



March 17, 2008

The Honourable Roy McMurtry  
McMurtry Victim Compensation Review  
880 Bay Street, 2nd Floor  
Toronto, Ontario  
M7A 2B6

Dear Mr. McMurtry:

**Re: McMurtry Victim Compensation Review**

On behalf of the Ontario Bar Association (“**OBA**”), we are pleased to enclose our submission on the McMurtry Victim Compensation Review.

As stated in our enclosed submission, we welcome the opportunity for further input on the review and our submission in response to it.

Yours truly,

Gregory D. Goulin, LSM  
President  
Ontario Bar Association



**ONTARIO  
BAR ASSOCIATION**  
*A Branch of the CANADIAN BAR ASSOCIATION*

## **OBA Submission to the McMurtry Victim Compensation Review**

Submitted on *March 17, 2008*

Submitted by:  
Gregory D. Goulin, LSM  
President  
Ontario Bar Association

Submitted to:  
The Honourable Roy McMurtry  
McMurtry Victim Compensation Review  
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## About the Ontario Bar Association

Established in 1907, the Ontario Bar Association (OBA) is a branch of the Canadian Bar Association. It is the largest voluntary legal association in Ontario and represents more than 17,000 lawyers, justices, law professors and law students.

The OBA is a member-driven association. As ‘the voice of the legal profession’, the OBA represents lawyers through its 35 practice and substantive law Sections. Our Sections provide opportunities for excellence in legal and practice education, advocacy and the professional needs of lawyers.

The OBA is independently governed by an elected Council and Executive. Both OBA Council and OBA Executive represent lawyers from across the province and from all practice areas. The Council meets quarterly and the Executive meets monthly to discuss issues that affect Ontario lawyers and the justice system.

The OBA partners with other legal associations, justice stakeholder and legal advocacy groups to effect positive change in the law and legal services.

## Introduction

To provide input to the McMurtry Victim Compensation Review, the Ontario Bar Association convened a working group of members with an interest and expertise in the area of victims’ rights. Members included crown attorneys and defense counsel, administrative law experts and lawyers with extensive experience representing victims of crime in our civil and criminal courts.

While the backgrounds of working group members were quite diverse, there was a unanimous agreement that improvements to the victims’ compensation system were long overdue.

During our discussions, the Working Group identified a number of inadequacies of our criminal and civil justice systems in terms of compensating victims of crime; from the often prohibitive expense of pursuing compensation through the civil courts, to the length of time it takes to receive compensation, to the constant requirement for victims to retell their stories in order to achieve accountability and, ultimately, compensation. We concluded that this is not the time to cut back on or limit the compensation available to victims of crime through a publicly-funded system. Rather, we believe there is a need to strengthen our victim compensation system to ensure it assists those who need it the most and are otherwise at risk of falling through the cracks.

We are hopeful that the advice and recommendations found in this report will provide a solid foundation for reforms to improve the experience that victims of crime have within our justice system.

## Definition of Victim

The OBA supports a more expansive definition of victim than is currently found in the *Compensation for Victims of Crime Act (CVCA)*. The CVCA defines victim as:

5. Where any person is injured or killed by any act or omission in Ontario of any other person occurring in or resulting from,
  - a) the commission of a crime of violence constituting an offence against the Criminal Code (Canada), including poisoning, arson, criminal negligence and an offence under section 86 of that Act but not including an offence involving the use or operation of a motor vehicle other than assault by means of a motor vehicle;
  - b) lawfully arresting or attempting to arrest an offender or suspected offender for an offence against a person other than the applicant or his or her dependant or against such person's property, or assisting a peace officer in executing his or her law enforcement duties; or
  - c) preventing or attempting to prevent the commission of an offence or suspected offence against a person other than the applicant or his or her dependant or against such person's property.

We believe that the definition should be more consistent with that found in the *Victims' Bill of Rights, 1995*. Section 1 of the Act defines victim as:

a person who, as a result of the commission of a crime by another, suffers emotional or physical harm, loss of or damage to property or economic harm and, if the commission of the crime results in the death of the person, includes,

- (a) a child or parent of the person, within the meaning of section 1 of the *Family Law Act*, and
- (b) a dependant or spouse of the person, both within the meaning of section 29 of the *Family Law Act*;

but does not include a child, parent, dependant or spouse who is charged with or has been convicted of committing the crime. ("victime) 1995, c. 6, s. 1; 1999, c. 6, s. 65 (1, 2); 2005, c. 5, s. 72 (1, 2).

The one exception that we would suggest is that damage to property alone should not be compensable, however where property damage has a clear adverse personal impact, either psychological or physical, then it should be compensable. This could, for example, include the theft of a medical device (e.g. an insulin pump) or hate crime.

## Questions Presented by Consultation Paper

### *Purposes of Compensation*

*What purpose is served by paying compensation awards to victims?*

The OBA believes that the preamble to the *Victims' Bill of Rights* goes a long way in addressing this question; it states:

The people of Ontario believe that victims of crime, who have suffered harm and whose rights and security have been violated by crime, should be treated with compassion and fairness. The people of Ontario further believe that the justice system should operate in a manner that does not increase the suffering of victims of crime and that does not discourage victims of crime from participating in the justice process.

We interpret this to mean that justice is not completed once a perpetrator is convicted and sentenced. For justice to be fully done, every effort must be made to help an individual return to his or her pre-victim state. We also believe that crime is seen as a failure of government to protect us. Financial support for victims of crime allows them to begin their healing process. Compensation acts as a kind of insurance system for acts which the government is partially responsible.

*Should any groups or individuals be excluded from receiving victim compensation payments (e.g. persons whose behaviour significantly contributed to their injury or loss, persons whose expenses or losses are compensable through other sources such as disability insurance)?*

The decision making body should have the discretion to take into account the contributory role of the victim, which may serve as a basis to discount or deny an award of compensation. However, there should be a warning that the decision making body must not rely on discriminatory stereotypes when determining if a victim's own conduct contributed to the injury (e.g. that a woman's dress "provoked" a sexual assault). It should not be an automatic disqualification, but only after a review of the facts should such a determination be made. The reason for such exclusions rests partially with the fact that there are finite resources available in the system.

In addition, the OBA believes that the decision making body should be able to consider other forms of compensation received by the victim when making their decision. This would include reducing or denying compensation for an individual who has already been compensated from another source or recouping some or all of the compensation awarded after the fact should compensation be received from another source.

*Are there ways other than direct monetary compensation to better serve victims of crime? If so, what are the victim service priorities that the government should consider?*

Monetary compensation should be the primary service offered by a criminal injuries compensation type of board. For support services not covered by the Ontario Health Insurance Plan, the OBA believes additional services could be funded, such as counseling. These other services should be used to help victims with any lasting psychological and physical challenges they are trying to overcome.

We also support a discretionary award that would allow victims of crime to make creative proposals for healing where the money in question would, if the proposal were approved, go directly to the service provider as opposed to the victim. An example of this may come in the form of a clinic where counselors travel to victims of abuse, particularly when there is a group of them who were victimized by a single perpetrator, who live in remote communities to provide direct care.

Restorative or reconciliative victim/offender conferencing should also be made available within the victim compensation/support system. It would be essential that these be entered into voluntarily by both the victim and the offender. The costs of these programs are minimal when run by community groups, but the payout is significant when a victim is able to achieve a sense of closure and obtain restitution as a result of these sessions.

### ***Determining Compensation***

*Should victim compensation be based on the nature of the injury, expenses incurred, or a combination of both? If injury-based, what criteria should be considered in the development of a benefits schedule (e.g., loss of income, pain and suffering,)? If expense-based, what expenses should be recoverable?*

Compensation should be based on a combination of both the nature of the injury and expenses included. Similar injuries can have significantly varying impacts on the lives of different victims based on the unique circumstances involved. This may involve the distance a victim has to travel for care, varying costs of living based on income prior to the injury (i.e. mortgage payments), and home environment (i.e. making a two storey house accessible). Equally important is that victims have different ways of healing and should be accorded some choice in the process. A victim is someone who has, by definition, been deprived of choice. The compensation system should allow them at least a modicum of empowerment through the ability to choose which avenue best suits a victim's needs.

The benefits schedule should consider the following criteria:

- Pain and suffering and loss of enjoyment of life
- Loss of income, past and future
- Cost of care (eg. massage, physiotherapy, counseling by psychologists and others such as social workers, optometrists, chiropractors, alternative forms of medicine, prescription and other forms of medication, medical supplies, etc.)
- Discretionary special project awards that go directly to the service provider

- Special out-of-pocket expenses not covered by the above (e.g., installation of an alarm system)

*Should compensation be based on other factors? If so, what are they?*

One of the goals of compensation should be healing and restoring the person to pre-victim status and potential. This is why a broad and flexible compensation model should be created. Because individuals react differently to victimization it is important for the compensation system to be able to serve their varying needs.

### ***Compensation Delivery Model***

*In awarding compensation, which delivery model would be more responsive to victims' needs: an administrative model, an adjudicative hearing model; or a hybrid administrative/adjudicative hearing model?*

The OBA believes that a hybrid model would be most responsive to the needs of victims. Not all victims have the same experience or requirements to recover; even when they have been affected by the same crime or type of crime. As a result, it is important that our compensation system allow individuals to choose the path that will be most helpful in restoring them to their pre-victim status and potential. For some people simply receiving some financial compensation will go a long way in assisting with getting their life back on track. For others a more comprehensive approach that includes the opportunity to tell their story will better assist them in moving forward with their lives. As such, there is a valid role for both an administrative and adjudicative model to play in our victim compensation system.

At present, there are a variety of access points to victims' services; the OBA recommends that there should be a single point of contact for victims to identify and access the services available to victims. This may simply involve better promotion of the Victim Services Line offered through the Victim's Services Secretariat or the creation of a new point of contact similar to that offered to accused at the time of their arrest (e.g. currently a toll-free number for Legal Aid Ontario is given to them).

The OBA believes that the administrative side of the model should cover costs incurred by victims and award compensation for their type of injury. We encourage the province to develop a standardized list of benefits based on expert advice. We note that, as indicated in our response to the prior question, we believe these should be based on both the nature of the injury and expenses incurred.

We believe the role of the adjudicative body is to determine suitable injury benefit awards for the victim. We do recognize that this would be a lengthier process than the administrative model. As such, we recommend that victims who wish to pursue an adjudicative process still be allowed to apply for, and if they qualify, receive compensation through the administrative systems for expenses covered by the benefits schedule, including interim anticipated expenses. Importantly, the decision making body should also reimburse victims for reasonable costs incurred in pursuing administrative and/or adjudicative, such as the cost charged by health care providers for copies of health records needed to support an application and travel costs to attend a hearing.

### ***Considerations***

*What are the victim priorities that the government should address in developing any new compensation system?*

Victims need support and validation so that they can begin the healing process. This requires meaningful compensation that is delivered in a timely and sensitive manner.

*In which situations would an adjudicative hearing model be preferable (if any)? Is one model preferable for certain kinds of cases, e.g. adjudicative hearings for victims with catastrophic injuries; an administrative system to award expenses?*

The decision to pursue the adjudicative hearing model should be at the discretion of the individual seeking compensation.

*Are there compensation delivery models other than the options mentioned in this paper that would better serve victims' needs?*

The OBA believes that, in addition to a publicly funded compensation model, a victim would be better served if, during the criminal court process, the trial judge were empowered to order that meaningful compensation be paid by the convicted accused person to the victim.

Under our current system, the judge presiding over a criminal case will hear victim impact statements and possibly even assess victim impact for purposes of dangerous offender designation, but cannot assess victim compensation. It is then the responsibility of the victim to pursue the perpetrator in civil court for damages. The victim could conceivably come before the very same Superior Court judge several years later again recounting his or her abuse and related consequences, seeking compensation on the lower standard of proof, a balance of probabilities.

We see this as giving rise to delay and possible re-victimization that can be prevented. Not only should courts of criminal jurisdiction be granted the power to fully assess victim compensation, but after a finding of guilt, victims should be allowed to be represented by their own counsel at this stage and, if the victim qualifies, provided by the state with legally aided counsel just like the guilty party.

This proposal would not impose significant additional responsibility on the crown attorney's system; but it may involve an immediate increase in demands on judicial and court staff as well as increased burden on our legal aid system. We therefore recommend funding for victim representation be supported by the Victim Fine Surcharge fund.

This proposal would also relieve some of the strain on the civil justice system (as well as the backlog of Criminal Injury Compensation Board claims) in addition to providing

more immediate compensation to victims at a time of real need, sooner to the unfortunate event.

### ***Catastrophic Injuries***

*How should catastrophic injury be defined?*

We do not believe that compensation should be limited to catastrophic injury. To do so would have the effect of depriving large numbers of deserving victims of serious crimes (e.g., sexual, domestic and childhood abuse) compensation. The government would be shirking its responsibility towards crime victims if it allowed this to happen. As such, we do not see the need to define “catastrophic injury” for the purposes of this review.

*What delivery model should be used to determine compensation claims by victims who have suffered catastrophic injury?*

We do not believe that compensation should be limited to catastrophic injury; as such we believe the decision to pursue either the administrative or adjudicative process should be at the discretion of the victim.

### ***Other***

*Is there anything else relating to victim compensation that the McMurtry Review should consider?*

*Recovery from assailant*

The government should develop a mechanism to enforce court-ordered payments against persons convicted of crimes. This mechanism may also be considered for recouping payouts made to victims of crime by the Criminal Injuries Compensation Board and/or any future body that is created to compensate victims of crime.

*Use of Victim Fine Surcharge*

We suggest that funds collected through Victim Fine Surcharge be placed in a separate fund dedicated to compensation to be paid to victims of violence and that no more than 20% of these funds be used for administration of the process.