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Victims' Rights: Enhancing Criminal Law Responses to Better Meet the Needs of Victims of Crime in Canada

**NATIONAL CRIMINAL JUSTICE SECTION
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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Criminal Justice Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Criminal Justice Section of the Canadian Bar Association.

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Victims' Rights: Enhancing Criminal Law Responses to Better Meet the Needs of Victims of Crime in Canada

I. INTRODUCTION

The Canadian Bar Association's National Criminal Justice Section (CBA Section) appreciates the opportunity to comment on the government's discussion paper, *Victims' Rights: Enhancing Criminal Law Responses to Better Meet the Needs of Victims of Crime in Canada*. The CBA Section consists of a balance of defence lawyers, prosecutors and legal academics from every province and territory.

Victims need support and resources to navigate the criminal justice process. They need to be treated with courtesy, compassion and respect. Victims need to be informed and educated about the criminal justice process. They need to be advised of victim services and to be protected from harm, intimidation and retaliation.

The CBA Section has historically supported victims' needs, most recently in our submission on Bill C-54 (*Not Criminally Responsible Reform Act*). The CBA Section supported the right of victims, on request, to be advised when a not criminally responsible accused is released. The CBA Section has supported increased victim surcharges in Bill C-37 (*Increasing Offenders' Accountability*) but called for judicial discretion in their application. As far back as 1986, commenting on Justice Canada proposals on victims of crime, the CBA supported publication bans in accordance with the Supreme Court of Canada's standard of protecting social values of "superordinate importance" and the admission of victim impact statements at the Court's discretion subject to standards of proof.¹ In 1999, the CBA Section noted in our submission on Bill C-79 (*Victims of Crime*) "we must increase victim satisfaction with the criminal justice system" and stated unequivocally that "victims are entitled to a meaningful voice". Finally, the

¹ Submission on *Response to Justice Department Proposals Regarding Victims of Crime* (Ottawa: Legislation Directorate, Canadian Bar Association, 1986) p.4.

CBA Section supported the protection of child victims in the criminal justice system² and protection of children and vulnerable persons.³

Many needs of victims can and are being met through victim services programs, “best practices”, and existing *Criminal Code* provisions. Every province and territory provides some form of victim services. Each province and territory has Crown counsel “charge standards” and guidelines for dealing with victims. Existing *Criminal Code* provisions to assist victims include testimonial aids, publication bans, victim impact statements, restitution and victim surcharges. However, more can be done to assist victims, particularly in helping them understand the criminal justice process and providing information. When existing victim services are not adequately or consistently applied, victims can feel overwhelmed and dissatisfied by their experiences.

A Victims Bill of Rights (**VBR**) is an opportunity to raise awareness, develop national standards, and educate. In the CBA Section’s view, the purpose of a VBR is to address the needs of victims in a meaningful way. A VBR can promote uniformity of best practices in each province and territory. Education and best practices on the ground is where the difference can be made in meeting the needs of victims.

A VBR should also set out the government’s responsibilities towards victims and legislate the government’s commitment to resources and support for victims. These responsibilities should include measures of practical import for victims, such as:

- Adequate provision of victim services like counselling and healthcare;
- Education to ensure that victims understand the criminal justice process and the roles of the parties (i.e., police, Crown counsel, defence); and
- Other measures to enhance victims’ healing process, like leave from employment and compensation funds.

The CBA Section urges caution on the direction of some proposals in the consultation. Some victim rights groups are calling for victims to have the right to funded legal representation and standing in the criminal justice process (from laying charges to bail hearings to disclosure to

² Submission on *Child Victims and the Criminal Justice System*, Justice Canada public consultation (Ottawa: Canadian Bar Association, November, 2000).

³ Submission on Bill C-2: *Criminal Code* amendments (protection of children and other vulnerable persons) (Ottawa: Canadian Bar Association, 2005).

plea bargains and sentencing). They are also calling for the right to review prosecutorial or police discretion to lay or withdraw charges in accordance with charge standards.

Adding the victim as a party to the criminal justice process would give victims high expectations which would ultimately leave them dissatisfied:

Delay – Prolonged criminal proceedings – including constitutional challenges based on the legal right to a fair trial and the presumption of innocence – in an already overburdened criminal court system would increase the likelihood of more judicial stays because of delay.

Evidence – Victims are key witnesses in the criminal process whose evidence might appear tainted if they receive disclosure of Crown counsel’s case. This would make it harder to secure a conviction, while subjecting the victim to more rigorous cross-examination to test credibility and reliability.

Crown Counsel Independence and Discretion – Constitutionally protected Crown counsel independence and discretion would be fettered. Ill-founded charges may go forward to avoid prosecutorial review.

Relationship between Crown Counsel and Victim – An adversarial relationship between the Crown counsel and victim could be created if the victim disagreed with the charge standards or plea bargaining decisions of Crown counsel.

Division of Powers – Imposing additional costs and processes on the criminal justice system would breach provincial responsibility for the administration of justice. Compensation for victims of crime is provided by some provinces as a matter of “property and civil rights”.

Legal Rights under the Charter – Principles of fundamental justice, the legal right to a fair trial brought in a reasonable time, and the presumption of innocence could be infringed by these proposals leading to more judicial stays.

A VBR ought to maintain the integrity of a public prosecution and not turn it into a private one. It should guide Crown counsel in discharging their obligation to act impartially and independently in the public interest and should maintain prosecutorial discretion to continue to do so. A VBR should assist victims without becoming a process solely for retribution. It should uphold the legal right to a fair trial brought in a reasonable time and the presumption of innocence. It should respect provincial jurisdiction over property and civil rights and the administration of justice and avoid overburdening provincially administered court systems.

II. OVERVIEW OF PROPOSED INCLUSIONS IN THE VBR

For victims introduced to the criminal justice system for the first time, procedural and substantive aspects of the legal system may be overwhelming. Victims need to be informed early on about the criminal justice process and the rationale for the rules and practices that protect all citizens, victims and accused alike. Without this, the criminal justice process can seem like an

unfriendly and unsympathetic place for victims of crime. Victims also need to be put in touch with victim services and to be protected from harm, intimidation and retaliation.

The CBA Section believes the following victims' rights could be components of a VBR:

- to be informed by a victim support worker or Crown counsel about the status of the legal proceedings and their potential role in it;
- to safety and protection during criminal proceedings;
- to assistance and support, provided through victim support services, in addition to measures taken by Crown counsel (addressed below);
- to compensation or reparation, as outlined in provincial victims of crime and other provincial legislation;
- to prevention of victimization through support services and mechanisms to assist with testifying in court;
- to recognition (where appropriate) through the preparation and delivery of a victim impact statement;
- to be advised, on request of the victim, of the release of the offender.

Sufficient resources must be provided for victims to receive the information and guidance they need during the criminal justice process. If the government guarantees the process by which victims are informed and guided through the criminal justice system, it is incumbent on the government to legislate its responsibility for funding to ensure resources for victim support services.

III. EXISTING LEGISLATION, POLICY AND “BEST PRACTICES”

Victim rights are recognized in Canadian legislation, policy and practice. The *Criminal Code*, provincial legislation, Crown counsel policy manuals and “best practices” all recognize that victims must be respected, heard, informed and compensated.

Consistent with the existing rights of victims, the CBA Section supports a VBR with a declaratory framework acknowledging the needs of victims and setting out national guidelines or standards. The VBR declaratory framework could reinforce the right of victims to appropriate information and consultation during the criminal trial process, and to appropriate support from properly funded victim services.

A. Criminal Code

The *Criminal Code* establishes and protects the rights of victims to be respected, heard, informed and compensated through the use of victim impact statements, testimonial aids for witnesses, and restitution provisions.

The victim impact statement guarantees the rights of the victim to be heard at the time of an offender's sentencing.

Section 722 of the *Code* states that during sentencing, "the court shall consider any statement that may have been prepared...of a victim of the offence describing the harm done to, or loss suffered by, the victim arising from the commission of the offence."

Section 722 also provides that whether or not a statement has been prepared by the victim, the court may also consider "any other evidence concerning any victim of the offence for the purpose of determining the sentence to be imposed on the offender or whether the offender should be discharged under section 730."⁴

In addition to victim impact statements, the *Criminal Code* enhances and protects the right of a witness to be heard and limits the emotional upset of a witness when testifying. For example, section 486.2(1) allows a witness to testify outside the courtroom, behind a screen, or with an "other device that would allow the witness not to see the accused" as long as the judge or justice is of the opinion that the aid would not interfere with the proper administration of justice. This is permitted if the arrangement "is necessary to obtain a full and candid account from the witness of the acts complained of."⁵ Similarly, a witness under 18, or who has a mental or physical disability, may be permitted to testify with a support person nearby.⁶

Sections 486.4 and 486.5 of the *Code* protect the witness through publication bans of their identity. The *Code* also provides for restitution to victims of offences (section 738) and imposes a victim surcharge for offenders convicted or discharged of criminal offences (section 737).

⁴ Section 722(3) of the *Criminal Code*.

⁵ Section 486.2(2) of the *Criminal Code*.

⁶ Section 486.1 of the *Criminal Code*.

B. Provincial and Territorial Victims of Crime Legislation

Every province and territory has established victims of crime legislation which guarantee a range of victim rights and services. Some have established compensation funds for victims of crime. This legislation addresses the rights of victims to be informed, supported, compensated and recognized.

(i) Victim right to compensation

Many provinces have victim compensation laws, with a mechanism for victims to seek compensation for injury, pecuniary loss, and pain and suffering caused by criminal activity.⁷

Section 737 of the *Criminal Code* requires an offender convicted or discharged under the *Criminal Code* or the *Controlled Drugs and Substances Act* to pay a victim surcharge, which shall be used to assist victims of offences in the province in which the surcharges imposed.⁸ Ontario,⁹ Manitoba,¹⁰ Alberta,¹¹ Nova Scotia,¹² Newfoundland,¹³ British Columbia,¹⁴ Prince Edward Island,¹⁵ New Brunswick,¹⁶ Saskatchewan¹⁷ and the Northwest Territories¹⁸ require a person convicted of a provincial offence to pay a surcharge pursuant to their victims of crime legislation.

⁷ See, for example, *Compensation for Victims of Crime Act*, RSO 1990, c. 24, s.7; *Crime Victims Compensation Act*, RSQ, c. I-6, ss.3, 8, 11; *Criminal Injury Compensation Act*, RSBC 1996, c. 85, ss.2; *Victims' Rights and Services Act*, SNS 1989, c.14, s.11A and *Criminal Injuries Compensation Regulations* NS Reg. 24/94; *Victims of Crime Act, 1995*, SS 1995, c.V-6.011, s. 16(2) and *Victims of Crime Regulations* 1997, RRS, c.V-6.011 Reg. 1, s.8(1); *Victims' Bill of Rights*, CCSM c.V 55, s.47 and *Victims' Rights Regulation*, Man. Reg. 214/98.; *Victims of Crime Act*, RSA 2000, c.V-3, s.12(1); *Victims of Crime Act*, RSPEI, c.V-3.1, s.16.

⁸ S. 737(1) and (7) of the *Criminal Code*.

⁹ See s. 5(2) of the *Victims' Bill of Rights, 1995*, SO 1995, c 6 which creates a victims' justice fund of surcharges paid in respect of fines imposed under the *Provincial Offences Act* and the *Criminal Code*.

¹⁰ See s. 44 of the *Victims' Bill of Rights*, CCSM, c V55.

¹¹ See s. 8(1) of the *Victims of Crime Act*, RSA 2000, c V-3.

¹² See s. 7(1) of the *Victims' Rights and Services Act*, SNS 1989, c. 14.

¹³ See s. 11.1 of the *Victims of Crime Services Act*, RSNL 1990, c V-5.

¹⁴ See s. 8.1, *Victims of Crime Act*, RSBC, c.478.

¹⁵ See s. 9, *Victims of Crime Act*, RSPEI 1988, c.V-3.1.

¹⁶ See s. 18, *Victims Services Act*, SNB 1987, c.V-2.1.

¹⁷ See s. 10, *Victims of Crime Act*, 1995, SS 1995, c.V-6.001.

¹⁸ See s. 12, *Victims of Crime Act*, RSNWT, 1988, c.9.

At present, seven provinces¹⁹ and one territory²⁰ have established a Victim Justice Fund Account or Victim Assistance Fund to provide funding for victim services.

(ii) Victim's right to information and to be treated with courtesy and respect

Victims' rights to information about a prosecution and the role in it, and to be treated with courtesy and respect are already guaranteed in provincial and territorial victims of crime legislation. Some examples:

- Ontario: Section 2 of the *Victims' Bill of Rights* confirms the victim's right to be treated with courtesy and compassion and to detailed information about services available to victims, the progress of an investigation, if no charges are laid the reasons for this decision, and, if charges proceed, all relevant information about the course of the proceedings;²¹
- Manitoba: Sections 3, 7 and 12 give victims the right to detailed information from the police about the investigation of the offence and any prosecution;²²
- British Columbia: Section 2 confirms a victim's right to be treated with courtesy and respect; section 6 gives the victim access to detailed information about the status of an investigation and subsequent criminal proceedings;²³
- Alberta: Section 4 outlines victim's rights to information including the status of the police investigation and any prosecution that results, the role of the victim, court procedures, and any opportunity for the victim to make representations to the court on the impact of the offence. Section 2 establishes fundamental principles in the treatment of victims, including being treated with courtesy, compassion and respect;²⁴
- New Brunswick: Sections 2 and 7 confirm the victim's right to extensive information about a criminal prosecution, and to be treated with courtesy and respect. Section 7.5 establishes the type of information the Minister may disclose to victims including the name of the accused or offender, the date of certain court hearings or Review Board hearings, and the date of

¹⁹ *Victims' Bill of Rights*, 1995, SO 1995, c.6, s. 5 establishes a Victims' Justice Fund Account; *Victims of Crime Act*, RSBC 1996, c.478, s. 8.1 (Victim Surcharge Special Account); *Victims of Crime Act*, RSA 2000, c V-3, s. 9 (Victims' Programs Assistance Fund); *Victims' Rights and Services Act*, 1989, SNS 1989, c. 14: s. 6 (Victim Assistance Fund); *Victims of Crime Act*, RSPEI 1988, c. v-3.1, s. 8 (Victim Assistance Fund); *Victims Services Act*, SNB 1987, c. V-2.1, s. 17 (Victim Services Fund); *The Victims of Crime Act, 1995*, SS 1995 c. 24, s. 6 (Victim Fund).

²⁰ *Victims of Crime Act, 1988*, RSNWT, 1988, c. 9, s. 11 establishes the Victims Assistance Fund.

²¹ *Victims' Bill of Rights*, S.O. 1995, c.6.

²² *Victims' Bill of Rights*, CCSM, c V55.

²³ *Victims of Crime Act*, RSBC, 1996, c.478.

²⁴ *Victims of Crime Act*, RSA 2000, c V-3.

the release of the offender (if in a correctional institution or place of secure custody);²⁵and

- Yukon: Section 3 confirms the victim's right to be treated with courtesy, compassion and respect. Section 4 gives the right to be informed at the earliest reasonable opportunity about aspects of the justice process.²⁶

Similar guarantees reflecting the victim's entitlement to be treated with courtesy and respect, to information about criminal proceedings in which the victim has an interest, and to be consulted on significant decisions about a prosecution in which the victim has an interest, are in other provincial and territorial victims of crime legislation.²⁷

Some provinces and territories have established victim advisory committees or offices to address and monitor victim access to support services, including access to information about the criminal justice system and the proceedings they are participating in.

For example, in Ontario, section 5.1 of the *Victims' Bill of Rights* establishes an Office for Victims of Crime. The function of the Office is to advise the Attorney General on ways to ensure victims receive the information and services guaranteed by the VBR. In addition, the Office advises the Attorney General on:

- Development, implementation and maintenance of provincial standards for services for victims of crime;
- Use of the Victims' Justice Fund to provide and improve services for victims of crime;
- Research and education on the treatment of victims of crime and ways to prevent further victimization; and
- Matters of legislation and policy on the treatment of victims of crime and the prevention of further victimization.²⁸

In PEI, section 3 of the Bill of Rights establishes the Victim Services Advisory Committee that serves many of the same functions.²⁹ In the Northwest Territories, section 2 of the VBR establishes the Victims Assistance Committee to promote courteous and compassionate

²⁵ *Victims Services Act*, SNB 1987, c.V-2.1.

²⁶ *Victims of Crime Act*, 2010, SY 2010, c. 7.

²⁷ See, for example, *Victims' Rights and Services Act, 1989*, SNS 1989, c. 14, s. 3, *Victims of Crime Act*, RSPEI 1988, c. V-3.1, s. 2; *Victims of Crime Act, 1995*, SS 1995, c. 24, s. 2.1 *Victims of Crime Services Act, 2005*, SNL 2005, c. 24, s. 3, 7; *Victims of Crime Act*, RSNWT 1988, c.9, s. 5.

²⁸ *Victims' Bill of Rights, 1995*, S.O. 1995, c.6, s.5.1.

²⁹ *Victims of Crime Act*, RSPEI 1988, c. V-3.1.

treatment of victims. It also promotes prompt redress for victims, availability of information about remedies and social, legal, medical and mental health services available to victims and mechanisms to access them, as well as training for police, health, social service and other personnel on the needs and concerns of victims.³⁰

C. Crown Counsel Policy Manuals

Crown counsel are given guidance on dealing with victims of crime in Crown Counsel Policy Manuals. These Manuals inform Crown counsel about assistance available for victims and the appropriate role of Crown counsel. Manuals recognize the rights of victims, especially their right to be respected, heard and informed during the criminal justice process. The Manuals are an example of existing procedural and substantive consideration given to victims.

Victims are key witnesses in the criminal justice process whose evidence is often the most important part of a prosecution. Their evidence must not appear tainted or tailored to meet the charge and Crown counsel's role is to maintain the integrity of the evidence presented at trial. The Ontario Crown Policy Manual states: "Crown counsel have a responsibility to ensure that every prosecution is carried out in a manner consistent with the public interest."³¹ The Policy ensures that Crown counsel endeavor at all times to discharge their responsibilities in accordance with the public interest, free of partisan considerations.

Prosecutors receive guidance on victims with special needs,³² child victims,³³ victim impact statements and the victim's role at the sentencing hearing. The Manual also provides offence-specific advice, for example on victims of spousal abuse, domestic violence and sexual offences, ensuring Crown counsel appropriately consult victims of these offences during the criminal justice process.

In the context of domestic violence, the Ontario Manual states: "At all stages of the prosecution, including bail hearings, the safety of victims and their families is a paramount factor for Crown

³⁰ *Victims of Crime Act*, 1988, c. 9, s.4.

³¹ Province of Ontario, Ministry of the Attorney General, Crown Policy Manual. (2005, March 21). *Role of the Crown: Preamble to the Crown Policy Manual*. Retrieved from: www.attorneygeneral.jus.gov.on.ca/english/crim/cpm/2005/CPMPreamble.pdf

³² *Ibid.*

³³ Province of Ontario, Ministry of the Attorney General, Crown counsel Policy Manual. (2005, March 21). *Child Abuse, Internet-Based and Other Offences Involving Children*. Retrieved from: www.attorneygeneral.jus.gov.on.ca/english/crim/cpm/2005/ChildAbuse.pdf.

counsel to consider in the exercise of discretion".³⁴ The Manual also includes general guidance on domestic violence prosecutions:

Counsel should exercise caution in evaluating requests from the victim for withdrawal of charges. Given the dynamics that exist in families where a spouse is abused, victims may be reluctant to continue a prosecution and be under intolerable pressure to withdraw.³⁵

D. Best Practices and Victim Rights Groups

Support to victims provided by victim rights groups across Canada, in addition to the "best practices" implemented by criminal justice system participants, ensures that victims can receive a high level of guidance, information and support during legal proceedings. The CBA Section supports measures to educate victims about the Court process and inform them about the status of their cases. This is the cornerstone of "best practices" and meaningfully assists the victim.

IV. PROPOSALS: SUPPORTING VICTIMS, MAINTAINING THE FAIR TRIAL AND PRESUMPTION OF INNOCENCE

The CBA Section urges caution on the direction of some proposals in the consultation. Some groups call for victims to have the right to funded legal representation and standing in the criminal justice process (from laying charges to bail hearings to disclosure to plea bargains and sentencing). They also call for the right to review prosecutorial (and police) discretion to lay or withdraw charges.

The CBA Section believes this approach would:

- A. add to the costs of the criminal justice system;
- B. cause delays leading to more judicial stays;
- C. raise issues of evidentiary disclosure by Crown counsel to the defence;
- D. overstep Crown counsel independence and fetter Crown counsel discretion while contributing to a potentially adversarial relationship between Crown counsel and victims;
- E. encroach provincial jurisdiction over the administration of justice and property and civil rights; and

³⁴ Province of Ontario, Ministry of the Attorney General, Crown Policy Manual. (2005, March 21). *Spouse/Partner Offences Also Referred to as Domestic Violence*. Retrieved from www.attorneygeneral.jus.gov.on.ca/english/crim/cpm/2005/SpousePartnerOffences.pdf.

³⁵ *Ibid.*

- F. infringe entrenched *Charter* rights of fundamental justice, presumption of innocence and a fair trial within a reasonable time.

A. Costs

Significant costs are associated with adding victims as parties in criminal justice proceedings. In addition to short term startup implementation costs for organizations and offices there are significant long term costs:

- The cost of accommodating an increased trial load to ensure charges are not stayed such as building more courtrooms and hiring new court staff and judges.
- The cost of funding counsel for victims through publically funded programs. Legal aid programs, administered by the provinces, are struggling to provide basic services and changing eligibility requirements to reduce costs.

Victims will not have meaningful participation or access to the criminal justice process without sufficient and stable funding allocated for their needs. Legal aid funding is already stretched to its limits. A VBR without sufficient and stable funding will give victims false hope and high expectations without improved treatment in the criminal justice process. Victims would feel more dissatisfied by their experience.

B. Delay

Adding the victim as a party to the criminal justice process would likely impede the day to day operation of the court system – a system already overburdened. Fewer cases would be resolved through plea bargaining if the victim had not only a voice in the process but a right to appeal any decision by Crown counsel. This would lead to more cases going to trial, and in turn to greater delay in having the trial heard as the system attempts to accommodate the new case load. Matters that proceeded to trial would take longer as the victim's lawyer would have the right to bring legal motions and examine witnesses.

Victims who have a lawyer may not cooperate with the police without their lawyer. A delayed police statement might impact the credibility of the victim as witness at trial. A victim's lawyer could assert solicitor-client privilege over communications with the victim, and the communications might be the subject of applications for disclosure from defence counsel, further delaying the trial process. This dynamic could create a distance between the Crown counsel and victim which could lead to an adversarial relationship between them. The ability of victims to meet with the Crown counsel and the ability of Courts to schedule appearances would be complicated by having to consider the availability of a victim's lawyer.

The vast majority of cases in the criminal justice system are resolved by guilty plea and most of those are reached through plea negotiations between defence and Crown counsel. These negotiations can be lengthy and complex, particularly with a serious personal injury offence. Introducing a third party into the negotiations is likely to lengthen and complicate the process. Defence counsel may not be as open in discussions with the victim's lawyer. The possibility of reaching an agreement is less likely if all three parties must agree. The Martin Report, an important examination of the criminal justice process in Ontario, recognized the importance of plea discussions and joint submissions to the proper functioning of the justice system. The reason for their importance was described in this way:

The Committee recognizes that an important, sometimes the most important, factor in counsel's ability to conclude a resolution agreement, thereby depriving the benefits that such agreements bring, is that of certainty. Accused persons are, in the Committee's experience, prepared to waive their right to a trial far more readily if the outcome of such a waiver is certain, than they are for the purely speculative possibility that the outcome will bear some resemblance to what counsel has agreed to. And likewise, from the perspective of Crown counsel, agreed upon resolutions that have a stronger, rather than weaker sense of certainty to them, are more desirable because there is less risk that what Crown counsel concludes is an appropriate resolution of the case in the public interest will be undercut.³⁶

Absent the certainty of a joint submission reached through plea negotiations, an accused person is more likely to go to trial in a criminal court system which does not have sufficient capacity. The prospect of charges being stayed without adjudication on the merits due to delay will not protect victims nor enhance public perception in the administration of justice.

C. Evidence

Victims are key witnesses in a criminal trial. The nature and extent of information given to witnesses may have an impact on the outcome of a prosecution. If victims were added as parties, disclosure of the Crown counsel's evidence may appear to taint the victim's testimony. Even if reviewing this evidence did not actually taint the victim's testimony, it would create the appearance of tainting. The appearance of tainting would be used by defence counsel in cross-examining the victim at trial and could be a significant factor relied on by a judge in assessing credibility and reliability. Allowing a victim to review other evidence could have a negative impact on a Crown counsel's ability to secure a conviction. The CBA Section believes that information provided to victims should not be extended to include actual evidence in the case.

³⁶ The Honourable G. Arthur Martin, O.C., O. Ont., Q.C., LL.D., Chair, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions* (Martin Report) (Toronto: Ontario Ministry of the Attorney General, Queen's Printer for Ontario, 1993), at p. 328.

D. Crown Counsel Independence and Discretion

In a criminal prosecution, the Minister of Justice is represented by Crown counsel who must act in the public interest. Crown counsel must impartially analyze evidence and determine whether there is a reasonable prospect of conviction. If there is insufficient evidence, Crown counsel has a duty not to proceed with a prosecution to avoid the possibility of malicious prosecution.

In *Boucher v. The Queen*, the Supreme Court of Canada stated:

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown counsel considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented; it should be done firmly and pressed to its legitimate strength but must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility.³⁷

Crown counsel exercise quasi-judicial decision making authority to assess whether a prosecution is in the public interest. Crown counsel's independence and discretion is, therefore, fundamental to the functioning of the criminal justice system. The Supreme Court of Canada in *Miazga*³⁸ stated unequivocally that the independence of the Attorney General from political pressures from government is constitutionally entrenched and placed Crown counsel discretion beyond review subject only to the doctrine of abuse of process. Subjecting the Attorney General's quasi-judicial function to review by political interference or judicial supervision could erode the integrity of our system of public prosecutions:

The principle of independence requires that the Attorney General act independently of political pressures from government and sets the Crown counsel's exercise of prosecutorial discretion beyond the reach of judicial review, subject only to the doctrine of abuse of process. The Court explained in *Krieger* how the principle of independence finds form as a constitutional value (at paras. 30-32):

It is a constitutional principle in this country that the Attorney General must act independently of partisan concerns when supervising prosecutorial decisions. Support for this view can be found in: Law Reform Commission of Canada [Working Paper 62, Controlling Criminal Prosecutions: The Attorney General and the Crown

³⁷ 1954 Can LII 3 S.C.C., [1955] S.C.R. 16 at pp 23-24 per Rand J. See also judgment of Locke, J. who adopts the following as an accurate statement of the role of Crown counsel in *Boucher*, supra at p.25: "The learned counsel for the prosecution has most accurately conceived his duty, which is to be of assistance to the court in the furtherance of justice, and not to act as counsel for any particular person or party".

³⁸ *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339.

counsel Prosecutor (1990)], at pp. 9 11. See also Binnie J. in *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12, at paras. 157 and 158 (dissenting on another point).

This side of the Attorney General's independence finds further form in the principle that courts will not interfere with his exercise of executive authority, as reflected in the prosecutorial decision making process. . . .

The court's acknowledgment of the Attorney General's independence from judicial review in the sphere of prosecutorial discretion has its strongest source in the fundamental principle of the rule of law under our Constitution. Subject to the abuse of process doctrine, supervising one litigant's decision making process — rather than the conduct of litigants before the court — is beyond the legitimate reach of the court. . . . The quasi judicial function of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute. To subject such decisions to political interference, or to judicial supervision, could erode the integrity of our system of prosecution. Clearly drawn constitutional lines are necessary in areas subject to such grave potential conflict. [Emphasis added]³⁹

Under Crown Counsel Policy Manuals, Crown counsel must consult with the victim on major prosecutorial decisions, including the decision not to prosecute. They must exercise discretion in an impartial manner. While the victim's viewpoints are an integral consideration of the exercise of discretion, the role of the Crown counsel is clear: "Crown counsel is not and can never function as the victim's lawyer."⁴⁰ Crown counsel has a wider responsibility to serve the public interest. A Crown counsel cannot champion a "cause" and must act impartially as an element of the legal right to a fair trial and the public interest therein.⁴¹ Crown counsel's only cause should be to seek justice by making decisions in a fair and impartial manner and not allow a public prosecution to be turned into a private one.

The CBA Section believes a VBR that impinges on prosecutorial independence and discretion will have significant constitutional and practical implications. A chilling effect on Crown counsel decisions to withdraw charges based on charge standards might result in ill-founded charges going forward to avoid prosecutorial review.

³⁹ *Ibid.* at para 46.

⁴⁰ Province of Ontario, Ministry of the Attorney General, Crown Policy Manual. (2005, March 21). *Role of the Crown: Preamble to the Crown Policy Manual*. Retrieved from www.attorneygeneral.jus.gov.on.ca/english/crim/cpm/2005/CPMPreamble.pdf

⁴¹ *Boucher*, supra note 37.

E. Provincial Jurisdiction – Administration of Justice and Property and Civil Rights

The powers of the federal government include “Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.”⁴² The addition of victims as third parties in the criminal justice process may encroach on the provincial jurisdiction over the administration of justice by adding significant costs and procedural issues in the provincially administered court systems.

The exclusive powers of the provincial legislatures include “property and civil rights in the province.”⁴³ Apart from easily quantified losses suffered by a victim, which may properly be the subject of a restitution order under s. 738 of the *Criminal Code*⁴⁴, compensation for damages to a victim of criminal activity is a matter of provincial jurisdiction under s. 92(13) of the *Constitution Act*. This is reflected in provincial schemes for the compensation of victims of crime.

The CBA Section believes that payment of compensation for harm alleged to have been suffered by the victim, is appropriately in the civil justice system and provincial schemes for victims of crime.

F. Charter Issues – Fundamental justice, right to fair trial in a reasonable time, presumption of innocence

Adding the victim as a party to the criminal justice process raises *Charter* issues concerning principles of fundamental justice, the legal right to a fair trial and the presumption of innocence in accordance with *Charter* values.

(i) Section 7 – Principles of Fundamental Justice

It is a principle of fundamental justice that an accused is entitled to Crown counsel who, at all times, acts as an agent for the Attorney General but also as a Minister of Justice with a duty to ensure that the criminal justice system operates fairly to all. A criminal trial is not a contest

⁴² *Constitution Act, 1867*, (UK), 30 & 31 Vict, c.3, s. 91(27).

⁴³ *Ibid.*, s. 92(13).

⁴⁴ *R. v. Zelensky* [1978] 2 S.C.R. 940 establishes that a restitution order is in Parliament’s jurisdiction to legislate under the criminal law and procedure power in s. 91(27) of the *Constitution Act*, but is limited to amounts which can be quantified expeditiously (per Laskin, J. at p. 963). As the Court notes at p. 963: ... although there is now a broad range of powers in a sentencing court to deal with offenders, it nonetheless remains true that the criminal law cannot be used to disguise an encroachment upon provincial legislative authority.”
This limitation is reflected in *Criminal Code* s. 738(1)(b).

between the accused and a complainant: *Boucher, supra*. Fundamental justice mandates that the Crown counsel's exercise of prosecutorial discretion is immune from political or other interference, and from judicial review except when it is exercised for partisan or other improper purposes: *Krieger, supra*. Permitting a victim, with counsel, to participate in a criminal trial in support of the prosecution, would inject partisanship into the prosecution that would be in violation of section 7 of the *Charter*.

(ii) Section 7 – Right to a full answer and defence and procedural fairness

Pursuant to section 7 of the *Charter*, Crown counsel must disclose its evidence to the defence prior to trial. The law is well settled: absent full disclosure of the prosecution's case and other relevant information, accused persons cannot fully avail themselves of the right to a full answer and defence.⁴⁵ That extends to third party records of the victim⁴⁶ and might include communications between a victim and counsel. These considerations would be a part of the section 7 right to a full answer and defence.

If a victim has a statutory right to be heard during a criminal justice proceeding, the accused may have corresponding constitutional rights to have a review of Crown counsel discretion or participation in proceedings conducted in accordance with principles of procedural fairness, as guaranteed by section 7 of the *Charter*. An accused may have a constitutional right to cross-examine a victim seeking to assert rights under a VBR given that *justice must not only be done but must manifestly be seen to be done*.

(iii) Section 11(b) – Unreasonable delay

A VBR which adds victims as parties will generate further delays getting a matter to trial accompanied by a corresponding increase in judicial stays of proceedings due to unreasonable delay under section 11(b) of the *Charter*.

(iv) Sections 11(d) and (e) – presumption of innocence and right to reasonable bail

There are procedural and constitutional impediments associated with a victim's statutory right to representation or participation at a bail hearing. During bail hearings, Crown counsel bears the onus to adduce evidence that the accused ought not be released and must be detained. At this first stage of the criminal justice process, the characterization of a complainant as a victim is

⁴⁵ *R v. O'Connor*, [1995] 4 S.C.R. 411, *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66.

⁴⁶ *Ibid.*

a subtle yet troubling move toward reversing both the presumption of innocence and Crown counsel's onus. In circumstances where a victim seeks a review or appeal from a Crown counsel's exercise of discretion in a bail hearing, the accused may have a corresponding constitutional right to participation in that process, increasing the cost and duration of the proceeding. Ironically, in such circumstances, both Crown counsel and the accused might have a commonality of interest against the complainant's assertion of rights as a victim.

Finally, many victims have or will come before the criminal courts as accused persons. In many instances, two parties are charged for alleged unlawful conduct toward each other. In these circumstances, both individuals would have conflicting constitutional rights under the *Charter* versus statutory rights under the VBR.

V. CONCLUSION

A VBR should support victims in a meaningful way and maintain principles of fundamental justice, the legal right to a fair trial, and the presumption of innocence.

A VBR is an opportunity to raise awareness, develop national standards, and educate. A VBR can promote uniformity of best practices in each province and territory. Education and best practices are where the difference can be made in meeting the needs of victims.

Many needs of victims can and are being met through:

- Victim services programs;
- Crown counsel best practices and charge standards; and
- Existing *Criminal Code* provisions.

A VBR can set out the government responsibilities towards victims and legislate the government's commitment to resources and support for victims. Those responsibilities should include measures of practical import for victims, such as:

- Adequate provision of victim services such as counselling and healthcare;
- Educational measures to ensure victims understand the criminal justice process and the roles of the parties involved (i.e. police, Crown counsel, defence); and
- Other measures to enhance victims' healing process (e.g. leave from employment, compensation funds).

The CBA Section urges caution on the direction of some proposals in the consultation. Some victim rights groups are calling for victims to have the right to funded legal representation and standing in the criminal justice process (from laying charges to bail hearings to disclosure to plea bargains and sentencing). They are also calling for the right to review prosecutorial (and police) discretion to lay or withdraw charges.

VI. SUMMARY OF RECOMMENDATIONS

The CBA Section recommends that:

- 1. A VBR provide a declaratory framework:**
 - a. Declaring that victims are to be treated with courtesy, compassion and respect throughout the criminal justice process;**
 - b. Providing the victim's right to be informed by a victim support worker or Crown counsel about the status of the criminal justice process and their potential role within it and to be consulted where appropriate;**
 - c. Acknowledging the victim's right to safety and protection;**
 - d. Advising the victim of the right to assistance and support through victim support services;**
 - e. Advising the victim of the right to the prevention of victimization through support services and mechanisms to assist with testifying in court;**
 - f. Giving the victim the right to recognition where appropriate through the preparation and delivery of a victim impact statement;**
 - g. Advising the victim, on request, of the release of the offender.**
- 2. A VBR establish national guidelines for the treatment of victims in the criminal justice process in accordance with provincial charge standards, best practices and Crown Counsel Policy Manuals.**
- 3. A VBR set out the government's responsibilities to victims and legislate the government's commitment to resources and support for victims. These responsibilities should include measures of practical import for victims, such as:**
 - a. Adequate provision of victim services such as counseling and healthcare;**
 - b. Educational measures to ensure that victims understand the criminal justice process and the roles of the parties involved (i.e., police, Crown counsel, defence); and**
 - c. Other measures to enhance victims' healing process (e.g., leave from employment, compensation funds)**

- 4. Victims be recognized as key witnesses in the criminal justice process but not be added as parties to the process in order to respect provincial jurisdiction over the administration of justice and property and civil rights and to maintain, in accordance with principles of fundamental justice, the legal right to a fair trial and the presumption of innocence.**