



## International Covenant on Civil and Political Rights

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### Human Rights Committee

Ninety-eighth session

8–26 March 2010

### Views

#### Communication No. 1467/2006

<i>Submitted by:</i>	Michel Dumont (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Canada
<i>Date of communication:</i>	17 March 2006 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 3 May 2006 (not issued in document form)  CCPR/C/90/D/1467/2006 – Decision on admissibility dated 13 July 2007
<i>Date of adoption of Views:</i>	16 March 2010
<i>Subject matter:</i>	The right to be compensated after the reversal of a conviction
<i>Procedural issues:</i>	Failure to exhaust domestic remedies
<i>Substantive issues:</i>	Compensation for a miscarriage of justice
<i>Article of the Covenant:</i>	14, paragraph 6
<i>Article of the Optional Protocol:</i>	5, paragraph 2 (b)

On 16 March 2010, the Human Rights Committee adopted the annexed draft as the Committee's Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1467/2006.

[Annex]

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\* Made public by decision of the Human Rights Committee.

## Annex

### **Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (ninety-eighth session)**

concerning

#### **Communication No. 1467/2006\***

<i>Submitted by:</i>	Michel Dumont (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Canada
<i>Date of communication:</i>	17 March 2006 (initial submission)
<i>Decision on admissibility:</i>	13 July 2007

*The Human Rights Committee*, established under article 28 of the International Covenant on Civil and Political Rights,

*Meeting* on 16 March 2010,

*Having concluded* its consideration of communication No. 1467/2006, submitted by Mr. Michel Dumont (not represented by counsel) under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication and the State party,

*Adopts* the following:

#### **Views under article 5, paragraph 4, of the Optional Protocol**

1.1 The author of the communication, dated 17 March 2006, is Michel Dumont, a Canadian national. He claims to be the victim of a violation by Canada of article 14, paragraph 6, of the International Covenant on Civil and Political Rights. He is not represented by counsel.

1.2 On 28 July 2006, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, decided that the admissibility of the communication should be considered separately from the merits.

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

The text of an individual opinion by Mr. Fabián Omar Salvioli is appended to these Views.

**The facts as submitted by the author**

2.1 On 25 June 1991, the Court of Quebec found the author guilty of having committed rape in the city of Boisbriand and sentenced him to 52 months' imprisonment. He appealed against that decision before the Appeal Court of Quebec, which upheld the conviction on 14 February 1994 on the grounds that the author had not invoked any error of law. On 23 June 1992, even before his appeal was heard, the victim of the rape signed a formal attestation stating that she had been mistaken about the identity of her aggressor, but this attestation was not mentioned during the appeal proceedings. The author remained in prison until May 1997, when he was granted parole. He therefore spent 34 months in prison. The Government commissioned a board of inquiry to report on the grounds for the author's request for review under article 690 of the Criminal Code. The report, which was issued on 15 July 1998, concluded that the victim's statement gave rise to reasonable doubt as to the author's guilt. The case was therefore referred back to the Appeal Court of Quebec. On 22 February 2001, the Appeal Court of Quebec quashed the conviction handed down by the Court of Quebec and acquitted the author of all charges against him.

2.2 On 21 August 2001, the author initiated a civil action in the Superior Court of Quebec against, inter alia, the Attorney General of Quebec, in which he sought financial compensation for the harm suffered by him and his family. Quebec filed its response to the author's claims on 13 August 2002. The author's initial statement was made more specific and amended to produce his final written argument, which is contained in his amended statement of 17 February 2004. On 15 June 2006 the case was inscribed for proof and hearing by the Court. The author also wrote numerous letters to various authorities seeking compensation for the miscarriage of justice he had suffered.

**The complaint**

3.1 The author claims to be the victim of a violation of article 14, paragraph 6, of the Covenant. Despite the fact that his conviction was reversed because a new or newly discovered fact showed that there had been a miscarriage of justice, he was not compensated in accordance with the Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons. Under the Guidelines, which were adopted in 1988 by the federal and provincial justice ministries and prosecutors, in order to be eligible for compensation, the claimant must have been imprisoned, a new fact must have come to light that shows that a miscarriage of justice has taken place, and a decision must have been taken under article 690 of the Criminal Code. Compensation is to be paid by the relevant provincial authorities. If a person is entitled to compensation, a judicial or administrative inquiry is to be opened in order to make a recommendation on the amount of compensation.

3.2 The author considers that he meets the three criteria set forth in the Guidelines on Compensation. As there is no official form, he has simply written numerous letters to the relevant authorities to seek compensation. All his requests have been rejected. The Ministry of Justice of Quebec suggested that he should apply to the civil courts. The author points out that the Guidelines do not mention any need to bring an action in the civil courts to obtain compensation, and he argues that he does not have the financial means to do so. He indicates that only one person, Mr. R.P., has received compensation from Quebec since the programme was set up in 1988. That person had been acquitted in 1986 and did not receive compensation until 2001, after a 15-year wait. According to the author, Mr. R.P. managed to obtain compensation only because the Ombudsman had put pressure on the then Minister of Justice.

**State party's observations on admissibility**

4.1 On 7 July 2006, the State party challenged the admissibility of the communication. It states that the author initiated a civil action against, inter alia, the Government of Quebec

seeking financial compensation in the Superior Court of Quebec on 21 August 2001, i.e. six months after his acquittal. On 15 June 2006, the case was inscribed for proof and hearing by the Court. The State party says the author could have filed his case as early as 13 August 2002, after Quebec had filed its response, but did not do so. The State party therefore argues that the author has not exhausted domestic remedies. It also says that his case should be heard shortly. If the claim is rejected, the State party notes that the author can appeal to the Appeal Court of Quebec and, ultimately, if given leave to do so, to the Supreme Court of Canada.

4.2 The State party notes that the author also lodged a complaint with the Quebec Ombudsman on 22 March 2006 and that this procedure is ongoing as well. Although the author maintains that he does not have the financial means to pursue these remedies, the State party observes that recourse to the Ombudsman does not involve any financial payment and that, in any case, simply pleading penury is not enough to absolve the author of his obligation to exhaust domestic remedies.

#### **Author's comments on the State party's submission**

5.1 On 17 October 2006, the author noted that the State party argues, on the one hand, that his communication is inadmissible because he has initiated legal action against, among others, the Attorney General of Quebec, but on the other hand that this legal action is not admissible either. In any case, the author maintains that his legal action has no bearing on his right to compensation as a victim of a miscarriage of justice under article 14, paragraph 6, of the Covenant. His action is intended to prove that the police and the Crown were at fault.

5.2 The author contends that the State party is not honouring its commitments under the Covenant, as the only measure it has taken to implement article 14, paragraph 6, is to adopt the Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons. He recalls that the State party itself admits in the Guidelines that "a compensation mechanism based solely on these Guidelines might go only part of the way towards enabling Canada to meet its obligations under the International Covenant, as the right to compensation would not be established in law as article 14, paragraph 6, of the International Covenant requires". The Guidelines also state that victims of a miscarriage of justice in Canada, even if their conviction has been reversed as provided for under article 14, paragraph 6, of the Covenant, must *prove* their innocence beyond a shadow of a doubt in order to be compensated. In that respect, the author refers to the reply from the Associate Deputy Minister of Justice of Quebec, dated 24 February 2006, to the effect that his examination of the case did not convince him of the author's factual innocence and that such a conviction was required in order for the Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons to be applicable. The author recalls that the Appeal Court acquitted him on 22 February 2001 and that the principle of the presumption of innocence should be fully applicable.

#### **Additional comments by the parties on admissibility**

6.1 On 6 February 2007, the State party noted that, in his civil liability suit before the Superior Court of Quebec, the author claims that the Attorney General of Canada committed specific errors during the author's term of detention in the federal prison system. Those allegations are not taken up before the Committee. It is in respect of those allegations that the Government of Canada has raised objections to admissibility. As part of his claim

in the Superior Court of Quebec, the author also requests compensation for the harm he and his family allegedly suffered as a result of his conviction and imprisonment.<sup>1</sup>

6.2 Although the author asserts that his action “has no bearing on his right to compensation as a victim of a miscarriage of justice under article 14, paragraph 6, of the Covenant”, the State party notes that the author amended his initial statement, adding a separate chapter specifically on his right to compensation under the Canadian Charter of Rights and Freedoms and the Charter of Human Rights and Freedoms within the overall context of the Covenant. Thus, contrary to what the author seems to be suggesting to the Committee, the State party is of the view that his action could result in compensation for the miscarriage of justice that he claims to have suffered. The State party therefore argues that the action could provide the remedy which he seeks before the Committee, i.e., compensation for the miscarriage of justice that he claims to have suffered, regardless of the fact that the burden of proof lies with the author in that suit, since the burden of proof is an integral part of any civil action. The State party further recalls that the author must, in any event, show that he meets the conditions for the application of article 14, paragraph 6, in particular by proving that there has been a miscarriage of justice.<sup>2</sup>

6.3 The State party considers that the author’s arguments with regard to the Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons are not relevant.

6.4 With regard to the complaint lodged with the Quebec Ombudsman on 22 March 2006, the State party notes that the Ombudsman had declared it inadmissible in June 2006 on the grounds that the Public Protector Act bars the Ombudsman from intervening when a judicial remedy is being sought by the complainant.

7.1 On 22 May 2007, the State party noted that the author’s action in the Superior Court of Quebec has not yet been heard and a hearing date has not yet been set. Since it was inscribed for proof and hearing on 15 June 2006, the case has followed the usual course. Inscription for proof and hearing means a case is ready and a date for the hearing can be set. The parties to the action met in court in March 2007 to fix a hearing date, but the Court postponed the setting of a date until 29 June 2007 so that certain steps could be taken to facilitate the proceedings, given that several parties are involved and the proceedings will be lengthy. It should be noted that the delays that have arisen since the case was inscribed for proof and hearing in June 2006 are normal under the circumstances.

7.2 The State party also notes that the author waited 18 months after Quebec had filed a response, i.e., until 17 February 2004, to file a further amended statement with the Court. He then waited 28 months, i.e., until 15 June 2006, before inscribing the case for proof and hearing, and then only after Quebec had obliged him to do so by procedural means. Consequently, nearly four years elapsed between the time that Quebec filed its response with the Court and the author’s inscription of the case for proof and hearing.

8. On 29 May 2007, the author noted that, in the State party’s response to the action which he had initiated in the ordinary courts, the State party itself said that, since articles 2, paragraph 3, and 14, paragraph 6, of the Covenant have not been specifically incorporated into Canadian law, those obligations could not constitute a valid basis for action. In addition, in response to the State party’s argument that the author must prove that a miscarriage of justice has occurred, the author points out that his file was transmitted to the

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<sup>1</sup> The State party has attached a copy of the response of the Attorney General of Canada to the suit initiated by the claimants dated 8 June 2006.

<sup>2</sup> See, for example, communication No. 89/1981, *Muhonen v. Finland*, Views adopted on 8 April 1985; and communication No. 408/1990, *W.J.H. v. the Netherlands*, inadmissibility decision adopted on 22 July 1992.

Court of Appeal of Quebec and that this led to his acquittal, precisely because there had been a miscarriage of justice.

9. On 11 June 2007, the author explained that all the procedural delays in the Superior Court of Quebec were occasioned by the Attorney General of Quebec. He says that, between 2004 and 2006, his lawyer repeatedly requested meetings with the Ministry of Justice lawyers, with a view to reaching an amicable settlement with them. The author himself was invited to meet with the Associate Deputy Minister of Justice of Quebec on 30 November 2005 to discuss the issue of compensation for persons wrongly convicted and imprisoned. On 24 February 2006, the Deputy Minister told him that there would be no amicable settlement. It is for these reasons that the author postponed procedures with the Court, so as not to incur pointless expenditures if an amicable settlement could be reached.

10.1 On 19 June 2007, the State party reiterated that it was not claiming that the entire action initiated by the author in the Superior Court is inadmissible. The Government of Canada has raised certain pleas as to inadmissibility and responses relating to specific errors for which it is allegedly responsible regarding the author's detention conditions in the federal prison system. On the merits, it maintains there was no error. As for the author's request for compensation for the harm allegedly suffered by him and his family in consequence of his conviction and imprisonment, the Government of Canada maintains that it is not responsible for this harm. It is up to the Superior Court to determine if the Government of Canada is responsible and, if so, to what extent.

10.2 In addition, the State party explains that the author's claim for damages is based first and foremost on the applicable rules in Quebec relating to civil liability and not on the Covenant. The author has amended his initial statement in order to add a separate chapter, in which he bases his right to compensation on the Canadian Charter of Rights and Freedoms and the Charter of Human Rights and Freedoms, within the overall context of the Covenant. Accordingly, the argument made by the Government of Canada that articles 2, paragraph 3, and 14, paragraph 6, of the Covenant do not constitute a valid basis for action because the Covenant has not been explicitly incorporated into Canadian law has no relevance for the determination of whether or not the actions undertaken before the Superior Court with a view to obtaining monetary compensation are or are not well founded or for the Court's determination of the level of responsibility of each of the respondents in the action. The Superior Court has the requisite jurisdiction to deal with the action brought before it and the pleas entered by the respondents.

10.3 With regard to the author's assertion that "the Government of Canada argues that it has not incorporated the Covenant in Canadian law (in 31 years) and that, as a result, its international commitments do not give rise to rights for persons subject to Canadian jurisdiction", the State party recalls that article 2 of the Covenant does not specify precisely how the commitments under the Covenant are to be fulfilled, but rather stipulates that States parties must undertake to implement the Covenant through the adoption of legislative or other measures. The implementation of the Covenant in Canada is effected through a range of measures, which may be either legislative or regulatory, as well as through programmes and policies.

11. On 1 July 2007, the author stated that the dates had been set for a 15-day hearing, which was to take place from 5 to 25 February 2009. He noted that the Superior Court of Quebec "strongly recommends that the parties take part in a settlement conference, to be held before completion of their joint case management statement".

12. On 9 July 2007, the State party explained that the time elapsed before the trial was normal, given the large number of cases waiting to be heard in the district of Montreal, the relative urgency of these cases, the anticipated duration of the hearing in the author's case and the number of parties involved. The dates that had been set were the first available

dates for proceedings of the length required in the author's case and had been accepted by the author.

### **Decision of the Committee on admissibility**

13.1 On 13 July 2007, at its ninetieth session, the Committee considered the admissibility of the communication.

13.2 The Committee observes that the author's conviction by the Court of Quebec on 25 June 1991 was upheld by the Court of Appeal of Quebec on 14 February 1994. The author did not appeal to the Supreme Court of Canada but wrote to the Minister of Justice of Canada under article 690 of the Criminal Code. On the basis of that request, the Minister of Justice ordered the case to be referred back to the Court of Appeal because certain information had been brought to the Minister's attention which could be relevant in determining the innocence or guilt of the author. On 22 February 2001, the Court of Appeal of Quebec acquitted the author of all the charges against him. The Committee therefore considers that article 14, paragraph 6, applies in the present case.

13.3 On the question of exhaustion of domestic remedies, the Committee takes note of the State party's argument that the author could obtain compensation for the miscarriage of justice he claims to have suffered through the legal action he has brought before the Superior Court of Quebec. It also notes, however, that the author has approached numerous authorities to obtain compensation, thus far without success. According to the Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons, a legal or administrative board of inquiry should have been set up by the provincial or federal minister responsible for criminal justice in order to look into the matter of compensation for the author. No such board of inquiry was ever established. In any event, the Committee notes that the State party itself admits in the Guidelines that "a compensation mechanism based solely on these Guidelines might go only part of the way towards enabling Canada to meet its obligations under the International Covenant, as the right to compensation would not be established in law as article 14, paragraph 6, of the International Covenant requires".

13.4 The Committee notes that, on 21 August 2001, the author brought a civil liability action against the Attorney General of Quebec to obtain compensation. This action has lasted for some six years and has still not been concluded. The Committee notes that, even though the author amended his initial statement on 17 February 2004, the case could not have been inscribed for proof and hearing in the Superior Court of Quebec before 15 June 2006 because the Attorney General of Canada did not file its response until 8 June 2006. Furthermore, it also notes that the author hoped to achieve an amicable settlement of the case up until 24 February 2006, the date on which the Deputy Minister finally informed him that there would be no such settlement (see paragraph 9 above). The Committee is therefore of the view that the author cannot alone be held responsible for the delay. Under the circumstances, the Committee considers that the State party has not demonstrated that the judicial process is effective and finds that the communication is admissible insofar as it raises issues with respect to article 14, paragraph 6.

### **State party's observations on admissibility and on the merits**

14.1 On 29 April 2008, the State party submitted its observations concerning the admissibility and the merits of this communication and asked the Committee to reconsider its decision regarding admissibility under rule 99, paragraph 4, of its rules of procedure and to find the communication inadmissible on the grounds of failure to exhaust domestic remedies. Alternatively, the State party requests that the Committee declare the communication inadmissible *ratione materiae* on the grounds that the author has not established that he meets the requirements set forth in article 14, paragraph 6, of the

Covenant or that it reject the communication on the merits on the grounds that there has been no violation of article 14, paragraph 6.

14.2 The State party recalls the facts of the case and notes that, on 23 June 1992, the victim of the acts which the author was accused of committing, who mistakenly believed that he was still in prison,<sup>3</sup> stated that in late March 1992 she had thought she had seen someone who looked very much like the author in a video rental shop. This statement was reportedly transmitted to the author's counsel in a letter dated 3 July 1992. Between 1994 and 1997, the victim had reportedly said on several occasions that she was uncertain as to the identity of her assailant, but had never retracted her statement. In its judgement of 22 February 2001, the Court of Appeal of Quebec concluded that the victim's statements gave rise to a reasonable doubt as to the author's guilt. The Court did not, however, rule on the author's innocence.

14.3 The State party maintains that the civil suit brought by the author before the Superior Court of Quebec can provide a full remedy for the harm which the author claims to have suffered. Since that suit is currently under way, it submits that the author has not exhausted all the effective domestic remedies available to him. It contends that, if the Court finds in favour of the author, this civil action can provide a full remedy for the harm that he claims to have suffered.

14.4 The State party disputes the statements made by the Committee in paragraph 13.4 and observes that the Attorney General of Canada was impleaded<sup>4</sup> in the suit on or around 24 July 2002 by the Attorney General of Quebec and was made a respondent in the case on 17 February 2004 on the basis of the author's amended statement. It asserts moreover that the delays that have arisen in the civil case being heard by the Superior Court of Quebec are entirely attributable to the author, since, under the Code of Civil Procedure of Quebec, the plaintiff is responsible for moving the proceedings along. The author could have had his claim inscribed for proof and hearing as early as March 2004, at which time the Attorney General of Canada would have had to present its response.<sup>5</sup> The State party adds that the author inscribed his complaint (on 15 June 2006) only after the Attorney General of Quebec had forced him to do so.<sup>6</sup> It also maintains that the author's attempt to arrive at an amicable settlement did not delay the proceedings in the Superior Court of Quebec because the case could have been inscribed for hearing at any time and that this therefore cannot be used as a justification for his inaction.

14.5 The State party emphasizes that the amount of time that passed between the date on which the author inscribed the action for proof and hearing (June 2006) and the date set for the hearing (February 2009) is unexceptional, given the large number of cases waiting to be heard, the relative urgency of these cases and the anticipated duration of the hearing in the author's case (see paragraph 12).

14.6 With regard to the establishment of a judicial or administrative board of inquiry pursuant to the Guidelines on Compensation for Wrongfully Convicted and Imprisoned

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<sup>3</sup> On 27 January 1992, the Court of Appeal of Quebec released the author conditionally while he waited for the Court to hear his appeal; he had been given leave to appeal on 31 July 1991.

<sup>4</sup> "Impleading" is a procedure by which a respondent in an action may have a third party named to the suit on the grounds that the third party's presence is required in order for the case to be fully resolved.

<sup>5</sup> Under articles 218 and 222 of the Code of Civil Procedure of Quebec, the plaintiff in the principal action (in this case, the author) has an interest to make any useful application to ensure that an action in warranty does not cause undue delay in the principal action. The Attorney General of Canada did not present its defence until 8 June 2006 (see paragraph 13.4 of the decision on admissibility).

<sup>6</sup> On 16 May 2006, the Attorney General of Quebec petitioned that the action be dismissed for want of prosecution under article 265 of the Code of Civil Procedure of Quebec.

Persons, the State party also disputes the comments made by the Committee in paragraph 13.3, noting that such a board is to be set up only if the person in question meets certain eligibility criteria. One of those requirements is that it must have been proven that the person did not commit the crime for which he or she was convicted; this is not the same thing as a person having been found not guilty. In this particular case, the author was acquitted in view of the fact that the new evidence, i.e., the victim's statement, would not permit a prudent jury to conclude beyond all reasonable doubt that the author was guilty. The Court of Appeal did not state that the author did not commit the crimes for which he was convicted and, in the absence of such a statement, the question of eligibility under the Guidelines was examined by means of an administrative inquiry. The findings of that inquiry were that it had not been proven that the author did not commit the offence for which he had been convicted. There was thus no reason to name a board of inquiry to determine the amount of compensation.

14.7 The State party also submits that the meaning of the expression "according to law", as it appears in article 14, paragraph 6, of the Covenant, has no practical or specific implication in terms of this communication, since the question of whether the Guidelines are applied by means of administrative measures or by law does not alter the requirement of factual innocence that must be met in order for a person to be eligible for compensation. The State party contends that, in the light of article 2, paragraph 2, of the Covenant,<sup>7</sup> the Guidelines give effect to the rights set forth in article 14, paragraph 6, of the Covenant because they are public and sufficiently detailed to enable an individual to ascertain the nature of the criteria that will be used in dealing with his or her request.

14.8 As an alternative, if the Committee lets its Views of 13 July 2007 stand, the State party submits that the communication should be found to be inadmissible *ratione materiae* under article 3 of the Optional Protocol, since the author has not established that he meets all the conditions required for the application of article 14, paragraph 6, of the Covenant. Moreover, the author has not established that his conviction was reversed because of a new or newly discovered fact, since the victim's statement expressing uncertainty about her identification of the author was conveyed to the author's counsel in 1992, i.e., between the time of the original trial and the appeal. The State party also asserts that, even if the statement made by the victim in 1992 were to be regarded as a new or newly discovered fact, which it denies, its non-disclosure in time is wholly or partially attributable to the author, who failed to submit it during his hearing of 14 February 1994 before the Court of Appeal of Quebec. It reminds the Committee that, according to its own jurisprudence, the State party should not be held responsible for the actions or omissions of author's counsel.

14.9 Lastly, the State party submits that the author has not demonstrated that he has been the victim of a miscarriage of justice within the meaning of article 14, paragraph 6. It observes that, according to the preparatory work, some States interpret the objective of article 14, paragraph 6, to be the compensation of people who are innocent of the crimes for which they have been convicted.<sup>8</sup> The State party also observes that, according to the Committee's jurisprudence, the principle of the presumption of innocence, as invoked by the author, is not applicable to compensation proceedings. It contends that the author has not proved on the balance of probabilities that he did not commit the crime in question and has therefore not proven his factual innocence. The victim's uncertainty as to her assailant's

<sup>7</sup> See paragraph 13 of general comment No. 31 (CCPR/C/21/Rev.1/Add.13) of 26 May 2004.

<sup>8</sup> General Assembly of the United Nations, fourteenth session, 1959, report of the Third Committee, vol. 4, p. 273, para. 24, and p. 285, para. 11; Commission on Human Rights, summary records, sixth session, E/CN.4/365, pp. 39-40; Commission on Human Rights, summary records, sixth session, E/CN.4/SR.158, p. 7, para. 27, and p. 12, para. 61; Commission on Human Rights, summary records, eighth session, E/CN.4/SR.323, p. 7.

identity led to the author's acquittal, but does not prove his factual innocence. Furthermore, the victim did not retract her statement or have any doubts during the preliminary inquiry or the trial that the author was her attacker. The State party goes on to note that the Court of Appeal that reviewed the judgement did not find that there had been any irregularity, negligence, abuse of rights or denial of justice during the police investigation or the proceedings.

#### **Author's comments on the State party's submission**

15.1 On 29 June and 9 July 2008, the author repeated that he meets all the requirements for compensation under the Guidelines and under article 14, paragraph 6, of the Covenant, since the final decision by which he had been convicted was reversed on the basis of new evidence (i.e., the victim's statement regarding her mistake regarding the identity of her assailant), and he had been acquitted of all charges against him.

15.2 The author affirms that the delays arising in the course of the civil proceedings are wholly attributable to the Attorney General of Quebec and the Attorney General of Canada. He submitted a request for inscription for proof and hearing on 21 May 2002, which led to the impleading of the Attorney General of Canada on 23 July 2002. The author emphasizes that this procedural step placed the Government of Quebec in opposition to the Government of Canada and that this was the main cause of the delay of the civil proceedings.

15.3 The author disputes the State party's arguments concerning the alignment of the Guidelines with article 14, paragraph 6, and notes that, in the Guidelines themselves, the State party affirms that, in the absence of a law, the Guidelines do not fully meet the obligations assumed under the Covenant. He adds that — unlike the Guidelines — article 14, paragraph 6, does not require victims of a miscarriage of justice to prove their factual innocence.<sup>9</sup>

15.4 The author further maintains that, upon remitting his case to the Court of Appeal, the Minister of Justice had acknowledged the author's innocence by stating that "this remedy is an extraordinary measure which is used only when the Minister is assured that there has probably been a miscarriage of justice". The author contends that the Court of Appeal acknowledged, in effect, his innocence by reversing his conviction and acquitting him of the charges. If there had been any doubt as to his innocence, the Court of Appeal could have ordered a retrial. Since the police investigation did not turn up any fingerprints and no DNA analysis was conducted, the author's conviction rested entirely on the victim's statements, and the victim had stated that he was innocent on repeated occasions, in some instances publicly. The author also challenges the description of the assailant that was submitted by the State and points to several differences between it and the description contained in the police report that was prepared at the time that the victim pressed charges.

15.5 The author also emphasizes that the Court of Appeal admitted the six statements made by the victim after the original trial as new evidence, stating that this evidence had been submitted with due diligence and that it was relevant, credible and could influence the verdict. The introduction of the victim's statements led to the reversal of the judgement rendered on 25 June 1991. He states that the Court of Appeal had established that the non-disclosure of this new fact was not attributable to him. The author also disputes the contention that the State party forwarded the victim's statement of 23 June 1992 to his counsel and observes that the State party has not produced an acknowledgement of receipt

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<sup>9</sup> The author refers to the case of Mr. S.T., who is said to have been acquitted in 2007 without being declared innocent and who reportedly received compensation in 2008.

for a letter dated 3 July 1992. In addition, he contends that it was the State party's duty to make this new information known during the appeal proceedings.

#### **Additional observations of the parties on admissibility and on the merits**

16.1 On 19 December 2008, the State party repeated that "proof of factual innocence is required for the application of article 14, paragraph 6, and the Guidelines (see paragraph 3.1 above)<sup>10</sup> and that it is an essential component of a miscarriage of justice". The concept of a miscarriage of justice applied by the Minister of Justice in referring the case back to the Court involves the determination of whether or not, in the light of additional evidence, a conviction is sustainable beyond all reasonable doubt, whereas compensation for a miscarriage of justice is based on factual innocence. The State party emphasizes that the author's acquittal was founded upon the victim's uncertainty as to her identification of her assailant; the author was acquitted because there was a reasonable doubt, but this cannot be interpreted as proof of his factual innocence.

16.2 With regard to the author's allegations concerning receipt of the statement made by the victim in 1992, the State party reaffirms the comments it made on 29 April 2008 and states that these allegations will be considered by the Superior Court of Quebec in the course of the civil action. It asserts that the judgement handed down by the Court of Appeal in 2001 did not establish that the non-disclosure in time of the victim's 1992 statement was not attributable to the author, in whole or in part.

16.3 The State party argues that the victim's statement does not prove that the author is innocent, since she said that the man whom she saw in the store "could have been Dumont". Her subsequent statements do not prove the author's factual innocence on the balance of probabilities either.

16.4 The State party reiterates that the delays occurring in the civil action are attributable to the author. It notes that the author's request for inscription of his claim for proof and hearing was rejected in June 2002 and that the author did not move his case along thereafter. The State party repeats that, contrary to what the author has stated, domestic remedies have not been exhausted, and the grounds for the civil proceedings do not differ in substance from those cited in the communication that he has submitted to the Committee, given the fact that he has invoked article 14, paragraph 6, in his civil suit.

16.5 The State party also rejects the author's challenge to the description which the victim gave of her assailant; it emphasizes that the author did not call into question, either in 1994 or in 2001, the description given in the court of first instance.

17. On 10 February 2009, the author repeated his comments of 29 June 2008 and highlighted the fact that the victim has publicly stated that he was not guilty of the crime.

18. On 27 February 2009, the State party reported that an amicable settlement had been reached between the author and the City of Boisbriand and its insurers (two of the four respondents in the civil proceedings brought by the author before the Superior Court of Quebec) and asserted that this demonstrates that domestic remedies are useful and effective. The author had sued the City of Boisbriand in connection with the harm caused by alleged misconduct on the part of the police handling the investigation.<sup>11</sup> The exact terms of the settlement, including the sum to be paid, are, however, confidential. The State party

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<sup>10</sup> The Guidelines state that "compensation should only be granted to those persons who did not commit the crime for which they were convicted".

<sup>11</sup> The matter on which an amicable settlement was reached differs from the case submitted to the Committee because it did not concern a miscarriage of justice.

reiterates that the communication should therefore be found to be inadmissible on the grounds that domestic remedies have not been exhausted.

19. On 23 July 2009, the State party indicated that the Superior Court of Quebec had dismissed the action brought by the author against the Attorney General of Quebec and the Attorney General of Canada on 17 July 2009. It repeats that the communication remains inadmissible on the grounds that domestic remedies have not been exhausted, since the Court's decision can be appealed to the Court of Appeal of Quebec.

20. On 23 August 2009, the author stated that, the day after the alleged encounter in the video club in March 1992, the investigator was apprised of the doubts raised by the victim as to her assailant's identity, but that neither he nor his counsel was so informed. He also contends that the judgement of 17 July 2009 contains obvious errors, such as the fact that the judge relied on a statement regarding the identification of the assailant by the victim, in which she said that, in addition to seeing a photograph of the author, she also wanted to see his hands because her assailant had tattoos. The author claims, however, that the victim never saw his hands. He also states that there was no crime scene, as the victim did not report the attack until two days after it had occurred. It would have been surprising, he says, if the victim had informed the prison service of her doubt about her assailant as early as September 1994, and it is even less understandable why the authorities did not take action on their own initiative to reopen the case. Lastly, the author maintains that the State party and the Government of Quebec refuse to acknowledge their responsibility for this miscarriage of justice and that he has received only a portion of the compensation which he sought from the City of Boisbriand and its insurers.

21.1 On 25 September 2009, the State party informed the Committee that the author was appealing the judgement of 17 July 2009 to the Superior Court of Quebec and that the Appeal Court's decision was not expected for several more months. The State party reiterates that the object of the civil action brought by the author is essentially the same as that of the communication submitted to the Committee and that the civil action is an effective remedy which has not yet been exhausted.

21.2 The State party explains that the judge of the Superior Court of Quebec rejected the author's claim based on an absence of fault on the part of the Attorney General of Quebec and the Attorney General of Canada. The Court found that, at the time that the Attorney General of Quebec brought charges against the author in 1990, he had reasonable and probable grounds for believing that the author was guilty of the crime in question and that there was no evidence of malice, abuse or bad faith on the Attorney General's part. The conclusions reached by the Court support the State party's contention that it committed no fault in the proceedings against the author. The Court reportedly concluded, in addition, that it had not been established that neither the author nor his counsel had received the report on the investigation containing the victim's statements concerning her doubts about her assailant and that the Attorney General of Quebec was not at fault for having failed to introduce the victim's statement at the appeal stage, since he had fulfilled his disclosure obligation, and it was not for him to become involved in the defence's case. The State party maintains that the Superior Court's conclusion that there were indications that the person whom the victim saw at the video club in March 1992 could have been the author supports its contention that the author has not established his factual innocence for purposes of the application of article 14, paragraph 6, of the Covenant.

#### **Review of the decision on admissibility**

22.1 The Committee takes note of the State party's request that it reconsider its decision of 13 July 2007 regarding admissibility under article 99, paragraph 4, of its rules of procedure and find the communication inadmissible on the grounds of failure to exhaust domestic remedies.

22.2 The Committee takes note that the State party recognizes that it did not set up a legal or administrative board of inquiry under the Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons to consider the author's case because he did not meet the eligibility criteria requiring proof of his innocence. His request was therefore denied. It also notes that on 17 July 2009 the Superior Court of Quebec dismissed, in the first instance, the civil liability suit brought by the author on 21 August 2001 against the Attorney General of Quebec and the Attorney General of Canada to seek compensation for a miscarriage of justice, and that these proceedings have still not been completed, nine years after the acquittal of the author of the communication. In the light of the explanations of the parties regarding the delay in the civil proceedings, the author cannot be held solely responsible, given that he was informed only on 24 February 2006 that he would not receive an amicable settlement.

22.3 The Committee takes note that the State party has not provided any new information that would lead to reconsideration of its decision regarding admissibility. Accordingly, it reiterates that the communication is admissible and proceeds to consider the merits of the case.

### Consideration of the merits

23.1 The Committee has considered the present communication in the light of all written information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

23.2 The Committee recalls that, under the conditions set out for the application of article 14, paragraph 6, of the Covenant, compensation according to law shall be paid to persons who have been convicted of a criminal offence by a final decision and have suffered punishment as a consequence of that conviction, if their conviction has been reversed or they have been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice.<sup>12</sup>

23.3 In this case, the author was convicted of a criminal offence by a final decision and was sentenced to a term of imprisonment of 52 months. He was held in prison for a total of 34 months. On 22 February 2001, the Court of Appeal of Quebec acquitted the author of all the charges against him "in view of the fact that the new evidence which has come to light would not permit a reasonable jury acting on correct instructions to find the appellant [the author] guilty beyond all reasonable doubt".

23.4 The Committee notes the State party's argument that it had not been established that the author did not commit the crime in question and that his factual innocence had therefore not been proven. The State party submits that it is of the view that a miscarriage of justice within the meaning of article 14 (6) of the Covenant occurs only when the convicted person is in fact innocent (factual innocence) of the offence with which he is charged. It also explains that in the Canadian penal system, with its common-law tradition, the subsequent

<sup>12</sup> See CCPR/C/GC/32, general comment No. 32, para. 52; communication No. 89/1981, *Muhonen v. Finland*, Views adopted on 8 April 1985; communication No. 408/1990, *W.J.H. v. the Netherlands*, inadmissibility decision adopted on 12 August 1992, para. 6.3; communication No. 868/1999, *Wilson v. the Philippines*, inadmissibility decision adopted on 30 October 2003; communication No. 880/1999, *Irving v. Australia*, inadmissibility decision adopted on 1 April 2002; communication No. 963/2001, *Uebergang v. Australia*, inadmissibility decision adopted on 27 March 2001, para. 4.2; communication No. 980/2001, *Hussain v. Mauritius*, inadmissibility decision adopted on 18 March 2002; communication No. 1001/2001, *Strik v. the Netherlands*, inadmissibility decision adopted on 1 November 2002; communication No. 1367/2005, *Anderson v. Australia*, inadmissibility decision adopted on 31 October 2006.

acquittal of a convicted person does not imply innocence, unless expressly stated by the court due to evidence to that effect.

23.5 In this case, without prejudice to the Committee's position on the accuracy of the State party's interpretation of article 14, paragraph 6, of the Covenant and its implications for the presumption of innocence, it observes that the author's conviction was primarily based on the victim's statements and that the doubts expressed by the victim after March 1992 concerning her assailant led to the reversal of the author's conviction on 22 February 2001. It further notes that, in the event of acquittal of the person prosecuted, the State party has no procedure for launching a new investigation in order to review the case and to possibly identify the real perpetrator. The Committee therefore considers that the author should not be held responsible for this situation.

23.6 Consequently, owing to this gap, and to delays in the civil proceedings, which have been pending for nine years, the author has been deprived of an effective remedy to enable him to establish his innocence, as required by the State party in order to obtain the compensation provided for in article 14, paragraph 6. The Committee therefore notes a violation of article 2, paragraph 3, read in conjunction with article 14, paragraph 6, of the Covenant.

24. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal a violation of article 2, paragraph 3, read in conjunction with article 14, paragraph 6, of the Covenant.

25. Pursuant to article 2, paragraph 3 (a), of the Covenant, the State party is obliged to provide the author with an effective remedy in the form of adequate compensation. The State party is also required to ensure that similar violations do not occur in the future.

26. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

## Appendix

### Partially dissenting individual opinion by Mr. Fabián Omar Salvioli

1. I agree with the decision of the Human Rights Committee, in which it found a violation of article 2, paragraph 3, read in conjunction with article 14, paragraph 6, of the International Covenant on Civil and Political Rights in the *Dumont v. Canada* case.
2. However, for the reasons given below, I believe that the Committee should have concluded that in this case the State was also guilty of a separate violation of article 14, paragraph 6, of the International Covenant on Civil and Political Rights.
3. Article 14, paragraph 6, states as follows: “When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.”
4. Clearly, article 14, paragraph 6, does not require the convicted person to prove his or her innocence; it establishes the right to compensation for a miscarriage of justice if an error is revealed by a new or newly discovered fact.
5. It may also be noted that paragraph 6 does not require the wrongly convicted person to prove that a miscarriage of justice has taken place; such proof may be provided by any means, irrespective of the action undertaken by the convicted person.
6. In the context of article 14, paragraph 6, the expression “according to law” does not allow States to restrict a right which has been established by legislation, but only the possibility of regulating the way it is exercised in order to ensure compensation. This is how the Committee understood it when it stated in paragraph 52 of its general comment No. 32 that “It is necessary that States parties enact legislation ensuring that compensation as required by this provision can in fact be paid and that the payment is made within a reasonable period of time.”
7. In its observations, the State notes that according to the preparatory work, some States interpret the objective of article 14, paragraph 6, to be the compensation of people who are innocent of the crimes for which they have been convicted and that proof of factual innocence is a requirement that must be met for article 14, paragraph 6, to be applicable.
8. The Committee should have established clearly that such an interpretation is incompatible with both the letter and the spirit of article 14, paragraph 6, of the Covenant. A treaty must be interpreted in good faith, according to its literal meaning and in the light of its aim and objective. It may be useful to refer to the preparatory work as an additional means of interpretation or in the event that the outcome of interpretation, purposive or otherwise, turns out to be ambiguous or confused.
9. The wording of article 14, paragraph 6, of the International Covenant on Civil and Political Rights is clear: nowhere does it contain a requirement of the proof of innocence, and even less of “factual innocence”.
10. In the light of the above arguments, since Canadian legislation requires that it is the wrongly convicted person who must show proof of innocence in order to be entitled to compensation for miscarriage of justice, it cannot be considered compatible with article 14, paragraph 6, of the International Covenant on Civil and Political Rights.

11. According to a rule of both customary and conventional international law, a party may not invoke the provisions of its own domestic law as justification for not applying a provision of international law; this rule entails a general obligation not only to align domestic law with the provisions of the international instrument concerned, but also not to enact legislation which is incompatible with that instrument.

12. I therefore consider that in the Dumont case the Committee should have concluded that, in order to ensure that no similar violation occurs in future, the Canadian State must abolish the obligation for the convicted person to give proof of innocence in order to receive compensation for a miscarriage of justice.

(Signed) Fabián Omar **Salvioli**

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

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