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LEGISLATIVE SUMMARY

Bill C-32:

An Act to enact the Canadian Victims Bill of Rights and to amend certain Acts

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Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

Legislative Summary of Bill C-32
(Legislative Summary)

Publication No. 41-2-C32-E

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LEGISLATIVE SUMMARY OF BILL C-32: AN ACT TO ENACT THE CANADIAN VICTIMS BILL OF RIGHTS AND TO AMEND CERTAIN ACTS

1 BACKGROUND

Bill C-32: An Act to enact the Canadian Victims Bill of Rights and to amend certain Acts (short title: "Victims Bill of Rights Act") was introduced in the House of Commons on 3 April 2014 by the Minister of Justice and Attorney General of Canada, the Honourable Peter MacKay. The bill was introduced after a process of online consultations, as well as in-person consultations in 16 cities across the country.[1]

Generally speaking, the bill:

- creates a federal bill of rights for victims of crime (the Canadian Victims Bill of Rights, or CVBR);
- amends the *Criminal Code* (Code)[2] to enhance the rights of victims to information and protection and provide victims with increased opportunities for participation in the criminal trial and sentencing processes;
- creates a general rule of competency and compellability with respect to the testimony of the accused's spouse in criminal proceedings under the *Canada Evidence Act*;[3] and
- amends the *Corrections and Conditional Release Act*[4] (CCRA) to increase victims' access to information about the offender who harmed them.

This legislative summary presents general information about victims' rights in Canada in Part 1 and describes the new Canadian Victims Bill of Rights and the changes proposed to other laws in Part 2.

1.1 RESPONSIBILITY FOR VICTIMS' RIGHTS

In Canada, the provinces, territories and federal government share responsibilities with respect to the criminal justice system. Generally speaking, the federal government is responsible for establishing legislation, including procedural rules, with respect to criminal law, while the provinces and territories are responsible for the administration of the justice system.[5] Law enforcement, prosecution and victim support are all shared responsibilities, although for the most part these services are provided by provincial and territorial authorities.[6]

1.2 EXISTING RIGHTS FOR VICTIMS

In Canada's adversarial criminal justice system, the two main parties are the accused and the prosecutor. The prosecutor represents the public interest. The victim may be a witness, but he or she is not a party to the proceedings. Nonetheless, particularly

since the 1980s, the victims' rights movement has been pressing for increased consideration of the needs and rights of victims in the criminal justice system.

1.2.1 Declarations of Principle

The United Nations *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*[7] was approved by the United Nations General Assembly in 1985. The issues addressed by the Declaration include access to justice, fair treatment, restitution, compensation and assistance for victims. In the *Canadian Statement of Basic Principles of Justice for Victims of Crime*, *2003*[8] (revised from the 1988 version), Canadian federal, provincial and territorial ministers responsible for criminal justice also agreed to principles to guide the treatment of victims, with a particular focus on the provision of information to victims and incorporating consideration of their needs and views in the system. Neither statement of principles is binding.

1.2.2 The *Canadian Charter of Rights and Freedoms* and Criminal Procedure

Although the *Canadian Charter of Rights and Freedoms*[9] (Charter) does not explicitly mention victims, courts have typically considered victims' rights and interests under various provisions such as section 7 (right to life, liberty and security of the person), section 8 (right to privacy), sections 15 and 28 (right to equality) and section 1 (providing for reasonable limits as long as they are prescribed by law and can be shown to be demonstrably justified in a free and democratic society). However, victim rights under the Charter remain limited.[10]

Nonetheless, criminal procedure has evolved through amendments to the Code and the CCRA, and through the progression of jurisprudence: it now better addresses the needs of victims and enhances their participation in the criminal justice system. For example, the production of complainants' counselling records in sexual offence proceedings is tightly controlled, and victim impact statements are an integral part of criminal justice proceedings.[11] Some of the most important changes will be explained in the sections below that discuss the Code and the CCRA.

1.2.3 Provincial Victims' Rights Legislation

Given that much of the administration of justice is within provincial jurisdiction, a brief summary of provincial victims' rights may be of assistance in understanding the implications of Bill C-32. In 1967, Saskatchewan became the first province to enact a victim compensation program,[12] and others followed suit in the late 1960s and 1970s. Since the 1980s, starting with Manitoba, every province and territory has also adopted victims' rights legislation similar to the CVBR proposed in Bill C-32.[13] In most cases, this provincial and territorial legislation does not create actual rights and associated legal obligations and remedies. Rather, the laws outline guiding principles.[14] In *Vanscoy v. Ontario*, for example, the court found that Ontario's *Victims' Bill of Rights*[15] "is a statement of principle and social policy, beguilingly clothed in the language of legislation. It does not establish any statutory rights for the victims of crime."[16]

Nevertheless, some provinces and territories do use language that is more rights-based than others. In Manitoba's legislation, for example, mandatory obligations are outlined for each level of the justice system (law enforcement, prosecution, court administration, correctional services, etc.). If they feel their rights have not been respected, victims in Manitoba may make a complaint to the Director of Victim Services and then to the Ombudsman, both of whom may make recommendations. However, there is no right to sue on the basis of a violation of the rights outlined in Manitoba's legislation, and no appeal of an order, conviction or sentence can arise from the infringement or denial of a victim's rights.[17] Even though the Manitoba legislation is couched in the language of rights, it is difficult to characterize the requirements it sets out truly as rights, given the lack of a binding enforcement mechanism.

1.3 Criminal Victimization in Canada

Each year, thousands of people and businesses are victims of crime in Canada. In 2012, nearly 2 million criminal offences came to the attention of police,[18] who identified some 367,000 victims of violent crime.[19] Unfortunately, these data do not reflect the full extent of criminal activity in Canada,[20] because many victims of crime do not report their victimization to authorities. To address this shortcoming, Statistics Canada periodically conducts a survey on victimization within the General Social Survey (GSS).[21] This survey collects information about the experiences of Canadians aged 15 and older for eight types of criminal offences (sexual assault, robbery, physical assault, break and enter, theft of motor vehicles or parts, theft of household property, vandalism and theft of personal property).

According to the 2009 GSS, rates of criminal victimization in Canada had remained stable since 2004. Just over a quarter of respondents felt they had been victims of crime in the 12 months preceding the survey.[22] However, the proportion of crimes reported to the police declined slightly, from 34% in 2004 to 31% in 2009. The 2009 GSS confirmed that reporting rates to police vary greatly according to the type of crime, the age of the victim, the location of the incident and the value of any stolen or damaged property. The reasons most often given for not notifying the police were that the incident was not important enough (68%), the police would not have been able to solve the matter (59%), the incident was dealt with another way (42%) and the matter was personal (36%). Those who reported the incident to the police said they did so out of a sense of duty (86%) or a desire to see the offender apprehended and punished (69%).

A study published in 2011 by the Department of Justice of Canada placed the social and economic costs of crime in Canada in 2008 at $99.6 billion.[23] These costs include tangible costs (health care, productivity losses and damaged property) as well as intangible costs (stress, pain, and loss of life). The study found that victims bear most of the costs of crime (83% of the tangible and intangible costs). Table 1 shows the distribution of the costs of crime to victims.

Table 1: Estimated Costs of Crime in Canada to Victims, 2008

Cost category	Costs ($ millions)[a]
Health care	1,443
Productivity losses	6,734
Stolen/damaged property	6,143
Total tangible costs	*14,320*
Pain and suffering	65,100
Loss of life	3,055
Total intangible costs	*68,155*

Note: a. Generally speaking, costs do not include the costs of traffic offences or drug offences.

Source: Table prepared by the authors using the data in Tables 1 and 2 of the report Ting Zhang *Costs of Crime in Canada, 2008*, Department of Justice Canada, 2011.

2 DESCRIPTION AND ANALYSIS

Bill C-32 has 60 clauses. Some make minor amendments of a technical nature, such as stylistic changes or reformulations designed to clarify legislative intent. The description and analysis that follow focus on the substantive changes in the bill, rather than examining each provision. The relevant provisions are generally grouped into four main themes: the right to information, the right to protection, the right to participation and the right to restitution.

2.1 THE CANADIAN VICTIMS BILL OF RIGHTS (CLAUSES 2 AND 2.1)

Clause 2 of Bill C-32 enacts the Canadian Victims Bill of Rights (CVBR), which includes a preamble that notes the harm done to victims and society by crime, the importance of respecting victims' rights in the interest of the proper administration of justice, the rights of victims guaranteed in the *Canadian Charter of Rights and Freedoms,* and the recognition of the 1998 and 2003 versions of the *Canadian Statement of Basic Principles of Justice for Victims of Crime*, mentioned above.[24]

On 2 December 2014, the House of Commons Standing Committee on Justice and Human Rights clarified the statement in the preamble providing that victims of crime and their families deserve to be treated with courtesy, compassion and respect by amending it to add that this principle includes respect for their dignity.

The CVBR uses the language of "rights" as opposed to "principles," although, as with the provincial and territorial legislation, enforcement of these rights can be challenging. This difficulty is discussed in detail below. The rights outlined in the CVBR are primarily procedural (rights to information, to have victims' views considered, etc.). The CVBR does not grant victims status as a party to proceedings.

On 2 December 2014, the House of Commons Standing Committee on Justice and Human Rights amended Bill C-32 in order to provide for a statutory review of the CBVR by a committee of Parliament five years after its enactment (new clause 2.1).

2.1.1 Victims and the CVBR

2.1.1.1 Definition of a Victim (Sections 2 and 19 of the CVBR)

For the purposes of the CVBR, a victim is an individual who has suffered physical or emotional harm, property damage or economic loss as a result of the commission or alleged commission of an offence (section 2 of the CVBR). A conviction is not required for an individual to be deemed a victim for the purposes of the CVBR.

This definition does not appear to be limited to the immediate victim, and could presumably include a traumatized bystander who witnessed a crime or a close family member of an immediate victim. However, section 19 states that the rights outlined in the CVBR "are to be exercised through the mechanisms provided by law," and so the definition of a victim that will apply at each stage of the criminal justice process will depend on the definitions in the relevant law, such as the Code or the CCRA (see sections 2.2.1.1 and 2.4.1.1 of this document for the definition of a victim in those laws).

2.1.1.2 Persons Who May Act on a Victim's Behalf (Section 3 of the CVBR)

If a victim is deceased or incapable of acting for himself or herself, certain other individuals may exercise the victim's rights on his or her behalf: namely, a spouse (married or common law), a relative, a dependant or an individual who has custody or is responsible for the care or support of the victim or of a dependant of the victim (section 3 of the CVBR). The French version of section 3 appears to be more restrictive than the English, allowing only one of the individuals listed to represent the victim ("l'un ou l'autre"), whereas the English appears to allow for more than one person to represent the victim at the same time ("Any of the following …").

An individual may not be considered a victim for the purposes of the CVBR or act on behalf of a victim if he or she has been charged with, found guilty of, or found not criminally responsible or unfit to stand trial for, the offence in question (section 4 of the CVBR).[25]

2.1.1.3 Applicable Offences (Sections 2 and 18 of the CVBR)

Section 2 of the CVBR emphasizes that only offences under the following laws (either committed or alleged to have been committed) can give rise to rights under the CVBR:

- *Criminal Code*;
- *Youth Criminal Justice Act*;[26]
- *Crimes Against Humanity and War Crimes Act*;[27]
- *Controlled Drugs and Substances Act* (with respect to designated substance offences as defined in section 2(1));[28] or
- *Immigration and Refugee Protection Act* (section 91 or part 3).[29]

Section 18(3) of the CVBR specifies that the CVBR does not apply to service offences, which primarily affect military personnel.[30]

The CVBR also does not apply to an offence under any legislation that is not listed above. This would mean, for example, that it would not apply to offences such as deceptive telemarketing under the *Competition Act*, environmental offences under laws such as the *Fisheries Act*, or provincial offences.

2.1.1.4 Exercise of Victims' Rights (Sections 5, 18 and 19 of the CVBR)

The CVBR applies when a victim interacts with the criminal justice system, beginning the moment an offence is reported and continuing through the investigation and prosecution of the offence, to the correctional and conditional release process. It also applies in relation to proceedings regarding accused persons who are found to be not criminally responsible or unfit to stand trial (sections 5 and 18 of the CVBR).

As noted above, victims may exercise the rights set out in the CVBR only when there are mechanisms provided by law to do so (section 19(1) of the CVBR). In other words, the CVBR does not appear to create free-standing enforceable rights.[31] This is because, as will be explained further below, the CVBR provides for a complaint mechanism but no binding dispute resolution mechanism for a victim whose rights under the CVBR have been violated.

Finally, to benefit from the CVBR, the victim must be present in Canada, or be a Canadian citizen or permanent resident (section 19(2) of the CVBR).

2.1.1.5 Quasi-constitutional Status and Rules of Interpretation (Sections 20–24 and 27 of the CVBR)

The CVBR stipulates that it is to be construed and applied in a manner that is reasonable in the circumstances and not likely to interfere with the proper administration of justice, ministerial discretion or discretion exercised by a person or body authorized to release an offender into the community. It is also not to be interpreted in a manner that could endanger an individual's life or safety or cause injury to international relations, national defence or national security (section 20 of the CVBR).

Justice Minister Peter MacKay stated during second-reading debate on Bill C-32 that, "[i]n order to give meaningful effect to victims' rights by all players in our criminal justice system, our government is proposing that this bill have quasi-constitutional status."[32] As such, the bill requires that, where possible, laws are to be construed and applied in a manner compatible with the CVBR, providing that the limitations outlined in section 20, as mentioned above, are also respected. This means that the rights outlined in the CVBR will affect the interpretation and application of other legislation such as the Code or the CCRA. Where there is an inconsistency with another Act, the CVBR is to prevail, except when the other law is also quasi-constitutional, namely, the *Canadian Bill of Rights*,[33] the *Canadian Human Rights Act*,[34] the *Official Languages Act*,[35] the *Access to information Act*,[36] or the *Privacy Act*[37] and their associated orders, rules and regulations (sections 21–22 of the CVBR).

In addition, identifying an individual as a victim with the rights set out in the CVBR does not result in an adverse inference against the accused (section 23 of the CVBR). As noted in section 2.1.1.1, the definition of a victim in the CVBR does not require an accused to have been found guilty of the offence, as this would deny victims' rights during the investigation and prosecution of the offence. This section clarifies that the designation of a person as a victim (prior to a finding of guilt) for the purposes of the CVBR cannot be used against the accused during criminal proceedings. The CVBR also does not grant the victim, or someone acting on the victim's behalf, status as a party, intervener or observer in proceedings (section 27 of the CVBR), **nor does it remove any status otherwise afforded to victims.**[38]

2.1.2 Finally, the CVBR is not to be construed as to permit an individual to enter or remain in Canada beyond authorized periods or to delay removal or extradition proceedings (section 24 of the CVBR).Rights Recognized in the CVBR

2.1.2.1 Right to Information (Sections 6–8 of the CVBR)

Sections 6 to 8 of the CVBR provide that the victim has the right, upon request, to information concerning the following topics:

- the criminal justice system and the role of the victim;
- services and programs available for victims;
- his or her right to file a complaint;
- the status and outcome of the investigation into the offence;
- the location of proceedings in relation to the offence, when they will take place and their progress and outcome;
- reviews relating to conditional release, including the timing and conditions of release; and

- hearings for the purpose of making dispositions relating to a person found to be not criminally responsible or unfit to stand trial (e.g., to decide whether to discharge the individual and under what conditions).

Victims already have access to much of this information, but the CVBR makes this access a quasi-constitutional requirement.

2.1.2.2 Right to Protection (Sections 9–13 of the CVBR)

Section 9 of the CVBR recognizes the right of victims to have their security considered by the "appropriate authorities" in the criminal justice system. A definition of "appropriate authorities" is not provided, but presumably it would include police, prosecutors, judges and parole boards. Victims also have the right to have reasonable and necessary measures taken by authorities to protect them against intimidation and retaliation (section 10 of the CVBR). The bill does not quantify or qualify the type or level of assistance to be provided.

Victims have a right to have their privacy considered by authorities (section 11 of the CVBR). A victim who is a complainant or witness in proceedings relating to the offence may request that his or her identity be protected (section 12 of the CVBR). Presumably, this request could be made to police or prosecutors before the case reaches the courts, or to a judge during court proceedings, or to decision-makers at a review or parole board. The bill does not specify what forms of identity protection are to be considered. Existing forms of identity protection in criminal proceedings include the exclusion of the public from the courtroom, the non-disclosure of the identity of witnesses, and publication bans, provided that criteria specified in the Code are met.[39]

A victim also has the right to request aids when testifying, although the court is not obligated to grant the request (section 13 of the CVBR). The bill does not specify which types of aids are allowed, but aids currently being used in Canadian courts include closed-circuit television, audio links, screens, and designated support persons, provided that criteria specified in the Code are met.[40]

2.1.2.3 Right to Participation (Sections 14–15 of the CVBR)

Section 14 of the CVBR sets out that victims have the right to convey their views about decisions that affect their rights under the CVBR to authorities and to have them considered. Victims also have a right to present a victim impact statement to appropriate authorities in the criminal justice system and to have it considered, as is already the case (section 15 of the CVBR). These guarantees do not necessarily provide victims with a specific outcome.

2.1.2.4 Right to Restitution (Sections 16–17 of the CVBR)

Section 16 of the CVBR grants victims the right to have the court consider making a restitution order against the offender.[41] This does not mean that such an order must be granted, but rather that the court must turn its mind to the possibility.

For a restitution order to be meaningful, the offender must have the ability to pay. If a restitution order is made and the offender does not pay, the victim may have the order entered as a civil court judgment enforceable against that offender, which allows the victim to seek repayment through measures such as the seizure of the offender's funds (section 17 of the CVBR). This is already possible under section 741 of the Code.

2.1.3 Remedies (Complaints and Appeals) (Sections 25, 26, 28 and 29 of the CVBR)

Sections 25, 26, 28 and 29 of the CVBR set out the remedies that may or may not be available to victims who have complaints about their treatment by federal or provincial/territorial departments, agencies or bodies involved in the criminal justice system. Guidelines, regulations or policies will likely need to be developed at the federal, provincial and territorial levels to create the complaint mechanisms necessary to provide greater clarity as to the division of responsibility for dealing with complaints under this legislation.

2.1.3.1 Remedies Against Federal Actors (Section 25 of the CVBR)

Every federal department, agency or body in the criminal justice system must have a mechanism for the review of victim complaints under the CVBR and the making of recommendations (not binding decisions). In each case, the victim is to be informed of the outcome (sections 25(1) and (3) of the CVBR).

If he or she is not satisfied with the response, a victim may file a further complaint with the authority having jurisdiction to hear complaints in relation to the department, agency or body in question (section 25(2) of the CVBR). It may be possible to request judicial review by the Federal Court if a victim is not satisfied with the outcome of the complaint, but this will depend on the complaint mechanisms that are implemented.

The CVBR does not specifically authorize the making of regulations. As such, the complaint mechanisms required by the CVBR will have to be created through internal policies, under the powers to make regulations in existing laws or through future legislative proposals.

Currently, Canada's Federal Ombudsman for Victims of Crime is responsible for addressing victims' complaints with respect to processes outlined in the CCRA and has the power to make non-binding recommendations.[42] The role, if any, that the Ombudsman would play in the CVBR-mandated complaints system is not explicitly outlined in the bill.

Other Canadian quasi-constitutional laws generally outline any complaint mechanism in the legislation and include a binding dispute mechanism for instances where a victim is not satisfied with the handling of his or her complaint. For example, the *Canadian Human Rights Act* created the Canadian Human Rights Tribunal, which can make binding decisions.[43] The *Official Languages Act*, the *Access to Information*

Act and the *Privacy Act* allow a complainant to seek a remedy from the Federal Court if he or she is not satisfied with the outcome of their complaint.[44]

2.1.3.2 Remedies Against Provincial Actors (section 26 of the CVBR)

Section 26 of the CVBR states that a victim who feels that his or her rights have been infringed by a provincial or territorial department, agency or body, may file a complaint in accordance with the laws of that jurisdiction.

2.1.3.3 No Right of Action (Sections 28 and 29 of the CVBR)

Sections 28 and 29 of the CVBR highlight that violation of the rights outlined in the CVBR does not create a cause of action (i.e., ability to sue in court) or a right to damages, nor does it create a right to appeal a decision in criminal justice system proceedings on the basis that a right under this Act has been infringed or denied.

2.2 Amendments to the *Criminal Code*

Clauses 3 to 36 of Bill C-32 deal with amendments to the Code that build upon existing measures to protect victims and witnesses through the course of criminal proceedings.

2.2.1 Victims and the Code

2.2.1.1 The Definition of Victim (Clause 3)

The definitions of the term “victim” in the CVBR and in the Code differ. The CVBR definition appears to apply both to immediate victims and to other persons, such as family members, who have suffered physical or emotional harm, property damage or economic loss as the result of the commission or alleged commission of an offence.

Under the Code, persons other than those against whom an offence has been committed are considered to be victims only in specified circumstances. The bill modifies the definition of a victim in section 2 of the Code, which currently includes the victim of an *alleged* offence (i.e., prior to a legal finding that the offence actually occurred), to include a person against whom an offence has been committed, or is alleged to have been committed, who has suffered, or is alleged to have suffered, physical or emotional harm, property damage or economic loss as the result of the commission or alleged commission of the offence.[45]

As was previously the case, persons other than the immediate victim who have suffered physical or emotional harm as the result of the commission of an offence continue to be considered victims for the purposes of victim impact statements,[46] disposition hearings (if the accused has been found not criminally responsible on account of mental disorder)[47] and hearings for the review of parole ineligibility periods for cases of murder and high treason (for which the sentence imposed was imprisonment for life without eligibility for parole for more than 15 years).[48] However,

the bill adds property damage and economic loss resulting from the commission of the offence as further bases upon which such persons qualify as victims.

2.2.1.2 Persons Who May Act on a Victim's Behalf (Clause 4)

In specified circumstances, a spouse (married or common law), a relative, a dependant or an individual who has custody or is responsible for the care or support of the victim or of a dependant of the victim may exercise the rights of the victim if the latter is deceased or incapacitated. Bill C-32 removes the reference to illness in determining whether a person may act on a victim's behalf (clause 4). In the current wording of the Code, a person may act on a victim's behalf if the victim is "dead, *ill* or otherwise incapable."[49] Eliminating this concept could limit the application of this provision, since a person can be ill without being unable to act on his or her own behalf.

Prior to Bill C-32, representatives could act on behalf of the victim for the purpose of making a victim impact statement, in disposition hearings and in hearings for the review of parole ineligibility periods in cases of murder and high treason.[50] Under new section 2.2(1) of the Code, representatives can also act on behalf of victims for the purposes of being provided with an opportunity to indicate whether they are seeking restitution or to establish their losses and damages in restitution order proceedings,[51] and where the victim is to be informed of a plea agreement entered into by the accused and the prosecutor.[52] Moreover, an individual accused in relation to the offence that resulted in the victim suffering harm or loss, or who has been found guilty of the offence, or who has been declared not criminally responsible on account of mental disorder or unfit to stand trial is prohibited from representing the victim (new section 2.2(2) of the Code).

Individuals who may act on behalf of the victim under the Code are essentially the same as those stipulated in the CVBR. Also, as in the wording in the CVBR, the proposed amendment to the French version of the Code appears more restrictive than the one to the English version because it allows for only one representative per victim (see the analysis in section 2.1.1.2 of this document).

2.2.2 Right to Information (Clauses 20, 27, 32 and 33)

Code amendments in the bill allow victims to request copies of judicial interim release orders (bail orders) (new section 515(14) of the Code), conditional sentence orders (amended section 742.3(3)(*a*) of the Code) and probation orders (amended section 732.1(5)(*a*) of the Code). Courts making restitution orders are currently required to notify the person to whom the restitution is ordered to be paid (section 741.1 of the Code). The bill provides that a public authority responsible for enforcing the restitution order must also be notified of the order (amended section 741.1 of the Code). Although such orders are presumed to be available to the public at courthouses across the country,[53] these amendments provide specific rights of access.

2.2.2.1 Informing the Victim of Guilty Plea Agreements (Clause 21)

Section 606 of the Code, as amended, requires a judge, after accepting a guilty plea, to ask the prosecutor if reasonable steps were taken to inform the victim of a plea agreement in cases of murder or "serious personal injury offences" (new section 606(4.1) of the Code). The term "serious personal injury offence" is defined as an indictable offence for which the offender may be sentenced to imprisonment for 10 years or more (other than high treason, treason, first degree murder or second degree murder), that involves either the use or attempted use of violence against another person, or conduct endangering or likely to endanger the life or safety of another person, or inflicting or being likely to inflict severe psychological damage to another person.[54] Moreover, it includes the offences of sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm or aggravated sexual assault, as well as attempts to commit those offences.

The court must also inquire about victim notification of plea agreements in other prosecutions concerning an offence (as defined in the CVBR)[55] that is subject to a maximum sentence of five years or more. This may only be done if the victim has expressed a desire to be informed of such an agreement (new section 606(4.2) of the Code). This means that whereas new section 606(4.1) always requires that reasonable steps be taken to inform the victim of a plea agreement, new section 606(4.2) requires this only if a victim has expressed the desire to be so informed.

Where the new section 606(4.1) or (4.2) applies and the victim was not informed of the agreement before the plea of guilty was accepted, a duty to inform the victim is imposed upon the prosecutor, who must, as soon as is feasible, take reasonable steps to inform the victim of the agreement and the acceptance of the plea (new section 606(4.3). However, 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 (new section 606(4.2)).

2.2.3 Right to Protection

2.2.3.1 The Disclosure of Third Party Records to the Accused in Sexual Offence Cases (Clauses 5–10)

"Third party records" are records that contain personal information about the victim or other witnesses in the possession of someone other than the Crown prosecutor or the defence. Such records include medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, as well as personal journals and diaries.[56] In criminal prosecutions, although the Crown prosecutor has an obligation to disclose investigative files to the accused, third parties in possession of records do not have the same obligation. The Code provides a two-stage procedure for the disclosure of personal information records: the first stage involves a determination as to whether the records ought to be produced to the court, and the second stage involves a determination as to whether the court will order that the records be disclosed to the accused.[57]

Although the right to make full answer and defence under sections 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms* is a core principle of fundamental justice, in the context of the production of records in sexual offence cases it does not automatically entitle the accused to gain access to information contained in the private records of complainants and witnesses. The courts assess the scope of the right to make full answer and defence in the particular circumstances of each case in light of the need to balance full answer and defence with the privacy and equality rights of complainants and witnesses.[58]

2.2.3.1.1 The Offences for Which the Complainant's Records May not Be Disclosed (Clause 5)

Section 278.2 of the Code lists the types of offences (the qualifying offences) for which complainants' records held by a third party may not be disclosed to an accused, except in accordance with the procedure in sections 278.3 to 278.91. The qualifying offences include sexual assaults, sexual offences involving children, incest, prostitution, indecent acts and other sex-related offences. The bill modifies the qualifying offences in section 278.2(1) to include all historical sexual offences in the Code when the alleged conduct involves a violation of the complainant's sexual integrity and that conduct would have constituted a qualifying offence if it had occurred on or after the coming into force of the new definition. The current list of qualifying offences includes a description of certain sexual offences under the Code (historical sexual offences) that is incomplete (as it does not include historical sexual offences committed prior to 1970) and contains drafting errors.[59]

2.2.3.1.2 Timing of the Application (Clause 6)

Clause 6 of the bill doubles the time frame in which an application for the production of third party records may be served on the prosecutor, the person who has possession or control of the record, and the complainant or witness to whom the record relates from at least 7 to at least 14 days before the third party records production hearing. The Court retains its discretion to allow the application to be made after that time if it would be in the interests of justice to do so (amended section 278.3(5) of the Code).[60]

2.2.3.1.3 Duty to Inform Those Concerned of Their Entitlement to Independent Counsel (Clauses 7 and 9)

Although they are not compellable as witnesses in third party record production hearings, complainants, witnesses, persons in possession or control of such records and other persons to whom the records relate are entitled to make submissions. The bill gives the court the duty to inform these persons of their right to be represented by counsel during the proceedings (new section 278.4(2.1) and amended 278.6(3) of the Code). Representation by independent counsel can make a significant difference in the ability of victims and other persons to navigate the third party records application process, to assess any privacy or security risks that the process may create, and to make informed choices about how to proceed.[61]

2.2.3.1.4 Personal Security as a Factor in Third Party Document Disclosure (Clauses 8 and 10)

The bill amends the Code to include the security interests of the complainant, witness or other persons to whom a personal record relates as a factor in the determination of whether the records ought to be produced to the court and disclosed to the accused, and whether conditions should be imposed on their disclosure to the accused (amended sections 278.5(2), 278.7(2) and 278.7(3) of the Code).

2.2.3.2 Testimonial Aids for Witnesses (Clauses 13–19)

The bill extends the availability of testimonial aids to victims and witnesses by expanding the types of supports and procedural protections, as well as the categories of persons who may benefit from such protections, provided that certain criteria are met. These amendments build upon previous Code amendments that extended the availability of testimonial aids for witnesses in order to encourage victims and witnesses to participate in the criminal justice process.[62]

2.2.3.2.1 Exclusion of the Public in Criminal Proceedings (Clause 13)

Section 486 of the Code sets out the presumption that criminal proceedings are held in open court and the circumstances under which a judge may order the exclusion of the public from the courtroom. The judge may order the exclusion of the public if such an order is in the interests of public morals, the maintenance of order or the proper administration of justice, or is necessary to prevent injury to international relations, national defence or national security.

Excluding the public allows a court to control the publicity of its proceedings with a view to protecting the innocent and safeguarding privacy interests.[63]

In making decisions about whether the public should be excluded from a courtroom, the circumstances that are to be considered by the judge are expanded by the bill to include the following: society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process; the ability of the witness to give a full and candid account of the acts complained of if the order was not made;[64] whether the witness needs the order for his or her security or protection from intimidation or retaliation; whether effective alternatives to the making of the proposed order are available in the circumstances; the salutary and deleterious effects of the proposed order; and any other factor that the judge or justice considers relevant (amended section 486(2) of the Code).

2.2.3.2.2 Support Persons for Witnesses (Clause 14)

Section 486.1 of the Code provides that, in certain cases, a support person may be present and close to the witness when he or she testifies. If the witness is under the age of 18 years or has a mental or physical disability, the judge *must* make the order under this section, as requested, unless he or she is of the opinion that the order

would interfere with the proper administration of justice (section 486.1(1) of the Code). For other witnesses, the judge can authorize a support person to be present and close to the witness when he or she testifies, if the judge is of the opinion that the order is necessary to obtain a full and candid account (section 486.1(2) of the Code).

The bill expands the standard upon which an order can be made authorizing a support person to be present and close to the witness. The judge can now make such an order, as requested, on the basis that it would *facilitate* the giving of a full and candid account by the witness of the acts complained of, or would otherwise be in the interest of the proper administration of justice (amended section 486.1(2) of the Code). Moreover, additional factors are to be considered by the court in determining whether to make such an order; these factors include whether the witness needs the order for his or her security or for protection from intimidation or retaliation; society's interest in encouraging the reporting of offences; and the participation of victims and witnesses in the criminal justice process (amended section 486.1(3) of the Code). The court's discretion to consider any other circumstance considered to be relevant remains, although it is now formulated as any other "factor" that the judge considers relevant (amended section 486.1(3) of the Code).

On 2 December 2014, the House of Commons Standing Committee on Justice and Human Rights amended Bill C-32 to allow applications for such orders to be made in advance of proceedings to any judge having jurisdiction in the judicial district where the proceedings will take place if the presiding judge has not been determined. Currently, such applications can only be made during the proceedings, or before they begin, to the judge who will preside at the proceedings (section 486.1(2.1) of the Code).

2.2.3.2.3 The Taking of Witness Testimony Outside of the Courtroom, or Behind a Screen or Other Device (Clause 15)

Section 486.2 of the Code provides for witness testimony to be given, in certain cases, outside of the courtroom or behind a screen or other device that allows the witness not to see the accused. However, witnesses cannot testify outside the courtroom unless facilities are available to allow the accused, the judge and the jury to watch the testimony by closed-circuit television or other arrangement and the accused has a means of communicating with counsel while watching the testimony.[65]

In cases involving witnesses under the age of 18 years or who may have difficulty communicating their testimony because of a mental or physical disability, the provision effectively creates a presumption that the order will be granted, unless the judge is of the opinion that the order would interfere with the proper administration of justice (section 486.2(1) of the Code).

Clause 15 of the bill relates to circumstances regarding other witnesses.

As with orders for support persons for witnesses (see section 2.2.3.2.2 of this document), although such orders were previously made on the basis that they were *necessary* to obtain a full and candid account from the witness of the acts complained of, they can now be made if the order would *facilitate* the giving of a full and candid account by the witness of the acts complained of or would otherwise be in the interest of the proper administration of justice (amended section 486.2(2) of the Code).[66]

The statutory bases to be considered by a court in determining whether to order that a witness be permitted to testify outside of the courtroom or behind a screen have been expanded to include whether the witness needs the order for his or her security or for protection from intimidation or retaliation, society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process (amended section 486.2 of the Code). The reformulated provision also specifically provides for the protection of law enforcement officials and persons acting in aid thereof by adding the new factor of whether an undercover police officer or a person acting covertly under the direction of a peace office (a police agent) needs the order for the protection of his or her identity (amended section 486.2(3) of the Code). The court's discretion to consider any other relevant factor remains (amended section 486.2(3) of the Code).

As with orders for support persons for witnesses, provisions regarding the taking of witness testimony outside the courtroom were amended on 2 December 2014 by the House of Commons Standing Committee on Justice and Human Rights to allow applications to be made in advance of proceedings to any judge having jurisdiction where the proceedings will take place, when no judge has yet been determined.

2.2.3.2.4 Cross-examination of Witnesses by the Accused (Clause 16)

Section 486.3 of the Code allows for a court order prohibiting a self-represented accused from personally cross-examining a witness in certain cases. When such an order is made, the court must also make an order appointing counsel for the purpose of cross-examination. The related provisions apply to three categories of witness: those under 18 years of age, victims of certain specific offences, and other witnesses. Bill C-32 amends the provisions relating to the second and third categories.

- In cases involving witnesses under the age of 18 years, upon the application being made the judge *must* make the requested order unless he or she is of the opinion that the proper administration of justice requires the accused to personally cross-examine the witness (section 486.3(1) of the Code).
- In cases involving victims, clause 16 adds the offences of sexual assault (section 271 of the Code), sexual assault with a weapon, threats to a third party or causing bodily harm (section 272 of the Code) and aggravated sexual assault (section 273 of the Code) to the offence of criminal harassment (section 264 of the Code) already provided for in section 486.3(4) of the Code (new section 486.3(2) of the Code). As is the case with the first category, upon the application being made the judge *must* make the order unless the proper administration of justice

requires that the accused personally cross-examine the witness (new section 486.3(2) of the Code).

- In the case of all other witnesses, the court *may* make the requested order if it is necessary in order to obtain a full and candid account by the witness of the acts complained of or if it would be in the interest of the proper administration of justice. In making decisions about whether to allow a self-represented accused to cross-examine the witness, the factors to be considered by the judge are extended by the bill to include the security of the witness, whether the witness requires protection from intimidation or retaliation, society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process, and any other factor that the judge considers relevant (new section 486.3(4) of the Code).

As with orders for support persons for witnesses and orders for the taking of witness testimony outside the courtroom, provisions for orders prohibiting the cross-examination of witnesses by the accused were amended on 2 December 2014 by the House of Commons Standing Committee on Justice and Human Rights to allow applications to be made in advance of proceedings to any judge having jurisdiction where the proceedings will take place, when no judge has yet been determined.

2.2.3.2.5 Non-disclosure of the Identity of Witnesses (Clause 17)

Clause 17 of Bill C-32 creates a new type of court order directing that any information that could identify the witness not be disclosed in the course of the proceedings when such an order is in the interest of the proper administration of justice (new section 486.31 of the Code). Under this new measure, the identity of a witness would not be disclosed to the accused or his or her defence lawyer, or to the general public.

The judge may hold a hearing to determine whether the requested order should be made, and the hearing may be held in private (new section 486.31(2)). Hearings taking place "in private" have been defined as hearings at which all of the parties are present, but which are nonetheless closed to the public.[67]

In determining whether to make an order that the identity of a witness be protected, the judge must consider factors including the accused person's right to a fair and public hearing, the nature of the offence, whether the witness needs the order for his or her security or for protection from intimidation or retaliation, whether the order is needed to protect the security of anyone known to the witness, society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process, whether an undercover police officer or a person acting covertly under the direction of a peace office (i.e., a police agent or other witness assisting the police) needs the order for the protection of his or her identity, the importance of the witnesses' testimony to the case, and any other factor that the judge considers relevant.

2.2.3.2.6 Publication Bans (Clauses 18 and 19)

Under current sections 486.4 and 486.5 of the Code, a court can order a publication ban, which is an order that the identity of a complainant or a witness (or information that could identify him or her) not be published, broadcasted or transmitted in any way. The power of a court to regulate the publicity of its proceedings serves to protect privacy interests, especially those of witnesses and victims.[68]

Publication bans may be granted under section 486.4 of the Code to protect the identity of complainants and witnesses when the accused is charged with certain specified offences – generally of a sexual nature. There is a presumption that such orders will be granted in the case of witnesses under the age of 18 years and complainants: the judge is required to inform the witness of his or her right to apply for the order and to make the order upon the application of the witness or the prosecutor. The bill amends the list of qualifying offences in section 486.4 to include all historical sexual offences in the Code if the alleged conduct involves a violation of the complainant's sexual integrity and that conduct would be a listed offence if it had occurred on or after the coming into force of the new definition (amended section 486.4(1) of the Code).[69]

Moreover, Bill C-32 makes publication bans for victims under the age of 18 years mandatory on application regardless of the offence with which the accused is charged: the judge is required to inform the victim of his or her right to apply for the order and to make the order upon the application of the victim or the prosecutor (new sections 486.4(2.1) and (2.2) of the Code).[70]

Section 486.5 governs the making of publication bans in cases other than those captured by section 486.4. Under section 486.5, upon the application of the prosecutor, a victim or a witness or a justice system participant[71] involved in the proceedings, the court may order that the identity of (or information that would identify) the victim or another witness not be published, broadcasted or transmitted in any way. Bill C-32 lowers the standard under which such orders may be made. First, the basis upon which such orders may be made has been changed from a determination that the order is *necessary* for the proper administration of justice to it being *in the interest* of the proper administration of justice (amended section 486.5(1) of the Code). Second, one of the listed factors to be applied in deciding "whether there is a real and substantial risk that the victim, witness or justice system participant would suffer significant harm if their identity were disclosed" has been changed to "whether there is a real and substantial risk that the victim, witness or justice system participant would suffer harm if their identity were disclosed" (section 486.5(7)(*b*) of the Code).

On 2 December 2014, the House of Commons Standing Committee on Justice and Human Rights amended Bill C-32 to add the recently enacted offence of criminal organization recruitment (section 467.111 of the Code) to the criminal organization, terrorism and national security offence proceedings in which justice system participants can apply for a publication ban on any information which could identify them (amended section 486.5(2.1) of the Code).

2.2.3.2.7 Amendment to the Offence of Intimidation of a Justice System Participant (Clause 12)

Section 423.1 of the Code criminalizes intimidation that is intended to provoke a state of fear in

- a group of persons or the general public in order to impede the administration of criminal justice;
- a justice system participant[72] in order to impede him or her in the performance of his or her duties; or
- a journalist in order to impede him or her in the transmission to the public of information in relation to a criminal organization.

Clause 12 of Bill C-32 amends the offence of intimidation of a justice system participant to extend the liability for the commission of the offence to any form of conduct that is intended to provoke a state of fear described above. Liability for the commission of this offence was previously based on specified types of prohibited conduct.

2.2.4 Right to Participation

2.2.4.1 Bail Hearings (Clause 20)

The Code currently provides measures to protect the safety of victims of crime in bail proceedings, as follows:

- Justices are required to consider no-contact conditions and any other conditions necessary to ensure the safety and security of victims.[73]
- When considering whether detention is necessary for the protection or safety of the public, justices must specifically consider whether detention is necessary for the protection or safety of any victim of or witness to the offence.[74]
- During bail hearings, justices must consider any evidence submitted regarding the need to ensure the safety or security of any victim or witness to an offence.[75]

Under Bill C-32, a justice who makes an order in respect of bail shall include in the record of the proceedings a statement that he or she considered the safety and security of every victim of the offence when making the order (new section 515(13) of the Code).

2.2.4.2 The Purpose, Principles and Objectives of Sentencing

Section 718 of the Code sets out the “fundamental purpose” of sentencing as follows: “to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society” by imposing just sanctions that achieve certain listed objectives. These objectives include the denunciation of unlawful conduct, general and specific deterrence, the separation of offenders from society “where necessary,” the rehabilitation of offenders, the reparation to victims or

the community, the promotion of a sense of responsibility, and the acknowledgement of harm done to victims and the community.

The principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender is found in section 718.1 of the Code. In addition, section 718.2 of the Code requires that the following additional principles be taken into account:

- A sentence should be increased or reduced to account for any aggravating or mitigating circumstances relating to the offence or the offender (such as significant impact upon the victim).
- Penalties should be consistent with those imposed on similar offenders for similar offences.
- The aggregate of consecutive sentences should not be "unduly long or harsh."
- Offenders should not be deprived of liberty when less restrictive sanctions may be appropriate.
- All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

2.2.4.2.1 The Protection of Society (Clause 23)

Clause 23 of Bill C-32 adds the protection of society to the provision that specifies the fundamental purpose of sentencing (amended section 718 of the Code). This amendment could be interpreted as the mere codification of an existing purpose of sentencing as existing case law recognizes the protection of society as the "fundamental purpose of any sentence of whatever kind."[76] Moreover, section 718 of the Code already incorporates the maintenance of a safe society as a fundamental purpose of sentencing.

2.2.4.2.2 Acknowledgement of Harm Done to Victims and the Community (Clause 23)

Clause 23 of Bill C-32 also modifies the objectives of sentencing to specify that denunciation includes denunciation of the harm caused by the unlawful conduct to both victims and the community (amended section 718(*a*) of the Code). Although the addition of the harm done to the community will be a factor to be considered in all cases, it will be particularly relevant in cases involving offences for which the victim is society at large rather than identifiable individuals (e.g., drug offences and criminal organization offences).

2.2.4.2.3 Sanctions Other than Imprisonment Must be Consistent with the Harm Done to Victims or to the Community (Clause 24)

Under section 718.2(*e*) of the Code, "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with

particular attention to the circumstances of aboriginal offenders." This provision has been interpreted as a remedial provision applying to all offenders, to the effect that imprisonment is to be used only when no other sanction is appropriate to the offence and to the offender.[77] Clause 24 of Bill C-32 adds that the harm done to victims or to the community shall be considered in the determination of whether sanctions other than imprisonment are appropriate in a particular case (amended section 718.2(*e*) of the Code).

2.2.4.3 Victim Impact Statements

A victim impact statement (VIS) describes the impact of an offence upon a victim. According to case law, the nature of the information that can be included in a VIS is restricted by the principle that fairness in the sentencing process is of fundamental importance.[78] As such, the content of a VIS is restricted to personal statements of harm and loss that do not include criticisms of the offender or a retelling of the crime.[79]

2.2.4.3.1 Obligation of the Court to Inquire whether Reasonable Steps Have Been Taken to Provide the Victim With an Opportunity to Prepare a Statement (Clause 25)

Clause 25 of Bill C-32 amends the obligation of the court to inquire of the prosecutor, a victim of the offence or any person representing a victim of the offence, as to whether the victim has been advised of the opportunity to prepare a VIS to a more specific obligation to inquire, of the prosecutor, if reasonable steps have been taken to *provide the victim with an opportunity* to prepare such statement (new section 722(2) of the Code).

2.2.4.3.2 Standardized Victim Impact Statement Form (Clauses 25 and 35)

The bill makes changes to assist victims in the preparation of a VIS by providing a standardized form. The new form explains the types of harm and losses to be described therein, with specific reference to the impact of the offence on the victim, the physical or emotional harm, property damage or economic loss suffered by the victim resulting from the commission of the offence, as well as fears of the victim for his or her security. It provides an area in which additional information (such as a drawing, poem or letter) can be included (amended section 722 and new Form 34.2 of the Code).

The new form also specifies that the VIS must not include statements about the offence or the offender that are not relevant to the harm or loss suffered; unproven allegations; comments about offences for which the offender was not convicted; or complaints about individuals, other than the offender, who were involved in the investigation or prosecution of the offence.

According to case law, in the absence of exceptional circumstances, recommendations as to the length and severity of a sentence are not to be included in VISs.[80] The new

form, however, allows the victim, with the court's approval, to express an opinion or recommendation about the sentence. Although the impact of this change has yet to be determined, the influence of victims on sentencing is limited by the sentencing outcomes provided in the Code. Moreover, because Crown prosecutors must act in the interests of society rather than the particular interests of a victim, they may be obliged to recommend sanctions other than those favoured by the victim, taking into account precedent in case law and the range of penalties usually imposed.[81]

On 2 December 2014, the House of Commons Standing Committee on Justice and Human Rights amended Bill C-32 to add that the new VIS form is to be prepared in accordance with the procedures established by a program designated for that purpose by the lieutenant governor in council of the province in which the court is exercising its jurisdiction. This amendment is meant to ensure that victims receive assistance in completing the form.

2.2.4.3.3 Method of Submission and Presentation Process (Clause 25)

Currently, victims can either read their statement aloud during sentencing proceedings or present it in any other manner that the court considers appropriate (section 722(2.1) of the Code). Clause 25 of Bill C-32 specifies different ways in which the statement may be presented that afford the victim support and privacy: the victim can read the statement in the presence of a support person, or read it outside the courtroom or behind a screen (with a means, such as closed-circuit television, of allowing for the court and the offender to watch the presentation) (new sections 722(5) and 722(7) of the Code). The victim, or the victim's representative, may bring a photograph of the victim to court when presenting the VIS, unless to do so would disrupt court proceedings (new section 722(6) of the Code). The new provisions specify that the court shall take into account the portions of the statement that it considers relevant in sentencing the offender and disregard any other portion (new section 722(8) of the Code).

2.2.4.4 Standardized Victim Impact Statement Form Where the Accused Has Been Found Not Criminally Responsible on Account of Mental Disorder (Clauses 22 and 36)

Victims can provide VISs at disposition hearings if the accused has been found to be not criminally responsible because of a mental disorder.[82] In determining the appropriate disposition or conditional discharge conditions, Review Boards must take the information given in VISs into account to the extent that the information is relevant to the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused (section 672.5(14) to (15) and section 672.54 of the Code).[83]

Bill C-32 provides a standardized form for VISs for cases in which the accused has been found to be not criminally responsible on account of mental disorder. As with

the standardized VIS form of general application under the Code, the new form explains the types of physical or emotional harm, property damage or economic loss suffered by the victim to be described therein and with specific reference to the impact of the offence on the victim (amended section 672.5(14) and new Form 48.2 of the Code).

2.2.4.5 Community Impact Statements (Clauses 11, 26 and 35)

Community impacts statements constitute a means by which the court may ascertain the impact of the harm against the community. They were first introduced in the Code in 2011, but their application is currently limited to cases of fraud (section 380.4 of the Code).[84] As such, in sentencing hearings for fraud offences, the court can consider a statement made by a person on a community's behalf describing the harm done to, or losses suffered by, the community arising from the commission of the offence.

Bill C-32 makes community impact statements applicable in sentencing hearings for all criminal and regulatory prosecutions. Under new section 722.2 of the Code, the court is required to consider any statement made by an individual on a community's behalf describing the harm or loss suffered by the community resulting from the offence and the impact of the offence on the community. Unlike VISs, community impact statements can be used in sentencing proceedings for offences, such as drug offences and criminal organization offences, that have no identifiable individual victim. Bill C-32 provides a prescribed form with content requirements that are analogous to the new form for VISs (new section 722.2(2) and new Form 34.3 of the Code).

Although VISs can provide information relevant to the purpose, objectives and principles of sentencing, "the guiding principle in criminal law is that any criminal offence is not a wrong committed against the person who is harmed, rather it is a wrong against the community as a whole."[85] A community impact statement provides a means to ascertain the harm to the community that complements Bill C-32 amendments to the objectives of sentencing, which specify that denunciation includes denunciation of the harm caused by the unlawful conduct to both victims and to the community (see section 2.2.4.2.2 in this document).

As with the victim impact statement form of general application, provisions regarding the community impact statement form were amended by the House of Commons Standing Committee on Justice and Human Rights on 2 December 2014 to add that the form is to be prepared in accordance with the procedures established by a program designated for that purpose by the lieutenant governor in council of the province in which the court is exercising its jurisdiction.

2.2.4.6 Victim Surcharge (Clause 28)

The victim surcharge is a financial penalty imposed under section 737 of the Code on offenders at the time of sentencing. It is added to any other penalty imposed by the court upon conviction for an offence under the Code or under the *Controlled Drugs and Substances Act*, or when an offender is discharged.[86]

In 2013, the Code was amended to make the victim surcharge mandatory by removing the judicial discretion to waive it in cases of undue hardship to the offender or the offender's dependants and to increase the amounts that the offender must pay from 15% to 30% of any fine imposed by the court.[87] In cases in which no fine is imposed, the amount for an offence punishable by summary conviction has been increased from $50 to $100, and the amount for an offence punishable by indictment has been increased from $100 to $200.[88]

Currently, the victim surcharge is payable at the time that the fine imposed for the offence is payable. When no fine is imposed, it is payable within the time established by the province in which it is imposed. Clause 28 of Bill C-32 renders the victim fine surcharge payable within the period set by the province or territory in which the surcharge is imposed. If no such period has been set by the province or territory, the offender needs to pay the victim surcharge within a "reasonable time" after its imposition. Thus, if the province or territory has not set a payment period, judges would presumably have the discretion to consider the unique circumstances of the offender, including his or her ability to pay the surcharge, in establishing a reasonable period for payment.[89]

2.2.5 Right to Restitution

Restitution is part of the sentence and is to be distinguished from a judgment in damages as a result of a civil suit. It responds to a number of sentencing principles, including denunciation, specific and general deterrence and rehabilitation, as well as the objectives outlined in sections 718(*e*) and (*f*) of the Code (providing reparations and promoting a sense of responsibility). To ensure that the total sentence is not excessive, restitution must be considered as part of the sentence along with periods of incarceration, probation and so forth.[90]

If an offender is convicted or given an absolute or conditional discharge under section 730 of the Code, the court *may* impose an order that the offender make restitution to another person at the request of the Attorney General or on its own motion (section 738 of the Code).[91] For such an order to be made, the damage or harm must be a result of the commission of the offence or the arrest or attempted arrest of the offender, the amount must be readily ascertainable and one of the following situations must apply:

- Damage, loss or destruction of property: Restitution can be granted in an amount not exceeding the replacement value of the property at the time the order is made, less the value of any property returned.

- Bodily or psychological harm: Restitution can be granted in an amount not exceeding all pecuniary damages, including loss of income or support, incurred as a result of the harm.
- Moving expenses: In cases in which bodily harm or threat of bodily harm has been made against a member of the offender's household, including a spouse, common-law partner or child, the offender may be required to pay for actual and reasonable expenses incurred by that person because they are moving out of the offender's household, including costs for temporary housing, food, child care and transportation.
- Identity theft or identity fraud: Restitution can be granted for actual and reasonable expenses incurred in re-establishing the person's identity, including replacing identity documents and correcting credit history and rating.

If property obtained as a result of the commission of an offence has been returned to its owner or the person who had lawful possession of the property, but

a. that property was conveyed or transferred for valuable consideration (e.g., money) to a person acting in good faith and without notice, or
b. the offender had used the property as security to borrow money from a person acting in good faith and without notice,

the court *may* order restitution to be paid to the person referred to in (a) or (b). However, the amount of the restitution is not to exceed the amount of consideration that was given for the property or the amount outstanding on the loan (section 739 of the Code).

In the situations outlined above, the court "may" order restitution but is not required to do so or even to consider doing so. In contrast, in situations of fraud as defined in section 380(1) of the Code, a court is *required* to consider making a restitution order under section 738 or 739 when an offender is convicted or given an absolute or conditional discharge (section 380.3(1) of the Code). Again, this does not mean that a restitution order is required, but only that the court must consider ordering one.

In a case of fraud under section 380(1), as soon as is practicable after a finding of guilt and prior to sentencing, a court must ask the prosecutor whether reasonable steps have been taken to ascertain whether victims are seeking restitution. An adjournment may be granted to permit victims to indicate whether they want restitution or to establish their losses if the court is satisfied that this would not interfere with the proper administration of justice. In cases in which a victim is seeking restitution and the court decides not to grant the order, reasons are to be given and stated in the record (section 380.3 of the Code).

2.2.5.1 Consideration of Restitution Order now Mandatory (Clause 29)

Clause 29 of Bill C-32 requires the court to consider making a restitution order under section 738 or 739 if an offender is convicted or given a conditional or absolute discharge. The new provision essentially makes the special rule with respect to fraud outlined above applicable in all cases, meaning that the court must always consider whether a restitution order is appropriate prior to sentencing or when an absolute or conditional discharge is granted and, where restitution is not granted, include the reasons in the court record (new section 737.1 of the Code). Since the general rule is now to require consideration of a restitution order, Bill C-32 repeals section 380.3 as it is no longer necessary.

2.2.5.2 Payment (Clause 30)

Clause 30 of the bill states that the offender's financial means or ability to pay do not prevent a restitution order being made (new section 739.1 of the Code). This new provision reflects the jurisprudence concerning restitution, which does not bar a restitution order being made when the offender is unable to pay. Although according to case law the offender's current and future means to pay are not determinative of the issue, these factors must be taken into account when considering whether a restitution order is appropriate. In addition, the impact of restitution on rehabilitation is to be considered.[92]

In making the order, the court must require the offender to pay the full amount by the date specified in the order or, where the court is of the opinion that the amount should be paid in instalments, it is to set out a payment scheme in the order (new section 739.2 of the Code). The order may be paid to more than one person, in which case the order must specify the amounts to go to each and the order of priority of payment (new section 739.3 of the Code).

2.2.5.2.1 Enforcement (clauses 30–31)

When making a restitution order under section 738 or 739, rather than list the person to whom restitution is to be made, the court may make the order in favour of a public authority (designated by regulation) that would then be responsible for enforcing the order and remitting the amount to the person who made the request for restitution. Bill C-32 allows provincial governments to designate a person or body to be a public authority for this purpose (new section 739.4 of the Code).

On 2 December 2014, the House of Commons Standing Committee on Justice and Human Rights amended Bill C-32 to allow the provinces to make such designations on the basis of orders in council rather than by way of regulations. This amendment is meant to avoid the possible delays that could have resulted from the regulation-making requirement initially proposed in the bill.

In addition, victims will be able to continue to have restitution orders enforced in the civil courts (amended section 741(1) of the Code).

2.3 AMENDMENTS TO THE *CANADA EVIDENCE ACT* AND THE *EMPLOYMENT INSURANCE ACT* (CLAUSES 52–54)

For hundreds of years, the rule of spousal incompetency has existed in the common law. This rule states that a spouse is incompetent to testify, i.e., "not legally qualified to testify,"[93] in criminal proceedings against the other spouse. As such, individuals cannot testify against their spouses even if they want to. The authors of the third edition of *The Law of Evidence in Canada* stated that the law in this area is "marked with significant inconsistencies and is in serious need of rationalization at the legislative level."[94]

Clause 52 creates a general rule of competence and compellability by revising section 4(2) and repealing sections 4(4) and 4(5) of the *Canada Evidence Act*. As such, the common law rule of spousal incompetence would be eliminated and spouses will be competent and compellable by the prosecution to testify against the other spouse. However, spousal privilege under section 4(3) remains, so a husband would continue not to be compellable to disclose communications made by his wife during the marriage and vice versa.

Clause 54 repeals section 133 of the *Employment Insurance Act*,[95] which is no longer necessary given the change to the general rule about spousal competence and compellability.

2.4 AMENDMENTS TO THE *CORRECTIONS AND CONDITIONAL RELEASE ACT*

The CCRA provides the statutory basis for the Correctional Service of Canada (CSC) in Part I, the Parole Board of Canada (PBC) in Part II, and the Office of the Correctional Investigator in Part III. It sets out their respective responsibilities and the principles that must guide their actions, as well as the rules for implementing conditional release. It also establishes rules to ensure transparency in the correctional system as well as the provision of information to victims and the participation of victims in the correctional process. The CCRA is complemented by the *Corrections and Conditional Release Regulations* (hereafter, the "Regulations").[96]

Clauses 45 to 51 of the bill amend Parts I and II of the CCRA, thereby affecting the rules for the CSC and the PBC.

2.4.1 APPLICATION

2.4.1.1 DEFINITION OF VICTIM (CLAUSE 45(1))

Clause 45(1) of Bill C-32 makes a few amendments to the definition of victim, which appears in section 2(1) of the CCRA. One of the amendments aims to harmonize the CCRA's definition with the CVBR's. It expands the definition to include individuals who have suffered not only physical or emotional harm as the result of the commission of the offence, but also property damage or economic loss.

Like the definition of "victim" in the new CVBR, this definition includes the immediate victims – those against whom the offence is committed – as well as indirect victims. Therefore, an individual who has suffered psychological damage as a result of an assault against his or her spouse could be considered a "victim" under the CCRA.

The bill also replaces the word "person" in the definition of "victim" with the word "individual." This change restricts the definition to individuals, thereby ruling out the possibility that a corporation could be considered a "victim" under the CCRA.[97]

2.4.1.2 Individuals Who May Act on a Victim's Behalf (Clause 45(2))

The bill also proposes moving to a new section the list of individuals who may now act on behalf of a victim who is "is dead or incapable of acting on their own behalf" (new section 2(3) of the CCRA). The elements in this clause are not new; they are included in the definition itself of "victim" in section 2(1) of the CCRA.[98]

To reconcile the provisions of the CCRA with the provisions of the new CVBR, the reference to illness has been eliminated in determining whether an individual may act on a victim's behalf (clause 45(2) of the bill). This amendment, identical to that proposed to the Code, could limit the application of this provision (see the discussion in section 2.2.1.2 of the document).

Individuals who may act on behalf of the victim under the CCRA are the same as those in the CVBR. As well, like the wording in the Code, the proposed amendment to the French version of the CCRA appears to be more restrictive than the one to the English version because it allows only one representative per victim (see the analysis in section 2.1.1.2 of this document).[99]

Lastly, clause 45 adds an exception so that the offender cannot be considered a "victim" or act on a victim's behalf (new section 2(4) of the CCRA).

2.4.1.3 Other Persons who may Obtain Information About an Offender and Participate in the Corrections Process (Clauses 46(5), 46(6) and 49(2))

As with victims of crime as defined in section 2 of the CCRA, persons who satisfy the Chairperson of the PBC or the Commissioner of the CSC, as the case may be, that harm was done to them or that they suffered physical or emotional damage as a result of an act of an offender, regardless of whether the offender was prosecuted or convicted for that act, and that a complaint was made to the police or the Crown attorney, or an information was laid under the Code (these persons are referred to in sections 26(3) and 142(3) of the CCRA) can:

- obtain information about the offender who harmed them;
- present written statements to the CSC or the PBC at any time in the offender's sentence describing the harm or loss resulting from any act of the offender and its continuing impact on them; and
- attend PBC hearings as an observer.

Clauses 46(5), 46(6) and 49(2) of the bill make a few amendments to the provisions dealing with these persons so as to reflect the expanded definition of “victim” in section 2(1) of the CCRA to include persons who have suffered not only physical or emotional harm but also property damage or economic loss as the result of an act of an offender.

2.4.1.4 Registration of Victims with the CSC or the PBC

It should first be pointed out that information on offenders is not automatically provided to victims and persons referred to in sections 26(3) and 142(3) of the CCRA. For access to this information, a written request must first be made to the CSC or the PBC. Once one of these organizations determines that the person making the request meets the criteria established under the CCRA, the person is automatically registered with both organizations.

In 2012–2013, 17.6% of victims of offenders under CSC’s jurisdiction had registered to receive information about the offender who harmed them.[100] That same year the PBC had more than 22,000 contacts with victims of crime, had more than 3,500 observers at its parole hearings and released more than 6,600 conditional release decisions.[101]

2.4.2 Right to Information

As mentioned previously, victims of crime as well as persons referred to in sections 26(3) and 142(3) of the CCRA can, on request, obtain information about the offender who harmed them from the Commissioner of the CSC or the Chairperson of the PBC (sections 26 and 142 of the CCRA). Two classes of information can be provided to them on request.

The first class consists of information that is largely already in the public domain and available within other parts of the criminal justice system. Under sections 26(1)(*a*) and 142(1)(*a*), the Commissioner of the CSC or the Chairperson of the PBC, as the case may be, *must* provide the following information to victims of crime and the persons referred to in sections 26(3) and 142(3):

- the name of the offender who harmed them;
- the offence for which the offender was convicted;
- the court where the offender was convicted; and
- the date the offender began to serve his or her sentence, the length of the sentence, and the offender’s eligibility dates and review dates for temporary absences or parole.

The second class of information is largely not in the public domain and is protected by the *Privacy Act*. Under sections 26(1)(*b*) and 142(1)(*b*) of the CCRA, the Commissioner of the CSC and the Chairperson of the PBC, as the case may be, *may* provide to victims of crime and the persons referred to in sections 26(3) and 142(3) of the CCRA additional types of information about the offender who

harmed them if, in their opinion, the interests of the victim clearly outweigh the offender's right to privacy. Parliament has therefore decided, given the nature of the information in this class, to require authorities to apply a test that involves weighing the victim's interests against the offender's privacy. The information in this class varies slightly in sections 26(1)(*b*) and 142(1)(*b*) of the CCRA to reflect the information collected by the CSC and the PBC. The information that can currently be disclosed based on this test is as follows:

- the offender's age and the name and location of the penitentiary in which the sentence is being served;
- if the offender is transferred, a summary of the reasons for the transfer and the name and location of the penitentiary in which the sentence is being served;
- if the offender is to be transferred to a minimum security institution, a summary of the reasons for the transfer in advance, whenever possible;
- social reintegration programs in which the offender is participating or has participated;
- serious disciplinary offences committed by the offender;
- the date, if any, on which the offender is to be released on temporary absence, work release, parole or statutory release and the conditions attached to the offender's supervised release into the community;
- the destination of the offender on conditional release and whether the offender will be in the vicinity of the victim;
- the date of any hearing for the purposes of a review respecting detention after the offender's statutory release date;
- whether the offender is in custody and, if not, the reason why the offender is not in custody;
- whether the offender has waived his or her right to a hearing before the PBC and the reason for the waiver; and
- whether the offender has appealed a decision of the PBC under section 147 of the CCRA and the outcome of the appeal.

2.4.2.1 Facilitating and Increasing the Information that May Be Disclosed to Victims (Clause 46)[102]

Bill C-32 amends section 26(1)(*b*) of the CCRA to require the Commissioner of the CSC to disclose to the victim or the person referred to in section 26(3), upon a determination that the interest of a victim clearly outweighs an invasion of the offender's privacy, information pertaining to the offender's correctional plan, including information regarding the offender's progress toward meeting the objectives of the plan (new section 26(1)(*b*)(iii))[103] and inform the victim of the offender's removal from Canada before the expiration of their sentence under the *Immigration and Refugee Protection Act* (new section 26(1)(*b*)).

The bill also adds a new paragraph to section 26 of the CCRA (new section 26(1)(*c*)). Under this provision, the Commissioner of the CSC is required to disclose to victims and persons referred to in section 26(3) who make a request the following information, unless the disclosure would have a negative impact on the safety of the public:

- the date, if any, on which the offender is to be released on temporary absence, work release, parole or statutory release and the conditions attached to his or her release; and
- the destination of the offender on any temporary release, work release, parole or statutory release, whether the offender will be in the vicinity of the victim while travelling to that destination and the reasons for any temporary absence.[104]

This new category imposes less of a burden on the Commissioner of the CSC than that prescribed in section 26(1)(*b*), thereby facilitating the sharing of information on the conditional release of offenders with victims.

Section 46(4) of the bill also adds two new sections, 26(1.1) and (1.2), to the CCRA requiring the Commissioner of the CSC to disclose the information referred to in section 26(1)(*c*) before the day on which the offender is released and, unless it is not practicable to do so, at least 14 days before that day. The Commissioner must also follow up with the victims and the persons referred to in section 26(3) by disclosing to them any changes to the information referred to sections 26(1)(*a*) to (*c*).

Lastly, the bill adds section 26(1)(*d*) to the CCRA to require the Commissioner of the CSC to provide to victims and persons referred to in section 26(3) who make a request a photograph of the offender before he or she is released into the community, unless doing so would have a negative impact on the safety of the public. Under new section 26(1)(*d*), the photograph must be taken on the occurrence of the earliest of any of the following: unescorted temporary absence, work release, release on parole, statutory release or release by virtue of the expiration of the sentence. The Commissioner must also provide any subsequent photograph of the offender taken by the CSC after his or her release if, in the Commissioner's opinion, doing so would not have a negative impact on the safety of the public.[105]

2.4.2.2 Designation of a Representative and Recognition of the Right to Withdraw a Request to Receive Information (Clauses 46(7) and 50(2))

Sections 46(7) and 50(2) of the bill set out in the CCRA the right of victims and persons referred to in sections 26(3) and 142(3) to designate a representative to receive information on the offender who harmed them on their behalf, including access to a photograph of the offender (new sections 26(5) and 142(3.1) of the CCRA). The existing application to receive information about an offender from the CSC and the PBC already has a section on the notification of the victim through an agent named by the victim. The bill therefore sets out in the CCRA an existing practice.

Always with a view to giving victims greater consideration, the bill also includes in the CCRA the right of victims and persons referred to in sections 26(3) and 142(3) to withdraw at any time their request to receive information on the offender who harmed them (new 26(6) and 142(3.2) of the CCRA).

Lastly, if they have made reasonable efforts to contact the victim and have failed to do so, the Commissioner of the CSC and the Chairperson of the PBC may consider the victim to have withdrawn his or her request to receive information on the offender who harmed them (new sections 26(7) and 142(3.3) of the CCRA).

2.4.2.3 Informing Victims of Victim–Offender Mediation Services (Clause 47)

Clause 47 provides that once a victim or person referred to in section 26(3) of the CCRA has registered for the application of this section (therefore, for restorative justice and mediation services), the CSC must provide him or her with information about its restorative justice and victim-offender mediation services. On the request of the victim or the person referred to in section 23(3), the CSC must also take measures to provide these services (new section 26.1(1) of the CCRA). These services must be provided in accordance with the Commissioner's Directives and only with the voluntarily given, informed consent of the participants (new section 26.1(2) of the CCRA).

The CSC has introduced a program called the Restorative Opportunities Program and Victim-Offender Mediation Services, supported by Commissioner's Directive 785.[106] The purpose of the directive is to guide CSC staff "when receiving a request for victim-offender mediation or any form of contact between victim and offender" and to "provide a consistent approach to administering victim-offender mediation services." It states the responsibilities of the appropriate officials, information management rules concerning victims and offenders, and technological solutions for the secure recording, storing and communication of case files.[107]

2.4.2.4 Providing a Copy of Any Decision Rendered in Relation to the Offender to the Victim (Clause 51)

Clause 51 requires the PBC to provide, upon request, victims or persons referred to in section 142(3) with a copy of any decision rendered by the PBC under Part II of the CCRA in relation to the offender who caused them harm, unless doing so could reasonably be expected to jeopardize the safety of any person, reveal a source of information obtained in confidence or prevent the successful reintegration of the offender into society. All persons registered as victims with the CSC or the PBC should therefore automatically receive a copy of each decision in relation to the offender who caused them harm.

Currently, under section 144(2) of the CCRA,

> [a] person who demonstrates an interest in a case may … have access to the contents of the registry relating to that case, other than information the disclosure of which could reasonably be expected
>
> (*a*) to jeopardize the safety of any person;
>
> (*b*) to reveal a source of information obtained in confidence; or
>
> (*c*) if released publicly, to adversely affect the reintegration of the offender into society.

2.4.3 Right to Protection

The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society through the safe and humane custody and supervision of offenders and through programs to facilitate their rehabilitation and reintegration into the community as law-abiding citizens (section 3 of the CCRA). The protection of society is the paramount consideration that must guide the actions of the CSC and the PBC throughout the corrections and conditional release process (sections 3.1 and 100.1 of the CCRA).

Several provisions in the CCRA already aim to protect victims and society in general. Sections 3.1 and 100.1 of the CCRA expressly recognize the importance of sharing relevant information with the victims to increase the effectiveness of conditional release. Section 25 requires the CSC to notify the appropriate police forces before releasing an offender into the community when there are reasonable grounds to believe that the offender poses a threat.

By requiring through new section 26(1)(*d*) in the CCRA that the Commissioner of the CSC provide a recent photograph of the offender to the victim or the person referred to in section 26(3) if, in the Commissioner's opinion, to do so would not have a negative impact on the safety of the public, Parliament recognizes not only the victim's right to information but also the victim's right to protection (the amendment set out in clause 46 of Bill C-32 is discussed in Part 2.4.2.1).

2.4.3.1 Long-Term Supervision Conditions (Clause 48)

Some federally incarcerated offenders are subject to a long-term supervision order (LTSO).[108] An LTSO is a sentence imposed by the courts on an offender who poses a high risk of recidivism in order to ensure an extended period of supervision and close support of the offender in the community. With a maximum term of 10 years, an LTSO comes into force on the expiry of the warrant of committal. Three conditions must be met for the court to opt for an LTSO (section 753.1(1) of the Code):

> (*a*) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;
>
> (*b*) there is a substantial risk that the offender will reoffend; and

> (*c*) there is a reasonable possibility of eventual control of the risk in the community.

In addition to being subject to basic conditions of release (section 161(1) of the Regulations), offenders subject to an LTSO may currently have to abstain from having any contact with a victim, like all other offenders under CSC jurisdiction who pose a risk to their victim and for which the imposition of such a condition is considered reasonable and necessary to protect the victim.

Clause 48 amends section 134.1 of the CCRA to require the PBC to consider any statement made by a victim or a person referred to in section 142(3) regarding the effect on the victim or person of an act committed by an offender who is subject to an LTSO to impose any conditions that it considers reasonable and necessary to protect the victim, including non-contact orders and geographic restrictions (new section 134.1(2.1)). If the PBC decides not to impose any conditions, it must provide written reasons for its decision (new section 134.1(2.2) of the CCRA). The bill also requires the PBC to take reasonable steps to inform victims or persons referred to in section 142(3) of its intention to remove or vary a condition imposed on an offender subject to an LTSO and consider their concerns, if any (new section 134.1(5) of the CCRA). It is important to note, however, that these conditions remain discretionary.

Parliament also wished to specify, in new section 134.1(2.3) of the CCRA, that even if no statement has been provided to the PBC, the PBC may set conditions for the supervision of an offender subject to an LTSO that it considers reasonable and necessary in order to protect society under section 134.1(2).[109] Section 134.1(2) already gives the PBC considerable latitude in imposing conditions that it considers reasonable and necessary in order to protect society and facilitate the successful reintegration into society of federal offenders.

2.4.4 Right to Participation (Clause 49)

Victims and persons referred to in sections 26(3) and 142(3) of the CCRA can currently present at any time a statement describing the harm or loss as the result of the act of the offender and the continuing effects on them, including safety concerns, the possible release of the offender, and any other information considered relevant. A victim or person referred to in section 142(3) who cannot or does not want to attend the conditional release hearing can present his or her statement in a format that the PBC considers appropriate. However, the Act provides that a transcript of the victim's statement must be delivered to the PBC before the hearing (section 140(10) of the CCRA).

Clause 49(3) of the bill adds a paragraph to section 140 of the CCRA to allow victims and persons referred to in section 142(3) who do not attend the conditional release hearing to listen to an audio recording of the hearing.

NOTES

1. Department of Justice Canada, "Minister of Justice Concludes Cross-Country Consultations on Victims Bill of Rights," News release, 25 September 2013.
2. *Criminal Code*, R.S.C. 1985, c. C-46.
3. *Canada Evidence Act*, R.S.C. 1985, c. C-5.
4. The *Corrections and Conditional Release Act* (S.C. 1992, c. 20), proclaimed on 1 November 1992, replaced the *Penitentiary Act* and the *Parole Act*.
5. Sections 91 and 92, *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.).
6. Alan D. Gold, *Halsbury's Laws of Canada: Criminal Procedure,* Sheila Nemet-Brown, ed., LexisNexis Inc., Markham, 2012, para. HC2-2.
7. *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, 29 November 1985, 96th plenary meeting, A/RES/40/34.
8. Department of Justice Canada, *Canadian Statement of Basic Principles of Justice for Victims of Crime, 2003*.
9. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.
10. For more about the *Canadian Charter of Rights and Freedoms* and victims' rights, see Joan Barrett, "Expanding Victims' Rights in the Charter Era and Beyond," *Supreme Court Law Review*, Vol. 40, 2008, pp. 627–653; Kent Roach, "Victims' Rights and the Charter," *Criminal Law Quarterly*, Vol. 49, 2005, pp. 474–516; and Standing Senate Committee on Legal and Constitutional Affairs, *Statutory Review on the Provisions and Operation of the Act to amend the Criminal Code (production of records in sexual offence proceedings) – Final Report*, December 2012, pp. 10–12 [Statutory Review – production of records in sexual offence proceedings].
11. See Barrett (2008) for more about the use of testimonial aids.
12. Victim compensation programs use government funds to cover certain expenses incurred by eligible victims. Who is eligible and the types and maximum amounts of the expenses they may claim are determined by the provinces and, as such, vary across jurisdictions.
13. Barrett (2008), p. 629.
14. Sheila Nemet-Brown, *Halsbury's Laws of Canada: Compensation of Crime Victims,* LexisNexis Inc., Markham, 2014, para. HCC-3.
15. *Victims' Bill of Rights, 1995*, S.O. 1995, c. 6.
16. *Vanscoy v. Ontario*, [1999] O.J. No. 1661 (Ontario Court of Justice (General Division)).
17. *The Victims' Bill of Rights*, C.C.S.M. c. V55.
18. Criminal offences reported by police forces through Statistics Canada's Uniform Crime Reporting Survey have been substantiated by police investigations. Samuel Perreault, "Police-reported crime statistics in Canada, 2012," *Juristat*, Catalogue no. 85-002-X, Statistics Canada, 25 July 2013.
19. Mary Allen, "Victim services in Canada, 2011/2012," *Juristat*, Catalogue no. 85-002-X, Statistics Canada, 13 February 2014. The General Social Survey – Victimization measures both reported and unreported crime. It is worth noting that the incidents identified in the GSS are not necessarily included in police-reported data, as the police

include in their statistics only those crimes that they have substantiated. Also, data from this survey are subject to sampling errors and assumes that the respondent correctly places the time of the incident, recognizes the incident as a crime, agrees to disclose information on the incident, and remembers and describes it accurately.

20. Actual crime refers to the number of criminal offences effectively committed.

21. The General Social Survey – Victimization has been conducted every five years since 1988.

22. Samuel Perreault and Shannon Brennan, "Criminal victimization in Canada, 2009," *Juristat*, Catalogue no. 85-002-X, Statistics Canada, Summer 2010.

23. Ting Zhang, *Costs of Crime in Canada, 2008*, Justice Canada, 2011.

24. In this Legislative Summary, clauses of Bill C-32 are referred to as "clauses," while clauses of the Canadian Victims Bill of Rights (CVBR) are referred to as "sections" to avoid confusion.

25. Part XX.1 of the *Criminal Code* [Code] establishes the statutory framework that governs the treatment of accused persons who are deemed unfit to stand trial or not criminally responsible on account of mental disorder. Fitness addresses the mental state of the accused at the time of court proceedings, whereas a finding that someone is not criminally responsible is based on the person's state of mind at the time of the offence.

26. *Youth Criminal Justice Act*, S.C. 2002, c. 1.

27. *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24.

28. *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. Designated substance offences are offences such as trafficking, importing, exporting and producing various types of drugs. Possession is not included.

29. *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. Section 91 of the Immigration and *Refugee Protection Act* (IRPA) makes it an offence to represent someone or offer to do so for consideration (generally in the form of payment) in proceedings related to IRPA unless the representative satisfies certain criteria. Part 3 provides for enforcement measures in immigration law and includes offences such as human smuggling and trafficking in persons and offences related to false documents.

30. Service offences are offences under the *National Defence Act* (R.S.C. 1985, c. N-5), the Code, or any other Act of Parliament committed by an individual while subject to the Code of Service Discipline, if investigated or proceeded with under the *National Defence Act*. Section 60 of the *National Defence Act* outlines who is subject to the Code of Service Discipline and under what conditions.

31. Office of the Federal Ombudsman for Victims of Crime, *A Cornerstone for Change: A Response to Bill C-32, the* Victims Bill of Rights Act*, from the Federal Ombudsman for Victims of Crime*, 2014.

32. House of Commons, *Debates*, 2nd Session, 41st Parliament, 9 April 2014.

33. *Canadian Bill of Rights*, S.C. 1960, c. 44.

34. *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.

35. *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.).

36. *Access to Information Act*, R.S.C. 1985, c. A-1.

37. *Privacy Act*, R.S.C. 1985, c. P-21.

38. **On 2 December 2014, the House of Commons Standing Committee on Justice and Human Rights amended Bill C-32 in order to clarify this point by specifying that the CVBR does not remove from any victim or any individual acting on behalf of a victim the status otherwise granted of party, intervener or observer in proceedings.**

39. See sections 2.2.3.2.1, 2.2.3.2.5 and 2.2.3.2.6 of this document.

40. See section 2.2.3.2 of this document.

41. See section 738 of the Code for an explanation of how restitution is calculated.

42. The position of the Federal Ombudsman for Victims of Crime was created by regulation in the *Terms and Conditions of Employment of the Federal Ombudsman for Victims of Crime*, SOR/2007-54, under the *Public Service Employment Act*. The Ombudsman reports to the Minister of Justice.

43. *Canadian Human Rights Act*, section 48.1.

44. See section 77 of the *Official Languages Act*; section 42 of the *Access to Information Act* (under this Act, if the Information Commissioner applies to the Court, then the applicant may also be a party to proceedings but cannot bring such an application on his or her own); and section 41 of the *Privacy Act*.

45. *Interpretation Act*, R.S.C. 1985, c. I-21, s. 35 (definition of “person”).

46. Code, section 722(4).

47. Code, section 672.5(16).

48. Code, section 745.63(2).

49. Code, sections 722(4), 672.5(16) and 745.63(2).

50. Ibid.

51. Code, new section 737.1.

52. Code, new section 606.

53. Canadian Judicial Council Judges Technology Advisory Committee, *Model Policy for Access to Court Records in Canada*, 2005, p. iii.

54. The term “serious personal injury offence” is defined in section 752 of Part XXIV of the Code (which deals with dangerous and long-term offenders).

55. The offences included for the purpose of this section are the offences specified in the CVBR, namely, offences under the Code, the *Youth Criminal Justice Act*, the *Crimes Against Humanity and War Crimes Act*, as well as specified offences in the *Controlled Drugs and Substances Act* and the *Immigration and Refugee Protection Act*. See section 2.1.1.3 of this document.

56. Code, section 278.1.

57. In 2012, the Standing Senate Committee on Legal and Constitutional Affairs (Senate Committee) conducted a statutory review of the provisions and operation of the Code provisions concerning the production of records in sexual offence proceedings. Although the Committee found that the records production scheme in the Code is balanced and appropriate and is generally working well, several areas were identified where changes to the provisions could provide greater specificity and improve the effectiveness and clarity of the legislation. See Statutory Review – production of records in sexual offence proceedings. Bill C-32 responds to some of the recommendations made by the Senate

Committee in respect of the Code provisions concerning the production of records in sexual offence proceedings.

58. *R. v. Mills*, [1999] 3 S.C.R. 668, paras. 91 and 94.

59. Statutory Review – production of records in sexual offence proceedings, p. 16.

60. Ibid., pp. 21–22.

61. Ibid., p. 26.

62. Prior enactments expanding the availability of Code testimonial aids to witnesses include *An Act to amend the Criminal Code (victims of crime) and another Act in consequence*, S.C. 1999, c. 25, s. 2; *An Act to amend the Criminal Code (victims of crime*), S.C. 1988, c. 30, consolidated in R.S.C. 1985, c. 23 (4th suppl.); and *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, S.C. 2005, c. 32.

63. *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, para. 43.

64. Applying a previous version of section 486, in *R. v. Lefebvre* [1984] C.A. 370 (Que. C.A.), the Court of Appeal of Quebec found that the exclusion of the public when the complainant in a sexual offence proceeding would otherwise be too nervous to give evidence was in the interest of the proper administration of justice. This situation would presumably now fall within the new factor pertaining to the ability of the witness to give a full and candid account of the acts complained of.

65. Code, section 486.2(7), which is replicated in new section 486.2(5).

66. Currently, specific measures are provided for certain listed offences related to intimidation, criminal organizations or terrorism, or under specific provisions of the *Security of Information Act*, R.S.C. 1985, c. O-5. Witnesses can be ordered to testify outside the courtroom if the judge or justice is of the opinion that the order is necessary to protect the safety of the witness; and outside the courtroom or behind a screen if the judge is of the opinion that the order is necessary to obtain a full and candid account from the witness of the acts complained of. Clause 15 of the bill eliminates this category of witnesses, such that witnesses in such prosecutions now fall under the category of general witnesses.

67. *Toronto Star Newspapers Limited v. Canada*, [2007] 4 FC 128, paras. 32–33.

68. *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, para. 39. The Supreme Court of Canada has also recognized a common law discretion on the part of courts to order a publication ban. See *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, p. 875.

69. The current list of qualifying offences includes a description of certain sexual offences under the Code (historical sexual offences); this description is incomplete (as it does not include historical sexual offences committed prior to 1970) and contains drafting errors. See section 2.2.3.1.1 in this document.

70. This right currently exists for persons under 18 years of age if they are victims or witnesses in youth crimes: *Youth Criminal Justice Act*, section 111(1).

71. The term “justice system participant” is defined in section 2 of the Code to mean:

> (*a*) a member of the Senate, of the House of Commons, of a legislative assembly or of a municipal council, and
>
> (*b*) a person who plays a role in the administration of criminal justice, including

> (i) the Minister of Public Safety and Emergency Preparedness and a Minister responsible for policing in a province,
>
> (ii) a prosecutor, a lawyer, a member of the Chambre des notaires du Québec and an officer of a court,
>
> (iii) a judge and a justice,
>
> (iv) a juror and a person who is summoned as a juror,
>
> (v) an informant, a prospective witness, a witness under subpoena and a witness who has testified,
>
> (vi) a peace officer within the meaning of any of paragraphs (*b*), (*c*), (*d*), (*e*) and (*g*) of the definition "peace officer,"
>
> (vii) a civilian employee of a police force,
>
> (viii) a person employed in the administration of a court,
>
> (viii.1) a public officer within the meaning of subsection 25.1(1) and a person acting at the direction of such an officer,
>
> (ix) an employee of the Canada Revenue Agency who is involved in the investigation of an offence under an Act of Parliament,
>
> (ix.1) an employee of the Canada Border Services Agency who is involved in the investigation of an offence under an Act of Parliament,
>
> (x) an employee of a federal or provincial correctional service, a parole supervisor and any other person who is involved in the administration of a sentence under the supervision of such a correctional service and a person who conducts disciplinary hearings under the *Corrections and Conditional Release Act*, and
>
> (xi) an employee and a member of the Parole Board of Canada and of a provincial parole board.

72. Ibid.

73. Code, sections 515(4)(*d*), 515(4)(*e.1*), 515(4.2), 516(2), 522(2.1) and 522(3).

74. Code, section 515(10)(*b*).

75. Code, section 518(1)(*d.2*).

76. *R. v. Wilmott*, 1966 CanLII 222 (ON CA).

77. *R. v. Gladue*, [1999] 1 S.C.R. 688, para. 36. In *R. v. Gladue*, the Supreme Court of Canada also determined that the purpose of section 718.2(*e*) is to ameliorate the serious problem of overrepresentation of Aboriginal people in prisons and to encourage sentencing judges to have recourse to a restorative approach to sentencing. Moreover, the court found that section 718.2(*e*) directs judges to undertake the sentencing of such offenders individually, but also differently, because the circumstances of Aboriginal people are unique. In sentencing an Aboriginal offender, the judge must consider the systemic or background contributing factors, and sentencing procedures and sanctions must be appropriate to the offender's particular Aboriginal heritage or connection.

78. *R. v. Bremner*, 2000 BCCA 345.

79. *R. v. McDonough*, 2006 CanLII 18369 (ON SC); Sandra Bacchus, "The Role of Victims in the Sentencing Process," in *Making Sense of Sentencing*, ed. Julian V. Roberts and David P. Cole,1999, pp. 217–229; and *R. v. Gabriel*, 1999 CanLII 15050 (ON SC), p. 2.

80. See *R. v. Bremner*, *R. v. McDonough* and *R. v. Jackson*, 2002 CanLII 41524 (ON CA). In *R. v. Gabriel*, the Ontario Superior Court held that "[r]ecommendations as to penalty must be avoided, absent exceptional circumstances, *i.e.* a court-authorized request, an aboriginal sentencing circle, or as an aspect of a prosecutorial submission that the victim seeks leniency for the offender which might not otherwise reasonably be expected in the circumstance."

81. Bacchus (1999), p. 218.

82. Section 672.5(14) of the Code provides that a court or review board shall take into account a victim impact statement in determining the appropriate disposition for an accused found not criminally responsible on account of mental disorder.

83. Although the acknowledgment of, and reparation for, harm done to victims are express statutory objectives of sentencing, the same is not true of disposition hearings in which the primary issue is whether the accused poses a significant risk to the safety of the public. See Barrett (2008), p. 641; and *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, para. 3.

84. *Standing up for Victims of White Collar Crime Act*, S.C. 2011, c. 6.

85. *R. v. Labbe*, 2001 BCSC 123 (CanLII), para. 48.

86. An absolute or conditional discharge may be ordered under section 730 of the Code, which results in the accused not having a criminal record for the offence in question. An absolute discharge takes effect immediately, whereas a conditional discharge requires the accused to adhere to the conditions of a probation order prior to the discharge becoming absolute. For more information on the victim fine surcharge, see Tanya Dupuis, *Legislative Summary of Bill C-37: Increasing Offenders' Accountability for Victims Act*, Publication no. 41-1-C37-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 11 April 2013.

87. *Increasing Offenders' Accountability for Victims Act*, S.C. 2013, c. 11.

88. Section 737(3) of the Code affords the court the discretion to order an offender to pay a higher victim surcharge if the offender is able to pay and if a higher surcharge is appropriate in the circumstances. Pursuant to the 2013 amendments, offenders who are required to pay a victim surcharge have access to fine option programs in the provinces and territories that offer such programs. These programs allow offenders to earn credits for work performed toward the payment of fines and victim surcharges.

89. For more information on the victim fine surcharge, see Dupuis (2013).

90. *R. v. Yates*, 2002 BCCA 583 (CanLII), paras. 7 and 15; and *R. v. Siemens*, 1999 CanLII 18651 (MB CA), para. 8.

91. Note that section 738(2) of the Code allows the lieutenant governor in council of a province to make regulations precluding provisions with respect to enforcement of restitution orders in probation orders or conditional sentence orders in their jurisdiction.

92. *R. v. Fitzgibbon*, [1990] 1 S.C.R. 1005; *R. v. Biegus*, 1999 CanLII 3815 (ON CA), paras. 15 and 21; *R. v. Yates*, 2002 BCCA 583 (CanLII), paras. 12, 15 and 17; *R. v. Siemens*, para. 8.

93. Bryan A. Garner, ed., *Black's Law Dictionary,* 9th edThomson Reuters, St. Paul, Minn., 2009, p. 1740.

94. Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst, *The Law of Evidence in Canada*, LexisNexis, Markham, Ont., 2009, p. 891.

95. *Employment Insurance Act*, S.C. 1996, c. 23.

96. *Corrections and Conditional Release Regulations*, SOR/92-620.

97. *Interpretation Act* (definition of "person").

98. Bill C-10, the Safe Streets and Communities Act (short title), expands the definition of victim to anyone who has custody of or is responsible for a dependant, in law or fact, of the main victim if the main victim is dead, ill or otherwise incapacitated (clause 52 of Bill C-10). See Laura Barnett et al., *Legislative Summary of Bill C-10: An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts*, Publication no. 41-1-C10-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 5 October 2011, revised 17 February 2012.

99. Currently, the situation seems the opposite. The wording of the English version of the existing CCRA appears more restrictive than that of the French version, which, by using "or" instead of "and" in section 2(1), limits the victim's representative to a single person.

100. Correctional Service Canada, *2012–13 Departmental Performance Report*, Ottawa, 2013.

101. Parole Board of Canada, *2012–2013 Departmental Performance Report*, Ottawa, 2013.

102. Similar amendments were already proposed to section 142 of the CCRA through Bill C-479: An Act to amend the Corrections and Conditional Release Act (short title: An Act to Bring Fairness for the Victims of Violent Offenders). At the time of writing, this private member's bill had passed second reading in the Senate and been referred to the Standing Senate Committee on Legal and Constitutional Affairs.

103. An identical amendment is proposed to section 142(1)(*b*) of the CCRA through Bill C-479.

104. Bill C-479 amends section 142 of the CCRA in a similar fashion. Should this private member's bill pass, the chairperson of the PBC could also more easily share this information with victims and persons referred to in section 142(3).

105. This section is not in Bill C-479.

106. Correctional Service Canada, "Restorative Opportunities Program and Victim-Offender Mediation Services," *Commissioner's Directive*, No. 785, 2013.

107. The communication and mediation process between the victim and the offender can include letter exchange, video recording exchange, face-to-face meetings and group conferencing.

108. Statutory provisions relating to long-term supervision orders are contained in sections 753.1 to 753.4 of the *Criminal Code*, sections 134.1 and 135.1 of the *Corrections and Conditional Release Act* and Commissioner's Directive 719 of the Correctional Service of Canada – *Long-Term Supervision Orders*. As of 14 April 2013, there were 722 offenders with LTSOs. From the establishment of LTSOs in 1997 to 14 April 2013, the courts have imposed 832 LTSOs, of which 70% were for a period of 10 years. As of 14 April 2013, 110 orders have therefore expired. Public Safety Canada, *Corrections and Conditional Release Statistical Overview*, 2013 Annual Report, p. 105.

109. Similar amendments have already been proposed to section 133 of the CCRA regarding conditions of conditional release for other offenders under CSC jurisdiction through Bill C-489, An Act to amend the Criminal Code and the Corrections and Conditional Release Act (restrictions on offenders), which received Royal Assent on 19 June 2014.