THE CANADIAN BAR ASSOCIATION
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Bill C-32 — *Victims Bill of Rights Act*

NATIONAL CRIMINAL JUSTICE SECTION
CANADIAN BAR ASSOCIATION

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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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Bill C-32 — *Victims Bill of Rights Act*

I. INTRODUCTION

The Canadian Bar Association's National Criminal Justice Section (CBA Section) is pleased to comment on Bill C-32, the *Victims Bill of Rights Act* (the Bill). The CBA Section represents a balance of Crown and defence counsel from all regions of Canada.

The criminal justice system must continually improve the way it responds to victims of crime. As lawyers working in that system, we are keenly aware of the need to do better. We are also cognizant of other important public interest issues in ensuring the efficient administration of justice and protecting the procedural rights of people accused of crimes. Our comments are aimed at balancing these important considerations, and ultimately improving the Bill. We had the opportunity to consult with government officials and Justice Minister Peter MacKay in advance of this Bill being tabled in Parliament, and appreciate the extent to which our advice and experience has been integrated.

This Bill is an important step for victims of crime. As a whole, it is a responsible piece of legislation that would articulate specific rights of victims without creating significant procedural roadblocks for the administration of criminal justice in Canada. That said, several parts of the Bill could inadvertently undermine the independence of Crown prosecutors and unnecessarily complicate and delay the trial process, and we provide our suggestions to rectify those issues.

Spousal Testimony

Clause 52 of the Bill would replace current provisions in the *Canada Evidence Act (CEA)* on spousal testimony with:

> 52. (2) No person is incompetent, or uncompellable, to testify for the prosecution by reason only that they are married to the accused.

The CBA Section agrees that the existing *CEA* provisions on spousal incompetence and non-compellability are outdated. We support the repeal of those sections.

II. RIGHT TO INFORMATION

Proposed section 7 of the Bill would read in part:

> 7. Every victim has the right, on request, to information about
> (a) The status and outcome of the investigation into the offence

The term "outcome" seems to refer to the end result of the investigation; that is whether or not a charge has been laid. However, the phrase could also be interpreted as providing a right to information about the fruits of that investigation. This interpretation would be unworkable for prosecutors and for the overall administration of justice. For example, it could lead to problems that include the contamination of witness testimony, intruding on third party rights, or hampering the effective use of informants.

The CBA Section urges that the Bill be as clear as possible as to what rights it guarantees to victims. The intent cannot be to promise victims rights that cannot be delivered. A victim who believes that section 7(a) grants the right to access investigative materials may feel alienated and disappointed when informed that there is no such entitlement. Section 7(a) should be clarified to specifically state that it does not entitle a victim access to investigative materials.

RECOMMENDATION:

1. **The CBA Section recommends that section 7(a) specifically state that it does not entitle a victim to access investigative materials.**

III. RESTRICTIONS

Proposed section 19(2) would limit a victim's entitlement to exercise rights:

> A victim is entitled to exercise their rights under this *Act* only if they are present in Canada or they are a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act.*

This would preclude a foreign victim from filing a claim for restitution or a victim impact statement unless physically present in Canada. Foreign property owners residing outside of Canada could not claim restitution for damage to their property without incurring the expense of returning. Similarly, foreign victims of violent crimes would have no input in the sentencing process unless prepared to return to Canada.

These restrictions seem unfair to victims, and unnecessary for the proper administration of justice. If a foreign victim files a victim impact statement or request for restitution and a need then arose to question the witness on the material, section 714.1 would permit that witness to testify via video link. Forcing a victim to return to Canada to enforce their right to file a victim impact statement or make a claim for restitution appears to run contrary to the spirit of the Bill.

RECOMMENDATION:

2. **The CBA Section recommends that section 19(2) be amended to allow foreign victims to make a request for restitution or to file a victim impact statement without having to be in Canada at the time.**

Section 19(2) is also unclear as to the Crown's role in exercising rights on a victim's behalf. For example, if a foreign witness under the age of 18 was outside of Canada, could the Crown make a pre-trial application under section 486.3(1) for an order that the accused not personally cross examine the witness? To avoid unnecessary delays, the application should be made at the pre-trial stage so counsel could be in place by the trial date. If the Crown is bound by the restriction under section 19(2), the application would have to wait until the witness was physically brought to Canada to testify, likely resulting in additional expense and delay.

RECOMMENDATION:

3. **The CBA Section recommends that section 19(2) be amended to state that it does not apply to an application being made by a prosecutor in the course of proceedings.**

IV. NOTIFICATION OF GUILTY PLEA

Clause 21 of the Bill proposes to enact section 606(4.1) to (4.4) of the *Criminal Code*:

> (4.1) If the accused is charged with a serious personal injury offence, as that expression is defined in section 752, or with the offence of murder, and the accused and the prosecutor have entered into an agreement under which the accused will enter a plea of guilty of the offence charged — or a plea of not guilty of the offence charged but guilty of any other offence arising out of the same transaction, whether or not it is an included offence — the court shall, after accepting the plea of guilty, inquire of the prosecutor if reasonable steps were taken to inform the victims of the agreement.

> (4.2) If the accused is charged with an offence, as defined in section 2 of the Canadian Victims Bill of Rights, that is an indictable offence for which the maximum punishment is imprisonment for five years or more, and that is not an offence referred to in subsection (4.1), and the accused and the prosecutor have entered into an agreement referred to in subsection (4.1), the court shall, after accepting the plea of guilty, inquire of the prosecutor whether any of the victims had advised the prosecutor of their desire to be informed if such an agreement were entered into, and, if so, whether reasonable steps were taken to inform that victim of the agreement.
>
> (4.3) If subsection (4.1) or (4.2) applies, and any victim was not informed of the agreement before the plea of guilty was accepted, the prosecutor shall, as soon as feasible, take reasonable steps to inform the victim of the agreement and the acceptance of the plea.
>
> (4.4) Neither the failure of the court to inquire of the prosecutor, nor the failure of the prosecutor to take reasonable steps to inform the victims of the agreement, affects the validity of the plea.

These significant proposals are problematic and could cause unnecessary delays in prosecutions proceeding through the courts. Delays are detrimental to the public interest. They impede both a victim's interest in obtaining fair and speedy justice and the efficient administration of justice.

The proposed sections would also require significant additional resources. Providing the promised information and notifications to victims would require additional staff time. Further, the onus seems to be on the Crown to inform a victim that the accused intends to plead, or has pled guilty. The Crown must also provide this information even if no plea bargain has been struck. Delivering on these promises to victims would require significant additional funds and resources for prosecution services.

In addition to cost, the proposals could increase backlogs in an already overburdened justice system. Notifying victims that an accused has agreed to plead guilty should remain an after-the-fact decision made on a case by case basis, using independent Crown discretion.

Further, prosecutors often drop a count or case against an accused when the accused pleads guilty to other charge(s). The Crown’s decision to drop one or more charges against an accused where the accused pleads guilty to another charge should not require notice to the victims involved.

RECOMMENDATION:

4. **The CBA Section recommends that clause 21 of the Bill be eliminated. In the alternative, the clause should be amended to apply only where the prosecutor agrees to present a joint submission on sentencing with the accused in return for a guilty plea.**

V. SENTENCING

The Bill would amend section 718(a) of the *Criminal Code* dealing with the principles of sentencing as follows:

> (a) to denounce unlawful conduct and the harm done to victims or the community that is caused by unlawful conduct.

Judges historically and currently weigh the harm done to victims and the community, and section (f) already lists "harm done to victims and to the community" as a purpose of sentencing. Adding it again to section (a) would be redundant and could lead to confusion in interpreting the law, adding to delay and the cost of proceedings. Specifically, that repetition could suggest that additional weight must be given to the "harm done" over other purposes and principles of sentencing, tipping the fine balance required of judges to address many sentencing principles.

Under the Bill, section 718(f) of the *Code* would be replaced by the following:

> (f) to promote a sense of responsibility in offenders, and the acknowledgment of the harm done to victims or to the community.

And, section 718.2(e) would be replaced as follows:

> (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

Again, these proposed amendments are redundant, since "consistent with the harm done to victims or to the community" is already in the *Code* under the fundamental purposes and principles of sentencing. Further, it is currently included as a paramount principle in the preamble to the sentencing provisions of the *Code*.

To repeat, this repetition suggests to judges that greater weight must be attributed to the consideration of harm over other important considerations of sentencing, like proportionality, the circumstances of the offender and the offence, rehabilitation and reintegration, and others. The fine balance required could easily be skewed by the Bill.

The cumulative impact of these proposed amendments, with the increased use of mandatory minimum penalties and the elimination of conditional sentence orders for many non-violent offenders, risks adding to Canada's over-reliance on incarceration. This has been a persistent concern for the CBA Section, particularly as it relates to Aboriginal and other marginalized communities in Canada.

In our view, these proposed amendments are redundant and would only generate confusion. Current *Code* provisions represent an appropriate and tested balance of the purposes and principles of sentencing, including proportionality. Repeating or rephrasing some purposes and principles over others risks uncertainty as to the proper weight to be afforded to particular purposes or principles.

RECOMMENDATION:

5. **The CBA Section recommends that the amendments to section 718 be deleted.**

Section 722 amendments

Clause 25 of the Bill would replace section 722 of the *Code* with the following:

> 722.(1) When determining the sentence to be imposed on an offender or determining whether the offender should be discharged under section 730 in respect of any offence, the court shall consider any statement of a victim prepared in accordance with this section and filed with the court describing the physical or emotional harm, property damage or economic loss suffered by the victim as the result of the commission of the offence and the impact of the offence on the victim.

This defines the parameters of the victim impact statement, allowing a victim to describe the "physical or emotional harm, property damage or economic loss" incurred. The amendment would expand the wording in the existing section, which provides that the victim impact statement may describe "harm done to, or loss suffered by, the victim."

Canadian courts have made it clear that legislative provisions govern the victim's right to file a victim impact statement, and appropriate content for the statements. Any information outside the scope of the defined content has been held as improper and struck from the statements.

The proposed *Victim Impact Statement* in Form 34.2 lists several points not traditionally included in the victim impact statement for important and sound reasons. The last of these points creates infinite possibilities beyond the existing list, by saying "except with the court's approval, an opinion or recommendation about sentence". This would allow the court to permit a victim's recommendation on sentence, far beyond what is authorized in section 722.

In our view, this change to section 722 is unwise and would not advance the legitimate objectives of sentencing. The sentencing process is and should remain a careful legal analysis of the various factors in section 718, together with consideration of the relevant case law. Victims of crimes may certainly be capable of describing the harm suffered, but for the most part are not equipped to make legally relevant or meaningful recommendations on the appropriate sentence. If a victim has personal information regarding the offender relevant to the appropriate sentence, that can be included in a pre-sentence report.

RECOMMENDATION:

6. **The CBA Section recommends that the proposed form of the victim impact statement be amended to delete the reference to including a victim's opinion or recommendation on sentence.**

VI. COMMUNITY IMPACT STATEMENTS

Clause 26 of the Bill would permit one individual to file a community impact statement describing the harm or loss suffered by a community and the impact of an offence on the community.

There is no question that an offender's actions can impact the community at large, and that impact is a relevant factor at sentencing. The difficulty is that this proposal contains no guidance or direction as to who would be entitled to speak or make representations on the community's behalf. Nor is there any guidance as to the number of people who could file statements for a community, potentially inviting contradictory views and information. To be effective and meaningful, criteria must be provided to ensure anyone filing a statement on behalf of a community has some genuine status to speak for the community. Individuals could

easily use this provision to advance a personal perspective by claiming that it is shared by the community as a whole, when other community members feel otherwise.

Our concerns and recommendations above on including an opinion on sentence in a *Victim Impact Statement* apply equally to the community impact statement in Form 34.3, which contains a parallel provision allowing a community to present an opinion on sentence to the court. For the same reasons, this too would be unwise.

RECOMMENDATION:

7. **The CBA Section recommends for the purpose of introducing "community impact statements", the Bill contain clear definitions of what constitutes a "community" and strict criteria for how a community representative is to be selected, as well as the appropriate type of content to be included in such statements.**

VII. RESTITUTION ORDERS

Section 738 to 741.2 of the *Criminal Code* represent the current legislative scheme permitting courts to order restitution and for the enforcement of those orders. Clause 30 of Bill C-32 proposes adding:

> 739.1 The offender's financial means or ability to pay does not prevent the court from making an order under section 738 or 739.
>
> 739.2 In making an order under section 738 or 739, the court shall require the offender to pay the full amount specified in the order by the day specified in the order, unless the court is of the opinion that the amount should be paid in instalments, in which case the court shall set out a periodic payment scheme in the order.

Courts have held that the offender's ability to pay is not determinative of whether or not a restitution order should be made. Section 739.1 appears to codify those rulings.

Section 739.2 adds a new element to restitution orders, providing that the court specify a date by which the restitution is to be paid, or in the alternative set out a payment scheme. Including a deadline for payment could create adverse consequences for victims.

The proposed sections do not limit the length of time an offender can be given to make restitution. In theory, a court could order an offender to make restitution in periodic installments of $1,000 per year for 25 years. Under section 741, a victim could not attempt to

enforce that order civilly as long as the offender makes the payments. Victims would have to wait for a default to enforce the orders civilly, even if there were personal assets of the offender that could be subject to a civil execution order.

The wording of section 739.2 is mandatory: a court *shall* specify times periods in the restitution order. There may well be instances where the court believes that a restitution order should be made, but given uncertainty about the offender's financial situation is reluctant to specify a date for payment or installments. Fettering judicial discretion in this way is unnecessary and may have the adverse effect of providing victims with false hope of financial recovery.

RECOMMENDATION:

8. The CBA Section recommends that section 739.2 be removed.

VIII. NON-DISCLOSURE OF WITNESS IDENTITY

Clause 17 of the Bill proposes a new regime allowing for the non-disclosure of a witnesses' identity in the course of the proceeding:

> 486.31(1) In any proceedings against an accused, the judge or justice may, on application of the prosecutor in respect of a witness, or an application of a witness, make an order directing that any information that could identify the witness not be disclosed in the course of the proceedings if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.
>
> (2) The judge or justice may hold a hearing to determine whether the order should be made, and the hearing may be in private.
>
> (3) In determining whether to make the order, the judge or justice shall consider
>
> (a) the right to a fair and public hearing;
>
> (b) the nature of the offence;
>
> (c) whether the witness needs the order for their security or to protect them from intimidation or retaliation;
>
> (d) whether the order is needed to protect the security of anyone known to the witness;
>
> (e) whether the order is needed to protect the identity of a peace officer who has acted, is acting or will be acting in an undercover capacity, or of a person who has acted is acting or will be acting covertly under the direction of a peace officer;
>
> (f) society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process;

(g) the importance of the witness' testimony to the case;

(h) whether effective alternatives to the making of the proposed order are available in the circumstances;

(i) the salutary and deleterious effects of the proposed order; and

(j) any other factor that the judge or justice considers relevant

(4) No adverse inference may be drawn from the fact that an order is or is not, made under this section.

Concealing a witness' identity from the accused in a criminal proceeding is problematic, inviting rigorous constitutional scrutiny. Section 486.5 of the *Code* currently provides for an order restricting *publication* of information that could identify a victim or witness. The information can be adduced in court but its publication can be prohibited.

In applying section 486.5, courts have been cautious in their approach and often decline to order indefinite publication bans. They sometimes use section 486.5(8) which authorizes a court to impose any conditions that it deems fit. There is no similar authorization for the court to impose conditions in an application granted under proposed section 486.31.

Even if such authorization was included, it is difficult to imagine how an accused could receive a fair and public hearing if any information that may identify a witness must be concealed. Information inevitably comes to light during direct or cross-examination about the identity of the witness. To suggest that counsel could effectively question the witness without eliciting such evidence would create a mine field.

The proposed section would preclude disclosure of information of the witness' identity even to the trier of fact. This would obviously be impossible in a judge alone trial and would be improper in the case of a jury trial. The trier of fact must assess the evidence of witnesses, including their credibility and reliability. It would be impossible to do this in the absence of knowledge as to their identity.

RECOMMENDATION:

9. The CBA Section recommends that clause 17 of Bill C-32 be deleted.

IX. CONCLUSION

The CBA Section appreciates the opportunity to provide our views on the proposed *Victims Bill of Rights Act*. The changes we recommend would improve the Bill and make it more likely to

withstand constitutional scrutiny, safeguard prosecutorial independence and ensure that the criminal justice system is actually able to deliver on the additional rights promised to victims of crime.