

IN THE MATTER OF STEVEN TRUSCOTT

ADVISORY OPINION ON THE ISSUE OF COMPENSATION

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IN THE MATTER OF STEVEN TRUSCOTT ADVISORY OPINION ON

THE ISSUE OF COMPENSATION

INTRODUCTION

In this report, I respectfully submit my advice and recommendations on the question of compensation for Steven Truscott.

Among the growing ranks of the wrongfully convicted, Mr. Truscott stands apart. He was convicted at the age of 14, sentenced to death by hanging, the subject of an unprecedented Reference to the Supreme Court of Canada in 1966, on parole for almost 40 years living under an assumed name, and the subject of enduring public interest and widespread concern that he was the victim of a miscarriage of justice.

As a result, while I have carefully considered other decisions relating to compensation for wrongfully convicted persons, and the writings of scholarly commentators, I have been mindful throughout of the fact that Mr. Truscott's case is unique. It raises highly unusual considerations, all of which I have sought to take into account in fulfilling my mandate.

For the reasons that follow, I have come to the conclusion that compensation should be paid to Mr. Truscott.

I. MY MANDATE

Immediately following the release of the Ontario Court of Appeal's decision on the Reference directed by the federal Minister of Justice, I was retained by the Attorney General to provide independent advice and recommendations on the issue of whether compensation ought to be paid to

Mr. Truscott and his immediate family "based upon and accepting the findings" of the Court of Appeal and, if so, in what amount and by which level of government.

I have received extensive submissions on all aspects of this matter from Hersh Wolch, Q.C. and Marlys Edwardh, counsel for Mr. Truscott. Their assistance is very much appreciated. I have also received written personal statements from Mr. Truscott and his wife, Marlene, which detail the impact that the wrongful conviction has had on their lives.

In addition, Mr. Truscott's mother, Doris Brennan, sent a letter offering some insight into the turmoil and upheaval that her family suffered as a result of her son's conviction and imprisonment. Sadly, Mrs. Brennan died before my mandate was completed. I pause to express my condolences to Mr. Truscott and his family, and to voice my regret that Mrs. Brennan did not live to see the issue of compensation finally resolved.

I have also heard from Lynne Harper's family. Lynne's brother, Barry, and her father, Les, made helpful submissions to me in writing through their counsel, Ian Smith. I recognize the emotional upset that this process must cause them, and thank them for their participation.

The process that I have followed has, by design, been non-adversarial. My goal throughout has been to avoid causing any additional trauma to the interested parties — be they the family of Steven Truscott or of Lynne Harper — while still obtaining all of the information needed in order to advise the Attorney General as to what a fair and equitable result would be. I have been assisted in this process by Julie Rosenthal, a very able young counsel with Goodmans LXP, whose contribution has been substantial.

In coming to my conclusions, I have taken into account not only the interests of the Truscott family, and the Harper family, but also the broader interests of the public as a whole and, in particular, the public interest in the administration of justice.

My task begins, as it must, with the death of Lynne Harper.

II. FACTUAL BACKGROUND

In June 1959, Lynne Harper was murdered.

She was 12 years old when she died. She lived with her parents and her two brothers at the Royal Canadian Air Force station in Clinton, Ontario.

Steven Truscott was 14 at the time. He lived with his parents, two brothers and a sister at the same RCAF station as did Lynne.

Early on the evening of June 9, 1959, Steven gave Lynne a ride on the crossbar of his bicycle. They rode from the local school that both attended, heading north along the County Road.

What happened next remains unknown.

At about 11:20 that evening, Lynne's father reported her missing. Two days later, on June 11, 1959, her body was found in a wooded area known as Lawson's Bush that is located adjacent to the County Road. She had been strangled and sexually assaulted.

The next evening, on June 12, 1959, Steven was taken into custody and later that night, at about 2:30 a.m., he was charged with first degree murder. On June 20, 1959, he was ordered to stand trial as an adult.

The preliminary inquiry was held the following month and, on July 14, 1959, Steven was committed to stand trial for capital murder.

He remained in custody in the Goderich jail pending his trial.

The trial was held during the last two weeks of September 1959. On September 30, 1959, the jury returned a verdict of guilty, with a recommendation for mercy. The presiding judge sentenced Steven to be hanged, as was required under the law as it then stood.

Steven's subsequent appeal to the Ontario Court of Appeal was dismissed on January 21, 1960. Immediately thereafter, the Government of Canada commuted Steven's sentence to life imprisonment.

Up until that time, Steven had been held in custody at the Huron County Jail in Goderich. Following the commutation of his death sentence, he was transferred to the Kingston Penitentiary for assessment, but remained there only briefly. Beginning in February 1960, Steven was held at the Ontario Training School for Boys, in Guelph.

In the interim, Steven applied for leave to appeal to the Supreme Court of Canada. However, his leave application was dismissed on February 24, 1960.

For the next three years, Steven remained at the Ontario Training School for Boys. Then, in January 1963, when he turned 18, he was transferred to the Collins Bay Penitentiary in Kingston.

Approximately three years later, the case returned to the public's attention with the publication of a book entitled *The Trial of Steven Truscott*, by Isabel LeBourdais, which raised a number of questions about the reliability of the conviction. In April 1966, in response to the debate sparked

by Ms. LeBourdais' book,¹ the federal cabinet took the extraordinary step of directing a Reference of the case to the Supreme Court of Canada, pursuant to section 55 of the *Supreme Court Act*, R.S.C. 1952, c. 259. The Order in Council explained the reason for the Reference as follows:

[There exists widespread concern as to whether there was a miscarriage of justice in the conviction of Steven Murray Truscott and it is in the public interest that the matter be inquired into.²

The scope of the Reference was broad. The Supreme Court was to consider the matter as if it were an appeal brought pursuant to what was then section 597A of the *Criminal Code*, which permitted the Court to review not only findings of law, but also findings of fact and mixed fact and law.

At the hearing of the Reference, the Court considered both the trial record and a significant volume of fresh evidence. Included in this fresh evidence was the testimony of Steven Truscott, who provided *viva voce* evidence for the first time before the full panel of the Supreme Court.

Based on all of the evidence, eight of the nine judges concluded that the jury's verdict should stand. First, the majority held that, based on the original evidentiary record, the jury's verdict was not unreasonable:

On a review of all of the evidence given at the trial we are of the opinion that, on the record as it then stood, the verdict could not be set aside on the ground that it was unreasonable or could not be supported by the evidence.

¹ Ms. LeBourdais' book was not the only publication that dealt with Mr. Truscott's trial and conviction. There were many others, among them *Until You Are Dead: Steven Truscott's Long Ride Into History*, by Julian Sher; *The Steven Truscott Story*, by Bill Trent; *Mind Over Murder: DNA. and Other Forensic Adventures*, by Jack Batten; "Requiem for a Fourteen-Year-Old", by Pierre Berton, along with countless newspaper articles and television stories.

² Order in Council dated April 26, 1966, P.C. 1966-760

³ *Re Truscott*, [1967] S.C.R. 309 at 312 (hereinafter "Supreme Court Reference")

Supreme Court Reference, *supra* note 3 at 366

Then, the majority went on to state that nothing in the new evidence gave it reason to doubt the correctness of the original conviction:

We have already stated our conclusion that the verdict of the jury reached on the record at the trial ought not to be disturbed. The effect of the fresh evidence which we heard on the Reference, considered in its entirety, is to strengthen that view.⁵

Accordingly, the majority ruled that, had an appeal of the conviction been heard by the Supreme Court, it would have been dismissed.

The lone dissenting judge, Mr. Justice Hall, would have quashed the conviction and ordered a new trial. His decision was based on a number of factors, including his conclusion that the trial judge had wrongly permitted the Crown to lead highly prejudicial similar fact evidence,⁶ that other prejudicial, non-probative evidence had been improperly admitted,⁷ and that the trial judge's charge to the jury contained a number of misdirections.⁸

Following the release of the Supreme Court's decision in May 1967, Steven was held for a further two-and-a-half years at Collins Bay, until he was released on parole on October 21, 1969. By the time of his release, Steven had served over ten years in custody. He had an unblemished institutional record.

Later in this report, I will review in greater detail the time that Steven spent in prison and his life after his release. For present purposes, it is sufficient to note that, by all accounts, in the almost

⁵ Supreme Court Reference, *supra* note 3 at 367

⁶ Supreme Court Reference, *supra* note 3 at 387

⁷ Supreme Court Reference, *supra* note 3 at 392-393 and 398

⁸ Supreme Court Reference, *supra* note 3 at 392-393, 400, 409 and 411

40 years since his release, Steven Truscott has lived the life of an exemplary citizen.

III. REFERENCE TO THE COURT OF APPEAL

In November 2001, Mr. Truscott applied to the federal Minister of Justice pursuant to what is now section 696.1 of the *Criminal Code*, seeking to have the minister review the case on the grounds that the conviction was a miscarriage of justice.

In response, in January 2002, the federal government appointed the Honourable Fred Kaufman to review the case. Justice Kaufman engaged in an exhaustive consideration of all available evidence, comprising not only the historical record, but also a substantial volume of fresh documentary evidence and the fresh *viva voce* testimony of over 20 witnesses.

In 2004, Justice Kaufman delivered his report, which ran to 700 pages, not including appendices. He concluded that there was "clearly a reasonable basis for concluding that a miscarriage of justice . . . likely occurred". He accordingly recommended that the Minister of Justice refer the matter to the Court of Appeal for Ontario.⁹

In accordance with Justice Kaufman's recommendation, on October 28, 2004, the federal Minister of Justice directed a Reference to the Ontario Court of Appeal pursuant to section 693.3(a)(ii) of the *Criminal Code* to consider whether new evidence would have changed the 1959 verdict. The Court was to hear and determine the matter as if it were an appeal by Mr. Truscott from his conviction.

⁹ Report to Minister of Justice in the Matter of an Application by Steven Murray Truscott Pursuant to Section 690 of the *Criminal Code*, prepared by the Honourable Fred Kaufman, April 2004 at 699

The Reference to the Court of Appeal was heard over ten days in January and February 2007. On August 28, 2007, the Court rendered its decision. Its reasons fill almost 800 paragraphs.

The Court concluded that Mr. Truscott's conviction was a miscarriage of justice and must be quashed. However, the Court of Appeal did not go so far as to hold that Mr. Truscott was innocent of the crime. Nor did it hold that, if a new trial were held, an acquittal would be the inevitable result. Rather, the Court determined as follows:

We are further satisfied upon a review of the entirety of the evidentiary record and the additional material available to this court and not previously judicially considered, that if a new trial were possible, an acquittal would clearly be the likely result. The interests of justice dictate that we make that order. Mr. Truscott should stand acquitted of the murder of Lynne Harper."

Following the delivery of the Court of Appeal's decision, Attorney General Michael Bryant issued a press release which included an apology on behalf of the government:

The court has found in this case, in light of fresh evidence, that a miscarriage of justice has occurred. And for that miscarriage of justice, on behalf of the government, I am truly sorry.

At this same time, the Attorney General announced that I had been appointed to advise the government on the issue of compensation for Mr. Truscott.

In the section which follows, I review in greater detail the specific findings made by the Court of Appeal that led to their ultimate decision. This review, while somewhat lengthy, is relevant to the question of Mr. Truscott's entitlement to compensation.

¹⁰*R. v. Truscott*, [2007] ONCA 575 at para. 3 (hereinafter "Decision of the Court of Appeal")

DECISION OF THE COURT OF APPEAL

At the 1959 trial, the Crown's case rested on four main evidentiary "pillars" as follows:

- (1) forensic evidence used by the Crown to establish that Lynne Harper died before 7:45 p.m. on the night she disappeared;
- (2) eyewitness evidence as to where and when Steven Truscott was seen on the evening that Lynne Harper disappeared, which was used by the Crown to establish that Steven must have taken Lynne into the wooded area where her body was later found;
- (3) evidence of Steven Truscott's post-offence conduct, which the Crown argued was indicative of guilt; and
- (4) evidence that lesions observed on Steven Truscott's penis at the time of his arrest were either caused or aggravated by forced intercourse.

The Court of Appeal concluded that all four of these pillars would be significantly weakened, if not entirely destroyed, by fresh evidence if a new trial were held. The Court's analysis of each of these pillars and the related fresh evidence, stated as succinctly as possible, is as follows.

(i) *The First Pillar Evidence Related to the Time of Lynne Harper's Death*

At trial, the Crown's memory was that Lynne Harper had died before 8 p.m. on the night she disappeared. This theory was crucial to the Crown's case because, at about 8 p.m. that night, Steven Truscott returned to the school grounds, where he was seen by a number of people. There was never any suggestion that Mr. Truscott could have committed the murder at any time after 8 p.m.

Therefore, based on the Crown's theory, if Lynne had died after 8 p.m., Steven could not have been the killer. The Court of Appeal explained as follows:

If Lynne was killed some time after the appellant returned to the school grounds at about 8 p.m., the Crown's theory collapsed.

The Court emphasized how important the time-of-death evidence was to the Crown's case:

The importance of the evidence of Lynne Harper's time of death to the Crown's case can hardly be overstated.¹²

At trial, the Crown had relied heavily on the evidence of Dr. Penistan, a pathologist who performed the autopsy on Lynne Harper's body. Dr. Penistan testified that, based on the contents of Lynne's stomach, the extent of decomposition, and the degree of *rigor mortis*, he believed that she died before 7:45 p.m. on the evening she disappeared.¹³

The Court of Appeal considered Dr. Penistan's trial testimony in light of new evidence from pathologists and a gastroenterologist — one of whom was a Crown witness — all of whom testified that Dr. Penistan's opinion was unjustified. The Court also considered additional contemporaneous documents, most notably various versions of Dr. Penistan's autopsy report, which varied widely in their respective estimates as to the time of death, that may not have been available to defence counsel at the time of the original trial.¹ Based on the new evidence, the Court determined that Dr. Penistan's opinion was entirely unreliable. The Court stated:

¹ Decision of the Court of Appeal, *supra* note 10 at para. 127

¹² Decision of the Court of Appeal, *supra* note 10 at para. 306

¹³ Decision of the Court of Appeal, *supra* note 10 at para. 128

¹⁴ Decision of the Court of Appeal, *supra* note 10 at para. 242

[T]here is no scientific justification for Dr. Penistan's opinion that Lynne Harper must have died between 7 and 7:45 p.m. on June 9.¹⁵

The Court concluded that, if a new trial were held, Dr. Penistan's opinion would likely be rejected by the trier of fact:

[T]he defence could have established that Dr. Penistan's opinion had ranged from an initial assessment placing the time of death at 12:45 a.m. on June 10, to a second estimate placing the time of death at least some four hours later on June 10, and finally, to a third opinion placing the time of death at between 7:15 and 7:45 p.m. on June 9, several hours earlier than either of his prior estimates. Absent some plausible explanation for these variations, it seems unlikely that Dr. Penistan's opinion could be accepted as reliable by a reasonable trier of fact. Indeed, the nature of the changes in his opinion leaves Dr. Penistan's evidence reasonably open to the allegation that his opinion shifted to coincide with the Crown's case against the appellant."

On this basis alone, the Court determined that Mr. Truscott's conviction could not stand.

Having decided that the conviction must be quashed, the Court then went on to consider the three remaining pillars of the Crown's case as well as certain additional evidence in order to determine what the probable result would be if a new trial could be held.

(ii) *The Second Pillar: Eyewitness Evidence as to Where and When Steven Truscott Was Seen on the Evening of June 9*

As mentioned above, the Crown's theory at trial was that Steven Truscott took Lynne Harper along the County Road and then into the wooded area, known as Lawson's Bush, where her body was ultimately found. The defence's theory, by contrast, was that Steven took Lynne on the County Road, past Lawson's Bush, to the junction with a local highway. The defence's theory was further that

⁵ Decision of the Court of Appeal, *supra* note 10 at para. 215

⁶ Decision of the Court of Appeal, *supra* note 10 at para. 232-233

Steven left Lynne at the highway junction, saw her get into a car that had pulled over at the side of the highway, and returned alone down the County Road.

In this regard, a large body of eyewitness testimony was led at trial, much of it conflicting, as to who saw Steven and Lynne — and where and when — on the evening that Lynne disappeared. The Court of Appeal considered all of the evidence relating both to the Crown's theory and to the defence theory. This included testimony from the trial, police notes and witness statements from the original police investigation, as well as additional evidence (such as visibility tests) that corroborated or contradicted certain aspects of the eyewitness testimony.

Based on all of the evidence, the Court concluded that it was unlikely that a jury would accept the Crown's version of the eyewitness evidence — namely, that Steven Truscott rode his bicycle with Lynne Harper north on the County Road and turned onto the tractor trail, leading to Lawson's Bush. Rather, the Court concluded that the jury was more likely to accept the defence's version of these accounts — namely, that Steven rode his bicycle with Lynne Harper north on the County Road, past Lawson's Bush, up to the junction with Highway 8, where he left her, and then returned alone south on the County Road. While the Court did not conclude that a jury would necessarily accept the defence's theory of that evidence, it did say that the defence theory "fit comfortably" with the totality of the material before the Court:

We are satisfied having regard to the material placed before us, that it is unlikely that a jury would be convinced of the Crown's version of the County Road evidence. The totality of the record suggests significant flaws in each factual cornerstone of that theory. While we do not go so far as to say that any jury would reasonably be convinced of the truth of the appellant's theory of the County Road evidence, we do say that the archival material adds significant force to that theory. The defence theory fits comfortably with the totality of the material as we now have it. It is reasonably arguable that the

defence theory is at least as tenable as, if not more tenable than, the Crown's theory of the County Road evidence.¹

(iii) *The Third Pillar Post-Offence Conduct*

At trial, the Crown argued that Steven Truscott's conduct after Lynne's disappearance was indicative of his guilt. This third pillar of the Crown's case consisted of three allegations:

- (1) that Steven asked his friend, Arnold George, to lie to the police about where and when he had seen Steven on the evening that Lynne disappeared;
- (2) that Steven must have lied to the police about seeing Lynne get into a car at the junction of the County Road and Highway 8, because it was physically impossible for him to have seen her getting into a car from the spot where he claimed to have been standing; and
- (3) that Steven had made certain inculpatory statements to his friends following Lynne's disappearance.

The Court of Appeal found that all of these allegations were now open to question.

First, the Court was of the view that the veracity of parts of the evidence of Arnold George was "open to serious question"¹ and that prior inconsistent statements made by him had "powerful impeachment potential" and could be used by the defence at a hypothetical new trial to undermine his

¹⁷ Decision of the Court of Appeal, *supra* note 10 at para. 504

¹⁸ Decision of the Court of Appeal, *supra* note 10 at para. 588

trial testimony that Steven had asked him to lie to the police.¹⁹

Second, the Court found that, based on new visibility tests and related evidence, it would no longer be open to the Crown to argue (as it did at trial) that it was physically impossible for Steven to have seen Lynne getting into a car, based on where he said he was standing at the time.

Third, the Court found that evidence of one of the allegedly inculpatory statements made by Steven would be "open to serious question" at a hypothetical new trial.

With respect to the order allegedly inculpatory statements, the Court found that they continued to provide "some limited value as admissions for the Crown" in that they "support the contention that [Steven] was not being candid in describing his whereabouts in his various statements to the police in the days following Lynne's disappearance".

(iv) *The Fourth Pillar The Penis Lesions Evidence*

The fourth pillar of the Crown's case at trial related to lesions observed on Steven Truscott's penis at the time of his arrest. Medical evidence was led that the lesions were consistent with his having raped Lynne Harper. At the 1966 Reference to the Supreme Court, that evidence was discredited by the defence, and the Crown varied its theory so as to allege that the lesions may have been aggravated (as opposed to caused) by a sexual assault.

¹⁹ Decision of the Court of Appeal, *supra* note 10 at para. 562

²⁰ Decision of the Court of Appeal, *supra* note 10 at para. 587

²¹ Decision of the Court of Appeal, *supra* note 10 at para. 588

²² Decision of the Court of Appeal, *supra* note 10 at para. 590

With respect to this pillar of the Crown's case, after considering fresh expert evidence, the Court of Appeal concluded that the pillar had been effectively destroyed. The Court stated:

At a hypothetical new trial, the penis lesions evidence would have so little probative value that it could potentially be excluded by the trial judge on the basis that its prejudicial potential outweighs its probative value.

And similarly:

As it currently stands, the penis lesions evidence is close to no evidence at all. . . . [T]he penis lesions evidence as presently constituted would do little, if anything, to advance the Crown's case at a hypothetical new trial.²⁴

(v) *Other Evidence Considered by the Court of Appeal*

After reviewing the four pillars of the Crown's case, the Court went on to consider evidence of Lynne Harper's mood on the evening that she disappeared and her general willingness to hitchhike, which was relied upon by the defence in support of its theory that Lynne had got into a car at the junction of Highway 8 and the County Road.²⁵ Among other things, the Court considered a witness statement taken by the police shortly after Lynne disappeared. According to this statement, on the evening of her disappearance, Lynne had said that she did not want to go home because her mother was angry with her. The Court of Appeal held that, at a hypothetical new trial, the defence could have relied on the witness statement (or on first-hand testimony from the person who made the statement) to support the defence's assertion that Lynne wanted to delay her return home the night of her

Decision of the Court of Appeal, *supra* note 10 at para. 592 Decision of the Court of Appeal, *supra* note. 10 at paras. 615 and 617 Decision of the Court of Appeal, *supra* note 10 at para. 668ff

disappearance. This, in turn, could offer support for the defence's theory that Lynne had hitchhiked that evening after Steven left her at the junction of the County Road and Highway 8.

The Court also considered evidence of the crime scene which it said "seems out of place with the actions of a fourteen-year-old schoolboy". The Court stated:

While far from conclusive, that gruesome picture — no struggle, the use of her blouse as a garrotte and sex while she was dead or dying — seems out of place with the actions of a fourteen-year-old schoolboy whose sexual advances were rebuffed by a twelve-year-old classmate; rather, this picture would appear to be the work of a sexual deviant for whom sex with a dead or dying child was somehow capable of providing stimulation.

The Court also noted another "puzzling" feature of the crime scene - which was evidence of injuries to Lynne's left leg and foot indicating that she was barefoot when she entered the bush. The Court said:

The various injuries to Lynne's left leg and foot and the mud on the top of her right foot suggest that Lynne did not enter the woods voluntarily, as the Crown would have it, but rather, as the appellant contends, that she was dragged in a downward facing posture, first over barbed wire fence and then for some distance into the woods before being taken to the place where she was strangled and sexually assaulted.

In oral argument on this Reference, the Crown was questioned about the injuries to Lynne's left leg and foot and asked whether there were some theory, other than the one put forward by the appellant, that might account for these injuries and the manner in which they were sustained. No cogent answer was forthcoming.²⁹

²⁶ Decision of the Court of Appeal, *supra* note 10 at para. 673-674

²⁷ Decision of the Court of Appeal, *supra* note 10 at para. 736

²⁸ Decision of the Court of Appeal, *supra* note 10 at para. 736

²⁹ Decision of the Court of Appeal, *supra* note 10 at paras. 743-744

The Court Of Appeal's Conclusion

Based on its analysis of the evidence against Mr. Truscott, the Court of Appeal concluded that his conviction must be quashed. In considering the appropriate remedy, the Court considered a number of factors, including the following:

- the fresh evidence satisfied the Court that Mr. Truscott's conviction was a miscarriage of justice;
- that fact that Mr. Truscott had maintained his innocence since the night of Lynne Harper's disappearance and had "lived under the burden of that miscarriage of justice for almost 50 years";
- the fresh evidence significantly weakened the Crown's case against Mr. Truscott;
- the Court of Appeal was the first judicial body to have before it a substantial amount of material that could have assisted Mr. Truscott's counsel in making full answer and defence at his trial and on the Reference to the Supreme Court;
- the fact that there would "never be another forum in a better position to make an assessment of Mr. Truscott's culpability based on a complete record";
- the Court's assessment of the evidence led it to conclude that it was clearly more probably than not that Mr. Truscott would be acquitted, if it were possible to hold a new trial; and

- the fact that it would be unfair to order a new trial, because a new trial would never be held, thereby "leaving in place the stigma that would accompany being the subject of an unresolved allegation of a crime as serious as this one".

Accordingly, in the highly unusual circumstances of this case, the Court entered an acquittal.

It is against this factual backdrop that I turn to consider the question of compensation.

V. ENTITLEMENT TO COMPENSATION - THE LEGAL FRAMEWORK

(a) A Civil Cause of Action

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

Nevertheless, it has been suggested by Mr. Truscott's counsel that he might have a claim for negligent investigation, a cause of action recently recognized by the Supreme Court of Canada in *Hill v. Hamilton-Wentworth Regional Police Services Board*³¹ I do not propose to engage in an examination of the merits of such a claim nor, indeed, can I. It does bear repeating, however, that the Court of

³¹Decision of the Court of Appeal, *supra* note 10 at paras. 260 and 265³¹

Appeal refused to assign any blame to the investigative authorities for Mr. Truscott's wrongful conviction. The Court also noted that the information relied upon to suggest that the police had improperly focussed their investigation on Mr. Truscott was "in the nature of first and second-hand hearsay" and was "too speculative and inconclusive" to be given any weight.

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

(b) *Ex Gratia* Payment by the State

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

Notwithstanding that there is no legal obligation to make any payment to the wrongfully convicted, as a matter of policy, the desirability of granting compensation to persons who have been

³² Decision of the Court of Appeal, *supra* note 10 at paras. 285-288.

so convicted has been officially recognized. In August 1976, Canada ratified the *International Covenant on Civil and Political Rights*. Article 14(6) of the *Covenant* provides that persons who have been convicted as a result of a miscarriage of justice should generally be compensated by the state. It states as follows:

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

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

1. The wrongful conviction must have resulted in imprisonment, all or part of which has been served.
2. Compensation should only be available to the actual person who was wrongfully convicted and imprisoned.
3. Compensation should only be available to an individual who has been . wrongfully convicted and imprisoned as a result of a *Criminal Code* or other federal penal offence.
4. As a condition precedent to compensation, there must be a free pardon granted under section 748(2) of the *Criminal Code* or a verdict

of acquittal entered by an Appellate Court pursuant to a referral made by the Minister of Justice pursuant to section 696.3.

5. Eligibility for compensation would only arise when sections 696.3 and 748 were exercised in circumstances where all available appeal remedies have been exhausted and where a new or newly discovered fact has emerged, tending to show that there has been a miscarriage of justice.

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

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

It should be noted that sections 696.3 and 748 may not be available in all cases in which an individual has been convicted of an offence which he did not commit, for example, where an individual had been granted an extension of time to appeal and a verdict of acquittal had been entered by an Appellate Court. In such a case, a Provincial Attorney General could make a determination that the individual be eligible for compensation, based on an investigation which has determined that the individual did not commit the offence.³³

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

For example, in the matter of compensation for Donald Marshall Jr., the Honourable Gregory Evans recommended that compensation be paid to Mr. Marshall's parents,³⁴ despite the fact that the

This last provision is commonly referred to as the "basket clause".

Commission of Inquiry Concerning the Adequacy of Compensation Paid to Donald Marshall, jr., June 1990, at p. 17

Guidelines limit entitlement to compensation to the actual person who was wrongfully convicted.³⁵

As a further example, in the Thomas Sophonow Inquiry, the Honourable Peter Cory recommended that Mr. Sophonow receive \$1.75 million for non-pecuniary damages, despite the fact that the *Guidelines* mandate a cap on such damages in the amount of \$100,000.³⁶ In refusing to apply the mandated cap, Justice Cory noted that the *Guidelines* are not an act of the Legislature but simply a guideline. I agree.

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

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

- he was convicted and imprisoned;

³¹ *Federal/ Provincial Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons*, B.2

³⁶ The Honourable Peter Cory, *The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation* (2001) (hereinafter "The Sophonow Inquiry Report"), "Compensation: Non-Pecuniary Compensation".

³⁷ *Ibid*, "Compensation: Recommendation".

³⁸ H. Archibald Kaiser, "Wrongful Conviction and Imprisonment: Towards an End to the Compensatory Obstacle Course", *Windsor Yearbook of Access to Justice*, Vol. 9 (1989) at 120

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

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

(c) Proof of Factual Innocence

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

[M]inisters, being accountable for the expenditure of public money, are rightly circumspect about making gratuitous payments to members of the public; and the need for circumspection is particularly great where the recipient may be a wholly innocent victim of mistake or misidentification, or may be a serious criminal who is very fortunate to have escaped his just desserts. While the public might approve sympathetic treatment of the former, they would be understandably critical if significant sums of public money were paid to the latter.³⁹

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

³⁹ *Re McFarland*, [2004] UKHL 17 at para. 7 (as per Lord Bingham of Cornhill)

⁴¹ For a discussion of this point, see the dissent of Charron J. in *Hill v. Hamilton-Wentworth Regional Police Services*, [2007] S.C.C. 41 at para. 158

Consonant with this rationale, it appears that in all of the cases to date where compensation has been paid the innocence of the wrongfully convicted person has been established by some means — whether by DNA evidence,⁴¹ or by subsequent conviction of the true perpetrator,⁴² or by determination following a police investigation or judicial inquiry that there was no evidence that the wrongfully convicted person committed the crime,⁴³ or where there was no evidence that a crime had even been committed.⁴⁴

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

It is argued that persons who have been wrongfully convicted and imprisoned are *ipso facto* victims of a miscarriage of justice and should be entitled to be compensated. To maintain otherwise introduces the third verdict of "not proved" or "still culpable" under the guise of a compensatory scheme . . .⁴⁵

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

⁴¹ For example, in the cases of Guy Paul Morin, David Milgaard, Randy Druken, Herman Kaglik and Gregory Parsons.

⁴² For example, in the cases of David Milgaard, Donald Marshall and Richard Norris.

⁴³ For example, in the case of Thomas Sophonow.

⁴⁴ For example, in the case of Clayton Johnson.

⁴⁵ H. Archibald Kaiser, "Wrongful Conviction and Imprisonment: Towards an End to the Compensatory Obstacle Course", *Windsor Yearbook of Access to Justice*, Vol. 9 (1989) at 139

presumption of innocence:

[O]ne who is acquitted or discharged is innocent in the eyes of the law and the sights of the rest of us should not be set any lower . . .

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

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

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

- (1) it did not have the jurisdiction to issue such a declaration; and
- (2) there were "important policy reasons for not, in effect, recognizing a third verdict, other than 'guilty' or 'not guilty', of 'factually innocent'."⁴⁸

If proof of innocence is a condition precedent to the payment of compensation, then the question arises whether innocence must be proven beyond a reasonable doubt in each and every case,

« Peter MacKinnon, "Costs and Compensation for the Innocent Accused" (1988), 67 *Can. Bar Rev.* 489 at 498

⁴⁷ *Ibid* at 498-499

« *R. v. Mullins-Johnson*, [2007] ONCA 720 at paras. 24-25

or whether there may be cases where a less onerous standard of proof, namely, proof on a balance of probabilities, is appropriate.

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

In principle, it is difficult to justify requiring an individual to bear the burden of proof beyond a reasonable doubt. Such a high standard of proof in all other contexts is only imposed on the state with its superior resources and coercive powers. Although it is possible to posit cases in which an individual could satisfy such an extraordinary burden, such cases will generally be limited to DNA exonerations.⁴⁹

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

(The balance of probabilities standard could often be a difficult standard for a convicted person to satisfy especially in cases where it remains clear that a crime has been committed; where there is no DNA evidence; and where the perpetrator remains at large. In most wrongful conviction cases, there will be reasonable and probable grounds to charge the person and circumstantial evidence that is suggestive of the person's guilt. Such evidence will make it more difficult for the person to establish innocence on a balance of probabilities.⁵⁰

The question of the appropriate standard of proof, and the broader question of whether a determination of factual innocence should or should not be a mandatory prerequisite to the payment

⁴⁹ Professor Kent Roach, "Report Relating to Paragraph 1(f) of the Order in Council for the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell", at page 42

⁵⁰ *Ibid* at pages 42-43

of compensation are important policy issues. They are a matter for study and debate in the context of the development of a legislative scheme designed to provide a systematic basis upon which compensation for the wrongfully convicted can be determined. Such study and debate and the resolution of any issues arising therefrom are, of course, beyond the scope of my mandate.

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

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

VI. ENTITLEMENT TO COMPENSATION - PROOF OF INNOCENCE IN THE PRESENT CASE

Mr. Truscott faces insurmountable hurdles to establishing his factual innocence.

Before the Court of Appeal, he sought not only an acquittal, but an affirmative declaration of his innocence. His counsel argued that the entirety of the record established that he did not kill Lynne Harper. The Court of Appeal declined to issue the declaration. It was of the view that Mr. Truscott had not, in fact, demonstrated his innocence.⁵²

At the same time, the Court acknowledged that, in the circumstances, such proof of innocence would, as a practical matter, be impossible. Definitive forensic evidence, such as DNA, is not

⁵¹ Decision of the Court of Appeal, *supra* note 10 at para. 251

⁵² Decision of the Court of Appeal, *supra* note 10 at para. 264

available "despite the appellant's best efforts".⁵³ Without such forensic evidence, the Court stated that the passage of time and certain immutable facts casting suspicion on Mr. Truscott - in particular, the fact that he was the last person known to have seen Lynne Harper alive, and the fact that he was with her close to the location where she was murdered - made demonstrating his innocence particularly difficult.⁵⁴

The Court of Appeal's refusal to declare Mr. Truscott innocent does not, of course, end my consideration of this question of factual innocence. It must be remembered that the Court of Appeal found Mr. Truscott's conviction to be a "miscarriage of justice". The term "miscarriage of justice" can be used in one of two ways: first, to refer to the conviction of an innocent person (which, given its refusal to find innocence, the Court of Appeal cannot have intended in the present case); or, second, to refer to a conviction which cannot stand because of the discovery of new evidence which could reasonably be expected to have affected the verdict. When used this second way, "miscarriage of justice" refers to the fact that "it would be unfair to maintain the accused's conviction without an opportunity for the trier of fact to consider the new evidence".⁵⁵

Of course, because of the passage of time and the consequent fading of memories, as well as the death or unavailability of witnesses, and the loss or destruction of evidence, Mr. Truscott will never have the opportunity of having a trier of fact consider the newly discovered evidence in his case. Moreover, while counsel for Mr. Truscott at the Kaufman Reference identified a number of individuals who might have been the actual perpetrators of the offence, it is impossible at this late

⁵³ Decision of the Court of Appeal, *supra* note 10 at para. 264

⁵⁴ Decision of the Court of Appeal, *supra* note 10 at para. 264

⁵⁵ Report to Minister of Justice in the Matter of an Application by Steven Murray Truscott Pursuant to section 690 of the *Criminal Code*, prepared by the Honourable Fred Kaufman, April 2004 at 51

stage~to come to any conclusion about the likelihood of any of those persons having committed the offence, let alone determining that question with certainty.

The factors that made it impossible for the Court of Appeal to order a new trial would equally prevent a full and searching investigation into Mr. Truscott's innocence, in light of the new evidence. Mr. Truscott is, accordingly, through no fault of his own, left in a situation where his miscarriage of justice cannot be fully corrected. He will never have the opportunity to seek factual vindication. He will never be able to establish conclusively that he did not commit the offence.

At the same time, while the Court of Appeal refused to make any finding of innocence, and while it said that there remained a reasonable prospect of conviction if a new trial were held, it repeatedly said that the prospect of a conviction was clearly less likely than the prospect of an acquittal. The court stated:

[W]hile a conviction is still a possibility, an acquittal is clearly the more probable result.⁵⁶

This statement that an acquittal was "clearly the more probable result", or words to that effect, appear throughout the reasons for judgment.⁵⁷ While such statements are obviously not tantamount to a judicial finding that Mr. Truscott did not commit the crime, they are indicative of the Court's view of the weakness of the prosecution's case.

Moreover, the Court of Appeal recognized that, notwithstanding the deficiencies of the appellate forum insofar as fact-finding is concerned, there will never be another forum in a better

⁵⁶ Decision of the Court of Appeal, *supra* note 10 at para. 276

⁵⁷ Decision of the Court of Appeal, *supra* note 10 at paras. 3, 11, 268-269, 270, 751 and 787

position to make an assessment of the appellant's innocence based on a complete record.⁵⁸ For that reason and for reasons of fairness, the Court of Appeal engaged in the highly unusual approach of considering a hypothetical new trial in order to weigh the evidence that remained against Mr. Truscott.

The same reasons that led the Court of Appeal to embark on the hypothetical trial exercise are applicable here, and I adopt a similar approach. That is to say, I have considered the evidence against Mr. Truscott in an effort to determine whether, on a balance of probabilities, Mr. Truscott would be able to prove his innocence if a forum existed for doing so. It should be emphasized that this approach is justifiable only because of the very unusual circumstances of this case.

Adopting that unique approach and considering the evidence, I believe that it can fairly be concluded that, if a hearing could be held to determine Mr. Truscott's innocence, it would be more likely than not that he would be found, on a balance of probabilities, to be innocent in fact.

I rely in particular on the following conclusions reached by the Court of Appeal.⁵⁹

- The pathology evidence admitted as fresh evidence demonstrated that the time of Lynne Harper's death could not be pinpointed as occurring prior to 8 p.m. Therefore, it could no longer be alleged that Mr. Truscott had the exclusive opportunity to murder Lynne Harper.
- Entomology evidence, if it were admitted and if it were accepted by the trier of fact, could go so far as to exclude Mr. Truscott as the killer.

⁵⁸ Decision of the Court of Appeal, *supra* note 10 at para. 260

⁵⁹ Summarized at paragraphs 777-786 of the Court of Appeal's reasons.

- The eyewitness evidence (referred to by the Court of Appeal as the "County Road evidence") is consistent with Mr. Truscott having taken Lynne on his bike along the County Road to the junction with Highway 8.
- Archival and photographic evidence shows that it would have been possible for Mr. Truscott to have been standing at the bridge and to have made out certain details on a car stopped at the junction with Highway 8, as he claimed.
- Other potentially exculpatory evidence includes the evidence of Doug Oates, Gordon Logan, and Karen Daum as to where and when they saw Lynne Harper and Mr. Truscott on the night of Lynne's disappearance, which supported Mr. Truscott's claim that he left Lynne at the junction of the County Road and Highway 8.
- The evidence of post-offence conduct — specifically, evidence that Mr. Truscott asked a friend to lie to the police for him — is open to attack as lacking in credibility.
- The penis lesion evidence "that so vividly demonstrated [Mr. Truscott's] guilt at trial has been weakened to the extent that it is virtually no evidence at all".
- Important aspects of the crime scene evidence "seem inconsistent with the theory that [Mr. Truscott] was the perpetrator".

Just as the Court of Appeal concluded that if a new criminal trial were held an acquittal would "clearly be the more likely result", so I conclude that, if it were possible to hold a trial to determine Mr. Truscott's innocence, a finding of innocence would be the more likely result. My finding in this regard is key to my conclusion that Mr. Truscott should receive compensation.

VII. CONCLUSIONS ON ENTITLEMENT TO COMPENSATION

In its reasons, the Court of Appeal describes Mr. Truscott's appeal as the successful culmination of a lengthy quest for vindication:

The guilty verdict and the subsequent affirmations of that verdict have not deterred Mr. Truscott in his efforts to demonstrate that he is an innocent man. Fortified by the unqualified support of family members and others, and with the assistance of a group of skilled and indefatigable lawyers, Mr. Truscott returns to the judicial system one last time seeking vindication.

This time Mr. Truscott is successful.⁶⁰

In my opinion, that vindication would not be complete without compensation. Indeed, a refusal to grant compensation would leave a stigma — a suggestion of guilt — attached to Mr. Truscott. That is the very stigma which the Court of Appeal took pains to remove when it ordered an acquittal, rather than a new trial, explaining that an order for a new trial "would remove the stigma of the appellant's conviction, but leave in place the stigma that would accompany being the subject of an unresolved allegation of a crime as serious as this one"⁶¹

I am also cognizant of the fact that the Attorney General has issued a public apology for the miscarriage of justice. That apology, while not an admission of liability, is nonetheless a recognition of responsibility of some kind.

I would also emphasize that Mr. Truscott's conviction has been definitively held to be a miscarriage of justice and that he has lived under the burden of that miscarriage of justice for almost 50 years. He was convicted of murder as a 14-year-old. He was sentenced to death by hanging. He

⁶⁰ Decision of the Court of Appeal, *supra* note 10 at para. 2-3

⁶¹ Decision of the Court of Appeal, *supra* note 10 at para. 265

spent approximately five months living under the threat of execution. Thereafter, he spent ten years -virtually his entire adolescence and much of his young adulthood - in prison. He had no chance to go to high school. He was incarcerated throughout what could have been his years in college. Even after his release, he lived in the shadow of his murder conviction. This caused him to live under an assumed name, and restricted his day-to-day life in ways that we can only imagine. And yet, despite all of the hardship that he has suffered and seemingly against all odds, Mr. Truscott has led an exemplary and successful life since his release from prison.

Finally, I repeat my conclusion that, if a trial could be held to determine Mr. Truscott's innocence, a finding of innocence would be the likely result.

As I have stressed, the circumstances of this case are, without a doubt, highly unusual. It would be a harsh result indeed if the government were to refuse to Mr. Truscott the compassionate exercise of the Crown's grace in the form of an *ex gratia* payment solely because he cannot affirmatively prove his innocence — something that the Court of Appeal noted would be "a most daunting task" absent definitive forensic evidence such as DNA.

It was the state, through the operation of the criminal justice system, that inflicted the harm on Mr. Truscott. We are all dependent upon the proper functioning of the criminal justice system and we must all share the burden of its errors. Through no fault of his own, Mr. Truscott suffered as a result of one of those errors. His loss should be borne by the community as a whole, and not by Mr. Truscott alone. The state has a moral obligation — an obligation that springs from a sense of justice and equity - to provide some redress to Mr. Truscott. The public's interest in the proper administration of justice — and, indeed, the public's conscience - demand that a payment be made.

In the sections which follow, I consider what the appropriate amount of compensation would be.

VIII. QUANTUM OF COMPENSATION - INTRODUCTION

In assessing the quantum of compensation that should be paid to Mr. Truscott, the starting point must necessarily be Mr. Truscott's ordeal that began with his arrest in June 1959, certain details of which I set out earlier in this report.

Mr. Truscott was taken into custody on June 12, 1959 and formally arrested on June 13, 1959. He was 14 years old. From that time until October 21, 1969 - over ten years later — he remained in custody.

He was held initially at the Goderich jail. For the first four months, until he was convicted, he was given approximately 30 minutes per day in the jail courtyard for exercise.

On September 30, 1959, he was convicted of murder and was sentenced to death. For the next four months, he remained in the Goderich jail, awaiting execution. The hanging was originally scheduled for early December, but was postponed until February.

Mr. Truscott has given me a personal statement, in which he very movingly describes the fear and confusion that he felt as a young teenager, imprisoned and put on trial for a crime that he has always maintained he did not commit. His fear changed to uncomprehending shock when, despite all of the assurances that he had been given by his parents and his counsel, he was convicted and sentenced to hang.

After his death sentence was commuted to life imprisonment in January 1960, Mr. Truscott was transferred to the Ontario Training School for Boys in Guelph. Mr. Truscott has described the intense isolation that he felt throughout this time. Any relationships that he developed with other boys in the institution were short-lived, as those boys served their time and were released. Moreover, because Mr. Truscott's father had been transferred to Ottawa, visits from his family were less frequent than they otherwise might have been.

At the age of 18, he was transferred to the federal penitentiary at Collins Bay, near Kingston, where he remained for almost seven years. While his parents could visit with somewhat greater frequency, Mr. Truscott found that they had less and less to talk about. He felt that he was drifting apart from his family, which increased his sense of loneliness and isolation.

All of Mr. Truscott's adolescence and early adulthood was spent in custody. He effectively lost all of the years between 14 and 24. He did not go to high school. He did not attend college or university. He spent these crucial formative years isolated from his peers, with no chance to partake in the ordinary activities and experiences that contribute to the significant social, emotional and cognitive development that occurs during that stage of life.

In addition to this physical and psychological dislocation, incarceration also carried with it an near complete loss of privacy. This began just hours after his arrest, when he was physically examined by two physicians at the RCAF guardhouse in Clinton. Those two physicians observed sores on Mr. Truscott's penis, which became the subject not only of trial testimony and judicial deliberation, but also countless newspaper, television and radio reports. Moreover, from the moment of his arrest, Mr. Truscott was, like every prison inmate, under constant surveillance and scrutiny.

While in prison, Mr. Truscott was also subjected to psychiatric treatment that, by twenty-first century standards, appears highly questionable. Mr. Truscott's impression of the therapy sessions that he was ordered to attend is that the psychiatrists were chiefly interested in eliciting a confession of guilt. On a number of occasions, the psychiatrists administered LSD or sodium pentothal to Mr. Truscott. Mr. Truscott has explained that, while he and his parents did consent to the administration of the drugs, they did so because they believed that the psychiatrist's support was needed in order to obtain parole.

While there is no reason to doubt that the psychiatrists acted throughout with honourable intentions, it must also be recognized that such an experience would be extremely distressing for a person who had been incarcerated for a crime that he did not commit.

The humiliation suffered by Mr. Truscott throughout these years was also profound. He was at the forefront of public attention, branded a rapist and murderer. The Supreme Court rejected his sworn testimony as lacking in credibility. Beyond this, he had to endure the daily humiliations of incarceration. For example, in February 1960 he was taken to the Kingston Penitentiary for "processing". On the way, Mr. Truscott and the accompanying corrections officers stopped at a roadside restaurant. Mr. Truscott had to walk into the restaurant in leg irons and eat his meal while handcuffed. He has described in a letter to me how emotionally distressing this was for him.

Mr. Truscott was released from prison and placed on parole in October 1969. His parents had separated two years earlier. So, he went to live at first with Mac Steinberg, the prison's former chaplain, who was then working as a parole officer. Mr. Steinberg and his wife helped Mr. Truscott evade the media attention that accompanied his release, and welcomed him into their home, assisting him in making the transition to life out of prison.

Mr. Truscott stayed with the Steinbergs for six months. Then, in the spring of 1970, the parole board determined that he should live in British Columbia with his grandparents. In April of 1970, he moved to Vancouver. While there, he formed a relationship with Marlene — whom he would later marry. The two were introduced by Isabel LeBourdais.

In the summer of 1970, he and Marlene decided that they wanted to marry and move back to Ontario. However, the parole board was reluctant to approve the move, citing the media attention that would ensue. Mr. Truscott persisted and, with the assistance of Mr. Steinberg, obtained the necessary approvals. However, in order to avoid any publicity, he and Marlene were told that the wedding would have to be held in secret. Ultimately, the ceremony was performed by Mr. Steinberg. A member of the parole board and his wife, whom Marlene had never met before, acted as the witnesses. Steven and Marlene were not allowed to have any family members present.

Over the next thirty-seven years, Mr. Truscott and his wife settled and raised three children in Guelph, where Marlene's parents lived. Mr. Truscott worked throughout those years for two different companies — at Unread of Canada for 17 years and then at Owens Corning for 20 years. He was employed first as a machinist, a trade he had learned while in Collins Bay, and later as a mechanical millwright.

Although Mr. Truscott was freed from prison in 1969, he remained on parole until his conviction was quashed by the Court of Appeal in August of 2007. For the first five years of parole, Mr. Truscott was under the close supervision of his parole officer and was not permitted to leave the city of Guelph without prior approval. Even after his parole conditions were relaxed in November • 1974, he was required to notify the parole board of any change of his place of residence.

One of the conditions of his parole — imposed when he was first released from Collins Bay -was that he take a new family name, to avoid publicity. He has lived under the name "Bowers" (his mother's maiden name) for virtually all of the years since his release.

Throughout most of that time, Mr. Truscott lived in fear that his true identity would be discovered - either by neighbours or acquaintances, or by his children, who were not told the truth about their father's background until they were teenagers. As a result of this fear of exposure, the family has moved nine times since 1970. The prime motivator in these moves was Mr. Truscott's desire to protect his children. He wanted to do whatever he could to make sure that his children's prospects and happiness were not blighted by his status as a convicted murderer..

Despite his best efforts, Mr. Truscott could not completely hide his identity. On one occasion, his daughter lost a friend, because the little girl's mother had heard that Mr. Truscott was a convicted rapist. Years later, another of his daughter's friends confronted her with Mr. Truscott's true identity.

In his personal statement, Mr. Truscott has recounted many incidents where indignities small and large that were visited on him as a result of his status as a convicted murderer. He could not travel outside of Canada with his family. He did not take his children to his father's funeral, because he knew that members of the media would be there, and did not want his children to be confronted. His children endured strained relations with friends, and painfully uncomfortable moments in school, on occasions when lessons were taught about Mr. Truscott's case.

And Mr. Truscott himself has to cope with the psychological after-effects of his conviction and incarceration, including nightmares and a degree of social anxiety. His entire personality changed, as he became shy and hesitant in social settings. He has had to deal with all of this without the benefit

of psychiatric care - a choice which is understandable given the negative experiences he had with prison psychiatrists at Collins Bay.

In short, Mr. Truscott and his family have lived their lives for almost 50 years in the shadow of his murder conviction.

There is no question but that Mr. Truscott's conviction, incarceration and parole forever altered his life. For nearly 50 years, he bore the stigma of being a convicted rapist and murderer of a 12-year-old girl. I would not presume to minimize his suffering. What he has gone through makes what I am about to recount all the more remarkable. Despite all of his hardships and against all odds, Mr. Truscott has managed to build a remarkably stable and successful life for himself and his family. He and Marlene have been married for almost 37 years. Together, they raised three children, who by all accounts are leading productive and happy lives.

Mr. Truscott has been employed without interruption over the last 37 years, working for only two different employers. While his annual income was relatively modest and while I expect that, with three children, it did not allow the Truscotts much in the way of luxuries, it did afford them a reasonable degree of financial stability.

All that Mr. Truscott has achieved is a powerful testament to his internal strength and resilience, and his native abilities, as well as to the support that he received from his wife and children, family and friends.

IX. HOW SHOULD COMPENSATION BE DETERMINED?

Against the foregoing backdrop, I must determine the appropriate amount of compensation to recommend.

My task is complicated somewhat by the fact that there are only two Canadian cases — those of Thomas Sophonow and Donald Marshall Jr. — that provide articulated and accessible reasons explaining the principles that were used to determine the particular amount of compensation. In all of the other cases, the quantum of compensation was privately negotiated. In certain instances, most notably that of David Milgaard, there is no documentary record as to how the amount of compensation was arrived at.

The *Federal/Provincial Guidelines* provide for three types of compensation:

- (1) compensation for non-pecuniary losses (covering loss of liberty, the indignities of incarceration, loss of reputation, and loss or interruption of personal relationships) — limited to \$100,000;⁶²
- (2) compensation for pecuniary losses (loss of earnings — both past and future, loss of property or other consequential losses); and
- (3) compensation for costs incurred in obtaining a pardon or a verdict of acquittal.

This approach to assessing compensation enshrined in the *Guidelines* — which is to assess compensation for lost earnings, non-pecuniary losses, and out-of-pocket expenses — appears to have

⁶² As noted above, the limit of \$100,000 that the *Guidelines* prescribe in respect of non-pecuniary losses has not been consistently followed. For example, Thomas Sophonow received \$1.75 million plus interest in respect of non-pecuniary losses. Donald Marshall Jr. received \$225,000 plus interest.

been widely followed in this country, and in other jurisdictions. Such an approach, which is akin to the method of measuring damages in civil tort actions, also enjoys support with some commentators.

However, it is not the only approach to compensation. Some jurisdictions have chosen instead to fix a set amount of compensation which is payable in respect of each year spent in prison.

I will briefly consider each of these approaches in turn.

(a) The Tort-Based Approach to Compensation

The basic premise of tort law's measurement of damages is to put the aggrieved person in the position that he would have occupied but for the wrongful act. Pecuniary damages are measured by financial losses that the person has suffered in the past and will continue to suffer in the future, as a result of the tort. And non-pecuniary damages are an approximation of the person's emotional or physical suffering caused by the wrong.

This tort-based approach (referred to by some commentators as an "individualized approach") has been applied to *ex gratia* payments made to compensate a wrongfully convicted person. As noted above, it is enshrined in the *Federal/Provincial Guidelines* and it was the approach taken by Justice Cory in the Thomas Sophonow Inquiry.

In the Sophonow Inquiry, Justice Cory began his analysis by assessing the relative degrees of fault borne by government actors (such as the police and the prosecutors) and by Mr. Sophonow for the wrongful conviction. This process is akin to assessing the degree of contributory negligence that can be ascribed to the plaintiff in a negligence claim. And it is reflected in the *Guidelines* admonition that, in assessing lost earnings and non-pecuniary losses, the inquiring body must take into account:

- (a) blameworthy conduct or other acts on the part of the claimant which contributed to the wrongful conviction; and
- (b) due diligence on the part of the claimant in pursuing his remedies.

Having determined the degree of fault to be ascribed to the wrongfully convicted person, it is then necessary to consider pecuniary losses — which typically consist of income lost as a result of time spent in custody. Thus, in the Sophonow Inquiry, Justice Cory calculated the income that Mr. Sophonow lost as a result of his time in prison. This included both earnings lost during the period of incarceration, and earnings lost during a period of six months following his release when he could not find work.

Compensation for pecuniary losses may also cover expenses such as the costs of future care, including counselling fees paid for therapy to assist the wrongfully convicted person in coping with the effects of his incarceration, as well as other out-of-pocket expenses.

With respect to non-pecuniary losses, the *Guidelines* refer to the following:

- loss of liberty
- the physical and mental harshness and indignities of incarceration;
- loss of reputation;
- loss or interruption of family or other personal relationships.

In the Sophonow Inquiry, Justice Cory expanded that list to include the following factors — several of which merge or overlap to varying degrees:

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
- other foregone developmental experiences
- loss of freedom and other civil rights
- loss of social intercourse with friends, neighbours and family
- physical assaults while in prison
- subjection to prison discipline
- accepting and adjusting to prison life
- effects on the claimant's future
- the effect of post-acquittal statements by public figures.

It is impossible to value each of these losses in a separate and discrete fashion. Rather, the inquiry is whether the valuation, considered as a whole, represents fair compensation for all of the losses suffered.

The tort-based approach has also been adopted in the United Kingdom, and applies to the quantification of compensation carried out either pursuant to the statutory scheme provided by section 133 of the *Criminal Justice Act, 1988* or pursuant to a purely discretionary, extra-statutory grant of compensation.

I have some question as to the use of this tort-based approach to assess compensation in this particular case. The reliability of the compensation figures arrived at by means of this approach is dependent upon the context in which it was developed, namely, the adversarial model of civil litigation. Damages in tort are designed to restore the balance between plaintiff and defendant, and are a monetary equivalent of the magnitude of the wrong committed by the defendant. The accuracy of the damages figures asserted by the claimant is fully tested by opposing counsel, often with the assistance of expert witnesses. The adversarial process provides the adjudicator with a level of comfort as to the reliability and accuracy of the losses being alleged.

By contrast, in the present case, there was no civil wrong committed. As discussed above, there is no basis to argue that there was any wrongdoing on the part of prosecutors or investigators.

This case does not fit into the traditional plaintiff-defendant paradigm. The policy considerations that have led me to conclude that compensation should be paid to Mr. Truscott are very different from the policy considerations that form the basis for damage awards in tort. Moreover, the process that I have followed has been non-adversarial. There has accordingly been no opportunity to test the submissions on loss quantification that were prepared on behalf of Mr. Truscott.

(b) Standardized Approach Based on the Number of Years Spent in Custody

A second approach to assessing compensation, which has been adopted by a number of American jurisdictions, is to calculate the amount of compensation based on the length of time spent in prison. Typically, legislation sets out a fixed sum which is payable for each year of incarceration. This sum is intended to compensate the wrongfully convicted person for all losses suffered — both pecuniary and non-pecuniary. By our standards, the sums that have been so prescribed are inadequate compensation for a person who has been wrongfully deprived of his liberty by the state.

For example, in Alabama, a wrongfully convicted person may receive \$50,000 for each year spent in custody.⁶³ In California, the figure is \$100 per day spent in custody.⁶⁴ And, in Iowa, a wrongfully convicted person may recover the value of lost earnings up to a maximum of \$25,000 per year plus \$50 per day spent in custody.⁶⁵ Other states provide for a set annual payment, but cap the total amount payable. For example, the total limit in Wisconsin is \$25,000, in Maine \$300,000 and in South Carolina \$500,000. Still other states, such as Ohio, follow a hybrid system, with a fixed amount payable per year in respect of non-pecuniary losses, and other losses (such as lost earnings) being

⁶³ *Code of Alabama, 1975*, s. 29-2-159

⁶⁴ *California Penal Code*, s. 4904

⁶⁵ *Iowa Code c. 663A.1*, s. 6

compensated in accordance with the tort-based approach. And for persons wrongfully convicted of federal crimes, legislation provides for compensation of \$100,000 per year for death row exonerees and \$50,000 per year for non-death row exonerees.

At the same time, assuming that the compensation paid on a yearly basis is adequate, there are undeniable benefits to this type of approach. It is simple, certain and avoids inconsistency between different awards. And the amount payable is based on a relevant and objective standard — namely, the amount of time spent in custody.

The chief disadvantage of this standardized approach is that it takes the focus off the victim. It effectively ignores what a particular wrongfully convicted person has actually experienced, how he has suffered.

(c) How to Assess Compensation in the Present Case

In my opinion, just as the circumstances of this case demanded a unique approach to determining Mr. Truscott's entitlement to compensation, so too they demand a unique approach to calculating the quantum of that compensation.

Almost fifty years have gone by since Mr. Truscott was convicted. He has lived his life, raised his family, and had a long and productive career. He is now of retirement age. The reality is that no dollar figure can replace his lost years and lost opportunities or compensate for the injury sustained through this miscarriage of justice. In my opinion, the ultimate goal in assessing compensation at this stage should be to ensure him comfort and financial security for the rest of his life, with the ability to provide for his family as he sees fit.

In carrying out that assessment, I have had regard to both the tort-based approach, and the standardized approach. Bearing in mind all that Mr. Truscott has been through, the compensation awarded should take into account what he has lost, as well as the length of time that he spent in prison and remained on parole. It should also be reflective of other compensatory awards that have been made in Canada. In the circumstances of this case, this is best accomplished by a single award encompassing both pecuniary and non-pecuniary losses.

(i) *The Difficulty in Estimating Mr. Truscott's Loss of Earnings*

Mr. Truscott's counsel have urged me to adopt the tort-based approach for the purposes of this assessment. With respect to pecuniary losses, Mr. Truscott claims compensation for earnings that he lost as a result of his wrongful conviction. No claim is made for any other form of pecuniary losses, such as the costs of medical care, or any other expenses.

In accordance with the tort-based approach, Mr. Truscott's counsel have submitted a report prepared by an economist which assessed Mr. Truscott's loss of earnings — both past and future — as ranging between \$1.5 million and \$3.3 million. The assessment was prepared based on the assumption that, had Mr. Truscott not been wrongfully convicted, he would have worked as a commercial airline pilot.

My difficulty in evaluating this report is emblematic of the difficulties inherent in applying the tort-based approach to this case. Given that the process that I have followed is non-adversarial, there is no opposing party to challenge the assumptions and assertions made by the economist. It is, accordingly, not possible to test the validity of the figures put forward, or the various scenarios on which they are based, any more than it is possible to see the course that Mr. Truscott's life would otherwise have taken.

Moreover, while there can be no doubt that Mr. Truscott would have been a productive member of the work force, there is no way of knowing with any degree of certainty what career he would have pursued, had he not been wrongfully convicted. Judging by his demonstrated work ethic, one can, I think, properly assume that he would have earned more money, whether as a pilot or in some other field, but for the wrongful conviction. However, there is no way of accurately knowing how much more. The exercise of trying to estimate his loss of earnings quickly becomes mired in unsupportable and entirely speculative hypotheses. It is not possible to have any confidence in the reliability of the calculation that was ultimately carried out, riddled as it is with so much uncertainty.

(ii) *The Need for an Over-All Award*

Accordingly, rather than attempting to carry out a speculative estimate of Mr. Truscott's notional loss of earnings, the interests of justice would be better served by making one over-all award which takes into account both pecuniary and non-pecuniary losses. The aim of such an award is to provide Mr. Truscott with the financial security needed to live the rest of his life in comfort and dignity, able to assist his family as he sees fit. The quantum of the award should reflect and provide a measure of compensation for the hardships caused by the wrongful conviction. It should also be reflective of the other relevant compensatory awards that have been made. Finally, the amount of compensation should provide public recognition of the seriousness of the wrong suffered by Mr. Truscott.

At the same time, it must be recognized that no amount of money can erase the ordeal that Mr. Truscott has endured. Compensation cannot turn the clock back and give Mr. Truscott his life to live over. By its very nature, mental and emotional suffering cannot be remedied by the payment of

money. Any attempt to place a dollar value on such suffering is quixotic, at best. As Justice Dickson stated in

Andrews v. Grand & Toy Alberta Limited:

There is no medium of exchange for happiness. There is no market for expectation of life. The monetary valuation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. . . . No money can provide true restitution.

As noted above, there are only two instances where reasons have been given explaining how a particular figure for compensation was arrived at — those of Donald Marshall Jr. and Thomas Sophonow.

In the case of Donald Marshall Jr., Justice Evans valued the non-pecuniary losses at \$225,000, plus interest of \$158,000, for a total of \$383,000. Mr. Marshall spent 11 years in prison - between the ages of 17 and 28. In that sense, his case provides a relevant comparison with Mr. Truscott's. At the same time, the sum of \$383,000 falls well outside of the range of more recent awards of compensation.'

Thomas Sophonow received \$1.75 million plus interest in respect of non-pecuniary losses. The differences between Mr. Sophonow's case and Mr. Truscott's are readily apparent. Mr. Sophonow spent approximately four years in prison, as compared to the more than 10 years that Mr. Truscott spent incarcerated. Mr. Sophonow was never subject to the death penalty; he was an adult at the time he was charged; and he always had avenues of appeal open to him. Moreover, Mr. Sophonow was adjudged to be partially to blame for his wrongful conviction.

⁶⁶ (1978), 83 D.L.R. (3d) 452 at 475-476 (S.C.C.)

⁶¹ For example, David Milgaard received \$10 million. Thomas Sophonow received \$2.5 million. Gregory Parsons received \$1.3 million. Clayton Johnson received \$2.5 million. And Randy Druken received \$2 million.

Counsel for Mr. Truscott have submitted that Mr. Truscott's case is most comparable to those of Maher Arar and David Milgaard.

I reject entirely the suggestion that the case of Mr. Arar has any relevance here. The payment to Mr. Arar was not an *ex gratia* payment arising out of a wrongful conviction, but rather the settlement of a claim for damages resulting from governmental kidnapping to Syria, detention under the most inhumane conditions, and torture.

By contrast, the case of David Milgaard does have some relevance. Mr. Milgaard spent 23 years in prison. That is 13 years more than Mr. Truscott. He was shot during one of his two escapes from prison. And he suffered horrendous abuse - including a violent sexual assault - while in prison. At the time that compensation was assessed, Mr. Milgaard was approximately 47 years old. He received \$10 million in compensation, which included a \$750,000 payment to his mother. To date, this payment represents the high-water mark for compensation for the wrongfully convicted. However, because Mr. Milgaard's payment came about as a result of a settlement negotiated to resolve Mr. Milgaard's two civil law suits, there is no way of knowing the principles upon which the \$10 million figure was based.

I should note that Mr. Truscott's counsel have argued that Mr. Truscott should receive compensation significantly in excess of the amount paid to Mr. Milgaard. In my view, regardless of the particular approach taken, there can be no justification for such an award. Nevertheless, I have kept in mind the total amount awarded in the Milgaard case, as well as the amounts awarded in other cases, for use as a kind of proportionality yardstick when measuring a fair amount of compensation to be paid to Mr. Truscott.

In the end, I am brought back to two guiding principles. The total amount paid to Mr. Truscott should be enough to ensure that he can live the remainder of his life with financial security, and in comfort and dignity, able to assist his family as he sees fit. It should also be enough to send a clear signal to the public that the government recognizes the enormity of the suffering that this miscarriage of justice has caused.

(iii) Facts Relevant to Assessing Compensation

In considering the appropriate amount of compensation, the following facts (some of which I have already set out) are particularly relevant.

Mr. Truscott was only 14 years old when he was arrested. He had not yet finished junior high school. He was so ill in every meaningful sense of the word a child.

He spent three months in pre-trial custody at the jail in Goderich. He was separated from his family, held in a small jail cell, given only one change of clothing and permitted to bathe only once each week. During this period, his cell door was left open, because he was the only inmate on the corridor and he was permitted to walk down the corridor to the bathroom. He was taken out to the jail courtyard each day for about 30 minutes for exercise. Because of his age, he could not go outside if there were any other inmates in the yard. He had no one to talk to other than his family, on brief visits.

Needless to say, Mr. Truscott found this experience to be bewildering and frightening in the extreme.

However, frightening as it was, his experience only became worse when, at the end of September, he was found guilty of the murder of Lynne Harper and sentenced to hang. Following his

conviction, he was no longer allowed out of his cell at all, except to go to the bathroom, when he would be accompanied by a guard. He was no longer allowed to go outside. For four months he remained in that cell believing that he was going to die.

His execution date was set for December 8, 1959. One day, he heard someone hammering outside. He thought that his scaffold was being built. As it turns out, it was simply someone working on a nearby house. However, Mr. Truscott's terror at that sound is readily imaginable.

He has recounted to me that, in November, he learned that his execution had been postponed until the following February. He says that he was grateful that he would live to see Christmas.

It is impossible to fathom the effect that such an experience would have on a 14-year-old boy. One can only imagine the sheer terror and the profound sense of isolation and helplessness.

Any award of compensation must reflect the uniquely traumatic nature of those months.

In addition, I emphasize the fact that Mr. Truscott spent virtually all of his teenage and young adult years in custody. When he was at the Ontario Training School for Boys from the ages of 15 to 18, he did make some friends. However, he recounts how all of these friendships were short lived, as the other boys served their time and were released. Knowing that he would not be released and that he would be sent to a federal penitentiary when he turned 18, Mr. Truscott felt isolated from the other boys.

Of course, Mr. Truscott did not attend high school or college. And although he made some attempt at correspondence courses when in the penitentiary at Collins Bay, he found the nature of correspondence study — with no contact with a teacher or classmates, and with the time lag between

submission of assignments and arrival of the succeeding unit of study — to be disjointed and frustrating.

Therefore, not only was Mr. Truscott denied the normal opportunities for social and emotional development through his adolescence and young adulthood, he was also effectively denied a secondary and post-secondary education.

He was also effectively denied a family life over those ten years. Even though his parents could visit him in prison, he missed countless family events — Christmas dinners, birthday parties, weddings, the arrival of new children. Finally, while Mr. Truscott was in prison, his parents separated. He ascribes the breakdown of their marriage at least in part to the stress attendant upon his conviction and imprisonment.

Thus, even when Mr. Truscott was released from prison, his "home" no longer bore any resemblance to the home that he had left ten years before. One of his brothers had married and left home. The two remaining children had split up: Mr. Truscott's sister was living with his mother, and his younger brother with his father. This only added to Mr. Truscott's intense feelings of dislocation.

The amount of compensation paid to Mr. Truscott must also reflect his encounters with prison psychiatrists and, more specifically, the administration of LSD and sodium pentothal. While that "therapy" may have been acceptable according to the standards of the day, it appears highly questionable by today's standards. While I do not understand Mr. Truscott to have suffered any lasting adverse medical effects from that therapy, he speaks with a strong and understandable negativity about his psychiatric treatment while in prison.

Moreover, leaving aside the psychiatric "treatment" that he received, Mr. Truscott's incarceration did have serious psychological after-effects. He has a fear of dark, musty spaces,

because they remind him so powerfully of the Goderich jail. He cannot bear to wait in a line, because it recalls the endless lining up that seemed to mark his time at Collins Bay. He suffers from nightmares. He finds the ordinary uncertainties of daily life — such as answering the phone without knowing who is on the other end of the line — hard to deal with. His very personality was changed as a result of his ordeal.

Finally, the amount of compensation paid must reflect the number of years that Mr. Truscott spent on parole, as well as the continuing effect that his conviction had on his life, including his loss of earnings and opportunities. His conviction remained an enormous, although often silent, presence in his daily life. It would appear that, after his children were born, the family frequently moved so as to escape the possibility of neighbours discovering his true identity. To live for so many years, constantly watchful, constantly worried about having his secret revealed must have been a tremendous burden.

X. THE QUANTUM OF COMPENSATION FOR MR. TRUSCOTT

I wish to reiterate the purposes of an *ex gratia* payment in this case. They are:

- (1) to provide Mr. Truscott with the financial security needed to live the rest of his life in comfort and dignity, with the ability to provide for his family as he sees fit;
- (2) to provide a measure of compensation to Mr. Truscott for his emotional suffering and his economic loss; and
- (3) to provide a public recognition of the seriousness of the wrong suffered by Mr. Truscott

In the result, considering all of the foregoing, I have concluded that an appropriate amount for an *ex gratia* payment to Mr. Truscott is \$6.5 million. In my opinion, that amount provides fair and reasonable compensation to Mr. Truscott for all of his losses. It will provide him with financial security for the remainder of his life. It will enable him to provide a substantial legacy to his children. It is proportional to awards of compensation made in other relevant cases. And it will serve as a public acknowledgement of the magnitude of the harm caused by this miscarriage of justice.

As a means of testing the reasonableness of this amount, I have considered how much Mr. Truscott would receive if compensation were assessed based on the number of years spent in prison and on parole. In determining an appropriate amount payable per year, one would need to consider the nature and extent of Mr. Truscott's ordeal, as well as the fact that, for many of the years, he lost earnings as a result of his wrongful conviction. In my opinion, if such an approach were to be adopted, the appropriate amount payable in respect of the ten years that Mr. Truscott was incarcerated would be \$250,000 per year — a figure that is higher than that provided in any other jurisdiction, but that, in my opinion, would be fair in this case. In respect of the 38 years that Mr. Truscott spent on parole, the appropriate amount payable would be \$100,000 per year. The compensation arrived at by means of such an approach is in the same range as the \$6.5 million figure that I have recommended above.

XI. COMPENSATION FOR MARLENE TRUSCOTT

I would be remiss if I did not acknowledge Marlene Truscott and all that she has done for Mr. Truscott. She was the first person with whom Mr. Truscott could build a relationship, and establish the kind of emotional connection that had eluded him for the 10 years that he spent in custody. She helped him in ways both large and small to carry on, and to build the successful life that he did.

In more recent years beginning in 1997, Mrs. Truscott fought without respite to exonerate her husband, wading through boxes and boxes of documents, seeking the evidence that would assist in bringing about an acquittal. The amount of work that she did in seeking her husband's vindication was substantial. She spent considerable time reviewing and organizing the evidence available. Had she not done this work, it would have been necessary to pay someone — likely a law clerk or paralegal — to do so. Moreover, the amount of time that Mrs. Truscott spent on her task meant that she could not return to the workforce, as she otherwise would have done. She accordingly lost income as a result.

In the circumstances, I believe that an *ex gratia* payment should be made to Mrs. Truscott to compensate her for the earnings that she lost over the years as a result of the work she did to secure her husband's vindication. In my opinion, a fair amount of compensation for Mrs. Truscott would be \$100,000.

XII. CONTRIBUTION BY THE FEDERAL GOVERNMENT

The final question I am asked to address is which level of government should bear the cost of any compensation paid to Mr. Truscott and his wife.

When the *Federal/ Provincial Guidelines* were entered into, the federal government agreed to share with the provinces, on a 50/50 basis, the costs of compensation paid in accordance with the *Guidelines*.

I am aware of nine instances where the federal government contributed to *ex gratia* payments

to wrongfully convicted persons.⁶⁸ In those instances, the proportional share paid by the federal government ranged from 10% to 50%.⁶⁹ In most cases, the amount paid by the federal government was 50%.

The lowest proportional contribution - 10% - was made in the case of Thomas Sophonow, a case where significant criticism was levelled against the actions of provincial law enforcement agencies, notably the police services and the Crown prosecutors, for having contributed to the wrongful conviction.

In the present case, where there is no basis to suggest wrongdoing on the part of either federal or provincial actors, I believe that the cost of this miscarriage of justice should be shared equally by each level of government. Both governments have been involved in this matter virtually since its inception in 1959 and I can see no reason why they should not share equally the costs of the compensation payable to Mr. Truscott and his wife.

XIII. LEGAL FEES PAID BY LEGAL AID ONTARIO

In June 2000, as a condition of receiving Legal Aid funding for the Reference before Justice Kauffman, Mr. Truscott signed a "direction on civil action" which gives to Legal Aid Ontario the right to recover the cost of his legal representation from any award of compensation that he might receive.

Mr. Truscott's counsel advise that the total amount of those legal fees up to and including the

⁶⁸ Contributions were made by the federal government in the cases of Donald Marshall Jr., Kenneth Norman Warwick, Richard Norris, Linda Huffman, Guy Paul Morin, David Milgaard, Rejean Pepin, and Thomas Sophonow.

⁶⁹ There is, in fact, one case — that of Herman Kaglik — where the federal government paid 100% of the amount, because the wrongful conviction took place in a federal territory, and not in a province.

date that the Court of Appeal rendered its judgment is \$990,000, of which I understand \$200,000 was incurred in respect of the Kaufman Reference.

I am advised that Mr. Truscott's counsel have been in discussions with Legal Aid Ontario in an effort to determine whether Legal Aid intends to pursue its right of recovery against Mr. Truscott. As at the date of delivery of this report, Legal Aid has not advised of its position.

I wish to emphasize that the amount of compensation that I have recommended be paid to Mr. and Mrs. Truscott is exclusive of any amounts that he may be required to pay in the form of reimbursement to Legal Aid.

In my opinion, the \$990,000 in legal fees should, like the compensation to be paid to the Truscotts, be shared equally by the federal and provincial governments.

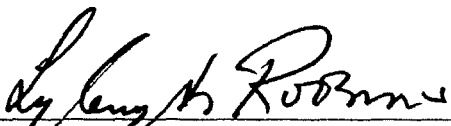
XIV. RECOMMENDATION

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

- (a) \$6.5 million to Mr. Truscott as compensation for his wrongful conviction; and
- (b) \$100,000 to Mrs. Truscott, as compensation for lost income.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

March 28, 2008

A handwritten signature in black ink, appearing to read "Sydney L. Robins", is written over a horizontal line.

The Honourable Sydney L. Robins, Q.C.