Key Highlights of the Canadian Victims Bill of Rights Legislation, Bill C-32

As you know, Bill C-32 came into force on July 22, 2015. The following discussion of the Bill is not intended to be an exhaustive and comprehensive analysis of the entire proposed piece of legislation. Instead, what follows are some key highlights of the Bill with particular attention being paid to aspects of the proposed legislation that will be of interest to those who practice criminal law. It should also be acknowledged that this summary of the key highlights of the Bill borrows generously from the Legislative Summary prepared of Bill C-32 dated July 23, 2014 and authored by Lyne Casavant, Christine Morris and Julia Nicol of the Legal and Social Affairs Division, Parliamentary Information and Research Service.

Generally speaking, the Bill creates a federal bill of rights for victims of crime (the Canadian Victims Bill of Rights or CVBR), it amends the *Criminal Code* 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, it 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*, and it amends the *Corrections and Conditional Release Act* to increase victims' access to information about the offender who harmed them. It must be noted that the rights outlined in the CVBR are primarily procedural (rights to have information, to have victims views considered, etc.). The CVBR does not grant victims status as a party to proceedings.

Section 2 of the Bill makes clear that the Victims Bill of Rights and its provisions apply in relation to offences under a number of federal statutes, including the *Criminal Code*, the *Youth Criminal Justice Act (YCJA)*, and the *Controlled Drugs and Substances Act* (with respect to designated substance offences as defined in s.2(1) of the *CDSA*). Section 2 of the Bill also gives an expansive definition of "victim." 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. Because the victim of an offence has qualified access to youth

justice court records, police records, and government records in relation to youths under s.119 of the *YCJA*, the wide scope of the definition of "victim" provided by Bill-C-32 is particularly relevant when dealing with young people.

Section 6 of the Bill enshrines the right of every victim, on request, to information about their right to file a complaint for an infringement or denial of any of their rights under the Act. This right would include information about any body set up to deal with a complaint, such as a Victims' Ombudsperson.

Section 20 is the key interpretation provision. It states that the Act 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 by, among other things, causing interference with prosecutorial discretion or causing excessive delay in, or compromising or hindering, the prosecution of any offence. Nor should the Act be interpreted to authorize interference with ministerial discretion or the discretion exercised by a person or body authorized to release an offender into the community. The Act 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. Sections 21 and 22 of the Bill make clear that this proposed legislation is to have quasi-constitutional status – something to keep in mind in the event of an apparent incompatibility between the Act and other pieces of legislation.

Sections 25, 26, 28 and 29 of the Bill 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. Under s.25, 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 mechanism must have the power to make

recommendations to remedy such infringements as well as the obligation to notify victims of the results of those reviews and recommendations. The Bill does not create similar obligations for provincial actors but s.26 of the Bill does state 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. Nevertheless, ss.28 and 29 of the Bill make clear that violations of the rights outlined in the CVBR do not create causes of action 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 the proposed Act has been infringed or denied.

Bill C-32 ushers in a number of changes to s.606 of the *Criminal Code*. The amended section 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." 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. 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 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. Specifically, the court shall, after accepting such a guilty plea, inquire of the prosecutor whether any of the victims had advised the prosecutor of their desire to be informed if such an agreement were entered into, and, if so, whether reasonable steps were taken to inform that victim of the agreement.

Where the new legislation 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 feasible, take reasonable steps to inform the victim of the agreement and the acceptance of the plea. 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.

Bill C-32 also alters the law of disclosure of third party records to the accused in sexual offence cases. 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 ss.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 s.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.

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.

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 s.278.4(2.1) and amended s.278.6(3) of the *Code*).

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 (amended sections 278.5(2), s.278.7(2) and 278.7(3) of the *Code*).

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. The new criteria set the bar lower than the current provisions.

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 (s.486.1(1) of the *Code*). For other witnesses, judges could authorize a support person to be present and close to the witness when he or she testifies, if the judge was of the opinion that the order was necessary to obtain a full and candid account (s.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 s.486.1(2) of the *Code*). Under the new s.486.1(2.2), these types of applications may be made to the presiding judge or, before the proceedings begin, to the judge who will preside at the proceedings or, if that judge has not been determined, to any judge having jurisdiction in the judicial district where the proceedings will take place.

Bill C-32 makes it easier to obtain orders for witness testimony to be given outside of the courtroom or behind a screen or other device that allows the witness not to see the accused, at least in relation to witnesses who are not under the age of 18 years or who may have difficulty communicating their testimony because of a mental or physical disability. 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 but now such orders will be able to 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 interests of the proper administration of justice. Under the new s.486.2(2.1), these types of applications may be made to the presiding judge or, before the proceedings begin, to the judge who will preside at the proceedings or, if that judge has not been determined, to any judge having jurisdiction in the judicial district where the proceedings will take place.

The Bill adds the offences of sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, and aggravated sexual assault to the offence of criminal harassment already provided for in what is now s.486.3(4) of the *Code*. Consequently, when the Bill becomes law, upon an application of the prosecutor or a victim who is a witness in any proceedings against an accused in respect to these offences, the judge must make the order prohibiting a self-represented accused from personally cross-examining the witness, unless the judge is of the opinion that the proper administration of justice requires the accused to personally conduct the cross-examination. If such an order is made, the judge shall appoint counsel to conduct the cross-examination (new s.486.3(2)). Such applications may be made to the presiding judge or before the proceedings begin, to the judge who will preside at the proceedings or, if that judge has not been determined, to any judge having jurisdiction in the judicial district where the proceedings will take place.

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 s.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 s.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 (see *Toronto Star Newspapers Limited v. Canada*, [2007] 4 FC 128 at paras. 32-33). In determining whether to make an order that the identity of a witness be protected, the judge must consider any relevant factor, including whether an undercover police officer or a person acting covertly under the direction of a peace officer needs the order for the protection of his or her identity.

Publication bans may be granted under s.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. The Bill amends the list of qualifying offences in s.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. 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 (now such publication bans are mandatory on application but only in regard to the listed sexual offences in s.486.4 and only in relation to witnesses under the age of eighteen years and complainants). Under the new ss.486.4(2.1) and (2.2) of the *Code*, 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.

Section 486.5 of the *Code* governs the making of publication bans in cases other than those captured by s.486.4. Under s.486.5, upon the application of the prosecutor, a victim or a witness, the court may order that the identity of the victim or another witness not be published. 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 s.486.5(1) of the *Code*). Second, one of the listed factors to be applied in deciding whether to make the publication ban order is "whether there is a real and substantial risk that the victim or witness would suffer significant harm if their identity were disclosed" and the Bill changes that factor to read, "whether there is a real and substantial risk that the victim or witness would suffer harm if their identity were disclosed" (s.486.5(7)(b) of the *Code*). Similar provisions and tests apply in relation to publication bans concerning other justice system participants involved in proceedings pertaining to certain criminal organization offences, terrorism offences, and offences under the *Security of Information Act*.

Under Bill C-32, a judge 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 s.515(13) of the *Code*).

The Bill broadens the type of conduct now captured by the offence of intimidation of a justice system participant and makes some changes to the principles and objectives of sentencing that are, arguably, a mere codification of existing common law. One such change to note is the one made to s.718.2(e) of the Code, the provision that was interpreted by the Supreme Court of Canada in *Gladue*. The amended s.718.2(e) 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.

The Bill requires that, as soon as feasible after a finding of guilty and in any event before imposing sentence, the court shall inquire of the prosecutor if reasonable steps have been taken to provide the victim with an opportunity to prepare a victim impact statement (new s.722(2) of the *Code*).

Bill C-32 makes changes to assist victims in the preparation of a VIS by providing a standardized form. The new form allows the victim, with the court's approval, to express an opinion or recommendation about the sentence. Bill C-32 specifies different ways in which a VIS may be presented. For example, 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 s.722(6) of the *Code*).

Community impact 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 (s.380.4 of the *Code*). 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. Under the new s.722.2 of the *Code* ushered in by the Bill, community impact statements would be applicable in sentencing hearings for all criminal and regulatory prosecutions.

Bill C-32 requires the court to consider making a restitution order under s.738 or s.739 if an offender is convicted or given a conditional or absolute discharge. The bill essentially makes the special rules with respect to fraud, whereby a court is required to consider making a restitution order, applicable in all cases, meaning the court must always consider whether a restitution order is appropriate prior to sentencing or when an absolute or conditional discharge is granted. Under the new s.737.1 of the *Code*, before imposing the sentence on an offender who is found guilty, the court shall inquire of the prosecutor if reasonable steps have been taken to provide the victims with an opportunity to indicate whether they are seeking restitution for their losses and damages, the amount of which must be readily ascertainable. Where a victim seeks restitution and the court does not make a restitution order, the reasons for not granting the order must be included in the court record (new s.737.1(5) of the *Code*). The new s.739.1 makes clear that the offender's financial means or ability to pay do not prevent a restitution order being made. 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.

The Bill amends the *Canada Evidence Act* by eliminating the common law rule of spousal incompetence rendering spouses competent and compellable by the prosecution to testify against the other spouse. However, spousal privilege under s.4(3) of the *Canada Evidence Act* would remain, so a husband would continue not to be compellable to disclose communications made by his wife during the marriage and vice versa.