WORKING PAPERS 5 & 6

RESTITUTION AND COMPENSATION AND FINES

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The thrust of the proposals in Working Papers 5 & 6 is stated in the forward:

> The present working paper has as its primary aim to make restitution—the responsibility of the offender to the victim to make good the harm done—a basic principle in criminal law, and to supplement it by a scheme for compensation—assistance by the state where the offender is not detected or where he is unable to assume responsibility for restitution.
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> The role of fines would shift accordingly. Apart from situations where they are imposed for crimes that have no specific victim, such as offences against public order, a fine would represent the penalty for an offence, over and above restitution. In addition, to ensure a more equitable application of fines, we recommend a system of day-fines based on income rather than fixed amounts. Finally, following the principle that imprisonment should only be used when that form of punishment is absolutely necessary, we are opposed to the automatic alternative of days in jail to fines. [1]

The terminology adopted by the Working Papers, as indicated, is that "restitution" and "compensation" differ in their source. Both flow to the victim, the former from the offender and the latter from the State. [2]

The Papers defend the early consideration of these problems:

> Restitution and compensation have been chosen for early consideration because they represent means of directing more attention to the victim of crime, stressing the responsibility of the offender and the state to make up for the harm done to the greatest possible extent. [3]

Although not stated expressly the inference that arises from a reading of the two Papers is that the subject of fines is also considered at the same time, because fines would prima facie provide the funding for the compensation. [4]

Central to the Commission's proposals concerning restitution and compensation is a concern for the victim:

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[1] LAW REFORM COMMISSION OF CANADA, RESTITUTION AND COMPENSATION, FINES, WORKING PAPERS 5 & 6, at 1 (1974).

[2] *Id.* at 8 & 18. This appears to be just a convenient terminology. BLACK'S LAW DICTIONARY (4th. ed.) gives almost identical definitions for both terms at 354 and 1477.

[3] *Supra* note 1, at 1.

[4] *Id.* at 23.

> Doesn't it seem to be a rejection of common sense that a convicted offender is rarely made to pay for the damage he has done? Isn't it surprising that the victim generally gets nothing for his loss? Restitution—making the offender pay or work to restore the damage—or, where this is not possible, compensation—payment from public funds to the victim for his loss—would seem to be a natural thing for sentencing policy and practice. Yet, under present law they are, more frequently than not, ignored.[5]

The Commission also defends an emphasis on restitution as necessary,[6] just,[7] rational[8] and practical.[9] In terms of traditional concepts of sentencing, its deterrent value lies in the removal of an offender's proceeds and its rehabilitative value in its invitation to the offender to be reconciled with the victim (and society) rather than be isolated.[10]

An order for restitution, therefore, would be a new "sanction permitting a payment of money or any thing done by the offender for the purpose of making good the damage to the victim."[11] Since its purpose is to restore financial, physical or psychological loss, it can include an "apology, monetary payment or a work order."[12] This sanction would be a "central consideration",[13] receiving consideration in most offences, either by itself or with supplementary sanctions such as the fine, whereby the offender would be made to pay back more than he took in recognition of the social harm. As well, one of the Commission's stated overall goals—the "restriction in the use of unnecessary imprisonment"[14]—would be furthered.

The Commission considers and rejects an alternative mechanism of a "combined trial"[15] where a "claim for damages is presented during the criminal proceedings"[16] and also considers and dismisses the following objections to the proposal as made: that offenders will not have the necessary funds, by observations based upon data dealing with the payment of fines and also

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[5] *Id.* at 5. *See also* page 6 where it is said that, "[a]s his losses tend to be swept aside by state interests in the criminal trial, the victim is left unsatisfied."

[6] *Id.* at 6. The Commission on the same page goes on to say that usually other state mechanisms assist to redress losses but the "civil remedy . . . is expensive, often illusory, and little used. There is, therefore, a practical need to consider restitution as a sanction."

[7] *Id.* at 5. As well, "not only [is restitution] in accord with common sense, [it is] also just. If justice is to be done, the violation of the individual victim's personal and property rights ought to be redressed. The sanction in criminal cases becomes justifiable on account of the offender's violation of someone else's rights—rights that are publicly supported through the criminal law." *Id.*

[8] *Id.* at 6. It is a rational response, the Working Paper says, because it recognizes crime as an "inevitable aspect of social living" and, instead of rejecting the "offender as a parasite on the body politic", it would "impose a sanction that encourages reconciliation and redress."

[9] *Id.* at 7. It is a practical response because it recognizes the victim's claim to satisfaction and his psychological need that notice be taken of the wrong done.

[10] *Id.* at 7-8.

[11] *Id.* at 8.

[12] *Id.*

[13] *Id.* at 15.

[14] *Id.*

[15] *Id.* at 11.

[16] *Id.*

studies showing that the average restitution costs of most offences would not be prohibitive; [17] and that the administration would be too burdensome upon the courts, by suggesting provision for a reference by the judge for assessment by a court official. [18]

As will be seen, both the compensation and fines proposals also contemplate a court official, either the clerk or an administrator, as a necessary part of the delivery mechanism and presumably this same official is contemplated here for restitution assessment.

In defence of its proposal, the Commission points out the limited scope of the present Canadian law respecting restitution. As indicated in greater detail by the Ouimet Committee: [19]

> Existing provisions in the Criminal Code offer limited opportunities to order restitution or compensation. Section 373 relates to wilful destruction or damage to property not exceeding fifty dollars. Section 628 makes much broader provision for the payment of satisfaction or compensation for loss or damage to property suffered by a victim of crime. Section 629 provides for compensation to a bona fide purchaser to whom property had been sold and who had been forced to return the property to its true owner. Section 630 provides for the restitution to the person entitled to it of property obtained through the commission of an offence. Restitution may also be ordered under section 638 as a condition for suspension of sentence. [20]

> These provisions have been on the statute books for quite some time but have rarely been invoked, with the exception of the provisions directing return of property to the true owner and restitution as a condition for suspension of sentence. [21]

A caveat could perhaps be entered here: the focus on de jure restitution may be misleading, ignoring de facto restitution, either by the police or Crown attorney. Without specific study, the prevalence of the latter is hard to know, but it would be difficult to imagine it not occurring in cases where goods which are the subject of crime are recovered *in specie*. And it would be interesting to know what percentage of all property offences fall into this category.

Working Paper 5 then goes on to deal with Compensation: payment by the state to supplement or replace restitution by the offender, where, for example, he is unable or unwilling to pay it in whole or in part or where the offender is unknown or his guilt cannot be proven. [22]

Again, compensation is justified on the basis of its supporting the purpose of the criminal law in protecting core values. But, unlike sanc-

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[17] *Id.* at 13. It is also suggested at 14 that, if an offender lacks funds, he could "work off" a restitution order, even in an institution if prison wages were appropriately raised.

[18] *Id.* at 11-12.

[19] REPORT OF THE CANADIAN COMMITTEE ON CORRECTIONS (Ouimet, J. Chairman 1969) [hereinafter referred to as the Ouimet Report].

[20] And now in respect of a conditional discharge pursuant to section 662.1.

[21] Ouimet Report at 201.

[22] *Supra* note 1, at 17.

tions, it has no offender dimension: it is directed toward the victim, a visible demonstration of societal concern that criminal wrongs be righted. [23]

Consistent with this basic view, the Commission rejects a delivery system along the lines of public insurance schemes and emphasizes the necessity for close connection with the criminal justice system:

> [Compensation] . . . can be used to further the purposes of the criminal law and ought not to be lost in social insurance programs aimed at sharing . . . losses arising from the social and economic policies of society as a whole. That being so, the structures and mechanisms for delivery of compensation to victims of crimes should be related to the criminal law and its process . . . .
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> The Compensation Board must be brought visibly to the forefront of the administration of justice and linked to the courts in determining compensation. [24]

The source of compensation funds would be fines and forfeitures. [25] The range of offences for which compensation would be available would be not only those involving personal injury but also those property offences involving an analogous affront to the individual as offences against the person (*e.g.* theft from a person and breaking and entering from a dwelling house). [26] The Commission also notes the necessity for compensation to be "timely" to reduce the anxiety arising from injury.

Working Paper 6, dealing with Fines, offers proposals at once the most concrete and easiest to implement of the two Papers.

The general theory is expressed as follows: the preference being in favour of restitution where an individual victim is harmed, a fine would constitute a supplementary sanction for the offender to repay the whole community. [27]

The Commission first recommends the elimination of two aspects of the present system: the restriction upon fines alone for offences punishable by more than five years and the use of alternative jail sentences. The former seems logically indefensible, given the ease with which a judge can pronounce "one day in jail" and the latter is effectively discriminatory giving rise to the appearance of freedom being purchased. [28] These changes seem long overdue, regardless of one's feeling about the balance of the proposal.

The Commission then makes its substantive proposal whereby justice—in the sense of uniformity and equality—will be achieved: a system of day-fines, which has regard to the individual financial circumstances of the offender in setting the actual penalty. [29] In the words of the Paper, "all fines over $25 [would] be judicially expressed in terms of day fines, and . . . the court clerk or court administrator [would] conduct a means inquiry to de-

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[23] *Id.* at 17-18.
[24] *Id.* at 19-20.
[25] *Id.* at 23.
[26] *Id.* at 21-22.
[27] *Id.* at 29.
[28] *Id.* at 31-33.
[29] *Id.* at 33-35.

termine the dollar value of the fine, immediately upon pronouncement of the sentence." [30] For example, in Sweden one day-fine equals roughly 1/1000 of an offender's yearly gross income. The Commission reasonably proposes a pilot project to be instituted first limited to an offence such as impaired driving for which fines constitute the common disposition. [31]

Central to the enforcement of fines would be a single administrative agency connected with the Court to which responsibility for restitution could also reasonably be given. [32] A "means inquiry" would initially determine the amount of a day-fine and subsidiary issues, such as length of time for payment [33] or a subsequent application for extension of time. [34]

In the event of non-payment, this same agency, rather than the courts or the police would be responsible for collection. Imprisonment would be available only if an offender is unwilling to pay, has the means to do so and other methods of enforcement fail. First would be a second means of inquiry, where the offender would show cause for non-payment. A warning, summons and warrant if necessary would be available to secure his attendance.

If the offender's circumstances had changed to the point where payment was impossible, the official could apply to the judge for a change in the sentence, which the judge could remit or alter to a work order or probation. In the case of wilful refusal to pay, the same would apply but the judge could re-sentence to coerce payment by garnishee order or the seizure and sale of property or, if necessary, imprisonment.

In these proposals, the Commission has adopted almost all of the earlier proposals of the Ouimet Committee. [35] However, with respect to recovery of fines that Committee stated:

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[30] *Id.* at 34.

[31] The Swedish system is detailed in an appendix at pages 43-48. The actual value of a day-fine for a given offender is of course more detailed and has regard to his financial responsibilities, etc.

[32] *Supra* note 1, at 37.

[33] *Id.* at 38.

[34] *Id.* at 39.

[35] The Ouimet Committee recommended:

(a) greater use be made of fines, in suitable cases, where the offender has benefited financially from the commission of the offence either in lieu of or in addition to a sentence of imprisonment;

(b) legislation be enacted to establish procedures to determine, prior to the imposition of a fine, the ability of the offender to pay a fine or to pay a fine in a particular amount and to determine the amount by which the offender has benefited financially from the commission of the offence where there is reason to believe that the offender has so benefited;

(c) time be allowed for the payment of fines, at the discretion of the sentencing authority but within a reasonable period to be defined by law;

(d) legislation be enacted to establish procedures to review the ability of the offender to pay the fine imposed where the fine imposed remains unpaid and to review the sentence;

(e) imprisonment in default of payment only be ordered where the offender, although able to pay, has refused to pay the fine or has fraudulently divested himself of his assets;

> Consideration should also be given to the possibility of introducing legislation whereby a deterrent fine could be made recoverable directly by civil process without further litigation. Prior to 1955, the Criminal Code contained such a provision. In the 1955 revision, the procedure, for no apparent reason, disappeared. It would not seem that any constitutional difficulty was involved, as a provision in section 623 of the Criminal Code provides for recovery of fines on corporations or legal "persons" by filing a conviction as a civil judgment. There is no reason why section 623 should not be extended to cover fines on real persons. If this were done, the obsolescent notion of imprisonment in default of payment might well become less significant. Such legislation would have the effect of making immediately available civil remedies such as proceedings to set aside fraudulent conveyances and the examination of the defendant as a judgment debtor. [36]

The Working Paper does not expressly deal with including such a provision as one of its "last ditch" coercive methods.

The imposition of a fine, as the Ouimet Committee noted, implicitly acknowledges that "the offender presents no problem of dangerousness," [37] since fines have no affirmative rehabilitative value. It is a disposition focusing on deterrence of the offender, but it can have repercussions on other persons associated with him. The "means inquiry" appears to allow for adequate consideration of the import of the imposition of a fine on the offender's dependents, as well as of the requisite amount of deterrence having regard to the offender, instead of merely the offence. The Commission's proposals in this area appear very difficult to criticize and, if anything, one should hope for early translation into appropriate legislation.

Similarly, the proposals in Working Paper 5 are generally commendable, reflecting an enlightened and rational philosophy of criminal justice. Certainly there are matters of detail which are not gone into in the Working Paper and about which one must know more.

For example, it is important to know the precise role which the Commission envisions for the victim in restitution proceedings. Would the victim be represented by counsel and be able to lead evidence on his own initiative? If not, a victim may not be able to properly present his claim through the media of the police and Crown attorney who will not be used to representing a particular "client"; but if so, these hearings may become mini-civil-cases, requiring time and resources for completion and further delaying the ultimate disposition of criminal cases. And then what would become of the requirement of "timeliness" so properly emphasized by the Paper?

(f) legislation be anacted to provide that a sentence imposing a fine take effect as a civil judgment and that all civil remedies be immediately available without first resorting to civil litigation;

(g) the restrictions of section 622 of the Criminal Code precluding the imposition of a fine in lieu of imprisonment where the offender is convicted of an indictable offence punishable by more than five years be repealed.

Ouimet Report at 122.

[36] *Id.* at 197.

[37] *Id.* at 198.

The basis upon which the assessment in a given case will be made is also important, lest the overall results come out in fact counter to our "core values". What would be the nature of damages for which recovery would be available, "pain and suffering" being an obvious grey area. If one presumes a focus on "actual damage or injury" then how will, for example, rape be dealt with. Some rapes involve minimal actual expenses to the victims—their harm resulting from psychological injuries. If a rape victim receives only nominal compensation, will justice really be done, or be seen to be done?

Concern over such details is lessened somewhat by the fact that any further proposals made by the Commission will be able to draw upon the experience of the various provincial compensation tribunals that deal with victims of crime, and presumably the Commission will consider this experience.

On a more general level, however, one can also be concerned for the success of the Commission's proposals, especially if one reads section 663 (2)(*e*) of the Criminal Code which provides for a condition for restitution in a probation order (upon either a suspended sentence or a conditional discharge). This provision seems in itself to take quite appropriate regard to all the considerations raised in the Working Paper. The Commission does not make clear the practical improvement that its proposal will be over the present law in encouraging the use of restitution. If judges are not more inclined to use a new restitution sanction than they are now to suspend sentence and order restitution, then the Commission's proposal will come to nought.

Judges presently appear hesitant to emphasize restitution and use section 663(2)(*e*) as widely as they could for a variety of reasons, some administrative and some philosophical. The proposed provision for referring the matter for assessment rather than taking up court time might eliminate the administrative restraints, but it may be that it is in the self-imposed philosophical restraints of judges that the most dangerous shoals for the Commission's proposals lie.

Sentences of imprisonment tend to be long and they are imposed more frequently in Canada than in many other countries in the world.[38] The failure of our prisons to prevent recidivism is too notorious to require documentation. On merely practical grounds, a reduction in the use of imprisonment makes good sense. The incarceration of most offenders would

[38] Waller & Chan, *Prison Use: A Canadian and International Comparison*, 17 Crim. L.Q. 47, at 57-60 (1974). Hogarth, *Toward the Improvement of Sentencing in Canada*, 9 CAN. J. CORR. 122, at 124 (1967); EVANS, DEVELOPING POLICIES FOR PUBLIC SECURITY AND CRIMINAL JUSTICE 84-89 (Report of the Economic Council of Canada 1973); Morris, *Lessons from the Adult Correctional System in Sweden*, 30 FED. PROBATION 3, at 4 (1966); Mannheim, *Comparative Sentencing Practice*, 23 LAW & CONTEMP. PROB. 557, at 571 (1958); REPORTS ON THE WORK OF THE PRISON DEPARTMENT, STATISTICAL TABLES 10-11 (Home Office 1967); Williams, *The Use the Courts Make of Prison, in* SOCIOLOGICAL STUDIES IN THE BRITISH PENAL SERVICES 49 (Halmos ed. 1965).

properly be avoided, leaving the prisons for that small percentage of offenders who must be imprisoned. Prisons in turn, might even become effective since their programmes could then be geared to a smaller, more homogeneous population and programmes might even be developed that can truly deal with the "dangerous offender". Lowering prison population would free financial and other resources for redistribution elsewhere in the criminal justice system.

A separate Working Paper is devoted to imprisonment in its own right, and there the Commission makes the above points, and more. This Working Paper simply offers a reduction in the use of imprisonment as an advantage of its proposals without defending this on practical or other grounds. The fact is: the desirability of reducing the use of imprisonment is by no means a self-evident or commonly favoured proposition. Therein I think lies the rub—and also an indication perhaps why present restitution provisions are not widely used. Commitment to a basic philosophy that sees imprisonment as an unusual response to be imposed with regret is essential to the success of the proposals. Among the converted, these Papers will represent a lucid, succinct, flawless and compelling argument. But to those with an emotional attachment to imprisonment these Papers will probably appear misguided—internally consistent in their logic and well-written, but nevertheless misguided in a basic assumption. A clinging faith in imprisonment will not allow the restoration of the victim to a proper place in the criminal justice system.

If these and other Working Papers secure a consensus of commitment to a basic philosophy that eliminates the primacy of imprisonment, then acceptance of these proposals should follow very easily. If not, then these Papers will become as ignored and unused as the present provision for restitution that exists in the Criminal Code, and the answer to the Commission's question will be: "It may be contrary to common sense, but we must keep sending people to jail."