LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON CIVIL RIGHTS

(Project No. 3)

PART II: COSTS OF ACCUSED ON ACQUITTAL

LRC 16

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The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

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TO THE HONOURABLE ALEX B. MACDONALD, Q.C.
ATTORNEY-GENERAL FOR BRITISH COLUMBIA

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON CIVIL RIGHTS
(Project No. 3)
PART II: COSTS OF ACCUSED ON ACQUITTAL

This Report has been prepared in the Commission's study on Civil Rights which is Project No. 3 in the Commission's Approved Programme.

Strive as we may for perfection, institutions created by man are fallible. So, in the administration of criminal justice, it is inevitable that from time to time persons will find themselves before the courts, charged with offences which they did not commit. We have concluded that the losses suffered by such persons should he borne by society as a whole.

Thus, in this Report, we recommend a scheme aimed at compensating those individuals who are charged with offences under provincial law and subsequently acquitted or otherwise discharged.

CHAPTER 1 INTRODUCTION

Of the many facets of Canada's judicial system perhaps the most significant is that which is concerned with the administration of criminal justice. A basic purpose of the criminal justice system is, as stated in the Ouimet Report:[1]

> ... to protect all members of society, including the offender himself, from seriously harmful and dangerous conduct.

Although protection of society may be the basic purpose of the criminal law the Ouimet Committee also took the view that it was self-evident that the innocent must be assured of recognition at all stages of the criminal process.[2]

Although provincial offences are not regarded as "criminal" in the true sense of the term,[3] the institutions and procedures adopted to administer them largely parallel those of the criminal law. The provisions of the *Summary Convictions Act*[4] which govern the prosecution of provincial offences in this province are essentially a shorter version of those contained in the *Criminal Code*.[5] Even where gaps occur in the *Summary Convictions Act* they are filled *mutatis mutandis* by the appropriate provisions of the Criminal Code.[6] Provincial offences are, in essence, treated by our criminal justice system in the same way as is murder so far as the rules of evidence and trial procedures are concerned.

Our criminal justice system places high value on safeguards against the conviction of innocent persons, and the accused is presumed to be innocent until convicted as the result of due process of law. Criminal proceedings start at the time the accused is arrested[7] or brought before a court, but the presumption of innocence

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1. *Report of the Canadian Committee in Corrections. Toward Unity: Criminal Justice and Corrections* 11 (Queen's Printer, Ottawa, 1969).

2. *Ibid.* 12.

3. For constitutional purposes, only the Parliament of Canada may legislate with respect to "crimes." *See British North America Act, 1867* 30 Vic., c. 3, s. 91(27).

4. R.S.B.C. 1960, c. 373.

5. R.S.C. 1970, c. C-34.

6. *Summary Convictions Act, supra* n. 4, s. 101.

7. It was an attempt to give meaning to the presumption of innocence that led to the bail reform amendments to the *Criminal Code* in 1971. *See, S.C.* 1970-71, c. 37.

8. [1935] A.C. 462, 481-482.

means that the prosecutor must prove his case against the accused beyond a reasonable doubt. It has been expressed in the famous extract from *Woolmington* v. *Director of Public Prosecutions*[8] *delivered by Viscount Sankey:*

> Throughout the web of English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt ... If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner ... the prosecution has not made out the case and the prisoner is entitled to an acquittal.

This basic presumption is crystallized in section 2(10) of the Canadian Bill of Rights[9] whereby Federal legislation is to be construed so as not to:[10]

> ... deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or the right to reasonable bail without just cause.

Under section 59(a) of the *Summary Convictions Act* the same proposition is contained, albeit in abbreviated form, whereby a person "shall be deemed not to be guilty of [a provincial] offence until convicted thereof."

As a corollary of the presumption of innocence, our trial process requires the prosecutor to present his case against the accused and establish beyond a reasonable doubt that the accused is guilty. This imposes no duty on the accused to answer the case against him, although he may run the risk of "non-persuasion" if he fails to explain apparently condemning evidence. If the accused is convicted he is subject to a variety of penalties and controlled rehabilitation devices including fines, imprisonment, and probation.

If acquitted, the accused is regarded in law as being entirely innocent of the offence with which he was charged, but whether or not an accused is convicted the machinery of criminal justice inevitably carries with it humiliation, inconvenience and financial loss. An acquittal won in Court is a hollow victory to the innocent person if he has been financially destroyed in the process of establishing his innocence. What, then, are society's obligations to such accused and how are they to be met?

In May 1973 this Commission circulated a working paper which explored the problem. The theme of the working paper was stated to be that although suffering as a result of psychological and social damage may be one of the risks an individual member of the community may have to run as a condition of belonging to it, reasonable compensation for financial costs incurred in his defence should, in proper cases, be paid to him if he is charged, tried and acquitted. This proposal, it was suggested, is a corollary of the concern of the law to protect the innocent.

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9. S.C. 1960, c. 44.

10. Provincial Court practice is to observe the standard criminal trial procedures when dealing with Provincial offences.

The working paper set out, as a proposal for reform, a specific scheme for the award of costs to the acquitted accused. That proposal is set but in full as Appendix A to this Report.

Our working paper, which solicited comment on the proposal, was widely circulated among members of the criminal bar, groups having an interest in criminal justice, each judge of the Supreme Court and County Courts in the province, each member of the Court of Appeal, each Provincial Court judge in the lower mainland who regularly hears criminal cases, each District Judge of the Provincial Court, and various prosecutors. The response was disappointing. We received only six replies which related to the substance of the proposals made; three from County Court judges, one from a municipal prosecutor, one from the British Columbia Civil Liberties Association, and one from the Director of the Project on Criminal Procedure currently being carried out by the Law Reform Commission of Canada. The latter response took the form of a study paper on this topic which was circulated for comment and criticism in August 1973.

Since the circulation of our working paper there have been a number of new developments in addition to the circulation of the study paper referred to above. In England the various statutes which provided for costs in criminal cases have been consolidated into a single Act.[11] Consequent on that consolidation has come a new practice direction which radically alters the presumptions governing the exercise of discretion to award costs under the English legislation.[12] In British Columbia the *Crown Costs Act* has recently been repealed and the *Crown Proceedings* Act enacted.[13]

The final conclusions reached, and recommendations made, in this Report are, therefore, based on the tentative conclusions set out in the working paper, re-examined in the light of the response received and the new developments referred to above.

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11. *See* Chapter V.

12. *Ibid.*

13. *See* Chapter II.

CHAPTER II COSTS OF ACCUSED AT COMMON LAW

At common law the general rule relating to costs in litigation is that the "vanquished party must pay costs."[1] This rule derived from the Chancellor's equitable jurisdiction[2] and was finally adopted by statute in the sixteenth century.[3]

The question of the award of costs against the Crown in criminal cases is merely one facet of a wider issue concerning the responsibility of the state and its agents towards private individuals who may have suffered[4] injury at the hands of the state.[5]

> The system of responsibility of the central government in England centres around the position of the Crown. During earlier feudal times the king did not possess the transcendental qualities with which he was later endowed by theologians, political philosophers and lawyers. The king was not the State; and although he could not be sued, this was due merely to the old principle that no feudal lord could be sued in his own courts.[6]

It was during the Middle Ages that legal theory, influenced by ecclesiastical doctrine, evolved the principle that the sovereign held his position by divine right and was, therefore, not subject to man-made laws. In the reign of Henry III it was recognized that the king could not be sued in the central courts of law, because they were his own courts and no lord could be sued in his own court.[7] Considerable changes in English society resulted from the disappearance of the feudal system and the

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1. *"In expensarum causa victus victori condemnandus est."* For a short history of the development of costs in judicial proceedings, *see* 4 Holdsworth, *A History of English Law* 436-538.

2. *Ibid*, 536.

3. The *Statute of Gloucester,* 6 Edw. 1, c. 4, assigned costs to a successful plaintiff, and 23 Hen. 8, c.15 and 4 Jac. 1, c. 3 assigned costs to a successful defendant where a successful plaintiff could have made such recovery. It was not until *Garnett* v. *Bradley*, (1878) 3 App. Cas. 944, that a successful, defendant became entitled to costs as such.

4. There is an extensive body of published comment concerning the development of sovereign immunity as a legal doctrine. *See, e.g.,* Borchard, *Government Liability in Tort,* (1924-25) 34 Yale L.J. 1, 129, 229; (1926-27); 1, 757, 1039; concluded (1928) 28 Column. L.Rev. 577, 734; Borchard, *Government Liability in Tort,* (1928) 26 Can. B.Rev. 399; Davis, *Tort Liability of Government Units,* (1956) 40 Minn. L.Rev. 751; Lansing, *The King Can Do No Wrong! The Oregon Tort Claims Act,* (1963) 47 Ore. L.R. 357; Street, *Governmental Liability: A* Imparative Study (1953): Williams, *Crown Proceedings Act, 1947* (1948)

5. Blanchly & Oatmah, *Approaches to Governmental Liability in Tort: A Comparative* Survey, (1942) 9 Law & Contemp. Prob., 181, 182.

6. Holdsworth, *A History on Remedies Against* the (1922) 38 L.Q.R. 141-142.

decrease in power of the great nobles, accompanied by a concomitant increase in the power of the sovereign. A number of doctrines were developed by political theorists, theologians and judges to explain and rationalize these changes. The primary doctrine defined sovereignty, personified the Crown as the State, and applied the principle that the king can do no wrong.[8]

So far as the specific issue of costs is concerned, Blackstone expressed the matter in the following way:[9]

> The king (and any person suing to his use) shall neither pay nor receive costs; for, besides that he is not included under the general words of the statutes, as it is his prerogative not to pay them to a subject, so it is beneath his dignity to receive them.[10]

In England, until the Victorian era, the only way in which a subject could obtain a remedy against the Crown was by bringing a petition of right.[11] In 1860 *The Petitions of Right Act, 1860*[12] as enacted regulating proceedings against the Crown and providing for costs to be awarded to and against the Crown in certain cases. This enactment, however, did not relate to criminal or tort matters. The *Petitions of Right Act, 1860* was amended by the *Administration of Justice (Miscellaneaus Provisions Act, 1933)*[13] which provided that in any civil proceedings or arbitrations to which the Crown is a party the costs shall be in the discretion of the Court or arbitrator. Finally, the *Crown Proceedings Act, 1947*[14] swept aside most of the immunities, other than immunities relating to criminal proceedings, which the Crown formerly enjoyed against its subjects. None of that legislation in any way affected criminal proceedings which, so far as indictable offences were

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7. Blanchly & Oatman, *supra* n. 5 at 183.

8. 3 *Blackstone's Commentaries,* 400. An implied criticism of this formulation is contained in the comment of J.W.C. Turner who considered that: In criminal law costs do not 'follow the event.' The common law knew nothing of costs. And the statutes which introduced them do not mention the Crown - *an omission which Blackstone elevates into rules,* that it is the prerogative of the Crown not to pay costs, and that it would be beneath its dignity to receive them. Hence as criminal prosecutions are technically at the suit of the Crown no judgment for costs could be given to them ... *Kenny's Outlines of Criminal Law,* para. 769, (19th ed., 1966)

9. To this rule there were a number of statutory exceptions relating to specific civil actions. *See Blackstone's Commentaries, ibid.* at n. 60.

10. This remedy was not available in actions in tort.

11. 23 & 24 Vict., c. 34.

12. 23 & 24 Geo. 5, c. 36, s. 7.

13. 10 & 11 Geo. 6, c. 44.

14. 8 Edw. 7, c. 15.

concerned, had been largely governed by the *Costs in Criminal Cases Act, 1908*.[15] That Act has been variously amplified and has been recently re-enacted as the *Costs in Criminal Cases Act, 1973*.[16] The legislation upon which it is based has been followed by broadly similar legislation in New Zealand[17] and New South Wales.[18]

In Canada the position is complicated by the constitutional division of powers. Two provinces[19] require a petition of right and retain the old common law doctrine of sovereign immunity in relation to tort actions. The federal position has almost paralleled the English developments.[20] In 1875 a Petitions *of Right Act*[21] was passed which mirrored the rules in force in England under The *Petitions of Right Act, 1860*.[22] The 1875 Act which gave jurisdiction to the superior courts of the provinces, was replaced in 1887 by legislation granting that jurisdiction to the Exchequer Court, which had been created in 1876.[23] The need to apply for the Governor-General's fiat, which was

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15. 21 & 22 Eliz. s, c. 14. There had been discrete instances of a statutory authority to award limited costs in summary matters. Section 18 of the *Summary Jurisdiction Act, 1848* gave the justices a discretion to award costs as between prosecutor and defendant. The *Costs* in Criminal *Cases Act, 1908* "contained a very restricted power to allow costs to the defence Devlin L.J. in *Berry* v. *British Transport Commission,* [1962] 1 Q.B. 306, 324; [1961] 3 All E.R. 65 73.

16. Statutes of New Zealand 1967.

17. Statutes of New South Wales 1967, Act. No. 13.

18. Prince Edward Island and Newfoundland. *Seegenerally* Law Reform Commission of British Columbia, *Report* on the *Legal Position of the Crown* (LRC 9, 1972).

19. Cn the development of the present law of crown immunity in Canada *see*: Bourinot, Petition of Fight *(Annotation),* [1928] 2 D.L.R. 625-656; French, Rights *in Contract* and in *Tort in Relation* to the *Crown,* (1956) 6 Chitty's L.J. 76; Jamieson *;Proceedings By and Against the Crown in Canada;* (1948) 26 Can. B. Rev. 373; Kennedy, *Suits by and Against the Crown* (1928) 6 Can. B. Rev. 329; McLaurin, *The Crown as Litigant,* (1936) 14 Can. B. Rev. 606; Strayers, *Crown Immunity and Judicial Review* in Lang (ed.), *Contemporary Problems in Public Law* 79 (1968); *Liability of the Crown in* Tort, (1936) 14 Can. B. Rev. 499.

20. F.C. 1875, c. 12.

21. Strayer, *Crown Immunity* and *Judicial Preview* in Lang (ed.), *Contemporary Problems* in Public *Law* 79 (1968).

22. Audette, *Practice of the Exchequer Court of Canada* 84-85 (2nd ed. 1909).

23. Section 18(l)(c) of the Petition *of Right Act* enacted by amendment, S.C. 1952, c. 98.

24. S.S. 1952-53, c. 30; Strayer, *supra* n. 21 at 80.

discretionary, was removed in 1951.[24] In 1958 the *Crown Liability Act*[25] enlarged the substantive liability of the Crown and removed most of its immunities at common law.

In British Columbia a petition of right was required, and the common law doctrines of sovereign immunity were retained, until 1974. The enactment of the *Crown Proceedings Act* [26] altered this and the law of British Columbia is now comparable to that which prevails federally and in most other provinces.[27]

The specific issue of the award of costs against the Crown is one which has been readily resolved by the courts in other provinces. The general rule formerly applied in Canada under the common law was that set out in *Johnson* v. *The King*.[28] In the absence of statutory modification or "exceptional circumstances" governing the matter, the Crown neither received nor paid costs. This rule, however, is not one which is generally adhered to by Canadian courts today.[29] summarizing contemporary judicial practice, Limerick J.A. in *R.* v. *Guidry* for the Appeal Division of the Supreme Court of New Brunswick stated:[30]

> ... [T]he Appeal Court of Ontario had adopted the view that such a rule of common law is an anachronism and the Crown should receive and pay costs and do award costs against the Crown. "The rule of dignity which formerly prevailed that the Crown (and the Attorney-General acting for the Crown) neither asks nor pays costs, is practically superseded."

The Appeal Court of Manitoba in *Attorney-General for Manitoba* v. *Attorney-General of Canada,* 50

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25. Bill No. 6, 1974.

26. The *Crown Proceedings Act* implemented most of the recommendations which this Commission made in the *Report on Legal Position of the Crown, supra* n. 18.

27. (1904) A.C. 817, 825 (P.C.).

28. For a discussion of the question whether costs may be awarded against the Crown, *see Gooliab* v. *The* Queen (1967), 59 W.W.R. 705, 717, 735, in which the case law on the matter was reviewed by the Manitoba Court of Appeal and in which it was held that in appropriate cases costs may be awarded against the Crown.

29. (1965), 47 C.R. 375, 380; [1966] 2 C.C.C. 161. This case dealt with costs on appeal under the *Summary Convictions Act,* S.K.B. 1960, c. 72. It was held that the Court had the power to award costs against the Crown.

30. R.S.B.C. 1960, c. 87.

> Man. R. 17 at p. 23 [1942] 1 W.W.R. 688, [1942] 2 D.L.R. 96 held. "Unless the Legislature intervenes, it will be for the Judges to determine whether the sensible attitude that apparently obtains in Ontario shall be followed or Johnson v. The *King, supra*, alone shall be looked at for guidance ...

In summary, the former "general rule" that costs are not awarded to or against the Crown seems in some jurisdictions to have fallen into desuetude so far as judicial practice is concerned and has been reversed in a number of Provinces by statutes dealing with specific subject matter.

In British Columbia it is somewhat difficult to assess the extent to which the "general rule" prevails because until very recently the old common law position was enshrined in section 2 of the *Crown Costs Act*[31] which provided that:

> No Court or Judge may adjudge, order or direct that the Crown, or any officer, servant or agent of and acting for the Crown, shall pay or receive any costs in any cause, matter, or proceedings except under the provisions of a Statute which expressly authorizes the Court or Judge to pronounce a judgment or to make an order or direction as to costs in favour of or against the Crown.

That provision was more stringent than the rule set out in *Johnson* v. *The King*[32] as it could not be relaxed in "exceptional circumstances."

The *Crown Costs Act* was initially passed in 1910.[33] The reasons for its enactment have not been obscured with the passage of time. The immediate cause if found in the judicial policy then being applied. The practice in British Columbia concerning the award of costs in Provincial offences prior to this Act has been set out in two decisions: *R.* v. *Little*[34] and *In Re Narain Singh*.[35] In *Little* costs were awarded to the Crown in a *certiorari* application to quash a conviction under section 4 of the *Coal Mines Regulation Act*.[36] In dismissing the *certiorari* application the Full Court held that costs would be awarded to the Crown stating, "... The old rule [that the Crown neither asks for nor pays costs] has been broken into of late years."[37]

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31. *Supra* n. 27

32. (1910) Journals of the Legislative Assembly (B.C.) 58.

33. (1898), 6 B.C.R. 321.

34. (1908), 13 B.C.R. 477.

35. R.S.B.C. 1897, c. 138. Little was charged with being the manager of a coal mine and allowing a Chinese to be employed at the mine.

36. (1898), 6 B.C.R. 321, 322 per McColl, C.J.

37. British Columbia *Immigration Act,* S.B.C. 1908, c. 129.

That decision was followed by the Full Court *In Re Narain* Singh and costs were granted against the Crown in a successful *habeas corpus* application where a number of immigrants had been jailed under Provincial legislation[38] which was held to be *ultra vires* in the light of the existing federal *Immigration Act*[39] in delivering the judgment Hunter C.J. held:[40]

> In this case the Court had decided to adhere to the rule of practice laid down 10 years ago in the case of *Regina* v. *Little* (1898), 6 B.C.R. 321, in which it was established that the Court would and should on occasion give costs either for or against the Crown. That practice as then established has never been interfered with by the authorities, although they have had frequent occasion to change the rule; and therefore it must be understood so far as we are concerned, that we will not interfere with it, especially as in our opinion the practice is reasonable.

The Journals of the Legislative Assembly do not reveal any background to the *Crown Costs Act* but a survey of the contemporary newspapers shows that the impetus was derived from the Attorney-General's concern at the decision in *Narain Singh*.

At the second reading of the Bill on 9 February, 1910[41] one commentator summarised its effects:[42]

> A measure which practically went through today will hit the man who may unfortunately be wrongfully prosecuted and who has to appeal to the Supreme Court in order to get relief from fine or imprisonment. This bill will effectively prevent the court from giving him costs as against the Crown, as has been what the courts themselves term the very reasonable practice in this province. H.C. Brewster protested against such a reactionary piece of legislation going through.

In outlining the policy lying behind the Bill in some detail the same commentator reported:[43]

> Mr. Bowser [the Attorney-General], moving the second reading of a bill respecting Crown costs, said the practice of British courts, settled by the House of Lords, was that the Crown, acting for the people and in the public interest alone, could not either receive or pay costs. The B.C. courts, as he considered, were misinterpreting the law, and in a recent case the Chief Justice had laid it

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38. R.S.C. 1906, c. 93.

39. (1908) 13 B.C.R. 477, 481.

40. (1910) 39 Journals of the Legislative Assembly 33.

41. *Victoria Daily Times,* Thursday, February 10, 1910.

42. *Ibid.*

43. R.S.B.C. 1960, c. 373, ss. 55 (Trail), ss. 79, 82, 83 (Appeals), s. 91 (e) (stated case to Supreme Court), and s. 94 (Appeal to Court of Appeal on question of law). *See* Ch. III *infra.*

> down that the courts did not feel like departing from the practice of ten years past. In that case an Indian agent had laid information, the magistrate in all good faith had recorded a conviction and then the Attorney-General's department was dragged in to defend a conviction, and be mulcted in costs, in a matter with which it had never had anything to do.
>
> H.C. Brewster looked upon the bill as quite unnecessary. It placed any man who might be wrongfully brought before the courts in a position of helplessness in the matter of costs. In the recent case referred to Chief Justice Hunter, in Full Court, in stating that the court did not intend to depart from the practice of the past added: "Especially as in our opinion the practice is reasonable." Suppose the province had an inefficient Attorney-General the public accounts would show these costs being paid owing to that cause, and the people would demand a better man in the office.

"I think," added Mr. Brewster, "that what the people demand is more progressive and less reactionary legislation. I am sorry the Attorney-General has brought in this Bill, and I do not think it should pass unless he gives us some better excuse for it than he has done."

With the benefit of hindsight it is legitimate to point out that if the Attorney-General's office were concerned about private informations being laid and then taken up by the Crown resulting in the Crown being "mulcted in costs," narrower statutory provisions could have been enacted to remedy the situation. As it was enacted, section 2(1) of the *Crown Costs Act* was of general application and subject only to specific statutory exception.

Accordingly, in prosecutions of provincial offences no costs could be awarded to an accused or the Crown in the absence of specific statutory authority empowering the court to grant them. Statutory authority concerning provincial offences is contained in the Summary *Convictions Act*.[44]

In 1974 the *Crown Costs Act* was repealed by the *Crown Proceedings Act*.[45] If that and no more were done the law relating to costs arising out of provincial offences, except those governed by the *Summary Convictions Act*,[46] would once more be governed by the common law.

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44. *Supra* n. 25, s. 17.

45. S. 56 of the *Summary Convictions Act* provides: The fees and allowances mentioned in the tariff to this Act and *no others* are the fees and allowances that may be taken or allowed in proceedings before Justices under this Act [emphasis added]. This would seem to override any right at common law or under a statute of general application to award costs.

46. Rule of construction (f) of S. 23 of the *Interpretation Act*, R.S.B.C. 1960, c. 199 states:

> Every Act and every provision or enactment thereof shall be deemed remedial, whether its immediate purport be to direct the doing of anything that the Legislature deeps to be for the public good, or to prevent or punish the doing of anything that it deems contrary to the public good; and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act, and of such provision or enactment, according to their true intent, meaning and spirit;

The Crown Proceedings Act does, however, make provision for costs in section 11(1):

> In proceedings against the Crown and proceedings in which the Crown is a party the rights of the parties shall, subject to this Act, be as nearly as possible the same as in a suit between person and person, and the court may
>
> (a) make any order, including an order as to costs, that it may make in proceedings between persons; and
>
> (b) otherwise give such appropriate relief as the case may require.

Does that provision, in effect, oust the common law rules relating to costs and expressly authorize the court to award them in causing criminal proceedings?

The plain wording of section 11(1) seems to lend itself to that interpretation. It may, however, be argued that the Act is to be interpreted as being remedial[47] and that its ambit should extend only to those civil actions which, before its enactment, could not be pursued or could be pursued only through a petition of right. Some weight is lent to that interpretation by section 3(2)(e) the *Crown Proceedings Act* which provides that nothing in section 2, which inter alia abolishes the fiat and makes the Crown liable in tort, "authorizes proceedings against the Crown in respect of anything done in the due enforcement of the criminal law or the penal provisions of any Act."

Thus it is not clear whether costs arising out of provincial offences are governed by section 11(1) of the Crown *Proceedings Act* or are a matter of common law. If the latter is the case other difficulties emerge because it cannot be predicted with certainty how British Columbia judges would interpret the common law and exercise such newly acquired freedom as they may have to award costs in criminal matters. It is likely, however, that the rule in *Johnson* v. *The King*[48] would not prevail and the liberal trends evidenced by the Little[49] and *Narain Singh*[50] cases at the turn of the century and contemporary judicial practice in other provinces would be adopted.

The repeal of the *Crown Costs Act* will, in fact, have a relatively narrow effect. As costs at trial and on appeal with respect to provincial offences are the subject of special provisions of the Summary *Convictions Act*[51] the right to award costs to the acquitted accused, either at common law or under the *Crown Proceedings Act,* is ousted in

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47. *Supra* n. 27.

48. *Supra* n. 33.

49. *Supra* n. 34.

50. *Supra* n. 43.

51. The relevant sections of the *Summary Convictions Act* are examined in greater detail in the following Chapter.

favour of the more specific provisions.[52]

The actual impact of the repeal of the *Crown Costs Act* would seem to be limited to proceedings relating to the extraordinary remedies of *certiorari, prohibition, mandamus* and *habeas corpus*[53] arising out of provincial offences[54] and costs may now be available.

52. It will be recalled that it was a successful application for *habeas corpus* that prompted the enactment of the *Crown Costs Act*.

53. The law relating to the availability of costs on applications for extraordinary remedies arising out of *Criminal Code* proceedings is unsettled. Section 438(2)(c) of the *Code* confers on the Supreme Courts of the Provinces the power to regulate, in criminal matters, the pleading, practice and procedure in the court, including proceedings with respect to *mandamus, certiorari, habeas corpus, prohibition, bail, and costs*; and the proceedings on an application to a summary conviction court to state a case. The question which arises from this section is whether the right to make rules to regulate costs in criminal matters includes the substantive right to award such costs, or only gives the right to regulate the amount of such costs and the procedure under which they are awarded, taxed and collected. This is an issue which has not been judicially resolved by the Supreme Court of Canada, and judicial practice varies amongst the Provinces. *See, Re Christianson* (1951), 3 W.W.R. 133; *R.* v. *Cunningham* (1953), 3 W.W.R. 345; *Re Bence*, [1954] 2 D.L.R. 460; *Re Ange* [1970] 5 C.C.C. 371, 374 (*per* Laskin J.A.); *Re Sheldon* (1972), 8 C.C.C. (2d) 355. cf, *Ruud* v. *Taylor* (1965), 51 W.W.R. 355; R. v. *McClenis,* [1970] 3 O.R. 791; R. v. *Smythe*, [1971] 2 O.R. 209; *Hrischuk* v. *Clarke and Policha* (1970), 73 W.W.R. 236; *Evans* v. *Pesee* (1969), 70 W.W.R. 321.

CHAPTER III COSTS OF ACCUSED UNDER THE SUMMARY CONVICTIONS ACT

A. Current Law and Practice

1. Costs at trial

Section 55 of the *Summary Convictions Act* purports to grant the trial court wide powers in the matter of costs:

> (1) The Justice may in his discretion award and order such costs as he considers reasonable and not inconsistent with the fees established by section 56 to be paid
>
> (a) to the informant by the defendant, where the Justice convicts or makes an order against the defendant; or
>
> (b) to the defendant by the informant, where the Justice dismisses an information.
>
> (2) An order under subsection (1) shall be set out in the conviction, order, or order of dismissal, as the case may be.
>
> (3) For the purposes of this Act, costs awarded and ordered to be paid by a person under this section shall be deemed to be all or part, as the case may be, of a fine imposed against him.

Section 56 of the *Summary Convictions Act* provides that:

> The fees and allowances mentioned in the Tariff to this Act and no others are the fees and allowances that may be taken or allowed in proceedings before Justices under this Act.

Section 55 does not seem to have been the subject of any reported decisions but its terms are relatively clear and the legislative intent apparent. Under subsection (1) the trial Justice[1] has a *discretion* to award *reasonable costs* to any of the persons outlined in paragraphs (a) and (b) so long as the conditions outlined in those paragraphs are met and if in his view the award is consistent with the fee structure established by section 56.

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1. Defined in s. 2 of the Act as being a "Justice of the Peace, and includes two or more Justices, if two or more Justices act or have jurisdiction, and also a Judge of the Provincial Court or any person having the power or authority of two or more Justices of the Peace."

2. *Report of Sub-Committee on Costs in Criminal Acquittals,* Vancouver Bar Association, Criminal Justice subsection.

It is appropriate to deal with this last matter first since it highlights one of the more striking anomalies which was taken up in the *Hyde Report*[2] presented to the Vancouver Bar Association, Criminal Justice Subsection in 1969. In this context the Report states:[3]

> The *Summary Convictions Act*... s.55 provides that costs, not inconsistent with the fees and allowances set out in s. 56, are payable to a defendant by an information. This is discretionary in the Justice and is almost identical to the Code s. 716 [now s. 744].
>
> Under s. 56, the fees and allowances mentioned in the Tariff and no others are the fees and allowances that may be taken or allowed in proceedings before Justices under the Act.
>
> In 1966 [S.B.C. 1968, c. 12, s. 13] the Legislature amended the Tariff by the *Statute Law Amendment Act*, and deleted all but item 1 of the Tariff. *The result appears to be* that the only *costs that may now be assessed under* the Summary Convictions Act *is the $5.00 costs of arrest. Insofar as a successful defendant* is concerned, therefore, the costs are nil that he can *recover*.[4]

This conclusion is similar to that drawn by Kerwin C.J. in *Attorney-General for Quebec v. Attorney-General for Canada*[5] with respect to the effect of the identical terms of sections 733 and 736 of the former Criminal *Code* (now section 744): the costs referred to in the section are meant to be only those fees and allowances contained in the Tariff.

Although the matter seems closed as a consequence of that decision, it is arguable that another construction could be placed on section 55. Section 55 refers to the award of costs which are not inconsistent with the fees established by section 56. Section 56 provides that:

> The fees and allowances mentioned in the Tariff to this Act and no others are the fees and allowances that may be taken or allowed in proceedings before Justices under this Act.

It can be argued that the Tariff of fees and allowances is merely meant to provide a guide to setting the scale of costs and nothing more, as a distinction might be drawn between section 55, which speaks of "costs", and section 56 which refers to "fees and allowances": two different categories of expense. "Costs" have been defined as:[6]

> A pecuniary allowance made to the successful party, (and recoverable from the losing party), for his expenses in prosecuting or defending a suit or a distinct

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3. *Ibid.* at 6.

4. Emphasis added.

5. [1945] S.C.R. 600, 607-608. *See also,* R. v. *Abram,* [1946] 1 C.R. 151.

6. *Black Is Law Dictionary* 415 (4th ed.).

7. *Ibid.* at 740.

proceeding within a suit.

"Fees" on the other hand are, *inter alia*:[7]

> [R]recompense for an official or professional service or a charge or emolument or compensation for a particular act or service.

The term "allowance" in this context usually refers to costs which the ordinary scale does not allow,[8] but it is arguable that the legislature was merely referring to paragraphs 26, 28 and 29 of the Tariff: specified[9] expenses incurred as opposed to a fee for attending and taking part in the trial. The construction of section 55 adopted in the *Hyde Report* would, in effect, render that section nugatory.[10] Accordingly, the view could be taken that the discretion to award costs in section 55 is in no way contingent on the existence of a scale in the Tariff to the Act except so far as the scale must be taken as a guide by the court in assessing the amount of costs to be awarded. Such a view, however, clearly conflicts with the decision of the Suppeme Court of Canada in *Attorney-General for Quebec v. Attorney-General for Canada*[11] and probably would not prevail in British Columbia Courts.

A further statutory provision for costs may be found in section 335 of the Vancouver *Charter*[12] which provides that:

> Every fine and penalty imposed by or under that authority of this Act may, unless other provision is specially made therefore, be recovered and enforced with *costs* on summary conviction before a Justice of the Peace.[13]

This leads to a paradox: "costs" are undefined in the *Vancouver Charter* and the prosecution procedure is defined in the *Summary Convictions Act*. But under the latter Act, effectively, costs at trial cannot be awarded. How then do the courts arrive at the scale of costs in the numerous parking offence prosecutions occurring in Vancouver?

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8. *Ibid.* at 101.

9. *E.g.*, mileage travelled and actual living expenses when away from ordinary place of residence.

10. Such an interpretation, in fact, seems to be-in conflict with s. 23(f) of the *Interpretation Act*, R.S.B.C. 1960, c. 199.

11. *Supra* n. 5.

12. S.B.C. 1953, c. 55.

13. Emphasis added.

2. Costs against informants

The term "informant" is defined in section 2 of the *Summary Convictions Act* as "the person who lays an information." In the ordinary couprse of events an information will be laid by a public official, normally a police officer, although sometimes informations may be laid by private individuals.[14] As section 55 provides that the costs of the acquitted accused (if awarded) shall be borne by the informant, a *de facto* limit on recovery is created that amounts to one of the Act's more obvious defects. There is a natural reluctance on the part of trial Judges to award costs against individual police officers who have acted honestly and in the ordinary pursuit of their duties.

The earlier legislation did not impose this limitation on the award of costs. Section 47 and 48 of the earlier *Summary Convictions Act*[15] provided that:

> 47. In every case of a summary conviction or of an order made by a Justice, such Justice may, in his discretion, award and order in by the conviction or order that the defendant shall pay to the prosecutor or complainant such costs as to the said Justice seem reasonable in that behalf and not inconsistent with the fees established by law to be taken on proceedings had by and before Justices. Code, s. 735.
>
> 48. Whenever the Justice, instead of convicting or making an order, dismisses the information or complaint, he may, in his discretion, in and by his order of dismissal, award and order that the prosecutor or complainant shall pay to the defendant such costs as to the said Justice seem reasonable and consistent with law.

Under these provisions the Court had a discretion to award costs to or against the prosecutor or complainant and the defendant. The change in text was wrought in 1955, apparently to bring the language into conformity with that adopted during the revision of the *Criminal Code* in 1953.[16]

In summary, restricting costs to those recoverable from and by informants renders section 55 of the *Summary Convictions Act* of very little real effect. When that feature is combined with the construction placed on the comparable *Criminal Code* provision by the Supreme Court of Canada[17] - that only the Tariff [or other statutory items] can be recovered - then section 55 is rendered nugatory in every sense except for the informant who may be awarded the sum of $5.00, that being the cost of arresting the

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14. In private prosecutions it will be a private individual but in some proceedings taken by the Crown, private individuals may also have laid the information. The term "prosecutor" is also deemed by s.2 of the *Summary Convictions Act* to mean "an informant, or the Attorney-General or their respective counsel or agents."

15. S.B.C. 1915, c. 59. These provisions applied until amended by s. 54 of the *Summary Convictions Act,* S.B.C. 1955, c. 71, which remains in force today. *See now,* R.S.B.C. 1960, c. 373.

16. Section 615 of the *Criminal Code,* R.S.C. 1953, c. 51. The former Code provision was identical in terms to the *Summary Convictions Act* (B.C.) sections. The reason for the change from "prosecutor" to "informant" remains unclear.

17. *Attorney-General for Quebec* v. *Attorney-General for Canada, supra* n. 5.

18. S. 55(2).

defendant under warrant where a summons has been previously issued. The only conclusion to be drawn is that, for all practical purposes, section 55 is no more than meaningless statement of principle.

Section 55 requires the court to set out an order as to costs in the order for conviction or dismissal[18] and such costs are deemed to be part of a fine where such is adjudged, so the remedies available on non-payment of costs apply in the same way as to fines.[19]

B. Costs on Appeals

1. Trial de novo in County Court

The ordinary appeal is by way of a trial *de novo* in a County Court[20] under section 79 of the *Summary Convictions Act* which provides that:

> Where an appeal has been lodged in accordance with this Act from a conviction or order made against a defendant, or from an order dismissing an information, the Appeal Court shall hear and determine the appeal by holding a trial *de novo*, and for this purpose the provisions of section 7 and of sections 42 to 46, 50 to 55, and 67 to 70, in so far as they are not inconsistent with sections 72 to 84, apply *mutatis mutandis*.

At first sight, because section 55 seems to apply *mutatis mutandis* to the appeal, the same criticism levelled at the trial position can be made concerning appeals. The criticism leveled at the trial position must, however, be tempered with respect to the trial *de novo* as a result of section 82(1) which provides that:

> Where an appeal is heard and determined, or is abandoned or is dismissed for want of prosecution, the Appeal Court may make any order with respect to costs that it considers just and reasonable.

This provision obviously alters the effect of section 55 so far as it applies to appeals because it grants the County Court a discretion to award costs that it considers just and reasonable *without reference to a tariff or schedule*. If County Courts exercised their discretion as granted, the position with respect to costs would not be unsatisfactory.

The difficulty is that, for the purpose of ensuring uniform judicial practice in matters such as costs in criminal cases, in some Counties Judges have decided not to award costs in any event[21] involving a summary conviction appeal whether Provincial or under the *Criminal Code*. The rationale, apart from standardizing judicial practice, seems to be that since costs cannot be awarded by the Court of Appeal on indictable

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19. S. 55(3).

20. An "Appeal Court" under ss. 72-84 means "the County Court of the County in which the conviction or order was made or sentence passed." *See* s. 71.

21. This information was volunteered by a Vancouver County Court Judge who said it was the practice in that County and others.

offence appeals under section 589(3) of the *Criminal Code,* it would be inequitable to permit such costs in summary conviction matters, which are generally held to be of lesser social gravity, on appeal by trial *de novo*.[22] This reasoning is not entirely convincing. If it is desirable to award costs in any criminal proceedings, it should not be a bar in lesser offence appeals that indictable offences are not susceptible to awards of costs. The existence of an inequity should not be a reason for extending it. At best, there is a diversity of judicial practice in the matter, and in Vancouver County, which is most concerned with such appeals, the practice is not to exercise the discretion at all.

2. Appeals by way of stated case

Under section 85(1) a party to proceedings under the *Summary Convictions Act* may appeal a conviction, order, determination or other proceeding of a justice on the ground that it is erroneous in law or is in excess of jurisdiction. An appeal of this kind is launched by applying to the Justice to state a case outlining the facts as found and the grounds on which the proceedings are questioned. The appeal is heard in the Supreme Court[23] which, under section 91(e), is empowered to make "any order with respect to costs that it considers proper, and that could be made by a Justice, but not against the Justice who states a case."[24] With respect to these appeals the discretion vested in the Supreme Court seems to be limited in the same way as that of a justice under section 55.

3. Appeals on Questions of law to the Court of Appeal

These appeals may be taken under section 94 of the *Summary Convictions Act* which provides that:

> 94. (1) An appeal to the Court of Appeal may, with leave of that Court, be taken on any ground that involves a question of law alone against
>
> (a) a decision of a Court in respect of an appeal under s. 79; or
>
> (b) a decision of the Supreme Court in respect of a stated case under s. 91.
>
> (2) Sections 581 to 595 [now ss. 601 to 616][25] of the *Criminal Code* apply, *mutatis mutandis*, to an appeal under this section, and the Court of Appeal may grant a new trial.
>
> (3) Notwithstanding subsection (2), the Court of Appeal may make any order with respect to costs that it considers proper in relation to an appeal under this section.

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22. This explanation was also made by the same County Court Judge.

23. *S.*91

24. Except as provided in s. 89(2), e.g., where a Justice has refused to state a case.

25. These in no way relate to the power to award costs except in so far as s. 610(3) excludes the power to award costs in appeals concerning indictable offences.

Section 94(3) seems to give the Court of Appeal a complete discretion to award costs.

C. Conclusions

In summary the existing provisions relating to the award of costs in provincial offences are defective in that:

(a) The right to costs arising out of the extraordinary remedies is unsettled following the enactment of the *Crown Proceedings Act* and the repeal of the *Crown Costs Act*.

(b) The right to costs arising out of trial under the *Summary Convictions Act*

(i) is conditional on an essentially non-existent Tariff;

(ii) Crown, where a stay of proceedings has been entered or where unnecessary, or a large number of remands or adjournments have caused a party to incur additional expensed;

(iii) provide only for payment by the informant personally if costs are awarded to the accused.

© Where a wider discretion to award costs exists, such as in appeals by way of trial *de novo,* judicial practice is not uniform.

(d) Those fees and expenses provided for in the Tariff in the *Summary Convictions Act* are unrealistically low.

CHAPTER IV JUDICIAL IMPRESSIONS OF THE EXISTING POSITION

A. Survey of Judicial Views

In the course of this study a questionnaire was prepared and circulated in an attempt to survey judicial views of the existing powers to award costs in provincial offence proceedings. Copies of the questionnaire were sent to the twenty-two Provincial Court Judges and the five County Court Judges in Vancouver. Replies were received from eight Provincial Court Judges and two County Court Judges.

The following table summarises the results of that survey:

		Provincial Court	County Court
1.	Do you consider the provisions relating to the granting of costs in cases falling under the *Summary Convictions Act,* R.S.B.C. c. 373, to be adequate?		
	No	8	2
	Yes	-	-
2.	If you feel the provisions are inadequate, does this criticism apply to costs to he awarded to:		
	Witnesses	-	1
	The accused	-	-
	Both witnesses and the accused?	2	7
3.	In the event of legislation enabling a court to award costs to an accused in a trial involving provincial offences being enacted, in what type of cases should it apply?		
	The court should be granted a complete discretion subject to a maximum scale [*see e.g.* , *s.*1 of *The Costs* in *Criminal Cases Act,* 1952 (U.K.)).	3	1
	The court should have a discretion to be effected in the light of but not bound by stated statutory guidelines and subject to a maximum scale [see e.g., s. 5(2) of *The Costs in Criminal Cases Act,* 1967 (N.Z.)].	4	1
	The court should have no discretion and the situations in which costs should be awarded should be spelled out in such legislation.	1	-
4.	The nature of costs that may be awarded		
	Should be left to the discretion of the court, subject to a maximum scale.	6	1
	Should be clearly defined in any proposed legislation	2	1
5.	Any proposed legislation should also make provision for costs to be awarded in favour of the Crown in appropriate cases.		

Yes	6
No	1
Not sure	1

One Provincial Court Judge took the view that:

> ... awarding of costs to either party in a Criminal proceeding or quasi-criminal proceeding,...might delay justice and be fairly costly as regarding administration. In most cases of a criminal nature where there is a trial, there are sufficient complications without bringing in the question of costs ... there is some advantage to keep the administration of justice as simple as possible.

The same Judge was of the opinion, however, that the scale of witness fees (both Crown and Defence) is too low and should be amended.

This view regarding the scale of witness fees was repeated by another Provincial Court Judge. A further concern raised, not covered by the questionnaire, related to cases where the prosecutor has obtained an adjournment resulting in additional costs to the defendant whether he is acquitted or not. The same concern was voiced regarding the use of a stay of proceedings by the Crown when it has been refused an adjournment. This last matter is now one that falls directly within the purview of this Report since, although there are no indictable Provincial offences, the power to stay proceedings has been extended to summary conviction offences.[1]

B. Conclusions

Any conclusions to be drawn from the questionnaire must be imperfect having regard to the small sample tested and the few responses received. At least one thing, however, stands out clearly: all those judges responding are of the opinion that the existing provisions relating to the award of costs at trial under the *Summary Convictions* Act are inadequate or defective. Almost unanimous views were held that the defects relate to the power to award costs and expenses to the accused and witnesses (for both the Crown and the accused).

There is a diversity of views concerning the type of case which should be susceptible to an award of costs. A small majority favoured a discretion with stated guidelines and subject to a maximum scale.[2] Most judges felt that the trial court should have a discretion (subject to legislative scale maxima) as to the nature of costs to be awarded and, again, there was almost unanimity in the view that the Crown, too, should be capable of obtaining any type of award that may be made to an accused.

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1. *See* s. 732 (1) of the Criminal Code. This would seem to be incorporated by reference into the *Summary Convictions Act* by s. 101.

2. As in s. 5(2) of the *Costs in Criminal Cases Act, 1967 (N.Z.). See* Appendix C.

CHAPTER V COMPARATIVE SURVEY OF EXISTING SCHEMES

There are several statutory schemes in the Commonwealth relating to the award of costs in criminal cases.[1] It is proposed to consider briefly the three major schemes, since there are a number of features unique in each system. The practice in the United States of America will also be reviewed.

A. United Kingdom:[2] The Costs in Criminal Cases Act, 1973[3]

1. General

This Act governs the granting of costs in most criminal proceedings. Costs may be awarded by Magistrates' Courts,[4] Crown Court,[5] Divisional Court,[6] Court of Appeal[7] and the House of Lords,[8] to either the accused or the prosecutor. Costs may also be awarded to witnesses.[9] Provision is made in almost all cases for the payment

1. There are four major schemes in existence at the present time: the United Kingdom (excluding Scotland); Northern Ireland; New Zealand and New South Wales. Western Australia is in the process of reviewing the law relating to the payment of costs in criminal cases, and their Law Reform Committee has recommended that an acquitted accused should be awarded his costs subject to the discretion of the court. *See* Working Paper *Payment of Costs in Criminal Cases* (1972). In Tasmania, legislation permits costs to be paid to an accused in respect of a new trial rendered necessary by reason of the initial proceedings having proven abortive, or because the jury's verdict was insupportable. *See, Appeal Costs Fund Act, 1968* (Tas.), No. 57.

2. *The Costs in Criminal Cases Act, 1973* (U.K.) does not extend to Scotland or Northern-Ireland (s. 22). Northern Ireland, however, has enacted similar legislation. *See Costs in Criminal Cases Act* (Northern Ireland) 1968, c. 10.

3. 21 & 22 Eliz. II, c. 14. The Act is included as Appendix 3 to this Report; it merely consolidated the provisions relating to costs in a number of existing Acts, the main one being the *Costs in Criminal Cases Act, 1968, 15* & 16 Geo. V i and 1 Eliz. II, c. 48 [hereafter referred to as the 1952 Act]. The 1952 Act was itself a consolidating Act which repealed the *Costs in Criminal Cases Act, 1908,* 3 Edw. VII, c. 15, and amended and consolidated other statutes dealing with costs. The 1952 Act was substantially amended by the *Courts Act, 1971,* c. 23. For a comprehensive study of the 1952 Act up to 1969, *see:* G. J. Graham-Green, *Criminal Costs and Legal Aid* (2nd ed. 1969). For a general review see: (1952) 102 L. J..580; (1956) 100 Sol. J. 255; (1959) 26. The Solicitor 184; (1960) 124 J.P. 198; 110 L.J. 679; (1961) 125 J.P. 440; (1967) 131 J.P. 504; 117 New L.J. 1373; and A.K.R. Kiralfy, *The English Legal* System (4th ed. 1967).

4. *S.* 1, 12.

5. Ss. 3, 4.

6. S. 5.

7. Ss. 7, 9, 10, 11.

8. Ss. 6, 10, 11.

9. *Ss.* 1, 3, 8.

of these costs from "central funds" provided by the government.[10] Costs may also be awarded between parties at trial court and at various levels of appeal.

No guidelines are set out in the Act indicating when costs are appropriate. The discretion of the judge is total. Nor is any tariff provided[11] beyond the general reference to costs "reasonably sufficient to compensate the [party concerned] for the expenses properly incurred by him," and to compensate any witness "for the expense, trouble or loss of time properly incurred in or incidental to his attendance."[12] The award of costs to a witness for the defence does not turn on an award of costs to the accused.[13] The amount of costs is to be ascertained as soon as practicable by the appropriate officer of the court.[14] It seems that there must, in addition, be some evidence of accused's ability to pay before an order will be made against him.[15]

In a 1968 Practice Direction by the Criminal Division of the Court of Appeal, Lord Parker, C.J., made the following observations concerning section 1 of the 1952 Act:[16]

> The court's attention has been drawn to several recent cases in which on an application being made on behalf of an acquitted person for costs under s. 1 of the Costs in Criminal Cases Act, 1952 the judge ... has awarded less than the sum put forward as representing the costs of the defence. Once, however, the judge has exercised his discretion in favour of making an award of costs there is no further discretion to limit the amount awarded to a contribution, such as a percentage of the amount asked for because the section refers to payment of "the expenses properly incurred" in carrying on the defence. At the same time the acquitted person is not entitled to anything more than the costs properly incurred. The proper approach is to assume the defendant to be of adequate but not abundant

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10. An exception would seem to be summary trial of informations in magistrates courts when costs may be awarded only between parties, *see*, Appendix P, s. 2

11. But, "rates or scales of payments of any costs payable out of central funds" may be prescribed by the Secretary of State under s. 17(l)(a).

12. *See, e.g.*, s. 3 (3)

13. Ss. 1(7), 3(8). In some cases costs may not be awarded to character witnesses. *See,* 1(5), 3(5).

14. *Ss.* 1(6), 3(6), 4(2), 5(3), 6(3), 7(4), 8(i), 9(3), 10 (3), 11 (2), 12 (2).

15. *R.* v. *Pottage* (1922), 17 CV. App. R. 33. An order may be discharged on appeal by the Court of Appeal on evidence of means: *R.* v. *Howard* (1910), 6 Cr. App. R. 17; *R.* v. *Jones.* (1921), 16 Cr. App. R. 52. Imprisonment may not be ordered in default of payment: *R.* v. *McClusky* (1921), 15 Cr. App. R. 148.

16. [1968] 1 W.L.R. 389; [1968] 1 All E.R..778.

> means and to ask oneself whether the expenses were such as a sensible solicitor in the light of his then knowledge would consider reasonable to incur in the interests of his client, the defendant ...
>
> Section 1(5) of the Act of 1952 provides specifically that the amount of costs is to be ascertained by the proper officer of the court and, accordingly, the judge should in general refer the question of amount to the proper officer. Should however the judge have no reason to think that the sum asked for is in any way excessive there is no reason why he should not, in the interests of expedition, award that sum without referring the matter to the proper officer.

There appears to be no reason why these remarks should not apply also to the 1973 Act.

The nature of the costs recoverable under this legislation is not subject to any general limitation, and includes counsel's or solicitor's fees.[17] All costs may be recovered if shown to be reasonably incurred in the prosecution or defence. The witnesses' expenses may be laid down by regulations made by the Secretary of State.[18]

Costs may be awarded on information or complaint which is not proceeded with or where an accused is committed for trial but the trial is not proceeded with.[19]

2. The Exercise of Discretion to Award Costs

Neither the 1952 Act nor the 1973 Act contains any guidelines concerning the circumstances in which costs should be awarded to the acquitted accused. On the face of the legislation the award is purely a matter of discretion for the judge. In fact, this question has been the subject of a number of Practice Directions which give some insight into how the English system has operated, and will continue to operate in practice.

Shortly after the 1952 Act came into force a Practice Direction was issued by Lord Goddard C.J. which stated that costs should be awarded only in "exceptional"[20] cases. This rule was amplified by Lord Parker C.J. in a further Practice Direction in 1959:[21]

> The court's attention has been drawn to the difficult question as to the lines on which the discretion to award costs to an acquitted person should be exercised ... The discretion is in terms completely unfettered, and there is no presumption one

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17. S. 20(2).

18. S. 17(1). For the regulations made under the 1952 Act, *see, Witnesses' Allowances Regulations,* s. I. 1971 No. 107.

19. S. 12.

20. (1952) 36 Cr. App. R. 13.

21. (1959) 3 All E.R. 471.

way or the other as to the manner of its exercise.

> In a statement issued on May 24, 1952, this court, while emphasising that every case should be considered on its merits, said that it was only in exceptional cases that costs should be awarded ... While no attempt was there made to catalogue the exceptional cases in which costs might be awarded, such illustrations as were given were cases where the prosecution could be said to be in some way at fault. On the other hand a suggestion has been canvassed that the mere fact of an acquittal should carry with it the expectation that the discretion would be exercised in favour of the acquitted person. Were either of these views correct, the effect would be to impose a fetter on the exercise of the absolute discretion conferred by the statute. As we have said, there is no presumption one way or the other as to its exercise. Each case must be considered on its own facts as a whole and costs may and should be awarded in all cases where the court thinks it right to do so. It is impossible to catalogue all the factors which should be weighed. Clearly, however, matters such as whether the prosecution have acted unreasonably in starting or continuing proceedings and whether the accused by his conduct has in effect brought the proceedings, or their continuation, on himself, are among the matters to be taken into consideration. On the other hand the court desires to make it plain that they entirely dissociate themselves from the view that the judge is entitled to base his refusal to award costs on the ground that he thinks that the verdict of the jury was perverse or unduly.benevolent. The mere fact that the judge disagrees with the verdict of the jury is no more a ground for refusing to award costs to the acquitted person than the mere fact of his acquittal is a ground for awarding them.

In *R.* v. *Sansbury,*[22] Devlin J. (as he then was) stated that the Practice Direction of Lord Parker had not laid down any new law, but had made it clearer that the Judge's discretion was rather wider than had previously been thought; and it was made quite clear that the widely held notion that an award of costs against the prosecution necessarily involved some reflection on the conduct of the prosecution was quite wrong. In other words, misconduct was not a condition precedent to an award of costs against the prosecution under the 1952 Act.[23]

As the 1973 Act introduced no changes in principle; one might think that the principles set out in the 1952 and 1959 practice directions would continue to guide the exercise of discretion to award costs. That has not been the case. A further practice direction issued by Lord Widgery C.J. seems to have altered the position radically.[24]

> Although the award of costs must always remain a matter for the Court's discretion, in the light of the circumstances of the particular case, it should be accepted as normal practice that *when the Court has power to award costs out of central funds it should do so in favour of a successful defendant, unless there are positive reasons for* making a *different order.* Examples of such reasons are:-
>
> (a) where the prosecution has acted spitefully or without reasonable cause.

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22. [1959] 3 All E.R. 472.

23. But the courts in England seem to have preferred to follow the direction of Lord Goddard. In an article explaining costs in magistrates' courts, Dr. E. Anthony, J.P., states that defence costs for the acquitted accused would normally be granted only if the court felt that the proceedings were wrongly brought and in effect constituted a criticism of the police. *See* (1967) 131 J.P. 504. This is in direct conflict with *R.* v. *Sansbury, Ibid.*

24. [1973] 2 All E.R. 592.

Here the defendant's costs should be paid by the prosecutor.

(b) where the defendant's own conduct has brought suspicion on himself and has misled the prosecution into thinking that the case against him is stronger than it really is. In such circumstances the defendant can properly be left to pay his own costs.

© where there is ample evidence to support a verdict of guilty but the defendant is entitled to an acquittal on account of some procedural irregularity. Here again, the defendant can properly be left to pay his own costs.

(d) where the defendant is acquitted on one charge but convicted on another. Here the Court should make whatever order seems just having regard to the relative importance of the two charges, and to the defendant's conduct generally.[25]

The reasons for this shift in thinking are not entirely clear. It may have been a response to mounting public dissatisfaction with the former, more restrictive, practice.[26] Or it may have been based on the fact that costs are now paid from a central fund rather than by local governments.[27]

The principles are set out in the 1973 Practice Direction have been the subject of academic comment which is discussed in a later Chapter of this Report.[28]

B. New Zealand: The Costs in Criminal Cases Act, 1967[29]

The Costs in Criminal Cases Act, 1967 (N.Z.) seems to be based on the English model but has been expanded to encompass additional matters. Costs are defined as, "any expenses properly incurred by a party carrying out a prosecution, carrying on a defence, or in making or defending an appeal."[30] Where an accused is convicted, the court has a

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25. Emphasis added.

26. *See* comment (1973) 123 New L.J. 555.

27. The fact that the accused may be in-receipt of legal aid seems to be immaterial to the award of costs. *See* R. v. *Arron* [1973] 2 All E.R. 1221.

28. *See* Chapter VI.

29. *See* Appendix C.

30. *Costs in Criminal Cases Act, 1967,* s. 2.

31. *Ibid.* s. 4(1) and (2).

discretion to order him to pay a just and reasonable sum towards the prosecution's costs and use, to this end, any money taken from him on his arrest.[31] If an accused is convicted and the prosecutor has not prepaid the court fees, such fees may be ordered to be paid by the accused, and costs awarded to the prosecutor are recoverable in the same way as a fine.[32]

If an accused is acquitted or discharged, or the information is dismissed or withdrawn,[33] the court may order that he be paid such sum as it thinks *just and reasonable* towards the cost of his defence. This discretion is absolute and can be exercised in any way the court considers proper. The court must, however, in exercising its discretion, take into account all the relevant circumstances, including:[34]

(a) Whether the prosecution acted in good faith in bringing and continuing the proceedings:

(b) Whether at the commencement of the proceedings the prosecution had sufficient evidence to support the conviction of the defendant in the absence of contrary evidence:

(c) Whether the prosecution took proper steps to investigate any matter coming into its hands which suggested that the defendant might not be guilty:

(d) Whether generally the investigation into the offence was conducted in a reasonable and proper manner:

(e) Whether the evidence as a whole would support a finding of guilt but the information was dismissed on a technical point:

(f) Whether the information was dismissed because the defendant established (either by the evidence of witnesses called by him or by the cross-examination of witnesses for the prosecution or otherwise) that he was not guilty:

(g) Whether the behaviour of the defendant in relation to the acts or omissions on which the charge was based and to the investigation and proceedings was such that a sum should be paid towards the costs of his defence.

There is no presumption for or against the granting of costs in a particular case,[35] but no accused is to be granted costs merely because he has been acquitted or

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32. *Ibid. s.* 4(4).

33. *Ibid,* s. 4(3) and (4).

34. *Ibid. s.* 5(2).

35. *Ibid,* s. 5(3).

36. *Ibid. s.* 5(4).

discharged or that the information has been dismissed or withdrawn,[36] nor should he be refused costs merely because the proceedings were properly brought and continued.[37] In practice the courts in New Zealand seem reluctant to award costs to acquitted persons.[38]

Section 6 of the Act provides that if an accused is convicted, but the court takes the view that the prosecution involves a difficult or important point of law, the court may order that the accused be paid such sum as it considers just and reasonable in the circumstances.[39] This section was applied in *Simpson* v. *Simpson,*[40] where the Court of Appeal dismissed an appeal against conviction of the accused's driving a motor-vehicle with excessive blood alcohol concentration.[41] The case turned on a very technical analysis of a directory provision contained in the *Transport (Breath Tests) Notice, 1969*.[42] The Court of Appeal allowed appellant's counsel's disbursements;[43] including reasonable travelling and accommodation costs "and the costs of printing the case and all other reasonable disbursements."[44]

Where the court is of the opinion that costs should be paid to an accused because the prosecution was brought, continued or conducted negligently or in bad faith, the court can order the costs to be paid by the Government Department, officer of the Crown, local authority or public body on whose behalf that person was

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37. *Ibid.* s. 5(5).

38. *See,* Working Paper of Western Australia Law Reform Committee, *Payment of Costs in Criminal Cases,* para. 23, (1972). This statement appears to be supported by the low cost of operating the scheme. *See ibid.* para. 45.

39. Subject to any regulations made under the Act.

40. [1971] N.Z.L.R. 393.

41. In breach of s. 59A of the *Transport Act, 1962* (N.Z.).

42. S.R. 1969-70 (N.Z.).

43. Since the Crown had undertaken not to enforce the costs awarded in the Magistrate's Court and Supreme Court.

44. (1971) N.Z.L.R. 393, 397-98, *per* North P.

45. *Costs in Criminal Cases Act, 1967,* s. 7(2).

acting or by that person personally, and they are recoverable as a debt[45] otherwise (i.e., in the absence of negligence or bad faith), an order is to be made against the Crown (if the Crown is prosecuting) and to be paid by the Secretary for Justice from money appropriated for that purpose by Parliament and may be recovered as a debt. If the prosecution is not by or on behalf of the Crown, the order is made against the informant and recoverable as a debt.[46]

The Act provides for costs on appeal[47] and for costs in those cases where a party gives notice of an appeal and fails to pursue it.[48] If the court which determines an appeal is of the opinion that a difficult or important point of law is involved, it may order that either party's costs may be paid irrespective of the result of the appeal. An order for costs made by either the Supreme Court or the Court of Appeal has the effect of a judgment.[49] Before awarding costs under the Act the court must permit any party who wishes to make submissions or call evidence relating to the matter of costs a reasonable opportunity of doing so.[50]

C. New South Wales: The Costs in Criminal Cases Act, 1967[51]

The Costs in Criminal Cases Act, 1967 is less detailed than the comparable United Kingdom and New Zealand legislation. A certificate may be awarded at trial to the accused after the merits of the case have been determined and acquittal or discharge has resulted.[52] A certificate may also be awarded to the accused where, on appeal, his

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46. *Ibid. s.* 7 (1) (a) and (b)

47. *Ibid.* s. 8.

48. *Ibid.* s. 9.

49. *Ibid. s.* 11.

50. *Ibid.* s. 12.

51. *See* Appendix D. The 1967 Act was amended in 1971, to enable an applicant for a certificate to adduce evidence of further relevant facts not established in the original proceedings. This amendment was prompted by the decision of the New South Wales Court of Criminal Appeal in R. v. *Williams (1970)* 91 W.N. (N.S.W.), where it was held that "all relevant facts" under s. 3(1)9a) means all the relevant facts as they emerged at the trial.

52. *Costs in Criminal Cases Act, 1967,* s. 2(a).

53. *Ibid.* s. 2 (b)

conviction is quashed and he is discharged.[53]

The certificate granted by the court must specify that in the court's opinion,[54]

(a) if the prosecution had, before the proceedings were instituted, been in possession of evidence of all the relevant facts, it would not have been reasonable to institute the proceedings, and

(b) that any act or omission of the defendant that contributed, or might have contributed, to the institution or continuation of the proceedings was reasonable in the circumstances.

A certificate granted by a Justice must also specify the amount of costs that the Court would have ordered to be paid if an order had been made against the informant, prosecutor or complainant, as the case may be.[55]

Section 4 of the Act sets out procedure under which costs granted under a certificate are to be recovered. Application is made to the Under Secretary of the Department of the Attorney-General and of Justice for payment from the Consolidated Revenue Fund. The Under Secretary is required to furnish a report to the State Treasurer specifying the amount and any amounts that in the Under Secretary's view the defendant may have received or be entitled to receive from other sources. The Treasurer then, assuming his belief that the amount is justified, may make payment. Section 5 provides for the Under Secretary to be subrogated to all rights the defendant might otherwise have had to recover costs, once payment is made. Section 6 renders a certificate granted under this Act inadmissible in legal proceedings.

D. American Practice

There is a paucity of full discussion in American legal periodicals on the question of costs in criminal cases,[56] and particularly on the subject of costs to an acquitted accused. Many states have recently amended their criminal law and criminal procedure code provisions as a result of the draft American Model Penal Code, but the question of costs has not apparently been a matter of any significance in this process. Even the President's Commission on Law Enforcement and Administration of Justice ignored the question of cost taxation in its discussion of

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54. *Ibid.* s. 3(1)(a) and (b). S. 3(1)(a) has been taken to apply only to those defences that the Crown was unaware of prior to drawing up the indictment. *See Z.* v. *Lawrence,* (1969) 90 W.N. (Pt. 1) (N.S.W.) 425. *See also* R. v. *Spall,* (1970) 91 *W.N.* (N.S.W.) 327.

55. *Costs in Criminal Cases Act, 1967,* s. 3(2).

56. *See generally Charging Costs of Prosecution to Defendant*, (1971) 59 Georgetown L.J. 991; Lovell, *The Case for Reimbursing Court Costs and A Reasonable Attorney Fee to the Non-Indigent Defendant Upon Acquittal*, (1970) 49 Neb. L. Rev. 515; *Reimbursement of Defence Costs as a Condition of Probation for* indigents, (1969) 67 Mich. L. Rev.1404; Stein, *Imprisonment for Nonpayment of Fines and Costs; A New Look* at the *Law and the Constitution,* (196869) 22 Vand L. Rev. 611; Cheek, *Attorney's Fees: Where* Shall the *Ultimate Burden Lie?* (1967) Vand L. Rev. 1216; Harvey, *Jail Fees and Court Costs for the* indigent Criminal Defendant: *An Examination of the Tennessee Procedure,* (1967) 35 Tenn. L. Rpv. 74; *Criminal Law - Taxation of Court Costs,* (1964) 17 Vand. L. Rev. 1572; Original *Cost Assessment in Missouri - Without Rhyme or Reason,* (1962) Wash. U.L.Q. 76; Smyth, *The Assessment and Collection of the Costs of a Criminal Prosecution in Wyoming,* (1969) 13 Wyo. L.J. 178.

57. President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* 14-28 (1967).

sentencing alternatives.[57]

The almost universal rule in the United States is that the accused bears the costs of his defence whether he is found guilty or innocent. In this regard American practice follows the common law rule that no costs were recoverable in any criminal court action except by statutory provision.[58] But those statutory provisions which do exist, in most instances, permit only the imposition of the costs of prosecution[59] upon a convicted person, and there is no reciprocal legislation to permit the award of costs to the acquitted accused.[60] In fact, one Pennsylvania statute, in force for 150 years, allowed a jury to tax costs against an acquitted accused if it felt that his conduct merited censure but not conviction on the charge.[61] The United States Supreme Court, however, has held the statute to be unconstitutional.[62]

There are two recognized rationales for awarding costs against criminal defendants, one being recovery or a portion of the expenses attributable to his wrongdoing, and the other, punishment by increasing the penalty upon conviction.[63]

Where a convicted accused is unable to pay the costs of prosecution, in the majority of states he is imprisoned until the costs are paid, or until he has served his time in jail to fulfil his sentence or work out his fine.[64] Fourteen states unqualifiedly require criminal defendants to work out their costs completely if they are unable to

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58. *20 Corpus Juris Secundum. See also 20 American Jurisprudence*, s. 107 (2nd ed.).

59. These costs generally include witness fees, transcript costs and fees of Court officers. But at least two states include the fees for court-appointed attorneys: Virginia and Ohio. This is not the practice of the Federal courts: 28 U.S.C.S 1918(b) (1964). There are six states which do not tax the costs of prosecution to the convicted defendant: California, Connecticut, Massachusetts, Michigan, New Hampshire, and New York. *See note Criminal Law - Taxation of Court Costs, supra* n. 56 at 1572, n. 3.

60. *See Reviser's Note*, 28 U.S.C.S 1921 (1964) at 6013 where it states: "The acquitted defendant is not permitted to tax costs against the U.S. Indeed, the allowance of costs in criminal cases is not a matter of right, but rests completely within the discretion of the court. *Morris* v. *U.S.,* 1911, 185 Fed. 73, 107 C.C.A. 293."

61. Pa. Stat. Ann. Tit 19, S 1222 (1964).

62. *Giacco* v. Pennsylvania, 382 U.S. 399, 402 (1965Y. *See generally* (1966) Duke L.J. 792.

63. For a complete discussion of these rationales of cost assessment in American courts, *see Charging Costs of Prosecution to the Defendant supra* n. 56 at 991-1006.

64. Indigent defendants present special problems. In Wyoming, for example, a defendant was sentenced to less than six months imprisonment and a fine of $100.00, but the costs of prosecution were over $900.00. If the defendant had been unable to pay them, he would have been in jail for over two and a half years. *See* (1959) 13 Wyo. L.J. 178, 181.

65. Alaska, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Minnesota, Mississippi, Montana, Nebraska, North Dakota, Ohio, Texas, and Washington. *See Criminal Law Taxation of Court Costs, supra* n. 56 at 1573, n.

pay them.[65] Several states have recognized the inequity of requiring imprisonment for nonpayment of costs and either:

(a) have no provision for taxation of costs,[66] or

(b) by statute exempt all criminal defendants from the payment of such costs.[67]

In still other states,[68] statutes specifically exempt persons who cannot pay from payment of costs or from imprisonment for non-payment. Eleven states[69] have statutes which empower the trial judge to release criminal defendants from liability for costs. Apparently, however, these statutes are rarely used.[70] The Federal system[71] and eight states[72] set a relatively short period for which an indigent defendant may be imprisoned for nonpayment of costs. None of these provisions however addresses itself to the question at issue in this Report: the award of costs to the acquitted defendant.

In the United States, the acquitted defendant has only one avenue of recourse available: an action in tort for malicious prosecution. This has proven to be a very limited remedy.[73] Many states have codified provisions which deal with proceedings

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66. Arizona, California, Iowa, and New York.

67. Connecticut, Massachusetts, Michigan, and New Hampshire.

68. Colorado, Illinois, Kansas, New Jersey, South Carolina, and West Virginia.

69. Delaware, Florida, Georgia, Montana, Pennsylvania, Rhode Island, South Dakota, Tennessee, Vermont, Virginia and Wyoming.

70. *See, note Criminal Law - Taxation of Court Costs, supra* n. 56 at 1574.

71. 18 U.S.C. S 3569 (1958).

72. Alabama, Hawaii, Maine, Maryland, North Carolina, Oklahoma, Oregon and Wisconsin.

73. For a discussion of the limitations of an action in malicious prosecution, *see Lovell, supra* n. 56 at 522-24.

74. *See* generally: Deering's Penal Code, Ann s. 1447 (Calif.); Minn. Stat. Ann., s. 625.07; Mont. Rev. Codes Ann. s. 94-5114; Ore. Rev. Stat., s. 137. 210; Wash. Rev. Code Ann. 10.46.210; Wis. Stat. Ann SS 9-954.12 and 960.22.

in which the prosecution is malicious and without probable cause. In these instances, the complainant may be ordered by the Court to pay the costs of the action.[74]

In summary, cost taxation in criminal cases in the United States is an established judicial practice, "but one of uncertain and often contradictory character."[75] For the acquitted defendant the cost of obtaining "justice" may have been extremely high, as he is certain to leave the courtroom in a weakened financial condition.[76] He may have lost his job, suffered imprisonment and been publicly humiliated. The American legal community has shown little interest in the plight of the acquitted defendant. Professor Edmond Cahn has summarized the case for providing relief to the acquitted defendant very ably:[77]

> A fair-minded society will not only provide and pay independent counsel to defend all indigent persons who are arrested on serious charges; it will also pay the necessary and reasonable defence costs of all accused persons, whatever their economic condition, who are eventually found to be not guilty. As matters now stand in the United States and most other democratic countries, the state, by recognizing no duty of reimbursement after acquittal, can compel an innocent man to choose between unjust conviction and personal bankruptcy.

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75. *Charging Costs of Prosecution to the Defendant, supra* n. 56 at 1005.

76. Lovell, *The Case for Reimbursing Court Costs, supra* n. 56 at 523.

77. E. Cahn, *The Predicament of Democratic Man*, 51-52 (1961), cited in Lovell, *ibid.* at 535.

CHAPTER VI POLICY CONSIDERATIONS ON THE QUESTION OF COSTS IN CRIMINAL CASES

There are at least two primary policy aspects to the award of costs generally. The first is the compensatory aspect whereby the law attempts to compensate the successful party for those costs he has incurred in the litigation. The second aspect is the punitive and deterrent aspect of costs. Here the law is attempting to deter frivolous actions and punish a party who brings them. It is evident though that neither rationale can be employed to justify the existing inadequacies in the practice of awarding costs under the relevant provisions of the *Summary Convictions Act.*

Are those considerations equally forceful in the context of criminal proceedings? In particular, should the wrongly accused person be entitled to costs?

When this question arose in New Zealand the policy issues were stated in the following way:[1]

> There are two possible approaches to this question. The first is that exposure to 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, incompetence or serious neglect can be attributed to the prosecutor. This view has prevailed in the past. The second is that it is unjust for an innocent man to have to suffer financial hardship, perhaps serious hardship, in establishing his innocence. The expenses of a defended criminal case even in the lower court are often quite substantial and counsel's fees together with witnesses' expenses may often go into treble figures.

The issues were resolved by the suggestion that:[2]

> It would we think be common ground that by accepting the benefits of an ordered society the citizen becomes subject to various dangers and risks, among them the risks of being suspected, of being arrested and of being prosecuted for offences he has not committed. These dangers are minimized by the provision of fair procedure, trained and upright police forces, and speedy and efficient access to the Courts. Nevertheless there are and will always be cases where innocent men are prosecuted without any fault being necessarily laid at the door of the police. It does not seem to us to follow that in these circumstances the citizen must also be expected to bear the financial burden of exculpating himself. Because we cannot wholly prevent placing innocent persons in jeopardy that does not mean that we should not as far as is practicable mitigate the consequences.

This conclusion would seem to apply with equal force in British Columbia.

The basic proposition that costs should, in appropriate cases, be awarded to the acquitted accused did not, however, go unchallenged by two respondents to the working paper. One respondent, a County Court Judge, wrote:

> There in my view are many areas of criminal law more urgently in need of study and reform. I fear that once the door is opened to payment of costs upon

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1. *Report of Committee on Costs in Criminal Cases,* para. 28 (1966).

2. *Ibid.* para. 30.

> acquittal the disadvantage will outweigh the benefits. Judges will be plagued by applications for payment of costs as nearly everyone who has successfully defended a criminal charge will have some reason for thinking he should be reimbursed. There are cases where law enforcement authorities are under obligation to lay charges and to leave the question of guilt or innocence to the courts without any real assurance of obtaining a conviction. Are these authorities to be discouraged in the performance of their duties by the opprobrium of having an order for costs against them?

The other respondent, a municipal prosecutor stated:

> The ramifications of some of the condemnatory proposals [in the working paper] increase with every passing moment of writing, but possibly the principal one is of time. Assuming the worst, one can imagine a fairly insignificant matter; a dismissal, an application to the Court for costs necessitating an opportunity to prepare and make submissions in support. This might well involve allegations of negligence and/or bad faith requiring determination of these issues and to whom they should be attributed, followed by a reference to a taxing officer as to amount.
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> It would not conceivably take many of such instances to necessitate as much time, as the attendance to the ordinary business of the Court itself.
>
> From a good deal of experience must be observed that the writer has experienced very few cases of hardship arising out of the present absence of "costs provisions," an absolute minimum of unwarranted, negligent or bad faith cases, and is aware of no ground swell of feeling in support of the need for such provisions.

These reactions are hardly novel. There have been very few legal innovations making available new rights or remedies which have not been attacked on the basis that the proverbial "floodgates of litigation" will be opened up to deluge the courts. It seems safe to say that such gloomy predictions almost invariably turn out to be wrong. For this reason we regard with some skepticism suggestions that the courts or its officers will be significantly impeded in the discharge of their duties by the availability of costs. The other objections raised seen to reject the compensatory nature of costs. The suggestion is that just compensation should be sacrificed to administrative efficiency.

The other end of the spectrum of opinion on this issue is the basic position taken by the British Columbia Civil Liberties Association: that the accused should be awarded his costs in every case, whether or not he is acquitted.

We reject both extremes. There are, and will continue to be bases where justice demands that the accused should not be required to bear his own costs. In such cases costs should be available. The suggestion of the B.C.C.L.A. is, in the final analysis, a call for a vastly expanded system of legal aid. While we do not quarrel with the proposition that a well administered, readily available scheme of legal aid in criminal matters is a desirable thing, we do not consider the awarding of costs to the accused in all cases to be an appropriate means of achieving this end. We have therefore concluded that, in principle, a person wrongly accused of an offence should not be required to bear the additional burden of the costs of his defence.

It still remains to give some meaning to the expression "wrongly accused." Should it, for example, encompass all those who are acquitted? The following broad categories of cases illustrate the diversity of situations to be considered.

(1) Those cases where charges are brought through malice or an absence of reasonable investigation by either the police or prosecutor,[3] and the accused demonstrates his innocence.

(2) Those cases where the police have acted reasonably in proceeding with criminal charges (assuming it is a police prosecution) but where the accused demonstrates his innocence. This category does not relate to technical defences or defences turning on the "reasonable doubt" test of innocence. It is concerned with those cases where the Court is satisfied on a balance of probabilities that the accused did not in fact commit the offence charged.

(3) Those cases within (2) where the conduct of the accused has in some way contributed to his being charged, such as unreasonably refusing to assist in the investigation or unreasonably hindering it by his silence.

(4) Those cases where the evidence as a whole would support a conviction but the accused is acquitted because the Crown has not managed to prove its case beyond a reasonable doubt or as the result of a technical defence being raised.

In the face of that sort of classification the instinctive reaction of many is to say that those accused in categories (1) and (2) should be awarded costs while those in (3) and (4) should not. That was, in fact the approach which the Commission took in the working paper. We recognized that there would be "gray areas" and therefore proposed that the courts should have a wide discretion in the awarding of costs to the acquitted accused. That discretion would, however, be exercised in accordance with specific guidelines which would tend to draw what we then considered to be desirable distinctions between the more and less worthy accused. This approach is similar to those in New Zealand and England.

That approach has not, however, been free from criticism. The basic objection to it is that two classes of acquitted accused are created: those who receive costs and those who do not. It is argued that this gives rise to a "third verdict" such as that which exists under Scottish law[4] and this is undesirable for a number of reasons. The objections and the arguments in favour of awarding costs to all acquitted accused, are set out in the Study Paper circulated by the Law Reform Commission of Canada.[5] Since the conclusions contained in that study paper on this important point of principle diverge from those which we advanced in our working paper we feel obliged to present the opposing point of view in a full and fair manner and

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3. It is evident from the answers to questionnaires completed by practising criminal lawyers across Canada in a study carried on under the auspices of the Law Reform Commission of Canada that the absence of reasonable investigation is the major reason for their support of awarding costs to the acquitted accused. A secondary function of awarding costs would be to reinforce proper police and prosecution practices.

4. In Scotland there are three verdict alternatives: guilty, not guilty, and not proven. Either of the latter two verdicts will ensure the freedom of the accused. The "not proven" verdict indicates that the state has not established full legal proof that the accused committed the crime, whereas the Scottish verdict of "not guilty" represents a finding that the accused is in fact innocent of the alleged crime.

5. *A Proposal for Costs in Criminal Cases,* a Study Paper proposed by the Criminal Procedure Project of the Law Reform Commission of Canada, (August, 1973).

6. *Ibid.* at 47.

choose to do so by quoting at length from the study paper.[6]

> The most difficult question to be resolved in establishing a costs awarding scheme is just who should receive them ...
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> Earlier we noted 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." 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." So too are all accused persons against whom charges are dropped or suspended 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":[7] "(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. 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. It may be conceded of course that other common law jurisdictions, including England, 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, 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 would require costs to be awarded as of right to all acquitted accused 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" and (b) since all costs awards would have to come from the public purse such a broad scheme would he 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. 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. 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

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8. R. Thoresbym Comment, (1973) 36 Mod. L. Rev. 643, 646.

accepted in that verdict has an independent value which is central to the overall 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. But 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," 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."

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 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. Probably one reason for this limitation is an undue restriction by the courts on their discretionary power. 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 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 he 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, 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 jail 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 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; 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. The value in the general criminal verdict of "not guilty" would remain uncompromised and yet substantial justice would be achieved.

In the context of the English practice direction of 1973 it has been argued that the discretion in the court to award costs now undermines the role of the jury in the system of criminal justice:[8]

> For many hundreds of years decisions of guilt or innocence have been taken solely by the jury; now, in startling breach of principle, after the jury has returned its verdict of not guilty a second decision is to be taken by the judge, though a determination against the successful defendant should be made only when there are "positive reasons." This is an unfamiliar standard of proof, presumably somewhere between proof on balance of probabilities and proof beyond reasonable doubt. However the discretion is exercised it is certain that there will be more abnormal cases than there were "exceptional cases" and it is inevitable that the direction will introduce first and second-class acquittals into England.
>
> The only conclusion possible is that the direction is indeed revolutionary. It asks judges to usurp the jury's function and apply a wholly original standard of proof in ill-defined circumstances so as to bring about a result previously unknown in English law.

While we acknowledge that these arguments are persuasive we are not prepared to go so far as to recommend that costs be payable in all cases to the accused who is acquitted of a provincial offence. In our opinion the "third verdict" issue is much less critical in the context of provincial offences than in the context of "true crimes." Most of these offences carry little moral stigma even when conviction results. That attached to acquittal without costs is minimal. It is irrelevant, moreover, to speak of usurping the function of the jury when provincial offences are invariably tried by a judge alone.

In the final analysis we do not believe that the principle of awarding costs to all acquitted accused would gain any widespread public acceptance. The study paper of the Law Reform Commission of Canada speaks of its "concern ... to maintain the reputation ... of the system of justice itself."[9] It is our view that the automatic award of costs to the acquitted accused in every case would quite possibly achieve the opposite result. An award of costs to the accused who is acquitted on an obvious technicality when the weight of evidence would otherwise support a conviction is more likely to bring the law into disrepute in the public eye than any theoretical violation of principle.

We have concluded that the appropriate model for a scheme of costs in relation to provincial offences is one comparable to those in force in England and New Zealand: discretion with guidelines. Details are outlined in the following chapter.

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9. *Supra* n. 5 at 8.

CHAPTER VII THE COMMISSION'S CONCLUSIONS

A. Legislative Distribution

In our view it is desirable that there be a separate and distinct Act governing costs in criminal matters. Its scope should include all matters tried under the *Summary Convictions Act,* all appeals arising therefrom and all applications for judicial review such as for writs of *habeas corpus, certiorari, mandamus* and *prohibition*, and for declarations relating to matters arising out of provincial offences. Those sections of the *Summary Convictions Act* which relate to costs should be repealed.

B. Who Should Receive Costs?

While we have concluded that costs should be available to the acquitted accused this should not be the only situation in which costs should be awarded with respect to provincial offences. Costs should also be available to the private prosecutor when he is protecting some interest of a public nature. Costs should not be awarded to public prosecutors carrying out their normal duties.

We have rejected the suggestion advanced by the British Columbia Civil Liberties Association that costs be paid to all convicted accused as well as those who are acquitted, but we do think it is desirable that provision be made for payment of costs to the convicted accused in "test case" situations or those involving a difficult question of law.

A realistic award of costs should also be made to witnesses.

C. Who Should Pay Costs?

We foresee certain difficulties if legislation were to be enacted granting courts the power to award costs only against informants, prosecutors and defendants. The most obvious is based on the argument that to award costs against such persons will impede police officers and prosecutors in the fearless pursuit of their respective duties. In the absence of malice or negligence, however, an award to an accused who has been acquitted could be made from a fund established for this purpose by the provincial government. We have concluded that costs should be awarded *to the accused* rather than against the Crown. Costs should not be interpreted as a rebuke or punitive measure against the police and prosecutor, but as a means of compensating the accused for having to stand his trial. This is the situation which prevails in England, New Zealand and New South Wales.

We cannot, however, ignore the fact that costs may have a punitive and deterrent effect which may be desirable in some situations. In awarding costs against a party the law may be able to deter frivolous actions and punish parties who bring them. This is of particular significance in private prosecutions, and may also be of importance in reinforcing proper investigative and prosecution techniques by agencies of the state.

We have concluded that the court should have some latitude in these matters. If the court is satisfied that any person acted negligently or in bad faith in bringing, continuing or conducting a prosecution, it should have the power to direct that the defendant's costs be paid by the government department, officer of the Crown, local authority, or public body on whose behalf that person was acting, or if he was not

so acting, by that person himself. If the accused has difficulty collecting such costs he should be entitled to claim against the fund which could then be subrogated to his rights.

D. Presumptions

As we indicated in the previous Chapter, we have concluded that a scheme for the award of costs to those accused of provincial offences who are acquitted should embody the following principles:

1. The entitlement to costs should be a matter of discretion for the trial judge.

2. That discretion should be exercised in accordance with specified guidelines.

That is the basic position under the schemes in force in England and New Zealand. Those schemes do, however, diverge on the question of whether there should be any presumption for or against costs in any particular case. The New Zealand legislation specifically provides that "there shall be no presumption for or against the granting of costs in any case."[1] In England, on the other hand, there has always been a presumption. Under the 1952 Act the presumption was against the granting of costs (notwithstanding the statement in the 1959 Practice Direction that there was no presumption), while under the 1973 Practice Direction it is now in favour of costs.[2]

While we reject the notion that there should be any presumption against the granting of costs this leaves open the question whether the opposite presumption is desirable. In the working paper it was tentatively concluded that there should be no presumption.[3] In that working paper it was also stated:

> 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 evid6nce 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.... [T]he variety of possible meanings of the term "not guilty" indicate that need for an open mind about the problem of reimbursing the costs of accused persons on acquittal and a flexibility about the appropriate solution.

It has been urged on us that to say "an accused ... is entitled to have his acquittal taken at face value ..." is inconsistent with the position that there should be no presumption. We cannot agree. The statement quoted above is, essentially, a statement of the Commission's expectations that a full and unfettered discretion with

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1. *See* Appendix C, s. 5(3).

2. *See* Chapter V.

3. *See* Appendix A, (m).

respect to costs, subject only to stated guidelines, would be exercised fairly and reasonably.

We are not unaware that under the New Zealand scheme the courts have displayed a reluctance to award costs to the acquitted accused,[4] and recognize that a similar pattern could develop in British Columbia. We are not, however, at this stage, prepared to recommend that a presumption in favour of costs be introduced into a provincial scheme simply to guard against the possibility that our judges might exercise their discretion in a restrictive manner. If experience under a scheme such as that which we recommend demonstrates that our faith has been misplaced the scheme can be altered. We have therefore concluded that there should be no presumption for or against costs in any case.

E. Discretion Guidelines

We adopt, with minor modifications, the guidelines established under the New Zealand scheme which set out the factors to be considered in exercising the discretion to award costs.[5] We do not, however, regard the New Zealand guidelines as being exhaustive and further criteria seem desirable.

We have recommended that when a private prosecution is determined the court be given a discretion to award costs to the prosecutor personally and against him personally if he acts negligently or in bad faith. We feel that a relevant factor to be taken into account in such cases is whether the proceedings were privately commenced because a publicly appointed prosecutor refused to proceed. Where the accused is acquitted that refusal may, in some cases, be regarded as having put the complainant on notice that the charge was ill-founded, and so an award of costs against him personally may be in order. Conversely, the private party who successfully prosecutes a charge may be more worthy of an award of costs if he had first, unsuccessfully, attempted to persuade the proper authorities to take proceedings than if he had proceeded on his own in the first instance.

We have also concluded that when a court is considering the award of costs to a successful private crosscuter it should also look at the nature of the offence to determine if the prosecution is to enforce a "private right" or to protect some broader public interest. For example, section 23 of the *Hairdresser's Act*[6] prohibits the advertising of prices for hairdressing. Prosecutions for offences under that section are normally carried out privately by The Hairdresser's Association of British Columbia. It seems to us that such proceedings are more akin to enforcing internal discipline in a trade organization than protecting a broad public interest and it is doubtful if the public purse should bear their cost.

The 1973 Practice Direction recognized that problems might arise when an accused is charged with more than one offence and is acquitted on one or more

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4. *See* n. 38 to Chapter V *supra*.

5. *See* Appendix C, s. 5(2).

6. R.S.B.C. 1960, c. 169.

counts. The Practice Direction suggests that a positive reason for depriving the accused of costs might be:

> Where the defendant is acquitted on one charge but convicted on another. Here the Court should make whatever order seems just having regard to the relative importance of the two charges, and to the defendant's conduct generally.

That criteria, in modified form should form the basis of a further guideline.

F. Amount and Scope of Costs

While we would leave the entitlement to costs as a matter for the discretion of the judge we have concluded that calculation of the actual amount should be left to a taxing officer of the court as in civil matters. Costs recoverable should include counsel fees, witnesses' expenses, travel and accommodation costs, other disbursements properly incurred, and compensation for loss of wages.

Uniform practice in the matter of costs is desirable and, to that end a tariff or schedule of costs should be developed, with provision for the award of costs on a higher scale where the complexity of the case warrants it.

CHAPTER VIII SUMMARY OF RECOMMENDATIONS

For convenience the Commission's conclusions and recommendations may be summarized as follows:

The Commission recommends that:

1. *Those provisions of the* Summary Convictions Act *relating to costs be repealed.*

2. *New legistation be enacted governing costs arising out of prosecutions for provincial offences (hereafter referred to as "the proposed Act").*

3. *In particular, the proposed Act should provide for the award of costs to a party:*

   (a) *arising from prosecutions under the* Summary Convictions Act.

   (b) *on applications for writs of habeas corpus, certiorari, mandamus, and prohibition or actions for declarations and injunctions relating to matters arising out of provincial offences.*

   (c) *on appeals arising out of (a) and (b).*

4. *For the purposes of these recommendations the term "Party" includes informants (other than the Crown in the right of the Province of British Columbia, or its agents), prosecutors (other than the Crown in the right of the Province of British Columbia and its agents), witnesses, and the accused.*

5. *The proposed Act establish a provincial fund, appropriated annually and administered by the Department of the Attorney-General out of which costs awarded under the propvosed Act may be paid.*

6. *The entitlement to an award of cost of the acquitted or successful accused should be a matter of discretion for the court or judge hearing the matter but that discretion should be exercised having regard to the following factors.*

   (a) *Whether the prosecution acted in good faith in bringing and continuing the proceedings;*

   (b) *Whether, when the proceedings began, the prosecution had sufficient evidence to support the conviction of the defendant in the absence of contrary evidence;*

   (c) *Whether the prosecution took proper steps to investigate any matter coming into its hands fending to show that the defendant might not be guilty;*

   (d) *Whether, generally, the investigation into the offence was conducted in a reasonable and proper manner;*

   (e) *Whether the evidence as a whole would support a finding of guilt but the charge was dismissed on a technical point;*

   (f) *whether the charge was dismissed because the tribunal considered the accused to be innocent in fact;*

   (g) *Whether the conduct of the accused, in relation to the acts or omissions on which the charge was based add to the investigation and proceedings, was such that on acquittal costs should be awarded to him.*

   (h) *Where the application for costs is made by a private informant or private prosecutor, whether the proceedings were privately commenced because of a refusal of the Crown appointed prosecutor to proceed.*

   (i) *Where the application for costs is made by a private informant or private prosecutor, whether the nature of the offence was such that the proceedings were essentially to protect a private right.*

(j) where the accused is acquitted on one or more charges but is convicted on another or others, the relative importance of the charges involved.

7. *Costs awarded to a party be payable out of the fund except where the court is satisfied that any person acted negligently or in bad faith in bringing, continuing or conducting a prosecution, in which case it should have the power to direct that the costs of the accused be paid by the government department, officer of the Crown, local authority or public body on whose behalf that person was acting, or if he was not so acting by that person himself.*

8. *Any award of costs, except those payable out of the fund, should be recoverable as a civil debt, but the court should also be empowered to award the accused his costs from the fund, subrogating the fund to his rights against the person or department liable.*

9. *Where an action, appeal or application is stayed, withdrawn or abandoned by the prosecutor costs be available to the accused on the same basis as if the proceedings had resulted in an acquittal.*

10. *The calculation of the amount of costs awarded should be by a taxing officer of the court in accordance with a prescribed schedule of costs which includes:*

(a) counsel fees;

(b) witness fees;

(c) travel and accommodation costs;

(d) compensation for loss of wages; and

(e) other disbursements reasonably incurred.

11. *Provision should be made for a higher scale of costs in complex cases.*

12. *Before an award of costs is made a court should permit any party affected to make submissions.*

ACKNOWLEDGMENTS

The Commission wishes to express its appreciation to Professor Peter Burns whose research formed the basis of the working paper which preceded this Report. We also wish to thank those who took the time and trouble to respond to that working paper giving us the benefit of their views.

RONALD C. BRAY
Chairman

ALLEN A. ZYSBLAT
Commissioner

PAUL D. K. FRASER
Commissioner

June 24, 1974.

DISSENT OF PETER FRASER

I dissent from the recommendations of the majority Report. I believe the scheme proposed in the Report to be an awkward one which would bring little actual benefit to persons who are acquitted of provincial offences.

The most important shortcoming of the scheme is that the terms of eligibility will tend (in practice if not in theory) to exclude all but a handful of the potential recipients. The proposal is that a person (a) who is acquitted and (b) whose trial satisfies certain criteria may, but not necessarily will, be reimbursed for part but not all of the legal fees he or she has been called upon to pay. Presumably it is restricted to cases where no scheme of Legal Aid has assisted the accused.

I see no reason why the experience in British Columbia under this scheme would differ from the experience of New Zealand and New South Wales,[1] where the actual expenditure of money is negligible. The paucity of successful applications for costs in these two jurisdictions suggests that the entire scheme is unnecessary or that, if necessary, unworkable.

The awkwardness of the scheme lies in the fact that it calls for a judicial enquiry into costs which could easily be lengthier and more complex than the trial itself, putting both the accused and the state to effort hardly justified by the stakes.

I am dubious about the proposition that, as part of the enquiry, the Court will scrutinize the behaviour and motives of the prosecution[2] and the conduct of the police.[3] It may be that both Crown Counsel and the police need their actions reviewed from time to time but I question whether this is the context in which review should take place. I do hot think the Judges of the Provincial Court will be happy if they are obliged to examine prosecution and police files; and it does seem to run counter to the efforts which have been made in British Columbia over the last several years to emphasize the separation of the judicial from the police and prosecutorial functions. Finally, I doubt that a system of judicial review, through costs, would have the effect of "reinforcing proper investigative and prosecution techniques," as the Report suggests.[4]

I am concerned, too, that the scheme would create a middle ground between guilt and innocence. The principle that one is innocent until proven guilty is not so sacrosanct as to be beyond question but dilution of the principle is not something that should be undertaken lightly. On this question, I am in general agreement with

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1. Majority Report, Appendix E.
2. Majority Report, Recommendation 6, sub-paragraphs a, b and c.
3. Majority Report, Recommendation 6, sub-paragraph d.
4. At 61.

the extract from the Law Reform Commission of Canada Study Paper reproduced in the majority Report.[5]

Is it sufficiently straightforward to distinguish the person is "innocent in fact"[6] from the person who is acquitted on a "technicality"[7] or because of "reasonable doubt?"[8] Identifying what is and what is not a technicality is not an exercise I wish to embark upon here. Opinions differ: what some may regard as a technicality would be considered by others to be an absence of reliable information or a legitimate legal deficiency in the charge, such as charging an offence unknown to the law.

Even if there were a consensus as to the meaning of "technicality," the majority Report errs in the apparent assumption that a person who is acquitted on a "technicality" is probably guilty of the offence charged. That is not a reliable indicator of guilt: even where a defence is based on evidence tending to show innocence, it is standard practice for defence counsel to seek an acquittal on a "technicality."

The majority Report also seems to assume that the accused person is probably guilty where is acquittal is based upon reasonable doubt. But "reasonable doubt" both in law and in the daily experience of Judges connotes a real and tangible apprehension that the accused person is innocent, despite the best efforts of the whole apparatus of the state to demonstrate otherwise.

Two justifications are offered by the majority Report for this truncated system of costs.

The first is that most provincial offences carry "little moral stigma even when conviction results."[9] The number of provincial offences is very large and some of them proscribe behaviour to which many people would attach moral stigma. There are, for example, laws in this province concerning the employment of child labour,[10]

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5. At 52-57.

6. Majority Report, Recommendation 6, sub-paragraph f.

7. Majority Report 51.

8 Majority Report 51

9. Majority Report 58

10. Contrary *of Employment of Children Act,* R.S.B.C. 1960, c. 75.

11. *Medical Act,* R.S.B.C. 1960, c. 239, s. 71

practising medicine without a licence,[11] questionable poractices in selling stock to the public,[12] and protection of the environment.[13]

In addition, the "moral stigma" argument avoids the fact that people defend themselves for practical reasons, of which stigma is unlikely to be the most important. Besides the punishment imposed by the Court, conviction often carries with it a significant indirect punishment, e.g., suspension or revocation of a licence or payment of increased insurance premiums.

The second justification offered in the majority Report is that payment of legal fees to persons who are "guilty" but acquitted would be unacceptable to the public.[14] This is, in my opinion, disproved by the absence of public criticism of the legal aid scheme presently in effect in British Columbia.

Finally, how does the scheme of the majority Report fit into the context of a system in which legal aid already exists? The principles of the majority Report scheme are certainly different from those of legal aid. Legal aid is offered to persons charged with both federal and provincial offences, without regard to guilt or innocence but with regard for the financial situation of the accused person. Legal aid, moreover, pays the full amount of the legal fees, whereas the majority Report appears to contemplate part payment only.[15]

The legal aid concept and the majority Report concept cannot coexist comfortably. The legal aid approach, which avoids difficult and sensitive determinations of guilt and innocence and which appears administratively more efficient, is the one I prefer. If British Columbians are now being called upon to pay legal fees when it is not fair that they should do so, I believe that the solution lies in expansion of legal aid.

PETER FRASER
Commissioner

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12. *Securities Act,* S.B.C. 1967, c. 45, s. 134.

13. *Pollution Control Act,* S.B.C. 1967, c. 34, s. 20A.

14. Majority Report 58.

15. In the Report, Appendix E, reference is Made to an average payment of $200.00 which, by current standards, would fall well short of the actual cost to the accused.

APPENDIX A

A. Proposal in Working Paper

It is proposed that separate legislation be enacted by the British Columbia Legislature encompassing the whole matter of costs in judicial proceedings concerned with Provincial offences. Such legislation should be binding on the Crown and include provisions encompassing:

(a) The award of costs at the judicial hearing of any Provincial offence matter to either party (parties) to the proceedings. The term "party" for the purpose of costs should include the informant(s) (other than the Crown in the right of the Province of British Columbia, or its agents), the prosecutor(s)) (other than the Clown in the right of the Province of British Columbia and its agents) and the defendant(s)).

(b) Eligibility for costs should be determined by the trial or hearing Court. The calculation of quantum should be left to a taxing officer of the Court in the same way as in civil matters.

© The costs should be confined to those properly [reasonably] incurred by the party or parties concerned and include counsel fees.

(d) Although the nature of the costs to be awarded should he left in the discretion of the trial or hearing Court, provision should be made for a uniform schedule of costs to be laid down by regulation considered desirable. These costs could include:

(i) Counsel fees;

(ii) Witnesses' expenses;

(iii) Loss of wages, etc.; and

(iv) Travel and accommodation costs.

Provision should also be made for the award of costs in excess of any scheduled scale if higher costs are desirable, e.g., established complexity of the case.

(e) Although the Court should have a discretion in the matter of an award of costs, a provision should be enacted detailing factors that should be taken into account in exercising that discretion. This may be of assistance in ensuring uniformity of judicial practice. These factors would include:

(i) Whether the prosecution acted in good faith in bringing and continuing the proceedings;

(ii) Whether, when the proceeding began, the prosecution had sufficient evidence to support the conviction of the defendant in the absence of contrary evidence;

(iii) Whether the prosecution took proper steps to investigate any matter coming into its hands tending to show the defendant might not be guilty;

(iv) Whether, generally, the investigation into the offence was conducted in a reasonable and proper manner;

(v) Whether the evidence as a whole would support a finding of guilt but

the charge was dismissed on a technical point;

(vi) Whether the charge was dismissed because the tribunal considered the accused to be innocent in fact;

(vii) Whether the conduct of the accused, in relation to the acts or omissions on which the charge was based had to the investigation and proceedings, was such that on acquittal costs should be awarded to him. This means that it would be significant if the defendant refused to assist the investigation or hindered it by his silence or otherwise; and

(viii) Where the application for costs is made by a private informant or private prosecutor, whether the proceedings were privately commenced because of a refusal of the Crown appointed prosecutor to proceed.

(f) The same principles that apply to the trial situation should apply to an appeal by way of trial *de novo* and include not merely those cases where an appeal is heard and determined but also where it is abandoned or dismissed for want of prosecution.

(g) The same principles that apply to the trial situation should apply to an appeal by way of trial *de novo* and include not merely those cases where an appeal is heard and determined but also where it is abandoned or dismissed for want of prosecution.

(h) Provision should be made at both the trial (including preliminary hearings) and appeal levels for the possibility of an award of costs to the defendant who lost the case where the trial is in the nature of a test case or the appeal involves a matter which gives rise to a difficult or important point of law.

(i) The costs should be awarded from a Provincial fund, appropriated annually and administered by the Department of the Attorney-General.

(j) Recovery of costs against a private prosecutor should he by way of a summary judgment enforceable as a civil debt.

(k) No provision should be enacted prohibiting publication by the media of the decision of the Court regarding the award of costs in Provincial offence matters. The need to ensure that an acquitted person who was refused costs would not bear the public stigma of being considered not truly "innocent" is not as clear in the area of Provincial offences as it is with "true crimes."

(1) It is recommended that the scale relating to fees and allowances that may be allowed to witnesses, interpreters and peace officers, contained in the schedule to the *Summary Convictions Act* be revised so as to realistically reflect the real costs incurred by these groups.

(m) There should be no presumption in favour of either party to the proceedings no matter what the result of the trial or appeal.

(n) Before an award of costs is made a Court should permit any party affected to make submissions.

(o) A provision should be enacted so that if the Court is satisfied that any person acted negligently or in bad faith in bringing, continuing or conducting a prosecution, it should have the power to direct that the defendant's costs be paid by the government department, officer of the Crown, local authority, or public body on whose behalf that person was acting, or if he was not so acting by that person personally. This award should be recoverable as a debt. This should also enable the Court to award the defendant his costs from the Provincial fund, subrogating the fund to his rights against the person or

department, liable.

(p) Provision for costs should extend to applications for writs of *habeas corpus, certiorari, mandamus* and prohibition relating to matters arising out of Provincial offences.

(q) If costs are to be awarded to a successful defendant the award should be made to *that party against the specially created fund.* Only in the event of the case failing within the purview of paragraph (o), above, should costs be framed in a condemnatory way by the Court against the informant or prosecutor.

APPENDIX E

E. Cost of the Recommended Scheme

We have recommended that a provincial fund be established out of which costs awarded under the scheme be paid. Since the direct disbursement of public funds is contemplated, we feel some obligation to consider the likely costs of the scheme. Since no substantive recommendations or policy considerations are involved we have relegated what we have to say about the cost of the scheme to an Appendix.

Estimating the costs of the proposed scheme is a difficult exercise due to the number of variables involved. Probably the most significant of these variables is one which cannot be ascertained with any certainty at this time. That is the attitude which judges would take toward the scheme in exercising their discretion to award costs. If that discretion is exercised sparingly the costs will be insignificant. This has been the case in New Zealand. Between 1968 and 1972 the costs to the state of that scheme has averaged approximately $1,000 per year.[1] The New South wales experience has been similar.[2] In Western Australia, on the other hand, where a much more liberal scheme has been proposed the possible cost has been estimated at $161,900 (Aust.) per year.[3] *The Costs in Cases Act,1973* (U.K.) and the subsequent practice direction are still too new for any significant information to have developed on the English experience.

The wide divergence between the experience of New Zealand and New South Wales and the possible annual financial burden in Western Australia illustrate the important role which the exercise of discretion will play. It should also be noted that the Australian and New Zealand figures cover all offences including what, in Canada, would be *Criminal Code* matters. The costs awardable under the scheme we recommend would, therefore, be significantly less than those in a unitary, but otherwise comparable, jurisdiction.

It is possible to ascertain a very rough estimate of the maximum cost of our scheme by making a number of assumptions. Those assumptions are:

1. The number of charges laid under provincial statutes is approximately 7,000 per year.[4]

2. The discharge rate is approximately 15 per cent.[5]

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1. This information was provided by Mr. E. A. Missen, Secretary for Justice, Department of Justice, New Zealand, who also indicated that, from the practical point of View, there has been no difficulty with the administration of the scheme.

2. *Outline '72,* the 1972 Annual Report of the Department of Attorney General and Justice of New South Wales, sets out the following statistics:

	1969	1970	1971	1972
	$	$	$	$
Number of payments made	15	11	11	21
Highest single payment	341	120	2,094	1,372
Total of payments	1,255	808	3,500	3,845

3. *Ibid.*, at 13 of the working paper.

4. The latest statistics available to us indicate 6,996 charges for the year 1971: Dominion Bureau of Statistics, *Crime Statistics, 1971* Table II E.

3. The costs awarded to the accused will average approximately $200.[6]

4. The judge exercises his discretion in favour of the acquitted accused in every case.

Based on those assumptions the recommended scheme would impose a minimum financial burden of $210,000 per year. That figure, however, fails to take into account costs awarded to private prosecutors and witnesses, costs on appeals, costs related to lost wages, travel or accommodation and costs arising out of prerogative writs. The foregoing would tend to increase the estimated financial burden. On the other hand, the assumption that judges will exercise their discretion in favour of every acquitted accused is, in all probability, quite unrealistic. To the extent that costs are *not* awarded the financial burden is decreased. In summary, based on the assumptions which we have made, the cost of the recommended scheme is unlikely to exceed $210,000 and may amount to substantially less.

In the final analysis, a meaningful prediction can be based only on experience. Until a scheme such as we recommend has been operating for some period of time the financial burdens will remain uncertain. At this stage we can do little more than hope that this uncertainty will not deter those in a position to implement the scheme from proceeding.

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5. The most recent figures available indicate that for the years 1967 and 1968 the conviction rates for all offences heard or before (then) magistrates court were 85.9% and 84.3% respectively. This is based on statistics found in 1972 Canada Year Book 495.

6. Based on Appendix N to the British Columbia Supreme Court Rules, items 19 and 23 (one day trial with witnesses and preparation).