

# **A Qualitative Study of the Issues that Govern the Compensation Process for Wrongful Convictions**

by

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## **Abstract**

Compensation for wrongful convictions in Canada is an *ad hoc* process that must be reformed. Once exonerated, wrongfully convicted persons deserve reasonable and expeditious compensation awards for the miscarriage of justice that they have suffered. This study involves the use of two qualitative methods to investigate the compensation process for wrongful convictions in Canada. First, a review of archival records was performed based on the examination of a number of wrongful conviction cases, along with assessments of the compensation recommendations from the seven Commissions of Inquiry into wrongful convictions in five Canadian provinces. Second, in-depth interviews were conducted with prominent legal and government experts on compensation for wrongful convictions. This study provides a forum for continued exploration of this societal problem, with the objectives of heightening awareness of its nature and scope and proposing recommendations for an improved compensation scheme.

**Keywords:** wrongful conviction; compensation for wrongful conviction; federal-provincial guidelines; commissions of inquiry; factual innocence

*This thesis is dedicated to the wrongfully convicted who  
have endured the sufferings of injustice and the  
difficulties in seeking justified compensation.*

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# Chapter 1. Introduction

## 1.1. Research Overview and Rationale

Miscarriages of justice occur and individuals are convicted by mistake. But once these individuals are exonerated, how are they compensated for the mistakes of the justice system? One would expect that compensation would be provided for those individuals who have been exonerated. Hereafter, these individuals shall be referred to in this research as the wrongfully convicted. After all, such an individual not only suffered loss of freedom and dignity, but may also have been subjected to brutal prison behaviour, as well as undue financial and family deprivations. And yet adequate compensation for these individuals has not always been forthcoming. Rather, the compensation process has been applied in an *ad hoc* manner. In fact, a judicial decision in a civil case has yet to be made in court to seek compensation when a wrongful conviction has been recognized. Instead, an inconsistent compensation approach has been applied, from *ex gratia* payments to out-of-court lawsuit settlements.

Wrongful convictions occur in our justice system when the sentence of a convicted individual is overturned after new evidence surfaces proving that the original guilty conviction is in doubt. Wrongful convictions are caused by numerous factors, including as a minimum: police tunnel vision, jailhouse informants, false confessions, inadequate handling or preservation of evidence by police officers, flawed expert evidence, insufficient police resources when investigating cases, and plea bargaining to accept a prosecutor's deal when facing a potentially long period of incarceration if found guilty (Roach, 2013).

According to Statistics Canada in 2012, there were 246,984 cases in which adults were found guilty in Canada (McLellan, 2013). Assuming that 1% of these guilty

cases were wrongfully decided, then by extrapolation, approximately 2,470 wrongful convictions occurred in Canada in 2012.

Based on the impact of an unjustified incarceration, the expectation would be that the government has an efficient process in place for compensating the wrongfully convicted. With the provincial and federal governments determining the fate of compensation applications, this has not been the case. An inconsistent approach has been exercised for several of the better known claimants, in which the compensation award has been uniquely determined by the presiding commissioner or judge.

In Canada, the provinces have all adopted the *1988 Federal-Provincial Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons* (the “*Guidelines*”). It is important to note that the *Guidelines* pertained solely to the provinces and did not include the territories. While these *Guidelines* were based on the *International Covenant on Civil and Political Rights* (ICCPR) (Ministry of the Attorney General, 2010) to which Canada was a signatory in favour of compensation, neither the federal nor the provincial governments have developed legislation to implement the commitment made. Likewise, no common law solution exists for this problem. Currently, a judicial decision has never been made in Canada to determine the outcome of a civil lawsuit involving compensation for a wrongful conviction. Consequently, the outcome of compensation applications has been variable. On one hand, claimants such as Richard Norris received an “*ex gratia*” payment as a goodwill gesture from the government (DeRusha, 2002). In other cases, such as those of James Driskell and Steven Truscott, each received compensation in the form of a settlement after filing lawsuits against the government. Then again, in the cases of Kyle Unger and Anthony Hanemaayer, the government denied their compensation claims. These two cases are now pending judicial decisions in civil lawsuits against the government (CBC News Canada, 2008; Manitoba Government News Release, 2001).

One of the experts interviewed in this study, who wishes to remain anonymous, provided the following remarks, which summarize both the importance of this topic and the need to remedy the situation. In terms of the wrongful conviction of individuals, he/she re-phrased the often-cited Blackstone aphorism by stating that, “It is better to

acquit 100 guilty men than it is to convict one innocent man” (Government Expert 17). With respect to societal impact, he/she viewed the compensation of the wrongfully convicted through a lens that has been adopted by many great leaders, “You judge a civilization by the way that it treats the most marginalized” (Government Expert 17). For the wrongfully convicted who have endured unspeakable sufferings, the least that society can do is to provide an efficient process through which they can receive decent compensation for the miscarriage of justice that they have suffered. While there will never be sufficient funds to make a person whole again, there would be some solace in a speedy and efficient financial compensation process to cover their pecuniary and non-pecuniary losses. For all of these reasons, this study provides a forum for continued exploration of this societal problem, with the objectives of heightening its awareness and proposing recommendations for an improved compensation scheme.

## **1.2. Research Accomplished**

The subject of wrongful convictions has been widely canvassed in numerous studies and articles by authors who have devoted their research to the causes and damages of miscarriages of justice. In Canada, seven Commissions of Inquiry into wrongful conviction cases have been conducted with the purpose of identifying opportunities to improve the justice system. While the reports from these inquiries assist in resolving the original miscarriage of justice, their focus has not been on compensation. The literature is very sparse with respect to the difficulties and obstacles that those exonerated must face in obtaining compensation. The Canadian Commissions of Inquiry have proven that there is minimal attention paid to the challenges in receiving owed compensation from the justice system. Since the topic of compensation for the wrongfully convicted has largely been ignored, more awareness of this topic is warranted. The research questions to be answered include the identification of the Canadian justice system criteria that determine the award or denial of compensation, the problems associated with the current compensation process, the compensation systems of other countries, and the identification of variables that act as catalysts to trigger compensation.

The research for this paper has been conducted in two phases, the first involving a review of archival records and the second consisting of interviews with experts in the field. Reviewing archival records was performed to determine the mechanics of the compensation process. Specifically, this strategy was undertaken to better understand the criteria used in the decision-making process regarding the award or denial of compensation, the roles of the provincial and federal governments, the factors involved in the compensation calculation, and the consistency of the compensation process as it is applied across Canada. To accomplish this task, freedom of information requests were made to the Ministries of the Attorney General and/or Justice concerning 43 cases of documented wrongfully convicted individuals in Newfoundland, Nova Scotia, New Brunswick, Quebec, Ontario, Manitoba, Saskatchewan, Alberta, and British Columbia. Most Freedom of Information offices were found to be less than cooperative in providing data for this research. In contrast, both Nova Scotia and Manitoba were particularly helpful in their responses. In addition to freedom of information requests, the published proceedings of the Steven Truscott compensation case were also investigated.

It had been hoped that the study of archival records would be transparent and revealing regarding wrongful-conviction-compensation. However, the data received was minimal and therefore the research required a new source of reliable information. Experts on the subject of wrongful-conviction-compensation were identified and asked if they would be interested in sharing their insights on the subject. In order to gain a balanced perspective on the topic, the selected candidates included representatives from both past and present Provincial Ministries of the Attorney General and/or Justice, representatives from the Federal Department of Justice, criminal lawyers who have represented wrongfully convicted individuals, participants from seven Commissions of Inquiry, representatives from both the Association in Defence of the Wrongly Convicted (AIDWYC) and Innocence Projects, and other wrongful conviction experts. An interview guide was constructed to elicit responses on a variety of compensation-related topics. Interviews were scheduled with each individual, mostly by telephone. The interviews were digitally recorded, except for one in which hand-written notes were taken to record the conversation. The recorded conversations were transcribed and coded using NVivo. The analysis of the coded data resulted in the emergence of five themes.

### **1.3. Structure of the Paper**

The background information chapter of this paper presents a literature review that is pertinent to the discussion of compensation for the wrongfully convicted. In this literature review, several important building blocks are presented. They include a definition of the term “wrongful conviction”, a detailed account of the plight of those impacted, a review of alternative compensation methods, a description of the legal framework regarding compensation, a description of the compensation application process, the concept of factual innocence, compensation recommendations from the Commissions of Inquiry, and a review of compensation strategies used by Australia, England and Wales, and the United States.

The methodology chapter provides the study’s objectives along with the research questions. This chapter describes the research methodology used in phase one and phase two, the archival records and the interviews with the experts respectively, and concludes with a description of the ethical considerations.

The findings chapters summarize the information gathered from the archival records and the interviews with the experts. In the archival records phase, a detailed account is provided of the compensation process and outcomes of the wrongful conviction cases made available through the Freedom of Information applications and a published account of the Steven Truscott inquiry. The compensation recommendations from the seven Commissions of Inquiry are also identified. In the interviews with the expert-phase of the study, the results of all 24 interviews are presented. Based on the NVivo coding, five themes emerged from these interviews. Both, the results of the archival records review and the emerging themes from the coded interviews with the experts, provide the necessary qualitative data to answer the research questions of this study.

The conclusions chapter summarizes the salient elements of the research information collected from both the archival records review and the interviews with the experts.



The final chapter, recommendations, presents suggestions for consideration in the development of an improved compensation scheme. The study concludes with a number of proposals for future research into the compensation for the wrongfully convicted.

## **Chapter 2. Background Information**

This chapter provides the necessary background to appreciate the compensation process associated with wrongfully convicted persons. As a necessary first step, a definition of the term “wrongfully convicted” is provided. Appropriately, this is followed by a description of the sufferings incurred by individuals who have been wrongfully incarcerated. This description assists in underscoring the importance of researching this subject. The alternative compensation methods available to the wrongfully convicted are described. These methods are followed by a review of the Canadian legal system and the alternate paths that the wrongfully convicted may use to seek compensation. The concept of factual innocence in Canada and its impact on the determination of compensation will be studied. This will be followed by a review of the compensation process. The background information concludes with a comparison of alternate compensation schemes from other countries, such as Australia, England and Wales, and the United States. The compensation systems from these countries aid in providing a benchmark for the Canadian system.

### **2.1. Definition of Wrongful Conviction**

Before delving into the important matter of compensation for the wrongfully convicted, the definition of “wrongful conviction” must first be established. Of the various definitions that have been developed, the definition used in this study aligns with the one adopted by the ICCPR. The wrongfully convicted are individuals who have been “tried and convicted, have exhausted all appeals but who later have their convictions quashed in an extraordinary appeal and no retrial ordered, or are found not guilty at such a retrial or have been pardoned” (Hoel, 2008).

## **2.2. Consequences of Wrongful Convictions – Immeasurable Loss**

The repercussions of a wrongful conviction can severely impact an individual's ability to effectively re-assimilate into society once released from incarceration. Long-term imprisonment may give rise to adverse health effects including depression, despair, post-traumatic stress disorder (Grounds, 2004), substance abuse, permanent personality alterations (Wildeman, Costelloe, & Schehr, 2011), and paranoia, health effects that are comparable to those suffered after a devastating event. Furthermore, the problems encountered in acquiring housing, work, and health care are exacerbated by the absence of financial funding provided to exonerees and former inmates upon release from prison (Denov & Campbell, 2005). Long-term incarceration gives rise to family-related problems including rejection, missing family celebrations, (Grounds, 2004), and the loss of time and interactions with family members and friends. Other challenges include adapting to technological and cultural changes that affect day-to-day life (Dioso-Villa, 2011; Hoel, 2008; Wildeman et al., 2011).

As a consequence of their innocence, the wrongfully convicted are faced with additional challenges. Their prison sentences are more likely to be longer, since these individuals are unable to participate in rehabilitation and behavioural programs that oblige them to admit guilt and accept responsibility for crimes they did not commit. Their time in prison is focussed on proving their innocence by researching details and facts of their cases, petitioning aid from legal professionals, and acquiring information and assistance from prison and public officials with the ultimate goal of acquiring exoneration (Dioso-Villa, 2011).

Once the wrongfully convicted have been exonerated, they are often hastily released into society, usually without eligibility for government services that are provided to parolees for their reintegration into the community (Grounds, 2004; Wildeman et al., 2011). These essential services include living accommodations, job training and placement, and medical care for the physical, psychological, and emotional problems stemming from imprisonment. In addition to the lack of government services, exonerees are further burdened by the absence of financial support for legal assistance in

expunging their criminal records. In spite of expunged records, exonerees have the added challenge of explaining to potential employers the often lengthy gaps in their employment histories (Wildeman et al, 2011). Furthermore, exonerees are responsible for the legal fees and expenses required to pursue financial compensation for their wrongful conviction, including filing lawsuits against parties whose negligence or wrongdoing were causal factors in their conviction (Dioso-Villa, 2011).

Another problem that the wrongfully convicted may encounter is the unwelcome notoriety or the public's apprehensiveness, depending on the media's attention to the crimes. This problem is amplified if doubt of their innocence resides in their community (Grounds, 2004), especially with the victims of the crimes for which they were charged (Hoel, 2008). This situation gives rise to censure, shunning, or antagonism which serves to detract from a smooth re-assimilation into society. Wrongfully convicted individuals experience feelings of anger, betrayal, and are prone to paranoia. Some even suffer long-term psychiatric dysfunction and have continuing problems with the ability to reintegrate into the community. These long-term effects are similar to those experienced by war veterans (Hoel, 2008).

### **2.3. Compensation Methods**

Canada provides three primary means by which exonerees may obtain compensation. These include civil litigation, Provincial Orders-in-Council, and "*ex gratia*" (Latin word for "in favour") payments. These methods will now be examined.

In Canada, there is no provincial or federal legislation for the compensation of the wrongfully convicted. The only remedy for a wrongfully convicted person is to pursue a civil cause of action, "such as a claim in tort for malicious prosecution, negligent investigation, prosecutorial misconduct, false imprisonment, or perhaps a claim for breach of rights protected under the *Charter*" (Ministry of the Attorney General, 2010). To date, there has been no judicial decision rendered in a civil lawsuit against any Canadian provincial or federal government. Rather, these cases have resulted in out-of-court settlements.

In other cases, Orders-in-Council were used to compensate an individual. An Order-in-Council is an *ad hoc*, special bill which is legislated by a provincial government (DeRusha, 2002). These Bills are introduced when the provincial government feels great public pressure to compensate the case of a wrongfully convicted person. Normally, a Royal Commission of Inquiry is conducted which precedes this type of Bill. Orders-in-Council were used to provide compensation for Donald Marshall, Guy Paul Morin, Thomas Sophonow, and David Milgaard (DeRusha, 2002).

In some cases, the government provides an *ex gratia* payment as a form of compensation to individuals who have been wrongfully convicted and imprisoned. The Treasury Board of Canada Secretariat (2011) defines an *ex gratia* payment as follows:

An *ex gratia* payment is a benevolent payment made by the Crown. The payment is made in the public interest for loss or expenditure incurred where the Crown has no obligation of any kind or has no legal liability or where the claimant has no right of payment or is not entitled to relief in any form. An *ex gratia* payment is used only when there is no other statutory, regulatory or policy vehicle to make the payment.

Although there is currently no legal requirement to compensate the wrongfully convicted, it has been acknowledged that these individuals should be granted compensation (Ministry of the Attorney General, 2010). In August 1976, the Canadian government approved the ICCPR, which provides compensation for persons who have been imprisoned due to a miscarriage of justice.

In October of 2009, the Treasury Board of Canada Secretariat legislated a directive on *ex gratia* payments that applies “only when there is no statutory, regulatory or policy vehicle to make the payment” (Treasury Board of Canada Secretariat, 2011). This directive is intended to ensure that claims made by or against the Crown, as a result of government operations, are efficiently and effectively resolved. The directive provides a consistent method in managing claims and *ex gratia* payments in keeping with government finances and legal mandates and requirements (Treasury Board of Canada Secretariat, 2011). Richard Norris was one of the first wrongfully convicted persons to receive an *ex gratia* payment (DeRusha, 2002).

## 2.4. Canadian Legal System

The Canadian legal system has no statute that provides compensation entitlement for persons who have been wrongfully convicted. Although Canada has signed an international convention in support of awarding compensation to the victims of these cases, neither the federal nor any provincial government has yet legislated a financial remedy for those who are wrongfully convicted. Furthermore, as previously mentioned, no judicial ruling has been made in the Canadian common law system that would set a precedent for awarding compensation in these cases.

In some cases, *ex gratia* payments have been awarded by the government as a goodwill gesture. These payments are without obligation or liability. However, in the cases of Romeo Phillion, Anthony Hanemaayer, Ivan Henry, and Kyle Unger, *ex gratia* payments were not awarded. The civil cases against the government for these individuals are still pending. It would seem that a legislated compensation system is required to award individuals “whose rights or freedoms have been infringed or denied” under Section 24(1) of the *Canadian Charter of Rights and Freedoms* (1982).

Despite the inconsistent approach taken by the courts in awarding compensation in the above-mentioned cases, there are two noteworthy documents that recognize the importance in compensating the wrongfully convicted. They include the *International Covenant on Civil and Political Rights* (ICCPR) and the *Canadian Charter of Rights and Freedoms* (Charter). The ICCPR is an international agreement regarding the protection of human rights. This agreement identifies the importance of providing compensation to the victims of miscarriage of justice whose rights have been violated.

Article 9(5) Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 14(6) 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.

In 1982, Canada adopted the principles of the ICCPR into the *Constitution Act*. While well-intentioned, the federal government can enter into international treaties without the permission of parliament. However, provincial approvals are required to implement the principles of the international agreements into provincial legislation. To date, no province has implemented the ICCPR principles into their legislation.

The *Charter* devotes a section to Legal Rights. In this section, articles have been written to protect the rights and freedoms of Canadian citizens from illegal government actions. Further, Section 24(1) of the *Charter* stipulates that “Anyone whose rights or freedoms, as guaranteed by this *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” (1982). The leading case on compensation for breach of constitutional rights is: *Vancouver (City) v. Ward*, [2010] 2 SCR 28 (Supreme Court of Canada, 2010). Therefore, similar to the ICCPR, the *Charter* needs the provinces to develop legislation that provides compensation to victims of wrongful convictions.

In addition to the *Charter* and the ICCPR, the federal and provincial Ministers of Justice developed a joint set of guidelines to compensate wrongfully convicted persons in all Canadian provinces; the territories are represented by the Federal Ministry of Justice. They acknowledged that, despite the safeguards in the Canadian justice system, innocent persons are occasionally convicted and imprisoned. In March 1988, they met and agreed to a set of guidelines to compensate wrongfully convicted individuals. According to Canada’s 1988 *Federal-Provincial Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons* (henceforth referred to as the *Guidelines*), the following prerequisites are considered for compensation to be eligible (Evans, 1990):

1. The wrongful conviction must have resulted in imprisonment, all or part of which has been served.
2. Compensation should only be available to the actual person who has been wrongfully convicted and imprisoned.
3. Compensation should only be available to an individual who has been wrongfully convicted and imprisoned as a result of a *Criminal Code* or other federal penal offence.
4. As a condition precedent to compensation, there must be a free pardon granted under Section 683(2) [now 749(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 under Section 617(b) [now 690(b)].

5. Eligibility for compensation would only arise when Section 617 and 683 [now 690 and 749] 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.

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).

The *Guidelines* also provided an instrument for the government to follow in these cases. After the claimant's eligibility has been established, the determination of compensation may be investigated by the Ministries of the Attorney General and/or Justice, or the latter may appoint a retired judge or initiate a Commission of Inquiry to evaluate the application for compensation. The evaluating body would develop a report of recommendations to be acted upon by the respective provincial and federal governments.

As indicated below, the *Guidelines* list the criteria for non-pecuniary and pecuniary damages, in order that a quantum of compensation can be calculated in each case (Evans, 1990). Also included are factors to consider when contemplating compensation and costs to the applicant.

1. Non-pecuniary Losses

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

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

2. Pecuniary Losses

- (a) Loss of livelihood, including loss of earnings, with adjustments for income tax and for benefits received while incarcerated;
- (b) Loss of future earning abilities;
- (c) Loss of property or other consequential financial losses resulting from incarceration.



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

- (a) Blameworthy conduct or other acts on the part of the applicant which contributed or the wrongful conviction;
- (b) Due diligence on the part of the claimant in pursuing his remedies.

3. Costs to the Applicant

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

While the *Guidelines* are not part of any provincial or federal legislation, they do represent criteria that are used in the compensation decisions for wrongfully convicted cases. They have been used as a reference document in the award of *ex gratia* payments and Orders-in-Council settlements. The complete details of the *Guidelines* can be found in Appendix B.

## **2.5. Factual Innocence**

Innocence can be defined at a very fundamental level. A person is considered to be innocent if he/she did not commit the crime. In the Canadian legal system, there are two possible findings in court: guilty or not guilty. However, a finding of not guilty is not seemingly a finding of innocence. The definition of innocence has been refined into two types, material or factual innocence and probatory innocence (McClellan, 2013). Material or factual innocence is determined when the accused person has been able to prove that he/she did commit the crime. The public, including juries, believe that this definition signifies innocence. In contrast, probatory innocence is determined when the case against the accused cannot meet the proof established by the criminal standard (McClellan, 2013). In law, both factual or material innocence and probatory innocence lead to a verdict of “not guilty”. However, probatory innocence does not preclude the possibility that the accused was actually guilty of the crime. Rather, it signifies that sufficient proof could not be brought forward by the Crown to establish that the accused was guilty. From a wrongful conviction perspective, the Government of Canada does not want to be seen as compensating anyone other than a person who meets the materially or factually innocent standard. Individuals who acquire a verdict of not guilty

based on probatory innocence, are not viewed as eligible for compensation, because they may have committed the crime but received a not guilty verdict due to a technical or procedural issue in court (Ministry of the Attorney General, 2010). Material or factual innocence is therefore proven through such evidence as DNA testing, subsequent conviction of the actual perpetrator of the crime, confirmation of the alibi from the accused, or any other means that demonstrates that the accused person did not commit the crime. Proving factual innocence has been criticized as being an overly harsh standard, since the burden of proof rests on the wrongfully convicted person. Furthermore, factual innocence is not always easy to demonstrate since the evidence may be fragile, the witnesses may be deceased, and the means of displaying factual proof may no longer exist (Ministry of the Attorney General, 2010).

## **2.6. Compensation Process**

Literature could not be found that adequately described the compensation process followed in Canadian provinces. Therefore, a process description was obtained through dialogue with current Federal Ministry of Justice representatives. It was advised that a potential claimant or his/her lawyer would write to the Provincial Ministry of Justice or Attorney General requesting that the case be reviewed because a miscarriage of justice was believed to have occurred and compensation is owed. The claimant or his/her lawyer would present any new evidence that had not been provided earlier. The ministry officials would review the case and investigate any new facts that may justify the claim that a wrongful conviction had occurred. The officials would write a report with recommendations for the Minister. Alternatively, the Minister might appoint a Commission of Inquiry or a judge to review the case. If a judge is involved in the examination of the case, the recommendations will more likely be binding. Regardless of the approach used to determine whether or not compensation should be awarded, the first responsibility of the ministerial officials, Commissions of Inquiry Commissioner, or judge is to determine if the claimant was factually innocent. Once this determination has been made, discussions begin as to the quantum of compensation. A lawyer for the claimant would submit his/her statement of claims and the negotiations would begin. A judge or a Commissioner of Inquiry, experienced in these matters, may develop their

own amount of compensation to be awarded. If ministerial officials are involved, negotiations would take place between the government and the claimant's lawyer until a settlement is reached. This amount would be communicated to the Minister who would announce the award. Throughout these negotiations, discussions would be held between the Provincial Attorney General or the Ministry of Justice and the Federal Ministry of Justice to determine the portion of the award to be paid by each government jurisdiction.

Appendix C. displays the compensation awards provided to twenty-one of the more notable wrongfully convicted claimants.

## **2.7. Comparison of Compensation Systems in Other Countries**

To better understand the compensation process, it is important to compare the systems employed by other countries. Australia, England and Wales, and the United States were selected as countries to be used for this comparison. By adopting the best practices from these compensation schemes, it is hoped that Canada can derive a robust and equitable compensation process.

### **2.7.1. Australian Compensation Process**

In Australia, discretionary *ex gratia* payments may be granted by the states or territories. However, the logic of the decision regarding the amounts awarded is not clear. Tort suits provide greater compensation payments to exonerees, as opposed to the compensation payments awarded by the government (Hoel, 2008). Australia does not have federal or state legislation, including common law or statutory right, pertaining to compensation for the wrongfully convicted. Exonerees must either apply for *ex gratia* payments, file a tort action against legally responsible parties, or make a request to Parliament for a personalized compensation bill (Dioso-Villa, 2011). Since procedures do not exist for the granting and allocation of payments, *ex gratia* awards are often viewed as being insufficient and random. Also, Australian *ex gratia* payments are irrefutable without the opportunity for appeal (Dioso-Villa, 2011).

In Australia, once the wrongfully convicted are released from prison, there are no immediate social programs or services to assist their reintegration into society. These marginalized individuals are left to seek their own financial compensation for the consequences of their wrongful incarceration, including the loss of their lives, family and friends while in prison, the physical, emotional, and psychological harm and injury experienced while incarcerated, and the challenges of re-assimilating into the community (Dioso-Villa, 2011).

Furthermore, since the term “*ex gratia*” literally means “out of grace” as opposed to a “debt of justice” (Hoel, 2008), there is no legal requirement for the State or territory governments of Australia to provide financial compensation to the wrongfully convicted (Dioso-Villa, 2011; Hoel, 2008), nor are payments automatically awarded upon exoneration. Forms of financial compensation provided to exonerees by the government are *ex gratia* payments, which are at the discretion of state officials, such as the Attorney General, the Solicitor General, or the Governor (Dioso-Villa, 2011), and payments through indemnification laws. In some cases, exonerees may be awarded compensation through private bills lobbied by politicians to the legislature on behalf of the exoneree (Dioso-Villa, 2011). In the meantime, while applying for financial compensation, exonerees may opt to file legal action against arguably negligent parties, including state officials (Dioso-Villa, 2011), especially since a denied *ex gratia* application cannot be appealed (Hoel, 2008).

The Australian Capital Territory (ACT) is the only territory in Australia where exonerees have a statutory right to compensation (Dioso-Villa, 2011; Hoel, 2008). The ACT’s compensation law is founded on the United Nations’ ICCPR which has a specific provision (Article 14(6)) that addresses compensation for the wrongfully convicted. However, Article 14(6) of the ICCPR (as cited earlier) only defines who is entitled to seek compensation; it does not provide criteria or guidelines for decision-making, nor for the determination of the amount of compensation to be awarded (Dioso-Villa, 2011). The ICCPR, which was ratified in 1979, can only be enforced to compensate exonerees if the provision is incorporated into domestic law. Although Australia is a signatory of the ICCPR, the provision has yet to be included in Australian domestic law. Australia relies

on administrative, rather than legal, provisions regarding matters of compensation for miscarriages of justice (Dioso-Villa, 2011).

### **2.7.2. England and Wales Compensation Process**

Compensation for victims of wrongful convictions has existed in England and Wales for over a century. However, until 1988, there had been no statutory right to compensation (Layne, 2010). Exonerees had to rely on the *ex gratia* system, which was administered by the U.K.'s Home Secretary (Layne, 2010). The *ex gratia* model was highly discretionary, without rules or guidance for potential exonerees. In fact, the Home Secretary was within his/her rights to reject the compensation figures, which were recommended by an independent assessment, and to apply his/her own judgment in determining the amounts to be awarded (Layne, 2010). This process was found to be inconsistent and was frequently criticized, since the Home Secretary could deny compensation and not disclose the rationale for his/her decision to the exoneree (Layne, 2010).

In 1953, the U.K. endorsed a provision, advanced by the European Convention on Human Rights (ECHR), which included relevant stipulations for compensation to wrongfully convicted individuals (Layne, 2010). Article 5(1) of the ECHR states that, "No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by the law" (Layne, 2010). Since the conviction and incarceration of an individual is one of the allowable rationales for deprivation of one's liberty, then according to Article 5(5) of the ECHR, everyone who has been wrongfully convicted is in contravention of this article and has a right to be compensated. In 1976, the U.K. ratified the ICCPR, including Article 14(6) which stipulates a provision to compensate victims of miscarriages of justice who have been convicted of a criminal offence and subsequently have had the conviction overturned or pardoned, based on new important information presented that conclusively demonstrated a wrongful conviction (Layne, 2010). In 1985, the Home Secretary, Douglas Hurd, announced that he would stand by Article 14(6) and that he would be bound by the decision of the amount of compensation to be awarded (Layne, 2010). By 1988, the U.K.'s Criminal Justice Act included section 133(1) which stipulated that compensation would be paid "when a person has 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 beyond reasonable doubt that there has been a miscarriage of justice” (Layne, 2010). This amendment to the Criminal Justice Act provided a legislated basis for compensation (Layne, 2010).

In 2006, the U.K.'s Home Secretary made a number of significant changes to the compensation of wrongfully convicted persons. The most critical change was the withdrawal of the *ex gratia* mechanism for compensation (Layne, 2010). Other important modifications included the reduction of legal aid payment for work on these types of cases, the imposition of a six-month time limit to demonstrate evidence to support a claim, a one-year time limit from the notification of a potential claim to a decision, a £500,000 cap on payments to an individual, a ceiling on the lost earnings compensation to 1.5 times the gross average earnings, and an assessment of the deductions for previous convictions from the settlement (Layne, 2010). As of 2010, the compensation maximums and the time limits, set by section 133(1) of the *1988 Criminal Justice and Immigration Act*, have yet to be put into force. In addition, wrongfully convicted individuals, who have served more than ten years in prison, are now eligible for a higher compensation cap of £1,000,000 (Layne, 2010). These amounts are considerably lower than Canadian awards, though the system of compensation seems to have more rights in place for those asserting wrongful conviction.

### **2.7.3. United States Compensation Process**

Since 1989, over 300 exonerations have been granted to wrongfully convicted individuals in the United States, of which greater than 265 were attributed to DNA testing, and 138 in capital offenses (Norris, 2012). However, only around 60% of the first 250 DNA exonerated individuals were awarded compensation (Norris, 2012).

Compensation is awarded to exonerees in a number of ways, including private compensation bills, lawsuits, and compensation statutes (Norris, 2012). Private compensation bills may be acquired from the state legislature, although the probability of success is quite minimal since this method has been effective for only 9% of claims

made by the Innocence Project (an organization dedicated to exonerating the wrongfully convicted) exonerees. Likewise, acquiring compensation through lawsuits, either via tort or civil rights law, is an equally trying endeavour. The success rate of litigation is low due to first, the obligatory high burdens of proof, and second, the immunity shields of state authorities, including the police and prosecutors (Norris, 2012). Even when possible, lawsuits can be very expensive and drawn-out for exonerees who are now burdened with the challenges of release from prison and reintegration into society (Norris, 2012). Although some large civil awards have been granted, only 28% of Innocence Project exonerees have been awarded compensation via civil suits, with an average waiting period of close to four years (Norris, 2012).

Scholars advocate that state compensation statutes, along with assistance legislation for victims of crime, provide the simplest, most reasonable, and most reliable means for compensating the wrongfully convicted (Norris, 2012). Of the DNA exonerees having been granted compensation, approximately 33% obtained their awards from state compensation statutes (Norris, 2012).

Furthermore, other legal bodies have also supported compensation statutes. The American Bar Association strongly recommends jurisdictions to justly compensate exonerees based on the length of time incarcerated, including non-financial losses, as well as support with reintegration into society (Norris, 2012). The Innocence Project proposes the most comprehensive compensation package/standard for the wrongfully convicted. This includes a fixed annual pecuniary award of at least US\$50,000, with supplementary funds for time on death row, on parole, or as a registered sex offender; also included are support programs to facilitate reintegration into the community, education programs, and job training (Norris, 2012).

Existing statutes are not all the same. Weaknesses include occasionally rigid eligibility prerequisites (e.g., exonerees must acquire a full pardon), concrete evidence, limited monetary compensation, many exclusions, and the absence of noneconomic services (e.g., psychological and physical medical care, training programs) (Norris, 2012)

In 1913, Wisconsin was the first state to legislate a compensation statute for wrongful convictions. As of May 2011, state compensation statutes in the United States exist in 28 jurisdictions, including 27 states and the District of Columbia (Norris, 2012; Wildeman et al., 2011). The content of the existing compensation statutes is described below, with the percentages based on the 28 jurisdictions. As of 2014, there are now 29 jurisdictions which have compensation statutes (Slifer, 2014).

Twenty-seven statutes offer a type of financial aid, with the exception of Montana which does not. Fifteen statutes offer a pecuniary amount based on the length of time incarcerated, either per year or per day of imprisonment. Two statutes are based on state income and two others offer a range of monetary compensation based on the number of years incarcerated. One statute (New Jersey) offers the greater of either twice the exoneree's income in the year before conviction or US\$20,000. Ten statutes offer a set annual amount ranging from US\$5,000 to US\$80,000, with a median of US\$45,150. Statutes that do not offer pecuniary compensation based on length of time incarcerated, offer either a fixed amount for the whole conviction process or allow the deciding judge or committee to determine the amount. No statutes provide additional money for time spent on death row. One statute (Texas) provides an additional US\$25,000 for time served on parole or as a registered sex offender. Fourteen statutes have a maximum total compensation limit ranging from US\$20,000 to US\$2,000,000 with a median of US\$400,000 (Norris, 2012).

Sixteen statutes offer a type of other assistance of which eight provide education assistance and reimbursement for legal fees. With respect to reimbursement for legal fees, Illinois may not surpass 25% of the total award and Mississippi ranges from 10% to 25% of the award, based on court proceedings. Five statutes provide occupational support, five provide counseling or psychotherapy, five provide reimbursement of court fees or fines levied at the time of the verdict, four provide health care, three provide reimbursement for lost salaries or income, two provide for reimbursement for detention facility expenses, and one statute (Texas) provides reimbursement for child support payments. Several states provide reintegration assistance into the community. However, the services are not specified (Norris, 2012).



Thirteen statutes have restrictions on compensation eligibility, based on the type of crime resulting in the conviction, of which twelve are limited solely to felonies. One statute is limited to felonies or aggravated misdemeanors, and four others necessitate a pardon for eligibility. One statute (Alabama) awards compensation for pretrial imprisonment: however, this is limited to cases where no conviction occurred and imprisonment was 2 years or more (Norris, 2012).

Twenty-five statutes specifically state the necessary burden of proof, varying from the greater weight of the evidence to exonerating DNA evidence. Twelve statutes require strong and persuasive evidence, while one (Maryland) obliges the evidence to be decisive. One statute (Ohio) stipulates that, once exonerees have provided certified copies of court judgments proving that they were wrongfully convicted, they shall then be conclusively declared as wrongfully incarcerated individuals (Norris, 2012),

Of the American statutes providing monetary awards, ten address the situation where the exoneree dies before receiving full monetary compensation. Four statutes stipulate that payment ends once the exoneree dies and that payment can only be made to the exoneree. Three permit an annuity for beneficiaries, three allow the exoneree's estate or inheritors to qualify for compensation, while two statutes specifically permit a claim to be filed on the part of an exoneree if the latter dies prior to applying for compensation (Norris, 2012).

## **2.8. Conclusion**

The sufferings that a wrongfully convicted individual endures are immense. Therefore, the compensation process must be robust, expedient, and generous to make amends for the failings of the justice system. The Canadian compensation process does not appear to meet these standards. A legislated scheme is not in place to guarantee a quick quantum. The accused also has to prove his or her factual innocence to obtain compensation. Instead, the *Guidelines* were developed to provide reference documents for the provinces to consult in the administration of the compensation process. Once factual innocence has been established, the province can then move forward with the application. By comparison, other countries use a different approach towards

compensation. England and Wales has a national justice system where compensation is determined. In a similar manner, the United States has a justice system defined at the state level. In both situations, compensation is decided by only one level of government. While England and Wales use an independent commission to assist in the assessment of compensation for wrongful convictions, individual American states have compensation statutes. With the exception of the Australian Capital Territory, Australia does not have federal or state legislation regarding compensation for wrongful convictions. Exonerees must either apply for an *ex gratia* payment, file a tort action, or submit a request to the government for a personalized bill.

## **Chapter 3. Methodology**

A qualitative approach, based on information obtained from archival records and interviews with experts, was used for this study. The archival records, which were acquired from Freedom of Information requests, were referenced to determine the decision-making rationale in specific compensation claims. The cases were analyzed to expose compensation trends. The interviews with the experts enabled the collection of insights and recommendations from knowledgeable and experienced professionals. By selecting participants who represented all facets of the compensation system, a rich understanding of the strengths and shortcomings of the compensation process could be obtained. This multi-method triangulated approach strengthened the study outcome, since different sources of information were applied to reach one set of common conclusions (Hussein, 2009).

### **3.1. Research Objectives and Questions**

When the study was originally conceived, the primary objective was to determine the factors that triggered compensation. As archival records were gathered, it became apparent that this objective was not feasible, since few records were obtained through the provincial Freedom of Information requests. Subsequently, interviews were conducted with experts in the wrongful-conviction-compensation process. Both the archival records and the interviews with the experts demonstrated that concrete information regarding the triggering of compensation was unattainable.

In reality, the details of compensation decisions are not known. They are made at the discretion of judges, independent of the *Guidelines*. Files that document this decision-making process are not available to the public. Therefore, to obtain this information, interviews would have to be conducted with every judge who has presided over a compensation case and decreed a final ruling. Perhaps a compilation of these

responses would provide some evidence of a trend regarding the factors that trigger compensation. However, this information could not be forthcoming owing to solicitor-client privileges. This resulted in a shift of the study's original objective.

The revised study objectives are to review the existing process for compensating the wrongfully convicted, analyze both what is working and what is not, and develop recommendations for its improvement. To achieve these objectives, the following research questions have been designed to guide this study:

- What Canadian justice system criteria are associated with successful and failed wrongful-conviction-compensation applications? Are these criteria consistently applied in all provinces?
- What are the problems associated with the current compensation process?
- Do other countries have a more equitable manner of awarding or denying compensation to the wrongfully convicted?
- What variables act as catalysts to trigger successful compensation in wrongful conviction cases?

### **3.2. Research Methods - Introduction**

The compensation for wrongful convictions study employed two qualitative methods for obtaining research data. As noted above, these were the review of archival records and interviews with the experts. A qualitative approach was selected, as it is best suited for exploratory research, where the researcher is attempting to uncover the underlying motivations and factors that influence decision-making. The examination of archival records enables documented files to provide factual accounts of the decision-making rationale used to award or deny compensation. Likewise, the interviews with experts enables learned experiences to be elicited through open-ended and probing questions relating to the overall compensation process. The application of these two study methods provides the added strength of triangulation. The process of triangulation, which improves the study's credibility, (Fade, 2003) was applied "to provide corroborating evidence" (Creswell & Miller, 2000). This evidence was obtained through archival research and interviews with the experts. By using different analytical approaches to study one problem area, this created the opportunity to determine if the different methods converge on the same findings (Hussein, 2009).

### **3.3. Research Methods - Phase One: Archival Records**

A review was conducted of the archival records of several Canadian criminal court cases in which there was a wrongful conviction and a subsequent application for compensation. Archival records represent the most tangible means of determining the standards and guidelines used in the award or denial of compensation applications. The Ministries of the Attorney General and/or Justice have files on wrongfully convicted individuals in which the decision-making process regarding the compensation application has been documented. In each case, a review was performed of the decision-making process involved in the determination of whether or not financial compensation was warranted. These cases spanned several provinces, in the hope that a consistent theme(s) would emerge. In addition, a review was conducted of the seven Canadian Commissions of Inquiry into wrongful conviction cases to investigate any resulting compensation-related recommendations.

#### **3.3.1. Sample Selection**

This study comprises a homogeneous sample of Canadian criminal cases where a decision on compensation has been reached within the provincial judicial systems. All pending cases were excluded from this research. As a prerequisite, the cases must have been overturned with a wrongful conviction determination, as defined by the Association in Defence of the Wrongly Convicted (AIDWYC). Their definition of wrongful conviction is in keeping with the one previously identified in this study. As outlined by AIDWYC, the cases included in this study are limited to the most serious criminal offenses, typically homicide and rape, resulting in a term of imprisonment. Homogeneous sampling was selected because the available records for research included criminal cases that share the same or similar characteristics. This type of purposive sampling was chosen, based on the availability and access to information from provincial jurisdictions.

### **3.3.2. Compensation Case Archival Records**

To provide the necessary research data for analysis, the following information sources were used:

- Records of case compensation applications and decisions rendered from the Ministries of the Attorney General and/or Justice for wrongfully convicted individuals
- Commission of Inquiry Reports into wrongful convictions
- Inquiry into compensation for the Steven Truscott case

From the above sources, the most insightful data were expected from the records obtained from the offices of the Provincial Ministries of the Attorney General and/or Justice. To acquire this data, freedom of information applications were made to the Freedom of Information and Privacy Offices within the Ministries of the Attorney General and/or Justice for Newfoundland, Nova Scotia, New Brunswick, Quebec, Ontario, Manitoba, Saskatchewan, Alberta, British Columbia, and the federal government. The Freedom of Information offices typically charged between \$5 to \$25 to process an application for information. Telephone conversations were followed-up by formal documented applications made to each province under consideration. The selection of provinces was based on an internet search and a review of the documented publications of the known, higher profile wrongful conviction cases. No significant wrongful conviction cases were noted for Prince Edward Island.

Through the use of credible websites, such as AIDWIC and legitimate government websites, numerous wrongful conviction cases were identified for further follow-up with the provincial Freedom of Information Offices across Canada. In total, 43 wrongful conviction cases were identified for which freedom of information applications were made to the respective provinces. The largest contributor of wrongful conviction cases was the province of Ontario, with 13 cases. Several more Ontario-based cases existed, but it was felt that the initial 13 cases would best test the willingness of the Ontario Ministry of the Attorney General to share details of their compensation-related criteria for decision making.

Each Freedom of Information application required the use of a customized provincial form, accompanied by a detailed cover letter. In each application, no request was made for any specific compensation details. Instead, the request was made to better understand the compensation decision-making rationale used by the ministry for the selected group of wrongfully convicted individuals. In addition, it was also requested that the provincial ministry outline the compensation process steps involved from the application submitted through to the ministerial decision to award or deny compensation.

Eight months after the original applications were made to the respective provinces, the following results were obtained. The provinces of Manitoba and Nova Scotia were co-operative in that they each provided a number of records based on the original request. The provinces of Alberta and Saskatchewan are still considering the requests, despite the fact that they have both exceeded the provincial deadlines for responses. The province of Newfoundland indicated that no published records existed for the requested cases. The provinces of British Columbia, Ontario, Quebec, and New Brunswick declined to provide any records, each citing their rationale as to why this information would not be forthcoming. They indicated that the proposed Freedom of Information application represented a breach of the solicitor-client privilege. In addition, these provinces each acknowledged that they were unable to provide any personal information associated with their wrongful conviction cases. Under the Freedom of Information guidelines, applicants could appeal the ministerial Freedom of Information decision if it was deemed that the decision was not acceptable. Subsequently, appeals were sent to the provinces of New Brunswick, British Columbia, and Ontario. The province of Quebec had many requirements related to their appeal process. Therefore, an appeal was not registered with this province. The New Brunswick and British Columbia appeal processes are backlogged and no response has been received to date. In contrast, the Ontario appeal has gone to mediation for a potential settlement. The Ontario Ministry of the Attorney General has advised that they are unwilling to co-operate and the appeal process is moving towards an adjudicated decision. This ministry also indicated that they have taken the official position that they are unwilling to either confirm or deny that compensation applications for wrongful conviction were ever initiated by any of the 13 named wrongfully convicted individuals. This statement was

provided even though published reports of the settlements paid out to a number of these claimants are available through searches of the internet.

In addition to the Freedom of Information requests made, internet searches were also performed to acquire published documents on any wrongful conviction claims. Only one formally published report was found. This report covered the highly publicized compensation application for Steven Truscott of Ontario.

The Commissions of Inquiry reports for seven wrongful conviction provincial inquiries were readily accessible from the internet. The goal of this review was to analyze these landmark cases and to identify any compensation-related recommendations that were forthcoming.

### **3.3.3. Data Analysis - Archival Records**

Compensation decision criteria were analyzed in the provincial cases, the Steven Truscott Compensation Inquiry, and selected Commissions of Inquiry cases to determine the consistency of the decision-making process used in the awarding or denying of compensation. A number of selected case records were compared for emerging trends. This analysis contributed to the recommendations for advancement of the current governmental system of compensation.

### **3.3.4. Limitations**

Initially, it was hoped that compensation records for wrongfully convicted individuals would be readily forthcoming from the provincial Freedom of Information offices within the Ministries of the Attorney General and/or Justice. That was not the case. Except for the provinces of Nova Scotia and Manitoba, the Freedom of Information offices were not cooperative. Instead, they used various legal tools at their disposal to avoid providing any information. In addition, except for the Truscott case, compensation case details are not available on the internet. Therefore, the researcher was unable to acquire any source of information regarding the decision-making rationale to award or to deny compensation for most wrongful conviction cases.



### **3.4. Research Methods - Phase Two: Interviews with the Experts**

Semi-structured telephone interviews were conducted with experts, from both the public and private sectors, on compensation for the wrongfully convicted. The interviews were proposed to offset the difficulties in obtaining archival records from the Ministries of the Attorney General and/or Justice. Since wrongful conviction cases visibly demonstrate errors in the justice system, there is great reluctance in providing this information to the public. Therefore, the valuable insights obtained from the interviews with the experts assisted in the understanding of the strengths, weaknesses, obstacles, and frustrations of the current compensation process. These interviews permitted not only a better understanding of the mechanics of the compensation system, but they added valuable and practical insights into both the complexities of compensation and the obstacles preventing legislated compensation. Through this in-depth qualitative source of information, themes were identified that could be used to explain the decision-making rationales associated with the awarding or denying of compensation.

#### **3.4.1. Rationale for Using Interviews**

Obtaining first-hand information from experts in the field was a strategy selected to incorporate in-depth, practical experience into the study. There was a desire to learn from the experts who have shaped the current compensation process and who have endured the frustrations with the system. The responses to the questions provided a deeper understanding of the strengths and shortcomings of the overall process. In particular, the interview method was most useful, since access to case records was restricted. More importantly, the various personal insights shared are not to be found in text. In short, the aim was to incorporate as much practical expertise as possible into the study. From the experts' knowledge and experience, sound recommendations could be made for an improved compensation system.

### **3.4.2. Study Setting**

The participants in this study represented a cross section of Canadians from several provinces. In fact, representatives from Newfoundland, New Brunswick, Quebec, Ontario, Manitoba, Saskatchewan, Alberta, and British Columbia were identified and selected. The regional diversity of the experts was significant in acquiring various opinions and beliefs which reflected their provincial circumstances in the application of the compensation process. The majority of the participants were from Ontario, which is appropriate since the majority of compensation cases also originated from this province. Also, all of the participants lived and worked in large Canadian cities, including the capital of Canada, the capital of the province, or the next largest provincial city.

### **3.4.3. Participant Selection for Interviews**

Appropriate candidates needed to be identified for the interviews. To obtain initial contacts, the following steps were taken. An internet search was performed to identify the names and contact information of the Ministry of Justice and/or Office of the Attorney General for each Canadian province. Subsequently, emails were sent to the Ministries of Justice and/or Attorney General requesting suitable contacts on the subject of compensation for wrongful convictions. Through much follow-up and coordination, names of experts were acquired from the Ministries. Another internet search was conducted to identify several prominent lawyers who have been associated with wrongful conviction cases. Telephone calls were made to AIDWYC to solicit their advice. The researcher's project supervisors each suggested a number of experts to contact.

Candidates were selected based on their expertise on compensation for the wrongfully convicted, their availability, and their interest in participating in the study. From the above sources, initial telephone calls were made to potential candidates to be interviewed. In each of the initial calls, potential candidates provided suggestions and contact information of other candidates to be considered for the study. Networking with experts was found to be most beneficial in identifying suitable candidates for the

interviews. The credibility of the study's findings was dependent on acquiring a blended perspective of all interest groups.

Once all of the potential candidates were identified, invitations were sent out to those having expressed interest in the study. Each potential candidate received a telephone call explaining the overview of the study, an approximate schedule including length of time to be allocated for the interview, and a description of the participant's confidentiality. The telephone call was followed-up with a confirmation email. Upon request, additional information was sent including a copy of the interview questions and/or a copy of the *1988 Federal-Provincial Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons*. From the time of the initial telephone calls, internet searches, and scheduling of interview dates, one month was required to set up the list of experts to be interviewed. The experts to be interviewed included, but were not limited to, the following individuals:

- Key current and retired officials from Provincial Ministries of Justice and/or Attorney General who are/were involved with wrongful conviction cases.
- Experts who have served on wrongful conviction Provincial Inquiries.
- Criminal lawyers who have represented wrongfully convicted individuals.
- AIDWYC staff in Toronto.
- Staff from the Innocence Project in British Columbia.
- Academics.
- Journalists.
- Other experts in the wrongful conviction process.

This sample consisted of 24 participants, who had expertise on wrongful convictions and were residents of Canada. A heterogeneous sample was selected in order to obtain a blended perspective from the interviewed participants. The aim was to acquire viewpoints and opinions from both the Federal and Provincial Ministries of Justice, as well as from private sector individuals who understood the frustrations of the current compensation system. The common denominator for all participants was their expertise on the subject of the compensation process for wrongfully convicted individuals.

While confidentiality was offered to all participants, several individuals permitted their names to be used in the study. Current criminal lawyers, who have represented wrongfully convicted individuals included David Robins, Gary Botting, Philip Campbell, James Lockyer, Sean MacDonald, and Peter Wardle. Participants at previous Commissions of Inquiry for wrongfully convicted individuals included retired Chief Justice Fred Kaufman, Bruce MacFarlane, and Kent Roach. Retired Federal Ministers of Justice, who were interviewed, included Anne MacLellan and Kim Campbell (former Prime Minister of Canada). Also interviewed were a representative of the British Columbia Innocence Project - Tamara Levy, journalist and author - Kirk Makin, and retired former Deputy Attorney General for Ontario - Murray Segal. Participants who chose to remain anonymous included one additional Commission of Inquiry participant, one retired Provincial Attorney General, one retired Provincial Deputy Attorney General, three current Attorney General lawyers, one current criminal lawyer who represents wrongfully convicted individuals, two current Federal Department of Justice representatives, and one retired Supreme Court of Canada Justice.

For the purposes of this study, the participants who either currently work for or are retired from the Ministries of the Attorney General and/or Justice, are referred to as "Government Experts". The outstanding participants, including Kent Roach and Tamara Levy, are referred to as "Legal Experts". In this way, the comments and individual perspectives of all interviewed persons will remain confidential.

#### **3.4.4. Interview Guide**

An interview guide was developed to ask the same questions to all interview participants. The questions for the interviews focussed on a range of areas including the *Guidelines*, the key factors involved in awarding or denying compensation, the time efficiency of compensation settlements, opportunities for improvement, the *Charter of Rights* experience, and legislated compensation schemes in the United States. The questions were designed to be more open-ended in order to elicit a broader response, without restrictions. The interview questions can be found in Appendix A.

### **3.4.5. Data Collection**

Data collection for this study was gathered through semi-structured interviews conducted by telephone, in person, and by Skype. The interviews were semi-structured in design. “Semi-structured interviews, which are a common data collection tool, are used widely in qualitative research to understand the reasons why people act in particular ways, by exploring participants’ perceptions, experiences and attitudes” (Harvey-Jordan & Long, 2001). Key features of semi-structured interviews include: advanced scheduling at a designated time; use of predetermined questions; creating an opportunity for new questions to emerge from the dialogue; and, duration of 30 minutes down to a few minutes (Whiting, 2008). This format was chosen to provide structure and flexibility to the interview process.

The interviews, which took place over the telephone, were scheduled to be between 30 to 60 minutes in length. As previously mentioned, an interview guide was used for all interviews. Open-ended questions were used to obtain broad information from participants with follow-up probing questions used to supplement the open-ended questions. The probing questions were particularly useful in cases where the participant strayed from the desired area being examined. When warranted, new questions were asked based on the direction of the answers received. Depending on the participant’s time availability and interest, interviews ranged from 15 minutes to 75 minutes. To accommodate the participants’ busy schedules, interview times were expanded to include evenings and weekends. In addition, each participant was able to obtain the interview day and time of their choice. A few of the experts’ crammed work schedules resulted in four interviews being conducted on the same day. In total, it took six weeks to interview the 24 participants who had expressed interest in the study. To ensure that the participants had the researcher’s full attention, the interviews were audio-recorded, with minimal note taking. One participant was interviewed using “Skype”. One other participant declined to be audio-recorded; therefore, notes were logged by hand. All recorded interviews were transferred from a computer onto a USB memory stick for security reasons. Each participant was read the confidentiality agreement and was asked to provide a verbal consent prior to providing any answers to questions.

During the course of the interviews, it was very difficult to hear of the plight of the wrongfully convicted. The descriptions of their appalling life in prison and the difficulties they encountered in acquiring compensation, were most disturbing to the researcher. It was often challenging for the researcher to maintain professional composure. These adverse side effects, which have been documented in studies performed by Silverman and the team of Lincoln and Guba, demonstrate “the way in which investigators may become so immersed in the culture under scrutiny that their professional judgements are influenced” (Shenton, 2004).

Reflexivity is a validity process where investigators must not only reveal their personal beliefs, values, and prejudices, all of which may impact their study (Creswell & Miller, 2000; Fade, 2003), but must prove that these factors have been taken into account in the study (Fade, 2003). Reflexivity in qualitative research is viewed as a technique of ensuring rigour (Guillemin & Gillam, 2004). Therefore, “reflexivity involves critical reflection of how the researcher constructs knowledge from the research process” (Guillemin & Gillam, 2004). Reflexivity is established by the types of factors that influence the researcher’s accumulation of knowledge (Guillemin & Gillam, 2004). While conducting this study, the researcher was cognisant of the emotional distractions, but was successful in setting them aside.

In their closing remarks, several interviewed experts volunteered to provide follow-up assistance. A few participants advised that they could be reached for further questioning on the subject. Another individual volunteered himself as a person with whom the researcher could “bounce off ideas” under consideration. One other participant indicated that he/she would gladly read over the draft report and provide comments. In summary, no opportunities were taken to re-engage an interviewed participant on further discussions. However, many participants indicated that the research topic was very appropriate and looked forward to receiving a copy of the completed study with its findings.

### **3.4.6. Data Analysis – Interviews**

Qualitative research is the exploration of topics, the understanding of the unknown, and answering questions through the analysis of unstructured data. Different analytic tools are available to understand the data generated. For this project, the method of inductive thematic analysis was used. This is a flexible method that can be applied to qualitative research, outside the original focus area of psychology (Braun & Clarke, 2006). Using this approach, the research data was read several times to uncover prevailing themes that emerged. These themes were identified as categories or codes. Likewise, an inductive or “bottoms-up” approach was used to categorize or code the data, without attempting to fit it into a structured framework. In other words, the themes developed are generated from the research data itself.

In preparation for the data analysis stage, the researcher collected the information generated from the interviews. Following the one-on-one telephone interviews, the audio-recorded interviews were transcribed. Approximately four weeks were spent creating the transcriptions from the interview dialogue. In total, 201 pages of typed text were generated from the approximate 20 hours of interviews. All of the transcription files were labelled and kept on a secure USB memory stick for information security purposes. In addition, one interview did not permit an audio recording device to be used, so manual notes were created for this interview.

As a first step in the analysis, the manually transcribed records of the interviews were read over four times. This reading process enabled the researcher to acquire a strong familiarity with all of the interviews conducted. In addition, this reading process enabled preliminary categories or codes to be identified for the inductive thematic analysis. Using Descriptive Coding (Sandelowski, 2000), the researcher was able to organize the transcribed notes into categories for future reference. Key codes were created in the margin of each transcribed page to categorize what was being said in each paragraph.

As a second step in the analysis, a list of codes was identified from the questions in the interview guide. These codes were identified as either primary or subordinate. For some of the primary questions, follow-up subordinate questions are shown. These

questions were thus coded as “subordinate”. The codes identified during the reading of manual transcripts were reconciled with those identified from the interview guide to create one consolidated list of primary and subordinate codes. These codes were loaded into the analysis software, known as NVivo 10.

As a third step, the 24 transcripts were loaded into NVivo 10. This software is a universally used tool to analyze qualitative data for emerging themes and sub-themes, as expressed by the participants. In the application of this software, the researcher creates “nodes” or codes to organize the data collected. As mentioned previously, these codes and sub-codes were generated from the interview guide and from the manual notes left on the margin of the transcripts. Each transcript paragraph was then coded using one of the primary codes. In the event that one of the pre-defined primary codes did not adequately describe the paragraph, then a new primary code was created. That concluded the first round of coding.

The fourth step was to apply sub-codes for the uploaded transcript data. Again, the transcripts were reviewed, but this time on a line by line basis. Using one of the pre-defined sub-codes, each line was coded. In the event that a pre-defined sub-code did not adequately describe the text, a new sub-code was created.

In the fifth step, the primary and subordinate sub-themes were identified. By reviewing all of the coded data regarding each primary theme, the dominant themes emerged. In addition, one unexpected primary theme also emerged. However, a number of themes were discarded based on content and infrequency of use. For each primary theme, the coded sub-themes were reviewed. Similarly, dominant sub-themes for each primary theme also emerged. For a few primary themes, unexpected sub-themes surfaced. Likewise, a number of sub-themes were discarded based on content and infrequency of use. Based on an iterative process of continually reviewing the primary and subordinate, sub-themes, a list of five dominant themes prevailed. Likewise for each theme, one or more sub-themes were selected. Together, the five primary themes and the subordinate sub-themes tell the story of this research study. Through the coded themes and sub-themes, the answers to the research questions were developed.



### **3.4.7. Limitations**

There were limitations in conducting the interviews. A few individuals, who had previously agreed to participate in the study, did not make themselves available. As a result, several follow-up calls were made to these participants with no feedback provided. Also, a few participants were extremely busy in other activities on their respective interview day. As a result, they were unwilling to commit to an interview time of at least 30 minutes. For these individuals, their answers appeared rushed and less detailed. Not all participants were well-versed on all areas of the study. Consequently for some questions asked, the responses ranged from no response, to generalized responses, to very brief responses.

Other limitations included the following. One participant refused to be audio-recorded, therefore typed notes had to be taken. In this case, the participant's talking speed was faster than the researcher's typing speed, so few notes were taken. The researcher chose not to contact any exonerated individuals for fear of having them relive their horrendous experience. One prominent judge, who was identified to be interviewed, had passed away. The researcher was unable to contact a prominent American lawyer involved with the Innocence Project. The researcher received limited information from federal and provincial governments. Finally, a number of government experts requested that part of the interview be "off the record", thereby indicating that information may have been held back.

## **3.5. Ethical Considerations**

Records from the Provincial Ministries of the Attorney General and/or Justice are considered public information and carry minimal risk of harm. However, to ensure that the rights of the study participants have been protected, the informed consent process was used. In this process, the participation of the subjects was made voluntary, the study subjects clearly understood the benefits and risks associated with their participation, the participants were provided with all the information needed to reach a decision on whether or not to participate in the research study, any potential risks and

the intended use of the data was disclosed, and the prospective participants understood that the information given was confidential and they had capacity to give consent.

In addition, each prospective study participant was provided with the following information:

- purpose of the study
- nature of the study and a general description of other participants
- expected duration of the individual's participation
- description of the procedures
- description of the extent to which confidentiality would be maintained
- description of who would have access to the data
- statement that participation in the study was voluntary and response to a given question was voluntary
- statement indicating that the participant could withdraw at any time without penalty (Salmons, 2010).

A script was used to describe the study to each participant. Taking into account that the study could shift as emerging patterns prompted new questions, new areas were consequently opened for further discussion.

Salmons (2010) describes a set of principles of fair information processing online that can help prevent ethical lapses:

- personal data should be collected for one specific purpose
- participants should have access to the data collected about themselves
- personal data should be guarded against risks such as unauthorized access, modification, or disclosure
- data should be collected in a context of free speech
- personal data is not to be communicated externally without the consent of the subject who supplied the data

In the description of the study, the interview process required the use of an audio-recording device.

Verbal consent was requested and obtained after all ethical considerations were addressed.

## **Chapter 4. Findings – Archival Records**

This chapter features the findings of the archival records. The findings are based on the examination of several wrongful conviction cases, as well as the assessment of the compensation recommendations from the seven Commissions of Inquiry into wrongful convictions.

### **4.1. Wrongful Conviction Case Records**

Based on the material resulting from the Freedom of Information applications and internet searches, the compensation criteria, applied in a number of wrongful conviction cases, were investigated. The number of cases available to research was limited due to the lack of cooperation from the Freedom of Information offices of the Ministries of the Attorney General and/or Justice. In most cases, the provincial Freedom of Information offices were very reluctant to share any of the compensation-related information from documented wrongful conviction cases, even though the settlement provided to the wrongfully convicted was published in the media or on the internet.

#### **4.1.1. Steven Truscott Compensation Case**

The Steven Truscott compensation process for his wrongful conviction was described by several notable officials from the Ontario government as unique, unusual, and exceptional. Based on Steven Truscott's acquittal rendered by the Ontario Court of Appeal in 2007, the Attorney General of Ontario asked Sydney Robins, a retired judge, to review Truscott's application for compensation and make a recommendation as to whether or not compensation should be awarded, and if so, to provide a suggested quantum (Robins,2008). Judge Robins reviewed two available options being either a civil course of action or an *ex gratia* payment by the state. Since no blame on the Truscott conviction could be attributed to the investigative authorities, Judge Robins

believed that the *ex gratia* payment was the preferred alternative to be pursued (Robins, 2008). To determine compensation entitlement, the *Guidelines* were consulted. Upon review, it was concluded that Steven Truscott's application for compensation satisfied four of the five mandatory conditions outlined in the *Guidelines*. Truscott had been convicted of the federal offence of murder, he had been imprisoned for ten years, he had been acquitted by the Ontario Court of Appeal, and the compensation claim had been made only for him and for no other family member. However, since the Ontario Court of Appeal never declared Truscott to be factually innocent, he was therefore non-compliant with the fifth requirement of the *Guidelines* (Robins, 2008). In his investigation, Judge Robins examined other wrongful conviction case claims including those of Donald Marshall and Thomas Sophonow. Likewise, he studied the subject of factual innocence by reviewing scholarly articles published by well-known academics, such as Professors H. Archibald Kaiser, Peter MacKinnon, and Kent Roach (Robins, 2008). From his investigation, Judge Robins concluded that "the highly unusual circumstance of this case, combined with the frailty of such evidence as remains against Mr. Truscott, have led me to conclude that compensation should be paid to Mr. Truscott" (Robins, 2008).

To determine the quantum of compensation, Judge Robins considered two alternatives, the tort-based approach and the standardized approach (Robins, 2008). In the tort-based approach, both pecuniary and non-pecuniary damages are considered. Pecuniary damages are measured by the financial losses incurred by the wrongfully convicted person while incarcerated and after release from prison, as a consequence of the tort. Additional costs might also be incurred for future care, including therapy sessions on developing coping strategies. Non-pecuniary damages are based on the individual's emotional and physical suffering caused by the wrongful conviction (Robins, 2008). The non-pecuniary losses prescribed by the *Guidelines* include, the loss of liberty, physical and mental agonies of incarceration, loss of reputation, and the interruption of relationships (Robins, 2008). The tort-based approach to compensation is typically applied in civil cases where damages, which are based on the degree of harm perpetrated by the defendant, are intended to reinstate the equilibrium between the plaintiff and the defendant. However, since no civil wrong was committed on the part of the prosecutors or investigators in this case, it was difficult to apply this compensation

scheme (Robins, 2008). In contrast, the standardized approach calculates compensation based on the number of years of incarceration. Although this approach is direct and ensures consistency in awards, it is clearly disadvantageous since it disregards the losses, pain, and suffering endured by the wrongfully convicted person (Robins, 2008).

Judge Robins determined that the compensation entitlement for Steven Truscott should reflect the unique circumstances of his case and that an equally unique approach should be applied. Based on Steven Truscott's ten years of incarceration, including four months on death row and 38 years on parole after release from prison, Judge Robins believed that the quantum of compensation to be awarded should be based on the provisions of comfort, financial security for the balance of Truscott's life, and the ability to set aside money for his family members, should he desire to do so (Robins, 2008). The award should also compensate the non-pecuniary damages incurred by the wrongful conviction and provide public recognition for the harm and personal privations suffered by Truscott for a period of 50 years. These sufferings included the denial of a secondary and post-secondary education, the deprivation of social and emotional development through his teenage years, the separation from family in annual celebrations, the questionable drug therapy administered while in prison, and the loss of liberty (Robins, 2008). As a result, it was recommended that Steven Truscott be awarded an *ex gratia* payment of \$6.5 million. Had the standardized approach been used to calculate Truscott's compensation, it is estimated that the settlement would have been based on 10 years in prison at approximately \$250,000 per year, 38 years on parole at approximately \$100,000 per year, plus an additional \$100,000 for Truscott's wife, Marlene, for the unpaid years spent working towards obtaining his release (Robins, 2008).

When applying the *1988 Federal-Provincial Guidelines* to determine compensation for Steven Truscott, departures were taken from the documented criteria. Truscott was unable to establish factual innocence of the crime charged. The Ontario Court of Appeal recognized that proof of innocence would be impossible to establish since conclusive forensic evidence (i.e., DNA) was not available (Robins, 2008). Marlene Truscott, his wife, was granted financial compensation for her contribution

towards his release. These deviations from the *1988 Federal-Provincial Guidelines* indicate that the *Guidelines* were not followed as documented. Rather, they merely provided a starting point for the compensation discussion. Truscott's application for compensation clearly had unique circumstances that were evaluated to determine a settlement that was customized for his case. The prior compensation amounts awarded to Donald Marshall and to Thomas Sophonow provided benchmarks for Judge Robins to use to determine the relative magnitude of Truscott's settlement.

#### **4.1.2. Donald Marshall Compensation Case**

In 1990, the Administrator of the Government of the Province of Nova Scotia engaged retired Commissioner Gregory Evans to review the compensation paid to Donald Marshall for his wrongful conviction. A Royal Commission on the Donald Marshall, Jr., Prosecution was conducted in 1989 and it concluded with the following compensation-related recommendations: no limit on the compensation amount to paid out on any claim in a wrongful conviction application, reimbursement of all legal fees and disbursements incurred by or on behalf of the wrongfully convicted individual, and that the Nova Scotia government re-examines the adequacy of compensation paid to Donald Marshall, Jr., taking into account the factors and circumstances of his case (Evans, 1990). The Hickman Commission determined that the process used to originally calculate Marshall's compensation quantum was flawed. The Commission awarded \$270,000 compensation for Donald Marshall Jr.'s incarceration without considering the factors of negligence or wrongdoing on the part of the justice system which sent him to prison and kept him there for 11 years (Evans, 1990). In addition, the Department of the Attorney General of Nova Scotia instructed their negotiator to treat the Marshall case as a routine civil case instead of a unique wrongful conviction case, thereby resulting in an inadequate and unfair compensation award (Evans, 1990).

To determine Donald Marshall, Jr.'s, compensation entitlement, the *Guidelines* were consulted. Upon review, it was determined that Marshall's application for compensation satisfied all five mandatory conditions as set out by the *Guidelines*. Marshall had been convicted of the federal offence of murder, he was imprisoned for 11 years, the compensation claim was only being made for his benefit and for no other

family member, he had been acquitted by the Supreme Court of Nova Scotia, and he was factually innocent after it was determined that another man had committed the murder.

To establish the quantum of compensation, Commissioner Evans considered both pecuniary and non-pecuniary damages. There were concerns in calculating the pecuniary damages of lost earnings because Donald Marshall, Jr., was only 17 years old when he was arrested (Evans, 1990). Therefore, it would be impossible to estimate his potential future earnings. However, Commissioner Evans concluded that Marshall should be paid an income of \$1,875 per month, with payments guaranteed for 30 years. In addition, Marshall's payments would be indexed at 3% per year. (Evans, 1990). Donald Marshall Jr. was also found to be entitled to substance abuse treatment and rehabilitation, should he decide to seek this intervention. The drug abuse problem was attributed to his incarceration. To assist in his rehabilitation, Commissioner Evans decided that the Government of Nova Scotia should set aside \$50,000 for Marshall's treatment expenses. For pecuniary damages, Commissioner Evans reviewed the types of claims, as advocated by Professor H. Archibald Kaiser. Professor Kaiser believed that non-pecuniary compensation be made available to wrongfully convicted individuals to reimburse them for damages, such as:

Loss of liberty; loss of reputation; humiliation and disgrace; pain and suffering; loss of enjoyment of life; loss of potential normal experiences, such as starting a family or social learning in the normal workplace; other foregone developmental experiences, such as education or social learning in the normal workplace; loss of civil rights; loss of social intercourse with friends, neighbours and family; physical assaults while in prison by fellow inmates and staff; subjection to prison discipline, including extraordinary punishments imposed legally (the wrongfully convicted person might, understandably, find it harder to accept the prison environment), prison visitation and diet; accepting and adjusting to prison life, knowing that it was all unjustly imposed; adverse effects on the claimant's future, specifically the prospects of marriage, social status, physical and mental health and social relations generally (Evans, 1990).

In addition, it was discovered that Donald Marshall, Jr., suffered other indignities, such as the inability to use his native language in prison, nor was he able to become the Grand Chief of the Micmac Nation as a consequence of his imprisonment (Evans, 1990). In his assessment of the damages to be awarded to Marshall, Commissioner Evans



reviewed other pertinent cases as benchmarks, including those of Mike Grattan from Nova Scotia and Arthur Allan Thomas from New Zealand (Evans, 1990). After assessing the non-pecuniary factors, Commissioner Evans awarded Donald Marshall, Jr., an additional sum of \$199,872. He also recommended that the Province of Nova Scotia purchase an annuity for Marshall to enable him to generate a monthly income of \$1,875 for 30 years (Evans, 1990). In total, Donald Marshall was awarded \$1.5 million (Katz, 2011). In addition to the damages awarded to Donald Marshall, Jr., Commissioner Evans believed that his parents also suffered pecuniary and non-pecuniary damages. For pecuniary damages, Mr. and Mrs. Donald Marshall, Sr., were reimbursed for their 11 years of travel, accommodations, telephone expenses, and the pain and suffering incurred during their son's incarceration. In total, Commissioner Evans recommended that Mr. and Mrs. Donald Marshall be awarded \$174,265. He also recommended that, similar to their son's, an annuity be purchased by the Government of Nova Scotia for 30 years. This annuity would generate a monthly income of \$600, indexed at a rate of 3% annually. In addition, a claim was made by counsel for Donald Marshall, Jr., to fund a native survival camp for Micmac youth (Evans, 1990). It was suggested that Marshall could work at this camp as part of his rehabilitation, since he would enjoy this form of employment. Commissioner Evans dismissed this claim since it was not part of his mandate under the Order-In-Council (Evans, 1990).

The compensation case of Donald Marshall, Jr., clearly indicates that the *1988 Federal-Provincial Guidelines* were not used in the determination of the final compensation awarded. Although non-pecuniary damages were not awarded at the first compensation settlement, the subsequent inquiry into providing adequate compensation for Marshall resulted in an award well over \$100,000 to cover non-pecuniary losses. In 1990, Marshall's parents were also awarded compensation for their losses during their son's 11 years of incarceration (Evans, 1990).

#### **4.1.3. Thomas Sophonow Compensation Case**

In 2001, retired Supreme Court Judge Peter Cory was asked to conduct an inquiry into the wrongful conviction of Thomas Sophonow. As part of this inquiry, Justice Cory's mandate included the determination of the compensation owed to Sophonow.

Justice Cory consulted with the *1988 Federal-Provincial Guidelines* to obtain compensation guidance. Upon review, it was established that Thomas Sophonow's compensation application satisfied all of the five mandatory conditions set forth by the *Guidelines*. Sophonow had been convicted of the federal offence of murder, he was imprisoned for almost four years, the compensation claim was only being made for his benefit and for no other family member, he had been acquitted by the Manitoba Court of Appeal, and he was factually innocent after new evidence had cleared him.

To determine the quantum of compensation, Justice Cory applied the tort-based approach. Using this method, the wrongfully convicted individual is financially placed in the position that he would have held had the miscarriage of justice not occurred (Robins, 2008). Justice Cory considered both pecuniary and non-pecuniary damages. He determined both the earnings lost as a consequence of the incarceration, as well as the future earnings over the following six months after release as a result of not being able to gain employment. In addition, Justice Cory reviewed the non-pecuniary losses as prescribed by the *Guidelines*. These damages included "the loss of liberty, physical and mental harshness and indignities of incarceration, loss of reputation, and the loss or interruption of family or other personal relationships" (Robins, 2008).

In total, Justice Cory recommended that Thomas Sophonow be granted \$2.6 million for his wrongful conviction. This award was in addition to the \$75,000 compensated to Sophonow prior to the start of the inquiry. Included in his compensation package was a reimbursement of \$832,700 for his legal fees. Justice Cory also recommended that part of the settlement be used to purchase an annuity. In addition, Justice Cory also recommended that the Stoppel family be awarded \$307,000 to cover their legal fees and future counseling costs (Manitoba Government News Release, 2001).

#### **4.1.4. Kyle Unger Compensation Case**

The compensation claim of Kyle Unger is one notable case where compensation for a wrongful conviction was denied. The Attorney General of Manitoba declared that Unger's false confession to undercover officers contributed to the charges laid against

him, resulting in his subsequent conviction. Consequently, he decided that compensation for the wrongful conviction would be inappropriate (Manitoba Government News Release, 2009).

However, Kyle Unger's application for compensation would have satisfied all five of the mandatory conditions, according to the *Guidelines*. Unger had been convicted of the federal offence of murder, he was imprisoned for almost 14 years, the compensation claim was only being made for his benefit and for no other family member, he had been acquitted by the Manitoba Court of Appeal, and he was factually innocent after new DNA evidence cleared him.

According to the *1988 Federal-Provincial Guidelines*, Unger's application for compensation was denied based on the following factor: "Blameworthy conduct or other acts on the part of the applicant which contributed to the wrongful conviction" (Evans, 1990). However, it is important to note that the *Guidelines* only stipulate that "the inquiring body must take into account" the factor of blameworthy conduct, as opposed to using this factor to deny compensation. Unger has since filed a lawsuit against the office of the Attorney General office and the Crown attorneys who prosecuted him.

#### **4.1.5. Anthony Hanemaayer and Romeo Phillion Compensation Cases**

In both the Anthony Hanemaayer and the Romeo Phillion compensation cases, there is a noteworthy similarity to the case of Kyle Unger. For both Ontario-based cases, requests were made to the Ontario Attorney General's office through the Freedom of Information process. Even though information has not been forthcoming in each case, the denial of compensation for Hanemaayer (Robins, 2010) and for Phillion (Shah, 2014), appears to be consistent with the compensation decision in the Kyle Unger case. In each case, the defendant's actions contributed to the criminal charge brought against him. Anthony Hanemaayer served 16 months in prison (Robins, 2010), and Romeo Phillion was incarcerated for 31 years (Perkel, 2014).

Hanemaayer's application for compensation, as well as that of Phillion, each satisfied, for the most part, the five mandatory conditions set forth by the *Guidelines*.

Hanemaayer had been convicted of the federal offence of assault with a weapon, he had been imprisoned for almost 16 months, the compensation claim was only being made for his benefit and for no other family member, he had been acquitted by the Ontario Court of Appeal, and he was proven factually innocent after a confession was obtained from the actual perpetrator. Phillion had been convicted of the federal offence of murder, he had served 31 years in prison, the compensation claim was only being made for his benefit and for no other family member, and his conviction had been overturned by the Ontario Court of Appeal, but he was not exonerated. In terms of factual innocence, Phillion provided fresh evidence in the form of an alibi. However, while the Ontario Court of Appeal ordered a new trial, it was decided by the Office of the Attorney General to withdraw the charges, since the case was old and the evidence fragile.

Similar to Unger's case, it is believed that a false confession by Romeo Phillion and a guilty plea by Anthony Hanemaayer, contributed significantly to the lack of compensation in each of their respective cases. Hanemaayer's guilty plea was recommended by his defence attorney as a plea bargain for a lesser sentence. Phillion's false confession was recanted two hours after it was provided to the police. It is believed that the false confession and the guilty plea were considered to be "blameworthy conduct" (Evans, 1990), thus explaining the denial of compensation awards to these individuals. In contrast, these two compensation claims could have been treated as unique cases, similar to that of Steven Truscott. In particular, Romeo Phillion did not apply for parole throughout his prison sentence, since that would have meant admission of guilt for the crime. To maintain his innocence, Phillion passed on all opportunities for parole throughout his incarceration (Perkel, 2014).

## **4.2. Commissions of Inquiry – Compensation Recommendations**

Canadian provincial governments have conducted seven Commissions of Inquiry since 1990 (Botting, 2010). These public inquiries were initiated in response to high profile wrongful conviction cases being confirmed by provincial judicial systems. The majority of these cases involved wrongful convictions of homicide. These inquiries included:

The Marshall Inquiry – Hickman Commission (Nova Scotia, 1989)

The Morin Inquiry – Kaufman Commission (Ontario, 1998)

The Sophonow Inquiry – Cory Commission (Manitoba, 2001)

The Dalton/Parsons/Druken Inquiry – Lamer Commission (Newfoundland and Labrador, 2006)

The Driskell Inquiry – LeSage Commission (Manitoba, 2007)

The Milgaard Inquiry – MacCallum Commission (Saskatchewan, 2008)

Inquiry into Pediatric Forensic Pathology in Ontario – Goudge Commission (Ontario, 2008)

The outcomes of these inquiries resulted in a diverse array of recommendations focussed on the prevention of wrongful convictions. These recommendations were not legally binding; they could only become law if a court adopted them or a legislature converted them into law (Botting, 2010). Five of the inquiries proposed recommendations regarding compensation of the wrongfully convicted. These included the Marshall Inquiry, the Sophonow Inquiry, the Driskell Inquiry, the Milgaard Inquiry, and the Goudge Inquiry into Pediatric Forensic Pathology in Ontario. Below are compensation-related recommendations from each of the inquiries.

#### **4.2.1. Marshall Inquiry**

The first recommendation from the Marshall Inquiry dealt with the administration of compensation commissions for the wrongfully convicted. Commissioner Hickman wrote in his final report,

Recommendation 3. We recommend that when a person is found to have been wrongfully convicted, a judicial inquiry be constituted to consider any claim for compensation. The person or persons appointed to this inquiry should be completely independent of any involvement with the administration of justice in the province which gave rise to the wrongful conviction (Department of Justice, Nova Scotia, 1989).

The Hickman Commission felt that any judicial inquiry should be conducted by an independent judge from outside the province. In addition, the Commission felt that the provincial Court of Appeal should have involvement in an inquiry to determine

compensation for a wrongful conviction case. In the Marshall Inquiry, the Court of Appeal was responsible for making remarks concerning Donald Marshall, Jr.,'s partial responsibility for his own conviction, which became a factor in his negotiated settlement.

Other recommendations from the Hickman Commission include the following:

Recommendation 4. We recommend that there be no pre-set limit on the amounts recoverable with respect to any particular claim or any particular aspect of a claim (Department of Justice, Nova Scotia, 1989).

Recommendation 6. We recommend that appropriate legal fees and disbursements incurred by or on behalf of the wrongfully convicted person be paid as part of the inquiry's expenses (Department of Justice, Nova Scotia, 1989).

Recommendation 8. We recommend that Government reconvass the adequacy of the compensation paid to Marshall in light of what we have found to be factors contributing to his wrongful conviction and continued incarceration (Department of Justice, Nova Scotia, 1989).

In summary, while the above recommendations were not legislated, they impacted the outcomes of future wrongful conviction Commissions of Inquiry. Retired provincial and federal judges, serving on Commissions of Inquiry, must be from a province other than that of the wrongfully convicted; the limit on non-pecuniary compensation eclipsed the \$100,000, as suggested by the *1988 Federal-Provincial Guidelines on Wrongful Conviction Compensation*; the number of factors considered for non-pecuniary compensation was expanded; and the entitlement of a wrongful convicted person to be reimbursed for legal fees was advanced. The final recommendation of the Marshall Inquiry was to re-evaluate the compensation paid to Donald Marshall, Jr., in a follow-up inquiry. In 1990, this inquiry was initiated by Commissioner Gregory Evans (Evans, 1990).

#### **4.2.2. Sophonow Inquiry**

The Cory Commission made a recommendation regarding the establishment of an independent body to review the claims of wrongful conviction cases.

Recommendation 19. I recommend that, in the future, there should be a completely independent entity established which can effectively,

efficiently and quickly review cases in which the wrongful conviction is alleged. In the United Kingdom, an excellent model exists for such an institution. I hope that steps are taken to consider the establishment of a similar institution in Canada (Botting, 2010).

The recommendation for an independent body to review wrongful-conviction-case claims is a further extension of the recommendation proposed at the Marshall Inquiry.

#### **4.2.3. Driskell Inquiry**

As an outcome of the Driskell Inquiry, the following compensation-related recommendations emerged:

Recommendation 1. That James Driskell's claim for compensation be considered in light of the findings in the report (LeSage, 2007).

Commissioner LeSage believed that James Driskell should be awarded compensation for his 13 years of wrongful imprisonment (Botting, 2010). As a result of the inquiry, Driskell was awarded a voluntary payment of \$250,000 by the province of Manitoba until the compensation issues could be settled (Botting, 2010). Driskell subsequently sued for \$20 million and reached a settlement of \$4 million (Katz, 2011).

Commissioner LeSage (2007) also adopted the following recommendation from the Sophonow Inquiry:

Recommendation 10. That a completely independent entity be established which can effectively, efficiently and quickly review cases in which wrongful conviction is alleged.

With respect to factual innocence, Commissioner LeSage (2007) set forth the following recommendation:

Recommendation 15. Given Canada's obligations in relation to compensation in cases of "miscarriage of justice," pursuant to Article 14(6) of the International Covenant on Civil and Political Rights (ICCPR), that the study and related projects concerning questions of factual innocence and wrongful conviction be linked to the Ministerial review of compensation guidelines.

The LeSage Commission believed that the requirement of factual innocence, as advocated by the *1988 Federal-Provincial Guidelines on Compensation for the Wrongful Convicted*, needed to be further discussed by Federal, Provincial, and Territorial Ministers of Justice (Botting, 2010).

#### **4.2.4. Milgaard Inquiry**

The MacCallum Commission (2008) identified the following compensation-related recommendations of which the first bears the most significance:

Recommendation 12. Compensation for wrongful conviction lies within the purview of the Executive and should remain there, but factual innocence, as the sole criterion for paying compensation, is unduly restrictive. Where a miscarriage of justice has resulted from an obvious breach of good faith in the application of standards expected of police, prosecution, or the courts, the door to compensation should not be closed for lack of proof of factual innocence.

The MacCallum Commission found that factual innocence can be difficult to prove. In particular, wrongful convictions based on the misconduct of the police, the Crown, or the courts, should be open to compensation claims.

As in the Marshall Inquiry, the MacCallum Commission (2008) proposed that an independent body be engaged to review compensation claims.

Recommendation 13. The investigation of claims of wrongful conviction should be done by a review agency independent of government, established along the model of the English Criminal Cases Review Commission, replacing ministerial review under s.696.1 of the *Criminal Code*. The review agency would report directly to the Court of Appeal of the province or territory which registered the conviction.

#### **4.2.5. Inquiry into Pediatric Forensic Pathology in Ontario – Goudge Commission**

The Goudge Commission (2008) offered only one compensation-related recommendation:



Recommendation 148. The province of Ontario should address the identified challenges to see if it is possible to set up a viable compensation process. The objective is to provide expeditious and fair redress for those who, through no fault of their own, have suffered harm as a result of these failures of pediatric forensic pathology, thereby helping to fully restore public confidence.

This recommendation was more complex than any of the recommendations proposed by the previous inquiries. The province of Ontario had no guidelines to follow that could answer the questions of who was eligible for compensation, who was responsible for providing the compensation, and how was the quantum to be determined. Rather, Commissioner Goudge was advised to allow compensation to be determined by the processes of civil actions, arbitrations, mediations, and the *1988 Federal-Provincial Guidelines on Compensation for the Wrongfully Convicted*. It was believed that compensation for the families affected would help to restore confidence in the criminal justice system.

#### **4.2.6. Morin Inquiry and the Dalton/Parsons/Druken Inquiry**

No compensation-related recommendations were made by the investigation commission of either the Morin Inquiry or the Dalton/Parsons/Druken Inquiry.

### **4.3. Summary of Archival Records**

To better understand the wrongful-conviction-compensation process, two sources of records were employed. They included files from actual Canadian cases in which compensation was either awarded or denied to wrongfully convicted individuals. Also included were seven Commissions of Inquiry into wrongful convictions in five Canadian provinces. The archival records from actual cases were limited to an internet proceeding of the Steven Truscott compensation inquiry and sparse information gathered from Freedom of Information offices across the provinces. The collected data revealed one major common trend: the use of the *Guidelines* to make compensation-related decisions was limited to non-existent. While the *Guidelines* provided a starting point for a provincial government's position, they were typically abandoned in terms of their specific criteria. Rather, the presiding Commissioners of the Inquiries developed

their own unique decisions regarding eligibility and compensation quantum based on a combination of their own logic and the precedence of previous Commissions of Inquiry.

Several wrongful conviction Commissions of Inquiry developed compensation-related recommendations. Although no recommendations were ever legislated, a few were implemented. One common recommendation was for the development of an independent commission to hear and rule on the eligibility of compensation claims.

## Chapter 5. Findings - Interviews with the Experts

The interviews with 24 experts were transcribed and coded using NVivo software. From the coded transcripts, the following five main themes emerged:

*The Guidelines for compensation are out-of-date and obsolete.*

*Compensating the wrongfully convicted is an ad hoc process which is inconsistent and slow.*

*Legislated compensation is not a viable option worth considering.*

*Media and politics are pivotal in triggering compensation.*

*There is gridlock between the federal government and the provinces*

The interviewed participants consisted of members of two groups, Government Experts and Legal Experts. The Government Experts were participants who either work or who have worked for the justice system in a provincial government or the federal government. The Legal Experts consisted of criminal lawyers, an academic, and a journalist. To maintain confidentiality, each expert was assigned a unique number for identification purposes. This identification system was employed in this study.

### 5.1. The *Guidelines* for Compensation are Out-of-Date and Obsolete

A common theme shared by all interviewed experts was that the *1988 Federal-Provincial Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons* were obsolete and rarely applied. This theme is best reviewed by investigating five sub-themes, including “general impressions”, “factual innocence is an unfair

criterion”, “the cap of \$100,000 is too low”, “compensation ineligibility criteria is unfair”, and “legislation versus the *Guidelines*”.

### **5.1.1. General Impressions**

The general impressions of the *Guidelines* are fairly consistent among the interviewed government and legal experts. Government Expert 19 provided a brief history, explaining that when the *Guidelines* were developed, the intention was that they were to be used as stated. However that was not the outcome. Owing to the lack of empirical cases, government policy makers developed the *Guidelines* based solely on two prior cases, creating criteria that they believed to be obligatory. However, based on the cases that emerged over time, it was discovered that the policy makers had not anticipated the various types of cases that would arise, nor the ways in which they would surface. Therefore, problems were identified with the application of the *Guidelines* from their inception. It is also believed that, despite the lack of anticipation of the different applications of the *Guidelines*, several compensation cases that emerged after 1988 were considered to be politically “hot potatoes” and were consequently handled differently. Government Expert 19 advised that Federal Ministers of Justice have sometimes preferred to expedite compensation cases and settle the application quickly, as opposed to providing compensation according to the *Guidelines*. In general, it was found that the provinces tend to observe the *Guidelines* only when they are found to serve their best interests with respect to convenience and practicality.

Government Expert 18, who had acquired a great deal of proficiency and experience in the application of the *Guidelines*, described the latter as being overly specific and not germane to all compensation claims. Also indicated was the exceptionally high threshold the *Guidelines* had set for an individual to receive compensation.

You have to fall within very specific facts and sometimes it is just not in the cards that all of the conditions are going to be satisfied even though the circumstances may warrant compensating the accused.

Government Expert 04 referred to the *Guidelines* as:

A tool that is employed at the start of a compensation case, but when negotiating a settlement, they tend to fall by the wayside.

Government Expert 10 stated the following:

I believe the *Guidelines* to be very stingy and do not provide adequate compensation at all. The wrongfully accused can face either years of civil litigation, which they probably cannot afford either in terms of their energy and the desire to get on with their lives, or they have to settle for what the *Guidelines* provide. The *Guidelines* are a unilaterally imposed system which takes advantage of the vulnerability of these people.

Government Expert 02, who was involved in the compensation discussions of two Commissions of Inquiry into wrongful conviction cases, advised the following:

The relevance of the 1988 *Guidelines* was discussed, but it was conceded that time had passed them by and that they were really only historical.

According to several legal experts, with the exception of the policy makers who collaborated in their creation, the 1988 *Federal-Provincial Guidelines* are not highly regarded as a useful tool in the determination of compensation for wrongfully convicted individuals (Legal Expert 05). Rather, they are not considered to be relevant, since compensation for more than half of the cases has been determined outside of their application (Legal Expert 05). These *Guidelines* came into existence before the prominent wrongful conviction cases were heard. From Legal Expert 12's perspective, it was found that they do provide a useful starting point. However, most cases have departed from the *Guidelines* when determining the compensation award. From a practical perspective, many of the study's participants agreed that adherence to the 1988 *Federal-Provincial Guidelines* is considered to be impossible. Instead, the *Guidelines* are restrictive since they require a wrongfully convicted person to obtain a statement from an Appellate Court, or a free pardon, stating that the person requesting compensation did not commit the crime (Legal Expert 05). In the words of retired Judge Sydney Robins, who presided over the 2008 Steven Truscott compensation inquiry, "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*" (Robins, 2008).

Legal Expert 11 advocated for the wrongfully convicted and summarized the beliefs of his/her colleagues:

The *Federal-Provincial Guidelines* are clearly out-of-date. They are far below what I think people on either side of this issue think of as tolerable levels of compensation for people whose lives have been shattered by years of unjustified imprisonment. And they do not, as a practical matter, dictate the course of compensation discussions and negotiations, so they're not a big factor in how compensation claims play out.

In terms of the future of the *Guidelines*, Legal Expert 08 commented:

The *Guidelines* were never applied and they should never be applied. Therefore, there is no point in updating something that is stillborn. Why update something that is doomed to failure because it's the wrong approach?

### **5.1.2. Factual Innocence is an Unfair Criterion**

One of the central problems with the *1988 Federal-Provincial Guidelines* is the requirement for a wrongfully convicted person to obtain proof of factual innocence. As stated by Legal Expert 05:

The Canadian courts, including the Court of Appeal, do not have the jurisdiction to make findings of factual innocence. In the criminal process, the Court is required to determine whether the charge against the accused has been proven beyond a reasonable doubt, and if the Court concludes that there is reasonable doubt, then the verdict of not guilty is entered.

Government Expert 19 provided an historical perspective on the criterion of factual innocence. The government wished to create a threshold to ensure that an individual would be compensated for wrongful imprisonment based on factual evidence that he/she had not committed the crime. Proof of factual innocence is the first and most important factor taken into consideration for a compensation award. The second factor is whether or not the accused played any role in his/her prosecution

(Government Expert 19). Government Expert 06, who is an advocate for the requirement of factual innocence, commented:

We can only compensate people who we know were innocent and that's just a hard place to absolutely establish and a hard place to allow any wiggle room because if you allow wiggle room then what? We are just not going to give money. That is not the way that our system works.

Government Expert 07 indicated that proof of factual innocence is a high threshold and deemed that all wrongfully convicted individuals should be awarded compensation. However, the expert also believed that all of the underlying causes of the wrongful conviction necessitated an investigation which, in turn, would impact the quantum of compensation.

There was some disagreement from other government experts on this subject. According to Government Expert 23:

There is no sort of vehicle to prove factual innocence.

Government Expert 10 advised that proof of factual innocence can be quite subjective:

If someone is acquitted on a technicality, it doesn't mean that they should receive compensation as if they were factually innocent. On the other hand, it becomes quite subjective as to when somebody can be considered factually innocent and it's very difficult to prove a negative, ie. the person held to be wrongfully convicted nevertheless has to show that they were not either present at the scene of the crime, or not guilty. So, I don't mind there being some threshold that has to be reached which should be on the balance of probabilities, but I think it has to be kept in mind that these people are under a disadvantage, sometimes many years after the event, attempting to prove a negative.

In summarizing the concerns around factual innocence, Government Expert 18 commented:

It's not always so clear cut to prove factual innocence or to be satisfied with factual innocence in the way that it is envisioned in the *Guidelines*".

The legal experts were unanimous in their beliefs regarding the concept of factual innocence. In legal terms, they believe that there is no such concept as factual innocence, so this term remains nebulous (Legal Expert 22). Legal Expert 21 stated:

Factual innocence is a murky concept and an extremely difficult standard to apply. The law doesn't even kind of understand the notion of factual innocence. It deals with burdens of proof, levels of proof and convicts somebody because they're sure beyond a reasonable doubt, and if there's a reasonable doubt, then you're legally innocent.

According to Legal Expert 05, the requirement for proof of innocence is intended to provide a safeguard to the justice system. In this way, individuals who are wrongfully convicted are not awarded compensation unless they are found to be factually innocent with substantiated facts, such as DNA evidence, a confirmed alibi, or the apprehension and conviction of the real perpetrator of the crime. Factual innocence is difficult to comprehend from a legal perspective. In a fair trial, reasonable doubt allows the accused to be found not guilty. For the purposes of compensation, the concept of reasonable doubt is insufficient. It would be considered a political liability for the government to compensate someone on the basis of reasonable doubt. There are also cases in which a person is declared to be not guilty, but the individual is not able to prove factual innocence. There is a lack of evidence, cases grow older, witnesses die, police officers die, files, materials and physical exhibits get destroyed, which result in an inability to prove factual innocence.

According to all government and legal experts interviewed, factual innocence is often very difficult to demonstrate because the presumption of innocence no longer lies with the wrongfully convicted. This presumption shifts once the person has been convicted (Legal Expert 08). Since this individual typically has limited capacity and resources, the burden of proving factual innocence is not considered appropriate. Instead, once there has been an indication of a miscarriage of justice, the burden of proof should be shifted over to the state to seek the truth (Government Experts 02, 03, and 17).



### 5.1.3. The Cap of \$100,000 is Too Low

All experts agreed that the *Guidelines*' current cap of \$100,000 for non-pecuniary losses is unacceptably low. Government Expert 19 explained that the origin of the non-pecuniary cap was based on a trilogy of personal injury cases that were heard by the Supreme Court of Canada at the end of the 1970's. In the cases of Andrews, Teno, and Thornton, a limit of \$100,000 was determined as an appropriate sum for the most severe non-pecuniary losses (Evans, 1990), such as loss of life, loss of a limb, or some other physical or material loss. While these losses are not identical to loss of liberty and loss of family relations, the government decided to adopt the same limit that was used by the Supreme Court. Consequently, the *1988 Federal-Provincial Guidelines* established a cap of \$100,000 (Evans, 1990). As stated by Government Expert 19:

Through inflation, the 1988 cap of \$100,000 is probably about \$400,000 today. It's one of the things that we had not anticipated. We recognized fairly quickly as new cases arose that \$100,000 was not sufficient.

This expert further advised that appointed judges typically have started the compensation discussions by indicating that the *Guidelines* would be set aside and ignored. In addition, judges advised that they developed a recommended compensation amount based on their own unspecified and unstated criteria. In the Milgaard case, Judge Gold set forth a recommendation that \$10 million be paid by the province of Saskatchewan, with no explanations offered to government officials. Government Expert 07 advised that any cap can only be at best a guideline. Government Expert 18 commented the following on the \$100,000 cap:

It might have been something that made sense back then but, you know, there is inflation and all that sort of stuff over time and, as with anything, I will look at it. You have to keep looking at it periodically to see if it keeps up to date.

Legal Expert 05 summarized the sentiments of his/her colleagues. He/she commented that the degree of pain and suffering that one might endure in a prison atmosphere is substantial. The impact or damage caused by that experience is physically, psychologically, and mentally significant. It seems rather arbitrary to put a

cap of \$100,000 on the type of pain and suffering that a person may have experienced as a result of a wrongful conviction and that he/she continues to experience. Legal Expert 11 also believed that the non-pecuniary cap was especially low and commented that:

It's a ridiculously low amount, absurdly so. People who get compensated for wrongful convictions go into the millions, as they should.

Legal Expert 08 provided his/her rationale for the low cap on non-pecuniary compensation. The government had to limit the costs of their mistakes by keeping one eye on the public purse, while keeping the other eye on what is fair. Based on the assumption that in 1988, a wrongfully convicted person could not have earned more than \$10,000 a year, the sum of \$100,000 would appear to have been fair. This same expert went on to add:

You know, we're talking of course in 1988, so in 1988 dollars that might have been the reason for the \$100,000 cap. But clearly, cases since then have shown that that's not a reasonable ceiling and therefore each case should be looked at on its own merits.

In 1989, there was a desire to limit the compensation paid to Donald Marshall, though Judge Hickman made it very clear in his ruling that \$100,000 was an insufficient award (Department of Justice, Nova Scotia, 1989). The Donald Marshall Inquiry in 1989 was the first notable wrongful conviction case in which compensation was determined after the publishing of the *1988 Federal-Provincial Guidelines*. It is believed that this case set the stage for the balance of cases to follow with respect to non-pecuniary compensation (Legal Expert 08). In fact, the Marshall inquiry provided a recommendation that there should be no cap on the amount of compensation that can be recovered with regard to any claim or any aspect of a claim (Department of Justice, Nova Scotia, 1989). Another key lesson learned from the establishment of a cap on non-pecuniary damages is the impact of inflation in future years. Therefore, the \$100,000 cap of 1988 had no relevance to the economy of 2008 when the compensation decisions were being made for Steven Truscott (Legal Expert 08).

Legal Expert 12 provided his/her insights on the non-pecuniary compensation limit. He/she advised that a person who has been wrongfully convicted by the state is in a somewhat different situation from a person who has been unfortunately injured in an accident. Based on this difference, the non-pecuniary-compensation limit is deemed to be inappropriate and, for this reason, the many departures from the published cap can be explained. In addition, it is believed that the federal and provincial governments are using precedents from previous wrongful-conviction-compensation cases to determine future cases. In fact, the David Milgaard case has set a new bar at \$10 million. Legal Expert 22 recommended that a wrongfully convicted person should be awarded an amount of approximately \$330,000 to \$350,000 per year spent in prison. In terms of published settlements, he declared:

I've never thought that a number was too high. I've been surprised because the number may be too low.

#### **5.1.4. Compensation Ineligibility Criteria is Unfair**

The *Guidelines* contain a clause which states that the claimant's conduct must not have contributed to his/her wrongful conviction. Government Expert 06 advised that the government does not want to be viewed as having compensated someone who did something wrong or who contributed to their own demise. In some cases, wrongfully convicted individuals made false confessions, plead guilty, or made a plea bargain for a lesser sentence because the case appeared to be stacked against them and they wanted to incur the least amount of prison time. In doing so, the individual places their potential compensation claim at risk. According to Government Expert 01, it is important to know if the wrongfully accused contributed to his/her conviction. However, that information should only impact the amount of the award, and not the denial of compensation. Government Expert 02 indicated that in the Sophonow case, Judge Cory determined that, owing to the applicant's conduct, the award should be reduced by 10%. Accordingly, he applied a principle that arises in tort law whereby contributory negligence should reduce the quantum, but not extinguish it.

Legal Expert 15 raised the concern regarding the “blameworthy conduct” clause in the *Guidelines*. He/she advised that there is very little constituency for supporting individuals who made false confessions or agreed to plea bargains.

So, the principle is clear and pragmatically, the Crown, or government, or Attorney General, or whatever you prefer, is not going to want to open-up that incredible can of worms involving people who have pleaded guilty, in one way or another, because there are so many of them and because they would be constantly caught up in litigation and claims for compensation.

However, most legal experts commented that it is a mistake to employ hard and fast rules on compensation eligibility. While the claimant’s role in the wrongful conviction must be taken into account, so must all of the other factors that gave rise to the wrongful conviction.

Legal Expert 08 stated that it is unfair to deny claimants who were advised by their counsel to plea bargain. He/she indicated that, in the United States, plea bargains are used in 90% of its convictions to avoid trials. Legal Expert 12 acknowledged that the *Guidelines* were written before it was known that false confessions and plea bargains would present issues. In the words of this legal expert:

This part of the *Guidelines* is unfair and out-of-date and also based upon the simplistic view that the wrongfully convicted person is simply a victim.

Legal Expert 05 mentioned the issue as to whether someone maintaining their innocence throughout their incarceration may disqualify him/herself from eligibility for parole. Therefore, if a wrongfully convicted person admits guilt while in prison to obtain an early release, even though he or she is innocent of the crime, then he or she may not necessarily be eligible for compensation when he or she is exonerated.

### **5.1.5. Legislation versus the *Guidelines***

There has been much speculation as to whether or not the *Guidelines* should be transformed into legislation. It is generally accepted by most experts that legislation will not likely replace the *Guidelines*. According to Government Expert 19, the provinces

were opposed to legislation. It was a policy choice. A recommendation had been made to legislate the *Guidelines*, but provincial and federal ministers involved rejected the idea. They preferred the flexibility of the *Guidelines*. Since the federal government contributes to the provincial compensation awards, this contribution might be difficult to legislate. Therefore, it was concluded that an agreement among all parties using the *Guidelines* was a preferred arrangement.

According to Government Expert 18, there are good reasons for keeping the *Guidelines* “as is”. Firstly, the *Guidelines* serve a useful role in bridging the world of criminal and civil matters. Secondly, there is always an issue regarding the establishment of uniform provincial legislation on any subject. And finally, the *Guidelines* provide an agreement between the federal government and the provinces without the benefit of legislation, so there is no need for legislation. Government Expert 17 echoed the same sentiment. He/she believed that the *Guidelines* might be preferable to legislation because the latter creates rigidity. In addition, if the government wished to treat compensation as a priority, it would then be legislated. However, in this case, legislation is undesirable since the new legislative set of rules may skew matters and impose additional costs on the wrongful conviction process. Government Expert 17 went on to say that the government does not have a vault with an endless supply of money to compensate the wrongfully convicted. If funding the new legislation is a priority, then the Department of Justice would have to either seek new funds from the Minister of Finance, or cut programming in other areas and reallocate that money into compensation for victims of wrongful conviction.

Government Expert 01 indicated that the *Guidelines* are an agreement between two levels of government and these kinds of agreements are not generally found in law. Government Expert 07 explained that the *Guidelines* are hard to legislate because guidelines are not definitive. Furthermore, legislation is also very difficult to change once it has been created. Government Expert 09 believed that the *Guidelines* are not part of provincial legislation because the compensation cases for wrongful conviction are infrequent. He/she further elaborated by stating:

There are specific circumstances that arise and that will allow for consideration of the specific circumstances as a process or policy

matter and therefore, the need to have, at least the perceived need to have, legislation has not been so great as to result in legislation being proposed or enacted.

The legal experts agreed with the rationale behind the *Guidelines* versus legislation. According to Legal Expert 05, the *Guidelines* serve a useful purpose for the government insofar as they provide a blueprint for how to approach compensation for wrongful convictions. They provide a starting point, but that is the total value that they offer. If the *Guidelines* were to become part of legislation, there would be less flexibility in their interpretation and the federal government did not want to be placed in that position. Consequently, the government created the *Guidelines* so that they could be interpreted in a flexible manner, thereby serving the government's purpose when appropriate. Also, the federal government decided that legislating the *Guidelines* would create much bureaucracy for a process that quite rarely occurs. Legal Expert 14 confirmed the lack of constituency for legislation on compensation for wrongful convictions:

There isn't the political pressure or the political will, so it doesn't get on the agenda, or it just waits forever and it's not a priority.

Government Expert 10 provided the following insightful comment on the role of *Guidelines* versus legislation:

The *Guidelines* are not part of legislation because they are an act of the executive and the executive takes the view that this is all done on a discretionary spending power. It is much easier for them to control if they are not written into a statute. This strategy is to the advantage of the government.

## **5.2. Compensating the Wrongfully Convicted is an *Ad Hoc* Process which is Inconsistent and Slow**

The second theme of this study addresses the inefficient manner in which the compensation process is conducted. To best exemplify this theme, the following three sub-themes have been identified: "*Ad hoc* system", "lack of consistency", and "takes too much time".

### 5.2.1. *Ad Hoc* Process

Both expert groups agreed that the current compensation system is a less than robust process and is considered to be “*ad hoc*”. The outcome of the compensation case depends on a number of variables, including, the state of the negotiations, the case’s prominence in the media, the importance of the lawyer representing the claim, and the degree to which the government wishes the claim to be settled. Government Expert 07 reiterated the same remarks. He/she commented that the whole system is haphazard. Often, the cases take too long to resolve and, in general, the system lacks effectiveness. The statement made was:

Compensation seems to be paid, but I only hear about the cases where compensation is paid. I don’t hear about cases where it’s not paid when it should have been paid.

Essentially, compensation depends on the person who has been appointed to determine the award.

Legal Expert 08 commented on the viewpoint of the justice system in reviewing wrongful-conviction-compensation cases.

Deny, deny, deny and unfortunately you get into an occupational hazard with Crown Counsel and the Attorney General. They are in the right and criminals exonerated or not are the enemy and they are in the wrong. They are enemies of society and the proof is in the pudding because now they are seeking compensation from the state. Therefore, they are predators of the state. And so the psychology of prosecution is similar to the grand inquisitor. You know that there is an automatic assumption that the Crown is always right and that they are on God’s side. So, that justifies their minimizing everything, even after it has been shown that they make mistakes

According to Legal Expert 22, the compensation process for the wrongfully convicted is a political process. To begin, closed discussions take place within the senior levels of the Office of the Attorney General. The latter may then come back and advise that they are not inclined to offer any *ex gratia* payment. Consequently, the only other main option is for the wrongfully convicted to go to court and file a civil law suit. This can be an extremely long and expensive process.

Legal Expert 08 stipulated that the quantum of compensation is dependent on the time served in prison. The longer the incarceration, the more likely the compensation package will be decent.

Legal Expert 21 remarked:

It's not so much a question as to whether Canada has a fair system for evaluating compensation claims, rather it's a matter as to whether Canada has a system at all.

### **5.2.2. Lack of Consistency**

Both the legal and the government experts did not all agree on the consistency of the application of the *Guidelines*.

Government Expert 01 advised that when it comes to rendering compensation decisions, the federal government acts as a referee. Although criminal law falls under the federal jurisdiction, the prosecution and administration of justice are the responsibilities of the province. Since the federal government contributes up to 50% of the compensation award, they play a significant role in the discussions of each case with the respective province. The federal government also determines if the *Guidelines* have been interpreted in a sensible manner, with the intention of ensuring a degree of consistency across the board.

Yet, Government Expert 07 did not share the same viewpoint regarding the consistent interpretation of the *Guidelines* with respect to compensation. This individual advised that, theoretically, compensation should be equal from province to province given the same set of circumstances (i.e., same crime, same incarceration time), but in practice it will never be. Every case will stand on its own merits and there will be variations from one province to the next. If the province is very tight on money, this might reflect on the quantum of compensation. One major reason for the inconsistency in the application of the *Guidelines* is the existence of provincial differences in the standard of living, occupations, and income. Government Expert 07 stated that,

In some provinces, a hundred thousand might be a lot of money, in other areas a hundred thousand will be less money. It would be



desirable if you could govern it in a consistent manner, but experience has shown that it would not be so interpreted.

Legal experts also believed that the *Guidelines* are inconsistently applied. It was generally felt that each province interpreted them as they saw fit. As indicated by Legal Expert 05,

I think that the provinces might look to the *Guidelines*, they may consider them, but I don't believe that they are uniformly applied anywhere.

As an example, in the 1989 Nova Scotia case of Donald Marshall, the wrongfully convicted individual originally received \$250,000 for his 10 years of imprisonment. In contrast, Tammy Marquardt, a 2010 Ontario case, the wrongfully convicted individual received \$250,000 for her 13 years of incarceration. With inflation, the Legal Expert 05 believed that she should have received approximately \$5.2 million. In addition, Legal Expert 21 commented that as long as no set legal criteria exist for the compensation process, there will be different lawyers and different governments, all with different opinions, giving different advice to deputy ministers and ministers about whether or not to settle and for how much.

### **5.2.3. Takes Too Much Time**

The experts generally agreed that the time required to process an application for compensation can be quite lengthy and seemingly interminable for the wrongfully convicted. Government Expert 07 advised that the Ministry of the Attorney General does not readily disburse money without first taking the time to exercise due diligence to ensure that the correct action is undertaken. The acknowledgement that the government has made a significant error, which must be compensated with an award involving public funds, is a serious issue. The time to investigate a case is proportional to the complexity of the case, especially when probing for the causes of the wrongful conviction. Government Expert 18 further elaborated that the extended investigation time may be attributed to a number of factors including court processes, exhausting legal remedies, and thoroughly scrutinizing and re-examining the case on both sides.

Government Expert 19 indicated that the process for compensation is fairly quick, as compared to that of a civil court case. Once an individual has been determined to be wrongfully convicted and factually innocent, the process moves relatively swiftly. Proving factual innocence is usually time-consuming. If an inquiry is conducted, the time frame is 12 to 18 months before the report is made available and the applicable discussions are held between all affected parties. Government Expert 02 also stated that the process is reasonably time efficient, considering that four stages are involved in reaching a compensation decision.

The first stage is usually the discovery of a new fact. The second stage entails the media response or a public inquiry response to the new fact. In the third stage, the case goes forward to a retired judge to review compensation entitlement and quantum. In the fourth stage, there is usually an assessment of which order of government is going to contribute and how much. So, it takes time to go through each of these stages and it is uncertain as to whether any one of them can be sped up.

In contrast, Legal Expert 05 commented that the compensation process is tedious and lengthy. In terms of the *Guidelines*, the process is a discretionary decision that is left to the government to determine first, whether an individual should be compensated, and if so, the quantum of the award. Furthermore, there is nothing to compel the government to arrive at a decision, short of a civil lawsuit. In other words, resorting to the judicial process can be a long, drawn-out, and daunting experience. Also, the *Guidelines* do not prescribe any timelines and, even if they did, they still would not be binding. Legal Expert 08 commented on the plight of the wrongfully convicted waiting for a settlement.

You know his life has already turned to sludge because of the actions of the government and because he doesn't have any bargaining power. He can only hang on for so long and I think governments know this.

Legal Expert 12 advised that the compensation process could be more efficient and timely if the government adhered to the *Guidelines* or adopted a "cookie cutter" approach in administering compensation.

I do think there is a trade-off here between individualized justice, which is going to take a while, and efficiency.

### **5.3. Legislated Compensation Is Not a Viable Option Worth Considering**

A common theme that arose from the interviews with the experts was the subject of mandatory compensation. In the United States, mandatory compensation statutes exist in 29 states and it is believed that this option may be worth considering in Canada.

#### **5.3.1. Legislated Compensation in Canada**

Government Expert 06 stated that the federal government has no political will to devise a legislated compensation scheme. This process is overly complicated regarding the factors to be considered, aside from the potentially large awards to be drawn from public funds. Therefore, the unknown cost of compensation awards imposed on a jurisdiction is a prime reason for rejecting mandatory compensation for wrongfully convicted persons.

Conversely, several legal experts had opposing points of view. Legal Expert 05 felt that all wrongfully convicted persons should be awarded some form of mandatory compensation. However, he/she also believed that this should not be the only avenue of redress. Claimants for compensation should always have the option of being able to resort to the courts, should they so desire.

Legal Expert 08 believed that, if a wrongful conviction is demonstrated on a balance of probabilities and it is clear that the conviction should be overturned, then, in light of the miscarriage of justice, an automatic and generous compensation should be awarded. Also stipulated was that this process has to be visited in a systematic manner through the courts and not in an arbitrary way through the establishment of arbitrary guidelines that may not cover every situation.

Legal Expert 11 explained that the provincial governments are opposed to mandatory compensation since they are not in favour of granting monetary awards for wrongful convictions. They believe that the onus is on the federal government to compensate these individuals.

Because provinces don't like giving out money for wrongful convictions and they always take the position that it's for the federal government to pay and there is always an argument about who pays. The provincial and municipal governments don't want to put it into their domestic legislation because it might mean they suddenly become responsible above and beyond the feds.

He/she went on to comment that Canada has not adopted mandatory compensation because the governments do not believe that it is politically necessary to compensate the wrongfully convicted. The disbursement of monetary awards will not assist governments in their financial, political, or vote reaching endeavours. Therefore, mandatory compensation is not beneficial to any government from a political perspective.

Legal Expert 22 advised that the establishment of mandatory compensation is unlikely since, as a group, the wrongfully convicted do not have the political power to influence policy. Legal Expert 21 remarked that there is no mainstream impulse to give compensation to everyone who has been charged, served time in prison, then is released. Compensation awards are not negligible amounts of money and governments are intent on operating the justice system as economically as possible.

Other legal experts also commented on the government's lack of will to create mandatory compensation. Legal Expert 14 remarked:

I think the government wants flexibility. They don't want to have to open the door to an unknown series of claims that they can't stem and, even though these exoneration cases do often result in a lot of publicity, it tends to be short-lived. And, after the case is over and the inquiry is done, there isn't that much follow-up on the compensation angle in the media, so it just falls off the table. So, there isn't a political downside if they ignore it.

Legal Expert 12 advised that wrongful convictions are still considered to be relatively rare events, therefore establishing a legislated structure may not be worthwhile. He/she further enlightened:

There is still a degree of unease talking about wrongful convictions, so if a structure was created for compensating individuals, it would be

admitting that a systemic problem exists and not all Provincial or Federal Departments of Justice are prepared to admit that yet.

### **5.3.2. United States Mandatory Compensation Process**

Both expert groups agreed that the United States mandatory compensation process for the wrongfully convicted is not appropriate for Canada. Legal Expert 22 indicated that the U.S. system adopted a legislated approach in order to limit their liability and to restrict the quantum of the awards:

There are pros and cons with the approach that has been taken in the U.S. In many of the states that passed legislation, the objective was to cap the awards at a very low level.

Government Expert 19 responded that each U.S. state has determined a compensation award maximum which tends to be lower than that of any Canadian province. By comparison, Canadian compensation awards are more generous. The premise of awarding compensation is to not to reward someone because he/she was wrongfully convicted, but to try to make him/her whole. Another factor in the U.S. is that prosecutors are often elected. Consequently, elected officials are under pressure to maintain their positions. It is generally felt that U.S. prosecutors have a “win at all cost” approach, instead of seeking a win based on truth and fairness. Unlike the Canadian unified criminal code, each state has its own justice code with different procedures and different pressures, including the pressure to be re-elected and the pressure to be sensitive to community outrage. As a result, there are more wrongful convictions due to this approach. By comparison, once Canada determines that an individual been wrongfully convicted, the focus turns to “doing the right thing”.

Legal Expert 08 advised that the United States should not be used as a model for any aspect of the justice system. Not only does the U.S. tend to minimize its blame for the miscarriage of justice, but it also tends to minimize the damages suffered by the wrongfully convicted. Any compensation arrangement developed by a specific state is based on the self-interest of that particular state, as well as on the interest of the voter who is likely to elect the official back into office.

## **5.4. Media and Politics are Pivotal in Triggering Compensation**

The participants interviewed in this study were asked to comment on whether or not external factors were at play in determining compensation entitlement. The overall response was yes. These factors included race and wealth, with media attention and political influence emerging as the most significant determinants in triggering compensation awards.

### **5.4.1. Media Attention**

All experts agreed that media attention is highly influential in the compensation process. According to Government Expert 10, media attention raises the profile of a wrongful conviction case, thereby pressuring the government to arrive at a settlement. Otherwise, without this attention, the case can more readily be ignored. Government Expert 18 advised that compensation claims are advanced by the amount of public interest generated by the media. Government Expert 17 advised that compensation cases, especially when related to financial matters, require media attention to heighten their profile above the many other issues vying for the same public attention. Government Expert 01 advised that cases which take on an egregious appearance due to media attention draw higher political interest and consequently are not disregarded in the compensation process. Government Expert 02 indicated that media attention and publicity propagandize the issue, thereby catching the attention of the government and forcing the latter to take a close look at the case.

According to Legal Expert 05, the media may politicize an issue in order to motivate the government to address it. Cases that are highly publicized pressure the government to proceed quickly.

Legal Expert 12 explained the impact of media attention as one of assisting a number of wrongfully convicted individuals to obtain more generous compensation settlements than others.

I think it has more to do with how much publicity the particular wrongfully convicted person has. Someone like William Mullins Johnson received an awful lot of publicity and a fairly generous settlement. However, someone like Tammy Marquardt, one of Dr. Smith's victims, who spent 13 years in prison, did not receive a large settlement due to the lack of media attention.

Legal Expert 14 reaffirmed that higher profile cases capture the government's attention for arriving at quicker and better settlements.

Anyone who doesn't think that publicity plays a big role in making governments decide to move quickly or not is pretty naïve.

Government Expert 07 explained that the impetus behind Commissions of Inquiry into wrongful convictions was based on the government's response to public pressure. Commissions of Inquiry address cases involving publicly recognizable figures, while other non-spectacular cases come under the public radar.

Legal Expert 21 emphasized how the support provided to wrongfully convicted persons strongly impacts the attention drawn to a case and its compensation outcome. The support that David Milgaard received from his mother was highly significant. The high profile of Steven Truscott's case, with the series of books that were written and the close-up media attention it received, made a huge difference.

Remember the morning the judgment came out, the Ontario government had a plan for how to address compensation for Steven Truscott and appointed a retired Court of Appeal judge. That was because of the profile of Steven Truscott's case.

#### **5.4.2. Political Influence**

Both expert groups agreed that the role of politics in the decision-making of compensation settlements is not to be underestimated. According to Government Expert 23, the quantum of the award becomes quite political. Often, the basis on which compensation has been granted is unknown: however, it is clear that politics are involved. Government Expert 10 indicated that the court can move a case along within the tort system, whereas if a wrongfully convicted person has to rely on the goodwill of the government, the wait may be some time. Regrettably, a good number of these cases

become stalled within the bureaucracy, a circumstance which further disadvantages the wrongfully convicted. Legal Expert 11 advised that,

Because the governments do not feel that it is politically necessary to compensate the wrongfully convicted. It's a political judgment that it is not going to assist them in their endeavours be they financial endeavours, political endeavours, vote getting endeavours or whatever they may be. It is not helpful to them politically.

Legal Expert 22 stated that the process involved in determining compensation judgements is not transparent, but political. Consultations take place between lawyers, the Department of Justice, and the Office of the Attorney General. He/she explained that an analysis of the facts of a particular case would be performed, a line drawn on a piece of paper, the positive factors listed on one side, and the negative factors on the other. Positive and negative is probably all relative on how it will resonate in the public eye, in the public trust. He/she believed that decisions were made with the view of doing something within the public interest. He/she indicated that it was difficult to know the political dynamic at any given point in time, because it involves individuals who are inside the Department of Justice, or inside Cabinet. Furthermore, it may also depend on where the government is politically in their term, their mandate, and their policies with respect to justice. Legal Expert 22 indicated that,

The case of Romeo Phillion is a good example where there's no political will inside the Department of Justice or the Office of the Attorney General to compensate. So, the case will take a long time, if he gets compensation at all. The last resort is to engage in the litigation process which can drag on for years.

According to Government Expert 06, three wrongful conviction cases in Newfoundland, all within a short period of time, instigated a public outcry and forced the government to launch an inquiry to investigate the issues in the administration of justice in that province:

Those high profile cases were in the public eye because they weren't just about those individuals, they were about all of us in terms of administration of justice.



According to several legal experts, the Canadian justice system does not employ an independent body to review compensation cases. Government Expert 17 offered the following explanation:

It's completely a political decision. I think the concern of governments would be that they would completely lose control of the process and might find themselves facing very large liability. If the governments thought that it was an appropriate thing to do and they would do it. There is nothing standing in their way other than the political will to do it.

Government Expert 10 recommended that the use of an independent body would assist in preventing conflict of interest within the Ministry of the Attorney General.

## **5.5. There is Gridlock between the Federal Government and the Provinces**

Ideally, Canada requires a set of legislated guidelines that specifies federal and provincial duties and obligations in the administration of the wrongful-conviction-compensation process. Developing a harmonized system between the federal government and the provinces is a daunting task, especially in light of the intrinsic differences of each province. According to Government Expert 02,

It has proven extremely difficult in Canada because we have one federal system, ten provincial governments and three territorial governments. The U.K. has one national justice system. The United States goes state by state, with each state having its own criminal code. So, it's a little bit easier in the United States or the U.K. In our system with 14 governments, it has proven difficult to develop *Federal-Provincial-Territorial Guidelines*.

As previously noted, criminal law falls under the federal jurisdiction, while the prosecution and administration of this law fall under the provincial jurisdictions. According to Government Expert 01, the matter of compensation is a shared jurisdiction in many respects. However, wrongful convictions are largely attributed to mistakes made due to incompetencies at the provincial level, where the police provide evidence to the prosecutors and the case is put together. Government Expert 02 commented:

The federal government, I think, is hesitant to get too involved in wrongful convictions because they see it fundamentally as a provincial issue. The provinces are responsible for prosecuting most of the crimes in Canada, and so the federal government is saying, “our role should be limited because we’re not involved in these cases so, provinces – you guys should sort it out.”

Legal Expert 21 provided the following opinion with regards to compensating the wrongfully convicted:

You know, as long as this is a province by province determination rather than essentially a federal criminal law determination, and as long as there are no fixed legal criteria, you’re inevitably going to have different lawyers and different governments reaching different opinions and giving different advice to deputy ministers and ministers about whether or not to settle.

According to Government Expert 02, when the 1988 *Guidelines* were considered to have fallen into disregard, a committee was established to develop an improved compensation process with updated guidelines. The committee was comprised of approximately seven provincial representatives, a few federal representatives, and maybe a number of scholars. The mission of this committee was to hammer out an approach, including criteria and principles, by which each province would process an application for wrongful-conviction-compensation in a consistent manner. To date, no published legislation or updated guidelines have materialized. Government Expert 02 advised that it is difficult to develop a consensus on this type of matter, especially when not all provinces are represented at the discussion table. Furthermore, without consensus, the newly devised procedure will not be applied. As a result, the provinces and the federal government are gridlocked in the advancement of an improved compensation process. As stated by Government Expert 02:

It’s too difficult and it’s too sensitive at this point.

## **5.6. Summary of the Interviews with the Experts**

A collection of leading government and legal experts were interviewed to gain their perspectives on the compensation process for the wrongfully convicted. In total,

fifteen government experts and nine legal experts participated in the interview process. A blended perspective was obtained from the various opinions and experiences prompted by the questions asked of those interviewed. On issues such as the use of the *Guidelines*, the role of the media, and the role of politics, all agreed that the *Guidelines* are out-of-date, and both media and politics play a pivotal role in the determination of compensation. However, in other areas, such as the effectiveness of the compensation process and the viability of compensation legislation, opinions differed. From the survey of all interviews, a rich outcome was achieved in demonstrating both what is working and what is not. Likewise, a better understanding of the compensation process was gained from listening to the various perspectives. From the data gathering through the interview process, more practical-oriented recommendations resulted.

## Chapter 6. Conclusions

Two methods were used to investigate the compensation process for the wrongfully convicted: the review of archival records and the interviews with the experts. The review of the archival records entailed an examination of documents, including those received from the Freedom of Information Offices. The interviews with the experts included one in-person interview and a number of telephone conversations. The conclusions reached from both of these methods are discussed below.

### 6.1. Archival Records

The review of the archival records included the examination of three wrongful conviction cases as well as the investigation of three additional cases in which compensation was withheld due to the claimants' culpability for their role in the wrongful convictions. One prevalent theme emerged in all cases: the *1988 Federal-Provincial Guidelines on Compensation for Wrongfully Convicted* were not strictly observed in the administration and determination of compensation claims for the wrongfully convicted. Rather, the *Guidelines* were used as a reference or starting point, and the presiding judge or the Ministry of the Attorney General and/or the Department of Justice officials chose to depart from them over the course of the compensation claims.

In the cases of Steven Truscott, Donald Marshall, and Thomas Sophonow, the retired judges, who were responsible for providing guidance on these compensation cases, deviated from the *Guidelines* considerably. In the Truscott case, the claimant was not able to prove factual innocence, one of the essential criteria for the award of compensation. In addition, Judge Robins provided compensation to Steven Truscott's wife, thereby violating the *Guidelines* criteria. Finally, in determining the non-pecuniary compensation, Steven Truscott was awarded \$6.5 million and his wife was granted \$100,000. These two compensation awards far exceed the \$100,000 maximum as prescribed in the *Guidelines*. Likewise, in the Marshall and Sophonow cases,

Judge Evans and Justice Cory, respectively, disagreed with the compensation maximums prescribed by the *Guidelines*. As a result, Donald Marshall was awarded \$1.5 million and Thomas Sophonow was granted \$2.6 million (Katz, 2011). Furthermore, individuals affected in each of these cases also received financial awards. In the Marshall case, Donald's parents received \$174,265 (Evans, 1990) while in the Sophonow case, the Stoppel family was awarded \$307,000 for the pain and suffering of having lost their daughter (Katz, 2011). In the Truscott case, Judge Robins summarized the use of the *Guidelines* by stating that "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*" (Robins, 2008).

The cases of Kyle Unger, Anthony Hanemaayer, and Romeo Phillion all share the common attribute of blameworthiness on the part of the claimant for his role in his wrongful conviction. In each case, the individual either made a false confession or plead guilty to a charge. The *Guidelines* do not specifically deny compensation to a claimant who has made a false confession or plead guilty to a charge. However, several government experts who were interviewed suggested that a claimant's compensation award may be reduced to reflect his/her role in the wrongful conviction. It would appear that the Ministries of the Attorney General and/or Justice chose to interpret the *Guidelines* to suit these compensation claims. As a result, civil actions are pending in each of these cases.

## **6.2. Interviews with the Experts**

Interviews were conducted with a total of twenty-four government and legal experts on the compensation process as it related to the wrongfully convicted.

The following five main themes emerged from the coding of the transcribed interviews.

*The Guidelines for compensation are out-of-date and obsolete.*

*Compensating the wrongfully convicted is an ad hoc process which is inconsistent and slow.*

*Legislated compensation is not a viable option worth considering.*

*Media and politics are pivotal in triggering compensation.*

*There is gridlock between the federal government and the provinces.*

### **6.2.1. The *Guidelines* for Compensation are Out-of-Date and Obsolete**

All experts interviewed believed that the *Guidelines* are clearly out-of-date and need to be modernized, based on the experience acquired in the administration of compensation for wrongful conviction cases since the inception of the *Guidelines* in 1988. Both government and legal experts observed that the *Guidelines* were crafted with insufficient experience to ensure that they would meet the circumstances of the various cases in which they would be applied. As a result, the *Guidelines* have been discarded by the judge or ministry official who has provided a ruling on the compensation award. In the words of Government Expert 10,

*The *Guidelines* represent a unilaterally imposed system which takes advantage of the vulnerability of these people.*

The *Guidelines* requirement for proof of factual innocence by the claimant was met with arguments from both government and legal experts. The government experts sought to ensure that the threshold of innocence was sufficiently high to deny compensation to individuals who were found not guilty on a technicality. From the perspective of Legal Expert 21, the concept of factual innocence is a “murky” and a difficult standard to apply.

*The law doesn't even understand the notion of factual innocence. It only understands guilty and not guilty. It deals with burdens or levels of proof, convicts somebody because they're sure beyond a reasonable doubt, and if there is reasonable doubt, then there is innocence.*

Government Expert 23 indicated that “there is no sort of vehicle to prove factual innocence.” Likewise, Government Expert 10 advised that it can be quite subjective as to when an individual can be considered as factually innocent, and it is very difficult to prove a negative. The accused must prove either that he/she was not at the scene of the crime or that he/she is not guilty. The wrongfully convicted are under a disadvantage, sometimes many years after the event, attempting to prove a negative.

All government and legal experts agreed that the *Guidelines* cap of \$100,000 for non-pecuniary losses is unacceptable. Originally, the cap was set by the Federal Ministry of Justice, based on a trio of insurance awards. The cap, which has now been in existence for over 26 years, has not been indexed to reflect current day inflationary hikes. Government Expert 02 advised that appointed judges typically start the compensation discussions by indicating that the *Guidelines* will not be referenced. In addition, judges advised that they developed a recommended compensation amount based on their own unspecified and unstated criteria. Consequently, the cap must definitely be revised. A few legal experts advised that the current cap should be in the \$300,000 to \$400,000 range per year of incarceration (Legal Expert 08 and Legal Expert 22).

The issue regarding a claimant being ineligible to receive compensation as a consequence of their involvement in their wrongful conviction raised differing opinions. Government Expert 06 explained that the government does not want to be seen as having compensated an individual who committed a crime or who contributed to their own demise. Government Expert 01 remarked that it is important to know if a wrongfully accused was complicit in his/her own conviction: however, that information should not be used to deny compensation, but only to influence the amount of the award. In the Sophonow case, Justice Cory determined that, in light of the applicant’s conduct, the award should be reduced by 10%. In this case, Justice Cory applied a tort law based principle, essentially stipulating that contributory negligence should reduce the quantum, but not defeat it. (Government Expert 02)

All experts concurred that the *Guidelines* will likely never become legislated. The implementation of the *Guidelines* was a policy choice. A recommendation had been

made to legislate the *Guidelines*: however, the provincial and federal ministers involved rejected the idea since they all prefer the flexibility that the *Guidelines* offer. Government Expert 01 indicated that usually guidelines between the provinces and the federal government are not found to be agreements in law. Finally, Government Expert 10 advised that the *Guidelines* are not part of legislation because they are an act of the executive of the government. Therefore, the view is taken that compensation for the wrongfully convicted is based on a discretionary spending power. In summary, legislated guidelines are rejected because,

It is much easier for the government to control if it's not written into a statute.

### **6.2.2. Compensating the Wrongfully Convicted is an *Ad Hoc* Process that is Inconsistent and Slow**

The compensation process for wrongful convictions is deemed to be inefficient. However, it is considered to be quicker than civil litigation. The process varies from province to province, with lengthy delays in resolving individual claims. According to Government Expert 06, the outcome of a compensation case depends on a number of variables including the state of the negotiations, its prominence in the media, the importance of the lawyer representing the claim, and the government's motivation to settle the claim.

From a consistency perspective, the compensation process entails numerous variations including, the officials involved from the Provincial Ministries of the Attorney General and/or Justice, the standard of living and income differences in each province, the ability to finance compensation equally from all provinces, and the willingness to disperse funds. According to Legal Expert 21, as long as the compensation process is void of fixed legal criteria, claim settlement will be dependent on different lawyers and government officials providing varying opinions and advice to the decision-making deputy ministers and ministers.

In terms of the speed of the compensation process, views ranged from too slow to fairly quick. One's interpretation depends on one's knowledge of the legal process. Government Expert 18 indicated that once an individual has been determined to be



wrongfully convicted and factually innocent, then the process moves quite quickly. Establishing factual innocence usually takes a longer time. Government Expert 02 described the four stages involved in reaching a compensation decision: the discovery of new facts, the media response to the new information, the compensation review by a retired judge, and the determination of the quantum. Legal Expert 05 maintained that the process takes too long and further punishes the wrongfully convicted.

### **6.2.3. Legislated Compensation is Not a Viable Option Worth Considering**

The topic of mandatory compensation resulted in different perspectives from each of the expert groups. Government Expert 10 indicated that there is no political will to work out a legislated compensation scheme. The process is overly complicated in terms of the numerous considerations and the awards represent potentially a great amount of disbursement from public funds.

Legal Expert 11 commented that mandatory compensation is not part of provincial legislation because the provinces are not in favour of awarding compensation for wrongful convictions. Legal Expert 22 advised that individuals who have been wrongfully convicted will never receive mandatory compensation because, as a group, they do not have the political impact to influence policy. Also stated was the belief that the compensation process is not inexpensive and governments like to run the justice system cheaply.

Overall, both expert groups agreed that that the compensation process in the United States is not a model that Canadian provinces should adopt. In many of the states that passed legislation, the goal was to limit the awards. In particular, these states were effectively capping the awards at a very low level (Government Expert 02). Moreover, minimizing the impact on the wrongfully convicted was believed to be a common strategy used by U.S. government officials to promote their re-election into office.

#### **6.2.4. Media and Politics are Pivotal in Triggering Compensation**

Media and politics each play a significant role in the compensation process for the wrongfully convicted. As indicated by Legal Expert 14, publicity forces the government to expedite the claim and arrive at a settlement. Governments respond to public pressure thereby creating the impetus for public inquiries into wrongful convictions. Government Expert 01 advised that compensation cases, which adopt a grievous appearance as a result of media attention, gain the notice of politicians and are consequently processed with greater speed and efficiency. Effectively, media attention heightens public and government awareness of compensation cases, which otherwise might be ignored (Government Expert 02).

Politics is the stimulus factor in the compensation process. Government Expert 23 advised that the government is motivated to make decisions that will please the voters. The political dynamic depends on a number of factors, including who is in Cabinet and who is in the Ministries of the Attorney General and/or Justice, where the government stands in their term of office, the government's current justice mandate, and the government's political will with respect to the proximity of the next election.

#### **6.2.5. There is Gridlock between the Federal Government and the Provinces**

Perhaps the greatest impediment to the compensation process for wrongfully convicted individuals is the structure of the justice system in Canada. The federal government has jurisdiction over the development and reform of criminal law, while the provincial government governs the administration of the law. Therefore, a partnership exists between both levels of government in matters that affect the compensation process for the wrongfully convicted. However, this partnership has a number of challenges which are attributed to the differences between each province. Provincial variances are found in the standard of living, ability to pay reasonable compensation awards, political party affiliation, and willingness to award compensation to wrongfully convicted individuals. Consequently, these diversities explain the difficulties in attempting to reach a consensus, or a consistency over time, between the Federal Department of Justice and the Provincial Ministries of the Attorney General and/or

Justice regarding compensation-related guidelines. In fact, Government Expert 23 confirmed this explanation when stating that reaching agreements between the federal and the provincial governments is extremely difficult and complex because of the various perspectives and interests of each government.

In contrast, the justice system in England and Wales allows for an easier and more consistent approach to compensation for wrongful convictions, since the development of the criminal law and the administration and prosecution of this law all fall under the national jurisdiction. Similarly, in the United States, the individual states develop their own laws and administer their own justice systems, thereby readily enabling the creation of state-specific compensation statutes for the wrongfully convicted.

### **6.3. Summary**

Both the archival records and interviews with experts indicate that the Canadian justice system has a mixed review in terms of compensation for the wrongfully convicted. Individuals with higher media profile and political influence have been the beneficiaries of multi-million dollar settlements. Conversely, claimants with any blameworthy conduct have not received any *ex gratia* compensation. In comparison to England and Wales, and the United States, however, the Canadian justice system provides a more generous settlement.

## **Chapter 7. Recommendations and Future Directions**

The focus of this research is to heighten the awareness of the compensation process for the wrongfully convicted. A proposal will be outlined for an improved, more consistent, and expeditious compensation system. During the interview stage of this study, a number of concepts for advancement were elicited from the experts and are now currently under review. These new concepts will be shared. In addition, the researcher will present her own suggestions for improvement, based on the knowledge gained from this study.

### **7.1. Draft 2012 Federal-Provincial-Territorial Guidelines**

Through the interviews with the experts, it was discovered that the *1988 Federal-Provincial Guidelines* had been studied by a committee whose mandate was to draft an updated version. A number of the interviewed experts indicated that they had participated in the drafting of the *2012 Federal-Provincial-Territorial (FPT) Guidelines*. According to Government Expert 23, the federal government has been working on the new *FPT Guidelines* for 8 to 9 years.

The work has been done, but they're sort of stuck in FPT land. It's hard to explain without sort of understanding in great detail the machinations of FPT land. FPT ministers, Ministers of Justice meet only once a year, so anything that sort of happens is timed around there. It's a little bit complicated. One of these years, hopefully.

Government Expert 06 revealed that the *2012 FPT Guidelines* contain a number of new recommendations which may include the following:

An Attorney General or an appointed independent party would review a case to determine the innocence of an individual, based somewhere between a balance of

probabilities and beyond a reasonable doubt. This would allow flexibility for the current stringent threshold of proving factual innocence.

The addition of re-integration damages to pay for essentials such as counseling, education, employment assistance, and housing is a key need. No cap would be placed on these restitutions, since they vary from person to person. However, a reasonable cap should be placed on non-pecuniary damages, since the “sky can’t be the limit” (Government Expert 06).

In each compensation case, a financial manager would be engaged to assist the wrongfully convicted individual in managing his/her finances and setting up an annuity, if requested. In addition, a scheme would be devised to compensate family members for the suffering endured through the wrongful conviction.

In summary, a demand has been identified for one consistent, compensation process across Canada. This has proven to be a daunting task since the federal government’s mandate is criminal law, while the provinces’ mandate is the administration of justice. While the above recommendations have been studied and proposed by a Federal-Provincial-Territorial committee, not all provinces were represented in the process. Based on interviews with a few members from this committee, the new guidelines have not been issued due to a gridlock resulting from the lack of consensus between the federal government and thirteen provincial and territorial governments. According to Government Expert 02, the federal government believes that wrongful conviction is a provincial/territorial issue and is therefore reluctant to become heavily involved. The federal government has yet to render a decision in finalizing the *2012 FPT Guidelines*.

## **7.2. Proposed Recommendations**

From the information acquired in the investigation of this topic, the researcher has developed several recommendations to be considered for a more efficient, robust, reasonable, and expedient compensation process.

### **7.2.1. Independent Commission / Case Review Panel**

From the start, an independent body should be engaged and charged with the responsibility of reviewing all compensation cases for the wrongfully convicted. This recommendation has been proposed in four of the seven examined Commissions of Inquiry. To avoid conflict of interest, this independent body would report to the federal government of Canada. By assigning this responsibility to the federal government, the gridlock in the decision making on wrongful-conviction-compensation cases would end. At the federal level, the processing of all compensation cases would be treated consistently across Canada without any interference from political interests. This independent body, which would be staffed with experts on the subject, would review each compensation case to ensure consistency.

Several legal experts believed that compensation cases, including the establishment of the quantum to be awarded, should be reviewed by independent commissions: one for the determination of innocence (against a new proposed standard of innocence), and the other for setting the quantum of compensation. Government Expert 24 suggested that the independent case review panel (or commission) would be comprised of individuals who are impartial and are unaffiliated with any level of government, especially the Crown Office that convicted the individual. Government Expert 10 further added that this independent commission would be familiar with wrongful convictions and the systemic failures that lead to wrongful convictions. The commission would review each case on its own merits and determine whether the claimant is entitled to compensation, based on his/her evidence against the new proposed standard of innocence (yet to be determined). Government Expert 10 advised that an independent commission would be advantageous on the grounds of impartiality. This way, the responsibility for compensation decision-making would be removed from the office of the Attorney General who, being accountable for the provincial budget, has a financial interest in the granting of an award.

After the case has been reviewed by the independent case review panel, it is suggested that it be reviewed by either a second independent commission or by a designated person(s) to determine quantum. This approach models that of England and Wales. In England, this position is titled the Assessor (Layne, 2010). This expert would

be an actuary. The duties of the actuary would consist of analyzing the financial details of past settlements for consistency, quantifying non-pecuniary losses into financial terms, ensuring present settlements are adjusted for inflation, and developing a financial management plan for the claimant. Wrongfully convicted persons require assistance in their financial affairs to ensure that their award will take them through to retirement (Legal Experts 08 and 22). History has shown that large settlements are often mismanaged leaving the individual destitute in a very short time. Agreements would need to be in place between each province and the federal government regarding the determination and the sharing of the quantum of compensation.

To more efficiently review an applicant's claim, a wrongful-conviction-compensation database would be established to keep track of all pertinent case information in which an award was granted. The fields in the database would include, as a minimum, the name of claimant, province / territory of the conviction, date of conviction, date of incarceration, date of release from prison, number of years incarcerated, date of exoneration, settlement reached, year awarded, and name of the official who presided over the compensation review. In this way, all information regarding previous cases would act as a benchmark in the determination of awards for new compensation cases.

Critics may assume that this independent body may not be kept sufficiently occupied since wrongful convictions appear to be scarce. Although the number of reported wrongful convictions may be rare, the actual number of cases is believed to be much higher. In 2012, there were approximately 246,984 criminal court cases where a person was sentenced to custody. Based on an error rate of 1%, there would be approximately 2470 wrongful convictions per year (McLellan, 2013). However, the precise number of wrongful conviction cases is unknown for various reasons including, as a minimum, the lack of an egregious crime to draw public interest, lack of media attention, and the number of cases in which a plea bargain has been made to avoid longer prison sentences. Therefore, there would be plenty of productive work for this independent body to accomplish.

Government Expert 01 cautioned that, although an independent commission may be helpful, it has its shortcomings. The expert further commented that appointing an independent commission is akin to adding another layer of bureaucracy to the process. On the one hand, there may be a need for a more structured system where an individual or a panel is in charge of carrying the negotiations forward with the federal and provincial governments. However, the expert further added:

One can't underestimate the benefit of having deputy ministers from both the federal and provincial levels talking to one another and applying "small p" political pressure to make a deal happen, which an independent commission can't do.

This expert concluded by stating that an independent commission does not have the leverage of a minister or deputy minister to resolve compensation claims for the wrongfully convicted. Therefore, further work is required to study and resolve these concerns.

Government Expert 10 advised that the wrongfully convicted should not be subjected to yet another appeal-like process.

### **7.2.2. Factual Innocence**

Based on the difficulties associated with the wrongfully convicted having to prove factual innocence when applying for compensation, this restrictive standard should be abolished. Cases impacted by this limitation are found when DNA evidence does not exist, alibi(s) are lacking, and/or the actual criminal has not been apprehended. If not substantiated, the high threshold of factual innocence becomes a barrier to the wrongfully convicted in obtaining their justly deserved compensation. Achieving this standard of innocence proved to be problematic in the now-resolved case of Steven Truscott and in the pending case of Romeo Phillion. Hence, a new standard of innocence is required. Legal Expert 21 suggests the following new standard of innocence:

The federal government would have a list of criteria that would exclude the establishment of factual innocence. A broader term would be applied, like a miscarriage of justice meaning that the justice system



significantly messed up, nothing can now be done about it, and there is an appreciable chance that the person was innocent.

Regardless of the final determination, the next version of *FPT Guidelines* needs to establish a fairer standard of innocence.

### **7.2.3. Cap on Non-Pecuniary Losses**

The cap of \$100,000 for non-pecuniary damages is unacceptable. This cap was ill-conceived from the start and must be raised to a substantive level. The fact that all of the highly publicized wrongful conviction cases in the 1980's and 1990's ignored this cap is a testament to its inadequacy. The cap on non-pecuniary losses would be elevated to a more relevant amount based on today's standard of living and not on that of 26 years ago. In addition, an automatic inflation index would be applied to all awards to ensure that they are in keeping with the current cost of living increases.

Furthermore, it is also recommended that the disbursement strategy be altered. The claimant would receive either a lump sum payment or an annuity. Through the assistance of an actuary, provided by the independent review board, a financial plan would be proposed for the wrongfully convicted individual. This will serve to assure the long-term financial well-being of the claimant.

Consideration should also be given to compensation for family members and victims who have been affected by the wrongful conviction.

### **7.2.4. Two-Step Compensation Process**

A two-step process is recommended for the administration of a wrongful conviction application for compensation (Government Expert 02). This recommendation is a further enhancement of the independent commission / case review panel process, previously described. The objective of this two-step approach is to separate pecuniary awards from non-pecuniary awards, in order to accelerate the compensation process. In the first step, an independent body would review the wrongful conviction case to determine whether or not it conforms to the new proposed standard of innocence (yet to

be determined) ensuing from the wrongful conviction. Since the new standard is proposed to be a fairer assessment of the claimant's innocence, as compared to the current standard of factual innocence, this determination should be more readily achievable. Once the standard has been met, a pecuniary award, based on the length of incarceration, would be established and disbursed immediately. In this manner, the wrongfully convicted would receive a significant portion of his/her award which would enable him/her to move forward in his/her new life.

In step two, a second independent body or commission would review the case and identify all applicable non-pecuniary damages. Based on the findings, the amount of the non-pecuniary award would be defined and the exoneree would then be granted the second compensation instalment.

This two-step process will permit the exoneree to expeditiously obtain a first award for pecuniary losses, shortly followed by a second award for non-pecuniary damages.

### **7.2.5. Compensation Timeline**

Generally, the time taken to process an exoneree's application for compensation is very long. Once released from prison, wrongfully convicted individuals are anxious to move on with their lives. To this end, the compensation process must be re-designed to expediently establish and provide financial awards, thus enabling the wrongfully convicted to resume life as quickly as possible. Therefore, according to the above proposed two-step compensation process, the first award for pecuniary losses would be granted immediately upon release from imprisonment and, within a six-month period afterwards, the second award would be provided for non-pecuniary damages.

Government Expert 01 articulated the importance of a timely and expedient compensation process:

Wrongfully convicted persons have the right to get on with their lives and delays should be minimized. You know you could include a timeline so that within 6 months, x has to happen, y will happen within 12 months and maybe the compensation has to be agreed and signed

off. Whatever the timelines, there may be some benefit to that because I do think that sometimes these things tend to drag on.

The expert believed that a new expeditious compensation process should be developed, equipped with an appropriate timeline to bring closure to the process.

### **7.3. Future Directions**

To delve deeper into this topic, more research is required. One area for future study would be to investigate wrongful conviction cases where compensation applications have been processed. Numerous obstacles were encountered in the attempt to procure this case data. One possible approach would be to develop a research agreement in which the Provincial Ministries of the Attorney General and/or Justice would make these files available. This method was investigated with the Ontario Ministry of the Attorney General, but without success. However, other provincial ministries might be more agreeable. As indicated in Chapter 3, the pursuit of compensation records from the Ontario Ministry of the Attorney General has reached the adjudication stage. Therefore, it is hoped that the requested Ontario compensation files can be retrieved after the researcher's case has been heard by the Ontario Privacy Commissioner's office. To the researcher's knowledge, the Freedom of Information offices have yet to make a ruling to render this information accessible to the public. According to the Ontario adjudicator, the Ministry of the Attorney General has many legal roadblocks that can be employed to delay the access to information.

Another research objective would be to involve a number of wrongfully convicted persons who have experienced the compensation process. They would likely have unique perspectives and ideas that would aid in the development of a more reasonable compensation system. The researcher was advised by a representative from AIDWYC that this might be possible. However, exonerated individuals, who have been wrongly imprisoned, may prefer a quiet life, out of the public eye and therefore, may be unwilling to share their experiences in dealing with the compensation process.

Further research is required into the compensation systems of the United States, England and Wales, since they offer a wealth of experience in alternative compensation strategies.

Since the draft 2012 *Guidelines* exist in the Federal Department of Justice, a Freedom of Information application could be made to acquire this information. This draft document would enable the researcher to appreciate the efforts made by the FPT committee in creating new and improved *Guidelines* for the compensation of the wrongfully convicted.

An important consideration regarding the award or denial of compensation lies in the standard of innocence used. More research into the available standards of innocence needs to be conducted. It is hoped that a less restrictive and fairer standard can be adopted that better serves the needs of both the claimant and the government.

This thesis has focussed on targeted murder cases in which the accused was exonerated. Excluded are the cases of accused individuals who pled guilty to a lesser charge because their legal aid lawyer advised them of the risks involved in being convicted of the charge of murder. According to Legal Expert 08, the number of cases in the United States, which resulted in plea bargains instead of court trials, range from 80% to 90% of the cases in the judicial system. From these statistics, further research is required to determine the number of those cases that were subsequently overturned, as a result of newly discovered evidence that exonerated the accused individual. This information would likely cast greater light on the prevalence of wrongful convictions in the judicial system. These cases must be further researched.

Through the recommendations provided and the further research proposed, much work is required to improve the current compensation scheme for the wrongfully convicted. This societal problem is not an isolated issue confined to a relatively few number of wrongful conviction cases. This issue deserves the attention of federal, provincial, and territorial governments to develop an effective solution. In the words of Government Expert 17, "You judge a civilization by the way that it treats the most marginalized".

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## Appendix A.

### Interview Questions on Compensation for the Wrongfully Convicted

1. What is your experience with the 1988 Federal-Provincial Guidelines regarding compensation for the wrongfully convicted?
  - a) Are the *Guidelines* meant to be used “as stated” or as general guidelines to follow?
  - b) Is the requirement for an individual to prove him or herself to be factually innocent an appropriate criterion for compensation?
  - c) Is the maximum cap of \$100,000 for non-pecuniary damages an appropriate compensation award to be paid to a wrongfully convicted individual?
  - d) Should a wrongfully convicted individual, whose actions contributed to his/her own conviction, be eligible for compensation?
  - e) If the *Guidelines* are not being used to make decisions regarding the award or denial of application claims, what rationale and/or criteria do you think is being used?
  - f) Why do you think that the *Guidelines* have not been made part of provincial legislation?
  - g) Are you aware of any plans for updating the *Guidelines* in the future and if so, when?
2. What factors or criteria appear to be most important to provincial Ministries of Justice and/or Attorney General in determining whether a wrongfully convicted person will be either awarded or denied compensation?
3. What is your view on the timeframe in which it takes for a wrongfully convicted individual to receive compensation?
4. Is there anything you would want to change in the way that justice system processes compensation claims for the wrongfully convicted?
5. What is your experience with the application of Section (24)(1) of the *Charter of Rights* in allowing a wrongfully convicted person to seek a remedy as the court considers appropriate?
6. Why do Canadian provinces not adopt a legislated compensation scheme, similar to a number of American states?

## Appendix B.

### **1988 Federal-Provincial Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons (Evans, 1990)**

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

#### **A. Rationale**

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

#### **B. Guidelines for eligibility to apply for compensation**

The following are prerequisites for eligibility for compensation:

1. The wrongful conviction must have resulted in imprisonment, all or part of which has been served.
2. Compensation should only be available to the actual person who has been wrongfully convicted and imprisoned.
3. Compensation should only be available to an individual who has been wrongfully convicted and imprisoned as a result of a *Criminal Code* or other federal penal offence.
4. As a condition precedent to compensation, there must be a free pardon granted under Section 683(2) [now 749(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 under Section 617(b) [now 690(b)].
5. Eligibility for compensation would only arise when Sections 617 and 683 [now 690 and 749] were exercised in circumstances where all available appeal remedies have been exhausted and where a new or

newly discovered fact has emerged, tending to show that there has been a miscarriage of justice.

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

- (a) If a pardon is granted under Section 683 [now 749], a statement on the face of the pardon based on an investigation, that the individual did not commit the offence; or
- (b) If a reference is made by the Minister of Justice under Section 617(b) [now 690(b)], a statement by the Appellate Court, in response to a question asked by the Minister of Justice pursuant to Section 617(c) [now 690(c)], to the effect that the person did not commit the offence.

It should be noted that Sections 617 and 683 [now 690 and 749] may not be available in all cases in which an individual has been convicted of an offence which he did not commit, for example, when 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.

### **C. Procedure**

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

### **D. Consideration for determining quantum**

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

#### **1. Non-pecuniary Losses**

- (a) Loss of liberty and the physical and mental harshness and indignities of incarceration;
- (b) Loss of reputation which would take into account a consideration of any previous criminal record;



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

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

## 2. Pecuniary Losses

- (a) Loss of livelihood, including loss of earnings, with adjustments for income tax and for benefits received while incarcerated;
- (b) Loss of future earning abilities;
- (c) Loss of property or other consequential financial losses resulting from incarceration.

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

- (a) Blameworthy conduct or other acts on the part of the applicant which contributed to the wrongful conviction;
- (b) Due diligence on the part of the claimant in pursuing his/her remedies.

## 3. Costs to the Applicant

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

## Appendix C.

### Compensation for Wrongful Convictions (Katz, 2011)

Name	Jurisdiction	Conviction	Exoneration	Incarceration	Compensation	Year Awarded
Ronald Dalton	NL	1989	2000	8 years	\$750,000	2007
James Driskell	MB	1991	2005	12 years	\$4 million	2008
Randy Druken	NL	1995	2000	6 years	\$2.1 million	2006
Norman Fox	BC	1976	1984	8 years	\$275,000	1985
Clayton Johnson	NS	1994	2002	5 years	\$2.5 million	2004
Herman Kaglik	Federal	1992	1998	4 years	\$1.1 million	2001
Steven Kaminski	AB	1992	2002	7 years	\$2.2 million	2006
Donald Marshall	NS	1971	1982	11 years	\$1.5 million	1990
Simon Marshall	QC	1997	2004	6 years	\$2.3 million	2006
Michael McTaggart	ON	1987	1990	20 months	\$380,000	2001
David Milgaard	SK	1970	1997	23 years	\$10 million	1999
Guy Paul Morin	ON	1992	1995	18 months	\$1.25 million	1997
Richard Norris	ON	1980	1991	8 months	\$507,000	1993
Greg Parsons	NL	1994	1998	6 weeks	\$1.3 million	2002, 2005
Benoit Proulx	QC	1991	1992	1 year	\$1.1 million	2001
Thomas Sophonow	MB	1983,1985	2000	45 months	\$2.6 million	2002
Gary Staples	ON	1971	2002	2 years	Undisclosed	2002
Steven Truscott	ON	1959	2007	10 years	\$6.5 million	2008
Wilfred Truscott	AB	1984	1986	18 months	\$36,000	1986
Réjean Hinse	QC	1964	1997	5 years	\$13.1 million	2011
William Mullins-Johnson	ON	1994	2007	12 years	\$4.25 million	2010