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# CRIMINAL PROCEDURE

# A PROPOSAL FOR COSTS IN CRIMINAL CASES

*The Law Reform Commission of Canada will be grateful for comments before November 1, 1973. All correspondence should be addressed to:*
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AUGUST 1973

LAW REFORM COMMISSION

COMMISSION DE RÉFORME DU DROIT

CRIMINAL PROCEDURE

# A PROPOSAL FOR COSTS IN CRIMINAL CASES

A Study Paper Prepared by the
Project on Criminal Procedure

August 1973

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## INTRODUCTORY NOTE

This paper is the first in a series of working papers to be published by the Procedure Project dealing with nearly all stages of Canadian criminal procedure. Other studies in progress from which working papers will be published in the near future concern "discovery" in criminal cases, plea bargaining, and police powers in search and seizure. As well studies are in progress concerning the jury, the jurisdiction of Canadian criminal courts and classification of offences, the form of the criminal charge, private prosecutions, the exercise of discretion by the police and prosecution in the charging process, and the use of prerogative writs in criminal law.

While it may seem strange with all of these studies underway that the very first paper by the Procedure Project should concern a subject that bears only incidentally on procedure, i.e. costs in criminal cases, we think it is a very important paper nevertheless and one which we are quite pleased to publish. That this paper is first is explained by the fact that before the Procedure Project commenced its studies a research study on costs in criminal cases was contracted by the Law Reform Commission and placed under the supervision of the Project. The Report[i] from this study was received by the Commission in November of 1972 and since then, as with all background studies prepared for the Commission, the Project has been engaged in the task - along with continuing its own studies on other subjects - in determining the kind of proposal that should be made. This working paper then represents the present state of the Project's research on the subject of costs in criminal cases and rather than wait for other papers on more traditional subjects to be ready we decided to publish it now.

At the outset of our consideration of this subject it seemed that our task was simply to prepare a proposal based on the Burns Report. But as our thinking and writing progressed we found it impossible to accept the major thrust of that Report, which is: that a system of costs awards be devised to compensate acquitted accused

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i The Report was prepared by Professor Peter Burns of the Faculty of Law at the University of British Columbia; see also footnote[1] infra; in publishing this study paper the Procedure Project is of the view that all of the issues bearing on the matter of costs in criminal cases are adequately raised in this paper and thus the background Report of Professor Burns will not be made available for distribution.

persons who are wrongly charged or truly innocent. While we agree that there is a need for compensation of economic losses and expenses suffered in criminal prosecutions we have concluded that this approach is unsound, at least for the various offences which are referred to as the criminal law of Canada, and that the attempt to avoid the consequence of such a system - the creation of a third verdict of "not proven" or "less-than-innocence" - by leaving the whole question of costs in the discretion of the courts is not satisfactorily achieved. Our paper therefore takes the direct approach of arguing for the payment of costs in criminal cases to all acquitted and discharged accused persons - or at least to those that can show economic need.

The major part of this paper is Part II which is devoted to a consideration of the various policy questions that are raised by a costs awards system. Part I, on the history of costs awards and on existing law and practice, is very brief because this background is already fully covered in the Burns Report. As well, any detailed discussion of comparative costs systems has been omitted, again because they are fully drawn in the Burns Report and do not substantially contribute to a discussion of the central question: what is the basis for awarding costs to successful defendants in criminal cases. Finally, while the Burns Report also recommends that the fees and costs allowable to witnesses, interpreters, and peace officers be revised upwards to realistic levels - the fees allowable to jurors as well - we decided to omit these matters from our paper. It has been noted before that these fees and costs are inadequate and of course it would be anomolous to institute a system of substantial costs to acquitted accused persons and not to other persons who suffer their own economic losses when involved with the administration of the system. But nevertheless the matter of costs awards to the "parties" in the criminal process is a very special question, particularly costs to the accused, and so in this paper we decided to omit all other questions.

In conclusion, in advancing the proposals in this paper we are not unaware of the possible, perhaps probable, reaction from some segments of the public to the suggestion that costs awards be paid to accuseds who are only technically innocent. Of course our proposal is not framed in these terms, but since the basic proposal is to provide costs compensation to all acquitted accused or at least to those showing need and not just to the innocent, the technically innocent are included. We are aware of the fact that there are some cases that fit into this category. The 1966 New Zealand Committee on Costs in Criminal Cases went further and held that:

> *"(T)here is a substantial class of cases where in the popular phrase the accused is "lucky to get off" - the prosecution has not quite clinched the case or the exacting standard of proof in criminal cases is not quite satisfied... In our opinion it would ordinarily be wrong to award costs in these sorts of cases".* ii

It is really not clear however just how substantial this class is; we uspect it is less substantial than those who advance it as a limitation on costs awards would have us believe - although probably the real answer is that no one really knows. As well, we question that it would "ordinarily be wrong to award costs in these sorts of cases". The New Zealand Committee does not explain why they held this opinion. However it is our view that if costs payments can be regarded not as "rewards" but as compensation for losses and expenses that should not be suffered by anyone in defending the prosecution of an offence then there is nothing "wrong" in awarding costs in this class of cases. Furthermore to not award costs in cases in this class is to imperil both the presumption of innocence and the very high value that our system places on the general verdict of not guilty. Finally, it would mean that a Project proposal on this subject, being the first stage at which discussion and reaction are sought, would itself be a political and philosophical compromise. At this stage at least, we are not prepared to make that compromise.

June 28, 1973

D.W. Roberts

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ii Report of Committee on Costs in Criminal Cases, 12 September 1966, Wellington New Zealand, para. 25.

# A PROPOSAL FOR COSTS IN CRIMINAL CASES

This proposal follows upon a full research report[1] prepared for the Law Reform Commission of Canada by Professor Peter Burns of the Faculty of Law at the University of British Columbia. The report was received in the Fall of 1972 and received a limited circulation.[2] Since then the Procedure Project of the Law Reform Commission has been engaged in the task, more difficult than it had appeared at first sight, of drawing a proposal based on this report. The accomplishment of that task is now represented by this study paper which, while it does indeed follow and rely on much of the research of the Burns Report, it does not follow his major recommendations.[3]

In order to introduce the proposal it might prove valuable to review, in a general way, the existing law and practice regarding costs in criminal cases and then to examine the policy factors that seem to be involved in any criminal-costs system. Against this background the recommendations forming the proposal will be presented.

## I Existing Law and Practice in Canada

At common law the general rule concerning costs in litigation is that the successful party to the proceedings is entitled to costs. However for criminal law, again at common law, certain exceptions exist to this rule including a subsidiary principle to the effect that unless there are statutory modifications or exceptional circumstances the Crown neither receives nor pays costs in its own courts. This principle evolved at a time when the political and legal doctrine developed in England equating the Crown with the state. But even this subsidiary principle has not been equally adhered to by the Canadian courts. British Columbia has followed it,[4] but other provinces including Ontario, New Brunswick, and Manitoba have not.[5]

Yet, perhaps of more importance, there have been a number of statutory modifications of the common law position including the enactment of several costs provisions in the Criminal Code. Unfortunately however, most of these enactments are quite meagre and it appears that there is no uniformity of practice in their application. While most of the provinces have provided for the award of costs in provincial offence matters, they are not commonly employed. Further, while the Criminal Code has granted more generous costs-awarding powers for summary conviction matters,[6] whether at trial or on appeal, it would seem that the powers exist in name only because (a) the courts are

reluctant to award costs against the Crown, and (b) the costs provisions have been interpreted restrictively to cover the very minimal fees and allowances contained in the schedule to the Code.[7] These fees and allowances are in no way related to an accused's actual costs in defending a prosecution. As well, our courts under the Code have no power to award costs on the hearing of indictable offences, and, indeed, appeal courts are specifically precluded from making any such awards.[8] The only exceptions that obtain here are for defamatory libel[9] (a rare prosecution today) and where the accused has been misled or prejudiced in his defence by a variance, error, or omission in an indictment or a count thereof.[10] Again, costs awards in the latter situation are extremely rare. Finally, judicial practice relating to the extraordinary remedies varies from province to province.[11] There is no discernable uniformity in the case law which has resulted in arbitrary awards turning on the geographic location of the hearing.

In summary, the law relating to the award of costs in criminal cases is confused and based largely on out-dated theories of the relationship of the citizen to the state. Yet other jurisdictions have recognized the need for such awards and extensive costs awards schemes have been enacted by the United Kingdom,[12] Northern Ireland,[13] New South Wales,[14] and New Zealand.[15] The question here considered is whether or not Canada should do the same and on what basis.

## II Policy Considerations

There are a number of very basic policy questions that require consideration in determining whether or not our costs awarding system in criminal law is unsatisfactory and, if it is, how it should be altered. The first and fundamental question though is the rationale for awarding costs in criminal law. It is of primary importance because a number of other policy considerations may be determined by it.

To begin, as a general proposition it can be said that for litigation generally the primary rationale for awarding costs is to compensate the successful party for those costs incurred in successfully litigating a case.[16] As we will discuss somewhat later there is a second rationale in the punitive and deterrent effect of costs awards,[17] but to commence discussion it is safe to say that "compensation" is the primary rationale. But while this rationale has generally been fulfilled in civil

litigation, where in England and in Canada party and party costs are allowed to successful litigants, as a general rule it has never obtained in criminal cases. In part its absence from criminal law is a result of the historically rooted exception that the Crown, which conducts the vast majority of criminal prosecutions and provides the courts therefor, neither receives or pays costs in its own courts,[18] But more significantly it is likely that our criminal law system has never provided for costs awards, at least in favour of acquitted accused persons, out of a general feeling that to do so would go too far. After all, so the feeling might have been expressed, to secure an acquittal is reward enough and that:

> *"... the risk of a prosecution is one of the inevitable hazards of living in society and that there is no reason to shield the citizen against the financial consequences as long as no malice, incompentence or serious neglect can be attritubed to the prosecutor". 19*

However, although this view has prevailed in the past it has been increasingly challenged by an opposing view that:

> *"(W)hen a prosecution has been brought and it subsequently turns out that through no fault of the accused he should never have been charged at all justice demands that the status quo should be totally restored and in particular he should be reimbursed for all the costs and expenses which he has properly incurred". 20*

It is the contrary view which underlies the criminal costs awards schemes in other jurisdictions and which received support from Canadian lawyers and judges in a survey conducted by Professor Burns.[21] However the statement of the rationale in this form, i.e. "the accused should never have been charged at all", is somewhat different from its expression in civil litigation of compensating the successful party. In criminal law every accused person who is not convicted is a successful litigant and yet the restatement of the rationale would confine compensation in criminal cases to acquitted accused who are truly innocent. But, as well, the view that "the risk of a prosecution is one of the inevitable hazards of living in society" has been challenged from a second direction for which the development of criminal legal aid is but a reflection. It is the challenge that not only should all accused persons have equal access to legal representation and thereby receive

equal treatment before the law, which is the purpose of legal aid, but also that no accused should in addition to the prosecution of a crime suffer other economic hardships. While legal aid may look after the provision of legal counsel it does not compensate lost wages or lost business income or various other expenses or losses that may be suffered in court appearances in the defence of a prosecution. And while ideally these are losses that should not be suffered by anyone prosecuted with a crime they are especially vexing to those who cannot afford them. Thus the rationale for this challenge is not compensation of the successful party but simply compensation for costs that should not be suffered in any prosecution system - particularly by those who cannot afford them - and perhaps a starting point to begin such a compensation system would be with the acquitted accused.

Thus while it can be accepted that in a costs awards scheme compensation is the primary rationale and that it ought to be given some scope in criminal cases, very difficult questions remain. What is or should be the measure or amount of costs awards? Who should pay or provide the funds for costs awards? If compensation is the primary rationale should the focus be on compensating the successful party or a certain kind of successful party, or should the focus be on compensating those who need it? If compensation to the successful party should have some scope, should it include awards of costs to the Crown? The rest of this part will be devoted to a discussion of these questions.

## A. The Nature and Measure of Costs Awards

From the expression of the compensation rationale, that is (a) in compensating those who should never have been charged at all,[22] or (b) in compensating all accused persons for costs that should not have to be suffered in a criminal prosecution,[23] it is clear that the concern is with reimbursement of real costs and expenses. It is not an effort at tokenism nor is it an attempt at payment of general damages analogous to pain and suffering damages in tort law. Examples of real costs and expenses that are frequently incurred in defending criminal charges are obvious. They of course include the fees and expenses of legal counsel (where they have been incurred), witness expenses, lost wages, lost business income in a small business that is dependent on the services of the accused, and travel and accommodation costs. These costs are easily calculated and represent the kind of compensation that could and, arguably, should be made in a criminal costs scheme.

No doubt one might argue that an innocent victim of the prosecution process should be paid substantial damages to compensate for the insult to his reputation. But, while the existence of the tort remedy is a partial answer to this contention,[24] the main response is that the source of all costs awards in criminal law is not the opposite party, the prosecutor, but the public through a fund set up for this purpose. Obviously serious problems would arise if legislation were enacted granting courts the power to award costs against informants, the police, and prosecutors. Fundamentally, to award costs against the Crown would undoubtedly operate to impede police officers and prosecutors from fearlessly pursuing their respective duties. Thus, if the state is to provide for the payment of costs awards some reasonable limit will be required. From the present vantage point where there are no provisions at all for payment of compensatory costs to criminal defendants it is somewhat unrealistic to expect that the public will be agreeable to pay not only actual costs incurred but general damages as well.

Another question that might be asked at this point is the relationship of costs awards to legal aid. All provinces now have criminal legal aid schemes and many of them, eight in fact at the time of this writing,[25] have signed federal-provincial agreements for federal financial assistance for their legal aid programs. Therefore, the question might be asked, with criminal legal aid from province to province becoming a reality why should costs awards be made as well? Well first the purpose of legal aid is not to compensate for costs that have been incurred but rather to ensure that no one charged with an offence will be denied adequate legal representation. If an accused is unable to afford legal counsel of his choice, legal aid will permit him to do so or will otherwise provide legal counsel.[26] But the purpose of costs awards, at least on the first direction of the primary rationale, is compensation of innocent accused persons, and, taking the second direction of this rationale,[27] compensation of accused persons who have suffered other economic expenses and losses. If either or both of the two directions of the compensation rationale are applied it is clear that a costs awards scheme would provide compensation not covered by any legal aid plan. To not provide for costs awards on the basis that legal aid services are generally available would discriminate against all persons who would not be entitled to legal aid. Furthermore it would fail to provide for compensation of the various other actual costs that are frequently incurred in the defence of a criminal prosecution.[28] As a final observation here, for the cost of obtaining legal counsel where this costs is not covered by a legal aid program the provincial legal aid tariff could serve as a basis for

compensation, and of course if legal aid were provided this item would be excluded from any costs award.

Further, a question might be raised about the relationship of costs awards to civil suits for malicious prosecution. But here again the availability of this remedy is no answer to the need for a general scheme of costs awards. In the first place the civil suit is confined to accuseds who were "maliciously" prosecuted i.e., knowingly or without reasonable grounds to believe that the accused committed the offence charged. However the need for costs compensation, even if confined to the innocent accused,[29] is much broader. Secondly even for the very restricted class of innocent accused persons who are maliciously prosecuted "(A)ny tort lawyer will know ... that the severe burden of proof placed upon the plaintiff in such proceedings makes this at best a far from certain remedy, and at worst a further snare and delusion to the innocent". [30] In sum this remedy will of course remain available but it is no answer to the need for a sensible scheme for awarding costs in criminal cases.

Finally for other loss items that should be included in costs awards such as lost wages or lost business income, they would of course have to be based on actual costs incurred and subject to certain limits. The question of what those limits should be may be the subject of some debate, but one approach would be to apply the minimum wage laws in force in the provinces and on that basis compensate losses whether they are losses of wages or losses of business income. Another approach would be to apply the compensation schedules of the various Workmen's Compensation Boards. But in addition it would likely be necessary, whatever approach is followed, to prescribe maximum awards for any one claimant notwithstanding the actual losses incurred. Thus for an applicant who may have lost a job as a result of a criminal prosecution and been out of work for a year before obtaining employment, it might be necessary, simply to keep the costs scheme within financial limits, to limit his award and all others similarly situated to a maximum award - eg. $5,000.00. As well the compensation board would be required to deduct any other income received such as unemployment insurance so that any double recovery would be avoided.

Although this has been a rather brief discussion of some very practical questions, it does permit one to observe that the questions do not represent serious obstacles in the way of a costs system.

B. Who Should Receive Costs Awards

The most difficult question to be resolved in establishing a costs awarding scheme is just who should receive them. For the moment we can leave aside questions of costs to the prosecution and deterrent costs to accused persons, as they will be discussed later, and concentrate on payments of costs awards to accused on the compensation rationale.

Earlier we noted[31] that one direction of the rationale for awarding compensation costs to accused persons is that where an accused is successful and "it ... turns out that through no fault of (his own) he should never have been charged at all justice demands that ... he should be reimbursed for all the costs and expenses which he has properly incurred".[32] But while this view has considerable appeal it also has its problems. In our system all persons who are acquitted after a trial are adjudged innocent not just those who "should never have been charged at all".[33] So too are all accused persons against whom charges are dropped or suspended[34] because at the outset of the criminal process all accused persons are presumed to be innocent. Thus, in theory at least, our system is one that does not provide for different kinds of innocence yet this is precisely what this direction of the compensation rationale would accomplish. As John M. Sharp pointed out in his article "Costs on Acquittal, Some Comparisons and Criticisms":[35] "(T)he disadvantage attached to providing that defence costs should 'normally be awarded to the innocent' would be the creation of two classes of innocence - innocence with costs and innocence without".

Undoubtedly, to some, Mr. Sharp's point is not a disadvantage at all but a benefit as it would tend to inject a measure of realism into the criminal law system. But clearly if that were the goal then rationally it should be accomplished directly by adopting, as in Scotland, the third verdict of "not proven" and not indirectly through a costs awards system.[36] To others, more aware of the disadvantages involved in a third verdict, the point is, if not a real disadvantage, at least a real risk that cannot be completely guarded against by leaving the question of costs in the discretion of the courts.[37] It may be conceded of course that other common law jurisdictions, including England,[38] have costs awards systems that compensate acquitted accused who "should never have been charged at all", and do so without shrouding costs applications or costs awards in secrecy,[39] and that this fact is, perhaps, some support for down-playing the concern that to adopt this direction will create two classes of innocence. As well those

more agreeable to this direction of costs awards would argue that to adopt Mr. Sharp's view[40] would require costs to be awarded as of right to all acquitted accused[41] and to all accused where charges have been abandoned. They would argue that while this may be the more academically sound position to adopt it would likely result in no costs awards system ever being established because (a) in all likelihood it would indeed "'stick in one's (the public's) throat' to see a man acquitted on a technicality and then receive his costs"[42] and (b) since all costs awards would have to come from the public purse such a broad scheme would be too expensive. However in response to these arguments these points might be made. First, it is very risky to place much weight on what other jurisdictions have done particularly when an examination of them reveals that, despite the theory, it is a rare case indeed where an acquitted accused receives costs.[43] Obviously if that is the case there is little need to be concerned about the risk of a third verdict. Second, it is indeed possible to provide for a wider system of costs to more persons than the few "truly innocent" who can demonstrate that innocence without advocating an expensive system of costs for everyone.[44] Third, the concern that it would "stick in one's throat" to see a man acquitted on a technicality and then receive his costs is quite unjustified and should not go unanswered. Quite apart from the value of the general verdict of not guilty to individuals who are acquitted, the concept of legal innocence that is accepted in that verdict has an independent value which is central to the over-all quality of criminal justice. The concern of our system is not to maintain the reputation of the technically innocent, but that of the system of justice itself. Those who would object to the payment of costs to acquitted persons whose factual innocence has not been proved would thereby appear to regard the rule relating to proof beyond a reasonable doubt and various "technical defences" such as lack of corroboration, or involuntariness in the taking of a confession, as unfortunate obstacles to the proper administration of justice. And while the criminal law does place a number of evidentiary barriers in the path of the prosecution of a criminal charge, they are there as essential safeguards in order to keep the reach of the criminal law and those charged with its enforcement within reasonable limits. It follows therefore that while there may be some undeserving accused who are, to use the phraseology of the New Zealand Report, "lucky to get off",[45] society as a whole derives a substantial benefit by the maintenance of the rules that make such a disposition possible. It is on this basis that any intrusion on the value of the verdict of legal innocence should be resisted and upon which it may be concluded that "all the principles of British (and Canadian) justice dictate that a man should not be penalized, sometimes severely, for defending himself successfully against a criminal charge in a court of law".[46]

A second and equally important problem with the first direction of the compensation rationale is that it is too limiting. To confine costs compensation to the "truly innocent" to be determined in the exercise of discretion by the courts[47] may limit cost awards, as in England, to very few persons. In England, while the principle behind the *Costs in Criminal Cases Act 1952* is reasonably broad, in practice costs have only been awarded to innocent accused persons in exceptional cases.[48] Probably one reason for this limitation is an undue restriction by the courts on their discretionary power.[49] But it would seem that another reason is that it is one thing to find innocence based on a reasonable doubt but quite another to establish innocence, for example probable innocence, for purposes of costs. And while that difficulty may minimize the risk that a costs awards system in favour of "innocent" accused persons will create a third verdict - because some of those denied costs may indeed be innocent but unable to prove it - it will also result in a costs awards system of little or no benefit to the vast majority of persons who are charged in the criminal process. That is not to say that the first direction (or dimension) of the compensation rationale should be ignored as having no merit. On the contrary it has considerable force by the very fact that it is the basis of costs awards systems in other jurisdictions. But at the same time by reason of the risk of the third verdict that it raises and its somewhat limited application it is not, by itself, a substantial enough basis for a costs awards system.

The second direction of the compensation rationale, that is in compensating all accused persons for costs that should not have to be suffered, would seem to be more promising. Again, as earlier noted,[50] a compelling argument can be made that no accused should, in addition to being charged with a crime and subject to the possibility of conviction, suffer the various economic losses that are incurred in defending that criminal allegation or in waiting for a plea of guilty to be entered. Of course in practical terms most accused cannot avoid incurring economic losses for the periods of time that may be spent either in gaol following an arrest or in court appearances. During these periods wage and other income losses occur in addition to the direct defence costs that are incurred. However the fact that such losses and costs are suffered is surely only a consequence of the criminal process not its object and an ideal system would be one where they were not incurred at all. Thus in pursuing this direction of the compensation rationale one might even argue that every accused person, whether subsequently convicted or acquitted, should be compensated for all costs reasonably incurred from the commencement of criminal proceedings to their conclusion, that is, to the point of a verdict or other termination. And while the immediate response to such a proposal would likely be that it is both too idealistic and prohibitively expensive, it

does underscore the point that a claim for costs compensation based on this direction of the compensation rationale can be made equally by all accused persons and not just those who are "truly innocent". If the concern of a costs awards scheme is to achieve greater justice for those who are processed by the criminal law system then it would seem just as important, if not more so, to focus on the economic losses that are suffered by all accused persons, or at least all of those who are not convicted,[51] as those who might be judged "truly innocent". The ultimate purpose even of the latter direction is not to single out certain acquitted accused as being particularly innocent and therefore worthy of special mention, but to compensate these persons for economic losses incurred as a result of a prosecution. But since such losses are unfortunately borne by all accused persons it would be more just to approach that ultimate purpose directly. Thus while it would likely be prohibitively expensive to provide for costs awards to all accused persons it would be quite feasible to provide for costs to be awarded to those most in need of them. A further compromise might be made to limit such awards to acquitted or discharged accused persons,[52] but again on the basis of need rather than on the basis of who is the most innocent. To demonstrate need it should also not be necessary to show extreme poverty. Of course the poor would be covered by such a scheme if losses and expenses had been incurred. But, to refer again to the article of John M. Sharp, "the typical sufferer under the present law is the innocent[53] middle-upper income bracket defendant who just fails to qualify for legal aid and to whom the costs of a necessary defence represent a severe financial blow".[54] While there might be some disagreement as to the cut-off level for compensation, being either "middle-upper income bracket" or simply "middle income", and some difficulty in defining the criteria to be applied in determining need, the point is a sound one, that is that many average persons, not just the poor, should be compensated by a costs awards system. Thus instead of establishing a costs compensation scheme involving the courts in the exercise of discretion in favour of those acquitted accused who are "truly innocent", with the various problems thereby engendered,[55] it would be much more worthwhile to provide for a tribunal or board to exercise discretion on costs applications in favour of all acquitted or discharged accused persons who are most in need.[56] The value in the general criminal verdict of "not guilty" would remain uncompromised and yet substantial justice would be achieved.

## C. Additional Questions Concerning Compensation Costs to Acquitted Accused Persons

While the general issues related to the two possible directions for costs compensation to accused

persons have been drawn, there are still other factors that should be considered.

1. Costs to "Innocent" Accused Persons

The main difficulty with this direction has already been outlined,[57] but perhaps it would be helpful to more fully present some of the arguments. The main argument proceeds that "(T)he disadvantage attached to providing that defence costs should normally be awarded to the innocent would be the creation of two classes of innocence - innocence with costs and innocence without".[58] What that means in ordinary language is that if an accused is charged with a criminal offence and is acquitted without receiving costs there is at least the risk that in the public eye he will still be regarded as less than innocent. If he should not apply for costs a suspicion of guilt would be raised, and if he should apply and be refused perhaps an even greater suspicion would be raised.[59] And while this risk would not seem too important where the offence charged is of a minor, regulatory nature, such as provincial motor vehicle or liquor offences,[60] it could assume crucial importance for Criminal Code and other federal statute crimes. Persons accused of these offences would run the risk that even if acquitted or otherwise freed, if costs were not obtained they would be forever prejudiced in obtaining or holding employment.[61] Persons in public service occupations and many others where trust, integrity, responsibility, and other personal attributes are job-important would be especially vulnerable. As well such a system of costs compensation could well put unbearable pressure on these people in the defence of a prosecution. To them it would never be sufficient to just be acquitted or to be content should the prosecution abandon a prosecution by a withdrawal or a stay of proceedings. Undoubtedly there are times when the Crown should not be permitted to commence a prosecution and then abandon it leaving a cloud over the accused.[62] But there are also situations when an abandonment of a charge can be viewed as a just result. For example the development in the United States of alternative disposition procedures grouped under the terms of "screening" or "diversions"[63] hold considerable promise. However this discretion of a costs

scheme would likely pressure many persons against availing themselves of these alternatives should they become available in Canada.[64]

One other question to be considered here, as to the first direction for costs compensation to accused persons, concerns the tribunal to be employed in making costs awards. If costs are to be determined by "innocence" then it would seem sensible to entrust that question to the trial judge. The judge will have heard all the evidence in the case and will be in as good a position as anyone to make that determination. As well the trial judge would be able to take into account the conduct of the accused in relation to the investigation and prosecution of the offence charged.[65] Thus in taking another criteria into account his role will, in theory at least, be less one of awarding costs on a determination of innocence and more one of making awards in the exercise of discretion taking both innocence and co-operativeness into account. Therefore the extra cost and difficulty in having "costs hearings" before a separate tribunal or board could be avoided.[66] However against this apparent advantage might be weighed the extra burden that would be added to the work of criminal trial judges and, perhaps, the possible reluctance of some of them to go beyond the traditional duty of determining innocence or guilt based on the presence or absence of reasonable doubt.[67]

## 2. Costs to the Acquitted and Discharged Accused Based on Need

While at first sight it would seem to be extremely difficult to determine a system of costs compensation based on need there is more than one approach that might be followed in order to solve the problem.

(a) The best approach would be to provide for maximum costs to be awarded for lost wages, lost income, and for counsel fees and other costs actually incurred, to all acquitted or discharged accused persons whose income is below a particular level.[68] The level could be fixed by determining gross income upon proof provided to the compensation tribunal and the system could be one of providing uniform costs to all those who qualify,

or more equitably, a system providing proportional benefits decreasing in accordance with an applicant's lesser need. Thus taking the gross income figure of $12,000.00 as being the fixed level up to which maximum awards would be made, for an applicant with a gross income 10 per cent over this level he would receive 90 per cent of available costs and for one whose income was 50 per cent over he would receive 50 per cent of his costs, and so on. However for those with much larger gross incomes there would come a point, i.e. at $24,000.00 or more, where no costs would be paid if this scheme were followed. If this should seem too harsh it could be made subject to a minimum limit of 25 per cent of costs being available to all applicants.

There are of course many variations that can be made upon this theme but the thrust of it is to provide full costs compensation to all applicants in the lower income bracket and a reasonably high measure of compensation to those in the middle income range. While some persons might complain about having to disclose their income, the more substantial complaint would come from those who would either be denied costs or receive only minimum awards. But on the other hand if the levels of compensation are fixed at reasonable levels, such as those above, this complaint would be confined to persons who receive substantial gross incomes and to persons of affluence. And to their complaint it would be reasonable to respond that greater social justice would be achieved by this costs system than by one which attempts to single out the innocent accused - or by not having one at all which would probably be the case if the model proposed were one of compensating all acquitted and discharged accused persons with their full costs.

(b) A second approach, and arguably less worthwhile, would be to reduce the amount of all costs awards to minimal levels, and then permit them to be awarded to all acquitted or discharged accused persons without discrimination as to need. It is the approach often favoured in other compensation schemes, such as no-fault awards in automobile accidents.[69] But in

order to make it feasible it would likely be necessary to make the amount of awards quite small and since, unlike no-fault schemes in tort law where the victim is permitted to prosecute a civil suit for damages in excess of the no-fault award, claimants would not have other sources available for compensation,[70] the value of this approach is lessened accordingly.

For both approaches it would be best to separate the costs system from the courts, at least for compensation costs.[71] The courts have no special ability to determine economic need and since nearly all provinces now have established compensation systems for victims of crime[72] it would be a relatively simple matter to include costs awards to acquitted or discharged accused persons in those systems. The funds for each province should be provided from the federal purse and thus it would simply be a case of each province administering those funds - much as they are now encouraged to do through agreements with the federal government for compensation of victims of crime.[73]

A problem that could be encountered with a liberal costs awards system is that judges and juries might, in certain cases, be reluctant to acquit since the accused would receive costs. This concern could be expressed in the sense that such a costs system would distort the burden of proof in criminal cases and result in convictions in cases where acquittals based on reasonable doubt would otherwise obtain. However this is at best a very speculative concern and to the degree that it could be a problem it would likely be alleviated if the awarding of costs to acquitted accused is divorced from the courts and determined by a separate compensation board based on economic need - which is of course the proposal in this paper.

## D. Costs to the Prosecution

Another policy question that warrants consideration is whether costs should be awarded to the Crown against an accused. Formerly, in indictable cases, costs could be awarded against a convicted accused.[74] And although the provision for such costs was removed by a later revision of

the Criminal Code,[75] they may still be awarded in summary conviction cases.[76] But, history and present Criminal Code provisions aside, the argument is rather compelling that the expense of administering criminal justice should be borne by the state and not by the accused. Indeed the acceptance of this principle was the very reason for section 1044 being dropped from the Code in the 1953-54 Revision.[77] That principle was restated in the report of the Ontario Royal Commission Inquiry in Civil Rights.[78] In the words of McRuer C.J.:

> *"No person convicted of an offence should be required to subsidize the expense of his trial by having costs thereof levied against him". 79*

It is our conclusion that this principle should be followed. While it is of course possible to conceive of a defence counsel attempting to employ improper tactics or for an accused to conduct himself in a disagreeable manner there is no necessity to penalize them with costs. Our courts have ample control over the use of their resources to control and prevent improper delay or the advancement of frivolous arguments without resort to the penalty of costs. As well, the availability of costs in favour of the Crown could have the effect of making defence counsel or the accused afraid to pursue quite legitimate arguments and defences.

## E. Punitive and Deterrent Costs

As noted earlier[80] a second rationale for awarding costs is, in some situations, in their punitive and deterrent effect. In awarding costs the law may succeed in deterring frivolous prosecutions by punishing those who bring them. As well such awards may be used to discourage unacceptable investigation and prosecution practices such as excessive delay, unacceptable withdrawals of charges or stays of proceedings, and multiple charging. While these are hardly common practices, they do occur and it would seem that where they are unjustifiable the accused, whether eventually innocent or guilty, should be compensated for them.[81]

To apply this aspect of a costs scheme the eligibility for costs should be made by the trial court and once determined the amount of costs to be awarded could be the subject of a fixed scale collectable from the same compensation fund as compensation awards. In turn, to bring home the punitive and deterrent aspect of these awards, the fund should have a right of recovery (subrogation) against the prosecution officer or department concerned.

## F. Other Costs Awards

One other person who may have a valid claim for criminal costs compensation is the private prosecutor or private informant. From time to time private prosecutions are still conducted in Canada, in fact with a heightened awareness of consumer and environmental problems they may be increasing. Moreover a strong argument can be made for the need to permit some private prosecutions in the traditional criminal law field.[82] If that role is accepted then it seems more than reasonable that where the prosecution was justified[83] and was brought because of a lack of interest by the regular prosecution authority the private informant or prosecutor should not be required to bear the expenses of the prosecution and should be compensated by a costs award.

Here again the eligibility for the award should be determined by the trial court on the traditional basis of reasonable and probable grounds and once determined the actual amount of the costs award based on the actual costs suffered or incurred by reason of the prosecution should be paid from the compensation fund.

## III Recommendations

Measuring the existing system for costs in criminal cases against the policy issues just reviewed, it is not difficult to conclude that the existing system is totally inadequate and should be replaced by a full costs system. That new system should provide compensatory costs to all acquitted and discharged accused persons or at least to those for whom the economic costs suffered in the successful defence of a prosecution represent a severe financial blow. As well it should make provision for costs awards where, although even guilty, an accused has been subjected to unfair or oppressive investigative and prosecutorial practices. Finally it should permit costs to be awarded to private informants or prosecutors in appropriate cases but otherwise costs awards should be denied to the Crown.

Based on these conclusions it is recommended that steps be taken, in part by changes to federal legislatior and in part by federal-provincial arrangements, to provide a Canadian Criminal Costs system with these features:

1. The repeal of all existing costs provisions;

2. The granting of costs awards by Provincial Compensation Boards (the same boards that

are presently concerned with compensation awards to victims of crime) to all acquitted and discharged accused persons based on economic need. Maximum awards for counsel fees, lost wages or business income, actually expended or lost, are to be awarded to all applicants having a gross annual income of $12,000.00,[84] or less upon satisfactory proof as to the income level and as to the costs actually incurred, being provided to the Boards. For all applicants with a gross annual income in excess of $12,000.00, the amount of costs to be awarded shall be reduced by the percentage that the annual gross income exceeds the maximum income level of $12,000.00 (eg. an applicant with an income 10 per cent over $12,000.00 shall receive 90 per cent of costs incurred, etc.). Provided however that all applicants should be entitled to receive 25 per cent of their costs;

3. The costs awards to acquitted and discharged accused persons[85] should be based on maximum levels and should be in relation to:

   (a) counsel fees;

   (b) witness's expenses;

   (c) loss of wages or private business income;

   (d) travel and accommodation costs.

4. An award of punitive and deterrent costs to accused persons, whether acquitted or convicted, based on these factors:

   (a) whether, generally, the investigation - into the offence or related offences was conducted in a reasonable and proper manner;

   (b) whether, generally, the Crown conducted the prosecution or prosecutions in a reasonable and proper manner;

   (c) whether, generally, the conduct of the accused in relation to the investigations and prosecutions were reasonable.

5. The award of costs to a private informant or private prosecutor where the prosecution was commenced upon reasonable and probable grounds and where the Crown unreasonably refused to conduct the prosecution;

6. The award of costs against a private informant or private prosecutor where the prosecution was commenced without reasonable and probable grounds to believe that the accused committed the offence charged;

7. For costs awards in the cases of (4) (5) and (6), eligibility for costs should be determined by the trial or hearing court;

8. In the case of (4) once eligibility has been determined the applicant should receive a fixed costs award from the Provincial Compensation Board, upon presentation of a certificate of eligibility, the amount to be determined by those costs actually incurred by the accused and by the need to award punitive costs, (but in no case should an accused receive double costs under (2) and (4) above) and the Board should have the right to recover those costs from the Crown Officer, or Government Department, or local authority on whose behalf the Crown Officer was acting;

9. In the case of (5) once eligibility has been determined the applicant should be compensated by a costs award from the Provincial Compensation Board for actual costs incurred, as in (3) above;

10. In the case of (6) once eligibility has been determined (here the court clerk could act before the trial court as agent for the Provincial Compensation Board) the Provincial Board would have the right to claim against the private prosecutor all costs received by the acquitted or discharged accused;

11. The principles applicable to the trial situation shall apply to all appeals including appeal by way of trial de novo, to all hearings and appeals thereon for the Writs of habeas corpus, certiorari, mandamus, and prohibition relating to matters arising out of criminal charges under The Criminal Code or other federal statutes, and to cases where charges are withdrawn or proceedings stayed;

12. The Federal Government should provide the necessary money to fund the Criminal Costs system. This could be done by having the Federal Government provide the funds to the Provincial Compensation Boards under agreements requiring the money to be allocated as provided herein.

## IV Conclusion

At the outset of this proposal we drew attention to the fact that while our proposal follows upon the Research Report of Professor Burns entitled "Relating to the Matter of Costs in Criminal Cases"[86] it does not follow all of his recommendations. Of course some are agreed with and have been recommended in this paper, such as provisions for punitive and deterrent costs and costs, in appropriate cases, to private prosecutors. But we are in fundamental disagreement with his principal recommendation of costs awards to "innocent" accused persons.[87] While we agree with the statement in the working paper of the British Columbia Law Reform Commission on "Costs of Accused on Acquittal" that "the criminal justice system is constantly in need of reform and very often oppressive when enforced in its present state...",[88] we do not agree that the way to relieve that oppression is to compromise on the high value our justice system places "on safeguards against the conviction of innocent persons".[89] One of those safeguards, as expressed in the famous case of Woolmington v. Director of Public Prosecutions[90] and now contained in the Canadian Bill of Rights,[91] is that an accused "is presumed innocent until proved guilty according to law in a fair and public hearing...".[92] It is our view that, for "true crimes" at least,[93] that a safeguard would be seriously compromised by a system of costs that would single out the truly innocent from those not so innocent and thus all acquitted accused for whom costs were denied or unavailable would be in a worse position than at the commencement of criminal proceedings; though acquitted and entitled to their freedom they would no longer be presumed innocent but, at the very least, subject to the suspicion of guilt with all of the consequent disadvantages that could attach to that condition.[94]

In further support for this view we refer again to the working paper of the British Columbia Law Reform Commission where it is noted:

> *"In assessing the proposal made in this working paper, the reader should bear in mind that the cases are few that lead to a clear-cut conclusion of innocence. Most evidence is circumstantial and the Judge or Jury must draw inferences about whether an accused did or did not commit a certain act and whether he did it knowingly or with a wrongful intention. These are matters for human judgment rather than scientific proof, and an accused who wins an acquittal on such judgment is entitled to have his acquittal taken at face value". 95*

Not only do we agree that this assessment is sound, but we suggest it argues against and not for a costs awards scheme that would favour the demonstrably innocent accused.

Thus while we recognize the value of costs compensation in criminal cases, our proposal is one that attempts to meet that objective directly by a system of costs awards to those acquitted and discharged accused persons to whom the actual "costs of a necessary defence represent a severe financial blow".[96] Further while we recognize that our proposal has its own difficulties, not the least of which are its financial implications, nevertheless we are prepared to defend it, and not one that would tend to create a second class of innocence, as a just solution to the need for costs compensation to acquitted and discharged accused persons.

## End Notes

1. Burns, Research Report for the Law Reform Commission "Relating to The Matter of Costs in Criminal Cases" October, 1972, on file at the Commission (hereafter referred to as the Burns Report); Professor Burns research on the subject of Costs in Criminal Cases was actually done jointly for both the Federal Law Reform Commission and the British Columbia Law Reform Commission, and the British Columbia Commission has since published a working paper (No. 9) following the Report concerning costs in judicial proceedings for provincial offences.

2. The Burns Report was circulated to all Provincial Law Reform Commissions and to the Department of Justice.

3. The principal recommendation of the Burns Report is that costs should be paid to acquitted accused persons who are "wrongly accused" or "probably" innocent; see Burns Report at 89-93, and at 112. The Burns Report also recommends costs to be paid to all accused persons for abusive investigative and prosecutorial practices, and to the Crown in appropriate cases; see Burns Report at 89, 136, and at 105, 114, 120, 123-125, 126, and 134. Again we disagree with the Burns recommendation in favour of costs awards to the Crown. See infra at 3-20 for our discussion of these various issues.

4. The situation in British Columbia is generally governed by s.2(1) of the Crown Costs Act, R.S.B.C. 1960 c.87 wherein the Crown may not receive nor have costs awarded against it in the absence of statutory authority.

5. See eg., R. v. Guidry (1965) 47 C.R. 375, (1966) 2 C.C.C. 161 (N.B.C.A.).

6. See Criminal Code sections, 744(1)(b) (trial), 758 (trial de novo), 766 (stated case), 610(3) (appeals).

7. See Criminal Code section 772, and see the Attorney-General of Quebec v. Attorney-General of Canada (1945) S.C.R. 600, 84 C.C.C. 369, (1945) 4 D.L.R. 305 (S.C.C.)

8. Criminal Code section 610(3).

9. Criminal Code sections 656 and 657.

10. Criminal Code section 529(5).

11. On the issue whether or not provincial courts can make rules under s.438 of the Criminal Code authorizing the imposition of costs or whether their power is confined to the regulation of costs authorized by other substantive laws, there is a clear conflict of judicial practice: In British Columbia (Re Christianson (1951) 3 W.W.R. (N.S.) 133, 100 C.C.C. 289, 13 C.R. 22, [1951] 4 D.L.R. 462 (B.C.S.C.)) and Ontario (Re Ange [1970] 3 O.R. 153, 1970 5 C.C.C. 371 (Ont C.A.), Re Sheldon Unreported, (1972) per Lieff J. (Ont. S.C.) the judicial view is that courts do not have such power, whereas in Saskatchewan the opposite view has been adopted: Ruud v. Taylor (sub. nom. R. v. Taylor; Ex parte Ruud) (1965) 51 W.W.R. 335, [1965] 4 C.C.C. 96 (Sask. S.C.).

12. Costs in Criminal Cases Act, 1952.

13. Costs in Criminal Cases Act, 1968.

14. Costs in Criminal Cases Act, 1967.

15. Costs in Criminal Cases Act, 1967.

16. The Canadian practice in civil cases is to permit the successful party to charge against the unsuccessful party a number of tariff items reflecting the work of the various stages of the litigation from commencement to termination.

17. See infra at 15.

18. See supra at 1.

19. New Zealand Law Revision Commission Report of Committee on Costs in Criminal Cases 1966 para 28 (quoted in Burns Report at 92).

20. Statement issued by the English (London) Bar Council October 11, 1967 in response to the inadequate compensation awarded to one Powell after charges were dropped of indecently assaulting a girl of 10. (Referred to in Sharp, "Costs on Acquittal, Some Comparisons and Criticisms" (1968) 16 Chitty's Law Journal 77).

21. See Burns Report at 106, 110, 112-114.

22. See supra at 3.

23. See supra at 3-4.

24. Although occasionally substantial damages can be recovered in tort for malicious prosecution, see eg. Bahner v. Marwest Hotel Company Ltd. and Muir (1969) 6 D.L.R. (3rd) 322; aff'd on appeal (1970) 12 D.L.R. (3rd) 646 (B.C.C.A.), it is really an uncertain and illusory remedy. See text infra at 6.

25. See Press Releases from Office of The Minister of Justice dated March 15, 1973.

26. Some legal aid programs, as in Ontario and British Columbia, permit an accused to select a lawyer from a panel or list of lawyers agreeable to receive legal aid cases. Others, as in Nova Scotia and in the city of Montreal, resemble a public defender system.

27. See supra at 3-4.

28. See supra at 4.

29. The point made here is that even if costs were confined to the "truly innocent accused" as in the Burns Report, (and following the first direction of the compensation rationale), there would still be a considerable gap between the needs of such a scheme and compensation obtainable through the tort remedy.

30. Sharp, "Costs on Acquittal, Some Comparisons and Criticisms" (1968) 16 Chitty's Law Journal 77 at 85.

31. See supra at 3.

32. See supra footnote 20.

33. An acquittal verdict covers both hearings on the merits and dismissals of charges where the Crown fails, or declines to adduce any evidence. And in the latter case while such an acquittal may not prevent the accused from being recharged with the same offence, see R. v. Chambers (1970) 1 C.C.C. 217, and R. v. Rosenberg (1970) 9 C.R.N.S. 366, it remains an acquittal for all purposes until that event.

34. Reference here is to withdrawals of charges and to stays of proceedings; see Criminal Code section 508.

35. See supra footnote 30 at 85.

36. While this is too large a question to fully cover all of the arguments on it, in this paper, it will be obvious that the authors are opposed to the introduction into Canada of a third verdict of "not proven".

37. The Burns Report leaves the eligibility for costs in the discretion of the trial judge and, if the criteria of New Zealand were to be followed, in addition to the question of the accused's innocence the trial judge would be entitled to consider the conduct of the accused in relation to the investigation and prosecution of the offence charged. Thus to some extent it can be argued that since costs eligibility is dependent upon the exercise of discretion taking a factor other than innocence into account the risk of creating a third verdict of less-than-innocence is diminished - but only to some extent.

38. England has provided such costs since 1952; see Costs in Criminal Cases Act, 1952.

39. These jurisdictions do not require costs applications to be made in private chambers nor do they prohibit publication of costs awards or dismissals of costs applications.

40. The view that the "innocent" should not be singled out by costs awards.

41. See Sharp, "Costs on Acquittal..." supra footnote 30 at 85.

42. Ibid.

43. See Burns Report at 129-131 and at 121.

44. See Burns Report at 131-133. Taking the 1968 statistics he concludes that for both indictable and summary conviction cases there were only, approximately, 30,000 cases of acquittals. Added to this figure would be all cases of withdrawals and stays of proceedings. But even then an unmanageable figure would not be attained. As well it is probable that for a good percentage of this total there would not be any costs in excess of legal aid assistance already provided.

45. See supra, introductory note at iv.

46. "The Times" (London) newspaper October 12, 1967.

47. See supra footnote 37.

48. See Burns Report at 121 and see also Sharp, "Costs on Acquittal..." at 80-81.

49. See Burns Report at 71-72 for comment on the 1959 Practice Direction of Lord Parker on the eligibility for costs.

50. See supra at 4.

51. As noted earlier those not convicted include not only the acquitted accused, but those against whom charges are dropped or abandoned.

52. This compromise is necessary not out of principle but simply to make the costs scheme economically feasible.

53. Here Sharp clearly includes all acquitted accused not just the truly innocent.

54. See supra footnote 30 at 85.

55. See supra at 7-9 and infra at 10-12.

56. See infra at 12-14.

57. See supra at 7-9.

58. See supra footnote 30 at 85.

59. Of course if the trial judge in determining costs eligibility were also to take into account the accused's conduct, then it is possible that this risk might be reduced since a refusal of costs could, in a few cases, be attributable to an accused's lack of co-operation. But for the reason that it is difficult to know, in any given case, what will amount to a lack of co-operation, and because our system is not one that requires the accused to be co-operative this is not a substantial point.

60. This very point is acknowledged in the British Columbia working paper on costs. See Working Paper No. 9 "Costs of Accused on Acquittal" para (k) at 62.

61. In answer to this point it would not be sufficient to argue that employers should not be concerned as to whether or not costs were applied for or obtained in considering job applicants who have been charged but acquitted. If there is a real chance that they would, then the reality is that this direction of a costs compensation system creates an unacceptable risk.

62. This is a complaint that is raised against excessive use of the power to stay proceedings contained in section 508 of the Criminal Code.

63. See eg. the discussion of these procedures in the Report of The National Conference on Criminal Justice, January 23-26 1973 at 7-32.

64. For cases that might come within a "screening" system, i.e., where upon an examination of resource allocation a decision is made not to continue a prosecution, an accused might be unwilling to agree to a withdrawal of the charge to facilitate screening if it meant a denial of costs that were tied to proof of innocence. If costs were not so tied to innocence little problem would exist: if costs were available at the stage of screening for cases where charges were withdrawn or proceedings stayed, conceivably the actual costs incurred at that point would be minimal. Furthermore, if all "screening" of cases i.e., abandoning of charges, and "diversion" of cases where the accused consents, were pursuant to an open, acknowledged system that operated subject to known criteria and to a system of review it would be reasonable in a costs compensation system (that did not favour the innocent accused) to not provide costs for these cases.

65. See supra footnotes 37 and 58.

66. Following the first direction of the compensation rationale, costs based on innocence, if eligibility for costs were to be determined by a separate tribunal, eg. a Compensation Board, the board would be required to hold its own hearing on innocence and any other factor that would determine costs eligibility and that would be an extremely trying and inefficient procedure.

67. This reluctance is probably a contributing factor to the restrictive interpretation of England's costs awards scheme; see supra at 8.

68. No doubt there will be some disagreement as to what that level should be. For purposes of this proposal we have taken the sum of $12,000.00 as the annual income level up to which full awards should be made. It is of course simply an arbitrary choice, but it does meet the concern of attempting to provide reasonable costs compensation both to persons in the lower income bracket and to middle-income earners.

69. See eg. the no-fault automobile accident scheme in British Columbia enacted in 1969 by An Act to Amend the Insurance Act S.B.C. 1969 C.11.

70. Subject to the limited availability of a tort suit for malicious prosecution.

71. For punitive or deterrent costs and for costs for or against private prosecutors it would be reasonable to have eligibility determined by the trial court. See supra at 15-16.

72. Eight provinces have enacted legislation providing for compensation to victims of crime. They are:

(1) Alberta, Criminal Injuries Compensation Act R.S.A. 1970 C. 75

(2) Ontario, Law Enforcement Compensation Act R.S.O. 1970 C. 237

(3) British Columbia, Criminal Injuries Compensation Act S.B.C. 1972 C. 17

(4) Saskatchewan, The Criminal Injuries Compensation Act S.S. 1967 C. 84

(5) Newfoundland, The Criminal Injuries Compensation Act S.N. 1968 C. 26

(6) New Brunswick, The Innocent Crimes Victims Compensation Act S.N.B. 1971 C. 10

(7) Québec, The Crime Victims Compensation Act S.Q. 1971 C. 18

(8) Manitoba, The Criminal Injuries Compensation Act S.M. 1970 C. 56

73. Agreements have now been completed with all eight of the provinces that have victim compensation schemes.

74. See Criminal Code 1927 section 1044.

75. See Criminal Code 1953-54 Revision; for a historical development of section 1044 see Martin's Criminal Code 1955 at 958-959.

76. Section 744(1)(a) Criminal Code R.S.C. 1970 C. 34 as amended to July 15, 1972.

77. See Hansard, House of Commons Debates IV at 2888.

78. Report No. 1 Vol. 2.

79. Ibid. at 927.

80. See supra at 2.

81. This aspect of costs awards could develop as a reasonable alternative to the rather "heavy" doctrine of abuse of process. See R. v. Osborn (1971) S.C.R. 184, (1970) 1 C.C.C. (2d) 482, (1971) 12 C.R.N.S. 1. See also R. v. K. (1972) 5 C.C.C. 46 (B.C.S.C.) and Attorney-General of Saskatchewan v. Macdougall 1972 2 W.W.R. 66.

82. This question is the subject of a special study presently in progress for the Procedure Project of the Law Reform Commission.

83. It should not be necessary for the private prosecution to result in a conviction. Rather the test of reasonable and probable grounds for conducting the prosecution should be sufficient.

84. As noted earlier, the sum of $12,000.00 as the income level up to which maximum awards might be made is an arbitrary choice; see footnote 67 supra.

85. If the abandonment of prosecutions through withdrawals and stays of proceedings were according to "open" criteria and subject to review then it might seem reasonable to withdraw some pre-trial determinations from a costs awards scheme. For example for withdrawals or stays to facilitate some alternative form of treatment consented to by the accused it would be unreasonable to make provision for costs awards when, because the alternative treatment is determined by the guilt and consent of the accused, when no costs would be awarded to convicted accused dealt with in the traditional trial and sentencing process.

86. See supra at 1.

87. See Burns Report at 89-93.

88. Working Paper No. 9 at 1.

89. Ibid. at 2.

90. (1935) A.C. 467 at 481-482.

91. S.C. 1960 C. 44.

92. Ibid. section 2(10).

93. The British Columbia Working Paper No. 9 does in fact briefly acknowledge the possibility that our concern is a real one for "true crimes". See Working Paper No. 9 para (k) at 62.

94. See supra at 11-12.

95. Working Paper No. 9 at 4.

96. Sharp, "Costs on Acquittal..." at 85.