

Legal Fees

contemplates the establishment of a general legislative scheme to cover criminal prosecutions in which the Crown does not proceed with a prosecution or in which the accused is not convicted. Certainly that is the focus of public concern in recent cases about which we have heard, particularly the one in the Atlantic provinces where an individual charged with murder was found some 10 years or 11 years later to be innocent of the crime. If ever we need an argument for capital punishment, I am sure that case would be used in future debate. Beyond that, the terms of the motion would appear to extend to civil matters, to interlocutory proceedings and so on.

● (1620)

In this context the question must be asked: In what circumstances an individual is considered to be required to take action, to use the term of the motion itself? One would wonder what the phrase "other costs", may mean in the context of these various situations. We could determine that if we were dealing only with income tax interpretations by the Department of National Revenue. In that area we could bring about a focus and determine what is meant by the Hon. Member when he uses words like "other costs".

Assuming that a clear understanding could be reached as to the precise scope of the scheme that is contemplated in the motion, I believe that the proposals still give rise to a number of substantive and complex considerations which merit further exploration. Let me first address the question of criminal prosecutions. As Hon. Members are aware, the Criminal Code is federal legislation and is therefore covered by the terms of the motion. Indeed, under the Constitution Act, 1867, it is the jurisdiction of the Parliament of Canada to make criminal law and procedure.

Consideration of whether the state should provide a scheme for the reimbursement of all those who are charged with a criminal offence and who are not convicted—either by reason of a stay of proceedings or withdrawal of charge, the finding on a preliminary inquiry that the matter should not be sent to trial, an acquittal or a later determination that a conviction has been entered in error—must begin with a recognition of the traditional stance adopted in a common law jurisdiction such as ours.

Traditionally, the law has not provided compensation for accused persons who have either been discharged at a preliminary inquiry or acquitted at trial, because it was felt to be in the public interest that persons involved in the discovery and prosecution of crime should not be constrained unduly by the fear of civil proceedings, particularly in view of the unpredictable outcome of any criminal proceedings. However, it would be wrong that a citizen should have to bear the expense of a criminal proceeding where, at the outset, there were not reasonable and probable grounds to commence the proceedings and they were conducted with malice or for a purpose other than that of carrying the law into effect. The law has for these reasons permitted a private action for damages in cases of malicious prosecution.

In deciding whether to supplement or replace this private action with some form of public compensation measure, a number of factors have to be taken into account. One factor we simply cannot get around in the Canadian context is that of the division of responsibilities for criminal justice in Canada between the federal and provincial levels of government. While the legislative responsibility for criminal law and procedure lies clearly within the federal Parliament, the decision whether to prosecute in any given case under the Criminal Code generally rests with provincial authorities, in particular the provincial attorneys general.

I think any discussion at this point, and here I am restricting my comments to criminal prosecution, must also take into account the fact that many thousands of people accused of criminal offences do have their legal costs paid by legal aid schemes established by the provinces and cost-shared by the federal Government. I found an interesting statistic when preparing for this address. In 1981-82, the federal Government contributed almost \$30 million toward the cost of providing criminal legal aid services in over 200,000 cases across the country. I believe this consideration is important to take into account in determining the scope of the problem in light of the extent of the actual need. This is without those things which the Hon. Member for Calgary West (Mr. Hawkes) is talking about. In one year we are looking at 200,000 cases and \$30 million. What would be the scope of the recommendations contained in the Hon. Member's motion? I think it is worth repeating that there has to be more focus.

Quite apart from questions of constitutional responsibilities, there are questions of program design, which I believe is important to sort out in considering these issues. For example, should the legislative scheme suggested by the terms of the motion extend to all those individuals who are charged with a criminal offence and not convicted, or should assistance be provided on a more restricted basis? If the basis is to be restricted, according to what criteria should it be limited? Should it cover compensation for all costs incurred by an accused person in the case of his or her defence, or should there be a ceiling on such expenditures? The terms of the motion as it is stated do not make this entirely clear. Should ability to pay figure in the design of the scheme? Should there be separate provision made for those who are later found to have been wrongfully convicted, or should such cases be dealt with by a general scheme where primary emphasis would be on successful defendants at trial or on appeal?

One option in respect of this entire subject is, of course, to use executive discretion, for example in the case of *ex gratia* payments to deal with, thankfully, rare instances of serious miscarriages of justice. Such an approach, of course, allows for a flexible, specific, case by case examination of particular circumstances. Whether the flexibility afforded by this option outweighs the certainty provided by legislatively created schemes such as that contemplated in the motion is a matter that should be considered in light of the factors of relevance.

Having raised a number of these points, again restricted to the topic of criminal prosecutions rather than civil or any other