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LEGISLATIVE SUMMARY



Bill C-28: An Act to amend the Criminal Code (victim surcharge)

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Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both houses of Parliament, receive Royal Assent, and come into force.

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)

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LEGISLATIVE SUMMARY OF BILL C-28: AN ACT TO AMEND THE CRIMINAL CODE (VICTIM SURCHARGE)

1 BACKGROUND

Bill C-28: An Act to amend the Criminal Code (victim surcharge) was introduced in the House of Commons by the Honourable Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada, and received first reading on 21 October 2016.¹ The bill amends the victim surcharge provisions within the *Criminal Code* (the Code)² as follows:

- It provides an exception to pay fewer victim surcharges for certain offences related to the administration of justice where the court is satisfied that the cumulative amount of the surcharges imposed would be disproportionate in the circumstances (new section 737(1.1)).
- It reinstates judicial discretion by allowing an exemption where an offender has satisfied the court that the payment of the victim surcharge would cause undue hardship (new section 737(5)).
- It requires the court to provide reasons for the exercise of its limited discretion to grant an exception or an exemption to the surcharge (new section 737(6.2)).

1.1 VICTIM SURCHARGE

The victim surcharge is a monetary amount imposed by sentencing courts on offenders at the time of sentencing. It is automatically added to any other penalty ordered 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*.³

Introduced in 1989, the victim surcharge was created to help fund provincial and territorial victim services.⁴ The victim surcharge is separate from restitution orders and provincial compensation regimes that may be granted to victims of crime.⁵

The victim surcharge is not paid directly to the victim but is placed in a special fund administered by the province or territory where it 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. Although 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.⁶

In June 2013, the *Increasing Offenders’ Accountability for Victims Act*⁷ doubled the percentages and amounts of the victim surcharge and eliminated the previously existing judicial discretion allowing a sentencing court to waive the surcharge in cases where its imposition would cause undue hardship to an offender.

The victim surcharge is 30% of any fine imposed by the court, and where no fine is imposed, \$100 for an offence punishable by summary conviction and \$200 for an offence punishable by indictment (section 737(2) of the Code). A sentencing court may 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)).

The Code states that the victim surcharge “is payable within the time established by the lieutenant governor in council of the province in which the surcharge is imposed.” When a period of time is not specified, the Code allows for payment within a reasonable period of time after its imposition (section 737(4)). By way of example, in Ontario, 30 days are allotted for summary conviction offences, whereas 60 days are allowed for indictable offences.⁸

The constitutionality of the mandatory victim surcharge and the removal of judicial discretion has been scrutinized by the courts. For example,

a number of provincial court judges in Ontario released rulings that were critical of the changes because of the impact on chronic petty offenders, many with substance abuse or mental health issues.⁹

Since the tabling of Bill C-28 in October 2016, the Court of Appeal for Ontario has ruled that the victim surcharge must be imposed on every count and cannot be applied concurrently.¹⁰ Moreover, although the totality of surcharge amounts may be disproportionate against certain marginalized offenders, the Court ruled in another case that such disproportionality does not violate the *Canadian Charter of Rights and Freedoms*, which protects the right to life, liberty and security of the person, as well as the right not to be subjected to cruel and unusual punishment.¹¹

The frustration of sentencing judges who have balked at the seeming futility of imposing victim fine surcharges that are beyond the means of an offender in the foreseeable future is understandable, but the surcharge regime does not amount to a violation of s. 7 or s. 12 of the *Charter*.¹²

The issue of the constitutionality of the victim surcharge is currently before the Supreme Court of Canada in the case of *Boudreault c. R.*,¹³ an appeal from a two-to-one decision of the Quebec Court of Appeal upholding its constitutionality.¹⁴

1.1.1 ENFORCEMENT

The legal framework regarding the enforcement of fines and forfeitures in the Code also applies to the enforcement of victim surcharges.¹⁵ An offender may be found in default of payment of a victim surcharge and, in certain circumstances, a term of imprisonment may be imposed (sections 734(3) and 734(4)).¹⁶

An offender can, however, request additional time to pay the victim surcharge prior to being found in default of payment. Before a term of imprisonment can be imposed, the court must be satisfied of the following:¹⁷

- that the alternatives of either suspending or refusing to issue or renew a licence or permit (section 734.5) and proceeding with civil enforcement (section 734.6) would not be appropriate;¹⁸ or

- that the offender has, without reasonable excuse, refused to pay the fine or to discharge the fine through a fine option program (section 736 of the Code).

1.2 FINE OPTION PROGRAM

Section 736 of the Code provides for the possibility of an offender paying off his or her fine or victim surcharge as the case may be by earning credits for work performed under a provincial or territorial fine option program, where such a program exists and where the offender is eligible. The accumulated credits usually match the minimum wage rate of the province or territory where they are acquired and are applied to the fine until it is deemed to be paid off in whole or in part.

The provinces and territories that currently offer a fine option program are Alberta, Saskatchewan, Manitoba, Quebec, New Brunswick, Nova Scotia, Prince Edward Island, Yukon and the Northwest Territories.¹⁹ British Columbia, Ontario, and Newfoundland and Labrador do not offer this type of program to offenders.²⁰ The program eligibility criteria differ among the provinces and territories, and not every provincial fine option program allows an offender to pay off a victim surcharge by participating in such a program.²¹ For example, in New Brunswick and Nova Scotia, the offender may participate in a fine option program only after having paid the court costs and/or surcharge portion of his or her fine.²²

2 DESCRIPTION AND ANALYSIS

2.1 VICTIM SURCHARGE, EXCEPTION AND EXEMPTION (CLAUSE 2)

Clause 2 of Bill C-28 amends section 737(1) of the Code to provide that an offender must pay a victim surcharge for *each* offence, in addition to any other punishment imposed. It also provides for two circumstances under which a court may exercise its discretion to limit these victim surcharges:

- New section 737(1.1) provides that the court may order an exception to pay fewer victim surcharges if it is satisfied that the total amount imposed on the offender would be disproportionate in the circumstances, and the types of offences consist of:
 - (a) any offence relating to the offender's failure to appear before a court; and
 - (b) any offence relating to a breach of any conditions of a release imposed on the offender by a peace officer or of any conditions of a court order, if that breach did not cause a victim physical or emotional harm, property damage or economic loss.
- New section 737(5) provides that the court may order an exemption, on application of the offender, from the payment of the victim surcharge where it is satisfied that payment of the surcharge would cause undue hardship.

Undue hardship is defined to mean that the offender is unable to pay a victim surcharge on account of his or her "precarious financial circumstances, including

because of their unemployment, homelessness, lack of assets or significant financial obligations towards their dependants” (new section 737(6)).

New section 737(6.1) provides that the imprisonment of the offender alone does not constitute undue hardship.

Moreover, when making an order under new section 737(1.1) or 737(5) of the Code, the sentencing court must include its reasons in the record of proceedings (new section 737(6.2)).

Even if the offender avails him or herself of the exception allowing fewer victim surcharges than the number of offences, he or she could still qualify for the fine option program or be subjected to imprisonment in default of the payment of a fine, depending on the facts of the case at hand (new section 737(9)).

New section 737(10) states that the exception provided for in new section 737(1.1) (fewer victim surcharges) and the exemption provided for in new section 737(5) (undue hardship), as well as new section 737(6.2) (sentencing court’s reasons), apply to any offender sentenced under the Code or the *Controlled Drugs and Substances Act* after the day on which the new subsections come into force, regardless of the fact that the offences were committed before that day.

2.2 DEFINITION OF SENTENCE (CLAUSE 3)

Currently, the only possible appeal mechanism of the victim surcharge provisions is an appeal from an order increasing the amount of the victim surcharge.²³

Clause 3 of the bill adds new sections 737(1.1) and 737(5) to the interpretive definition of a “sentence” under section 785 of the Code, thereby making such orders (i.e., exception and exemption orders) appealable.

2.3 COMING INTO FORCE (CLAUSE 4)

Clause 4 provides that the bill comes into force on the 30th day after it receives Royal Assent.

NOTES

1. [Bill C-28, An Act to amend the Criminal Code \(victim surcharge\)](#), 1st Session, 42nd Parliament.
2. [Criminal Code](#) [the Code], R.S.C. 1985, c. C-46.
3. [Controlled Drugs and Substances Act](#), S.C. 1996, c. 19.
4. 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, Policy Centre for Victim Issues, 2001, p. 23.

5. For information on restitution orders and compensation to victims, 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.
6. 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, 2008, pp. 21–24.
7. [Increasing Offenders' Accountability for Victims Act](#), S.C. 2013, c. 11.
8. [R. v. Tinker](#), 2017 ONCA 552, para. 7.
9. Shannon Kari, "[Feds should move faster on surcharge changes](#)," *Law Times*, 10 July 2017.
10. [R. v. Fedele](#), 2017 ONCA 554
11. *R. v. Tinker*, para. 143. This is in contrast to lower court decisions. See, for example, [R. v. Michael](#), 2014 ONCJ 360; and [R. c. Larocque](#), 2014 ONCJ 428 [Available in French only] (appealed in [R. v. Larocque](#), 2015 ONSC 5407).
12. *R. v. Tinker*, para. 144.
13. [Boudreault c. R.](#), 2016 QCCA 1907.
14. Supreme Court of Canada, [Alex Boudreault v. Her Majesty the Queen, et al.](#), Docket 37427. See also "[Supreme Court to look at constitutionality of victim surcharges](#)," *CBC News*, 25 May 2017.
15. Section 737(9) of the Code states that a reference to the word "fine" in the listed Code sections (734(3) to 734(7), and 734.3, 734.5, 734.7, 734.8 and 736) apply with one exception (section 734.8(5)) and must be read as if it were a reference to the "victim surcharge." See also *R. v. Tinker*, para. 8.
16. It is worth noting the following:

[t]he purpose of imposing imprisonment in default of payment is to get offenders with the means to pay to in fact make payment. Imprisonment cannot be imposed where there is genuine inability to pay a fine.

See Alan Gold, "Practice Notes," *The Practitioner's Criminal Code 2018*, p. 1221.
17. Section 734.7 of the Code.
18. In Ontario, civil enforcement (section 734.6), through which the government may commence civil proceedings against an offender who has defaulted on the payment of a fine, is not available to recover victim surcharges. See *R. v. Tinker*, para. 16.
19. Alberta, [Fine Option Order](#), Alberta Regulation 92/1999; Saskatchewan, [The Fine Option Program Regulations, 1991](#), R.R.S., c. S-63.1, Reg 1; Manitoba, [Fine Option Program Regulation](#), Regulation 178/88; Quebec, Sécurité publique, [Travaux compensatoires](#); New Brunswick, Justice and Public Safety, [Fine Option Program](#); Nova Scotia, [Fine Option Program](#), N.S. Reg. 102/2000; Prince Edward Island, Justice and Public Safety, [Adult Fine Option Program](#); Yukon, [Fine Option Act](#), RSY 2002, c. 88; and Northwest Territories, [Fine Option Act](#), R.S.N.W.T. 1988, c. F-5.
20. In Ontario, the regulation that would have allowed for a fine option program ([Fine Option Program](#), R.R.O. 1990, Reg. 948) was formally revoked on 3 June 2016 by O. Reg. 162/16. Newfoundland and Labrador's Auditor General made the following recommendation in 2010:

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. See 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*](#), p. 297. It was not possible to confirm the existence or non-existence of this type of program in Nunavut.

21. Prince Edward Island's *Victims of Crime Act* states 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." See [*Victims of Crime Act*](#), R.S.P.E.I. 1988, c. V-3.1, s. 9(3). Alberta's current regulation on the fine option program is subject to a sunset clause and is set to expire on 30 June 2018. The regulation also provides that the suitability of the fine option program for an offender is subject to the approval of the Chief Executive Officer of Alberta Correctional Services. See Alberta, *Fine Option Order*, ss. 3–7.
22. See New Brunswick, Justice and Public Safety, *Fine Option Program*; and Nova Scotia, *Fine Option Program*, s. 6.
23. *R. v. Fedele*, paras. 29 and 30.