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Entitlement to Compensation - The Legal Framework**You are here:** [Home](#) » [What We Do](#) » [Publications and Reports](#) » [Truscott](#)**Text:** [Larger](#) | [Smaller](#)**(a) A Civil Cause of Action**

In Canada, there is no legal entitlement to compensation for a wrongful conviction. Unless a wrongfully convicted person can establish a civil cause of action, such as a claim in tort for malicious prosecution, negligent investigation, prosecutorial misconduct, or false imprisonment, or perhaps a claim for breach of rights protected under the *Charter*, he has no remedy for the wrongful conviction. In this case, the Court of Appeal refused to attribute blame to anyone responsible for the investigation or prosecution of Mr. Truscott. There is, accordingly, no finding of the Court that would offer support to any civil cause of action.

Nevertheless, it has been suggested by Mr. Truscott's counsel that he might have a claim for negligent investigation, a cause of action recently recognized by the Supreme Court of Canada in *Hill v. Hamilton-Wentworth Regional Police Services Board* 1 I do not propose to engage in an examination of the merits of such a claim nor, indeed, can I. It does bear repeating, however, that the Court of Appeal refused to assign any blame to the investigative authorities for Mr. Truscott's wrongful conviction. The Court also noted that the information relied upon to suggest that the police had improperly focussed their investigation on Mr. Truscott was "in the nature of first and second-hand hearsay" and was "too speculative and inconclusive" to be given any weight. 2

Moreover, given the years that have passed since the events in question, I expect that, realistically speaking, it would not be possible to successfully maintain any such claim. Despite the unprecedented degree of scrutiny that this case has received - both in and out of the courts - there do not appear to be any plausible accusations of blameworthy conduct on the part of the investigating or prosecuting authorities. Accordingly, if Mr. Truscott is to receive compensation, it can only be obtained as an *ex gratia* payment by the state.

(b) Ex Gratia Payment by the State

In recent years, there has been growing recognition in Canada and elsewhere that persons who have been wrongfully convicted and imprisoned should receive compensation from the state. Despite this growing recognition, there is no legal entitlement in Canada to compensation either by way of a statutory scheme or otherwise. Absent any recovery through a civil action, a wrongfully convicted person can obtain compensation only through an *ex gratia* payment by the state - a payment that, by definition, is made voluntarily, as a favour out of kindness or grace, and without recognition of any legal obligation.

Notwithstanding that there is no legal obligation to make any payment to the wrongfully convicted, as a matter of policy, the desirability of granting compensation to persons who have been so convicted has been officially recognized. In August 1976, Canada ratified the *International Covenant on Civil and Political Rights*. Article 14(6) of the *Covenant* provides that persons who have been convicted as a result of a miscarriage of justice should generally be compensated by the state. It states as follows:

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

No legislation has been enacted to give effect to the *Covenant*. However, the principles expressed in it appear to have informed a joint set of guidelines relating to compensation for the wrongfully convicted, formulated by the federal and provincial ministers of justice in 1988. *The Federal/Provincial Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons* (the "Guidelines") contain a number of criteria which must be met before a person can be considered eligible for compensation. Among other things, the *Guidelines* expressly limit the payment of compensation to the person who was wrongfully convicted and require a determination that the wrongfully convicted person was factually innocent of the crime charged. The *Guidelines* state as follows:

1. The wrongful conviction must have resulted in imprisonment, all or part of which has been served.
2. Compensation should only be available to the actual person who was wrongfully convicted and imprisoned.
3. Compensation should only be available to an individual who has been . wrongfully convicted and imprisoned as a result of a *Criminal Code* or other federal penal offence.
4. As a condition precedent to compensation, there must be a free pardon granted under section 748(2) of the *Criminal Code* or a verdict of acquittal entered by an Appellate Court pursuant to a referral made by the Minister of Justice pursuant to section 696.3.
5. Eligibility for compensation would only arise when sections 696.3 and 748 were exercised in circumstances where all available appeal remedies have been exhausted and where a new or newly discovered fact has emerged, tending to show that there has been a miscarriage of justice.

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

- If a pardon is granted under section 748, a statement on the face of the pardon based on an investigation that the individual did not commit the offence; or
- If a reference is made by the Minister of Justice under section 696.3, a statement by the Appellate Court, in response to a question asked by the Minister of Justice pursuant to section 696.3(2), to the effect that the person did not commit the offence.

It should be noted that sections 696.3 and 748 may not be available in all cases in which an

individual has been convicted of an offence which he did not commit, for example, where an individual had been granted an extension of time to appeal and a verdict of acquittal had been entered by an Appellate Court. In such a case, a Provincial Attorney General could make a determination that the individual be eligible for compensation, based on an investigation which has determined that the individual did not commit the offence. 3

It is important to bear in mind that the *Guidelines* are not binding legislation and have not been treated as such. Many if not most of the awards of compensation that have been made in the last 20 years departed in some manner from the criteria proposed by the *Guidelines*.

For example, in the matter of compensation for Donald Marshall Jr., the Honourable Gregory Evans recommended that compensation be paid to Mr. Marshall's parents,4 despite the fact that the *Guidelines* limit entitlement to compensation to the actual person who was wrongfully convicted. 5

As a further example, in the Thomas Sophonow Inquiry, the Honourable Peter Cory recommended that Mr. Sophonow receive \$1.75 million for non-pecuniary damages, despite the fact that the *Guidelines* mandate a cap on such damages in the amount of \$100,000. 6 In refusing to apply the mandated cap, Justice Cory noted that the *Guidelines* are not an act of the Legislature but simply a guideline. 7 I agree.

Just as the *Guidelines* do not create any legal right to compensation, by the same token, they cannot create any legal bar to compensation. Payment of compensation remains within the absolute discretion of the Crown. 8 In certain cases, the interests of justice may require that the Crown exercise its discretion in accordance with the *Guidelines*, but equally, in other cases, they may require a result that departs from the *Guidelines*. As matters stand, it is for the Crown to decide in the exercise of its discretion whether or not to make an *ex gratia* payment.

Nevertheless, I have considered the *Guidelines* carefully in determining whether an *ex gratia* payment ought to be recommended here. With one exception, Mr. Truscott meets all of the *Guidelines*' requirements:

- he was convicted and imprisoned;
- his conviction and imprisonment have been found to be a miscarriage of justice; and
- he was acquitted by the Court of Appeal following a Reference directed by the Minister of Justice pursuant to section 696.3 of the *Criminal Code*.

However, in Mr. Truscott's case, there has not been any declaration or determination that he did not commit the crime. He cannot meet the *Guidelines* requirement that there be a finding of factual innocence.

(c) Proof of Factual Innocence

Other jurisdictions, like Canada, require a determination of factual innocence before paying compensation to a wrongfully convicted person. The rationale for this requirement has been articulated in the following terms:

[M]inisters, being accountable for the expenditure of public money, are rightly circumspect about making gratuitous payments to members of the public; and the need for circumspection is particularly great where the recipient may be a wholly innocent victim of mistake or

misidentification, or may be a serious criminal who is very fortunate to have escaped his just desserts. While the public might approve sympathetic treatment of the former, they would be understandably critical if significant sums of public money were paid to the latter. 9

Put another way, it would not be in the interests of justice to provide a person who had committed the offence, but whose guilt could not be proved, with the means of profiting from the commission of his crime.

Consonant with this rationale, it appears that in all of the cases to date where compensation has been paid the innocence of the wrongfully convicted person has been established by some means - whether by DNA evidence, 11 or by subsequent conviction of the true perpetrator, 12 or by determination following a police investigation or judicial inquiry that there was no evidence that the wrongfully convicted person committed the crime, 13 or where there was no evidence that a crime had even been committed. 14

However, a rule limiting the state's payment of compensation to those persons who can prove their factual innocence has been criticized as unduly harsh, because it would deny compensation to an innocent person who, for whatever reason, was unable to conclusively prove his innocence. In his oft-quoted article on compensation for the wrongfully convicted, Professor H. Archibald Kaiser argues that to require proof of innocence is inconsistent with the fact that the Canadian criminal legal system has only two possible verdicts - guilty and not guilty:

It is argued that persons who have been wrongfully convicted and imprisoned are ipso facto victims of a miscarriage of justice and should be entitled to be compensated. To maintain otherwise introduces the third verdict of "not proved" or "still culpable" under the guise of a compensatory scheme . . . 15

A similar argument is made by Professor Peter MacKinnon, who states that to introduce any notion of "factual innocence", as opposed to the legal verdict of "not guilty", runs contrary to the presumption of innocence:

[O]ne 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 ... 16

Indeed, Professor MacKinnon states that any state-sponsored compensation scheme should avoid even trying to determine factual innocence, because such an exercise would undermine the presumption of legal innocence that accompanies an acquittal. He writes:

We may not be able to prevent suspicion that lingers, but there ought not to be official pronouncements of probable guilt, whether implicit in assessments of "innocence in fact" for the purpose of cost awards, or anywhere else. 17

In a recent decision, the Ontario Court of Appeal expressed a similar view, holding that it would be contrary to public policy for the Court to issue "pronouncements" of innocence. In *R. v. Mullins-Johnson*, although the Court found that there was "no evidence of a crime" and "no case against the [accused]", it refused to declare Mr. Mullins-Johnson to be innocent. It gave two reasons for its refusal:

1. it did not have the jurisdiction to issue such a declaration; and

2. there were "important policy reasons for not, in effect, recognizing a third verdict, other than 'guilty' or 'not guilty', of 'factually innocent'." 18

If proof of innocence is a condition precedent to the payment of compensation, then the question arises whether innocence must be proven beyond a reasonable doubt in each and every case, or whether there may be cases where a less onerous standard of proof, namely, proof on a balance of probabilities, is appropriate.

In my opinion, there may well be cases where the circumstances are such that requiring an individual to prove his innocence beyond a reasonable doubt is manifestly unfair. That exacting standard has to date been applied only to the Crown in the context of a criminal prosecution. As Professor Kent Roach states (albeit in the slightly different context of a discussion related to the granting of free pardons):

In principle, it is difficult to justify requiring an individual to bear the burden of proof beyond a reasonable doubt. Such a high standard of proof in all other contexts is only imposed on the state with its superior resources and coercive powers. Although it is possible to posit cases in which an individual could satisfy such an extraordinary burden, such cases will generally be limited to DNA exonerations. 19

Moreover, even the lesser standard of a balance of probabilities still imposes a substantial burden on an individual. Professor Roach states:

(The balance of probabilities standard could often be a difficult standard for a convicted person to satisfy especially in cases where it remains clear that a crime has been committed; where there is no DNA evidence; and where the perpetrator remains at large. In most wrongful conviction cases, there will be reasonable and probable grounds to charge the person and circumstantial evidence that is suggestive of the person's guilt. Such evidence will make it more difficult for the person to establish innocence on a balance of probabilities. 20

The question of the appropriate standard of proof, and the broader question of whether a determination of factual innocence should or should not be a mandatory prerequisite to the payment of compensation are important policy issues. They are a matter for study and debate in the context of the development of a legislative scheme designed to provide a systematic basis upon which compensation for the wrongfully convicted can be determined. Such study and debate and the resolution of any issues arising therefrom are, of course, beyond the scope of my mandate.

My mandate extends only to providing advice on whether *ex gratia* compensation should be paid in the circumstances of the present case, "based upon and accepting the findings" of the Court of Appeal. It is to that question that I now turn.

As discussed in the section which follows, the highly unusual circumstances of this case, combined with the frailty of such evidence as remains against Mr. Truscott, as outlined above, have led me to conclude that compensation should be paid to Mr. Truscott.

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1. [2007] SCC 41.
 2. Decision of the Court of Appeal, supra note 10 at paras. 285-288.
 3. This last provision is commonly referred to as the "basket clause".

4. Commission of Inquiry Concerning the Adequacy of Compensation Paid to Donald Marshall, jr., June 1990, at p. 17.
5. Federal/ Provincial Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons, B.2.
6. The Honourable Peter Cory, The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation (2001) (hereinafter "The Sophonow Inquiry Report"), "Compensation: Non-Pecuniary Compensation".
7. Ibid, "Compensation: Recommendation".
8. H. Archibald Kaiser, "Wrongful Conviction and Imprisonment: Towards an End to the Compensatory Obstacle Course", Windsor Yearbook of Access to Justice, Vol. 9 (1989) at 120.
9. Re McFarland, [2004] UKHL 17 at para. 7 (as per Lord Bingham of Cornhill).
10. For a discussion of this point, see the dissent of Charron J. in Hill v. Hamilton-Wentworth Regional Police Services, [2007] S.C.C. 41 at para. 158.
11. For example, in the cases of Guy Paul Morin, David Milgaard, Randy Druken, Herman Kaglik and Gregory Parsons.
12. For example, in the cases of David Milgaard, Donald Marshall and Richard Norris.
13. For example, in the case of Thomas Sophonow.
14. For example, in the case of Clayton Johnson.
15. H. Archibald Kaiser, "Wrongful Conviction and Imprisonment: Towards an End to the Compensatory Obstacle Course", Windsor Yearbook of Access to Justice, Vol. 9 (1989) at 139.
16. Peter MacKinnon, "Costs and Compensation for the Innocent Accused" (1988), 67 Can. Bar Rev. 489 at 498.
17. Ibid at 498-499.
18. R. v. Mullins-Johnson, [2007] ONCA 720 at paras. 24-25.
19. Professor Kent Roach, "Report Relating to Paragraph 1(f) of the Order in Council for the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell", at page 42.
20. Ibid at pages 42-43.

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For all of the reasons set out above, I recommend that *ex gratia* payments be made as follows:

1. \$6.5 million to Mr. Truscott as compensation for his wrongful conviction; and
2. \$100,000 to Mrs. Truscott, as compensation for lost income.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

March 28, 2008
The Honourable Sydney L. Robins, Q.C.

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