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LEGISLATIVE SUMMARY

Bill C-37:
Increasing Offenders' Accountability for Victims Act

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Legislative Summary of Bill C-37

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

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LEGISLATIVE SUMMARY OF BILL C-37: INCREASING OFFENDERS' ACCOUNTABILITY FOR VICTIMS ACT

1 BACKGROUND

Bill C-37: An Act to amend the Criminal Code (alternative title: "Increasing Offenders' Accountability for Victims Act") was introduced in the House of Commons by the Leader of the Government, the Honourable Peter Van Loan, on behalf of the Minister of Justice, the Honourable Rob Nicholson, and received first reading on 24 April 2012.

The purpose of the bill is to double victim surcharge amounts and to make them mandatory for all offenders convicted of a criminal offence. In making these amendments, the bill seeks to increase offenders' accountability to victims of crime.

To achieve this objective, the bill amends:

- section 737(5) of the *Criminal Code* (the Code)[1] to eliminate judicial discretion (clause 3(3) of the bill);
- section 737(2) of the Code to increase the victim surcharge from 15% to 30% of a fine imposed by the court (clause 3(2) of the bill);
- section 737(2) of the Code to increase the victim surcharge from $50 to $100 for offences punishable by summary conviction if no fine is imposed by the court (clause 3(2) of the bill); and
- section 737(2) of the Code to increase the victim surcharge from $100 to $200 for offences punishable by indictment if no fine is imposed by the court (clause 3(2) of the bill).

1.1 VICTIM SURCHARGE

The victim surcharge is a financial penalty imposed on convicted offenders at the time of sentencing. It is added to any other penalty imposed by the court when an offender is discharged (section 730 of the Code) or when the offender is convicted of an offence under the Code or under the *Controlled Drugs and Substances Act*.[2]

Brought into being in 1989, the victim surcharge was created to help fund provincial and territorial victim services.[3] The amount of the victim surcharge is not paid directly to the victim but is placed in a special fund administered by the province or territory where the victim surcharge is imposed. The fund, sometimes called a "victim assistance fund," is used to provide services and assistance to all victims of crime rather than to one victim in particular. Though it is not paid directly to the victim, the victim surcharge is considered a mechanism that makes it possible to establish a relationship between the personal accountability of the offender and the victim of the offence.[4]

It should be noted that the victim surcharge is not the same as restitution orders and compensation that may be granted to victims of crime. A restitution order is imposed at the time of sentencing under section 738 of the Code. It is a discretionary order according to which the judge may order the convicted or discharged offender to pay an amount directly to the victim in damages.[5] A restitution order is granted, for instance, in the following cases:

- damage to, or loss or destruction of, a person's property;
- bodily or psychological harm to any person; and
- bodily harm or threat of bodily harm caused by the offender to anyone living with him or her, in particular to the offender's spouse or common-law partner or child.

Various rules (codified and jurisprudential) set out the circumstances under which a restitution order is warranted, as well as the calculation required to determine the appropriate amounts.

In some provinces, it is also possible to claim compensation when, for instance, a person has been injured physically, psychologically or materially by someone, regardless of whether the person was charged or convicted of the offence in question.[6] The eligibility criteria is set out in provincial legislation. It should be noted that compensation amounts vary from province to province.

For example, the Province of Ontario has developed a legislative framework under which the Criminal Injuries Compensation Board, which is an administrative tribunal, may, under the *Compensation for Victims of Crime Act,* grant financial compensation to eligible individuals for an injury suffered in the province.[7] The amounts awarded as compensation by the board come from the Consolidated Revenue Fund.[8]

1.2 Recommendations and Initiatives to Strengthen the Victim Surcharge

After the victim surcharge was created, studies and stakeholders suggested that it was necessary to strengthen the current system. At first, the victim surcharge provision specified that the judge had to order this type of penalty, and the amount could not exceed the greater of the following: 15% of any fine imposed or, where such a fine was not imposed, $10,000 or any other amount provided for or calculated by regulations made by the Governor in Council. Where no fine was imposed, the offender had to pay $10,000 or any other amount specified or calculated by Governor in Council regulations. The court was not required to make such an order if the offender demonstrated that paying the surcharge could cause undue hardship.

Studies carried out in the early 1990s showed that revenues from the victim surcharge were lower than anticipated. In fact, a 1992 study of the victim surcharge in British Columbia showed that "the surcharge was applied in only 10% of eligible cases."[9] In 1994, a second study commissioned by the Department of Justice reiterated the 1992 findings: "Collected revenues across Canada were lower than expected with only 15% of the potential actually imposed and only 2.7% actually collected."[10]

In 1998, the report of the House of Commons Standing Committee on Justice and Human Rights entitled *Victims' Rights – A Voice, Not a Veto* recommended that the Code be amended:

> to allow for the automatic imposition of a mandatory minimum victim fine surcharge that could be waived by the sentencing judge, upon application with notice to the Crown, to avoid undue hardship to the offender.[11]

In 1999, the Code was amended so that when no fine was imposed, an offender was automatically required to pay $50 for an offence punishable by summary conviction and $100 for an offence punishable by indictment. The amount of the victim surcharge remained set at 15% of an imposed fine. If the court was satisfied that the offender was able to pay, it could order the offender to pay an amount exceeding that set out in the provision.[12] The court could also use its discretion to order that no fine be imposed when undue hardship could be caused. The amount of the victim surcharge has not changed since that amendment was made.

The problem noted in the early 1990s – that the collected amounts were well below expected amounts – persisted. In fact, by 2005, the then Attorney General of Manitoba recommended that the amount of the victim surcharge be increased from 15% to 20% in order to replenish the funds.

Subsequently, the federal, provincial and territorial governments agreed to study local practices on how the imposition and collection of the victim surcharge. In 2006, a first study carried out in New Brunswick revealed that:

> The anticipated revenue to be generated in New Brunswick from the 1999 amendments to the *Criminal Code* provisions related to surcharge have not been realized due primarily to high waiver rates. In fact, revenue has remained constant at pre-1999 *Criminal Code* amendment levels.[13]

A second study conducted in 2007 in the Northwest Territories produced similar findings in terms of high waiver rates:

> In addition, analysis of the FACTS [the court information management system] data on waivers and collection indicates that revenue shortfalls are due more to high waiver rates than to low collection. In fact, collection of the surcharge in the NWT is fairly high at 85% across the territory. This is true even for incarcerations, which have a collection rate of 75%. This finding is relevant given the perception among many judges that offenders serving a custodial sentence are unable to afford a surcharge.[14]

The Office of the Federal Ombudsman for Victims of Crime (OFOVC) also stressed the need to strengthen the victim surcharge system. In its 2010 report, *Toward a Greater Respect for Victims in the* Corrections and Conditional Release Act, the OFOVC recommended:

> That the Government of Canada amend paragraph 133(3) of the CCRA to include a necessity for conditions to ensure offenders fulfill their court ordered sentences, including restitution and victim fine surcharges.
>
> That the Government of Canada amend subsection 78(2) of the CCRA to authorize the CSC to deduct reasonable amounts from an offender's earnings to satisfy any outstanding restitution or victim fine surcharge orders.[15]

It should be noted that the *Corrections and Conditional Release Act* (CCRA)[16] has recently been amended through Bill C-10,[17] which received Royal Assent on 13 March 2012, in order to increase the degree of accountability of offenders in federal institutions. Under this legislative measure, offenders are required to fulfill their obligations under court orders, including restitution to or compensation for victims, or food for the children of victims. While it supported this new initiative, the OFOVC stressed the need to implement other measures to increase offenders' level of accountability to victims of crime.

In February 2012, the Federal Ombudsman for Victims of Crime, Sue O'Sullivan, released a special report called *Shifting the Conversation*. One of her recommendations in the report is to "[d]ouble the federal victim surcharge and make it mandatory in all cases, without exception."[18]

Once again, the OFOVC asked that the Correctional Service of Canada be authorized to deduct reasonable amounts from an offender's earnings to satisfy any outstanding victim fine surcharge orders, among other things.

On this point, it should be noted that Bill C-350, An Act to amend the Corrections and Conditional Release Act (accountability of offenders), which was studied by the House of Commons Standing Committee on Public Safety and National Security in April and May 2012, contains provisions regarding the payment of victim surcharges. The purpose of this private member's bill introduced by M.P. Guy Lauzon is to amend the CCRA so that any monetary amount awarded to an offender pursuant to a legal action or proceeding against the Crown must be used to settle any amounts owed to victims and other beneficiaries. The bill was amended and adopted by the Committee on 10 May 2012 and returned to the House of Commons on 14 May 2012.[19]

2 DESCRIPTION AND ANALYSIS

Bill C-37 has five clauses. Rather than reviewing every provision, the following description focuses on some key aspects of the bill.

2.1 VICTIM SURCHARGE (CLAUSE 3)

The victim surcharge is currently imposed with the exception set out in section 737(5) of the Code, which allows the court to waive the victim surcharge if requested by an offender who is able to demonstrate that the imposition of the surcharge would cause undue hardship.

Clause 3(1) of the bill amends section 737(1) of the Code to eliminate any reference to this possibility of exemption. Clause 3(3) of the bill repeals sections 737(5) and 737(6) of the Code. The repeal of section 737(5) seeks to eliminate judicial discretion and to make the victim surcharge automatic in all the cases provided under section 737(1) of the Code. Repealing section 737(6) eliminates the requirement for the court to state its reasons in the record.

2.2 Amount of the Victim Surcharge (Clause 3)

Clause 3(2) of the bill amends section 737(2) of the Code, increasing the amounts that the offender must pay. The victim surcharge increases from 15% to 30% of any fine imposed by the court. If no fine is imposed, the amounts for an offence punishable by summary conviction will increase from $50 to $100 and for an offence punishable by indictment, from $100 to $200.

The Code continues to allow the court to use its discretion to order an offender to pay a higher victim surcharge if the judge believes that the offender is able to pay and that it is appropriate in the circumstances (section 737(3) of the Code).

2.3 Applicability of Section 736 of the *Criminal Code* (Fine Option Program) (Clause 3)

Under the current version of section 736 of the Code, offenders who are required to pay a fine may discharge the fine in whole or in part by earning credits for work performed under a program set up for that purpose. According to the current wording of section 737(10) of the Code, this fine option program may not be used for a victim surcharge.

Section 737(10) of the Code is repealed by clause 3(5) of the bill. Offenders required to pay a victim surcharge now have access to this fine option program. The accumulated credits usually match the minimum wage rate of the province or territory where they were acquired.

The provinces and territories that offer the fine option program under section 736 of the Code are Quebec, New Brunswick, Prince Edward Island, Nova Scotia, Alberta, Saskatchewan, Manitoba, Yukon, Northwest Territories and Nunavut. Ontario and Newfoundland and Labrador do not offer this type of program to offenders.[20]

Program eligibility criteria also differ among the provinces and territories. For example, the 2004 Statistics Canada publication entitled *Community Corrections in Canada* states that:

> Prince Edward Island, Quebec, Yukon and Nunavut allow clients to enter the fine option program when the fine is levied, but not after. Nova Scotia, New Brunswick, Saskatchewan, and the Northwest Territories allow entry into the program up to the issuance of the warrant of committal for a fine default, and Manitoba allows entry into the fine option program at the point of admission to jail. Additionally, Alberta allows offenders to begin the program after entering the institution, thereby reducing the length of period of imprisonment.[21]

It should also be noted that not every provincial fine option program will allow an offender to dispose of a victim surcharge by participating such a program. For example, in Nova Scotia and New Brunswick, the offender may participate in a fine option program only *after* having paid the court costs and surcharge portion of his or her fine.[22] Prince Edward Island's *Victims of Crime Act* (the current version of which has been in force since 30 May 2012) goes even further by stating in subsection 9(3)

that a "surcharge shall not be disposed of or satisfied by participation in a fine option program or by way of imprisonment in default of payment."[23]

The availability and eligibility criteria of fine option programs therefore raises questions with respect to the imposition of mandatory minimum fines, fine recovery options and an offender's ability to pay. Other questions include whether or not it may be possible for an offender to be found in default of payment when the surcharge has not been paid in full upon expiration of the time provided by the sentencing court. The question could also be raised of whether, with the repealing of subsection 737(5) of the Code, the loss of the offender's ability to apply for an exemption from the victim surcharge because of "undue hardship" could be interpreted to mean that imprisonment is a potential outcome.

Finally, it is worth noting that although the court's discretion is removed in Bill C-37, the court retains discretion with respect to imprisonment in default of payment of a fine based on one's inability to pay.

> The Supreme Court of Canada has now held, however, that an offender is not to be imprisoned for non-payment of a fine where there is a genuine inability to pay. The Court held that poverty is a reasonable excuse for non-payment of a fine. The Court further held that imprisonment is only appropriate where the offender has demonstrated a refusal to pay without reasonable excuse.[24]

NOTES

1. *Criminal Code*, R.S.C. 1985, c. C-46.
2. *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.
3. *An Act to amend the Criminal Code (victims of crime)*, S.C. 1988, c. 30, consolidated in the R.S.C. 1985, c. 23 (4th suppl.).
4. See, for example, Lisa Warrilow and Susan McDonald, "A Summary of Research into the Federal Victim Surcharge in New Brunswick and the Northwest Territories," *Victims of Crime Research Digest* (Department of Justice), Issue No. 1, Spring 2008.
5. It is not mandatory that the entire loss be repaid; the court may order that only a part be paid to the victim, considering the offender's ability to pay and the principle of community reintegration. It is worth noting that the legislation does not require the court to consider the offender's ability to pay in all cases.
6. For more information about provincial and territorial victims services and the provinces where it is possible to make a compensation claim, see the website of the Federal Ombudsman for Victims of Crime [OFOVC].
7. *Compensation for Victims of Crime Act*, R.S.O. 1990, c. 24.
8. Ontario, Criminal Injuries Compensation Board, *36th Annual Report 2010–2011*.
9. Alan N. Young, *Victims of Crime Research Series: The Role of the Victim in the Criminal Process : A Literature Review – 1989 to 1999*, Department of Justice, 2001, p. 23.
10. Ibid., p. 24.
11. House of Commons, Standing Committee on Justice and Human Rights, *Victims' Rights – A Voice, Not a Veto*, 1998, Recommendation 13.

12. See Bill C-79: An Act to amend the Criminal Code (victims of crime) and another Act in consequence, 1st Session, 36th Parliament.

13. M. A. Law and S. M. Sullivan, *Federal Victim Surcharge in New Brunswick: An Operational Review*, Department of Justice, 2006, p. vi.

14. Warrilow and McDonald (2008), p. 22.

15. OFOVC, *Toward a Greater Respect for Victims in the* Corrections and Conditional Release Act, 2010, Recommendations 12 and 13.

16. *Corrections and Conditional Release Act*, S.C. 1992, c. 20.

17. 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, S.C. 2012, c. 1.

18. OFOVC, *Shifting the Conversation*, 2012, p. 28.

19. See House of Commons, Standing Committee on Public Safety and National Security, *Report 4 – Bill C-350, An Act to amend the Corrections and Conditional Release Act (accountability of offenders)*, 2011.

20. Donna Calverley and Karen Beattie, *Community corrections in Canada*, Catalogue No. 85-567-XIE, Statistics Canada, 2004. An Ontario Court of Justice decision confirms the non-existence of a fine option program in the province of Ontario:

> [T]here is no mechanism currently in place in the Province of Ontario that allows impecunious offenders to perform work credits as a means of payment of fines. The fine option program that was established in this jurisdiction is no longer available. As a result, Ontario is one of the few provinces where offenders, who are unable to pay fines, do not have the ability to satisfy them through the alternative means of work for fine credits, as noted in *R.* v. *Wu*, 2003 SCC 73 (CanLII), 2003 SCC 73. (*R. ex rel. City of Toronto.* v. *Doroz*, 2011 ONCJ 281).

The non-existence of a fine option program in Newfoundland and Labrador is confirmed in Newfoundland and Labrador, Office of the Auditor General, *Report of the Auditor General to the House of Assembly: Details of Updates on Prior Years' Report Items 2010*. The following recommendation was made by the Auditor General of Newfoundland and Labrador: "Government should consider enacting a Fine Option Program as outlined in the *Provincial Offences Act* to allow debtors of the Province to discharge their fines by a means other than monetary compensation."However, this recommendation was not implemented.

It was impossible to confirm the existence or non-existence of this type of program in British Columbia.

21. Calverley and Beattie (2004), pp. 9–10.

22. Nova Scotia, *Fine Option Program*; and New Brunswick, "Fine Option Program," *Public Safety and Solicitor General*.

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

24. See Clayton C. Ruby, Gerald J. Chan and Nader R. Hasan, *Sentencing*, 8th ed., Lexis Nexis Canada Inc., June 2012; and *R.* v. *Wu* [2003] 3 S.C.R. 530.