable costs.

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- (h) Provision should be made at both the trial (including preliminary hearings) and appeal levels for the possibility of an award of costs to the defendant who list the case where the trial is in the nature of a test case or the appeal involves a matter which gives rise to a difficult or important point of law.
- (i) The costs should be awarded from a Provincial fund, appropriated annually and administered by the Department of the Attorney-General.
- (j) Recovery of costs against a private prosecutor should be by way of a summary judgment enforceable as a civil debt.
- (k) No provision should be enacted prohibiting publication by the media of the decision of the Court regarding the award of costs in Provincial offence matters. The need to ensure that an acquitted person who was refused costs would not bear the public stigma of being considered not truly "innocent" is not as clear in the area of Provincial offences as it is with "true crimes."
- (l) It is recommended that the scale relating to fees and allowances that may be allowed to witnesses, interpreters, and peace officers, contained in the schedule to the *Summary Convictions Act*, be revised so as to realistically reflect the real costs incurred by these groups.
- (m) There should be no presumption in favour of either party to the proceedings, no matter what the result of the trial or appeal.
- (n) Before an award of costs is made a Court should permit any party affected to make submissions.
- (o) A provision should be enacted so that if the Court is satisfied that any person acted negligently or in bad faith in bringing, continuing, or conducting a prosecution, it should have the power to direct that the defendant's costs be paid by the Government department, officer of the Crown, local authority, or public body on whose behalf that person was acting, or if he was not so acting by that person personally. This award should be recoverable as a debt. This should also enable the Court to award the defendant his costs from the Provincial fund, subrogating the fund to his rights against the person or department liable.
- (p) Provision for costs should extend to applications for writs of habeas corpus, certiorari, mandamus, and prohibition relating to matters arising out of Provincial offences.
- (q) If costs are to be awarded to a successful defendant, the award should be made to that party against the specially created fund. Only in the event of the case falling within the purview of paragraph (o), above, should costs be framed in a condemnatory way by the Court against the informant or prosecutor.

B. Costs in Crim

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B. Costs in Criminal Cases Act, 1973 (United Kingdom)

1973 CHAPTER 14

An Act to consolidate certain enactments relating to costs in criminal cases. [18th April 1973]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Awards by magistrates' courts

Awards by magistrates' courts out of central funds.

1.—(1) A magistrates' court dealing summarily with an indictable offence, or inquiring into any offence as examining justices, may, subject to the provisions of this section, order the payment out of central funds of the costs of the prosecution.

(2) A magistrates' court dealing summarily with an indictable offence and dismissing the information, or inquiring into any offence as examining justices and determining not to commit the accused for trial, may, subject to the provisions of this section, order the payment out of central funds of the costs of the defence.

(3) The costs payable out of central funds under the preceding provisions of this section shall be such sums as appear to the court reasonably sufficient to compensate the prosecutor, or as the case may be the accused, for the expenses properly incurred by him in carrying on the prosecution or the defence, and to compensate any witness for the prosecution, or as the case may be for the defence, for the expense, trouble or loss of time properly incurred in or incidental to his attendance.

(4) Notwithstanding that the court makes no order under subsection (2) above for the payment out of central funds of the costs of the defence, it may order the payment out of those funds of such sums as appear to the court reasonably sufficient to compensate any witness for the defence for the expense, trouble or loss of time properly incurred in or incidental to his attendance.

(5) References in subsections (3) and (4) above to a witness include any person who is a witness to character only and in respect of whom the court certifies that the interests of justice required his attendance, but no sums shall be payable in pursuance of an order made under this section to or in respect of any witness who is a witness to character only and in respect of whom no such certificate is given.

(6) The amount of costs ordered to be paid under this section shall be ascertained as soon as practicable by the proper officer of the court.

(7) In this section the expression "witness" means a person properly attending to give evidence, whether or not he gives evidence; and a person who, at the instance of the court, is called or properly attends to give evidence may be made the subject of an order under subsection (4) above whether or not he is a witness for the defence.

Awards by magistrates' courts as between parties.

2.—(1) On the summary trial of an information a magistrates' court shall, on dismissal of the information, have power to make such order as to costs to be paid by the prosecutor to the accused as it thinks just and reasonable.

(2) On the summary trial of an information a magistrates' court shall, on conviction, have power to make such order as to costs to be paid by the accused to the prosecutor as it thinks just and reasonable, but—

(a) where under the conviction the court orders payment of any sum as a fine, penalty, forfeiture or compensation, and the sum so ordered to be paid does not exceed 25p, the court shall not order the accused to pay any costs under this subsection unless in any particular case it thinks fit to do so;

(b) where the accused is under seventeen years old, the amount of the costs ordered to be paid by the accused himself under this subsection shall not exceed the amount of any fine ordered to be so paid.

(3) A court shall specify in the order of dismissal, or as the case may be the conviction, the amount of any costs that it orders to be paid under subsection (1) or (2) above.

(4) Where examining justices determine not to commit the accused for trial on the ground that the evidence is not sufficient to put him upon his trial, and are of opinion that the charge was not made in good faith, they may order the prosecutor to pay the whole or any part of the costs incurred in or about the defence.

(5) If the amount ordered to be paid under subsection (4) above exceeds £25, the prosecutor may appeal to the Crown Court; and no proceedings shall be taken upon the order until the time allowed for giving notice of appeal has elapsed, or, if within that time notice of appeal is given, until the appeal is determined or ceases to be prosecuted.

Awards by Crown Court

Awards by Crown Court out of central funds.

3.—(1) Subject to the provisions of this section, where a person is prosecuted or tried on indictment before the Crown Court, the court may—

- (a) order the payment out of central funds of the costs of the prosecution;
- (b) if the accused is acquitted, order the payment out of central funds of the costs of the defence.

(2) Subject to the provisions of this section, where an appeal is brought to the Crown Court against a conviction by a magistrates' court of an indictable offence, or against the sentence imposed on such a conviction, the court may—

- (a) order the payment out of central funds of the costs of the prosecution;
- (b) if the appeal is against a conviction, and the conviction is set aside in consequence of the decision on the appeal, order the payment out of central funds of the costs of the defence.

(3) The costs payable out of central funds under the preceding provisions of this section shall be such sums as appears to the Crown Court reasonably sufficient—

- (a) to compensate the prosecutor, or as the case may be the accused, for the expenses properly incurred by him in carrying on the proceedings, and
- (b) to compensate any witness for the prosecution, or as the case may be for the defence, for the expense, trouble or loss of time properly incurred in or incidental to his attendance.

(4) Notwithstanding that the court makes no order under this section as respects the costs of the defence, it may order the payment out of central funds of such sums as appear to the court reasonably sufficient to compensate any witness for the defence for the expense, trouble or loss of time properly incurred in or incidental to his attendance.

(5) References in subsections (3) and (4) above to a witness include any person who is a witness to character only and in respect of whom the court certifies that the interests of justice required his attendance, but no sums shall be payable in pursuance of an order made under this section to or in respect of any witness who is a witness to character only and in respect of whom no such certificate is given.

(6) The amount of costs ordered to be paid under this section shall be ascertained as soon as practicable by the appropriate officer of the Crown Court.

(7) In subsection (2) above, "sentence" includes any order made by a court when dealing with an offender, including a hospital order under Part V of the Mental Health Act 1959 and a recommendation for deportation.

(8) In this section the expression "witness" means a person properly attending to give evidence, whether or not he gives evidence; and a person who, at the instance of the court, is called or properly attends to give evidence may be made the subject of an order under subsection (4) above whether or not he is a witness for the defence.

(9) The costs of carrying on the defence that may be awarded to any person under this section may include the costs of carrying on the defence

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before the examining justices who committed him for trial, or as the case may be before the magistrates' court who convicted him.

Awards by Crown Court as between parties.

4.—(1) Where a person is prosecuted or tried on indictment before the Crown Court, the court may—

(a) if the accused is convicted, order him to pay the whole or any part of the costs incurred in or about the prosecution and conviction, including any proceedings before the examining justices;

(b) if the accused is acquitted, order the prosecutor to pay the whole or any part of the costs incurred in or about the defence including any proceedings before the examining justices.

(2) The amount of costs ordered to be paid under this section shall (except where it is a specific amount ordered to be so paid) be ascertained as soon as practicable by the appropriate officer of the Crown Court.

Awards by, and on appeals from, Divisional Court

Awards by Divisional Court.

5.—(1) A Divisional Court of the Queen's Bench Division may order the payment out of central funds of the costs of any party to proceedings before the Divisional Court in a criminal cause or matter.

(2) The costs payable out of central funds under subsection (1) above shall be such sums as appear to the Divisional Court reasonably sufficient to compensate the party concerned for any expenses properly incurred by him in the proceedings or in any court below.

(3) The amount of costs ordered to be paid under this section shall be ascertained by the master of the Crown Office.

Awards on appeals from Divisional Court.

6.—(1) The House of Lords on determining an appeal from a decision of a Divisional Court of the Queen's Bench Division in a criminal cause or matter may order the payment out of central funds of the costs of the accused or the prosecutor.

(2) The costs payable out of central funds under subsection (1) above shall be such sums as appear to the House of Lords reasonably sufficient to compensate the party concerned for any expenses properly incurred by him in the appeal to the House (including any application for leave to appeal) or in any court below.

(3) The amount of costs ordered to be paid under this section shall (except where it is a specific amount ordered to be paid towards a person's expenses as a whole) be ascertained by such officer or officers, and in such manner, as may be prescribed by order of the House of Lords.

Awards by, and on appeals from, Court of Appeal

Awards by Court of Appeal out of central funds on determining appeals or applications. 1968 c. 19. 1964 c. 84.

7.—(1) When the Court of Appeal allow an appeal under Part I of the Criminal Appeal Act 1968 against—

(a) conviction, or

(b) a verdict of not guilty by reason of insanity, or

(c) a finding under section 4 of the Criminal Procedure (Insanity) Act 1964 that the appellant is under disability,

the court may order the payment out of central funds of the costs of the appellant.

(2) On determining an appeal or application for leave to appeal under Part I of the Criminal Appeal Act 1968, the Court of Appeal may order the payment out of central funds of the costs of the prosecutor.

(3) The costs payable out of central funds under subsection (1) or (2) above shall be such sums as appear to the Court of Appeal reasonably sufficient to compensate the party concerned for any expenses properly incurred by him in the appeal or application (including any proceedings preliminary or incidental thereto) or in any court below.

(4) The amount of costs ordered to be paid under this section shall (except where it is a specific amount ordered to be paid towards a person's expenses as a whole) be ascertained as soon as practicable by the registrar of criminal appeals.

Other awards by Court of Appeal out of central funds. 1968 c. 19.

8.—(1) The Court of Appeal may order the payment out of central funds of such sums as appear to the court reasonably sufficient to compensate a person properly attending to give evidence on an appeal under Part I of the Criminal Appeal Act 1968, or any proceedings preliminary or incidental thereto, whether or not he gives evidence, for the expense, trouble or loss of time properly incurred in or incidental to his attendance.

(2) Where an appellant who is not in custody appears before the Court of Appeal, either on the hearing of his appeal under Part I of the Criminal Appeal Act 1968 or in any proceedings preliminary or incidental thereto, the court may direct that there be paid to him out of central funds the expenses of his appearance.

(3) Any amount ordered to be paid under this section shall be ascertained as soon as practicable by the registrar of criminal appeals.

Awards by Court of Appeal against accused.

9.—(1) When the Court of Appeal dismiss an appeal or application for leave to appeal under Part I of the Criminal Appeal Act 1968, the court may order the appellant to pay to such person as may be named in the order the whole or any part of the costs of the appeal or application.

(2) Costs ordered to be paid under this section may include the cost of any transcript of a record of proceedings made in accordance with rules of court made for the purposes of section 32 of the Criminal Appeal Act 1968.

(3) The amount of costs ordered to be paid under this section shall (except where it is a specific amount ordered to be paid towards the costs of an appeal or application as a whole) be ascertained as soon as practicable by the registrar of criminal appeals.

Awards out of central funds on appeals from Court of Appeal.

10.—(1) The Court of Appeal on dismissing an application for leave to appeal to the House of Lords under Part II of the Criminal Appeal Act 1968, and that House on determining an appeal or application for leave to appeal under the said Part II, may order the payment out of central funds of the costs of the accused or the prosecutor.

(2) The costs payable out of central funds subsection (1) above shall be such sums as appear to the Court of Appeal of the House of Lords (as the case may be) reasonably sufficient to compensate the party concerned for any expenses properly incurred by him in the case being—

(a) where the order is made (whether by the Court of Appeal or by the House of Lords) on the dismissal of an application for leave to appeal, any expenses of the application, and

(b) where the order is made by the House of Lords on the determination of an appeal, any expenses of the appeal (including any application for leave to appeal) or incurred in any court below.

(3) The amount of costs ordered to be paid under this section shall (except where it is a specific amount ordered to be paid towards a person's expenses as a whole) be ascertained as soon as practicable—

(a) where the order is made by the Court of Appeal, by the registrar of criminal appeals; and

(b) where it is made by the House of Lords, by such officer or officers, and in such manner, as may be prescribed by order of the House.

Awards against accused applying for leave to appeal from Court of Appeal. 1968 c. 19.

11.—(1) Where the Court of Appeal or the House of Lords dismiss an application by the accused for leave to appeal to that House under Part II of the Criminal Appeal Act 1968, the Court of Appeal or the House of Lords may, if they think fit, order him to pay to such person as may be named in the order the whole or any part of the costs of the application.

(2) The amount of costs ordered to be paid under this section shall (except where it is a specific amount ordered to be paid towards the costs of the application as a whole) be ascertained as soon as practicable—

(a) where the order is made by the Court of Appeal, by the registrar of criminal appeals;

(b) where the order is made by the House of Lords, by such officer or officers, and in such manner, as may be prescribed by order of the House.

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Miscellaneous and general

Awards where prosecution not proceeded with.

12.—(1) Where an information charging an indictable offence is laid before a justice of the peace for any area but the information is not proceeded with (either by summary trial or by an inquiry by examining justices) a magistrate's court for that area may order the payment out of central funds of—

- (a) the costs properly incurred in preparing a defence to the offence charged, and
- (b) such sums as appear to the court reasonably sufficient to compensate any person attending to give evidence as a witness for the defence for the expense, trouble or loss of time properly incurred in or incidental to his attendance.

(2) The amount of costs ordered to be paid under subsection (1) above shall be ascertained as soon as practicable by the proper officer of the court.

(3) Where an information is laid before a justice of the peace for any area but the information is not proceeded with (either by summary trial or by an inquiry by examining magistrates), a magistrates' court for that area may make such order as to costs to be paid by the prosecutor to the accused as it thinks just and reasonable.

(4) An order under subsection (3) above shall specify the amount of the costs ordered to be paid.

(5) Where a person committed for trial is not ultimately tried, the Crown Court shall have the same power to order payment of costs under this Act as if the accused had been tried and acquitted.

Central funds.

13.—(1) In this Act and in any other enactment providing for payment of costs out of central funds "central funds" means money provided by Parliament.

(2) The Secretary of State shall, out of money so provided, pay to the persons charged with the duty of making the payments concerned all sums required to meet payments ordered to be made out of central funds under this Act or any other such enactment as is referred to in subsection (1) above.

Payment of costs ordered by superior courts to be paid out of central funds.

14.—(1) As soon as there has been ascertained the amount due to any person as costs ordered (under this or any other Act) by the Crown Court to be paid out of central funds, the appropriate officer of the Crown Court shall pay the amount so ascertained to that person, or to any person appearing to him to be acting on behalf of that person.

(2) As soon as there has been ascertained the amount due to any person as costs ordered (under this or any other Act) to be paid out of central funds by a Divisional Court, by the Court of Appeal or by the House of Lords,—

- (a) the master of the Crown Office, in the case of a Divisional Court, and
- (b) the registrar of criminal appeals, in the case of the Court of Appeal or the House of Lords,

shall pay the amount so ascertained to that person, or to any person appearing to him to be acting on behalf of that person.

Payment of costs ordered by magistrates' courts to be paid out of central funds.

15.—(1) As soon as there has been ascertained the amount due to any person as costs ordered to be paid out of central funds by a magistrates' court—

- (a) dealing summarily with an indictable offence, or
- (b) inquiring into an offence as examining justices and determining not to commit the accused for trial, or
- (c) where an information is not proceeded with, as mentioned in section 12(1) above,

the justices' clerk shall pay to that person the amount so ascertained.

(2) As soon as there has been ascertained the amount due to any person as costs ordered to be paid out of central funds by a magistrates' court otherwise than as mentioned in subsection (1) above, the justices' clerk shall—

- (a) so far as the amount is due for travelling or personal expenses in respect of that person's attendance, pay to him the amount due forthwith, and

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(4) This Act shall apply to—

- 1967 c. 80. (a) proceedings for dealing with an offender under section 6, 8 or 9 of the Criminal Justice Act 1948 (probation orders and orders for conditional discharge),
- 1972 c. 71. (b) proceedings under section 40(1) of the Criminal Justice Act 1967 for dealing with an offender in respect of a suspended sentence, and
- (c) proceedings under section 13, 17 or 18 of the Criminal Justice Act 1972 (suspended sentence supervision orders and community service orders),

as if the offender had been tried in those proceedings for the offence for which the order was made or the sentence passed.

(5) The provisions of this Act, except those relating to costs as between parties, shall apply with all necessary modifications to proceedings in which it is alleged that an offender required on conviction of an indictable offence to enter into a recognizance to keep the peace or be of good behaviour has failed to comply with a condition of that recognizance, as if that failure were an indictable offence.

General provisions as to costs. 1968 c. 19.

19.—(1) Except as provided by sections 7 to 9 of this Act, no costs shall be allowed on the hearing or determination of an appeal to the Court of Appeal under Part I of the Criminal Appeal Act 1968 or of any proceedings preliminary or incidental to such an appeal.

(2) Except as provided by sections 10 and 11 of this Act, no costs shall be allowed on the hearing or determination of an appeal to the House of Lords under Part II of the Criminal Appeal Act 1968 or of any proceedings preliminary or incidental to such an appeal.

(3) Nothing in this Act shall affect the provision in any enactment for the payment of the costs of the prosecution or defence of any offence out of any assets, money or fund other than central funds, or by any person other than the prosecutor or defendant.

Interpretation. 20.—(1) In this Act, except so far as the context otherwise requires, "magistrates' court" means a court of summary jurisdiction or examining justices and includes a single examining justice.

(2) References in this Act to costs paid or ordered to be paid out of central funds under this Act shall be construed as including references to any sums so paid or ordered to be paid as compensation to or expenses of a witness or other person or as counsel's or solicitor's fees.

(3) In this Act "indictable offence" means an offence—

- 1952 c. 55. (a) which if committed by an adult is punishable only on conviction on indictment, or is punishable only on such conviction unless the accused consents to summary trial, or
- (b) which by virtue of any enactment is punishable either on summary conviction or on conviction on indictment and which a magistrates' court has begun, in accordance with section 18(1) of the Magistrates' Courts Act 1952, to inquire into as if it were punishable on conviction on indictment only.

1966 c. 31. (4) Subject to rules of court made under section 1(5) of the Criminal Appeal Act 1966 (distribution of business of Court of Appeal between civil and criminal divisions), all jurisdiction of the Court of Appeal under this Act shall be exercised by the criminal division of the Court; and references in this Act to the Court of Appeal shall be construed accordingly as references to that division of the Court.

Consequential amendments, repeals and transitional provisions.

21.—(1) Schedule 1 to this Act (which makes consequential amendments of enactments not consolidated) shall have effect.

(2) The enactments specified in Schedule 2 to this Act are repealed to the extent specified in the third column of that Schedule.

(3) In so far as any order, regulation or certificate made or issued, or having effect as if made or issued, under an enactment repealed by this Act, or any other thing done or having effect as if done under such an enact-

ment, could have been made, issued or done under a corresponding provision of this Act, or any other thing done or having effect as if done under such an enactment, could have been made, issued or done under a corresponding provision of this Act, it shall not be invalidated by the repeal but shall have effect as if made, issued or done under that corresponding provision.

(4) Where any Act or document refers, or has effect as if it referred, to an enactment repealed by this Act, the reference shall, except where the context otherwise requires, be construed as, or as including, a reference to the corresponding provision of this Act.

(5) Nothing in the preceding provisions of this section or in Schedule 1 to this Act shall be taken as prejudicing the operation of section 38 of the Interpretation Act 1889 (which relates to the effect of repeals).

1889 c. 63.

Short title, commencement and extent.

22.—(1) This Act may be cited as the Costs in Criminal Cases Act 1973.

(2) This Act shall come into force on the expiration of the period of three months beginning with the day of which it is passed.

(3) This Act shall not extend to Scotland or Northern Ireland.

Sch. 1
1971 c. 23.

7. In costs)—
(a)

(b)

Section 21(2).

Section 21(1).

SCHEDULES

SCHEDULE 1

CONSEQUENTIAL AMENDMENTS

1952 c. 55.

1. In section 26(5) of the Magistrates' Courts Act 1952 (medical reports), for the words "The Costs in Criminal Cases Act 1952" there shall be substituted the words "The Costs in Criminal Cases Act 1973" and for the words "section five" there shall be substituted the words "section 1".

1957 c. 27.

2. In section 74(f) of the Solicitors Act 1957 (savings), for the words "the Costs in Criminal Cases Act 1952" there shall be substituted the words "the Costs in Criminal Cases Act 1973".

1965 c. 45.

3. In paragraph 4 of the Schedule to the Backing of Warrants (Republic of Ireland) Act 1965 (powers as to costs and legal aid), for the words from "section 5" to "local funds" there shall be substituted the words "section 1 of the Costs in Criminal Cases Act 1973 (award of costs by examining justices out of central funds)".

1967 c. 80.

4. In section 32(2) of the Criminal Justice Act 1967 (medical reports), after the words "Court-Martial Appeal Court" there shall be inserted the words "and sections 1, 3 and 8(1) of the Costs in Criminal Cases Act 1973 (payment of costs out of central funds)"; and for the words "section 5" there shall be substituted the words "section 1".

1968 c. 19.

5. In the Criminal Appeal Act 1968—

(a) in section 31 (powers of Court of Appeal under Part 1 exercisable by single judge), in subsection (1), after the word "below" there shall be inserted the words "and the powers to make orders for the payment of costs under sections 7 and 9 of the Costs in Criminal Cases Act 1973";

(b) in section 44 (powers of Court of Appeal under Part II exercisable by single judge), at the beginning, there shall be inserted the words "The power of the Court of Appeal to make an order for costs under section 10 of the Costs in Criminal Cases Act 1973, and"; and

(c) in paragraph 3 of Schedule 2 (acquittal on retrial), for the words from "paid out" to "shall" there shall be substituted the words "paid out of central funds under section 3 of the Costs in Criminal Cases Act 1973 shall"; and for the words "section 24 or 39 of this Act" there shall be substituted the words "section 7 or 10 of the Costs in Criminal Cases Act 1973".

1970 c. 31.

6. In Schedule 9 to the Administration of Justice Act 1970 (enforcement of orders for costs, compensation, etc.) paragraph 5 shall be omitted and for paragraph 9 there shall be substituted the following paragraph:—

"9. Where a court makes an order by virtue of section 18 of the Costs in Criminal Cases Act 1973 for the payment of costs by an offender."

Chap

15 & 16 C

& 1 E

c. 48.

15 & 16 C

& 1 E

c. 55.

7 & 8 E

c. 72.

1967 c. 80

1968 c. 15

1970 c. 31

1971 c. 2

1972 c. 7

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Act 1970 (enforcement i shall be omitted and ig paragraph:—

of section 18 of the ayment of costs by an

Sch. 1
1971 c. 23.

7. In section 50 of the Courts Act 1971 (Crown Court rules relating to costs)—

- (a) in subsection (3), for the words "the Costs in Criminal Cases Act 1952" there shall be substituted the words "the Costs in Criminal Cases Act 1973", and for the words "section 48 above" there shall be substituted the words "section 4 of that Act (awards by Crown Court as between parties)"; and
- (b) in subsection (4), for the words from "section 48" to "Act" there shall be substituted the words "any enactment", and after the word "Court" there shall be inserted the words "being an enactment passed before this Act or contained in the Costs in Criminal Cases Act 1973".

Section 21(2).

SCHEDULE 2

REPEALS

Chapter	Short Title	Extent of Repeal
15 & 16 Geo. 6 & 1 Eliz. 2. c. 48.	The Costs in Criminal Cases Act 1952.	The whole Act.
15 & 16 Geo. 6 & 1 Eliz. 2. c. 55.	The Magistrates' Courts Act 1952.	In Schedule 5, the entry relating to the Costs in Criminal Cases Act 1952.
7 & 8 Eliz. 2. c. 72.	The Mental Health Act 1959.	In Part I of Schedule 7, the entry relating to the Costs in Criminal Cases Act 1952.
1967 c. 80.	The Criminal Justice Act 1967.	Section 31(1) and (2). In section 32(2), the words preceding the words "section 33", and the words from "and section 47" to "Crown Court out of central funds". Section 32(4).
1968 c. 19.	The Criminal Appeal Act 1968.	Sections 24 to 28. Section 31(2)(g). Sections 39 to 41. Section 44(d). In Schedule 5, the entries relating to sections 12 and 17(2) of the Costs in Criminal Cases Act 1952.
1970 c. 31.	The Administration of Justice Act 1970.	In Schedule 9, paragraph 5.
1971 c. 23.	The Courts Act 1971.	Sections 47 to 49. Section 51(1). In section 51(2), the words "the Costs in Criminal Cases Act 1952 and other". Section 52(1) and (2). In section 52(3), paragraph (a) and the words from "by the prosecutor" to "may be". In section 52(5), the words from "Subsections (1)" to "1952; and". In Schedule 6— paragraphs 1 to 5; paragraph 8; in paragraph 9(1), the words from "Section 5" to "appeals out of central funds," and the words from "and after" onwards; paragraph 9(2); paragraph 11.
1972 c. 71.	The Criminal Justice Act 1972.	In Schedule 9, the entry relating to the Costs in Criminal Cases Act 1952. Section 39. Schedule 3. In Schedule 5, the amendments of the Costs in Criminal Cases Act 1952, and the amendment of paragraph 9 of Schedule 9 to the Administration of Justice Act 1970.

C. Costs in Criminal Cases Act, 1967 (New Zealand)

[Crest]

ANALYSIS

Title	
1. Short Title and commencement	10. Enforcement of order as to costs made on an appeal
2. Interpretation	11. Order for costs made by the Supreme Court or Court of Appeal
3. Act to bind the Crown	12. Submissions and evidence
4. Costs of the prosecutor	13. Regulations
5. Costs of successful defendant	14. Consequential amendments and repeals
6. Costs of convicted defendant	15. Saving
7. Payment of defendant's costs	16. Transitional provision
8. Costs on appeals	Schedule
9. Party giving notice of appeal and not prosecuting may be ordered to pay costs	

1967, No. 129

An Act to amend the law relating to the payment of costs in criminal cases

[24 November 1967]

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. Short Title and commencement—(1) This Act may be cited as the Costs in Criminal Cases Act 1967.
- (2) This Act shall come into force on the first day of April, nineteen hundred and sixty-eight.
2. Interpretation—(1) In this Act, unless the context otherwise requires,—
 - "Costs" means any expenses properly incurred by a party in carrying out a prosecution, carrying on a defence, or in making or defending an appeal;
 - "Court" means any Court exercising any jurisdiction in criminal cases;
 - "Defendant" means any person charged with an offence.
3. Act to bind the Crown—This Act shall bind the Crown.
4. Costs of the prosecutor—(1) Where any defendant is convicted by any Court of any offence, the Court may, subject to any regulations made under this Act, order him to pay such sum as it thinks just and reasonable towards the costs of the prosecution.
 - (2) Where on the arrest of that person any money was taken from him the Court may in its discretion order the whole or any part of the money to be applied to any such payment.
 - (3) Where the Court convicts any person and the informant or prosecutor has not prepaid any fees of Court, the Court may order the person convicted to pay the fees of Court.
 - (4) Any costs allowed under this section shall be specified in the conviction and may be recovered in the same manner as a fine.

Cf. 1957, No. 87, s. 72 (1), (4), (6); 1961, No. 43, s. 402 (1), (4)
5. Costs of successful defendant—(1) Where any defendant is acquitted of an offence or where the information charging him with an offence is dismissed or withdrawn, whether upon the merits or otherwise, or where he is discharged under section 179 of the Summary Proceedings Act 1957 the Court may, subject to any regulations made under this Act, order that he be paid such sum as it thinks just and reasonable towards the costs of his defence.

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 6. Costs of cor of the opinion that in the special circu of the arguing of t this Act, order that costs.
 7. Payment of d any order is made to the defendant sh
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(2) Without limiting or affecting the Court's discretion under subsection (1) of this section, it is hereby declared that the Court, in deciding whether to grant costs and the amount of any costs granted, shall have regard to all relevant circumstances and in particular (where appropriate) to—

- (a) Whether the prosecution acted in good faith in bringing and continuing the proceedings;
- (b) Whether at the commencement of the proceedings the prosecution had sufficient evidence to support the conviction of the defendant in the absence of contrary evidence;
- (c) Whether the prosecution took proper steps to investigate any matter coming into its hands which suggested that the defendant might not be guilty;
- (d) Whether generally the investigation into the offence was conducted in a reasonable and proper manner;
- (e) Whether the evidence as a whole would support a finding of guilt but the information was dismissed on a technical point;
- (f) Whether the information was dismissed because the defendant established (either by the evidence of witnesses called by him or by the cross-examination of witnesses for the prosecution or otherwise) that he was not guilty;
- (g) Whether the behaviour of the defendant in relation to the acts or omissions on which the charge was based and to the investigation and proceedings was such that a sum should be paid towards the costs of his defence.

(3) There shall be no presumption for or against the granting of costs in any case.

(4) No defendant shall be granted costs under this section by reason only of the fact that he has been acquitted or discharged or that any information charging him with an offence has been dismissed or withdrawn.

(5) No defendant shall be refused costs under this section by reason only of the fact that the proceedings were properly brought and continued.

Cf. 1957, No. 87, s. 72 (2); 1961, No. 43, s. 402 (3)

6. Costs of convicted defendant—Where any defendant is convicted but the Court is of the opinion that the prosecution involved a difficult or important point of law and that in the special circumstances of the case it is proper that he should receive costs in respect of the arguing of that point of law, the Court may, subject to any regulations made under this Act, order that he be paid such sum as it considers just and reasonable towards those costs.

7. Payment of defendant's costs—(1) Subject to subsection (2) of this section, where any order is made under section 5 or section 6 of this Act the amount ordered to be paid to the defendant shall—

- (a) If the prosecution was conducted by or on behalf of the Crown, be paid by the Secretary for Justice out of money appropriated by Parliament for the purpose and may be recovered as a debt due by the Crown;
- (b) If the prosecution was not conducted by or on behalf of the Crown, be paid by the informant and may be recovered from him as a debt, and any such order made by a Magistrate's Court shall be enforceable as if it were an order made under Part II of the Summary Proceedings Act 1957.

(2) Notwithstanding the provisions of subsection (1) of this section where a Court is of the opinion that any person has acted negligently or in bad faith in bringing, continuing, or conducting a prosecution it may, in any order made under section 5 of this Act, direct that the defendant's costs shall be paid by—

- (a) The Government Department, officer of the Crown, local authority, or public body on whose behalf that person was acting; or
- (b) If he was not so acting, by that person personally,—

and in any such case costs shall not be paid under subsection (1) of this section but shall be paid by, and may be recovered as a debt from, the Government Department, officer of the Crown, local authority, public body, or person specified in the order.

8. Costs on appeals—(1) Where any appeal is made pursuant to any provision of the Summary Proceedings Act 1957 or the Crimes Act 1961 the Court which determines the appeal may, subject to any regulations made under this Act, make such order as to costs as it thinks fit.

(2) No defendant or convicted defendant shall be granted costs under this section by reason only of the fact that his appeal has been successful.

(3) No defendant or convicted defendant shall be refused costs under this section by reason only of the fact that the appeal was reasonably brought and continued by another party to the proceedings.

(4) No Magistrate or Justice who states a case in accordance with Part IV of the Summary Proceedings Act 1957 and no Judge who states a case shall be liable to costs by reason of the appeal against the determination.

(5) If the Court which determines an appeal is of opinion that the appeal includes any frivolous or vexatious matter, it may, if it thinks fit, irrespective of the result of the appeal, order that the whole or any part of the costs of any party to the proceedings in disputing the frivolous or vexatious matter shall be paid by the party who raised the frivolous or vexatious matter.

(6) If the Court which determines an appeal is of opinion that the appeal involves a difficult or important point of law it may order that the costs of any party to the proceedings shall be paid by any other party to the proceedings irrespective of the result of the appeal.

Cf. 1957, No. 87, s. 140; 1961, No. 43, s. 391

9. Party giving notice of appeal and not prosecuting may be ordered to pay costs—

(1) In any case where notice of appeal is given under any provision of the Summary Proceedings Act 1957 or the Crimes Act 1961 but the appeal is dismissed for non-prosecution or a certificate is given under section 107 of the Summary Proceedings Act 1957 that the appeal has not been prosecuted, the Court to which the appeal is made may, subject to any regulations made under this Act, allow the respondent such costs as it thinks fit.

(2) No costs incurred after notice has been given by the appellant abandoning the appeal shall be allowed.

Cf. 1957, No. 87, s. 141

10. Enforcement of order as to costs made on an appeal—Where on the determination of any appeal either party is ordered to pay costs,—

(a) The order as to costs shall, in the case of an appeal under Part IV of the Summary Proceedings Act 1957, be included in the certificate of the decision transmitted in accordance with section 134 of that Act, and, except where the party ordered to pay costs is the Crown, or a person acting for or on behalf of the Crown, be enforceable as if it were a fine imposed by the Magistrate's Court:

(b) The amount of the costs shall be recoverable from the Crown where the party ordered to pay costs is the Crown or a person acting for or on behalf of the Crown.

Cf. 1957, No. 87, s. 142

11. Order for costs made by the Supreme Court or Court of Appeal—Any order made by the Supreme Court or the Court of Appeal, other than on an appeal under Part IV of the Summary Proceedings Act 1957, for the payment of costs by any person, other than the Crown, shall upon being filed in the Supreme Court have the effect of a judgment.

12. Submissions and evidence—Before deciding whether to award costs under this Act the Court shall allow any party who wishes to make submissions or call evidence on the question of costs a reasonable opportunity to do so.

13. Regulations—(1) The Governor-General may from time to time, by Order in Council, make regulations for all or any of the following purposes:

(a) Prescribing the heads of costs that may be ordered to be paid under this Act:

(b) Prescribing maximum scales of costs that may be ordered to be paid under this Act:

(c) Prescribing the manner in which costs for which the Crown is liable shall be claimed from or paid by the Crown:

(d) Providing for such matters as are contemplated by or necessary for giving full effect to the provisions of this Act and for the due administration thereof.

(2) Any regulations made under this Act may—

(a) Apply scales of costs, fees, or expenses prescribed from time to time under other enactments:

(b) Delegate, or empower a Court to delegate, to any person or officer the power to determine the costs to be allowed under any particular head.

(3) Where any nevertheless make that, having regard to the payment of greater

14. Consequences
(as inserted by section 72, 140—
omitting from sub-sections 72, 140—
costs of the appeal
(2) The enactment

15. Saving—Notwithstanding anything in this section 42 of the Crimes Act 1961

16. Transitional provisions
after the date of commencement of this Act
completed before the commencement of this Act

1957, No. 87—The provisions 72, 140—
1961, No. 43—The provisions

This Act is administered by the Department of Justice

(3) Where any maximum scale of costs is prescribed by regulation, the Court may nevertheless make an order for the payment of costs in excess of that scale if it is satisfied that, having regard to the special difficulty, complexity, or importance of the case, the payment of greater costs is desirable.

14. Consequential amendments and repeals—(1) Section 379A of the Crimes Act 1961 (as inserted by section 8 (1) of the Crimes Amendment Act 1966) is hereby amended by omitting from subsection (3) the words "and that Court may also make such order as to costs of the appeal as to that Court seems just".

(2) The enactments specified in the Schedule to this Act are hereby repealed.

15. Saving—Nothing in this Act shall limit or affect the powers of any Court under section 42 of the Criminal Justice Act 1954.

16. Transitional provision—This Act shall apply to proceedings commenced on or after the date of the commencement of this Act and to proceedings commenced but not completed before that date.

SCHEDULE

Section 14 (2)

ENACTMENTS REPEALED

1957, No. 87—The Summary Proceedings Act 1957: Subsection (2) of section 36, sections 72, 140–143, and 179. (Reprinted 1966 Statutes, Vol. 4.)

1961, No. 43—The Crimes Act 1961: Sections 391 and 402.

This Act is administered in the Department of Justice.

D. Costs in Criminal Cases Act, 1967 (New South Wales)

NEW SOUTH WALES

[Crest]

ANNO SEXTO DECIMO

ELIZABETHÆ II REGINÆ

Act No. 13, 1967.

An Act relating to costs in criminal cases; to amend the Justices Act, 1902, as amended by subsequent Acts; and for purposes connected therewith. [Assented to, 23rd March, 1967.]

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

Short title, commencement and application.
No. 13, 1967

1. (1) This Act may be cited as the "Costs in Criminal Cases Act, 1967".
- (2) This Act shall commence upon a day to be appointed by the Governor and notified by proclamation published in the Gazette.
- (3) This Act does not apply in respect of proceedings instituted, or appeals lodged, before its commencement.

Certificate may be granted.

2. The Court or Judge or Justice or Justices in any proceedings relating to any offence, whether punishable summarily or upon indictment, may—
 - (a) where a defendant, after a hearing on the merits, is acquitted or discharged as to the information then under inquiry; or
 - (b) where, on appeal, the conviction of the defendant is quashed and—
 - (i) he is discharged as to the indictment upon which he was convicted; or
 - (ii) the information or complaint upon which he was convicted is dismissed,grant to that defendant a certificate under this Act, specifying the matters referred to in section three of this Act and relating to those proceedings.

Form of certificate.

3. (1) A certificate granted under this Act shall specify that, in the opinion of the Court or Judge or Justice or Justices granting the certificate—
 - (a) if the prosecution had, before the proceedings were instituted, been in possession of evidence of all the relevant facts, it would not have been reasonable to institute the proceedings; and
 - (b) that any act or omission of the defendant that contributed, or might have contributed, to the institution or continuation of the proceedings was reasonable in the circumstances.
- (2) A certificate granted under this Act by a Justice or by Justices shall specify the amount of costs that he or they would have adjudged to be paid if he or they had made an order for costs against the informant, prosecutor or complainant, as the case may be.

No. 13, 1967
Payment of costs.

4. (1) In this section "Under Secretary" means the Under Secretary of the Department of the Attorney General and of Justice.
- (2) Any person to whom a certificate has been granted pursuant to this Act may, upon production of the certificate to the Under Secretary, make application to him for payment from the Consolidated Revenue Fund of the costs incurred by that person in the proceedings to which the certificate relates.
- (3) Subject to subsection four of this section, the Under Secretary shall, as soon as practicable after receiving an application under subsection two of this section, furnish to the Treasurer a statement, signed by the Under Secre-

No. 13, 1967

Under Secretary subrogated to rights of applicant.

Certificate not admissible in evidence.

Amendment of Act No. 27, 1902. New sec. 41. Justice may order costs to be paid by informant.

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tary, setting forth the particulars of the application and the certificate to which it relates and specifying—

- (a) (i) where an amount for costs has been specified in the certificate pursuant to subsection two of section three of this Act, the amount so specified; or
- (ii) where an amount for costs has not been so specified, the amount that, in the opinion of the Under Secretary, would reasonably have been incurred for costs by the applicant in the proceedings to which the certificate relates; and
- (b) any amounts which, in the opinion of the Under Secretary, the applicant has received or is entitled to receive or would, if he had exhausted all relevant rights of action and other legal remedies available to him, be entitled to receive, independently of this Act, by reason of his having incurred those costs.

(4) The Under Secretary may defer furnishing to the Treasurer any statement under subsection three of this section for as long as he considers it necessary to do so to enable him to specify the amounts referred to in subparagraph (ii) of paragraph (a), and paragraph (b), of that subsection.

(5) Where the Treasurer, after receiving the Under Secretary's statement relating to any such application, considers that, in the circumstances of the case, the making of a payment to the applicant is justified, the Treasurer may pay to the applicant his costs or such part thereof as the Treasurer may determine.

(6) Any payments under subsection five of this section may be made without further appropriation than this Act.

No. 13, 1967

Under Secretary subrogated to rights of applicant.

5. (1) Where payment is made to any person pursuant to section four of this Act, the Under Secretary shall be subrogated, to the extent of the payment, to all the rights and remedies of that person, other than those provided under this Act, to recover costs incurred in the proceedings in respect of which application for the payment was made.
(2) Any moneys recovered by the Under Secretary pursuant to subsection one of this section shall be paid to the Consolidated Revenue Fund.

Certificate not admissible in evidence.

6. No certificate granted pursuant to this Act shall be admissible in evidence in any proceedings.

Amendment of Act No. 27, 1902. New sec. 41. Justice may order costs to be paid by informant.

7. (1) The Justices Act, 1902, as amended by subsequent Acts, is amended by inserting next after section forty-one the following new section:—

41A. (1) The Justice or Justices making any order discharging a defendant as to the information then under inquiry may in and by such order adjudge that the informant shall pay to the clerk of the court to be by him paid to the defendant such costs as to such Justice or Justices seem just and reasonable.

(2) The amount so allowed for costs shall in all cases be specified in such order.

(3) The provisions of sections eighty-two, eighty-three and eighty-four of this Act relating to orders for the payment of costs shall, mutatis mutandis, apply to and in respect of orders for the payment of costs made pursuant to this section.

(2) The Justices Act, 1902, as amended by subsequent Acts and by this Act, may be cited as the Justices Act, 1902-1967.

No. 13, 1967

E. Costs of the Recommended Scheme

We have recommended that a Provincial fund be established out of which costs awarded under the scheme be paid. Since the direct disbursement of public funds is contemplated, we feel some obligation to consider the likely costs of the scheme. Since no substantive recommendations or policy considerations are involved, we have relegated what we have to say about the cost of the scheme to an Appendix.

Estimating the costs of the proposed scheme is a difficult exercise due to the number of variables involved. Probably the most significant of these variables is one which cannot be ascertained with any certainty at this time. That is the attitude which Judges would take toward the scheme in exercising their discretion to award costs. If that discretion is exercised sparingly, the costs will be insignificant. This has been the case in New Zealand. Between 1968 and 1972 the costs to the state of that scheme have averaged approximately \$1,000 per year.¹ The New South Wales experience has been similar.² In Western Australia, on the other hand, where a much more liberal scheme has been proposed the possible cost has been estimated at \$161,900 (Aust.) per year.³ The *Costs in Criminal Cases Act, 1973* (U.K.) and the subsequent practice direction are still too new for any significant information to have developed on the English experience.

The wide divergence between the experience of New Zealand and New South Wales and the possible annual financial burden in Western Australia illustrate the important role which the exercise of discretion will play. It should also be noted that the Australian and New Zealand figures cover all offences including what, in Canada, would be *Criminal Code* matters. The costs awardable under the scheme we recommend would, therefore, be significantly less than those in a unitary, but otherwise comparable, jurisdiction.

It is possible to ascertain a very rough estimate of the maximum cost of our scheme by making a number of assumptions. Those assumptions are:

1. The number of charges laid under Provincial statutes is approximately 7,000 per year.⁴
2. The discharge rate is approximately 15 per cent.⁵
3. The costs awarded to the accused will average approximately \$200.⁶
4. The Judge exercises his discretion in favour of the acquitted accused in every case.

Based on those assumptions, the recommended scheme would impose a minimum financial burden of \$210,000 per year. That figure, however, fails to take into account costs awarded to private prosecutors and witnesses, costs on appeals, costs related to lost wages, travel, or accommodation, and costs arising out of prerogative writs. The foregoing would tend to increase the estimated financial burden. On the other hand, the assumption that Judges will exercise their discretion in favour of every acquitted accused is, in all probability, quite unrealistic. To the extent that costs are *not* awarded, the financial burden is decreased. In summary, based on the assumptions which we have made, the cost of the recommended scheme is unlikely to exceed \$210,000, and may amount to substantially less.

In the final analysis, a meaningful prediction can be based only on experience. Until a scheme such as we recommend has been operating for some period of time, the financial burdens will remain uncertain. At this stage we can do little more than hope that this uncertainty will not deter those in a position to implement the scheme from proceeding.

¹ This information was provided by E. A. Missen, Secretary for Justice, Department of Justice, New Zealand, who also indicated that, from the practical point of view, there has been no difficulty with the administration of the scheme.

² *Outline '72*, the 1972 Annual Report of the Department of Attorney General and Justice of New South Wales, sets out the following statistics:

	1969	1970	1971	1972
Number of payments made.....	\$ 15	\$ 11	\$ 11	\$ 21
Highest single payment.....	341	120	2,094	1,372
Total of payments.....	1,255	808	3,500	3,845

³ *Ibid.*, at 13 of the working paper.

⁴ The latest statistics available to us indicate 6,996 charges for the year 1971: Dominion Bureau of Statistics, *Crime Statistics, 1971*, Table II E.

⁵ The most recent figures available indicate that for the years 1967 and 1968 the conviction rates for all offences heard or before (then) Magistrates' Court were 85.9 per cent and 84.3 per cent respectively. This is based on statistics found in 1972 *Canada Year Book* 495.

⁶ Based on Appendix N to the *British Columbia Supreme Court Rules*, items 19 and 23 (one-day trial with witnesses and preparation).

Acknowledgement

Funding for the background research upon which the proposals in this report are based was provided by the Law Foundation of Saskatchewan.

TENTATIVE PROPOSALS FOR
COMPENSATION OF ACCUSED ON ACQUITTAL

Law Reform Commission of Saskatchewan
Saskatoon, Saskatchewan

July, 1987

The Law Reform Commission of Saskatchewan was established by An Act to Establish a Law Reform Commission, proclaimed in November, 1973, and began functioning in February of 1974.

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The Law Reform Commission Act

6. The commission shall take and keep under review all the law of the province, including statute law, common law and judicial decisions, with a view to its systematic development and reform, including the codification, elimination of anomalies, repeal of obsolete and unnecessary enactments, reduction in the number of separate enactments and generally the simplification and modernization of the law.

* * * * *

N o t e

These proposals have been prepared by the research staff of the Commission and have been approved by the Commission for the purposes of discussion.

It is the policy of the Commission to seek response to its proposals before a final report is prepared for presentation to the Minister of Justice. Accordingly, the Commission invites comments and criticisms from the Bench and Bar and others interested in this particular area of the law.

Submissions should be directed to:

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I. INTRODUCTION

The basis of our criminal justice system is the concept that a person is presumed innocent until proven guilty by law.

Safeguards are built into the legal system to protect the rights of those who have been accused of a crime. Their purpose is to ensure that no one will be convicted of a crime which he did not commit. In addition, there are safeguards designed to protect the individual from an erroneous accusation of guilt.

In spite of the protections and safeguards offered by the law, it does happen that on occasion individuals are unjustly convicted or unjustly accused. It is the dilemma of this latter group - those who have been charged with an offence, but who are subsequently able to demonstrate their innocence - which is the subject matter of this paper.

Until recently, the prevailing view has been that such an eventuality is "one of the inevitable hazards of living in society"¹ and that those who have been unjustly accused have been well served if there ultimately is a finding of "not guilty". Now, however, another view is surfacing, that an acquittal is not satisfaction enough. Something more - a form of monetary redress - is required.

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Report of the Committee on Costs in Criminal Cases (New Zealand, 1966), para. 28. Cited in Report on Civil Rights - Part 2 - Costs of Accused on Acquittal, Law Reform Commission of British Columbia, 1974, p. 28.

It has no doubt been the dramatic case of Susan Nelles that has pushed the issue of compensation for those unjustly accused so forcefully into the limelight. Susan Nelles is the nurse who was charged in 1982 with the murder of four babies at the Toronto Hospital for Sick Children. There was a period of fourteen months between her arrest and her exoneration. It was reported by newspapers that at the end of that time her legal bills totalled between \$150,000 and \$200,000.²

Most individuals who fall into this category - that is, those who are innocent of the crime of which they have been accused - will not have legal costs that in any way approach the amount incurred by Susan Nelles. Yet the question to be asked is the same in each case: should a person who is innocent and who has been forced to prove that innocence with his own financial resources be compensated in some way? Should a person whose life has been disrupted, whose source of income may have been affected, whose name has been blackened through no fault of his own, receive some form of monetary redress?

The public purse supports the criminal justice system. Yet no one financially assists the innocent accused who is drawn into that system. Does the criminal justice system not have an obligation to the accused who has somehow inadvertently become caught in its mechanism?

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The Globe & Mail, Toronto, May 27, 1982 gave the figure of \$150,000. The Vancouver Sun, Vancouver, June 4, 1982 reported the sum to be between \$150,000 and \$200,000.

Although at least two of Canada's Law Reform Commissions have studied the problem of what the criminal justice system owe to those who have been unjustly accused,³ none of their proposals have been acted upon by their respective governments, nor has there been agreement among the Commissions themselves on the means by which compensation should be awarded. With this paper the issue is once again being addressed.⁴

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The Law Reform Commission of Canada issued a report in 1973 titled Criminal Procedure - A Proposal for Costs in Criminal Cases. The Law Reform Commission of British Columbia issued report in 1974 titled Civil Rights - Costs of Accused on Acquittal.

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The Law Reform Commission of Canada and the Law Reform Commission of Saskatchewan collaborated for a time in this area of the law, but ultimately concluded that separate papers were warranted.

II. A SUMMARY OF THE PRESENT LAW

Under the present law, the likelihood that an accused will be compensated for costs is very remote. The reason for this state of affairs is not hard to identify. Until fairly recently, in virtually all cases the Crown neither paid nor received costs.

[I]n dealing with costs in cases between the Crown and a subject...the rule should be that the Crown neither pays nor receives costs unless the case is governed by some local statute, or there are exceptional circumstances justifying a departure from the ordinary rule.

Over the years, statutory provisions have been developed that enable the courts to award costs. However, they are either very limited in scope or have been interpreted in a manner that has reduced their effectiveness.

Criminal law offences are divided into two categories, the indictable offence (the more serious offence) and the summary offence (the less serious offence). Each is treated differently in the Criminal Code. Even in the matter of costs there are differences. Each category, therefore, will be considered separately.

A. Indictable Offences

In the prosecution of indictable offences, there is no general power to award trial costs. There are a few circumstances under which costs may be awarded to an accused but their occurrence is extremely rare. Costs may be awarded to an

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Johnson v. The King, [1904] A.C. 817 (P.C.).

accused when the indictment or count under which he has been charged is incorrect and it is considered necessary by the court to adjourn the matter so that a correction may be made. Under those circumstances, the accused may be awarded costs that he incurred as a result of the system's initial error and the necessity for amendment.⁶ Costs may also be awarded in prosecutions for the virtually obsolete crime of defamatory libel.⁷ Courts of Appeal hearing indictable offences are explicitly precluded from making orders for costs.⁸

It has also been suggested that superior courts can rely on their inherent powers to impose costs on the Crown, but only in exceptional cases "analogous to contempt of court situations" where "necessary to censor the negligence or misconduct of a party".⁹

Prior to December, 1985, there was much speculation about section 438(2)(c) of the Criminal Code. Did it give a court general authority to award costs?

Section 438(2)(c) stated that the court had the power to regulate the pleading, practice and procedure in criminal matters, including costs. The question whether the word "regulate" included the substantive power to award costs was

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⁶ Criminal Code, s.529(5).

⁷ Criminal Code s. 656. See also Law Reform Commission of Canada, Working Paper 35, Defamatory Libel (1984).

⁸ Criminal Code s. 610(3).

⁹ A.G. Quebec v. Cronier (1981) 63 C.C.C. (2d) 437.

considered by commentators in scholarly works and by members of the judiciary but a definitive interpretation did not emerge.¹⁰ The word "costs" was deleted when section 438(2) was amended in December of 1985, rendering further consideration of the matter unnecessary.

B. Summary Conviction Offences

Legislation that deals with the awarding of costs in the prosecution of summary conviction offences is found in the Criminal Code in sections 744, 750, 772 and 438(1) and (2)(c).¹¹ Sections 744 and 772 provide that the trial court may, at its discretion, award costs that are reasonable for summary proceedings and that are not inconsistent with the schedule following section 772.

A reading of section 744 would lead one to believe that it confers a broad discretion on summary conviction courts to award costs. However, section 744 has been construed as referring only to the exceedingly modest fees and allowances set out in section 772 and the schedule following.¹² The schedule which sets out the fees and allowances that may be charged by summary conviction courts is badly out of date. The last changes to the schedule were made in the 1953-54 revision to the Code, and then only some

of the items were revised upward.¹³ For example, mileage costs may be allowed at the rate of 10¢ a mile; if the services of an interpreter are required he may be given \$2.50 for each half day he is attending trial, and if he is away from his ordinary place of residence, he is allowed his actual living expenses up to a limit of \$10 per day. In addition, and perhaps most importantly the fees and allowances set out in the schedule do not provide for the item that is the defendant's greatest expense - lawyer's fees. It seems, therefore, that none can be ordered.¹⁴ It is easy to see that reliance on this schedule has rendered the application of section 744 of little value when one is searching for an avenue by which an accused might be fully compensated for justice gone awry.

In the case of an appeal, section 758 allows a court to make any order concerning costs that it considers just and reasonable. In 1980 the question of whether the power to award costs pursuant to this provision included the awarding of costs against the Crown was raised in the case of R. v. Ouellette.¹⁵ It was concluded that on an appeal from a summary conviction, the Crown may indeed be asked to pay costs. In this particular instance, the Crown was ordered to pay the accused's costs on a solicitor

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R. v. Brown Shoe of Canada Ltd. (1984), 11 C.C.C. (3d) 514; Re Christianson (1951) 100 C.C.C. 289; Rudd v. Taylor (1965) 51 W.W.R. 335 (Q.B.).

¹¹ Criminal Code, R.S.C. 1970, c.C-34.

¹² A.G. Quebec v. A.G. Canada, [1945] S.C.R. 600.

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Robert S. Reid and Peter T. Burns, "The Power to Award Costs in Criminal Costs or How Juridical Illusions Remain Illusions None the Less", (1981-82) 24 Criminal Law Quarterly 455, at 474.

¹⁴ Ibid., at 473.

¹⁵ [1980] 1 S.C.R. 568.

and client basis.¹⁶ Just what the full scope of those costs is likely to be is uncertain. Different courts have handled the matter in different ways. It is an issue that has yet to be resolved.¹⁷

C. Provincial and Municipal Offences

Provincial and municipal governments also have the power to create offences, and those offences are processed through the criminal justice system. They are often referred to as quasi-criminal offences because they are usually less serious than criminal offences. However, they can still result in fines or jail terms. Examples of Saskatchewan legislation that contain quasi-criminal offences are The Highway Traffic Act, The Liquor Act and The Wildlife Act.

In Saskatchewan, Criminal Code procedures are incorporated by The Summary Offences Procedure Act.¹⁸ Section 3(3) makes Part XXIV of the Criminal Code (including sections 744, 750 and 772) applicable to summary conviction proceedings under provincial law

and municipal law. The payment of costs in provincial and municipal offences is therefore regulated by the provisions of the Criminal Code.

D. The Canadian Charter of Rights and Freedoms

The Canadian Charter of Rights and Freedoms¹⁹ has made available a new avenue of compensation. Those who believe their Charter rights have been violated may ask for redress under section 24(1). That section states:

Anyone whose rights or freedoms, as guaranteed by the Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The range of remedies available under section 24(1) includes: to stay or quash proceedings; to dismiss an indictment; to impose a lesser sentence upon conviction; to exclude evidence; to make a declaration that there has been an infringement of a constitutional right; to discipline the person who has infringed the right; to award monetary compensation.²⁰ In deciding which of those remedies is "appropriate and just" in the context of criminal law, McDonald J. in Germaine v. R. suggests that the requisite remedy is one that furthers the

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In a more recent instance of an appeal from a summary conviction, where the Crown was ordered to pay costs to the accused, Mr. Justice Wright of the Saskatchewan Court of Queen's Bench ordered that costs in a fixed sum be paid to the accused; R. v. Moen (1987), 50 Sask. R. 159. Also see: R. v. Wolter (T986), 49 Sask. R. 81.

¹⁷ Atrens, Burns and Taylor, Criminal Procedure: Canadian Law and Practice (1983), XX 96-100.

¹⁸ R.S.S. 1978, c. S-63.

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Constitution Act, 1982: Part I, Canadian Charter of Rights and Freedoms.

²⁰ Germaine v. R. (1984) 10 C.R.R. 232 at 242; McLellan and Etam, "The Enforcement of the Canadian Charter of Rights and Freedoms: An Analysis of Section 24" (1983) 21 Alta. L. Rev. 205.

object of the guaranteed Charter right that has been infringed, without offending the reasonable expectations of the community for the enforcement of criminal law.²¹

It should be emphasized that these remedies are available only when the Charter itself has been contravened. In the criminal process where Charter rights are not violated a request for monetary compensation could not be made under section 24(1). However, for those whose rights have been infringed under the Charter, it is a possible avenue of compensation that should not be overlooked.

A number of commentators have assessed section 24(1) of the Charter and believe that it should be, and will be, given a "generous interpretation".²² Several judicial decisions reflect the view that section 24(1) should be broadly applied. In Re Southam Inc. v. R. (No. 1)²³ it was stated:

The spirit of this "living tree" planted in friendly Canadian soil should not be stultified by narrow technical interpretations without regard to its background and purpose; its capability for growth must be recognized.

²¹ (1984) 10 C.R.R. 232.

²² Manning, Morris, Rights, Freedoms and the Courts: Practical Analysis of the Constitution Act 1982, at 481, Toronto, Emond-Montgomery Ltd., 1983; Fairley, H.S., "Enforcing the Charter: Some Thoughts on an Appropriate and Just Standard for Judicial Review", (1982) 4 Sup. Ct. L.R. 217; Gibson, Dale, "Enforcement of the Canadian Charter of Rights and Freedoms", at 481-527, Tarnopolsky and Beaudoin (eds.) The Canadian Charter of Rights and Freedoms, Toronto, Carswell, 1982.

²³ 3 C.C.C. (3d) 515.

In R. v. Belton²⁴ Allen Prov. J. noted:

As to the relief that may be given, it appears that the Charter has granted a very wide range within which a Court can exercise its discretion.

In Germaine v. R.²⁵ it was explained that the word "remedy" in the legislation was to be given a "generous interpretation".

Germaine was one of the first cases in which monetary compensation was granted as a remedy under the Charter. McDonald J. therefore felt it was necessary to demonstrate that monetary compensation did indeed form part of the armoury of remedies that may be granted when it is just and appropriate to do so. He looked to the Constitutions and cases of other nations for precedents, relying in particular on the case of Maharaj v. Attorney General for Trinidad and Tobago (No. 2).²⁶ He concluded that an order for monetary compensation was a remedy available to a court of superior jurisdiction. He added, "I express no opinion about any other court". Compensation was also granted in a case heard one month later, in May of 1984. In Re Marshall and The Queen it was held that since the accused suffered a violation of rights guaranteed by the Charter, he was entitled to his cost: (on a solicitor-client basis) as the "appropriate and just remedy".²⁷

²⁴ (1983) 2 C.R.R. 227.

²⁵ Supra, footnote 21.

²⁶ [1978] 2 All E.R. 670 (P.C.).

²⁷ (1984) 13 C.C.C. (3d) 73.

It is interesting to note that McDonald J. in Germaine v. R. leaves open the issue of whether a remedy of monetary compensation is available in any court other than that of superior jurisdiction. This has proved to be a contentious point, with strong opinions held on both sides. Mclellan and Elamn argue that section 24(1) authorizes a court to grant any remedy normally within the jurisdiction of that court.²⁸ A provincial court, therefore, would not have access to remedial powers that are not now available to it. A superior court, he argues, has inherent jurisdiction and may grant any remedy unless prohibited from doing so by statute. It is free to order a monetary remedy, but a provincial court, which does not have inherent jurisdiction, is not.

There are cases which support this view. Lee Prov. J. states that a provincial court does not have the power under section 24(1) "to order the making of an apology, the payment of damages or the performance of some act to draw attention to the transgression of the accused's rights".²⁹ In the more recent case of R. v. Halpert, Hawkins Co. Ct. J. says:

With great respect to the trial judge and to the principles of large and liberal interpretation, I feel that a court of competent jurisdiction, within the meaning of section 24(1) of the Charter is limited in its choice of remedies to those within its jurisdictional competence which, in the case of a summary conviction court dealing with costs is

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²⁸ Supra, footnote 20.

²⁹ R. v. Blackstock (1983) 29 C.R. (3d) 249 at 254.

severely, but nevertheless clear³⁰ circumscribed by section 744 and 772 of the Code. As indicated previously in this paper (pages 6 and 7), the schedules set out under sections 744 and 772 are so limited as to be practically valueless.

The contrary argument to the Charter remedy is that the phrase "such remedy as the court considers appropriate and just in the circumstances" refers only to jurisdiction over subject matter and parties and that every court has unlimited discretion to award whatever remedy it considers appropriate and just.³¹

In R. v. B.B.³² it was held that all courts have the authority to award monetary compensation for an infringement of Charter rights, including Youth Courts.

It seems that the clear intention of the framers of the Charter was to bestow the authority to grant a just and appropriate remedy, whatever form that might take, on any court with competent jurisdiction to deal with the matter before it for trial.

Porter Prov. J. found that the police had acted in an overly zealous, uncoordinated manner in contravention of the accused's rights and awarded the accused compensation in the amount of \$3,000. Judge Porter went on to say that it would not be a broad and generous interpretation of the Charter to say that a particular court may legally grant some remedies but not others.

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³⁰ (1985) 12 C.R.R. 201.

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³¹ Gibson, Dale, "Enforcement of the Canadian Charter of Rights and Freedoms", 481-527, at 507, Tarnopolsky and Beaudoin (eds.), The Canadian Charter of Rights and Freedoms, Toronto, Carswell, 1982.

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³² (1986) 8 C.R.D. 425.45-01.

It would seem that the boundaries of section 24(1) are still being established. For the most part, there is agreement that compensation may be awarded in criminal proceedings in a superior court where the Charter has been violated, even though there is no authority in statute to do so. Whether compensation may be similarly awarded in a provincial court is still cause for dispute, and one that only the passage of time and cases through the courts will resolve.

Although the Charter has opened a new avenue of compensation, it is restricted to those whose Charter rights have been violated. For others who believe they merit recompense from the criminal justice system but whose guaranteed rights have not been infringed, the situation remains the same. There is no adequate financial support for an accused who is innocent and subsequently acquitted. Assistance is limited and infrequent.

It is clear that something else is needed. A new system must be devised - about that there seems to be general agreement. But just what should that new system be? When should an accused who has been subsequently acquitted be entitled to costs? What expenses should be compensated? Who should pay? These are the difficult matters to be examined.

A number of countries have established compensation schemes; others are still in the process of studying the problem. An awareness of how this problem has been dealt with in these other

Jurisdictions will be of assistance in a study of this matter. We have therefore provided a brief look at the schemes already existence.

III. SURVEY OF EXISTING COSTS SCHEMES

A. The United Kingdom

The most recent Act governing costs in criminal proceedings in England and Wales is The Costs in Criminal Cases Act, 1973.³³

This Act consolidated the provisions relating to costs in a

number of existing Acts, primarily The Costs in Criminal Cases

Act, 1952.³⁴ It gives the courts wide discretionary authority to

award trial and appeal costs to an accused who has been

acquitted, or to the prosecutor. The last practice note that was

issued to provide direction in this matter stated that the making

of such an award "is a matter in the unfettered discretion of the

court in the light of the circumstances of each particular

case".³⁵ It stated further that it should be accepted as "normal

practice"³⁶ to award costs where the power to do so is given,

except where:

(a) the defendant's own conduct has brought suspicion on himself and has misled the prosecution into thinking that the case against him is stronger than it is;

(b) there is ample evidence to support a conviction but the defendant is acquitted on a technicality which has no merit;

(c) the defendant is acquitted on one charge but convicted on another, the court should make whatever order seems just having regard to the relative

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21 & 22 Eliz. II, c. 14.

³⁴ 15 & 16 Geo. VI & 1 Eliz. II., c.48.

³⁵ Practice Note [1982] 3 All E.R. 1152.

³⁶ Ibid.

importance of the two charges and the conduct of the parties generally.

B. New Zealand

Costs may also be awarded in criminal cases in New Zealand.

Under its system, the court has the discretion to award costs to the successful defendant.

The procedure to be followed is set out in The Costs in Criminal Cases Act, 1967 (N.Z.).³⁸ The court has absolute

discretion to award a sum it thinks just and reasonable in relation to the costs of the defence. Where there has been an

acquittal or discharge, or the information is dismissed or withdrawn for any reason, the defendant may make an

application.³⁹

The court must, however, take into account all relevant circumstances, and in particular:

(a) whether the prosecution acted in good faith in bringing and continuing the proceedings;

(b) whether at the commencement of the proceedings the prosecution had sufficient evidence to support the conviction of the defendant in the absence of contrary evidence;

(c) whether the prosecution took proper steps to investigate any matter coming into its hands which suggested that the defendant might not be guilty;

(d) whether generally the investigation of the offence was conducted in a reasonable and proper manner;

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Ibid.

³⁸ N.Z.S. 1967, No. 129.

³⁹ Ibid. s 5

(e) whether the evidence as a whole would support a finding of guilt but the information was dismissed on a technical point;

(f) whether the information was dismissed because the defendant established (either by the evidence of a witness called by him or by the cross-examination of witnesses for the prosecution or otherwise) that he was not guilty;

(g) whether the behaviour of the defendant in relation to the acts or omissions on which the charge was based and to the investigation and proceedings was such that a sum should be paid towards the costs of his defence.

There is no presumption for or against the granting of costs,⁴¹ but no defendant is to be granted costs just because he has been acquitted or discharged or because the information has been dismissed or withdrawn.⁴² On the other hand, he shall not be refused costs merely because the proceedings were properly brought and continued.⁴³

The New Zealand legislation does make reference to one situation where the costs of a defendant who was convicted might be paid. Where the accused is put to a greater expense in his defence because the prosecution wishes to address a difficult or important question of law, then he may receive costs that are just and reasonable.⁴⁴

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Ibid., s.5(2).
41 Ibid., s.5(3).
42 Ibid., s.5(4).
43 Ibid., s.5(5).
44 Ibid., s.6.

Despite the comprehensive legislation, the New Zealand courts seem reluctant to award costs to acquitted persons. For example, the expenditure for this item totalled only \$8,695.00 in the financial year ending March 31, 1986. Officials from the New Zealand Department of Justice explain the small figure on the basis that the bulk of criminal cases are defended by legal aid. Those whose cases were conducted by legal aid would not be entitled to compensation because they had not used their own financial resources in mounting a defence. In the same fiscal period, that is, the financial year ending March 31, 1986, \$4.85 million was spent on legal aid for offenders.⁴⁵

C. Australia - New South Wales

In the Australian State of New South Wales costs may be awarded to an accused who has been acquitted if the court finds that it would not have been reasonable for the prosecution to institute proceedings had they been in possession of all the relevant facts before the proceeding; and that any conduct of the defendant that might have contributed to the beginning or continuation of proceedings was reasonable in the circumstances.⁴⁶

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Correspondence from the New Zealand Department of Justice, 1986.
46 Costs in Criminal Cases Act, 1967 (N.S.W.) s.3.

In coming to a determination the court may refer to all relevant facts established in the proceedings and all relevant facts contained within the application itself.⁴⁷

If the court finds that the above criteria have been met, it may award a certificate to the applicant. This certificate is then presented to the Under Secretary of the Department of the Attorney General who approves the payment.

Although this avenue to compensation has been available since 1967, applications under it are extremely rare. To date total awards have never exceeded the \$10,000 the Treasury has allotted for this purpose. Often, the awards made during the course of a year are minimal. In 1972, the Law Reform Commission of Western Australia noted that the annual cost to the government of the scheme in New South Wales was \$1,255.50 for 1969 and \$758.00 for 1970.⁴⁸

IV. PROPOSED COMPENSATION SCHEME

It is clear that in Canada the system of costs in criminal matters is outdated and of little value. P.T. Burns and R.S. Reid, in the book Criminal Procedure: Canadian Law and Practice, state the case very strongly:

The present system of costs in criminal matters makes little sense. It is an anomalous and archaic system based on a principle that is no longer valid in our modern society. The case authority patently illustrates that the system does not work; in many cases costs are awarded without proper authority, and in other cases the costs that are awarded are totally inadequate to be classified as compensatory.

They conclude that apparently the Canadian public is willing to accept this situation and are not concerned enough to institute a scheme of compensation.⁵⁰

It is our view, however, that the Canadian public has indicated a very real concern about the issue of costs for an innocent accused. In the aftermath of the Susan Nelles trial, media editorials and comment, including letters to the editor, strongly supported the view that the criminal justice system owes something to those who have become entangled in the legal process through no fault of their own. Several newspapers⁵¹ featured editorials supporting some sort of compensation scheme for those

⁴⁹ Supra, footnote 17, at XX 151.

⁵⁰ Ibid.

⁵¹ Editorial, The Globe and Mail, Toronto, May 27, 1982; Letters to the Editor, The Globe and Mail, Toronto, May 27, 1982; The National, Ottawa, February, 1982; The Star-Phoenix, Saskatoon, August 8, 1981; The Leader-Post, Regina, June 16, 1982, and others.

⁴⁷ Ibid.

⁴⁸ Payment of Costs in Criminal Cases, Western Australia Law Reform Committee, Working Paper, 1972, p.14.

who have been forced to mount an expensive defence to prove their innocence. It is the view of the Commission that the public would support a scheme which provides compensation. The Commission believes, further, that simple justice demands it.

The same issues that the Commission is considering here have already been studied by those jurisdictions where a system of redress for the innocent accused has been implemented. The following statement is the philosophical basis upon which the New Zealand legislation is grounded:

It would, we think, be common ground that by accepting the benefits of an ordered society the citizen becomes subject to various dangers and risks, among them the risk of being suspected, of being arrested and of being prosecuted for offences he has not committed. These dangers are minimized by the provision of fair procedure, trained and upright police forces, and speedy and efficient access to the Courts. Nevertheless, there are and will always be cases where innocent men are prosecuted without any fault being necessarily laid at the door of the police. It does not seem to us to follow that in these circumstances the citizen must also be expected to bear the financial burden of exculpating himself. Because we cannot wholly prevent placing innocent persons in jeopardy that does not mean that we should not² as far as is practicable mitigate the consequences.

The Commission is in basic agreement with that view. No system works perfectly all the time. And when a system is as vast and complex as that of criminal justice, it should not be a surprise that occasionally events go awry without blame being attributable to anyone. Although these sorts of unhappy

occurrences are minimal, they cannot be completely prevented. No one can promise the citizen that he will not be unjustly accused. But the system can promise the innocent accused compensation for the cost of proving his innocence. The Law Reform Commission of Saskatchewan believes this is a promise that should be made.

As indicated previously in this paper, there are schemes in existence in various other jurisdictions, most notably Great Britain, New Zealand and Australia. Although their schemes look good on paper, it seems that very few individuals are receiving the benefits the legislation was intended to provide (see page 14). Can the problems with those systems be overcome?

Another difficulty is the question of who should be compensated. This is the issue that has generated the most discussion, particularly within the legal profession. Other matters that have to be decided are: what expenses incurred by the accused are to be compensated; what process would be used to award compensation; how should concurrent offences be dealt with?

We are aware there are very divergent views on the kind of a scheme that should be implemented. But this is no reason to defer action. To wait until there is consensus is to take no step at all.

A. Who should be compensated?

The most controversial and important issue is that of who should be compensated. There are primarily two schools of thought. One holds that every person who is charged and is

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Report of Committee on Costs in Criminal Cases (New Zealand, 1966), para. 30. Cited in Report on CIVIL RIGHTS - Part 2 - Costs of Accused on Acquittal, Law Reform Commission of British Columbia, 1974, p. 28.

subsequently acquitted is entitled to compensation. The Commission is not in accord with this all-encompassing view. We do not believe it is right to award compensation to those accused who have probably committed the act charged or a similar offence. Rather, we believe (as do most jurisdictions which have already implemented a compensation scheme) that compensation is owing only to those who are truly innocent and who have been drawn into the legal system through no fault of their own.

Legislation reflecting these principles would not allow an acquitted accused compensation when that acquittal is based solely on a technicality or on a reasonable doubt. Rather, compensation would be allowed only when the evidence has satisfied the Court that the accused, on a balance of probabilities, did not commit the offence. A determination of who is entitled to compensation would be made by the court in accordance with certain guidelines.

Nor would it allow compensation to the acquitted accused who, for some reason, had made it difficult for the justice system to ascertain his innocence. The Commission believes that such an individual should not be awarded compensation if it is largely as the result of his own actions that he finds himself in the predicament of being before the courts. In such a situation it is not unreasonable that he bear the expense of his defence.

There is one category of accused persons who, although being without fault, would not be eligible for compensation under the scheme proposed here. These are individuals who have been

convicted of an offence but who subsequently, after satisfying the sentence imposed (or a portion thereof), are found not to have been guilty of the offence for which the conviction was originally entered. While we believe this is a serious concern, it is our view that the basis of compensation for this category is different enough to warrant a separate compensation scheme. The person who has been convicted and who has suffered the consequences of that conviction, whether it be prison, or loss of reputation, or other more tangible losses such as loss of income, has a different basis for compensation than the acquitted accused who is seeking redress only for the costs associated with criminal proceedings.

Often we have used the term acquitted when describing those who are entitled to apply for compensation. By that term we mean to include all those defendants who have been acquitted at trial or on appeal, as well as: those whose charges have been withdrawn or discontinued; those who have been granted a stay of proceedings; and defendants who have been discharged after a preliminary hearing. It is to be emphasized, however, that an "acquittal" would not, in and of itself, be determinative of the compensation issue. Rather, it merely determines one's entitlement to bring an application for compensation.

B. The "third verdict" Problem

The Commission's decision to recommend compensation only for the truly innocent may be met by the criticism that a "third verdict" will be created. The contention is that by awarding compensation to some acquitted and not to others two classes of innocence have been created.⁵³ The end result is three verdicts: (1) guilty, (2) not guilty, with compensation (meaning probably innocent), and (3) not guilty, without compensation (meaning probably guilty).

It is suggested that this creates a problem for the accused who is acquitted but is not awarded compensation, because he may not be seen by the public to be innocent. The critics argue further that under our criminal justice system it is a person's right to be presumed innocent until proven guilty according to law. The method of compensation proposed here would deny the individual who was acquitted, but not awarded costs, that right.

It is the view of the Commission that the "third verdict" problem is not as insurmountable as it might appear. The public, by and large, is aware of the distinction between "true innocence" and acquittal or discharge. They know that there are occasions when someone who has committed a crime "gets off". Often acquittal and innocence do not converge because of the strict rules of proof and strict procedural requirements set by the criminal justice system. These standards are necessarily

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Criminal Procedure, A Proposal for Costs in Criminal Cases, The Law Reform Commission of Canada, 1973, pp. 7 and 8.

stringent so that the innocent may be protected from conviction. But are the same strict rules of proof and procedure equally applicable to a determination of costs? In our view they are not.

It would be appropriate to rely on other lesser standards of proof and to take into account the reasons for acquittal in determining who is entitled to compensation. The British Columbia Law Reform commission ~~believes~~ which studied this problem in 1973 concluded:

An award of costs to the accused who is acquitted on a obvious technicality when the weight of evidence would otherwise support a conviction is more likely to bring the law into disrepute in the public eye than any theoretical violation of principle.

The Commission is in accord with this view. While the public may be ready to compensate the truly innocent, we do not believe the would be disposed to compensate an accused who was "lucky to get off", to use a turn of phrase employed by the New Zealand Report.⁵⁵ This serves as an indication that the singling out of the "truly innocent" will not throw the criminal justice system into disarray.

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Report on Civil Rights, Part 2 - Costs of Accused on Acquittal, Law Reform Commission of British Columbia, p.33.
55 Report of Committee on Costs in Criminal Cases (New Zealand, 1966). Cited in Criminal Procedure: A Proposal for Costs in Criminal Cases. The Law Reform Commission of Canada, 1973, p 8.

It is for these reasons that we recommend the award of compensation be made only to some of those accused who are acquitted, that is - those who are also found to be "truly innocent".

C. The Basis for Compensation

In the Commission's opinion, some of the criteria which the court should consider in its determination of who is without fault are:

- (a) Whether the charge was dismissed on a technical point even though the evidence as a whole would support a finding of guilt;
- (b) Whether the charge was dismissed because the tribunal considered the accused to be innocent in fact;
- (c) Whether the accused did anything that contributed or might have contributed to the institution or continuation of the proceedings or that, if he did do so, it was reasonable in the circumstances;
- (d) Where the accused is acquitted on one or more charges, but is convicted on another charge or charges, the relative importance of the charges involved.

This is not meant to be an exhaustive list of all the possible factors that could be considered relevant to the determination of one's eligibility to compensation; it is a list of the more common factors which would be relevant to such a determination. Similar factors have been identified in the New Zealand compensation scheme and have also been the basis for the recommendations put forward by the Law Reform Commission of British Columbia. ⁵⁶

⁵⁶ Supra, footnote 55, at p. 37 and footnote 54.

The British Columbia Law Reform Commission is again in accord with New Zealand on the question of whether there should be a presumption for or against costs. They conclude that there should be no presumption at all and we agree with this position. To create a legal presumption in favour of costs in all cases of an acquittal would be to place a severe restriction on the presiding judge's discretion to determine the issue of compensation. Further, such a presumption would result in the primary burden being placed on the Crown to establish the defendant's entitlement to compensation. We believe the better approach is to grant to the court complete unfettered discretion to determine the issue of eligibility for compensation. If the circumstances commonly considered relevant to such applications (as set out above), are to be enumerated in the legislative scheme, they should be prefaced in a way which precludes their being taken as imposing a restriction upon the court's overriding discretion in such matters.

D. Offences Covered

The Commission proposes that the scheme encompass criminal offences and quasi-criminal (regulatory) offences, both federal and provincial. We expect that where regulatory offences are concerned, the cost of mounting a defence will, in most cases, be minimal. However, on occasion, more significant expense may be

incurred, and for this reason we propose that an accused who is acquitted of a regulatory offence also be entitled to apply for compensation.

E. Administration

As indicated, payment of compensation should be from public monies, from a fund established for that purpose.

The province would be responsible for the administration and payment of awards arising from provincial regulatory offences, and it is hoped that the federal government would assume responsibility in this regard for matters relating to federal regulatory offences. It is further suggested that any system of compensation that is ultimately implemented by the federal government and is available to accused persons charged with criminal offences would best be administered by the province, with the actual cost of such compensation awards being shared by both federal and provincial governments. The manner in which this would be done is a matter for negotiation between the two.

The establishment of a fund as suggested above has a further advantage - it enables an award to be made to the accused rather than against the Crown. To make an award against the Crown implies fault on the part of the prosecutors or the police or the body or individual who laid the charge. That is not the intent of this proposal. There have been and will continue to be instances where a charge is properly laid even though the ultimate result might be acquittal. To imply fault would be

inappropriate where no fault exists. Such a likelihood, in addition, might make police officers and prosecutors overly cautious in the pursuit of their duties.

There are instances, however, where the police, prosecutor, government department, public body or individual may have acted negligently or in bad faith in bringing proceedings forward. Other jurisdictions do make provision for the awarding of costs against the Crown in these rare circumstances.⁵⁷ A mechanism which would allow for the recognition of reprehensible behaviour might prove to be particularly valuable where actions have been brought under private prosecutions. The knowledge that such a provision exists would serve to deter frivolous actions and punish parties who bring them. Whether or not Saskatchewan legislation should contain such a provision is an issue that requires further study.

F. Procedure

This report has focused on the theoretical basis and merits of compensation schemes in general, and has outlined at a conceptual level a proposed scheme for Saskatchewan. Essential to the acceptance of any scheme for payment of costs is a satisfactory procedural framework. The Commission recognizes that a set of rules must be formulated which will not unduly delay the criminal process.

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Great Britain: Practice Note [1982] 3 All E.R. 1152; New Zealand: Costs in Criminal Cases Act, 1967 (N.Z.), N.Z.S., 1967, No. 129 s.7(2).

As a general rule all accused persons who are ultimately "acquitted" would be eligible to make an application for compensation. It would be the Judge who disposes of the charge at the trial, appeal or preliminary hearing who would hear the application for compensation. The Judge would be at liberty to consider all facts and circumstances considered relevant to the issue, established either during the proceedings or on the application itself. A right to compensation would arise only upon a finding of "true innocence". It would then be the Judge's function to determine the amount of compensation to be awarded, after hearing from the accused about the expenses incurred in mounting his defence. In the vast majority of cases, it is anticipated that such applications would be conducted in an informal manner, similar to that followed when speaking to sentence. Occasionally something further may be required, but it is not the Commission's intention to introduce a second trial into the proceedings.

In instances where a charge has been withdrawn or stayed, an application for compensation could still be made. When this occurs early on in the proceedings, the accused will have spent little on his defence. However, if proceedings are disposed of close to trial, the accused may already have incurred significant legal fees or other necessary expenses. In such a case, an application for compensation could be made to the court that would have heard the matter if the charge had not been withdrawn or stayed.

Special procedural rules must be formulated when oral submissions are inadequate to resolve fully the issue of costs. Answers to questions such as who should be able to call witnesses and whether police files, Crown files and other documents may be subpoenaed are critical to the successful implementation of the proposed cost scheme. Undoubtedly, further study will be required to determine how the scheme can best be implemented. The Commission will elicit the views of the Bar and Bench on the procedural implications before issuing a final report.

G. Amount and Scope of Compensation

It is the Commission's view that an award should be sufficient to compensate the accused for the expenses reasonably incurred in conducting his defence. These could include: counsel fees, the expenses incurred in calling witnesses or producing other evidence, travel and accommodation disbursements, or any other disbursements which were reasonable and necessary to participate in the proceedings. The court would have the discretion to award a sum which it considered just and reasonable taking into account all relevant circumstances.

H. Further Considerations

(a) Included or Concurrent Offences

A difficult situation arises when an accused is acquitted of one offence but convicted on an included offence, or of another offence on which he was tried concurrently. In what manner should he be compensated, if at all?

We believe there may be occasions where an award would be appropriate. We have therefore made provision for this eventuality in the list of factors to be considered by the court when assessing the merits of the applicant's claim. The court will be asked to consider the relative importance of the charges involved where the accused is acquitted on one or more charges, in its determination of whether an award should be made.

(b) The Final Result

An award for compensation should be based on the final result. For example, if an individual were convicted at trial but subsequently on appeal was successful and the charges were dismissed, an application for compensation could then be launched. However, if the appellate court, rather than dismissing the charge, ordered a new trial, an application for compensation would necessarily have to be postponed until the charges were finally disposed of at the second trial. It is only after final vindication that compensation should be considered. This finality would occur only after all appeals had been exhausted or abandoned.

(c) The Legal Aid Client

A significant number of those who travel through the criminal justice system are assisted in their defence by legal aid. This, however, should not present a difficulty if an application for compensation is made upon acquittal. The accused would ask to be reimbursed for expenses actually incurred, if any. This would be only those expenses not covered by the legal aid tariff.

It may be worth noting that data collected by the Law Reform Commission of Saskatchewan indicates that because so many of those who do pass through the criminal justice system are supported by legal aid, a compensation scheme would not represent a major government expenditure.

V. SUMMARY

The protections and safeguards afforded by the criminal justice system do not always provide adequate protection against the risks of being unjustly accused of a crime. An acquittal in such instances is not always sufficient to fully compensate the individual who has been drawn into the criminal process through no fault of his own. We propose that a new scheme of compensation be introduced into the law of Saskatchewan, which would significantly expand the court's jurisdiction to award costs to accused persons in appropriate cases.

Our recommendations in this regard may be summarized as follows:

1. The proposed compensation scheme would have application to all criminal and quasi-criminal proceedings, both federal and provincial, instituted in Saskatchewan. Payment of compensation would be from a public fund established for that purpose and awards would be made to the accused rather than against the Crown. The provincial government would administer the scheme and it is hoped that the actual costs of such compensation awards would be shared by the federal and provincial governments.
2. All accused persons who are acquitted would be eligible to make application for compensation. This would include: all those defendants who have been acquitted

at trial or on appeal; those whose charges have been withdrawn, discontinued, or stayed; and those who have been discharged after a preliminary hearing.

3. One's eligibility to bring an application must be distinguished from one's entitlement to compensation. Although all "acquitted persons" would be eligible to make application, it is only the "truly innocent", that is, those who have been drawn into the legal system through no fault of their own, to whom compensation would be owing. This would be a discretionary matter, that is, to be determined by the court upon application. We see factors such as the following as being relevant to this determination:
 - (a) Whether the charge was dismissed on a technical point even though the evidence as a whole would support a finding of guilt;
 - (b) Whether the charge was dismissed because the tribunal considered the accused to be innocent in fact;
 - (c) Whether the accused did anything that contributed or might have contributed to the institution or continuation of the proceedings or that, if he did do so, it was reasonable in the circumstances;

time being to foreclose the debate surrounding the issue of whether a person can be born into or marry into a claim under the *Family Law Reform Act*.²⁴

The *Family Law Act, 1986*, like its predecessor, continues to generate a broad array of issues which must be dealt with by the courts. At a time when it appeared that the courts were injecting a degree of predictability into the law respecting post-limitation amendments, recent cases have again provided fertile ground for a re-examination of these issues.

In the final analysis, our courts have yet to follow a united path when dealing with claims under the *Family Law Act, 1986*. It is submitted that *MacIsaac* can be viewed as a signal from the Divisional Court that there may be a more restrictive approach taken to the interpretation of the *Family Law Act, 1986*, as it relates to potential claims of unborn children and yet-to-be-married spouses. It remains to be seen whether the courts will adopt a similar restrictive approach in future cases dealing with post-limitation amendments.

CLAIMS FOR "LOST YEARS" IN ONTARIO

Michael H. Ryan*

In 1980, in *Gammell v. Wilson*,¹ the House of Lords held that a deceased's estate could recover as damages in an action for negligence the income the deceased would have earned had he lived, that is, during the deceased's so-called "lost years".

The decision engendered a great deal of controversy in England at the time. Concern centred on the possibility that tortfeasors (and their insurers) might be faced with claims by estates for lost earnings which would duplicate the damages already recoverable by dependants for loss of support under the *Fatal Accidents Acts* ("FAA").² There was also considerable concern about the potentially large awards to which "lost years" claims could give rise. Indeed, the Law Lords in their speeches revealed discomfort with the implications of their decision and several invited legislative action to alter the situation.³ Within a few months, Parliament had intervened and enacted legislation barring the recovery of damages for loss of income in respect of any period after a person's death.⁴

While there is no longer a right to damages for the "lost years" in England, it has since been suggested that the law of Ontario might permit recovery of such damages and that *Gammell v. Wilson* should be followed here.⁵ While the issue has never been decided in any reported Ontario case, it has been raised⁶ and it

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¹ [1981] 1 A.L.J.R. 578.

² *Fatal Accidents (Damages) Act, 1908* (U.K.), c. 7; and *Fatal Accidents Act, 1976* (U.K.), c. 30.

³ See the speeches of Lord Diplock, *supra*, footnote 1, at p. 583; Lord Fraser of Tullybelton, at p. 588; Lord Russell of Killowen, at p. 590; and Lord Scarman, at p. 595.

⁴ *Administration of Justice Act, 1982* (U.K.), c. 53, s. 4 (quoted in footnote 7, *infra*).

⁵ See Earl A. Cherniak, "Assessment of Damages in Fatal Accidents", 3 *Adv. Q.* 350 (1981-82), at pp. 339-40; and S. M. Waddams, *The Law of Damages* (Toronto, Canada Law Book Ltd., 1983), pp. 443 and 602-3.

⁶ *White v. Dominion of Canada General Ins. Co. and two other actions* (1985), 50 O.R. (2d) 231 at p. 241, 11 C.C.L.T. 121 at p. 134, [1985] 1 L.R. para. 1-1888 (H.C.J.), per Barr J.

²⁴ See also *Fichtl v. Kitchen* (1984), 47 O.R. (2d) 495, 46 C.P.C. 125 (H.C.J.); *Gooch v. Larsen* (1986), 54 O.R. (2d) 253 (H.C.J.); *Eastman v. The Queen in right of Ontario* (1982), 17 A.C.W.S. (2d) 293 (Ont. Dist. Ct.); *Seghers v. Double A Farms Ltd.* (1984), 9 D.L.R. (4th) 273, 46 O.R. (2d) 238, 43 C.P.C. 193 (H.C.J.).

seems to be only a matter of time before the issue will have to be confronted squarely in this jurisdiction.

What are the prospects for the success of such a claim in Ontario? That is the question this article addresses.

It is useful to begin with a look at the legal context in which the "lost years" claim first arose in England and the reasons why *Gammell v. Wilson* attracted such widespread attention.

The Position in England

At common law, no claim for personal injury survived the death of the injured person. The sometimes harsh effects of this doctrine on surviving dependants and the horrible anomalies it created ("it is better to kill than to injure") led to the enactment of s. 1 of the *Law Reform (Miscellaneous Provisions) Act, 1934*⁷ in England. That legislation provided for the survival of causes of action for physical injury for the benefit of the deceased's estate. Its provisions find close counterparts in the law of Ontario and all other Canadian jurisdictions.⁸

⁷ 1934 (U.K.) c. 41. The relevant portion of s. 1 read, prior to its amendment in 1982, as follows:

(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action . . . vested in him shall survive . . . for the benefit of his estate. . . .

(2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person:—

(a) shall not include any exemplary damages;

(c) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included.

The *Administration of Justice Act, 1982*, *supra*, footnote 4, made the following changes:

4(1) The following subsection shall be inserted after section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934 (actions to survive death)—

"(1A) The right of a person to claim under section 1A of the Fatal Accidents Act 1976 (bereavement) shall not survive for the benefit of his estate on his death."

(2) The following paragraph shall be substituted for subsection (2)(a)—

"(a) shall not include—

(i) any exemplary damages;

(ii) any damages for loss of income in respect of any period after that person's death"; [Emphasis added.]

⁸ See *Justice Act*, R.S.O. 1980, c. 512, s. 38(1); *Survival of Actions Act*, R.S.A. 1980, c. S-30, s. 2; R.S.N.S. 1967, c. 298, s. 1(1); S.P.E.I. 1978, c. 21, s. 4(1); R.S.N. 1970, c. 365, s. 2; R.S.N.B. 1973, c. S-18, s. 2(1); S.Y.T. 1981 (1st Sess.), c. 16, s. 3(1); *Trustee Act*,

Although the "lost years" claim is grounded in the rights which flow from the Act of 1934, it was not until the 1979 decision of the House of Lords in *Pickett v. British Rail Engineering Ltd.*⁹ that the potential for such a claim arose in England. Before the decision in *Pickett*, English courts assessed damages for loss of income on an injured person's post-accident life expectancy and not on his pre-accident life expectancy.¹⁰ (This had never been the case in Canada¹¹ and the decision in *Pickett* merely brought English law into line with Canadian law in this regard.) *Pickett* itself did not involve a fatal injury claim but, once it was accepted that the principle that a person whose life was shortened was entitled to recover his future lost earnings from the tortfeasor on the basis of his pre-accident life expectancy, there appeared to be no reason why that principle should not extend to fatal injuries.

Plaintiffs were not slow to seize upon the opportunity which *Pickett* presented.

Because provision had already been made in the FAA for the recovery of damages by surviving dependants, however, the extension of the principle adopted in *Pickett* to fatal accident cases gave rise to a difficulty. The problem was well illustrated by the fact situation which confronted Griffiths J., in *Kandalla v. British Airways Board*,¹² a "lost years" case which was a precursor of *Gammell v. Wilson*.

Kandalla involved a claim by a father, on his own behalf and on behalf of his wife, under the FAA for damages, *inter alia*, for loss of support as a result of the death of their two children. The claim was joined with a claim under the Act of 1934 on behalf of the children's estates for the children's future lost incomes.

Griffiths J. stated the nature of the problem that he was faced with by virtue of the "lost years" claim in the following way:¹³

A claim of this nature, conveniently referred to as "the claim for the lost years" was recently allowed by the House of Lords in the case of a living plaintiff whose life expectation had been materially shortened by reason of

R.S.M. 1970, c. T160, s. 55(1); R.S.S. 1978, c. T-23, s. 58(1); R.S.N.W.T. 1974, c. T-8, s. 33 (rep. & sub. 1976 (1st Sess.), c. 11, s. 1); *Estate Administration Act*, R.S.B.C. 1979, c. 114, s. 66(2).

⁹ [1979] 1 All E.R. 774.

¹⁰ See *Oliver v. Ashman*, [1961] 3 All E.R. 323 (H.L.).

¹¹ See *The Queen in right of Ontario v. Jennings* (1966), 57 D.L.R. (2d) 644, [1966] S.C.R. 532.

¹² [1980] 1 All E.R. 341 (Q.B.).

¹³ *Ibid.*, at p. 348.

industrial disease: see *Pickett v British Rail Engineering Ltd*. In so deciding the House of Lords overruled the earlier decision of *Oliver v Ashman* in which the Court of Appeal had held that no such claim could lie. By deciding as they did the House of Lords mitigated the hardship suffered by the family of the plaintiff from the result of the decision in *Oliver v Ashman*. If an injured plaintiff whose life expectation has been shortened sues and recovers damages, his dependants lose their rights to bring a subsequent action under the Fatal Accidents Acts: thus if a man of 40 has had his life expectation reduced to three years and cannot recover as damages his earnings during the "lost years" so that they are available to provide for his family after his death, his family will be worse off than if he had brought no action at all for his personal injuries and left them to sue after his death.

The same dilemma does not arise in a case such as the present where the wage earner has been killed in the accident and claims are brought both under the Law Reform (Miscellaneous Provisions) Act 1934 for damages on behalf of the estate and under the Fatal Accidents Acts, for both actions can run concurrently. Justice can be done to the parents by an award under the Fatal Accidents Acts, and any sums for the "lost years" awarded under the Law Reform (Miscellaneous Provisions) Act 1934 which exceed the value of the Fatal Accidents Acts damages will be a pure windfall for the parents. He then went on to comment as follows:¹⁴

I have no enthusiasm for these results that seem to flow inevitably from deciding that a claim for the "lost years" survives for the benefit of the estate. It does the deceased no good for, unlike the living plaintiff who recovers for the "lost years", the deceased can derive no comfort from the thought that he can make proper provisions for his dependants or any other objects of his bounty. In fact in most cases it will merely provide a windfall for the dependants, who will, as I have illustrated, recover not only fair compensation for their pecuniary loss as they have hitherto done under the Fatal Accidents Acts but an additional sum over and above such loss.

But the trial judge found no "legitimate judicial basis on which to reject the plaintiff's submissions".¹⁵ He accordingly assessed damages under the FAA in the total sum of £54,000, apportioning £21,000 to the plaintiff and £33,000 to his wife based on their actual pecuniary loss flowing from their dependency upon their daughters. He also assessed damages under the Act of 1934 at £54,000 in respect of the "lost years" which he apportioned equally between the estates (and which would pass by operation of law to the plaintiff and his wife in addition to the other assets of the estate, valued at £16,000).

In the result, since it appeared that each of the parents would receive more from the estates than the value of their FAA claims, the FAA claims were "extinguished".

Why the FAA claims were extinguished is a matter I return to below. I comment first on the measure of damages.

It was not mere coincidence that the quantum of damages awarded in *Kandalla* under the FAA and the Act of 1934 were identical. The measure of damages used for both purposes is essentially the same. Megaw L.J. (dissenting on other issues), said the following concerning the calculation of damages in the course of his judgment in the Court of Appeal in *Gammell*:¹⁶

If damages for loss of income in the lost years were recoverable by the estate in a Law Reform Act action, presumably the same principle of assessment would apply as applied in an action such as *Pickett's* case. The judge would have to assess what the earnings of the lost years would have been (presumably net of tax). That will often be an extremely difficult task, involving what is truly no more than guesswork in many aspects in many cases. But it is essentially the same task as is required to be carried out in assessing the dependency in a Fatal Accidents Act case.

The Court of Appeal's assessment of damages for lost income was affirmed on appeal.

Thus, in assessing for the purpose of an action under the Act of 1934 the income which would have been earned in the "lost years", English courts made a judgment concerning various factors which would impinge upon a determination of the amount that would have been left for the estate at the end of the expected life, *i.e.*, a deduction was made for living expenses. This is the same process that the courts go through in assessing the loss of support a spouse or children has suffered for the purpose of calculating an FAA claim. The living expenses of the deceased are the same in either case and the residual representing loss of support or loss of future income accordingly the same.

Why the recovery of lost income under the Act of 1934 should have the effect of extinguishing FAA claims was explained by the House of Lords in 1937 in *Rose v. Ford*.¹⁷ In that case the House of Lords first held that damages for loss of expectation of life were recoverable under the Act of 1934. (The actual damages claimed in that case were for mental pain and suffering arising from the contemplation of the lost expectation of life, and did not include loss of income.) Lord Wright said the following:¹⁸

One other point I ought to mention. It is said that, if this element of damage is allowed, there may be a risk of duplication of damages in partic-

¹⁴ *Ibid.*, at p. 349.

¹⁵ *Ibid.*

¹⁶ [1980] 2 All E.R. 557 at p. 567.

¹⁷ [1937] 3 All E.R. 359.

¹⁸ *Ibid.*, at p. 375.

ular, because the Act of 1934, by sect. 1 (5), provides that the rights conferred by the Act shall be in addition to, and not in derogation of, rights conferred on dependants by the Fatal Accidents Act, or other like Acts. If the Act necessarily involved this consequence, it would all the same have to be enforced, but, in my opinion, the Act does not. I think that, in practice, no duplication of damage need occur. I think the jury would be properly directed to take into account, either that they were at the same time giving damages under Lord Campbell's Act, as they did here, or that such damages had been, or might be, given. The object of damages in these cases is compensation for the benefit of the estate. It is true that the claims under Lord Campbell's Act are independent, and are for the separate pecuniary loss sustained by the dependants, whereas the damages under the Act of 1934 go into the general estate, in which quite different persons, creditors, legatees, or other beneficiaries may be interested. But one of the fruits of continued life is, generally, provision for dependants. If that provision is made good by awards under the Fatal Accidents Acts, the loss consequent on the shortening of life may be deemed to be *pro tanto* reduced. The award of damages in the present case shows how duplication may be avoided. This matter can fairly be left to the good sense of the jury or judge.

Although Lord Wright states in this passage that the award under the Act of 1934 should be reduced *pro tanto* by the award under the FAA, he later stated that the rule should work in reverse, *i.e.*, the FAA award is the one which should be reduced.¹⁹

It is to be noted that the extinction of an FAA claim would occur only if the plaintiff advancing the FAA claim were a beneficiary. In principle, one could have an FAA claimant who was dependent upon the deceased but to whom no money was left under the will. In such a situation, the estate could make full recovery for the "lost years" and the dependant could make a further and separate recovery under the FAA. The dependant would "pay twice".

One could also find a situation where the entire estate was left to a dependant spouse but there was no valid claim for loss of support; *i.e.*, a case in which the deceased could have been expected to devote none of his income to the support of his wife, for example, because of an inharmonious marital relationship. In such a case, the "lost years" doctrine would have an insidious effect. Even if a dependant established facts negating the claim for loss of support, the surviving wife could recover the same sum as income lost to the estate. As a result, the wife would be in exactly the same financial position as if she succeeded in her loss of support claim since she would not have been entitled to recover twice in any event.

The Position in Ontario

Since 1886,²⁰ the law of Ontario has made provision for the survival of certain causes of action. That legislation is now contained in s. 38(1) of the *Trustee Act*,²¹ which provides, in part, as follows:

38(1) Except in cases of libel and slander, the executor or administrator of any deceased person may maintain an action for all torts or injuries to the person or to the property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, have been entitled to do, and the damages when recovered shall form part of the personal estate of the deceased;

When the predecessor of s. 38 was first enacted, it was "not distinguishable" in effect from s. 1 of the Act of 1934.²² If that situation had persisted, the argument favouring the recovery of damages for "lost years" in Ontario would have been compelling.

However, there was prompt reaction in Ontario to the House of Lord's decision in *Rose v. Ford* which resulted in a significant parting of the ways between English law and Ontario law. Section 38(1) (then s. 37(1)) of the *Trustee Act* was amended by adding the following words to the end of the section as it is quoted above:²³

... provided that if death results from such injuries no damages shall be allowed for the death or for the loss of the expectation of life, but this proviso is not in derogation of any rights conferred by *The Fatal Accidents Act*.

(The reference to the *Fatal Accidents Act* is now to be read as a reference to Part V of the *Family Law Act, 1986*.)^{23a}

That the intent of this amendment was to reverse the effects of *Rose v. Ford* and to restore the law of Ontario to what it had always been thought to be before that decision is confirmed by contemporary reports of the debate the amendment provoked when it was introduced in the Legislature.²⁴

The simple question which the Ontario courts will have to address is whether the claim for "lost years" is a species of claim for loss of expectation of life. If it is, it is barred by the 1938

²⁰ See *Statute Amendment Act, S.O. 1886, c. 16, s. 23*.

²¹ *Supra*, footnote 8.

²² See *Major v. Bauer*, [1937] 4 D.L.R. 760, [1938] O.R. 1 at p. 8 (Ont. C.A.), per Middleton J.A.

²³ S.O. 1938, c. 44, s. 3.

^{23a} S.O. 1986, c. 4.

²⁴ *Globe and Mail*, Toronto, April 6 and 8, 1938. For an interesting comment on the public debate which preceded the enactment of the 1938 amendment and an analysis of the underlying issues see Cecil Wright, "The Abolition of Claims for Shortened Expectation of Life by a Deceased's Estate", 16 Can. Bar Rev. 193 (1938).

¹⁹ See *Davies et al. v. Powell Duffryn Associated Collieries Ltd.*, [1942] A.C. 601 at pp. 615-16.

amendment. If it is not, we have the anomalous situation that non-pecuniary damages for loss of expectation of life are not recoverable in Ontario but future pecuniary loss is.²⁵

It is submitted that the better view is the former.

It is a view that derives some support from the speech of Lord Edmund-Davies in *Gammell v. Wilson*. Posing himself the question as to whether or not a cause of action for "lost years" would lie, he said the following:²⁶

... in my judgment an affirmative answer is obligatory in light of the decisions of this House in *Rose v Ford* [1937] 3 All ER 359, [1937] AC 826 and *Pickett*. For it is impossible to distinguish in legal principle between a claim in respect of shortened expectation of life on the one hand and in respect of shortened expectation of working life on the other. And in *Rose v Ford* [1937] 3 All ER 359 at 365-366, [1937] A.C. 826 at 839 Lord Russell said:

"I am of the opinion that, if a person's expectation of life is curtailed, he is necessarily deprived of something of value, and that, if that loss to him is occasioned by the negligence of another, that other is liable to him in damages for the loss. That cause of the action was vested in the deceased before and when she died, and, by virtue of the Act of 1934, it survives for the benefit of her estate. It is no new cause of action created by that Act; it is a cause of action existing independently of the Act, which by the Act is preserved from the extinction which the death of the deceased would otherwise have brought about."

That passage must equally be applicable in its entirety to a claim in respect of the "lost years" resulting from cutting short a person's working life, and, as Holroyd Pearce LJ said in *Oliver v Ashman* [1961] 3 All ER 323 at 330, [1962] 2 QB 210 at 227-228, it leaves "no room for distinguishing between a claim brought by a living plaintiff and a claim brought on behalf of a dead plaintiff in respect of the loss of earnings during the years of which he has been deprived".

His Lordship appeared to be of the opinion that a claim for loss of future earnings is really nothing other than one element of a claim for loss of expectation of life.

Lord Scarman approached the matter in a similar fashion,²⁷ and

²⁵ It is interesting to note that in Alberta and Manitoba, which are the only Canadian jurisdictions where *Rose v. Ford* was not reversed by legislation, the courts have apparently proceeded on the basis that nothing can be recovered by a deceased's estate for loss of prospective earnings. See, for example, *Crosby v. O'Reilly et al.* in which the trial judge instructed the jury to that effect. His instruction to the jury on that issue, which is cited in the report of the decision of the Court of Appeal, 43 D.L.R. (3d) 571 at pp. 572-3, [1973] 6 W.W.R. 632 at p. 634, attracted no comment by that court or by the Supreme Court of Canada, 51 D.L.R. (3d) 555, [1975] 2 S.C.R. 381, [1974] 6 W.W.R. 475, when the case was before those courts. In *Crosby v. O'Reilly et al.*, the Supreme Court of Canada held that damages for loss of expectation of life should not be limited as a matter of law to a conventional sum.

²⁶ [1981] 1 All E.R. 578 at p. 584. (Additional emphasis added by author.)

²⁷ *Ibid.*, at p. 592.

Lord Russell of Killowen also appeared to have regarded the claim for "lost years" as a claim for loss of expectation of life.²⁸

When reading the speeches of the Law Lords in that case, it is to be borne in mind that the result of treating damages for loss of future earnings as a species of damage for loss of expectation of life was, in the context of the English legislation, that both types of damage were recoverable. The identification of the two in the context of the Ontario legislation would lead to the opposite result: neither type of damage would be recoverable.

It must be said that the language of s. 38 may leave something to be desired. Clearly preferable, if one intends to exclude "lost years" claims, is the language of s. 60(2) of the *Estate Administration Act of British Columbia*²⁹ which provides that recovery in an action by a personal representative of a deceased person shall not extend, if death results from such injuries, to damages for the loss of expectation of life, and then goes on to specifically exclude "damages in respect of expectancy of earnings subsequent to the death of the deceased which might have been sustained if the deceased had not died".

²⁸ *Ibid.*, at p. 590.

²⁹ *Supra*, footnote 8.

de révision du Code civil, ne devrait-on pas permettre au tribunal, dans un certain délai, de réviser son jugement? Même si les plus élémentaires principes de justice sont favorables à cette dernière formule, l'approche adoptée devra être très mesurée. Il en est ainsi d'ailleurs des taux d'actualisation des indices ou des taux d'indexation qui sont actuellement étudiés afin de faciliter le travail des tribunaux, dans ce rôle de prophète qu'on leur a longtemps imposé sans leur fournir des outils adéquats.

Enfin, les différentes formules qui parlent de plafonds ou de tables d'indemnités, de comité de tamisage ou d'arbitrage ou encore de la scission du procès sont également examinées.

Nous n'en sommes pas encore arrivés à l'étape où certaines solutions doivent s'incliner devant d'autres. Ce que nous savons cependant, c'est qu'il n'existe pas de formules vraiment gagnantes dans ce dossier et que même après l'adoption de la réforme, il faudra laisser la porte ouverte aux innovations et aux ajustements.

Est-il nécessaire de mentionner que le ministère de la Justice du Québec est à l'affût actuellement de tout ce qui s'écrit ou se dit sur le sujet, qu'il prend note de toutes les suggestions?

Nous serons très attentifs aux conférences et discussions qui prendront place au cours de ce colloque car, comme le traduit si bien une locution connue : « Le procès est encore devant le juge. »

The Future of Personal Injury Compensation

BLONUS WRIGHT
Assistant Deputy Attorney General
Ontario

THE INSURANCE CRISIS?

It is alleged that there is an acute insurance crisis having a significant and far-reaching impact on all sectors of the Ontario economy and society.

What is the evidence of an insurance crisis? Let me refer to three pieces of evidence:

1. The Legislative Assembly of the Province of Ontario on July 3, 1986, passed the following unique resolution with 38 ayes and 23 nays:

That in the opinion of this House, given the present trend towards escalating court awards in the liability insurance sector, and the resultant detrimental effect on the availability and affordability of insurance coverage, the Government should consider placing legislated limits on court awards.

2. Ontario drivers apparently pay 15 to 30 per cent more for insurance than drivers in other provinces while Ontario has more cars than any other province, but a lower number of accidents than the Canadian average. As a result drivers are being introduced to the "pay as you smash" principle, or "next time you crash, reach for your cash".

A friend of mine purchased a brand new 1985 Dodge Aries of which he was particularly proud, but while approaching his place of employment to make a right turn into the driveway, he noticed another car parked in the next driveway with the driver seemingly occupied, with his head down, perhaps reading; my friend put on his signal light and proceeded to make the right turn only to be hit on the door of the passenger side. The other driver pulled out of the driveway without first looking. Immediately, the driver of the other car said, "Please don't call the police, I will pay you for the damages" and proceeded to request my friend to go to his house, which my friend did and was given cash in the amount of \$ 350. That evening on the way home, my friend stopped at the dealership where he had purchased the car and was given an estimate of \$ 550 to replace the outer skin on the passenger door. My friend phoned the driver of the other car, who at the thought of \$ 550 began to suggest that he knew a friend of his who was in the body shop business who would probably do it for less than \$ 550. My friend insisted that he

wanted to get the work done at the dealership and if that was not satisfactory to the other driver, that he would have no choice but to call the police and report the accident. The other driver met my friend the next day and provided him with a cheque for the additional \$ 200 rather than reporting the accident to his insurance company.

3. The Insurance Bureau of Canada has recently commenced a series of newspaper advertisements depicting two automobiles in collision with the caption "We have to stop bumping into each other like this". The body of the ad states :

Last year insurance companies spent more than two billion dollars on car repairs. Huge sums were paid for lost wages due to injuries, for pain and suffering, loss of potential future earnings, and similar costs. Substantial payments were also made to the dependents of people killed in accidents. When you add it all up, the insurance industry paid out well over three billion dollars as a result of auto claims. And every year these costs keep going up. Where does it end? It ends up in your premium. The best thing for each of us to do to help control auto insurance costs is to drive more safely.

Tort or no tort — fault or no fault? That is the question. Where does the blame lay for the crisis? What precipitated the question? What is the answer?

As the Slater Report notes, there are no lack of accusations, counter accusations, finger pointing and anecdotal explanations. Some of those include :

1. a scam produced by greedy insurers who are, in fact, making a great deal of profit in the current market;
2. judicial inflation;
3. re-insurers blame primary insurers for pursuing the destructive course of cash-flow underwriting during the heady days of high interest rates while failing to retain sufficient amounts of risk. Interest rates fell, investment income declined, while claims were rising in terms of frequency and size and premium income and reserves suddenly proved willfully inadequate;
4. failure of public authorities to ensure the solvency and liquidity of insurers, to control rates and to protect consumers adequately.

The Slater Report appears to focus on the question of judicial inflation. Court awards are escalating out of control. Ontario is becoming California North. Courts are simply reflecting the deep social, legal and economic changes that have fundamentally altered the risk environment. It appears that a growing number of Canadians believe that high court awards are a primary cause of the current liability insurance crisis. A Gallup poll taken March 31, 1986, indicated that 33 per cent of the public believe that escalating court awards were to blame for the crisis in insurance.

U.S. studies have concluded that the court system is to blame. State legislatures have introduced bills for tort reform concluding that legislative intervention is needed to rein in the American tort system.

Slater concludes that Ontario is not California North but there is an indication that it may become so in the foreseeable future, not so much in the escalation of the size of the awards, but in the continuing expansion and extension of liability.

The Slater Report refers to the case of *McElean v. City of Brampton et al* 32 C.C.L.T. 199. This case involved a collision by two unlicensed trail bikes with a capability of going fifty miles per hour driven by unlicensed 13 and 14 year olds on a sharp and blind curve in a road on vacant park land which contained an abandoned gravel pit. The court found that the municipality made no attempt to exclude the public. The road was a good smooth gravel road and trail bike riders could round the curve at speeds of up to 50 miles per hour and still remain on their own side of the road. The court also found that, "the combination of circumstances, a road which narrowed at a sharp, blind curve and its use by other young trail bike riders, was, an unusual danger for trail bike riders". One of the drivers was an inexperienced driver weaving back and forth on the wrong side of the road. The court said :

He was old enough and knowledgeable enough to know that it was not reasonably prudent to drive a motor vehicle around a blind curve on the left hand side of the road and to know that, if he could not drive a vehicle well enough to control it, he ought not to drive it at all, let alone around a blind curve on a road used by young trail bike riders.

The court found him to be 15 per cent at fault.

The injured plaintiff is paralyzed, incontinent and unable to speak. The court said with respect to the plaintiff :

To have used that curve even at a moderate rate of speed and entirely on his own side, in all of the circumstances, was a failure to take reasonable care for his own safety.

He was found ten per cent responsible.

The City's failure to act was found to be more blameworthy and it was assessed 75 per cent of the total plaintiff's damages of \$ 7,230,150.

An important point to note is that in reference to this case, Slater comments that the seeds of the insurance controversy lie not in the amount of the award but rather in the imposition of liability.

Subsequent to that case, the same Ontario Supreme Court judge, in a case called *Girnone v. Weinberg* gave the largest medical malpractice award in Canada's history totalling \$ 3.2 million. A six-year old girl fell and the result was a compound fracture of the right arm. The doctor put her arm in a cast at the hospital on August 9, 1981. On August

the 11th, she commenced to run a fever and was returned to the hospital where it was determined that the cast was too tight. The cast was split and the doctor prescribed 222's for the fever. The problem persisted and on August 12th, the cast was removed and the doctor discovered that the arm had developed a gas gangrene. Unfortunately, the dominant right arm was amputated at the elbow.

The court found that she suffered daily pain, that there was a serious danger that she will develop skin problems, neck pains and psychological problems with depression. She has had a lot of mental suffering and will probably experience an emotional crisis during adolescence. The court also found that it was improbable she would go on to post-secondary education and she will probably not marry. Liability was admitted and the only question was the amount of the damages.

Both of these cases are under appeal (until final decisions are rendered, it would be unfair to use them to denounce the tort system as a failure).

Slater attacks the tort system and decides that tort reform is not the answer. The basic insurance problem is three-fold: availability, affordability and overall adequacy. There are three basic reasons why tort reform is not the answer.

1. No strong connection has been established between the areas of difficulty and the present insurance crisis. The proposals would make only modest differences to the costs and availability of insurance.
 2. Even if some measures are implemented, there is no evidence that the tort system would, in fact, be improved.
 3. Any reform of the tort system should only be implemented when objectives of that system have been satisfactorily identified. Slater states, "when the operation and objectives of the tort systems are mired in contradiction and confusion, adding ad hoc 'reform' measures that exacerbate the problem is no solution".
- Slater believes that modern tort law has been dramatically transformed from a mechanism primarily concerned with deterrence to one whose main purpose is compensation. He refers to the Osborne Study and quotes:

The massive transformation of the fault system... is a change which is explicable only on the basis of liability insurance and judicial compassion for the victims of social progress. Judges who in their written judgments give no indication of the prevalence of liability insurance are, in fact, keenly aware that in almost all cases, the defendant is not paying, and that they are in the last analysis deciding whether or not the plaintiff should be compensated from insurance monies.

The prevalence of liability insurance fundamentally altered the moralistic nature of the law shifting function of fault. The law shifting mechanism was converted into a law spreading mechanism and it became more realistic to speak of the fault system as a fault-insurance system. The punitive and deterrent aspects of fault were diminished and compensation became the predominant function of tort law.

Slater concludes that there is a profound inequity and unpredictability in continuing to use tort as a mechanism for accident compensation.

Slater believes that the answer lies in separating the compensation function from the deterrence function. He quotes from the Ontario Law Reform Commission Report of 1979 that, "Tort law is a haphazard and inefficient means of deterrence". Slater also finds that the tort system fails with respect to compensation; one-third to one-half of accident victims get compensation while others are left out — they are denied compensation because fault could not be found. He also complains about the enormous delays under the tort system.

Slater recommends a no-fault system of accident compensation run by the private insurance industry. Compensation would be provided on a no-fault basis, but fault will remain relevant and deterrence will be achieved through a more refined and rigorous penalty-rating or premium-pricing mechanism. He recommends unlimited medical and rehabilitation benefits, including costs of care and income care benefits at levels that would be reasonably adequate for the vast majority of citizens. With respect to additional coverage for income replacement, additional layers of insurance could be purchased voluntarily.

Slater concludes that:
The crisis reflects serious socio-legal and economic changes of a structural nature that give rise to such a degree of uncertainty as to permanently alter the risk environment and the insurance market. Certain fundamental reforms to the system are required in order to stabilize the risk environment and insure the provision of available, affordable and adequate insurance.

What have been the responses to the Slater Report?
The Ontario Branch of the Canadian Bar Association agrees that there are significant problems within certain lines of insurance, but:

These difficulties will not be solved by general system-wide changes. Instead, specific and focused solutions are required. Should focus on the specific problem areas instead of focusing on a no-fault insurance scheme — an insurance line in which few problems exist.

The C.B.A.O. claims that there are two general shortcomings of Slater: (1) The Report did not examine the role of tort as educator, re-enforcer of values, avenger of persons injured by anti-social behaviour, keeper of the peace and ombudsman. (2) The Report is based on the false premise that tort should ideally compensate everyone.

The C.B.A.O. response points out that the State of New York has had no-fault insurance since the 1970's and is currently suffering from the same problems within the same insurance lines as its Ontario. In Michigan, the issue of availability and adequacy of auto insurance persists despite a no-fault system. The response also claims that premiums do not decrease with the introduction of no-fault insurance.

Specifically, the C.B.A.O. response addresses the role of tort in an interesting paper prepared by Professor R.J.S. Gray, Assistant Dean of Osgoode Hall Law School. He states :

The law of tort has played a significant role in establishing the societal values we most cherish. It has created, nurtured and propagated these values so that today we consider them to be essentials of the kind of society we hope to live in.

He quotes from Linden, *Canadian Tort Law* :

We have not yet invented (better) mechanisms, nor is there any guarantee that they would be introduced if discovered. We do, however, possess tort law which is aimed at "maximizing service and minimizing disservice to multiple objectives". This description may not stir excitement in our hearts. But it should make us pause before we conclude that tort law is "doomed to irrelevance".

Philosophizing further, Gray states :

The idea that a person who imposes harm on another or deprives another of a benefit through wrongful conduct should and will correct the situation is the corollary of the "golden rule". All of us want to live in a society that contains, protects and endorses these ideals. The tort of negligence with its insistence on the worth of the individual and the validity of "fault" as the basis for loss fixing is a significant part of the underpinning of these values in our society.

In response to the alleged deficiencies of tort as a compensatory mechanism, specifically that it does not compensate all victims of injury, Gray retorts that :

If it is meant to be a system of distributive justice, which is the assumption made in the Slater Report — then, no doubt, it is a failure, but it seems bizarre to assail tort for failing to accomplish that to which it has never aspired. Tort is about correcting harmful "wrongs".

He claims that Ontario is not bereft of mechanisms to deal humanely with the victims of "pure" accidents as distinct from "negligent" accidents. A very extensive network of social benefits does exist.

Replying to Slater's alleged deficiencies of tort as a deterrence mechanism in that deterrence does not work any more because of "widespread phenomenon of liability insurance" which takes the pain out of tort liability, Gray responds that for every theoretic piece minimizing tort's role as a deterrent, there is another applauding it.

With regard to the scare of the California North syndrome, Gray responds :

What relevance is this comparative exercise outlining the woes of tort in our friendly, but culturally and politically, quite different neighbourhood? Why, when the existing situation is found to be relatively problem free, predict the slide into oblivion. Nobody wants this to become the situation in Canada. Why should we envision an insensitive and radicalized judiciary forcing us to become "California North", over the will of the citizenry and the Legislature and the corpses of bankrupted insurance companies?

Gray comments on the bonus-malus device saying that "it violates our societal conviction that citizens should not suffer penalties, in this case quite significant dollar penalties, without the ability to be heard before an impartial tribunal".

In conclusion, Gray states that the Slater Report :

is in conflict with the fiercely held view that in the society we wish to live in, a person is entitled, when push comes to shove, to "a day in court". This right, while, no doubt, seldom a pleasurable experience, is our ultimate assurance as individuals, of obtaining "justice". In our view, it is a fundamental of our society which should be impinged upon only with extreme caution.

The C.B.A.O. brief submits that a reformed tort compensation is the optimal compensation system for casually victims.

Murray Thompson, a member of the Slater Task Force and a former Superintendent of Insurance for Ontario, in an address on September 19th, to the downtown Business Council, mused that more drivers might risk going without auto insurance if Ontario adopted a proposal for no-fault car insurance. He said that taking away the right of victims to sue those responsible is no way to attack the problem of insurance costs. He advised opting for changes to the old, rather than inaugurating a new system.

The Committee for Fair Action in Insurance Reform, which I understand is made up largely of lawyers, has claimed that if the Slater no-fault system is introduced, consumers will likely pay more than twice as much for their auto insurance and injured parties will find compensation cut substantially and the number of accidents could rise significantly. The Committee also notes that no-fault plans have had "extremely unsuccessful histories" and that some U.S. states have returned to the tort system. The Committee concludes that :

The social costs of the abolition of the tort system consequently involve the loss of a significant deterrent to unsafe conduct, of a safety valve for human frustrations over the losses inflicted by others, of an identification of fault and an assignment of compensation to innocent victims.

Along the way in this debate, a number of suggestions for changes to the present system have been made. Some suggested reforms :

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Ben Wicks



"...and don't give me any of that 'it gets lonely at the top' stuff."

Priest's sex assaults cost church \$150,000

By Kevin Donovan
TORONTO STAR

OTTAWA — Rev. Dale Crampton's sexual assaults of young boys cost the Roman Catholic church \$150,000.

That was the Ottawa archdiocese's financial penance for failing to act on a previous complaint against Crampton, and for not counselling his victims.

The settlement is believed to be the first of its kind in Canada and could set a precedent for future actions against the church, similar to those in the United States since the early 1980s.

Minnesota lawyer Jeff Anderson estimates the Roman Catholic Church in the United States has paid out as much as \$90 million to victims of priests.

Anderson, of St. Paul, Minn., has handled numerous cases himself and regularly keeps in touch with more than 100 lawyers acting on other cases against the church "in virtually every state."

He said many of the U.S. cases have been decided on the basis of whether senior church officials were warned of abuse in the past.

Catholic church officials, on discovery of child abuse complaints,



Star reporter Kevin Donovan spent three months travelling across Canada for his three-part series on the sexual abuse of children by Catholic priests. Here is the last of his reports.

have "historically" kept the priests in the clergy, Anderson said.

"Instead of reporting them to the police or booting them out of there like most any other institution, they have, out of loyalty to their own, just moved them around secretly," he said in an interview.

Among the financial settlements in the United States:

\$15 million to 16 families in the case of a Lafayette, La., priest.

An estimated \$2.5 million to

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Parents 'shut out' by church after sex assaults

Continued from page A1
three victims and their families in Orlando, Fla.

□ \$375,000 to three boys abused by a priest in Springfield, Ill.

Canadian church officials interviewed by The Star say they hope parents and victims in this country will not follow the U.S. lead.

Valleyfield Bishop Robert Lebel, president of the Canadian Conference of Catholic Bishops, said the danger that the church will be sued is lessened if church officials report the complaints.

"If we follow the law there will not be lawsuits. (The priest) may be sued himself, but not the bishop," Lebel said.

The three Catholic families in the Ottawa area who shared the \$150,000 payout in the Crampton case did not make lightly the decision to sue their church, lawyer Bruce Carr-Harris said in a recent interview.

"From the families' perspective, they felt driven to seek a civil remedy because, having gone to the church for help after the assaults, they were shut out by officials, including the archbishop," Carr-Harris said.

Crampton pleaded guilty in 1986 to seven counts of sexual assault involving altar boys aged 11 to 13 over a 10-year period dating back to 1973.

Diagnosed a homosexual pedophile, the 50-year-old Crampton was first placed on probation and he'd started earlier that year. A crown appeal the next year increased his sentence to eight months in jail.

In the 1970s and early 1980s, Crampton was a respected man in the community, as priest, school board trustee and as honorary chaplain for the Royal Canadian Mounted Police.

So it was not unusual that parents allowed their sons to stay overnight at the rectories of his Golbourn Township or Nepean churches, or to spend the weekend at his Horseshoe Bay cottage.

Once there, Crampton would make advances, hug and French kiss the boys, then take them to bed and fondle their genitals, court transcripts show.

One boy's victim impact statement to the courts said he did not yet know the full effects of the as-

saults. "I'll let you know when I have kids," the boy wrote.

But some of the boys would never have been assaulted if church officials had paid heed to an earlier complaint, according to evidence from the civil action launched by the families of three victims.

'Every measure'

According to court records, Crampton had invited a 13-year-old altar boy to his cottage for a day of snowmobiling in 1979. After drinking heavily, Crampton got into bed with the boy and fondled him.

The next morning, the boy went home and told his mother, who contacted a prominent Ottawa psychiatrist for help. The psychiatrist, a Catholic who had done work for the church's marriage tribunal, took the complaint to Ottawa Bishop John Behan.

According to the psychiatrist's account at the civil discovery proceeding, Behan said he would "look into it and take every measure, even the most drastic, to see it is taken care of."

After waiting several weeks for

Behan to call, the victim's parents, guilt-ridden because they had entrusted their child to Crampton, called and made their own appointment.

The parents say they explained the assault to Behan at a Feb. 16, 1979, meeting and he promised to correct the situation. It is not known what, if any, action was taken by Behan, but no report of the incident was made to police or children's aid at the time.

More assaults followed over the next three years, including abuse of the three victims whose families launched the civil suit.

In her victim impact statement at Crampton's 1986 criminal hearing, the mother of the 1979 victim writes: "(Bishop Behan) assured us that the matter would be dealt with following an investigation. It upset me very much that in subsequent years Mr. Crampton continued to operate within the Catholic church, performing the duties of a priest."

And the boy's father writes: "It was only last summer when there was an indication that Dale Crampton had been involved with other children that I realized that

based on statements from the archbishop's office that nothing had been done with our report and, in fact, that it might have been suppressed by church officials."

During the discovery portion of the civil proceedings, Behan (who died two years ago) denied hearing anything of the 1979 complaint.

However, Behan said some boys had complained in the mid-1960s that Crampton had exposed himself to them. Crampton neither confirmed nor denied the incident and Behan attributed it to a "momentary weakness," according to the civil examination evidence.

Despite knowing the church had prior warning, the three families might not have sued if the archdiocese, after Crampton was charged, had shown sympathy and provided counselling for the victims, lawyer Carr-Harris said.

"But it was my clients' view the church was moving to protect its own and was indifferent to the concerns of the families," he said. The only attempt made at counselling was when church officials



DALE CRAMPTON: Clergyman pleaded guilty to sex assaults on altar boys.

sent one family to a local priest who told the parents it was the boy's fault and "he must have liked it," Carr-Harris said. Although the civil action began in late 1986, the trial was not set until last October. On Oct. 11, the night before the jury was to be picked, the archdiocese settled out of court, paying the full \$150,000 requested by the families.

More news/D33, D35

SIMPSONS

The Effect of Income Taxes on Personal Injury Awards

Howard N. Rosen*

Traditionally, income taxes have been a consideration in the determination of lump-sum settlements in cases of fatalities. Under the old *Family Law Reform Act* or new *Family Law Act* (F.L.A.) the surviving members of the family are entitled to a portion of the "after-tax" earnings of the deceased. Since the amounts determined are based on after-tax income, the courts have recognized the need to "gross-up" the settlement for the effect of income taxes. Similarly, future costs in a personal injury action have been subject to gross-up, recognizing the need to pay the future costs out of after-tax income.

In cases of personal injury however, where the plaintiff is claiming for future loss of income, the effect of income taxes has not been considered.

Quoting from the decision of Mr. Justice Barr in *Borland and Barr v. Muttersbach*,¹

"In calculating future loss of earnings in a personal injury case, income tax payable on such earnings, or on an income to be generated by award of damages for such loss of earnings, is irrelevant. In a wrongful death case, however, the plaintiff's loss is that portion of the after-tax income the survivor might reasonably have expected to enjoy. After this has been calculated it should be grossed up to provide an after-tax income similar to the after-tax income which has been lost. Future care must be provided from after-tax dollars. The allowance under this heading must be increased (grossed up) to a figure which will be adequate after payment of taxes."

The reason income taxes are not taken into account in a personal injury case is traced back to the 1966 Supreme Court of Canada ruling, *The Queen v. Jennings et al.*²

This has created a startling inconsistency in the computation of damages, when compared to fatality cases where the effect of income taxes are calculated.

In a personal injury settlement, the lump-sum is received tax free. The future income earned on the lump-sum is subject to taxes as is ordinary interest income. As the plaintiff draws from the pool set up by the lump-sum settlement, he will draw an amount comprised of principle and interest. The annual amount drawn by the plaintiff should exhaust the fund over the predetermined period for which the lump-sum was calculated. Since only the interest portion is taxable (return of principle does not attract any income taxes), a fund set up for a relatively short period of time would increase the plaintiff's after-tax position. This is due to the amount of principle as compared to the amount of interest received in each annual payment. A plaintiff who receives a lump-sum to sustain him over a long period of time is at a considerable disadvantage, since the early payments received will be composed primarily of interest and thus attracting a significant tax liability.

The best way to demonstrate this point is to examine two different scenarios. In scenario 1, the following facts are applicable:

- Annual lost income \$20,000
- Tax deductions \$3,960
- Inflation rate (long-term) 5.0%
- Interest rate (long-term) 7.625%
- Net discount rate 2.5%
- Estimated working life 15 years
- Present value of lost income \$247,628

Table 1 depicts the future disposable income of the plaintiff, A, as if he continued to work and, B, as if he received a lump-sum settlement.

As is demonstrated in Table 1, the cumulative annual disposable income of the plaintiff is increased due to him receiving his future earnings as a lump-sum. Although we can see in year 13, the annual disposable income drops below his expectations had he continued working, the cumulative position after 15 years is positive.

In scenario 2, the following facts are applicable:

- Annual lost income \$25,000
- Tax deductions \$7,920
- Inflation rate (long-term) 5.0%
- Interest rate (long-term) 7.625%
- Net discount rate 2.5%
- Estimated working life 39 years
- Present value of lost income \$618,259

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¹ (1984) 27 A.C.W.S. (2d).

² [1966] S.C.R. 532.

Table 2 depicts the future disposable income of the plaintiff; A. as if he continued to work and, B. as if he received a lump-sum settlement.

As is demonstrated in Table 2, the cumulative annual disposable income of the plaintiff is deficient due to him receiving his future earnings as a lump-sum. By year 17, the annual disposable income drops below his expectations had he continued working. By year 39, he has suffered a cumulative shortfall of almost \$600,000 because income taxes were not taken into consideration.

Thus, it can be seen that depending on the circumstances surrounding the claim, a gross-up for taxes may in fact be necessary to return the plaintiff to a similar position to what he was in prior to the accident.

The examples described above are simplified for the purposes of this article. In an actual situation the following factors should also be considered:

- Amount of award for non-pecuniary damages.
- Amount of award for future cost of care.
- Amount of award for future cost of homemaking services.
- Amount of award for loss of income to date.
- Amount of award for out-of-pocket expenses.
- Tax deductibility of future medical expenses.

All of these factors (if applicable) must be considered, since each one can have an effect on the tax position of the plaintiff.

It is not appropriate to ignore the effect of income taxes when calculating a lump-sum amount for future loss of income in a personal injury claim. It is not sufficient to assume that because the lump-sum amount is computed from pre-tax income that there will be no material difference between receiving the lump-sum and receiving the annual lost income.

APPENDIX
TABLE 1

	(A) LOST INCOME	TAX DEDUCT.	TAXABLE INCOME	INCOME TAXES	DISP. INCOME	ANNUITY PAYMENT	PRIN.	INTEREST	BALANCE IN FUND	TAX DEDUCT.	TAXABLE INCOME	INCOME TAXES	DISP. INCOME	DIFF.
1	20000	3960	16040	4021	15979	28053	9481	18572	238147	3960	14612	3595	24458	- 8479
2	21000	4158	16842	4232	16768	28053	10192	17861	227955	4158	13703	3296	24757	- 7990
3	22050	4366	17684	4454	17596	28053	10956	17097	216998	4366	12731	2980	25073	- 7477
4	23153	4584	18568	4687	18466	28053	11778	16275	205220	4584	11691	2664	25389	- 6924
5	24310	4813	19497	4931	19379	28053	12662	15391	192558	4813	10578	2326	25727	- 6348
6	25526	5054	20472	5188	20338	28053	13611	14442	178947	5054	9388	1965	26088	- 5750
7	26802	5307	21495	5458	21344	28053	14632	13421	164315	5307	8114	1599	26454	- 5110
8	28142	5572	22570	5741	22401	28053	15729	12324	148586	5572	6752	1214	26839	- 4438
9	29549	5851	23698	6038	23511	28053	16909	11144	131677	5851	5293	827	27226	- 3715
10	31027	6143	24883	6350	24677	28053	18177	9876	113499	6143	3732	416	27637	- 2961
11	32578	6450	26127	6677	25900	28053	19541	8512	93959	6450	2062	5	28048	- 2148
12	34207	6773	27434	7021	27185	28053	21006	7047	72953	6773	274	0	28053	- 868
13	35917	7112	28806	7383	28534	28053	22582	5471	50371	7112	0	0	28053	481
14	37713	7467	30246	7762	29951	28053	24275	3778	26096	7467	0	0	28053	1898
15	39599	7841	31758	8160	31438	28053	26096	1957	0	7841	0	0	28053	3385
					<u>343468</u>								<u>399910</u>	<u>- 56442</u>

Accordingly, *Zelensky* and the other seven cases in the criminal area, are consistent with this major Supreme Court direction. The only reason that *Zelensky* stands out, at first glance, as potentially inconsistent with the other cases, is that it is the only one in which the criminal law power was raised in the context of a federal statute. It is unlikely that a Criminal Code provision would be struck down by the Court as being outside Parliament's criminal law power. The present Court is balanced, flexible and tolerant in its consideration of all statutes, but particularly federal statutes. Its decision in *Zelensky* is representative of these judicial characteristics.

ANNUAL SURVEY OF CANADIAN LAW

JURISPRUDENCE

*John Underwood Lewis**

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I. INTRODUCTION	

Since the last jurisprudence survey was published,¹ two important developments have taken place in the field of basic Canadian legal theory. These have determined both the scope and the outline of the present survey.

First, work in law reform has led to changes in the various "black letter" areas of academic law. This was a logical, although by no means a

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¹ Lewis, *Annual Survey of Canadian Law: Jurisprudence*, 8 OTTAWA L. REV. 426

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 Compensation for Victims of
 Crime: Trends and Outlooks

I. Introduction

Modern day western society has only recently begun to pay attention to the plight of the innocent victims of crime. Statutes have been enacted to provide financial compensation to a victim, his dependents or someone responsible for his maintenance, for the suffering and losses that invariably follow from acts of violence. The two basic aims of compensation have been identified as the need to sustain public trust (in that societies core values should be protected) and the desire to demonstrate a concern for individual rights and well being.¹ In this paper I shall examine the historical outlook on these compensation programs, the anti-victim prejudices that existed then and now, and how compensation has developed in light of these factors.

An examination of the justifications behind compensation will reveal why society is no longer directing all of its attention to the criminal and his rehabilitation, and diverting some of the public purse towards the victims. Along with this comes an examination of the costs of the programs and the arguments against compensation. Nova Scotia's possible motives for enacting this legislation are also examined.

The alternatives of restitution, tort-law, insurance and welfare programs are also examined in order to determine the relationship that exists between them and compensation.

The general framework of the Canadian Legislation and its present effectiveness is tested with particular reference to the Nova Scotian statute.

Finally comes an examination of Great Britain, probably the single most influential country in the field and one of the forerunners in compensation legislation.

II. Historical Perspective

Societies treatment or emphases on the victim has shifted dramatically as time wears on. Schaler² identifies three distinct stages, the "golden age", the "decline of" and the "revival of" the victim.

During the early "golden age", the victim played a key role in the criminal process and emphasis was placed upon the victim. Primitive people showed a belief in justice for the victim. In Hammurabi's code (c. 1728-1686 B.C.) it was the victim and not the offender, who was considered first. Criminals were treated harshly in ancient Babylon, often losing life and limb to the satisfaction of the victim. Every victim had an inherent right to restitution or retribution, although social status was a key variable in determining the degree of retaliation available.

The victim's "decline" came about as the state gradually pushed the victim into the background of the criminal/tort proceedings. The victims rights to carry out personal vendettas against the criminal were gradually eliminated and replaced with a system of state fines and state punishment. The Draconian code (621 B.C.) effectively shifted the responsibility for punishing the offender from the victim to the state. Solon's code went one step further and established a system under which any citizen (not just the victim) could bring an indictment against the criminal. Gradually the communities' power exceeded that of the individual and the government began to claim more and more of the victim's restitution.

A sharpening of the division between tort and criminal law took place and by the twelfth century in England, practically all of the fines were remitted to the Kings treasury and punishment which was administered by the King's officers. At this point the victim was stripped of any financial compensation and the common law even went so far as to forbid any effort whatsoever by the victim to receive restitution from the offender.

By the nineteenth century, the victim's status had sunk to such a low level that Jeremy Bentham asked:

Has a crime been committed? Those who have suffered by it either in their person or their fortune are abandoned to their evil condition. The society which they have contributed to maintain,

*LL.B. (Dal.) 1983.

1. Law Reform Commission of Canada, Working Papers 5 & 6 (October 1974).

2. Schaler, *Victimology: The Victim and his Criminal* (Virginia: Reston Publishing Co., 1977).

and which ought to protect them, owes them an indemnity when its protection has been ineffectual.³

There were also rumblings about what was perceived by many to be the inequitable treatment of the criminal and his victim. While the offender was housed and fed at great public expense, the victim was left to pay his own medical and other expenses.

There is no doubt that today, the main emphasis is still on the offender. A multi-million dollar industry revolves around the criminal: his capture, processing, incarceration and rehabilitation. However, due to the work of people such as Margery Fry⁴ it appears that we are entering an era where the victim will be regarded as something more than a mere pawn to be utilized in the court room chess game.

New Zealand was first off the mark in 1964 when it enacted a specially state funded program designed to compensate victims of violent crime.⁵ Great Britain and other countries soon afterwards enacted legislation of their own.

Canadian legislation in the area began in 1967 with Saskatchewan and has continued along in a haphazard fashion. On May the twelfth, 1981 Nova Scotia finally proclaimed its statute, thus leaving Prince Edward Island as the only Canadian province or territory without a function compensation scheme.⁶

III. *Anti-Victim Bias*

One may justifiably wonder why these compensation plans have been so slow in getting off the ground, especially when compared to other welfare programs such as workmen's compensation.⁷ This was probably due to the fact that crime victims have been and still are, misunderstood, ostracized and blamed for their own misfortune. Upon hearing of a crime people automatically tend to look for

3. Edelbertz & Geis, *Public Compensation to Victims of Crime* (New York: Praeger Publishers, 1974) at 8.

4. *Id.* at 10. Margery Fry was an English magistrate and social reformer.

5. *Criminal Injuries Compensation Act*, Act No. 134 of 1963. See Edelbertz, *supra* note 2 at 238 for a discussion of the New Zealand statute.

6. Alberta: S.A. 1970 c. 75; British Columbia: S.B.C. 1972 c. 17; Manitoba: S.M. 1970 c. 56; New Brunswick: S.N.B. 1971 c. 10; Newfoundland: S. Nfld. 1968 No. 26; Northwest Territories: Revised Ordinance of 1976 c. C-23; Nova Scotia: S.N.S. 1975 c. 8; Ontario: S.O. 1971 c. 51; Quebec: S.Q. 1971 c. 18; Saskatchewan: S.S. 1967 c. 84; Yukon Territory: Consolidated Ordinances of 1976 c. C-10, 1.

7. *Nova Scotia Workmen's Compensation Act*, S.N.S. 1910, c. 3.

an explanation for the crime in the victim's behaviour. A glaring example of this kind of attitude would be the treatment bestowed on a typical rape victim. Whether in court or behind her back she is often accused of provoking the rapist, either by her flimsy clothing, her tantalizing mannerisms or the expensive perfume she is wearing. She will be accused of not resisting strongly enough, or of resisting too strongly. Why was she on that street, and at that time of the night? She was probably asking for it anyway?

We have even gone so far as to romanticize the criminal, and the daring and debonair lives they lead. Legendary figures such as Jesse James, Billy the Kid, and Bonnie and Clyde readily spring to mind. T.V. programs and movies focus on the plight of the criminal, his victimization by society and his daring exploits, as these are the kind of movies that are more likely to succeed at the box-office. Movies such as "An American Tragedy", "Looking for Mr. Goodbar", and novelists such as Agatha Christie consistently utilize the theme of the "deserving victim".

A whole field of criminology has even sprung up around the victim who gets what he deserves:

The contribution of the victim to the genesis of crime and the contribution of the criminal to the reparation of the offence are the central problems of victimology.⁸

Thus victimology studies have concentrated almost exclusively on the extent of involvement of victims in their own undoing, to the total exclusion of the consequences of victimization.

Very difficult issues of causation arise in this field, often pointing to subtle questions of degrees of involvement. No doubt victims sometimes do precipitate their own doom and often they lead less than angelic lives. However, as is demonstrated later in this paper, the Compensation Boards are well aware of this fact and often callously reduce awards at the slightest hint of victim fault or wrongdoing. The danger in this, is that the victim may be penalized merely for being at the wrong place at the wrong time, with characteristics (wealth, youth, old age, defencelessness, female, a minority) that attract a potential criminal.

Much of the social discrimination and psychological suffering that victims are put through could and should be avoided or at least minimized. This anti-victim attitude that seems pervasive throughout much of society may be a result of using the victim as the

8. Schaffer, *supra* note 1 at 3.

scapegoat for a large percentage of crime. It is easier to blame the victim for his own misfortune than to fault other parts of the system which threaten our ingrained beliefs that the world is just and fair.⁹ Unfortunately, the present legislation in even the most progressive districts, will only compensate the victim for "pain and suffering" resulting from the criminals' actions, not the guilt and anguish experienced when friends, neighbours, family and government display ambivalent and negative reactions towards the victim.

If properly utilized, compensation could provide a much needed step in the direction towards a much more humanitarian approach in dealing with victims.

IV. *Justifications and Rationals*

Why should crime victims be singled out as a group which should be compensated? Why not take it one step further and compensate people struck by lightning, or any other identifiable group of people always ready and eager to jump on the government candy wagon?

Compensation has most commonly been advanced either as a right to which the victim is morally entitled, or as a natural extension of existing welfare principles. Some would find a legal duty on the part of the state, and others merely see it as a political play designed to attract votes.

1. *Legal Duty*

One of the first champions of the legal duty theory was Jeremy Bentham. His reasoning behind the concept was that society has forced its law enforcement apparatus on the public via the social contract and in so doing has undertaken to protect them from crime. Thus, when a crime has been committed, society has failed in its duty to defend the victim. Another angle on this theme is that society has created crime and criminals indirectly through its ghettos, inadequate education and housing, and general abuse and discrimination.

However, it is doubtful that compensation can be justified merely on the basis of legal duty. Even a police state similar to Orwell's Big Brother could not possibly hope to prevent the majority of violent crimes. Society is simply too complex and violence has the capacity to erupt so suddenly that prevention is just not realistic in most instances.

9. Barkas, *Victims* (New York: Charles Scribner's Sons, 1978).

2. *Moral Duty*

Often words such as "sympathy", "charity", "humanity" or "welfare" are tossed about when the discussion turns to society's moral obligation to victims of crime.

Advocates of the moral duty theory see compensation as a natural extension of the welfare state and the desire to help those who suffer through no fault of their own. Analogies have also been made to other welfare programs such as workmen's compensation and unsatisfied judgment statutes.¹⁰ The basic purpose of much of these social service plans is to distribute the risks of the inevitable accident or injury from the individual, to some larger group of society that could much more easily bear the costs and sometimes also shares in the benefits of the particular activity.

As crime seems to be an unavoidable facet of our daily lives, and in view of the many social welfare programs that are presently in operation, the failure to recognize the special claims of this group would seem to have been a gross oversight on the part of our legislators:

If there is a widely recognized hardship, and if that hardship can be cheaply remedied by state compensation, I should have thought that the case for such a remedy was made out, provided the practical difficulties are not too great.¹¹

Criminal injury can be potentially devastating for a victim. The alternatives to compensation are practically non-existent, and it would seem in the best interests of "justice" and consistency that the welfare system be extended to encompass victims.

3. *Benefit to the State*

Often, the typical victim of today has nothing to gain and everything to lose by reporting the crime to the police. This has led to clear patterns of massive non-reporting by victims.¹²

Furthermore, a victim's characteristics play an integral part in whether or not a complaint will be forwarded to the police, and

10. Kirkham, *Compensation for Victims of Crime*, (Alberta: Institute of Law Research and Reform for the Province of Alberta, 1968). Note: discussion of workmen's compensation and unsatisfied judgments at 14-17.

11. Galaway & Hudson, *Perspectives on Crime Victims* (Toronto: C. V. Mosby Co., 1981) at 416.

12. *Id.* at 45. Note: A 1976 study revealed up to 50% non-reporting on certain types of violent offences.

victims also react to their own and reasonably accurate estimate that nothing will come of their report.

If the offender is in fact apprehended and brought to trial, the victim is subject to the manipulation of the criminal justice system.¹³ In order for the victim to participate in the prosecution of the criminal offender, he must be willing to withstand the time and income losses, and various other minor problems often associated with the cumbersome court process. Small wonder that many victims would see their role in court as somewhat like that of an expectant father in a hospital lobby: "necessary for things to have gotten underway in the past, but at the moment rather superfluous and mildly bothersome."¹⁴

An efficiently performing compensation scheme would in fact provide the victim with much more of the attention that he requires, lead to increased crime reporting, and presumably better enforcement and detection of crime. Along with this might come a restoration of the individual victim's faith in society generally and also supporting the fundamental purposes of criminal law.¹⁵

The appeasement of the public and the political benefits that flow from this type of action is not so much a benefit to the state as it is a benefit to the politicians. Rather than being a stated rationale, this may appear as a hidden motive behind the legislation. It would just not be good policy for an elected official to be seen as antagonistic to the interests of compensation for innocent victims of crime. However, the danger with a purely political motive for enactment of this type of legislation is that the program will be manipulated in order to achieve the desired ends, and then discard it until it is required again. By reporting the big crimes and awards in the paper the voter will hopefully be kept complacent, as justice appears to have been done.

V. Arguments Against Compensation

The arguments against compensation basically boil down to one overriding factor: money. Where it is felt that these victims are no different from any other victims of adversity in society, the prevailing attitude is that they should not be given preferential

treatment by the rest of the community. There is also the fear that fraudulent and undeserving claims will be put forward.

However, this paranoia about a budgetary crisis seems to be unsubstantiated when we look at the costs incurred thus far by the legislatures.¹⁶

YEAR	ADMINISTRATION COSTS (\$)	TOTAL PAID (\$)
<i>Ontario</i>		
71-72	100,657	399,811
72-73	193,144	615,413
73-74	205,317	730,401
74-75	259,073	726,880
75-76	306,090	899,785
76-77	394,496	1,410,812
77-78	427,533	1,629,896
<i>Saskatchewan</i>		
71-72	24,071	30,216
72-73	26,044	57,529
73-74	19,329	181,408
74-75	18,010	139,290
75-76	17,054	122,956
76-77	19,924	166,464
77-78	37,616	175,843

Also in effect for the benefit of the provincial governments is a cost-sharing program whereby the Federal Government has undertaken to contribute up to 50% of the awards granted by the boards (net of any recoveries) up to a maximum of 10 cents *per capita* of the particular province.

This cost-sharing scheme, coupled with the present anti-victim attitudes that exist, and the statutory restrictions placed on the awards have all combined to make the present costs of crime compensation almost trivial in comparison to other legislative expenditures (For example the cost of incarceration).¹⁷

16. Burns, *Criminal Injuries Compensation* (Vancouver: Butterworths & Co. Western Canada Ltd., 1980).

17. Eg. *Annual Report of the Commissioner of Penitentiaries for 1966* (Ottawa: Queen's Printer, 1966) reports the total outlays for goods and services required by penitentiaries for the year at \$54.7 million. McNeil and Vance, *Crimes and Unusual* (Deveau and Greenberg Publishers, 1978): see chapter 13 generally for cost figures. Note: The cost of incarceration is very much dependent upon which variables are included as an expense (Eg. police, courts, prisons) And the statistics can easily be manipulated to arrive at correspondingly high, or low figures in computing cost per prisoner per year.

13. *Id.* at 52. Article by Knudsen "What Happens to Crime Victims in the Justice System".

14. *Id.* at 64.

15. Law Reform Commission, *supra* note 1 at 17.

VI. Nova Scotia's Commitment So Far

Several factors require examination in order to determine what the real rational of any legislature is in enacting this type of legislation.¹⁸

The fact that need is not a visible criterion in the Nova Scotian statute seems to indicate an acceptance of state responsibility. However, it is also quite clear that the legislature will not permit the victim to recover anything that they might possibly perceive as a windfall from his victimization. Section 26¹⁹ empowers the board to make any deductions with respect to any money received by the victim as a result of the offence. The form which must be filled in by all applicants requires that the victim fill in an extensive list of any benefits received, and copies of the applicant's personal income tax returns may also be required (presumably as an aid in calculating lost wages, and not in determining actual need).

The funding provided to the various Canadian Boards thus far seem to indicate a real commitment to the scheme.²⁰

A frequent lament of the compensation boards is that only a low percentage of eligible claimants ever get around to making applications. In Great Britain, it was estimated that the highest percentage of eligible victims that ever applied was 19%.²¹ This may be due to a variety of factors, such as ignorance of the existence of the system, participation in the offence or expectations with respect to the size of any possible awards.

Ontario has a comprehensive attack on the problem of educating the public. Posters and brochures are displayed in Hospital wards and lounges across the province and the police are provided with wallet sized cards to distribute to victims, informing them of their "right" to apply, and how to proceed in the matter.²² Even through the practical difficulties of effectively educating the public may be great, it is still an attainable goal with time and persistence.

VII. Alternatives

1. Restitution

Restitution requires that the criminal court order that the offender compensate the victim (financially or otherwise) as part of his sentence. There are two basic types of restitution: "punitive" and "pure".

Punitive restitution requires the personal performance of the wrong-doer, and in theory is equally burdensome for all criminals, regardless of their individual characteristics. This is accomplished by requiring that the offender undertake manual labour or pay fines in proportion to his earning power. In the latter instance the fine would be determined not by actual harm but by the offender's ability to pay. This type of restitution places an emphasis on the deterrent, reformative, and rehabilitative effect of punishment. However, this system has the potential for allowing large scale inequities and discrepancies between similar cases and I doubt whether this system *standing alone* would be acceptable.

The point in pure restitution is not that the offender deserves to suffer, but rather that the victim deserves to be reimbursed for his suffering.

The conflict between the two systems is one of the underlying objectives. However, this need not imply that one must be accepted to the total exclusion of the other. But merely that different types of restitution are appropriate for different types of criminals.

The possible advantages of a properly managed restitution system appear to be significant. First, the victim would receive monetary compensation at the expense of the criminal and not the state. Psychological desires for revenge might be appeased to a certain extent, and restitution would also provide a much needed incentive for the victim to report the crime.

Secondly, the criminal might benefit from a much more meaningful form of punishment. Rather than merely "sitting on ice" the offender would be given a vehicle for alleviating the anxiety and guilt often experienced after the offence. This in turn would build his self-esteem by righting his wrong. Marketable working skills might even be acquired along the way and this would hopefully lead to a reduction in recidivism rates. White-collar crime and large scale theft would no longer pay as any stolen goods would either be returned or paid for. Restitution would also allow for a

18. Burns, *supra* note 16 at 132.

19. *Compensation for Victims of Crime Act*, S.N.S. 1975, c. 8.

20. Burns, *supra* note 16.

21. *Criminal Injuries Compensation Board Report*, Eleventh Report (Great Britain, 1978).

22. *The Eleventh Report of the Ontario Criminal Injuries Compensation Board* 1980 at 5.

self-determinative sentence, under which the worker would know that the length of his confinement is in his own hands.

Cited as disadvantages and problems of restitution:

- (1) insufficient deterrent to crime.
- (2) advantage given to rich criminals.
- (3) inappropriateness for victimless crimes.
- (4) Canadian constitutional issue as to the division of criminal and civil proceedings.²³

In view of the seemingly high recidivism rates in our prisons,²⁴ it seems unlikely that restitution could be less of a deterrent than the prisons.

The wealthy would not be given any advantage under a punitive restitution scheme or some other combination restitution, criminal sanction program.

Restitution is inappropriate with regard to victimless crimes. But these offences raise issues of their own as to the appropriateness of any criminal sanction in the vast majority of these "crimes".²⁵

Restitution today seems to take place mostly prior to police involvement, less often at the police and prosecutorial levels in the form of plea-bargaining and sometimes at the judicial level.²⁶ The Criminal Code has provisions which allow a judge to order restitution as a condition of probation²⁷ or as a term of sentence in relation to illegally obtained goods.²⁸ The Supreme Court of Canada dealt with this latter issue in *Felensky*.²⁹ This case involved embezzlement of company property by an Eaton's employee. The court ordered that the employee return the goods or their value as there was no dispute whatsoever over the quantum of damages.

23. Law Reform Commission *supra* note 1 at 11.

24. *Annual Report of the Commissioner of Penitentiaries* (Ottawa: Queens Printer, 1959) at 14 (general recidivism rate of 82.88%, and a penitentiary recidivism rate of 46.41%). For the more modern and somewhat dispersed rates see: *Penitentiary Statistics, 1975* (Ottawa: Statistics Canada, 1976).

25. Chambliss, *Criminal Law in Action* (Santa Barbara: California: Hamilton Pub. Co., 1975) at 1-15; McNeil and Vance, *Cruel and Usual*, (Deveau and Greenberg Publishers, 1978) at chapter 13.

26. Burns, *supra* note 16 at 9.

27. *Criminal Code*, R.S.C. 1970, c. C-34, s. 663(2)(e).

28. *Id.*, sections 653, 665, 388(2). See Burns *supra* note 16 for an in-depth analysis of these sections.

29. (1978), 86 D.L.R. (3d) 179 (S.C.C.).

However, the court still echoed the traditional belief that the criminal courts should not be used to enforce civil obligations, except in the most blatant of cases, such as this one.

Restitution is in itself, an important and complex area of the law calling for a detailed study of its viability and ramifications. Because of its disadvantages, it could never be utilized as a complete and just alternative to compensation. Whereas Margery Fry, and the Law Reform Commission of Canada saw compensation merely as a supplement to restitution, it seems that in light of present trends and the real practical difficulties encountered with restitution, compensation is the real *prima donna*, and restitution a scarcely seen stand-in.

However, this is not to conclude that restitution should always be denied the lime-light. The possible benefits to the victim, taxpayer and criminal seem to cry out for attention. Restitution may have a larger role to play, especially when dealing with property offences. This is an area left untouched by compensation schemes and a program which could utilize the advantages of each to complement one another seems to be a realistic and attainable goal.

2. Insurance

Private insurance does not appear to be a realistic alternative to compensation. The costs for the individual are so great and the chances of being a victim so small that it would not be economically viable for potential victims to insure themselves. Insurance does not lend itself well to awarding damages for non-pecuniary suffering, and it is the failure of insurance to meet the needs of victims of violence that has led to state intervention in the first place. However, it is worthwhile to note that insurance is presently being used (by those who can afford it) to cover property damages flowing from crimes.

3. Tort Law

Almost every crime has a corresponding tort, but in spite of this it still seems that the tort rights of victims are illusory. Victims seldom pursue their rights in a tort action³⁰ for several possible reasons:

30. Linden, *The Report of the Osgoode Hall Study on Compensation for Victims of Crime*, (Toronto: Osgoode Hall Law School, 1968) at 21 where the report finds that only 1.8% of those surveyed recovered any damages by way of a civil action.

- (a) the criminal has no money or has it hidden and is thus "judgment-proof";
- (b) the victim has to make a substantial outlay of cash for a lawyer and run the risk of losing in court.
- (c) litigation is time consuming.
- (d) court awards are often conservative and unpredictable.
- (e) must first apprehend the offender.
- (f) others may feel the victim is trying to profit from his victimization.

Compensation has several distinct advantages over tort law in that it allows for periodic awards without setting a fixed total amount at the time the award is made³¹ and it allows for interim compensation awards based on financial need while the hearing is pending.³² Subsequent action may also be brought to increase or decrease the award³³, whereas awards at common law are made once and for all. Section 31(1)³⁴ expressly leaves open the possibility for a victim to proceed by tort as well, subject to the section 31(2)³⁵ board rights to subrogation. Looking at the scheme as a whole one might validly draw the conclusion that compensation was intended to be utilized as a replacement of the empty right to bring a tort action.

4. Welfare

Most victims will have some of their expenses already covered by various social welfare schemes.³⁶ It would seem that compensation would be a proper extension of the welfare system in order to cover gaps in the existing programs or to help those unfortunate enough who happen not to be covered.

VIII. Canadian Legislation

Eleven out of the twelve provinces and territories now have very similar compensation schemes which are in force and operating.³⁷

31. N.S. Act, *supra* note 19, s. 28.

32. *Id.* s. 17.

33. *Id.* s. 22(1).

34. *Id.*

35. *Id.* Ontario recovered \$9,788,42 by subrogation during its 79,80 fiscal year.

36. Osgeode, *supra* note 32, at 27. Other appropriate welfare schemes: Unemployment Insurance, Workmen's Compensation, Canada Pension Plan, M.S.I.

37. *Supra* note 6.

1. Eligibility and Conditions

Victims, persons responsible for the maintenance of a victim or a victims' dependents may generally make an application.³⁸ With the exception of Ontario,³⁹ every jurisdiction relates the concept of "victim" to certain offences found in the Criminal Code. The schedule of offences are comparable for all of the provinces but of the approximately 49 listed offences, only half are ever drawn upon and an even smaller group of "core" offences take up the vast majority of applications.⁴⁰ Good samaritans are also covered in the legislation if they incur injuries while assisting a peace officer or while preserving or attempting to preserve the peace.⁴¹

Necessary causal connection between the offenders conduct and the applicant's injury is a prerequisite to every claim, and there are often problems establishing the necessary link.⁴²

The application must be filed within one year of the injury unless the board gives permission for an extension,⁴³ but none of the jurisdictions require that the victim be a resident of that province, yet the injury must have taken place in that region.

2. Types of Awards

Under the enactments, lump sums, periodic payments, or combination of both types may be awarded⁴⁴ for:

- (a) expenses actually and reasonably incurred or to be incurred as a result of the victim's injury or death;
- (b) pecuniary loss or damages incurred by the victim as a result of total or partial disability affecting the victim's capacity for work;
- (c) pecuniary loss or damages incurred by dependents as a result of the victim's death;
- (d) pain and suffering;

38. N.S. Act, *supra* note 19.

39. Ontario S.O. 1971, c. 51, s. 51a refers to "a crime of violence constituting an offence against the Criminal Code (Canada), including poisoning, arson, criminal negligence, and an offence under s. 86 of that Act but not including an offence involving the use or operation of a motor vehicle other than by means of a motor vehicle."

40. Burns, *supra* note 16 at 33.

41. N.S. Act, *supra* note 19, s. 6(1)(b)(c)

42. Burns, *supra* note 16 at 46-66 for a discussion of some of the finer points on causation.

43. N.S. Act *supra* note 19, s. 7.

44. *Id.* s. 27.

- (e) maintenance of a child born as a result of rape;
- (f) other pecuniary loss or damages resulting from the victim's injury and any expense that in the opinion of the board it is reasonable to incur.⁴⁵

This listing may be divided into two groups: Non-pecuniary (pain and suffering) and pecuniary (everything else). As is usual for any statute this language is subject to interpretation, and sections identical to these have been extensively interpreted in other provinces.⁴⁶

3. Restrictions and Deductions

Every application is subject to minimum and maximum limitations and no application will be entertained or awarded unless the total value of the grant is over one hundred dollars. Maximum awards for lump sum payments are \$15,000 to any individual except good samaritans, who are exempted from these constraints.⁴⁷ A compensable injury includes actual bodily harm, mental or nervous shock, and pain and suffering.⁴⁸

Under section 26, the Board shall deduct from any award granted, practically any benefits it feels appropriate to do so, and the application form sets an extensive list of possible benefits that will be accounted for.

The applicant is also required to "co-operate fully with the Board" and will probably be expected to undergo a medical examination and testify under oath at the hearing.⁴⁹

The victim's behaviour at the time of the commission of the offence and subsequent to it, is a decisive factor in determining the amount, if any, to be awarded. The Board "shall consider and take into account any behaviour of the victim that directly or indirectly contributed to his injury or death."⁵⁰ This broad wording gives the Boards considerable latitude in rendering a decision. The Ontario Reports supply an adequate number of examples as to what constitutes an unworthy victim. There are numerous instances where claimants have had their awards reduced or denied because

of: failing to report to the police within a reasonable time, participation in criminal conduct, membership with the underworld, homosexuality, drunkenness, family disputes, immoral conduct, imprudent behaviour. There seems to be no limit to the circumstances and instances that a board might designate as relevant. But they usually look for circumstances involving illegal, immoral or imprudent behaviour, as defined by the board members themselves.

4. Administration and Procedure

The N.S. Board presently has three out of an allowable five possible members, with a full-time investigator and a secretary rounding out the present staff appointed to administer the scheme.⁵¹ After the claimant has filed his application a hearing will be held, at a place and time to be determined by the Board, and a notice is sent out to the claimant. The Board presently uses the N.S. Civil Procedure Rules as the rules of procedure for the hearing.

Any "statement, document, information or matter" whether or not it is given under oath or is inadmissible in a court of law is admissible as evidence.⁵² The Board also relies heavily upon the investigator's report, police information and the doctor's report. A conviction of a criminal offence is conclusive evidence for the purposes of the hearing that a crime was committed⁵³ and section 12(6) provides protection to an accused and the testimony he gives at the hearing. Section 12(7) seems to suggest that the accused may be required by the Board to give evidence at the hearing under oath or face a contempt of court charge if he refuses to testify. The Act does not explicitly state what standard of proof the claimant must live up to in order to succeed, however, all the Canadian jurisdictions have utilized a balance of probabilities test.⁵⁴

Judicial review may be obtained on questions of law in N.S. as in Ontario. *Re Shevum*⁵⁵ and *Re Fryegum*⁵⁶ demonstrate that board

45. Burns, *supra* note 16.

46. N.S. Act, *supra* note 19, s. 8.

47. *Id.* s. 28 sets out maximum lump and periodic awards while s. 28(7) exempts good samaritans from these restrictions.

48. *Id.* s. 21(4d).

49. N.S. Act, *supra* note 19, s. 25(2).

50. *Id.* s. 25(1).

51. *Id.* s. 4(1). The present members of the N.S. compensation board are Mr. David J. Waterbury (Chairman), Mr. Robert H. Bruce (Vice-Chairman), Dr. Benson Auld (Member).

52. *Id.* s. 12(4).

53. *Id.* s. 12(5).

54. *Morris v. Attorney General of N.B.* (1975), 12 N.B.R. (2d) 520 (N.B.C.A.).

55. (1973), 3 O.R. 508 (Ont. H.C.).

56. (1973), 33 D.L.R. (3d) 278 (Ont. H.C.). See also *Fotoko v. Criminal Injuries Compensation Board* (1983) unreported (NSCA).

decisions are clearly not infallible. The *Sheenan* case involved board discrimination against an inmate of Kingston Penitentiary. As to the issue of causation the Ontario High Court held that the behaviour which "contributes to the injury" within the meaning of the act must be relevant behaviour related to the incident causing the injury, and the mere fact that Sheenan was an inmate did not "contribute" to his injury *per se*.

IX. Great Britain

As a brief overview of a system that has been effectively functioning for almost sixteen years and has acted as a leader in this area let us look to Great Britain.

The British scheme is based on two fundamental points. First, that claims for compensation should be determined by a judicial or quasi-judicial body, and second that remuneration should be payable only in deserving cases and on an *ex gratia* basis only, subject to variation at any time.⁵⁷

Unlike Nova Scotia, all of the members of the British Board must be legally qualified and board decisions are not subject to appeal or ministerial review, but an appeal may lie to an Appellate Tribunal of Board members.

The British Board publishes comprehensive annual reports dealing with the fiscal years volume of applications, the working and administration of the scheme and the awards granted. It is particularly interesting to note the costs of the British scheme and the trends that seem to be developing there. The total compensation paid out under the British statute from its inception (August 1, 1964) up until the last available report (March 31, 1978) has only been £50,526,013 and that is for a nation of 55,901,000 people.⁵⁸ However, over 50% (£26,260,582) of the total awards have been paid in the last three fiscal periods alone (75-76, 76-77, 77-78). Even after accounting for the influence of inflation and the cost of previously ordered periodic payments that are continuing through these later periods, one may note an increasing generosity of the Board and a greater public awareness on the behalf of the British as to the schemes utility and existence.

The cost breakdown for 1977-78 was:

Compensation Paid (77-78)	Size of Awards (77-78)
England	£ 8,072,616 under 100 1319 9.4%
Scotland	£ 1,706,523 100-399 7582 54.0%
Wales	£ 327,374 400-999 3491 24.8%
Total	£10,106,513 1000-4999 1399 10.0%
	5000-and up 261 1.8%

The total amount awarded in sums over 5000 was £2,999,454 representing 29.6% of the total compensation for that year. The highest award of the year was £65,000 to a 15 year old youth who was attacked, kicked in the head and is now permanently confined to a wheelchair.

Thus it seems that the compensation Board has effectively taken root in Britain, and is giving increased recognition to the plight of the victim.

X. Conclusion

Society has once again returned to a point where it acknowledges that victims of crime, do deserve recognition for their suffering. However, we are still a long way from the victim rights of Hammurabi's day, nor would I advocate them. Nonetheless, compensation merely seems to be the first cautious step towards a long over-due acknowledgement of society's duty to its forgotten victims. When one looks at the consequences of violent crime, the physical and mental scars that last a lifetime, one might justifiably wonder why it took so long for government to take appropriate action.

We have seen that the present criminal justice system holds next to no "justice" for the victim, and other than a few obsolete provisions in the Criminal Code, makes no pretence that it does. Even the general principles of sentencing presently utilized by the Canadian Courts,⁵⁹ do not take into account victim needs.

The alternatives to compensation are presently much more appealing in theory than in practice. Restitution seems to hold great potential, but mostly by way of saved taxes and possibly as a means of constructive penal therapy. Insurance (and sometimes restitution)

57. *Criminal Injuries Compensation Board, Fourteenth Report* (Great Britain, 1978) at 33.

58. *The World Almanac and Book of Facts 1981* (New York: Newspaper Enterprise Assoc. Inc., 1980).

59. *Eg. R. v. Grady* (1973), 5 N.S.R. (2d) 264 (N.S.S.C. A.D.).

has been left to indemnify victims of property offences and there seems to be little likelihood that compensation will ever extend into the area. All the more reason that some type of restitutional system be implemented to cover (as much as it feasibly could) property offences. Insurance is expensive, and most often affords protection for those who would be most able to bear the losses, rather than those who are really hit hard by these type of offences.

The Boards are given wide discretion in applying the schemes, and this is sometimes noticeable through the anti-victim bias that appears periodically through their decisions. The notion of *ex gratia* allows for a considerable degree of flexibility, especially when attempting to unravel an often times overly tangled web of criminal-victim relationships and subtle issues of causation.⁶⁰ Nonetheless, an injury is no less an injury merely because it was precipitated.

The Canadian compensation schemes are remarkably similar due to the influence of the Federal government. Thus far the costs have not been burdensome even in the most progressive of countries and the only major distinction between Nova Scotia and other jurisdictions in the overall lack of public awareness and efforts to remedy the situation.

Other programs such as counselling centres and telephone hot lines might also have a valuable role in attempting to round out the non-financial requirements of victims along with the more tangible aspects of compensation.

Compensation is a step in the right direction, but hopefully we will see a refinement and growth in the area which might in turn lead to, or coincide with a changing emphasis in our criminal justice system. In today's rapidly developing world, "no man is an island" and we must seek to develop a more comprehensive system under which the goals of humanitarianism and justice are held out as commendable aspirations, even if never fully attainable.

Reviews

The International Law of Pollution: Protecting the Global Environment in a World of Sovereign States. By Allen L. Springer. Westport, Conn.: Quorum Books, 1983. Pp. xiv, 218. (\$37.50).

A good book must have focus. This may not be the only criteria for evaluating a book, but it is certainly a *sine qua non*. A scholarly work such as Professor Springer's is a means of communicating ideas; the sharper its focus the clearer the message of its author and the better it and he communicates. When reading this book I wondered about its focus: was there a central unified objective? Having now completed the book, I can see that the author has painted us a useful, but blurred picture. He has not quite brought into focus his objective; much valuable information and many good ideas are obscured by the lack of a clear thesis. The book is not a repository or summing up of law; it does not provide reform or future-oriented suggestions; it does not argue for a particular point. What it does do is provide much interesting description on the theme of international pollution. But this is not the focus suggested by the author himself.

In his "Introduction" Professor Springer decries the "mass of ad hoc studies" in international environmental law which he feels has resulted in "a patchwork field created by individuals whose primary interests lie elsewhere". What is lacking is "any kind of systematic approach to the central questions of international environmental law"; what Professor Springer says his book attempts is "to create a more useful framework for the study of international environmental law through a detailed analysis of 'pollution'". He reemphasizes this objective by concluding his "Introduction" with the statement that "a clearer understanding is needed of how the pollution limits are and should be defined and of the nature of the process by which adherence to them is made to seem obligatory. By developing a comprehensive analytical framework for the discussion of pollution, this book attempts to contribute to that understanding."

Taking the book's own self-professed objective, one might be justified in anticipating that the author would pass beyond the descriptive to offer his views on how pollution limits should be

60. Schafer, *supra* note 1, at chapter 2 "Criminal-Victim Relationship as a Crime Factor".

THE CONSTITUTIONALITY
OF THE COMPENSATION
AND RESTITUTION PROVISIONS
OF THE CRIMINAL CODE
— THE PICTURE AFTER
REGINA v. ZELENSKY

*James C. MacPherson**

I. INTRODUCTION

A. The Social Background and Statement of Issues

Compensation and restitution¹ are *formal* remedies available to a judge sentencing someone for breach of particular sections of the Criminal Code. The major sections of the Code which provide for compensation and restitution are sections 388, 653, 655 and 663.² In recent years some judges, unhappy with the ineffectiveness and perhaps the irrationality of the traditional criminal punishments of jail and fines, have shown a willingness to experiment with compensation and restitution as legitimate components of the sentencing process. It is likely that this trend will continue. For example, the Law Reform Commission of Canada recently recommended that restitution be accorded a central place in criminal sentencing policy.³ The reasoning of the Commission is persuasive and should inspire a number of judges to test the Commission's thinking in the laboratories of their criminal courts.

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¹ The ordinary meaning of the terms "restitution" and "compensation" differs from the meaning assigned in the CRIMINAL CODE. Usually, restitution refers to the payment of money or goods *by the offender* to the victim; compensation refers to payment *by the state* to the victim. See, e.g., LAW REFORM COMMISSION OF CANADA, RESTITUTION AND COMPENSATION, WORKING PAPER 5, at 8 (1974). In the CRIMINAL CODE, restitution usually means the return of goods to the victim *by the offender*; compensation means the payment of money *by the offender* to the victim to compensate the victim for loss suffered on account of the actions of the offender. The Code meaning will be used in this article.

² CRIMINAL CODE, R.S.C. 1970, c. C-34, *as amended*.

³ *Supra* note 1, at 1.5-8.

Compensation and restitution are gaining increased visibility and acceptance on a second front as well. They are being used by the police, particularly in the juvenile area, as *informal* punishments for minor offences, to be imposed on offenders in lieu of a charge, and ultimately conviction and traditional punishment.⁴ In other words, compensation and restitution are central components of the theory and practice of diversion, a concept which appears to be gaining substantial acceptance in the criminal justice system.

Of course, compensation and restitution represent a departure, conceptually, from traditional sentencing theory. The focus of the criminal law has always been on the protection of public, not private, interests. Hence criminal sentencing policy has flowed from a balancing of the interests of the state and the offender; the needs of the third member of the criminal activity triangle, the victim, were lost in the shuffle. But modern sentencing theory recognizes the value of a three-dimensional approach to sentencing.⁵ Compensation and restitution are simply the most visible and most effective methods of according, to the victim of a crime, a meaningful place in the sentencing process.

Because of the importance, originality and complexity of the compensation and restitution sections of the Criminal Code, the recent decision of the Supreme Court of Canada in *Regina v. Zelensky*⁶ is of particular importance. It is a watershed in the discussion of innovative penalties in the Criminal Code, and, on its particular facts, is an authoritative statement of the constitutionality of some, and probably all, of the compensation and restitution sections of the Code.

Using the decision in *Regina v. Zelensky* as a foundation, the remainder of this article will be devoted to a consideration of three topics.⁷ First, there will be a survey of some of the important provincial superior court decisions concerning the constitutionality of the various compensation and restitution sections of the Criminal Code. Secondly, those same sections will be considered, from a constitutional perspective, in light of the Supreme Court's decision in *Zelensky*. Thirdly, the decision in *Zelensky* will be discussed, briefly, against the backdrop of other recent Supreme Court decisions in the constitutional/criminal area. An attempt

⁴ For a description of this development in a British Columbia context, see Alsop, *Making Punishment Fit Crime*, in *The Province*, October 31, 1978, at 9.

⁵ "Justice... in focussing on the wrong done and the need to restore the rights of the victims, provides an opportunity to individualize the sentence and to emphasize the need for reconciliation between the offender, society and the victim." LAW REFORM COMMISSION OF CANADA, *THE PRINCIPLES OF SENTENCING AND DISPOSITIONS*, WORKING PAPER 3, at 3-4 (1974).

⁶ [1978] 2 S.C.R. 940, 41 C.C.C. (2d) 97, 86 D.L.R. (3d) 179.

⁷ *Zelensky* raises an important non-constitutional issue, viz., the merits of judicial use of compensation and restitution. In the final pages of his judgment, Laskin C.J. set down some guidelines for the application of these penalties in future cases. *Id.* at 962-64, 41 C.C.C. (2d) at 112-14, 86 D.L.R. (3d) at 194-96. Because the focus of this paper is on

will be made to discern whether *Zelensky* is representative of, or inconsistent with, the direction of other decisions in this important area of the law.

Before turning to these issues it is necessary to describe briefly the factual background of *Regina v. Zelensky*.

B. *Regina v. Zelensky* — *The Factual Background*

Regina v. Zelensky was an appeal on the sentence after a guilty plea on a charge of theft, with the sentence including orders for compensation and restitution pursuant to sections 653 and 655 of the Criminal Code and a term of imprisonment. The accused pleaded guilty to a charge of theft of money in the amount of \$18,000 "more or less" and of merchandise worth \$7,000 "more or less" following a plea bargain which had resulted in the dropping of some other charges. The accused, an employee of the T. Eaton Company, had taken advantage of her position by fraudulently making money orders payable to herself and some relatives. The Eaton Company had commenced civil proceedings at the same time as the criminal action and these continued throughout the trial. In spite of the guilty plea, the accused disputed the amount involved when the company applied for compensation and restitution of the money and goods. Counsel for the opposing parties were unable to agree on the amount (much to the dismay of the trial judge) but the application was granted and compensation and restitution were ordered in the sums of \$18,000 and \$7,000 (goods) respectively. The accused appealed the sentence, including these orders, arguing *inter alia* that section 653(1) was unconstitutional as it infringed the provincial power over property and civil rights (section 92(13) of the B.N.A. Act). The Manitoba Court of Appeal unanimously upheld the sentence of imprisonment. But, by a three-two decision, the court ruled that section 653(1) was unconstitutional and struck out the orders for compensation and restitution.⁸

The Crown appealed this decision. The Attorneys-General of Alberta and Quebec intervened to support the decision, the Attorney-General of Canada (and the Eaton Company) intervened to support the constitutionality of section 653(1). Judgment was pronounced on May 1, 1978. The Court had little difficulty restoring the order for restitution — the constitutionality of section 655 had not been challenged before either the Manitoba Court of Appeal or the Supreme Court of Canada. In any case, all nine justices of the Supreme Court of Canada considered section 655 to be constitutional. With respect to section 653(1), the Supreme Court reversed the decision of the Manitoba Court of Appeal. Six justices, in an

⁸ *Regina v. Zelensky*, [1977] 1 W.W.R. 155, 33 C.C.C. (2d) 147, 73 D.L.R. (3d) 596 (Man. C.A. 1976). The two majority judgments were written by Mats J.A. (Hall J.A. concurring) and O'Sullivan J.A. The dissenting judgment was by Monnin J.A. (Guy J.A.

opinion written by Chief Justice Laskin, declared the section *intra vires*;⁹ Justices Beetz and Pratte joined in a dissent penned by Mr. Justice Pigeon.⁹

II. CONSTITUTIONAL ISSUES

A. Compensation and Restitution — the Criminal Code Framework

Although section 388(2) of the Criminal Code deals with compensation, its application is limited to situations in which property damage does not exceed fifty dollars. The significant Code provisions concerning compensation and restitution are sections 653,¹⁰ 654, 655 and 663(2)(e).

Even though these provisions may provide for compensation in only "an imperfect and partial manner"¹¹ and although judicial application of the provisions may be anarchic,¹² it is still possible to discern a theme or underlying philosophy in these sections. As the Chief Justice put it, correctly, in *Zelensky*:

It appears to me that ss. 653, 654 and 655, historically and currently, reflect a scheme of criminal law administration under which property, taken or destroyed or damaged in the commission of a crime, is brought into account following the disposition of culpability and may be ordered by the criminal court to be returned to the victimized owner if it is under the control of the court and its ownership is not in dispute or that reparation be made by the offender, either in whole or in part out of money found in his possession when arrested if it is indisputably his and otherwise under an order for compensation, where the property has been destroyed or damaged.¹³

⁹ I doubt that there is any significance in the fact that the three dissenting justices were the Quebec justices on the Court. Even if there is merit in the suggestion that there may be substantial differences between civilian and common law-trained justices concerning the fundamental nature of Canadian constitutional law, the judgment by Mr. Justice Pigeon, which is narrow and technical in emphasis, does not reflect this potential difference.

¹⁰ 653. (1) A court that convicts an accused of an indictable offence may, upon the application of a person aggrieved, at the time sentence is imposed, order the accused to pay to that person an amount by way of satisfaction or compensation for loss of or damage to property suffered by the applicant as a result of the commission of the offence of which the accused is convicted.

(2) Where an amount that is ordered to be paid under subsection (1) is not paid forthwith the applicant may, by filing the order, enter as a judgment, in the superior court of the province in which the trial was held, the amount ordered to be paid, and that judgment is enforceable against the accused in the same manner as if it were a judgment rendered against the accused in that court in civil proceedings.

(3) All or any part of an amount that is ordered to be paid under subsection (1) may, if the court making the order is satisfied that ownership of or right to possession of those moneys is not disputed by claimants other than the accused and the court so directs, be taken out of moneys found in the possession of the accused at the time of his arrest.

¹¹ *Turcotte v. Gagnon*, [1974] Que. R.P. 309, at 318 (C.S.) (per Hugessen A.C.J.).

¹² "Restitution in Canadian criminal law is in a near state of lawlessness in the sense that there are very few established principles governing its application." Chasse, *Restitution in Canadian Criminal Law*, 36 C.R.N.S. 201 (1977).

¹³ *Supra* note 6, at 949-41 C.C.C. (74) at 102-86 D.1. D. (73) at 185.

One qualification should be made concerning the view that these sections are a schematic whole. Although such a view is acceptable from a substantive criminal law perspective, that does not mean that the sections, when viewed from a constitutional law perspective, do not pose constitutional problems of varying degrees of difficulty. It is not possible, and the courts have not tried, to consider the constitutionality of sections 653, 654, 655, and 663(2)(e) on a package basis. There are significant differences in the purpose and the wording of these sections, differences which require careful and separate judicial treatment. For example, the courts have had more difficulty with section 653 than with the other sections. This can be explained by two important and unique components only on the application of the injured citizen; secondly, the compensation order can be enforced in a provincial superior court in a manner identical to the enforcement of a civil judgment. These and other differences underline the need for careful consideration of each section of the Code whose subject matter is compensation or restitution.

B. Provincial Superior Court Consideration of Compensation and Restitution

The constitutionality of the compensation and restitution sections of the Criminal Code has been considered by a number of provincial superior court justices in recent years. Decisions, some of them of very high quality, in this area have been rendered in Quebec, Ontario and Manitoba.¹⁴

In *Turcotte v. Gagnon*¹⁵ Associate Chief Justice Hugessen, of the Quebec Superior Court, was faced with a petition asking that a compensation order pronounced by a lower court, be entered as a judgment in the superior court, and enforced pursuant to section 653(2) of the Criminal Code. Hugessen A.C.J. had no difficulty upholding the constitutionality of those sections of the Code which permit a judge to order compensation or restitution as part of a criminal sentence. In his opinion, there was an important public interest to be served in focusing on the needs of the victim in the sentencing process.¹⁶ Accordingly, since for Hugessen A.C.J., "a criminal prosecution is one in which the interests and protection of the body politic as a whole are concerned",¹⁷ it followed that the Code sections establishing compensation and restitution were constitutional. He concluded that "an order for restitution to the victim of a crime

¹⁴ See *Regina v. Zelensky*, *supra* note 8; *Re v. Cohen*, 32 Man. R. 409, 38 C.C.C. 334, [1923] 1 D.L.R. 687 (C.A. 1922); *Turcotte v. Gagnon*, *supra* note 11; *Re Torek*, 20 O.R. (2d) 228, 15 C.C.C. (2d) 296, 44 D.L.R. (3d) 416 (H.C. 1974); *Regina v. Groves*, 17 O.R. (2d) 65, 37 C.C.C. (2d) 429, 79 D.L.R. (3d) 561 (S.C. Chambers 1977).

¹⁵ *Supra* note 11.

¹⁶ *Id.* at 317-18, quoting with approval from Law REFORM COMMISSION OF CANADA, *supra* note 5, at 31.

is not only incidental to criminal law and procedure; it may be an inherent part of the sentencing process".¹⁸

Hugessen A.C.J. then proceeded to the issue raised by the actual fact situation in *Turcoite v. Gagnon*, namely, the constitutionality of the enforcement mechanisms in section 653(2). The argument against the validity of this section was that the enforcement proceedings which would take place pursuant to section 653(2) would, in effect, be civil actions between private litigants, a subject matter outside the scope of Parliament's criminal law power. Hugessen did not accept this argument. In reasoning that was quoted with approval by Chief Justice Laskin in *Zelensky*,¹⁹ Hugessen A.C.J. stated:

[I] take it that the superior court in which the order of the criminal court [sic] filed is not called upon to exercise a judicial function in any normal sense of that word, but rather a purely administrative one, which has as its sole purpose to allow the civil execution process to be used to enforce what is already a binding order given by the criminal court.

Proceedings such as the present ones taken in a civil court in order to effect the execution of such an order do not cause it thereby to lose its criminal law character. In effect, all that Parliament has done is to impose upon the provincial superior courts, which are equipped for such purpose, the duty of providing for the execution of an order already given by a court of competent jurisdiction.²⁰

The constitutionality of sections 653(1) and 663(2)(e) was tested and upheld in two recent Ontario cases.²¹ The judgments by Justices Haines and O'Driscoll were comparable in both their general direction and high quality to that of Hugessen A.C.J. in Quebec.

In *Re Torek*²² the validity of section 653 was challenged. Mr. Justice Haines conceded that the right to bring and defend an ordinary civil action is a civil right, which is normally within provincial legislative jurisdiction.²³ In addition, he acknowledged that section 653 deprives an accused of many of the protections he would have in an ordinary civil action, such as the right to have prior notice of the claim and the right to discovery.²⁴ But these considerations did not persuade Mr. Justice Haines that the section was *ultra vires*. Without stating it explicitly, Haines J. applied the aspect doctrine²⁵ and found a valid criminal purpose underlying section

653. For him, "proceedings under s. 653 can be considered to be part of the sentencing process";²⁶ this was sufficient to establish their constitutionality under section 91(27) of the B.N.A. Act.

The only criticism that may be made of Haines J.'s judgment, which generally is both thorough and well-reasoned, is his spurious reliance on section 601 of the Criminal Code as a prop for the constitutionality of section 653. He said: "It is worth noting that in s. 601... the word 'sentence' is defined to include an order made under s. 653."²⁷ In a constitutional sense this fact is not at all worth noting; it is irrelevant, as both the Chief Justice²⁸ and Mr. Justice Pigeon²⁹ hinted in their judgments in *Zelensky*. Inclusion in a definition does not determine validity, particularly when, as in this case, the definition section is found in a completely unrelated part of the Code.³⁰

The second recent Ontario case concerning the compensation and restitution provisions of the Criminal Code is *Regina v. Groves*.³¹ In that case Mr. Justice O'Driscoll decided that section 663(2)(e) of the Code, which permits a judge to make a restitution order part of a sentence of probation, was *intra vires* Parliament's criminal law power. The judgment, which was rendered after the decision of the Manitoba Court of Appeal in *Zelensky*, but before that of the Supreme Court, is remarkable for its anticipation, not only of the result in *Zelensky*, but also of the broad outlines of the reasoning advanced in the Chief Justice's opinion. Using as starting points the presumption of constitutionality³² and the breadth of Parliament's criminal law power,³³ O'Driscoll J. easily concluded that sentencing is part of that power and section 663(2)(e) was part of sentencing. But he recognized, correctly, that this did not conclude the matter:

To say that s. 663(2)(e) is part of sentencing does not remove the necessity of determining its constitutional validity.

To answer this question one must examine how the concepts of "restitution" and "reparation" relate to the principles of sentencing. If the whole purpose of the provision in s. 663(2)(e) were to save the victim the necessity and expense of a civil suit, such would render the provision *ultra vires* because it would not be in "pith and substance" legislation in relation to criminal law.³⁴

O'Driscoll J. then embarked on an examination of the purposes of section 663(2)(e) and their relationship to the accepted purposes of

¹⁸ *Id.* at 317.

¹⁹ *Supra* note 6, at 958-59, 41 C.C.C. (2d) at 109-10, 86 D.L.R. (3d) at 191-92.

²⁰ *Supra* note 11, at 312, 318.

²¹ *Re Torek*, *supra* note 14; *Regina v. Groves*, *supra* note 14.

²² *Supra* note 14.

²³ *Id.* at 230, 15 C.C.C. (2d) at 298, 44 D.L.R. (3d) at 419.

²⁴ *Id.* at 229-30, 15 C.C.C. (2d) at 298, 44 D.L.R. (3d) at 418.

²⁵ This is one of the oldest and most important principles of constitutional interpretation. It was first enunciated in *Hodge v. The Queen*, 9 App. Cas. 117, at 130, 53 L.J.P.C. 1, at 6 (1883), where the Privy Council stated that "subjects which in one aspect and for one purpose fall within sect. 92, may in another aspect and for another purpose fall within sect. 91".

²⁶ *Supra* note 14, at 230, 15 C.C.C. (2d) at 298, 44 D.L.R. (3d) at 419.

²⁷ *Id.*

²⁸ *Supra* note 6, at 955, 41 C.C.C. (2d) at 107-08, 86 D.L.R. (3d) at 189-90.

²⁹ *Id.* at 984, 41 C.C.C. (2d) at 128, 86 D.L.R. (3d) at 210, citing *Regina v. Scherstabloff*, 40 W.W.R. 575, [1963] 2 C.C.C. 208, 39 C.R. 233 (B.C.C.A. 1962).

³⁰ *Id.* at 955, 41 C.C.C. (2d) at 107-08, 86 D.L.R. (3d) at 189-90. The definition is found in the part of the Code relating to appeals.

³¹ *Supra* note 14.

³² *Id.* at 74, 37 C.C.C. (2d) at 439, 79 D.L.R. (3d) at 570.

³³ *Id.* at 69, 37 C.C.C. (2d) at 433, 79 D.L.R. (3d) at 565.

³⁴ *Id.* at 70-71, 37 C.C.C. (2d) at 435, 79 D.L.R. (3d) at 566-67.

sentencing policy. He concluded that the three purposes of section 663(2)(e) were rehabilitation of the offender, deterrence and protection of the public. All of these are legitimate goals of criminal sentencing.³⁵ Hence the constitutional nexus between section 663(2)(e) of the Criminal Code and section 91(27) of the B.N.A. Act was established.

The picture, therefore, in Quebec and Ontario was one of judicial acceptance of the constitutionality of the various compensation and restitution sections of the Code. In Manitoba, prior to *Zelensky*, there was a similar picture. In an early case, *Rex v. Cohen*,³⁶ Chief Justice Perdue remarked (albeit clearly *obiter*) that section 91(27) of the B.N.A. Act supported the compensation and restitution sections of the Criminal Code.³⁷ More recently, in 1970, the Manitoba Court of Appeal upheld the predecessor of the present section 663(2)(e).³⁸

So, as the Manitoba Court of Appeal began its deliberations in *Zelensky*,³⁹ it did so against a background of judicial acceptance of three different compensation and restitution sections, in three different jurisdictions, including Manitoba itself. Yet the Court of Appeal declared in *Zelensky* that section 653(1) of the Code was unconstitutional. The decision was three-two;⁴⁰ the judgments unremarkable in either organization or depth of analysis.

The dissenting judgment of Monnin J.A. (Guy J.A. concurring) was relatively simple. He cited *Regina v. Lintler*,⁴¹ *Turcotte v. Gagnon*⁴² (quoting *Rex v. Cohen*⁴³) and *Re Torek*⁴⁴ as cases supporting the validity of the section. He also supported the reasoning of *Torek*. He concluded:

In pith and substance s. 653 is part and parcel of the sentencing process set out in the Criminal Code of Canada. If it were not, the hands of our courts would be sadly tied and the victims of crimes would of necessity have to seek recovery of property and moneys illegally taken away from them through civil courts on the basis that one cannot mix that which is criminal with that which is civil, and on the further basis that provincially appointed judges are not fit persons to deal with matters of civil law. Can one think of a more ridiculous proposition and one bound to bring the entire legal process — already badly challenged — in disrepute? Distinctions for the sake of distinctions have no place in courts of law.⁴⁵

Although one may sympathize with the general sentiments expressed by Mr. Justice Monnin in the last two sentences of this passage, it is doubtful that the first two sentences are particularly persuasive in

establishing the constitutionality of section 653(1). If we are to be convinced that section 653(1) is part of the sentencing process of the Code, then it would have to be on the basis that compensation meshes with some of the traditional and accepted goals of sentencing. Basically, those goals are rehabilitation, deterrence and punishment or retribution — all of which are primarily *offender*-focused. But Monnin J.A. did not tie section 653 to any of these goals; rather, his reason for upholding section 653(1) was *victim*-focused — it relieved the victim from having to go to the civil courts to recover property or money taken from him. Even though in policy terms this is undoubtedly desirable, it hardly relates to sentencing and, therefore, does not support the conclusion Monnin J. reached in the first sentence.

The majority judgments were written by O'Sullivan J.A. and Matas J.A. (Hall J.A. concurring). Matas J.A. commenced by quoting Lord Atkin's statement in *Attorney-General of British Columbia v. Attorney-General of Canada* that the only limitation on the federal criminal power was that Parliament could not enact legislation in the guise of criminal law which encroached on provincial jurisdiction.⁴⁶ Next, he pointed out three differences between section 653(1) and section 655(1). First, section 653(1) uses the verb "may", whereas section 655 uses "shall"; secondly, section 653 requires an application by the victim; and thirdly, section 655 refers to property before the court which was capable of restoration to the victim, whereas there is no such limitation in section 653.⁴⁷ These distinctions led Matas J.A. to the consideration of section 653 in isolation.

Matas J.A. considered the key issue to be whether the procedure for compensation was necessarily incidental to the criminal law power.⁴⁸ While acknowledging that Parliament must have wide powers over sentencing with the changing times, he still felt an examination was in order to determine whether the legislation was a valid criminal function or merely an expedient conjunction of civil and criminal remedies.⁴⁹ He then proceeded to consider the appropriateness of compensation, mentioning the lack of discovery and the possibility of the accused being deprived of the right to make full answer and defence.⁵⁰ It seems that his views on these functions were very important to his decision. He agreed that compensating victims was a worthy goal and that a valid object of sentencing was preventing the criminal from profiting from his crime. But he felt that the former did not necessarily flow from the latter. Instead, he mentioned using fines to prevent profits and using other means of compensating victims.⁵¹ All of this led Matas J.A. to the conclusion that

³⁵ *Id.*, at 74, 37 C.C.C. (2d) at 429, 79 D.L.R. (3d) at 570.

³⁶ *Supra* note 14.

³⁷ *Id.*, at 411, 38 C.C.C. at 335, [1923] 1 D.L.R. at 688-89.

³⁸ *Regina v. Butkuns* (unreported, Man. C.A., June 18, 1970).

³⁹ *Supra* note 8.

⁴⁰ See *id.* for identification of majority and dissenting justices.

⁴¹ 27 C.C.C. (2d) 216, 65 D.L.R. (3d) 443 (Que. C.A. 1974).

⁴² *Supra* note 11.

⁴³ *Supra* note 14.

⁴⁴ *Id.*

⁴⁵ *Supra* note 8, at 160, 33 C.C.C. (2d) 152-53, 73 D.L.R. (3d) at 602.

⁴⁶ *Id.*, at 172, 33 C.C.C. at 162, 73 D.L.R. (3d) at 611, citing with approval *Attorney-General for British Columbia v. Attorney-General for Canada*, [1937] A.C. 368, at 375-76, 67 C.C.C. 193, at 195, [1937] 1 D.L.R. 688, at 690 (P.C.).

⁴⁷ *Id.*, at 173, 33 C.C.C. (2d) at 163, 73 D.L.R. (3d) at 612-13.

⁴⁸ *Id.*, at 175, 33 C.C.C. (2d) at 164-65, 73 D.L.R. (3d) at 614.

⁴⁹ *Id.*, at 175-76, 33 C.C.C. (2d) at 165, 73 D.L.R. (3d) at 614.

⁵⁰ *Id.*, at 178-79, 33 C.C.C. (2d) at 167-68, 73 D.L.R. (3d) at 616-17.

⁵¹ *Id.*, at 180, 33 C.C.C. (2d) at 168, 73 D.L.R. (3d) at 617-18.

section 653(1) was not supported by section 91(27) or by the necessarily incidental doctrine; rather it was an encroachment on the provincial property and civil rights power.

Matas J.A.'s judgment suffers throughout from a fundamental error, namely confusion between the *constitutionality* of compensation and the *merits* of compensation. This confusion is clearly manifested when he states the following:

No doubt compensating victims of crime is a worthy goal. And Laugel with the statement by Haines J. in *Torek*, that it is a valid object in sentencing "to prevent a convicted criminal from profiting from his crime by serving a jail term and then keeping the gains of his illegal venture" . . .⁵²

In terms of constitutional analysis he needed to go no further. He had established a valid nexus between compensation (the impugned section) and an accepted purpose of sentencing (punishment). Since sentencing has always been accepted as a component of Parliament's criminal law power, this should have concluded the matter in favour of the constitutionality of section 653(1). Yet, Mr. Justice Matas continued: "But the two objectives do not need to be tied together. . . . There are other constitutionally valid ways of accomplishing this purpose."⁵³ Here Matas J.A. crossed the line dividing jurisdictional considerations from considerations of the wisdom of legislation. The existence of other methods, or the merits of those methods, are irrelevant from a constitutional perspective. Rather, the sole question is whether there is a rational connection between the method chosen by Parliament to accomplish a purpose, and one of its heads of legislative power. Having specifically found that there was such a connection in this case, Matas J.A. unfortunately failed to recognize that this concluded his judicial function.

The short concurring judgment of O'Sullivan J.A. seemed to be based on the assumption that section 653 conferred "a right" on the victim of a crime to claim compensation from the offender.⁵⁴ What O'Sullivan J.A. failed to recognize was that even if the victim established his claim, he would not be automatically entitled to compensation. In a civil court, the establishment of entitlement and award of damages are closely connected; if you prove you lost \$100 because of the actions of the defendant, then you will be awarded \$100. Such is not necessarily the case under the compensation and restitution sections of the Code. There, because these orders are components of the sentencing process, the judge imposing sentence focuses on the offender, not the victim. Accordingly, the amount the victim lost may be only one factor in the judge's mind as he imposes sentence. The victim has no "right" to recovery as he would have in an ordinary civil case if he established his claim. Rather, under section 653, his recovery is dependent entirely on the discretion of the judge, who may or may not attach significance to his loss.

In summary then, none of the judgments in *Zelensky* at the Court of Appeal level was particularly strong. An impartial observer, however, keeping in mind both the substantial provincial superior court support for the constitutionality of a variety of compensation and restitution sections in the Code, and the traditional support of the Supreme Court of Canada for federal legislation generally,⁵⁵ could not with any confidence have predicted that the decision of the Manitoba Court of Appeal would have been upheld.⁵⁶

C. *Regina v. Zelensky* — *Supreme Court of Canada*

The Supreme Court of Canada, in a six-three decision, reversed the decision of the Manitoba Court of Appeal.⁵⁷ The dissenting judgment by Mr. Justice Pigeon was a strong judgment, although perhaps top-heavy in its description of the facts.⁵⁸ It was well-organized and dealt clearly and separately with the two potential bases — the criminal law power and the necessarily incidental doctrine — for the validity of section 653.

As for the criminal law power, Pigeon J.'s conclusion that it did not support section 653 flowed from two dominant features of his judgment — first, his characterization of section 653; secondly, the importance he attached to the unique civil consequences of section 653(1). His characterization was brief: "As to the nature of the enactment, it obviously deals with a matter that is *prima facie* within provincial jurisdiction 'satisfaction or compensation for loss of or damage to property' ".⁵⁹ His analysis of the features of section 653(1) was more complete:

Unlike practically every other procedural provision of the *Criminal Code*, the remedy contemplated in s. 653 has the characteristics of a civil remedy. It is available only "upon the application of a person aggrieved". It is not sanctioned by a penalty but is "enforceable . . . as . . . a judgment rendered . . . in civil proceedings". In short the substance of s. 653 is that it enables a person who has suffered loss of or damage to property by the commission of an indictable offence, to obtain from the court of criminal jurisdiction a civil judgment against the offender.⁶⁰

This characterization and analysis led Pigeon J. to the conclusion that section 653(1) was outside the ambit of section 91(27) of the B.N.A. Act.

⁵⁵ Since 1949, only two minor sections of two federal statutes have been declared unconstitutional by the Court: s. 7(e) of the Trade Marks Act, R.S.C. 1970, c. T-10 and s. 2(2) of the Agricultural Products Marketing Act, R.S.C. 1970, c. A-7. See *MacDonald v. Vapour Canada Ltd.*, [1977] 2 S.C.R. 134, 66 D.L.R. (3d) 1 (1976); *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198, 84 D.L.R. (3d) 257.

⁵⁶ The author made the rash prediction to his Constitutional Law class that the Court of Appeal decision would be reversed 9-0.

⁵⁷ *Supra* note 6.

⁵⁸ The judgment is twenty pages in length. Thirteen pages are devoted to a description of the facts and some analysis of non-constitutional points.

⁵⁹ *Supra* note 6, at 979, 41 C.C.C. (2d) at 124-35, 86 D.L.R. (3d) at 206-07.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*, at 183, 84 C.C.C. (2d) at 170-71, 73 D.L.R. (3d) at 600-01.

There is much to admire in Pigeon J.'s discussion. Section 653(1) does have distinct provisions which, at first blush, appear to be primarily civil in nature. He presents clearly the arguments to support such a finding. But, the judgment loses much of its force by failing to deal with the arguments on the other side. For example, it is not "obvious" that the subject matter of section 653(1) is compensation for loss of or damage to property. Certainly that is one possible characterization. However, section 653 is found in the sentencing chapter of the Criminal Code and the actual words of section 653(1) clearly refer to compensation in a sentencing context. Consequently, Pigeon J. should have, at a minimum, acknowledged the possible sentencing *cum* criminal law characterization of section 653(1), and attempted to rebut the characterization.

Likewise, it is true that one possible analysis of "the substance" of section 653(1), is that it enables a victim to obtain a civil judgment from a criminal court. But surely, before coming to that conclusion, some discussion of other potential "substances" would be appropriate. Could not the essence of section 653(1) be criminal sentencing? Is compensation not consistent with the traditional goals of sentencing — deterrence, punishment, rehabilitation? For example, in *Zelensky* itself, could not an order for compensation and restitution, in the amount of \$25,000, be considered a very significant punishment and deterrent to the offender, irrespective of any attention the court might pay to the victim? In other words, it is not obvious, as Pigeon J. seemed to think, that there is not even an arguable nexus between compensation and criminal sentencing. His conclusions would have been much stronger if he had acknowledged the potential strength of the arguments in support of constitutionality, and had tried to rebut them.

A similar criticism can be levelled against that part of Pigeon J.'s judgment dealing with the possible application of the necessarily incidental doctrine to section 653(1). He took two pages to set out, carefully, the nature of that doctrine and to establish its applicability to section 91(27) of the B.N.A. Act.⁶¹ Having done that, though, he leaped directly to his conclusion:

I cannot find anything which would make it possible for me to consider subs. (1) and (2) of s. 653 of the *Criminal Code* as necessarily incidental to the full exercise by Parliament of its authority over criminal law and criminal procedure. A compensation order is nothing but a civil judgment.⁶²

With respect, this conclusion is not at all self-evident. The same considerations suggested above, in the discussion of the criminal law power, apply here. Is there not, arguably, a rational connection between a compensation order and a valid sentencing objective such as punishment or deterrence? Or, is there not a potentially rational connection between those compensation and restitution sections of the Code which were admittedly good (Pigeon J. himself strongly hinted that all of these sections except

section 653(1) and (2) were valid), and those which were alleged to be *ultra vires*? These issues should have, at least, been canvassed before Mr. Justice Pigeon reached his conclusion that he "cannot find anything" to tie section 653(1) and (2) to a subject matter necessarily incidental to the full exercise of Parliament's criminal law power. Without this analysis, his conclusion is unsupported and unpersuasive.

In summary, Pigeon J.'s judgment was a significant improvement over the majority judgments in the Manitoba Court of Appeal. He avoided, rigorously, the major pitfall of those judgments, namely, confusion between considerations of jurisdiction (legitimate for judicial attention) and of merits (not legitimate). The main strength of his judgment was his analysis of the effects and potential effects of the distinct civil characteristics of section 653(1) and (2). This was valuable because those distinct characteristics cast doubts on the nexus between that section and valid criminal law purposes. Unfortunately, Pigeon J. looked only at the civil side of the coin. If he had supplemented this analysis with an identification and rebuttal of the arguments denying the importance of these civil characteristics (for example, if he had responded to some of the reasoning by Huggessen A.C.J., Haines and O'Driscoll J.J. in *Turcotte*, *Torek* and *Groves* or, even better, to the views of Laskin C.J. in this case), his conclusion of *ultra vires* would have been more persuasive — although still, in my view, incorrect.

The first point which can be made about the Chief Justice's majority judgment in *Zelensky* is that it differed markedly, in terms of style, from Pigeon J.'s judgment. Whereas the emphasis in Pigeon J.'s judgment was on a close, almost technical, analysis of section 653, Laskin C.J.'s judgment was more broadly conceived. He made an historical analysis of the compensation and restitution sections of the Code,⁶³ was prepared to consider those sections as a comprehensive scheme⁶⁴ and appeared to attach significance to the thinking of the Law Reform Commission in this area.⁶⁵ This is, of course, typical of the Chief Justice's approach in most constitutional cases. His policy-oriented (at times philosophical) approach to constitutional issues is in sharp contrast to the Austinian analytical framework which characterizes the judgments of such justices as Martland, Ritchie and Pigeon JJ.

In substantive terms, the chief merit of Laskin C.J.'s judgment was the thorough framework he established before considering section 653. This framework consisted of four components and contributed substantially to the persuasiveness of his ultimate conclusion that section 653 was constitutional. The first component of the background framework was an historical analysis of the Code sections dealing with compensation and restitution. Secondly, there was a review of the case law defining the scope of Parliament's criminal law power. This examination established

⁶¹ I cannot find anything which would make it possible for me to consider subs. (1) and (2) of s. 653 of the *Criminal Code* as necessarily incidental to the full exercise by Parliament of its authority over criminal law and criminal procedure. A compensation order is nothing but a civil judgment.⁶²

⁶² With respect, this conclusion is not at all self-evident. The same considerations suggested above, in the discussion of the criminal law power, apply here. Is there not, arguably, a rational connection between a compensation order and a valid sentencing objective such as punishment or deterrence? Or, is there not a potentially rational connection between those compensation and restitution sections of the Code which were admittedly good (Pigeon J. himself strongly hinted that all of these sections except

⁶³ *Id.* at 948, 41 C.C.C. (2d) at 102, 86 D.L.R. (3d) at 184.

that this power is broad,⁶⁶ capable of growth⁶⁷ and includes criminal sentencing. Thirdly, Chief Justice Laskin reviewed all of the compensation and restitution provisions of the sentencing chapter of the Code. He concluded that they constituted a scheme of criminal law administration under which property taken, destroyed or damaged during an offence is accounted for after culpability is determined and returned to the victim.⁶⁸ Finally, he reviewed a number of leading cases in which the constitutionality of other non-traditional penalties or sanctions was upheld.⁶⁹ This four-pronged analysis established a background conducive to a favourable examination of section 653, an examination to which the Chief Justice then turned.

Although he had concluded that section 653 was part of a broad Criminal Code scheme of compensation and restitution and that these were valid parts of the sentencing process, he recognized that there were distinct features of section 653 which called for separate treatment. The two problematic features of section 653 — which for Pigeon J. were determinative of invalidity — are that the trigger for a compensation order is an application by the victim, not the court acting on its own motion and, secondly, that the compensation order can be registered and enforced in a civil court as if it were a civil order.

The Chief Justice, relying heavily on Associate Chief Justice Hugessen's judgment in *Turcotte v. Gagnon*, effectively answered the second problem. He concluded that section 653 was not invalid because it relied on provincial superior courts for automatic enforcement. Citing Hugessen A.C.J., he stated:

[T]he fact that Parliament has made the compensation order enforceable as a judgment in a civil action is more a call on the administrative side of the Superior Court than on the judicial side but it is, in any event, a means open to Parliament to provide for the execution of an order validly made. . . .

. . . This . . . is machinery which cannot control the issue of validity.⁷⁰

This is surely correct. Assuming the compensation order is a valid criminal order, it does not lose its criminal nature because, subsequently,

⁶⁶ *Id.* at 950-51, 41 C.C.C. (2d) at 104, 86 D.L.R. (3d) at 186.

⁶⁷ *Id.* There is some eloquence in the Chief Justice's articulation of this view: We cannot, therefore approach the validity of s. 653 as if the fields of criminal law and criminal procedure and the modes of sentencing have been frozen as of some particular time. New appreciations thrown up by new social conditions, or re-assessments of old appreciations which new or altered social conditions induce make it appropriate for this Court to re-examine courses of decision on the scope of legislative power when fresh issues are presented to it, always remembering, of course, that it is entrusted with a very delicate role in maintaining the integrity of the constitutional limits imposed by the *British North America Act*.

⁶⁸ *Id.* at 949, 41 C.C.C. (2d) at 103, 86 D.L.R. (3d) at 185.

⁶⁹ *Id.* at 953-58, 41 C.C.C. (2d) at 105-10, 86 D.L.R. (3d) at 187-92.

⁷⁰ *Id.* at 958, 959, 41 C.C.C. (2d) at 100, 110, 86 D.L.R. (3d) at 191, 192.

another arm of the judicial process needs to be invoked for enforcement purposes. Once the court has declared the purposes of a legislative enactment to be constitutional, the choice of means to implement those purposes is solely a function of that legislature.

The Chief Justice's response to the first problem of section 653 was brief. He compared sections 653(1) and 663(2)(e) of the Code and concluded: "I find little to choose, *except on the side of formality*, in the requirement of s. 653 that the compensation order must be based on an application by the person aggrieved rather than be made by the Court *suo motu* . . ." ⁷¹ The underlined passage captures, succinctly, the essence of the insignificance of the factual distinction between the two sections. Both sections deal with compensation or restitution in a sentencing context, and authorize a judge, *at his discretion*, to include these punishments in a sentence. Presumably, in so doing, the judge will adopt the traditional offender-focus and assess compensation or restitution in the context of the accepted purposes of sentencing — punishment, deterrence and rehabilitation. The fact that under section 653(1) this whole process is initiated by the victim does not deny the essential criminal law features of the section — namely, *offender-orientation* and *judicial discretion* in making the order.

Having rebutted the arguments in favour of the essential nature of section 653, and having established a general background conducive to a finding of validity (these are two points of excellence in the judgment), the Chief Justice concluded that "s. 653 is valid as part of the sentencing process".⁷²

However, in spite of the two strengths of the judgment, the conclusion of constitutionality would have been more persuasive if the judgment had been clearer or more thorough in two respects. The first, and minor, criticism is that the Chief Justice never clearly separated the criminal law and the necessarily incidental basis for validity. Although one suspects that the Chief Justice prefers not to rely on the necessary incident doctrine if it is at all possible to uphold a statutory provision under a specific head of power,⁷³ and although most of the judgment is clearly concerned with a discussion of section 91(27) of the B.N.A. Act, the combination of Laskin C.J.'s failure to specifically mention the doctrine, while at the same time talking in terms of rational connections between admittedly valid and challenged parts of legislation (the accepted formulation of the doctrine) and his citation of *Papp v. Papp*,⁷⁴ leave the reader wondering whether Chief Justice Laskin might invoke the doctrine to uphold the legislation.

⁷¹ *Id.* at 954, 41 C.C.C. (2d) at 107, 86 D.L.R. (3d) at 189 (emphasis added).

⁷² *Id.* at 960, 41 C.C.C. (2d) at 111, 86 D.L.R. (3d) at 193 (emphasis added).

⁷³ See, e.g., *Tomell Investments Ltd. v. East Marstock Lands Ltd.*, [1978] 1 S.C.R. 974, 77 D.L.R. (3d) 145 (1977), wherein Chief Justice Laskin upheld the validity of s. 8(1) of the federal Interest Act, R.S.C. 1970, c. 1-18, under s. 91(19) of the B.N.A. Act. Seven members of the Court, instead, invoked the ancillary doctrine to uphold the section.

⁷⁴ [1970] 1 O.R. 331, 8 D.L.R. (3d) 389 (C.A.). This is the leading case on the

Because of the distinct civil features of section 653, its validity was more doubtful than the other compensation and restitution sections of the Code. Judicial validation of section 653, thus, carries with it an implicit validation of all the Code sections dealing with these subject matters. Accordingly, *Zelensky* stands for the proposition that the constitution will permit, under section 91(27), experimentation with new forms of sentencing such as compensation and restitution. This is good news for those law reformers, legislators and judges who think that the traditional punishments such as jail and fines are not effective in some cases. These people should now feel comfortable in searching for, and applying, new sanctions in the knowledge that these sanctions will be upheld, provided they mesh with the same valid objectives of sentencing.

D. *Zelensky* as Representative of, or Inconsistent with, a Pattern of Decisions in the Constitutional/Criminal Area

There has been a large number of cases in recent years raising constitutional issues in a criminal law context.⁸² For example, the Supreme Court of Canada has delivered seven significant decisions in cases in which provincial statutes were attacked as infringing Parliament's criminal law power. In *Attorney General for Canada v. Dupond*⁸³ a city by-law which granted a local committee authority to prohibit the holding of assemblies, parades and gatherings if the committee has reason to believe that the public peace or safety was endangered, was held not to be a criminal law, even though the provincial enactment consisted of a prohibition and made failure to observe the prohibition an offence. In *Faber v. The Queen*,⁸⁴ the Court held that a provincial coroner's inquest was not a proceeding in a criminal matter. In *Di Lorio v. Warden of the Common Jail of Montreal*⁸⁵ and in *Keable v. Attorney General for Canada*,⁸⁶ provincial inquiries into criminal activity were upheld as falling within the administration of criminal justice. In *Nova Scotia Board of Censors v. McNeil*,⁸⁷ the Court upheld a provincial movie censorship regime, and declared that the regulation of public morals was not necessarily legislation of a criminal nature. Finally, in two slightly earlier decisions, *Ross v. Registrar of Motor Vehicles*⁸⁸ and *Bell v. Attorney*

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General for Prince Edward Island,⁸⁹ the Court upheld sections of provincial legislation which provided for automatic suspension of a driver's licence after a conviction for "drunk driving" offences under the Criminal Code.

Was there, then, a trend before *Zelensky* away from the traditional broad definition of Parliament's criminal law power? At first instance, the decision and the language in *Zelensky* seem inconsistent with the decisions in the seven cases listed above, and, in particular, with some of the reasoning in cases such as *McNeil* and *Dupond* which appeared to restrict the scope of section 91(27) of the B.N.A. Act.

The question just posed, however, must be answered in the negative. The Court's decision in *Zelensky* is in fact reflective of a broader trend in the life of the present Court, namely, functional concurrency, or the trend to uphold almost all statutes enacted by both levels of government. Thus, in the criminal law area, section 91(27) has not proved useful as a shield against provincial legislation. But that fact does nothing to deny the strength of section 91(27) as an effective sword in the federal hand, one which the courts seldom stay.

This judicial tolerance of the legislation of both levels of government flows directly from open judicial attachment to both the aspect doctrine and the presumption of constitutionality. The aspect doctrine,⁹⁰ probably the seminal principle of Canadian constitutional law, directs courts to view legislation, if possible, from a perspective or "aspect" which will result in its validity. The presumption of constitutionality, although not cited by the courts as frequently as the aspect doctrine, has an ancient Canadian pedigree — it was enumerated by Mr. Justice Strong in *Severn v. The Queen*,⁹¹ the first Canadian constitutional case. Recently, a number of the current justices, including Dickson J. in *CIGOL*⁹² and Ritchie J. in *McNeil*,⁹³ have professed the importance of this principle.

The effects of the application of the aspect doctrine and the presumption of constitutionality have been particularly evident in the Supreme Court's treatment of federal legislation. Since the Supreme Court became our final court, only two very minor sections of two major federal economic statutes have been declared unconstitutional.⁹⁴ Provincial statutes have not fared quite as well,⁹⁵ but still the overall picture is one of substantial judicial tolerance.

⁸² This is not the place to discuss in detail the recent decisions of the Supreme Court of Canada in the constitutional/criminal law field. For a more comprehensive discussion (although now somewhat dated) see J. MACPHERSON, DEVELOPMENTS IN CONSTITUTIONAL LAW 58-67 (1978); see also Arway, *The Criminal Law Power in the Constitution: And Then Came McNeil and Dupond*, in this volume.

⁸³ [1978] 2 S.C.R. 770, 5 M.P.L.R. 4, 84 D.L.R. (3d) 420.
⁸⁴ [1976] 2 S.C.R. 9, 27 C.C.C. (2d) 171, 65 D.L.R. (3d) 423 (1975).
⁸⁵ [1978] 1 S.C.R. 152, 35 C.R.N.S. 57, 73 D.L.R. (3d) 491 (1976).
⁸⁶ [1978] 2 S.C.R. 135, 41 C.C.C. (2d) 489, 87 D.L.R. (3d) 708.
⁸⁷ [1978] 2 S.C.R. 662, 25 N.S.R. 128, 84 D.L.R. (3d) 1.

⁸⁹ [1975] 1 S.C.R. 25, 5 N. & P.E.I.R. 173, 42 D.L.R. (3d) 82 (1973).
⁹⁰ *Supra* note 25.

⁹¹ 2 S.C.R. 70, at 103, 1 Cart. B.N.A. 414, at 446-47 (1878).

⁹² *Canadian Indus. Gas & Oil Ltd. v. Government of Saskatchewan*, [1978] 2 S.C.R. 545, at 573-74, [1977] 6 W.W.R. 607, at 630, 80 D.L.R. (3d) 449, at 468 (1977).

⁹³ *Supra* note 87, at 687-88, 25 N.S.R. at 152, 84 D.L.R. (3d) at 20.

⁹⁴ *Supra* note 55.
⁹⁵ The decisions in *CIGOL*, *supra* note 92, and *Central Canada Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42, 23 N.R. 481 (1978), indicate that