



THE CANADIAN RESOURCE CENTRE
FOR VICTIMS OF CRIME

CENTRE CANADIEN DE RESSOURCES
POUR LES VICTIMES DE CRIMES

RESTITUTION

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What is Restitution?

If a crime victim suffers a financial loss as a result of the crime committed against them, they have the right to seek financial redress in the form of restitution from the offender. Restitution occurs when the offender remunerates the victim for the financial losses that they have incurred. Restitution can be ordered by the criminal court once an offender has been found guilty.

Restitution differs from compensation, which occurs when the state pays the crime victim for financial and other losses, such as pain and suffering.¹ Restitution orders can be applied in various ways in Canada:

- as a **stand-alone order**, given as an additional sentence (s.738 of the Criminal Code);
- as a **condition of probation** (s.732.1 (3.1) a); or
- as a **conditional sentence** (s.724.3(2) f).²

Restitution is considered a “right” victims have in the sentencing process. Courts can order offenders to pay restitution to their victims; yet, unfortunately, statistics suggest that restitution is rarely ordered in Canada (approximately 3% of guilty cases). Moreover, when restitution is ordered by the courts, it often goes unpaid.

The majority of the general public may be unaware of restitution and its significance to victims of crime. Individuals who work within – or are affected by – the criminal justice system, however, are certainly aware of its importance. The CRCVC believes that offenders must be held accountable for their crimes: when feasible they should be made to compensate victims directly for what they have taken.

A Brief History of Restitution

Restitution is an ancient concept that can be linked back to the earliest notions of justice. In England in 600 A.D., offenders were required to pay restitution to their victim(s), as well as a fine to the King to “buy back the peace.”³ Victims could sell indigent offenders into service for a period of time to cover damages.⁴

Peggy Tobolowsky notes that in colonial America, law enforcement and the administration of justice were conducted by individual victims with assistance from public officials who charged fees for their services. The victim was responsible for

arresting the offender (either by himself or with the assistance of a paid constable, local watchman or justice of the peace), investigating the crime, filing charges, prosecuting the offender or for paying others to perform these functions. In return, the victim could get damages from the offender or sell the offender's services to pay the debt.⁵

The victim was also the sole recipient of any payment.⁶ In her article "*Restitution and Victims' Rights in the 1980s*", Susan Hillenbrand explains that "private prosecution" was intended to be a means by which restitution could be provided to the victims of property crimes.⁷

Restitution for the victim became less common as the state moved its focus from the victim to the offender: fines were paid to the state and offenders were sent to prison. There are many obstacles faced by crime victims who attempt to obtain restitution, such as:

- the accused is unable to pay;
- there is a lack of enforcement; or
- the victim is simply unaware that restitution exists.⁸

Appendix A offers a full list of obstacles that can be faced by victims.

Restitution in Canada

The Canadian provisions that govern compensation were amended in 1996, when compensation order provisions were replaced with restitution order provisions.⁹ Originally only available for loss, destruction, or damage of property, the introduction of restitution order provisions allowed awards for fiscal damages, such as loss of income or support as a result of bodily harm due to an offence, or relocation expenses. Furthermore, orders of restitution were no longer required to be initiated by the victim, but could also be ordered by the sentencing court.¹⁰

The 1970s saw a renewed interest in restitution. Ironically, restitution has become a persistent theme in the rights movement¹¹, but the idea was originally seen by many as a means of helping to rehabilitate offenders by making them accountable for their actions. The concept of restitution is and has been a popular one. In the 1970s, probation officers and criminologists began looking for alternatives to prison and promoted restitution as a means to promote offender accountability.¹²

In 1969, the Canadian Committee on Corrections endorsed restitution as a

correctional method. The Law Reform Commission of Canada did the same in 1974.

“Restitution involves acceptance of the offence as a responsible person with the capacity to undertake constructive and socially approved acts. It challenges the offender to see the conflict in values between himself, the victim and society. In particular, restitution invites the offender to see his conduct in terms of the damage it has done to the victim’s rights and expectations. It contemplates that the offender has the capacity to accept his full or partial responsibility for the alleged offence and that he will in many cases be willing to discharge that responsibility by making amends.”¹³

In 1983, the Federal Provincial Task Force on Justice for Victims made several recommendations regarding restitution, including: to amend the *Criminal Code* to require judges to consider restitution in all appropriate cases, and to empower the court to impose jail terms when the accused wilfully defaults.¹⁴

In 1986, the Canadian Sentencing Commission recommended that judges be required to consider restitution in all cases and the court be empowered to impose jail terms where the offender wilfully defaults on payment.

In 1988, the Standing Committee on Justice and Solicitor General issued its report regarding sentencing. The report recommended that the federal and provincial governments examine civil enforcement mechanisms as a means to relieve victims of having to enforce these orders themselves. It also expressed support for the notion that judges be required to state the reasons why they do not impose a restitution order.

The principles of restitution (reparation and being accountable to the victim) can also be found in the new *Youth Criminal Justice Act*.

Currently, Canadian crime victims have no right to make a direct application to the court for restitution (except in Alberta, Saskatchewan and Nova Scotia), although they can outline the financial impact of the crime in their victim impact statements. If an offender fails to pay restitution, it is up to the victim to pursue payment in civil court.

Studies have shown that restitution is an important factor that influences most victims’ levels of satisfaction with the criminal justice system.¹⁵ The National Victim Assistance Academy notes that restitution can affect the psychological recovery of the victim from the aftermath of crime. They warn, however, that the victim’s

trauma may be compounded when restitution is not paid and the offender is not held directly accountable for his actions.¹⁶

Victims prefer restitution that comes directly from the offender, as opposed to compensation that is issued by the government.¹⁷ Victims are generally not concerned if they are compensated (by the offender) in payments, or if the offender simply reimburses a compensation program.¹⁸ There is some evidence that suggests if a victim receives restitution, they are less concerned about further punishment for the offender.¹⁹

Although normally used in property crimes, courts have ordered payments to family members of deceased victims for funeral costs, pecuniary expenses related to pain and suffering, and surgery/medical expenses.²⁰ Recently, the *Criminal Code* was amended to allow for restitution for psychological impact (Bill C-49).

Restitution across Canada

Only Alberta, Saskatchewan and Nova Scotia allow crime victims to apply directly for restitution. For the remaining provinces and territories, restitution must be ordered by the Crown counsel.

Alberta

In Alberta, when a financial loss is suffered due to a crime, the victim can apply for restitution directly. The victim must fill out a *Request for Restitution* form, which can be obtained from the investigating police officer.

Once the form is completed and returned to the police station, the police officer will submit it to the Crown prosecutor, who decides if the application will be made before the court.²¹ The Crown may refuse the application for a *Request for Restitution*; however, if this occurs, the victim can request that the court consider the request.

A restitution order can be given for a variety of reasons such as: property damage or destruction, loss of property, physical or psychological harm, and/or expenses incurred from moving out of the offender's home. It is important to obtain all the essential documents in order to submit a proper claim.

The following link provides the necessary information:

<http://www.victiminfo.ca/en/about-court/going-to-trial/how-trial-will-proceed/sentencing/restitution>

Saskatchewan

Saskatchewan allows crime victims to apply for restitution. In order to apply, the victim must fill out a restitution application. Similar to Alberta, once the application is completed, it must be returned to the investigating police officer or prosecutor. If the victim experiences problems or has questions while filling out the application, they can contact the investigating officer or victim services at the police station. It is important to keep all important documents, receipts, and/or invoices that have been accumulated, as they will be needed when filling out the application form.²²

The following link provides the restitution application, along with necessary information: <http://www.justice.gov.sk.ca/VS-Restitution>

In the restitution program in Saskatchewan, when the court orders restitution, it is attached to the probation order, and a letter of reminder with a payment schedule is sent to the offender after the court date. Regular checks on the payments are made. If the offender has not begun to make restitution, or if payments have stopped, a violation report is sent to the Crown and new charges can be added. A notice of breach is mailed to the offender, which usually results in payments being made. The violation report is not removed until the order has been paid in full. The majority of restitution orders are either paid or partially paid – almost 48% are paid in full, with an additional 20% that are partially paid. Only 32% involve no payment at all.²³

Nova Scotia

Crime victims in Nova Scotia are eligible to apply for restitution. The application process is similar to those of Alberta and Saskatchewan. The victim must fill out a request for restitution application and submit it, along with all the necessary documents outlining their losses. It is important for the victim to fill out the application as soon as possible following the crime, and to return it to the investigating police officer.

The following link provides the necessary information: http://www.victimsofviolence.on.ca/rev2/index.php?option=com_content&task=view&id=333&Itemid=23

The Restitution Process in the Criminal Justice System

Step 1: Request for Restitution Form

It is important to be precise with the amount of damage and to provide all of the necessary paperwork (receipts, invoices) as verification. Upon completion, the form must be returned to the investigating officer at the police station.

Step 2: Request for Restitution is presented to the Crown

If there is not enough evidence to support a claim, or the offender cannot realistically pay restitution, the request will not be submitted.

Step 3: Order of Restitution

It is important to remember that the act of submitting a Request for Restitution in court does not mean that the judge will automatically enforce it. If a judge does order restitution, it can be ordered in three ways:

- as a condition of probation;
- as a condition of a conditional sentence; or
- as a stand-alone order.²⁴

When a judge attaches an order of restitution to a **condition of probation**, this means restitution must be made during a specific duration of time. A reporting clause is included in this option, whereby the offender will have to report to a probation officer, who will ensure that the restitution is paid.

When a restitution order is given as a **condition of a conditional sentence**, this means that if the offender fails to pay restitution, their probation officer can commence a charge or breach of the conditional sentence order.

A **stand-alone order** is not given in conjunction with other sentences, and is usually paid immediately by the offender. The money owed is paid to the court, who then issues a cheque to the crime victim. If the offender does not make restitution payments, crime victims can proceed to a civil proceeding in order to receive restitution.²⁵

Prevalence of Restitution Orders

While the concept of restitution provides a vision of support and benefits to victims, the Department of Justice estimates that almost 70% of the costs associated with crime remain borne by crime victims. In fact, fewer restitution orders are made today than a decade ago, in both adult and youth cases.²⁶

The prevalence of restitution is obtained through statistics collected and administered by the Canadian Centre for Justice Statistics department of Statistics

Canada. The data is limited to the number of orders each year, organized by offence type and jurisdiction. On a national scale, no data is collected regarding the value of the restitution orders or on the amount collected. In individual jurisdictions, the small amount of information that is retained lacks in quality and varies to a considerable degree across the country.

- 1994-1995: 11,017 restitution orders made (represents 4.6% of the total 242,011 guilty cases).
- 2006-2007: 7,490 restitution orders made (represents 3.1% of the total 242,988 guilty cases).
- Property crime accounts for the majority of restitution orders made in Canada. In 2006-2007, 80% of all orders were made in cases of property crime.²⁷

Canadian Case Law

Criminal courts remain hesitant to award restitution orders to victims because they are considered civil remedies that are difficult to enforce, although they have been upheld as constitutional.²⁸

In *R. v. Siemens*,²⁹ the court said:

“The constitutional justification for a provision in the Code permitting restitution orders is that restitution is part of the punishment. Where punishment is exacted in the form of a restitution order, there should be a corresponding reduction in other forms of punishment which might be imposed. In some cases, a restitution order will be a significant factor, while in others it will be trivial depending on the circumstances, but it must be included as a factor in the totality of the punishment imposed.”

In *R. v. Crowell*,³⁰ the court said:

“Restitution or compensation, like imprisonment, fines and probation, is one of the judicial instruments used for the protection of the public. Its role as such is increasing; it is a deterrent that deprives an offender of the fruits of crime and aids in the reformation of the sincerely repentant. In some circumstances it is the best possible protection for specific victims.”

In *R. v. Quinlan*,³¹ the court said:

“Section 718(e) of the *Code* lists reparation for harm done to victims as

one of the objectives of sentencing. In property-related offences restitution must be considered a primary means of reparation... Restitution can be an important factor assisting in the rehabilitation of an offender, which is specifically made an objective of the fundamental purpose of sentencing by s.718 (d) of the *Code*. It is reasonable to regard restitution as having particular import in the rehabilitation of an offender who is guilty of property-related offences such as involved in this appeal. If the prospect of repayment of the victims is overlooked, it is possible that the rehabilitative factor was discounted in fashioning a sentence.”

In *R. v. Degan*,³² the objectives and factors relevant to determining whether to make a restitution order were outlined:

1. An order for compensation should be made with restraint and caution.
2. The concept of compensation is essential to the sentencing process:
 - (i) it emphasizes the sanction imposed upon the offender;
 - (ii) it makes the accused responsible for making restitution to the victim;
 - (iii) it prevents the accused from profiting from crime; and
 - (iv) it provides a convenient, rapid and inexpensive means of recovery for the victim.
3. A sentencing judge should consider:
 - (i) the purpose of the aggrieved person in invoking s.725(1);
 - (ii) whether civil proceedings have been initiated and are being pursued; and
 - (iii) the means of the offender.
4. A compensation order should not be used as a substitute for civil proceedings. Parliament did not intend that compensation orders would displace the civil remedies necessary to ensure full compensation to victims.
5. A compensation order is not the appropriate mechanism to unravel involved commercial transactions.
6. A compensation order should not be granted when it would require the criminal court to interpret written documents to determine the amount of money sought through the order. The loss should be capable of ready calculation.
7. A compensation order should not be granted if the effect of provincial legislation would have to be considered in order to determine what order should be made.
8. Any serious contest on legal or factual issues should signal a denial of recourse to an order.
9. Double recovery can be prevented by the jurisdiction of the civil courts to require proper accounting of all sums recovered.

10. A compensation order may be appropriate where a related civil judgment has been rendered unenforceable as a result of bankruptcy.

It is difficult to provide a definitive analysis of the willingness of judges to order restitution or of the likelihood that offenders will pay when so ordered, because there are no national statistics. One estimate is that restitution orders are paid only in about 20% of cases in which courts order them, compared to almost 100% of cases where restitution orders are part of an agreement worked out between victims and offenders.³³ According to the Ontario Office for Victims of Crime: “(L)iterally millions of dollars in uncollected restitution orders/civil judgments are outstanding.”³⁴

The limited amount of data available does suggest that victims need assistance with the enforcement of restitution orders. The federal government says that criminal legislation has gone as far as it can to permit restitution to victims of crime.³⁵

Requesting restitution is often problematic because it can be difficult for the victim to provide the Crown with the necessary information at the time of sentencing (the expenses provided must be “readily ascertainable”). Therefore, the Crown is unable to request that the court make a restitution order. As an example, a victim may be unable to account for loss of future income, which can be a substantial expense.

A 1999 study in Nova Scotia³⁶ found that:

- complicated restitution orders are generally rejected by the criminal justice system and are rarely brought before the court (and if they are, they are rarely successful);
- the 1996 amendment regarding bodily harm has had little impact;
- victims are not central participants in the criminal justice system;
- victim dissatisfaction with the restitution process is high; there is a lack of understanding of the process (that victims have to collect, that pain and suffering is not included);
- victims are not always told that they can make a restitution request;
- the majority of requests are for property damage or loss;
- offenders rarely pay for moving expenses;
- for anything more complicated than property damage, the victim is generally told to go to civil court;
- probation officers in smaller communities are more willing to enforce restitution conditions;

- stand-alone orders are a burden for victims and often go un-enforced;
- if the police/Crown believe the offender cannot pay, they will not even tell victims of their right to request restitution;
- if the offender has a number of unpaid fines, police/Crown may not tell the victim (avoid setting up false expectations for the victim);
- victims often fail to get necessary paperwork/forms; in urban settings, no support or assistance is provided to victims;
- police do not consistently tell victims about restitution/provide forms.

An American Bar Association study showed higher compliance rates by offenders to pay restitution orders accompanied efforts to monitor payments. Consistent and early action taken to respond to delinquencies also made a difference.³⁷ Other research suggests payment is more likely if Probation Officers make the restitution order a focus of their work with the offender, and offenders are allowed to pay in instalments.³⁸

One way to enforce restitution orders is to refuse to grant or renew licenses to offenders who have not complied with their restitution orders. Licensing is a provincial issue; the Ontario Office for Victims of Crime recommended an amendment to section 734.5 of the *Criminal Code* to include non-payment of restitution orders and bail forfeiture orders as a justification to refuse to issue, or to suspend, any provincial "...license, permit or other instrument..." until the debt is paid.³⁹

Restitution as part of the restorative justice process tends to have higher compliance rates. In different jurisdictions, programs are set up to divert cases out of the criminal justice system or to bring a more restorative element to sentencing. In many of these cases, the accused agrees to pay the victim restitution. It is important to recognize that most of these programs screen cases to ensure they have properly motivated offenders, which helps explain the high rates of payment.

International Use of Restitution

The International Criminal Court also emphasizes restitution. Article 75⁴⁰ (*Reparation to Victims*) says:

1. "The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting."

2. “The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.”

3. “Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.”

Furthermore, the 1985 UN *Declaration of Principles of Justice for Victims of Crime and Abuse of Power*⁴¹ highlights the importance of restitution:

8. “Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.”

9. “Governments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.”

In various American states:

- a) Restitution can be taken from an offender’s prison pay.⁴²
- b) Parole or probation can be extended until restitution is paid.⁴³
- c) Until restitution is paid, victims have a right to access information about the offender’s finances, income and/or employment that is in the possession of the courts, parole board or corrections.⁴⁴
- d) Judges must consider restitution and state reasons for not ordering it.
- e) Courts can order a “to be determined” restitution order if the costs are not fully assessed at the time of sentencing.⁴⁵
- f) Restitution can be a condition of parole.⁴⁶
- g) The victim can appeal the restitution order.⁴⁷
- h) Victims have a constitutional right to ask for restitution.⁴⁸
- i) A probation officer can ask a court to sell an offender’s non-necessity property (i.e. television, stereo) to pay the victim.⁴⁹

According to Irvin Waller, a professor at the University of Ottawa: “In France, victims can be assisted by a legal aid lawyer in the criminal courts; judges often delay sentencing until after restitution has been paid with the result that many apparently destitute offenders pay restitution.”⁵⁰ In many countries, the civil and

criminal courts operate together to ensure that the victim's civil needs can be addressed during the criminal trial. In Queensland, Australia, if the offender does not pay the ordered restitution, the state will compensate the victim for all or part of it.

Conclusion

Restitution can be used to accomplish many goals, including: to be held accountable and reform the offender, to provide financial assistance to the victim, and to alleviate an expense to the taxpayer (as compared to government-funded compensation). Restitution is a very significant mechanism for victims of crime, and when ordered, restitution not only increases victims' overall satisfaction with the criminal justice system, but it also recognizes their personal interests by retaining for them some of what has been taken by the offender. It is vital to the rights of victims that judges begin to seriously consider restitution orders against guilty offenders. Furthermore, it is paramount that the Canadian criminal justice system enforces offender compliance with restitution orders, to guarantee that crime victims receive fair reparation for their losses.

Appendix A

Table 1: Obstacles to the use of restitution, as reported by victim services and advocacy groups, 2004

Obstacles	Victim Services Groups[10] (n=94, 30% of total respondents)	Advocacy Groups (n=19, 40% of total respondents)
Accused usually poor or unable to pay	34%	32%
Victims lack information about restitution or unaware of option	31%	--
Victim must pay the cost of enforcement	16%	--
No enforcement	14%	21%
Cumbersome application process	10%	--
Judicial or Crown Attorney reluctance to order or request	9%	--
Eligibility criteria too restrictive	7%	11%
Does not compensate victim adequately	--	21%
Other	11%	26%

Source: Multi Site Survey of Victims of Crime and Criminal Justice Professionals across Canada (2004). Department of Justice Canada. Available online: <http://dsp-psd.pwgsc.gc.ca/Collection/J3-2-2004-V1E.pdf>

Ontario: http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/mcmurtry/section_4.asp

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41. United Nations Distributor General. "Declaration of Basic Principles of Justice". United Nations. 07/22/2009 <<http://www.un.org/documents/ga/res/40/a40r034.htm>>.
42. *i.e.* California (20% of inmate pay), Wisconsin, Montana, Iowa, Louisiana.
43. *i.e.* Kentucky, Washington, Arkansas, Arizona (up to 3 years).
44. *i.e.* Kansas.
45. *i.e.* California
46. *i.e.* Florida
47. *i.e.* Maryland
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