XIII. VICTIMS

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A. *Introduction*

The Minister of Justice has stated that protection of the rights of victims and the public was the first priority in drafting Bill C-19.[1] The amendments "closely follow recommendations of the Federal/Provincial Task Force on Justice for Victims of Crime, which submitted its report in July 1983".[2] However, some defence lawyers reacted to the Bill with alarm, suggesting that it would produce legal assistance for victims as well as inequities and emotionalism.[3] And while advocates of the rights of victims described the proposals as progress, they also regarded them as inadequate.[4]

The Bill proposes the addition to the Criminal Code of a major section on restitution to victims, introduces powers to award special and punitive damages and directs probation officers to meet victims when preparing a pre-sentence report.[5] It makes clear that judges may invite a victim to address the question of restitution as a witness.[6] It places limits on court delays[7] and facilitates the return of property.[8] It clarifies the use of penal sanctions against victims[9] who refuse to give evidence. It sets out criteria for sentencing, which include redress for the victim.[10] It responds to the claims of survivors of homicides by increasing penalties for vehicular homicide[11] and facilitating the use of life imprisonment for dangerous offenders.[12]

In order to evaluate how these amendments will affect crime victims, the needs of those victims must be examined, together with the legislative response to them in Canada and in other countries. The proposed revisions can then be reviewed in detail from the perspective of the victim.

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[1] Criminal Law Reform Act, 1984, Bill C-19, 32nd Parl., 2d sess., 1983-84 (1st reading 7 Feb. 1984) [hereafter cited as Bill C-19].

[2] DEPARTMENT OF JUSTICE, NEWS RELEASE (7 Feb. 1984).

[3] The Globe and Mail (Toronto), 8 Feb. 1984, at 1.

[4] The Journal (CBC), 8 Feb. 1984.

[5] Respectively sub. 665(1) and paras. 665(1)(c), (d), as proposed in Bill C-19, cl. 206, and para. 648(1)(f), as proposed in Bill C-19, cl. 199.

[6] Subpara. 655(1)(b)(iii), as proposed in Bill C-19, cl. 206.

[7] S. 462.5, as proposed in Bill C-19, cl. 130.

[8] Sub. 446(1), as proposed in Bill C-19, cl. 108.

[9] Sub. 116(1), as proposed in Bill C-19, cl. 29.

[10] Para. 645(1)(d), as proposed in Bill C-19, cl. 199.

[11] Para. 233(1)(c), as proposed in Bill C-19, cl. 52.

[12] Sub. 668.31(1), as proposed in Bill C-19, cl. 209.

B. *Situation of the Crime Victim*

When the government stated its policy on the revision of the Criminal Code[13] in 1982, it said that "the purpose of the Criminal Law is to contribute to the maintenance of a *just*, peaceful and safe society through the establishment of . . . *procedures to deal fairly* . . . with . . . conduct that causes . . . serious harm to individuals . . .".[14]

This purpose was to be achieved in a manner consonant with the Canadian Charter of Rights and Freedoms,[15] and in accordance with certain principles, including the following:

> (g) wherever possible and appropriate, the criminal law and the criminal justice system should also promote and provide for:
> (i) opportunities for the reconciliation of the victim, community, and offender;
> (ii) redress or recompense for the harm done to the victim of the offence;
> (iii) opportunities aimed at the personal reformation of the offender and reintegration into the community.[16]

Given this official policy as well as the statements in the News Release accompanying the Bill, one might expect Bill C-19 to make changes to the Criminal Code that would recognize the concerns and interests of victims of crime. Indeed, it does so, but it does not recognize the special interests of the victim or their family in the crime itself;[17] it does not provide guidelines as to how police, courts and correctional authorities are to recognize the needs of the victim;[18] it does not facilitate mediation between victim and offender;[19] and it does not provide structures for the protection of the witnesses.[20]

1. *Victim's Interests*

Crime denies the existence of its victim, often in cruel terms. The victim is harmed intentionally, arbitrarily and usually suddenly by an offender. The careless acts of a robber, murderer or burglar result in financial loss, physical injury and emotional trauma, not only to the victim himself, but to spouses, children and close friends. Emotional trauma can involve intense feelings of fear, guilt and anger, which will

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[13] R.S.C. 1970, c. C-34.

[14] DEPARTMENT OF JUSTICE, THE CRIMINAL LAW IN CANADIAN SOCIETY (1982).

[15] Constitution Act, 1982, Part I, *as enacted by* Canada Act, 1982, U.K. 1982, c. 11.

[16] *Supra* note 14, at 5-6.

[17] K. FRIEDMAN, VICTIMS AND HELPERS: REACTION TO CRIME (1982); J. AMERNIC, VICTIMS: ORPHANS OF JUSTICE (1984).

[18] R. REIFF, THE INVISIBLE VICTIM (1979); U.S. ATTORNEY GENERAL, GUIDELINES FOR THE FAIR TREATMENT OF VICTIMS AND WITNESSES (1983).

[19] J. HARDING, VICTIMS AND OFFENDERS (1982).

[20] AMERICAN BAR ASSOCIATION, GUIDELINES FOR FAIR TREATMENT OF CRIME VICTIMS AND WITNESSES (1983).

diminish only over time, as the victims adjust to the incident. There are over 100,000 Canadians each year who suffer severe emotional trauma as a result of crime.[21]

Being the victim of a major tragedy is only the first step in the denial of the victim's rights. The legal dogma that we have inherited from the 19th century states that crimes are committed against the state. It is the victim who is raped or held at gun point; the family becomes the victim where the daughter is murdered or the son is slaughtered by a drunk driver; yet in the eyes of the law these are not crimes against the victim but rather against the Queen. This dogma is used to justify our neglect of victims and our failure to provide the time and the resources that would enable us to treat them with dignity by providing information, consultation and involvement before making any decision during the processing of "their" crime. This results in a further denial of the existence of the victim. This time, the state is responsible. It acts objectively, reflectively and usually very slowly.

It is sometimes suggested that this system avoids personal retaliation, which might be disruptive to the community and result in unfair action against innocent suspects.[22] Undoubtedly, it does protect innocent persons. However, there is little evidence that systems that involve the victim are more cruel; indeed, in comparative terms, the arrogation of criminal punishment to the state has resulted in the infliction of penalties far more cruel than any individual could mete out, simply because the state has greater means to indulge in systematic cruelty.

Moreover, the origins of the criminal justice system lie in the state's desire to protect its interests in collecting revenue and in enforcing its standards on a recalcitrant colony. The system was first established when the Normans decided to abolish a successful Anglo-Saxon system, known as composition, that involved the reconciliation of victim, offender and community. The Normans wanted to impose their own system of justice and above all to collect fines, which could be used to finance the state.

Today the direct victims of crime and their close relatives and friends want recognition. They feel that the present criminal justice system has had the concept of "justice" removed from it and has become a system concerned solely with the criminal, the person who destroyed a part of their lives.

The results of the Canadian Victimization Survey suggest that a large proportion of victims has ceased to report crimes to the police.[23] These victims are no longer prepared to subsidize a legal system that ignores their concerns, but requires them to be present in court at the convenience of the judge, the defence counsel or the prosecutor.

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[21] I. WALLER, CRIME VICTIMS: NEEDS, SERVICES AND REFORMS (1982).

[22] N. WALKER, SENTENCING IN A RATIONAL SOCIETY (1969).

[23] MINISTRY OF THE SOLICITOR GENERAL, CANADIAN URBAN VICTIMIZATION SURVEY (1983).

2. *Recognition of Needs of Victims Internationally*

The needs of victims have been recognized in other jurisdictions. For more than a century, France and its colonies have allowed victims to join a tort action against the offender to the state's criminal action, as the "partie civile". This procedure gives victims standing at all critical stages in the criminal justice process. Indeed, victims are able to present their views on prosecution, to gain access to the file on the investigation and to speak to sentence when requesting restitution. Court time is saved because many cases are settled before going to trial and there is no need for separate civil and criminal actions. Legal aid is available to the victim for these procedures. New amendments would in addition allow the victim access to a parole hearing. The British Home Secretary has announced a study of this procedure for possible adoption in England.

More recently, several American jurisdictions have approved statutes that recognize the needs of victims and in some cases require that the legal community listen to their views. In 1982, the Victim and Witness Protection Act[24] was signed into law by the President. This Act provides for "Victim Impact Statements", compulsory consideration of restitution, special protections for witnesses, accountability of the states for grossly negligent release of offenders, access by victims to any royalties earned by criminals and federal guidelines for legal personnel.

In 1982, the Presidential Task Force on Victims of Crime[25] made sixty-nine recommendations to government, lawyers, mental health specialists and six other groups of Americans. These recommendations included a constitutional amendment that would give victims, "in every criminal prosecution, the right to be present and to be heard at all critical stages of judicial proceedings".[26] The Task Force report was made after high profile hearings held with victims, their advocates, researchers and the legal community.

In 1983, the United States administration introduced new guidelines for all its federal investigative and legal personnel.[27] These required that, in an emergency, victims be assisted both socially and medically as well as be referred to community agencies. It required that they be informed of all stages during the prosecution, consulted with to obtain their views and have any critical stages in the criminal process explained to them before they took place.

In 1984, the administration introduced the Victims of Crime Assistance Act[28] to fund both state compensation and victim service agencies as well as to establish a Victims of Crime Advisory Committee that would recommend further improvements in assistance and justice for victims.

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[24] Victim and Witness Protection Act, 28 U.S.C.S. §2420 (1982).

[25] REPORT OF THE PRESIDENTIAL TASK FORCE ON VICTIMS OF CRIME (U.S. 1983).

[26] *Id.* at 3.

[27] *Supra* note 18.

[28] Victims of Crime Assistance Act, 28 U.S.C.S. §2423 (1984).

Many individual states have enacted similar laws. Eighteen have now provided for state-wide victim services in legislation similar to that of the most recent Victim Bill of Rights in Massachusetts.[29] That Act provides services, financial assistance and protection of witnesses as well as requiring victim-impact statements and opportunities for victims to present their views at sentence and parole hearings. It also provides for the creation of a commission whose purpose is to study issues relating to victims and prepare any necessary legislative amendments.

Other jurisdictions are working on a "New Deal" for crime victims. South Australia, the United Kingdom, the Council of Europe and the United Nations are all studying or acting on proposals that would provide greater recognition and greater rights for victims of crime.[30]

3. *Canada*

Gordon Walker, the Secretary for Justice in Ontario, propelled the issue of crime victims into the political arena at a meeting of federal and provincial Ministers of Justice in 1979. Before then only limited progress had been made in the areas of state compensation, restitution, research and volunteer rape and battered wife programs. Mr. Walker's speech precipitated a series of actions that placed the rights of crime victims high on the agendas of the legal bureaucracies in Canada.

In 1981, the independent Canadian Council on Social Development clarified rights and services for crime victims in a report with that title,[31] and defined detailed rights under the headings of protection from criminal acts; redress for pain, loss and injury; and dignity, respect and a fair deal. These were discussed in a major North American meeting on victim assistance in Toronto in 1981.[32]

With momentum building, a federal/provincial task force was established to recommend further action.[33] This task force did not hold public hearings and was composed of public servants, who were drawn from the research, prosecutorial or correctional communities.

Interest in the victim coincided with a separate movement to revise the criminal law in Canada. The Law Reform Commission had always talked about the importance of the victim, but none of its studies had addressed the needs of the victim directly; often the victim was treated as a means of getting offenders out of prison, rather than as an individual whose interests and feelings had their own right to protection.[34] In

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[29] Victim Bill of Rights, 1983 Mass. Acts 145.

[30] Waller, *United Nations Declaration on Justice and Assistance for Victims*, 32 CANADA'S MENTAL HEALTH, No. 1, at 2-3, 11 (1984).

[31] CANADIAN COUNCIL ON SOCIAL DEVELOPMENT, RIGHTS AND SERVICES OF CRIME VICTIMS (1981).

[32] 10-11 Oct. 1981.

[33] Appointed 1 Dec. 1981.

[34] LAW REFORM COMMISSION OF CANADA, RESTITUTION AND COMPENSATION, WORKING PAPER 5 (1974).

contrast, the Canadian Association for the Prevention of Crime in 1982 prepared a detailed brief on the revision of the criminal law, which tried to find a balance between the needs of the suspect, the victim and the community.[35]

C. *Restitution*

Bill C-19 contains several provisions that enable the court to order an offender to make restitution to another person. These include the return or the replacement of property, the payment of special damages for loss of income or for support made necessary by bodily injury and the payment of "punitive damages".[36]

These provisions made clear that restitution can constitute a separate sentence and generally encourage judges to make more use of this measure. In contrast to the four inconsistent and little used sections in the present Criminal Code,[37] these provisions are contained in one internally consistent section. This rationalization is long overdue.

That section also enables a restitution order to be enforced in a civil court. In the past, many jurisdictions had problems in securing the payment of such orders.

The introduction of punitive damages into the criminal proceedings is a contentious issue, however. It makes sense for an offender to pay punitive damages to his victim, rather than fines to the state, but it is not clear whether the higher courts will allow a criminal court to award punitive damages. Are the criminal courts to be equipped to make damage assessments?

One provision preserves the state's present interest in raising tax money rather than reconciling victim and offender. Where an offender is an individual convicted of an indictable offence, there is no maximum fine,[38] yet punitive damages are limited to $10,000.[39]

In general, however, priority is to be given to restitution rather than fines.[40] This priority does not extend to prison sentences, so that judges cannot provide for restitution before considering whether or not a prison sentence would be necessary. Such a change could have been made simply by stating that priority was to be given to restitution in the sentencing principles.[41]

Unfortunately, it is unclear how these sections will be received by the courts. Do they go beyond the jurisdiction of the federal government

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[35] CANADIAN ASSOCIATION FOR THE PREVENTION OF CRIME, TOWARD A NEW CRIMINAL LAW FOR CANADA (1982).

[36] Sub. 665(1), as proposed in Bill C-19, cl. 206.

[37] Present subs. 388(2), 653(1), 655(1) and 663(2).

[38] Sub. 668.1(1), as proposed in Bill C-19, cl. 206.

[39] Sub. 665(1), as proposed in Bill C-19, cl. 206.

[40] Sub. 667(1), as proposed in Bill C-19, cl. 206.

[41] Sub. 645(3), as proposed in Bill C-19, cl. 199.

by dealing with civil rights? Victims have not been able to understand why the state wants to pay for separate criminal and civil proceedings on the basis of the legal fiction that the crime was committed against the Queen, when it is they who were raped, held at gunpoint or bereft of their child by a drunk driver.

D. *Presentation of Views of Victims*

The new provisions make clear that a judge may hear from the victim, when considering restitution,[42] and if a pre-sentence report is ordered then the victim is to be interviewed.[43]

The proposed amendments "enable" the court to hear from the victim, but "require" it to hear from both the prosecutor and the offender. It would seem basic to any notion of justice that a victim seeking restitution should also have the right to require the court to "hear and consider any representations with respect to restitution" if he is eligible to receive it.

Furthermore, the court is required to hear evidence when the facts are disputed between the prosecutor and the offender.[44] Yet no such requirement exists if the victim disagrees. Again basic notions of fairness require that the court hear evidence from all interested parties when facts are in dispute.

The interview with the victim for the pre-sentence report is unlikely to give most victims any input into sentences. First, such reports are ordered in a minority of cases. Second, they are only compulsory when a first-time prison sentence is being considered, and thus will not be likely to provide victims of persons with a prison record an opportunity for input.[45]

Victims, their survivors and their parents want to be able to present their views of the case. At present, an offender may plead guilty or even go through a trial and never have to face the harm that he has done to another human being. Victims want offenders to know about that harm and ideally to redress it. They do not see any justice in allowing emotional pleas to the defence, while refusing victims the chance to tell their part of the story.

E. *Trial Within Reasonable Time*

Bill C-19 states that the trial and related hearings shall commence within six months of the first appearance of the accused. An extension can be given, where the court decides that "it is in the interests of justice

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[42] Para. 655(1)(b), as proposed in Bill C-19, cl. 206.
[43] Para. 648(1)(f), as proposed in Bill C-19, cl. 199.
[44] Subpara. 655(1)(a)(ii), as proposed in Bill C-19, cl. 206.
[45] Sub. 647(3), as proposed in Bill C-19, cl. 199.

to do so and that the accused will not suffer any prejudice as a result of the extension''.[46] The court must take into account the responsibility of the prosecutor and the defendant for the delay. If the trial does not take place within this time period, the proceedings on application are to be dismissed.

The Canadian Council on Social Development in 1981 proposed that the victim have a right to a speedy disposition of the case.[47] The 1983 task force on justice for victims of crime stressed that many victims complain about the delays that occur before trials take place.[48] Unfortunately for the victim, the task force went on to recommend that, in that event, the charge be dropped for want of prosecution. Victims almost invariably want to know exactly what happened in their case and would like to see trials proceed. They do not see any justice in the inequitable sentences that result from ''judge-shopping'', or in delayed trials, or in their loss of income as a consequence of their compulsory court appearances.

The new provisions do not mention the victim's interests except insofar as they may be subsumed in the interests of justice. However, they do make it clear that where delay is caused by the defence, an extension may be granted. Overall, the section would be improved by the insertion of the words ''and the victim'' after the reference to the interests of justice.

F. *Return of Property*

Bill C-19 provides measures to ''seize and freeze'' property and to subsequently return anything seized to its owner. Property seized must be preserved and returned within three months, unless a justice has ordered further detention or unless proceedings have been instituted.[49]

The Canadian Council on Social Development in 1981 proposed that the victim have the right to have his property returned when recovered.[50] The 1983 task force on justice for victims of crime made eight recommendations that would have facilitated the return of property.[51] These required only two amendments to the Criminal Code so as to set a maximum period for detention and to endorse the use of photographs of stolen property.

However, Bill C-19 does not require the court to consider the consequences to the victim when ordering the detention of property beyond the initial three-month period. Proposed paragraph 446(1)(a), for

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[46] Sub. 462.5(1), as proposed in Bill C-19, cl. 130.

[47] *Supra* note 31, at 10.

[48] REPORT OF THE FEDERAL-PROVINCIAL TASK FORCE ON JUSTICE FOR VICTIMS OF CRIME (1983).

[49] Sub. 446(2), as proposed in Bill C-19, cl. 108.

[50] *Supra* note 31, at 10.

[51] *Supra* note 48, at 85-90.

example, refers only to the purposes of the investigation or trial. It does not require the judge to have regard to the needs of the victim as well as the interests of justice. It does not require the prosecutor to inform the property owner of the hearing or to allow that owner to present his views. A person whose tools of employment have been stolen may suffer a significant loss as long as those tools are not returned. An elderly person living alone loses a major part of his life as long as a television is not returned.

G. *Attendance as a Witness*

Bill C-19 makes the failure of a victim to attend court a hybrid indictable and summary conviction offence.[52] While this is only a minor amendment, as long as it remains the only procedure for getting "victims to the court on time", it continues to coerce Canadians.

Victims are more likely to go to courts where they are welcomed than where they are coerced. The Canadian Council on Social Development suggested ways of welcoming victims to courts by proposing a variety of rights for victims and witnesses that would have granted them dignity, respect and a fair deal from the police, courts and correctional authorities.[53] These included the right to information about legal procedures and practices, the right to information on the progress of the investigation and prosecution, the right to present views and to be present, the right to legal advice, the right to privacy and dignity, the right to a speedy disposition, the right to adequate compensation for attending court and the right to protection from threats.[54] In addition, some countries have modified their evidence procedures so that commissioners of evidence and videotapes can be used to avoid bringing victims, particularly children, to court.[55]

The right to present views and to be present and the right to a speedy disposition have already been discussed above. The task force on justice for victims of crime recognized the right to information in several of its recommendations. The right to protection from threats was recognized by the task force when it recommended that intimidation be changed from a summary conviction to an indictable offence; however, no amendments to that effect were introduced in Bill C-19.

The other rights have not been addressed either in Bill C-19 or by the task force. In the United States, sixteen states and the federal government have introduced bills of rights for victims and witnesses.[56] These statutes define what police, prosecutors and judges should be doing to

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[52] Sub. 116(1.1), as proposed in Bill C-19, cl. 29.

[53] *Supra* note 31.

[54] *Id.* at 10-11.

[55] *E.g.*, the United States and Israel.

[56] NATIONAL ORGANIZATION OF VICTIM ASSISTANCE, VICTIM RIGHTS AND SERVICES: A LEGISLATIVE DIRECTORY, 1984.

accommodate victims and witnesses. The United States Attorney General's guidelines constitute instructions to all federal law enforcement and legal personnel. These have been criticized by some legal experts as unenforceable in a court of law. That may well be true, but it misses the point that many laws that are easy to enforce in theory are difficult to enforce in practice, but nevertheless may be extremely useful as exhortatory statements when people are trying to discover the limits to what they can do.

H. *Sentencing Criteria*

Proposed subsection 645(1) states that the overall objective of sentencing is the protection of the public, which may be furthered by:

> (a) promoting respect for the law through imposition of just sentences;
> . . . .
> (d) promoting and providing for redress to victims of offences or to the community. . . .

Proposed paragraph 645(3)(b) states that a sentence should be similar to sentences imposed on other offenders for similar offences committed in similar circumstances.

Bill C-19 does not seem to follow the government's previously declared policy since it does not specify that reconciliation between victim, offender and community is to be a part of the sentencing criteria. Since the victim does not have a right to address the court, it is likely that "just sentences" will be those that judges hand down after having heard from defence and Crown counsel. Proposed section 645 would be improved if reconciliation between victim, offender and community was stated to be a fundamental purpose of sentencing along with protection of the public.

I. *Longer Sentences for Dangerous Offenders*

Proposed subsection 233(1) increases the penalties for persons who drink and drive. Proposed section 668.3 provides life sentences for persons who commit serious personal injury offences.

Some of the lobby groups voicing the views of victims have been demanding stronger penalties. The Victims of Violence, based in Ajax, Ontario, originally wanted capital punishment reintroduced, and still wants greater use made of the dangerous offender legislation and much tighter controls placed on persons who are released on parole. Groups such as MADD, SADD and PRIDE[57] have demanded stiffer penalties against drunk driving. It is not clear that longer penalties will make any

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[57] *M*others *A*gainst *D*runk *D*riving, *S*tudents *A*gainst *D*runk *D*riving and *P*arents to *R*educe *I*mpaired *D*riving *E*verywhere.

difference in themselves, though there is some reduced risk of crime during the longer period of incarceration.

J. *Conclusion*

Bill C-19 proposes many amendments that will improve the situation for crime victims. However, it falls short of providing procedures that would promote reconciliation between the victim, the offender and the community. While the Bill will lead to more frequent restitution by offenders to their victims, it may also lead to longer sentences and to victims who still feel rejected and confused, their anger only festering.

Victims have heretofore been largely excluded from the justice system, to be kept in the shadows unless they could be used as tools of evidence.

They have a strong sense of injustice, whose roots lie in the assumption that it is not they but the state, who is the victim of crime. In the 17th century, it was only "heretics" who rejected the dogma that the world was round, but it is. Today victims and those affected by the pain they suffer are rejecting the dogma that crime is committed against the state and are insisting that it is committed against victims as well. Victims do suffer from crime.

The sections on restitution in Bill C-19 will ensure that the legal community hears from victims of less serious offences. As that community comes to realize the needs of victims, it will be forced to look more seriously for ways to return justice to a system that is now criminal in its neglect of victims.

What is needed is a criminal process that considers not only the rights of suspects and offenders, but those of the victim as well.