

Brief to the Standing Committee on Justice and Human Rights: Bill C-40 – Compensation for Miscarriages of Justice

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The plight of the wrongly convicted is gaining prominence with the growing awareness of the prodigious harms to innocent persons at the hands of the criminal justice system. Most of the attention, both scholarly and legislatively, has been focused on the causes of wrongful convictions and the need to free the innocent. What needs to now be addressed more comprehensively is the issue of how to provide redress to those persons whose lives have been inexorably damaged and how to best compensate them in their efforts to rebuild a life. The available remedies in Canada to pursue compensation include civil litigation for malicious prosecution, negligent investigation, a Charter breach and the highly politicized exercise of discretion by a government to make a payment without acknowledging liability. Except for the very few, none of these remedies are very helpful. Liberal democracies like Canada are honour bound if not constitutionally mandated to provide for innocence compensation far beyond the onerous and cost prohibitive pursuit of litigation against the State and the current highly secretive and inadequate executive remedy requiring an elusive exercise of mercy.

There is no question that the phenomena of wrongful convictions and miscarriages of justice have become an important issue in criminal justice over the course of the last three decades. As a function of examining the cases where an offender has been freed after a wrongful accusation or conviction, there has been a consensus amongst western democracies as to the systemic causes leading to wrongful convictions. These are well identified in LaForme...

In addition to the more obvious harms of miscarriages of justice on the limitations of liberty, there is the visceral humiliation and disgrace, loss of enjoyment of life, loss of potential normal experiences such as starting a family, loss of social intercourse with friends and neighbours and the unique frustration, pain and suffering associated with adjusting to prison life knowing that it was unjustly imposed.

As a corollary to the innocent movement's quest to free the innocent, there has been the realization of a need to restore to the wrongly convicted some semblance of a normal life going forward. Efforts in this regard include both services available upon re-entry into society together

with the prospect of compensation to redress the harms caused by a wrongful accusation, conviction and imprisonment.

As a function of Canada's agreement to abide by its international human rights obligations together with the first public inquiry in Canada into wrongful convictions, the federal government with the provinces and territories established guidelines for compensation.¹ These *FPT Guidelines*² provide a public law framework within which the State agrees to provide compensation in light of what are seen as intolerable errors committed by actors in the criminal justice system, without an admission of liability. There have been very few successful applications under these *FPT Guidelines* although they have led to the well-publicized awards in the millions of dollars.³

Having regard to all the avenues of recourse to compensation across the spectrum of common law jurisdictions it seems clear that the best way to provide relief to the wrongly convicted should be embodied within a statutory framework. The theory of strict enterprise liability would permeate such a process. The only two common law jurisdictions that provide legislative relief are the United States and the UK. In the USA there are thirty-nine jurisdictions that provide legislation to compensate wrongful convictions. They differ widely with respect to the eligibility requirements, limitations on awards, questions of factual innocence, burdens of proof, behaviour of the claimant contributing to the conviction, prior criminal history of the claimant and statutes of limitations. Nonetheless they have the great advantage of not requiring claimants to prove how the prosecution or police committed their mistakes. Compensation statutes provide money and services to exonerated individuals without regard to fault or blame. In the United Kingdom the *Criminal Justice Act, 1988* was originally seen as the model statute

¹ See the *International Covenant on Civil and Political Rights*, United Nations, Treaty Series, vol 999, online: https://www.canada.ca/content/dam/pch/documents/services/canada-United-nations-system/reports-United-nations-treaties/intnl_civil_politique-intnl_civil_political-eng.pdf. Hereinafter referred to as the “*Covenant*” unless indicated otherwise. And see Donald Marshall, Jr (Hickman Commission) (Nova Scotia, 1989) *The Marshall Inquiry*, online: https://novascotia.ca/just/marshall_inquiry/.

² See Ministry of the Attorney General of Ontario, *Entitlement to Compensation – The Legal Framework*, online: <https://www.attorneygeneral.jus.govon.ca/english/about/pubs/truscott/s5.php>. Hereinafter referred to as the “*FPT Guidelines*” unless indicated otherwise.

³ Such as Steven Truscott (The Honourable Sydney Lewis Robins, In the Matter of Steven Truscott: Advisory Opinion on the Issue of Compensation (Ontario: Ministry of the Attorney General, 2008) Truscott received 6 million [Truscott Inquiry] online: <https://www.attorneygeneral.jus.govon.ca/english/about/pubs/truscott/s5.php>; Thomas Sophonow (The Honourable Peter deCarteret Cory, The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation (Manitoba: Justice, 2001) Sophonow received 2.3 million [Sophonow Inquiry] online: <http://govmb.ca/justice/publications/sophonow>: “Compensation time”, Maclean’s 114:47 (19 Nov 2001) ; and David Milgaard (The Milgaard Inquiry (MacCallum Commission): David Milgaard (Saskatchewan, 2008) [Milgaard Inquiry] online: http://www.publications.govsk.ca/freelaw/Publications_Centre/Justice/Milgaard/Milgaard.pdf: “Milgaard will get \$10 million compensation” CBC News (17 May 1999) online: <https://www.cbc.ca/archives/entry/milgaard-gets-10-million-compensation-package>.

that best incorporated the mandate of the ICCPR. Due to amendments in 2014 however the requirement to prove beyond a reasonable doubt that the claimant was factually innocent has gutted this legislation.

Clearly, this is an area that calls for legislative action. The right to be free from a wrongful accusation, conviction and imprisonment and the corresponding right to be compensated for the damages caused thereby is enshrined in international human rights law. The need is palpable to create a legislative remedy that is transparent, consistent, removed from the political process and perhaps most importantly, accessible to those in need.