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# **Victims' Rights in Canada in the 21st Century**

**A Report Prepared by Alan N. Young and Kanchan Dhanjal**

**2021**

**Canada**

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## **Victims' Rights in Canada in the 21st Century**

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## Preface

As part of the Government of Canada's Victims of Crime Initiative, the Policy Centre for Victim Issues was created in 2000. In that same year, I completed a report for the Department of Justice entitled "The Role of the Victim in the Criminal Process: A Literature Review – 1989 to 1999." I was recently asked to provide an update to this report, and, despite having retired from the practice and teaching of law in 2018, I was honoured to have been asked to complete this task.

I felt honoured by the request to update my report because a large part of my professional life was consumed by working with the victims' rights movement. As a young criminal lawyer and law professor in the mid-1980s, I was constantly asked two things by friends, family and strangers: how can I defend people I know to be guilty and why is it that the system does not seem to care about crime victims? I had a stock, institutional answer to the question about defending the guilty, but I did not have a genuine response to the question about the mistreatment of victims. Despite being trained, and working, as a defence lawyer, I felt compelled to shift the focus of my research as an academic to find an answer to that question.

Since then, I have represented victims' groups and individual victims in court and before policy makers, advocating for better treatment and increased involvement in the criminal process. As an academic, I wrote numerous law journal articles and reports for the Department of Justice on victims' rights, and I also arranged conferences for crime victims to share their stories. In 2010, after two decades of working in this field, I withdrew from this particular area of practice and research. Despite the rewarding aspects of helping victims overcome the indifference of state officials, this work can take its toll emotionally. Victims' rights can be discussed and debated in an abstract and academic way, but ultimately, it has been the personal hardship and suffering of crime victims which has fueled the law reform movement, and by 2010, I was saturated by sad stories.

In the early days of this movement, I often seemed to be a lone voice among Canadian lawyers and academics. I was surprised by how much attention was being paid to this issue south of the border, whereas in Canada the issue was largely ignored in the academic community. This was surprising considering that at the first National Conference of Victims of Crime (held in Toronto, 1985), the victim movement was called the "growth industry" of the decade, and in the United Kingdom it was considered the fastest developing voluntary movement. Victim groups and associations were mushrooming all over North America and Europe.

In the 1990s, there was an explosion of scholarship and research, and the report I completed in 2000 (and that was published in 2001) was designed to be a comprehensive literature review. The literature was voluminous and the report exceeded 160,000 words. Despite the length of the report, I felt I was only addressing the tip of the iceberg. Even though the 2001 report clearly showed that a great deal of time, effort and money was being put into advancing the interests of victims, I was always concerned that this interest in advancing victims' rights would eventually wane and that victims' rights would be relegated to the status of flavour of the decade.

Working on this brief update to the 2001 report quickly showed me that my concerns were misplaced and that interest and activity relating to victims' rights continues to grow at an unprecedented pace. My co-author for this report, a talented young lawyer, Kanchan Dhanjal, spent a great deal of time reviewing a wide variety of periodical indexes and government

websites, and when the dust settled, she presented me with 22 books, 418 articles and 147 government reports for us to review for this report. Even this vast collection of literature was incomplete as a report of this brevity required us to exclude from consideration a great deal of literature pertaining to special or unique victim-related issues (such as, victims of terrorism, elder abuse, issues unique to Indigenous victims, human trafficking, victims of hate crimes, etc.).

For this brief report, it was also not possible to spend as much time reporting on international developments as was done in the initial report. As some recent European and American developments are of critical importance, there will be some updates on these international changes; however, it has become less necessary to spend time chronicling the literature and reforms in other parts of the world as the past twenty years has seen a significant growth in Canadian scholarship and research. In the first report you might find a few Canadian scholars writing in this area, but now you have many Canadian scholars and researchers, like M. Manikis, J. Roberts, S. McDonald, M. Northcott and J. Wemmers to name a few, making significant and prolific contributions to the literature.

Despite the flurry of activity over the past few decades, it still remains difficult to draw a firm conclusion regarding the overall success of this ongoing endeavour in criminal justice reform. There has been an abundance of piecemeal changes, but there still remains disagreement and debate among scholars, and in the community, over fundamental questions such as what are the needs of crime victims, what is their proper role and function within a highly-professionalized justice system, and what does the concept of victims' rights actually entail? The crime victim may have become an accepted and respected player on the political landscape, but in the legal realm, there are still many who see the crime victim as an unwelcome intruder.

This report will be primarily a descriptive report and not a prescriptive report. Despite having worked in the area of victims' rights since the mid-1990s, and having strong opinions about what needs to be done to support and enhance victims' rights, this report will not make suggestions or recommendations for future change. The goal in writing this report is to provide an accurate and current outline of new legislative and program developments since 2000, with an accompanying summary of evaluative and empirical studies which attempt to measure the success of new laws, new policies and new programs. As success is often measured by the level of satisfaction, or dissatisfaction, experienced by victims, the focus of this report will be on any studies which attempt to measure this level of success.

Whereas the 2001 report was largely structured as a literature review in which many hundreds of articles were reviewed, this review will not undertake an exhaustive summary of the current academic literature. A report of this brevity could not possibly cover and capture the wide body of literature of the last twenty years. In addition, many, if not most, of the articles reviewed in 2001 were in the nature of theoretical perspectives prescribing the proper role of the victim in an adversarial criminal process, and many articles in the sample for this report were also philosophical or theoretical in nature. Despite being important and interesting, the underlying theoretical perspectives have not changed in the past two decades and there is a great deal of overlap and repetition in this part of the literature.

This report will not revisit the well-known territory of theory and philosophy in any significant manner; however, **Part I** of this report will still explore the relationship between theory and practical change in order to provide some context and framework for the remainder of the report.

**Part II** will explore any significant changes, and the studies which have evaluated these changes, with respect to the rights of victims to participate at trial in the past twenty years and with respect to statutory provisions designed to protect the privacy and dignity of the victim as a witness at trial. **Parts III and IV** will present similar, but briefer, explorations with respect to the welfare rights or entitlements of victims, as well as developments relating to restorative justice. Although some reference will be made to the findings of the 2001 report, it could be helpful to read the lengthier 2001 report in conjunction with this condensed update to get a clear sense of what has changed in the past twenty years and how this enterprise continues to evolve.

Although this report is descriptive, and not prescriptive, and I avoid drawing strong conclusions about the actual progress made in the past two decades, I do wish to say that reviewing the literature from the past 20 years served as a personal confirmation that there has not been any retrenchment or retreat with respect to the victims' rights movement. Victims' rights were not just the flavour of the last decade of the 20<sup>th</sup> century. However, it is important not to be deceived by the flurry of law reform and academic activity and simply conclude from the flurry that real progress has been made in ameliorating the plight of the crime victim. Although there was a similar rapid flurry of activity in the last few decades of the 20<sup>th</sup> century, there were many who believed that victims were just "all dressed up with nowhere to go" (Elias 1993:26).

So as the reader of this report wades through all the developments at the beginning of the 21<sup>st</sup> century which are presented in this report, a critical issue which every reader needs to consider is whether the question posed by Professor Elias at the end of the last century has the same relevance at the beginning of this century:

For all the new initiatives, victims have gotten far less than promised. Rights have been unenforced or unenforceable, participation sporadic or ill-advised, services precarious and underfunded, victims needs unsatisfied if not further jeopardized, and victimization increased, if not in court, then certainly in the streets. Given the outpouring of victim attention in recent years, how could this happen? (Elias, 1993:45)

**Alan N. Young**  
September 28, 2020

## Part I: Introductory Remarks – From Theory to Practice

### 1. The Growth of Victims' Rights

Starting in the 1970s, crime victims began a transformation from being mere “evidentiary cannon fodder” (Cavadino & Dignan 1996:155) for the prosecutor to active participants demanding that their voices and views be considered by criminal justice professionals. The 1970s was a decade of significant reform with respect to compensation for injury from crime and the 1980s was a decade of the institutionalization of victim participation in the process through the creation of rights and entitlements for victims. The 1990s was a decade of taking stock of the rapid changes in the status of the crime victim.

The historical and political context in which this transformation begun may have changed in the past two decades, but the interest of academics and government officials has not waned. As for the origin of the victims' rights movement, it must be recognized that from the 1960s to 1991, the rate of violent crime in Canada increased dramatically by nearly 400% (Easton, Furness & Brantingham 2014; Statistics Canada 1992), and many political actors began to champion a war on crime and an espoused commitment to address the plight of crime victims. It may be that the victims' rights movement was partly spawned by political exploitation of fear, but it also had to be recognized that independently of any political objectives, crime victims (and the general public) consistently expressed a lack of confidence in the administration of justice. In addition, social scientists began to document the phenomena of “secondary victimization,” in which victims of crime experienced greater trauma and anxiety as a result of their interaction with the criminal justice system.

Since the 1990s, there has been a flattening and reduction in the incidence of violent crime but interest in fostering reform to address the plight of the victim has not subsided. Crime rates may have decreased over the long term, but public opinion polls still consistently demonstrate a low level of confidence in the administration of justice (Angus Reid Institute 2020; Ekos Research Associates Inc. 2017; 2019; Department of Justice Canada 2019b; Cotter 2015). A 2020 Angus Reid poll shows that only 36% of Canadians have confidence in the courts, which is down from 41% in 2018 and 44% in 2016 (Angus Reid Institute 2020). Other polls may show higher levels of confidence among the general population (Department of Justice Canada 2019b), but among crime victims there is a consistent expression of a lack of confidence in the ability of the system to assist the victim (Lindsay 2014a; 2014b; Department of Justice Canada 2017; 2019a; Office of the Federal Ombudsman for Victims of Crime 2017e). As the Federal Ombudsman for Victims of Crime said in 2017: “victims don't trust our criminal justice system” (2017e:5). Similarly, a 2019 Department of Justice report noted that “despite some advancements in victims' rights, many victims continue to lack confidence in the system” (2019a:5). The lack of confidence expressed by crime victims in the criminal justice system's ability to assist them is also reflected in current opinion polls, which show that “almost twice as many Canadians express high confidence in the system's ability to respect the rights of accused as compared to helping victims of crime” (Department of Justice Canada 2009:26).

In addition, many commentators and observers still believe that the criminal justice process is a breeding ground for secondary victimization. It has been said that “if one set out intentionally to

design a system for provoking symptoms of posttraumatic stress disorder, it might look very much like a court of law” (Herman 2003:159). In 2006, Wemmers and Cyr expressed the common refrain that “victims often report a sense of secondary victimization or the second wound which refers to the enhanced suffering resulting from insensitive reactions of others, particularly the criminal justice system” (2006b:103). In 2017, the Federal Ombudsman for Victims of Crime similarly noted that “interactions with Canada’s criminal justice system are often leading to...re-victimization...and...harmful experiences within that system have irrevocably altered their lives and notions of justice and community” (2017e:5).

Lack of confidence in the system, and the system’s capacity to revictimize the victim, may be fueling the continued academic and governmental interest in debating further law reform in aid of victims, but it is important to also acknowledge that another reason why victims’ rights are a work in progress is the fact that there remains an unresolved philosophical or theoretical debate about the proper role of the victim in an institutionalized justice system monopolized by the state. Despite the historical ascendancy of the victim (as discussed in the 2001 report), our system of public prosecution by state agents has a well-established historical pedigree of over 200 years. The system was built on the notion of excluding lay participation (except for a jury) and when victims started to demand recognition in the 1960s, they were seen as “barbarians at the gate” (Cassell 1999). This started a prolific and sustained academic debate into the philosophical justifications for a renewed integration of the victim into the criminal justice process.

## 2. From Theory to Practice

In the 2001 report, a great deal of time was spent outlining the struggles to find a sound theoretical underpinning for the reintegration of the victim into the modern process. The report discussed the efforts of theorists to fit victims’ rights into a process designed to achieve retributive, denunciatory and deterrent effects. The academic enterprise of struggling to provide a proper penological foundation for victims’ rights spawned a large body of literature which has reformulated the nomenclature and philosophical underpinnings of a retributive theory of justice (Cavadino & Dignan 1996; Sebba 1996). Whether it is called “reconciliation” (Marshall 1985; Umbreit 1985; Galaway & Hudson 1990), “reparative justice” (Dignan 1992), “relational justice” (Burnside 1994) or “restorative justice” (Cragg 1992; Zehr 1990), the focus has been on emphasizing the “restoring the balance” function of retributive justice as a principled basis for re-integration of the victim.

The predominant theme and focus in the current literature still remains philosophical or theoretical. As Susan McDonald has recently noted: “there is less academic research in evaluating programs and reviewing legislative reform with an empirical (versus a theoretical) lens” (2020b:4). Commentators continue to try building upon Herbert Packer’s seminal 1968 textbook, “Two Models of the Criminal Process,” by reformulating Packer’s models, or constructing new theoretical models which could welcome and accommodate lay intrusion (Beloof 2007; Hughes & Mossman 2001; Wilson 2005; Jain 2019; Cassell 2009; Sorochinsky 2009; Edwards 2003). Canadian scholars have contributed to this enterprise starting with Professor Roach’s (1999) Punitive and Non-Punitive Victims’ Rights Models and most recently with Professor Manikis’ (2019a) Penal Parsimony Model. The fact that the theoretical debate has

not been resolved may provide some explanation for the continuing reluctance to fully embrace victims' rights by jurists who are tasked with interpreting and enforcing the law.

In the past two decades, it is unlikely to find many legal professionals and jurists repeat the condemnatory tone found in the comments of the pre-eminent criminal lawyer, Eddie Greenspan, who said that "gradually the novel notion of victims' rights has poisoned the well of traditional criminal law values" (2001:90); however, we do find jurists repeating the oft-quoted words of the B.C. Court of Appeal, who said in 1992 that we must understand the "the reality that the criminal justice system was never designed or intended to heal the suffering of the victims of crime." (*R. v. Sweeney* 1992:95). For example, in 2012, the B.C. Provincial Court noted that "the sentencing process is fundamentally incapable of dealing with the legitimate needs of victims and their survivors" (*R. v. Smith* 2012:8), and in 2013 the B.C. Court of Appeal pointed out that "it must be remembered that a criminal trial, including the sentencing phase, is not a tripartite proceeding. A convicted offender has committed a crime - an act against society as a whole. It is the public interest, not a private interest, which is to be served in sentencing" (*R. v. Berner* 2013:16; citing *R. v. Bremner* 2000:26 and *R. v. Gabriel* 1999:22). The current and conventional understanding of jurists does not readily accept that there is a theoretical justification for increased victim involvement in the process.

Resolution of theoretical debates is not a purely academic exercise. Consistency and clarity in practice can best be achieved when everyone is operating within the same theoretical framework. An example of how unresolved theory can lead to practical inconsistencies can be found in the area of victim compensation. As will be noted later on, there has been strong criticism expressed about the efficiency and efficacy of provincial compensation schemes which have existed since the late 1960s. Perhaps the shortcomings of these programs can be attributed to the fact that from the outset, there was a lack of consensus about the theoretical justification for the state to pay money for injuries inflicted by third parties.

Three models were advanced to justify state compensation. First, there was the argument that the state had a legal or moral duty to protect its residents and this triggered a moral duty to compensate for loss. Second, there was the "social welfare" justification - compensation as a natural extension of the developing welfare state, similar to the objectives underlying worker's compensation, i.e. to distribute the risks of employment to some larger institution, which could much more easily bear the costs of injury. The third justification for these programs was entirely different in that it engaged a utilitarian approach to the issue by arguing that the state would benefit from awarding compensation because such compensation would encourage victims to report crime and co-operate with law enforcement officials.

It would not be very important to articulate a coherent and consistent philosophical foundation for state compensation if theory did not impact upon practice. However, as Professor Burns strongly asserts, different philosophical orientations lead to different implementation strategies:

...the purpose of a scheme must be determined before that scheme can be properly administered. Ambiguous portions of an Act can best be construed and applied if the rationale of the Act is known. Again, the purposes of a scheme must be determined before the scheme itself can be evaluated. If its object is merely to placate the public, for example, then its success can be measured by how effectively it has silenced critics of the criminal justice system. The number of

persons who seek compensation and the eventual fate of their claims are both irrelevant in evaluating such a scheme. Yet clearly both of these are significant in evaluating a scheme whose purpose is to alleviate to some extent the suffering caused by violent crimes. The statutory scheme's purpose must be ascertained before it can be interpreted as an event in social or legislative history. If it reflects an extension of our concept of the obligations of the state, it must be interpreted in the light of increasing court-imposed duties on governmental bodies. If it reflects an expanded concept of the duties of the welfare state it must be interpreted in a different light. The way in which we construe the scheme's role in social history will suggest different extensions in the future (Burns 1992:94-5).

### 3. Striking a Balance – Three Difficult Cases

A coherent theoretical or philosophical foundation would assist justice officials with the more practical and real problem of striking a proper balance between the interests of the victim, the interests of the accused, the interests of the community and the interests of the state. Striking a proper balance is a difficult task and reasonable people will often disagree. Three high-profile cases from three jurisdictions demonstrate the practical difficulties in striking a proper balance which prioritizes the interests of victims. In New Zealand, a trial court imposed a “restorative sanction” which would have given the victim of a violent robbery \$15,000 for plastic surgery to repair an embarrassing scar. The victim indicated to the court that imprisonment would have no value and the accused agreed to pay for the surgery. The case was then overturned by the New Zealand Court of Appeal, which imposed a three year term of imprisonment, stating that: “[W]e would not want this judgment to be seen as expressing any general opposition to the concept of restorative justice... Those policies must, however, be balanced against other sentencing policies... dealing with cases of serious violence. Which aspect should predominate will depend on an assessment of where the balance should lie in the individual case” (*R. v. Clotworthy* 1998:661).

This decision generated a fair degree of commentary and criticism (Manikis 2019a; Roach 2005; Bowen & Thompson 1999) and it was suggested that the Court “succeeded in relegating the victim back to the periphery of the criminal justice system where victims have been since the implementation of the Westernised Criminal Justice System into New Zealand” (Bowen & Thompson 1999).

Seven years later, a trial court in Toronto adopted a similar restorative approach to sentencing for a high-profile drive-by shooting which left a woman in a restaurant paralyzed. In addition to a term of incarceration, the trial judge ordered that \$2 million be paid in restitution to the victim. On the one hand, this approach was seen as a “red-letter day for victims” as “a lighter sentence was a worthwhile trade-off for significant restitution for a victim of a horrible crime” (Edwards & Rankin 2011). On the other hand, the spectre of wealthy people being given a reduction in prison time in exchange for trying to make the victim whole was seen by some as the use of “dirty money” to set a “horrible, horrible precedent” (*ibid*).

Finally, in 2018, when Larry Nassar was to be sentenced in the United States for two decades of sexual abuse against professional gymnasts, the sentencing judge went to great lengths to give a multitude of victims a voice at sentencing. More than 150 victims spoke before sentence was

pronounced in this case, which was being followed carefully in the public eye. While some praised the judge for taking the time to ensure that all of the victims were heard and for supporting the victims throughout the sentencing process, others claimed that this type of spectacle does not aid the judge in arriving at a fit sentence and that the judge had “abandoned the proper role of neutral arbiter, took sides, and inappropriately broadcast[ed] her views” (Green & Roiphe 2019a:383).

Without a consensus on the philosophical foundation for victims’ rights, it is not surprising that judges have difficulties in striking a proper balance and integrating the victim in a manner that does not raise condemnation or criticism. However, in completing the 2001 report, it became clear that a murky philosophical foundation was of much less significance in thwarting the development of victims’ rights than the practical resistance to change shown by legal professionals.

#### 4. Professional Neutralization

Many commentators have asserted that victims have not been integrated into criminal justice processes because of institutional resistance. That is, legal professionals often engage in a form of “professional neutralization” (Davis, Kunreuther & Connick 1984; Erez & Tontodonato 1992; Erez 1994; Kury, Kaiser & Teske 1994; Erez & Roeger 1999; Erez & Laster 1999) to prevent full implementation of victims’ rights. Given that “criminal justice professionals have little incentive to act in accordance with the wishes and needs of victims, since they are not directly accountable to them, either legally or organizationally” (Garakwe 1994:599-600), this observation is not entirely surprising.

Professional neutralization was not borne out of malice or disdain for victims. Rather, “officials fail to honor victims’ rights largely as a result of inertia, past learning, insensitivity to the unfamiliar needs of victims, lack of training, and inadequate and misdirected institutional incentives (Mosteller 1999:449). Since the 2001 report, the academic literature has not further explored this issue in any serious or systematic way; however, there is some literature in Canada which still identifies the views and practices of legal professionals as a major obstacle to the development of victims’ rights. For instance, Professor Wemmers noted in 2005 that “the biggest obstacle to change is the attitude held by many legal professionals working throughout the criminal justice system that victims do not belong” (2005a:27). Similarly, as noted by a participant during the Federal Ombudsman for Victims of Crime’s engagement process in 2017, “it’s about an attitude shift and making a commitment. This requires the state to take responsibility for meaningfully supporting victims” (2017e:5). Despite such findings, however, Professor Roberts nevertheless claimed in 2008 that the research demonstrated a “much greater professional acceptance of the role of the victim now” than ever before (2008b:48).

There may not have been any systematic revisiting of the effect and impact of professional neutralization in the past two decades, but some of the empirical evidence in evaluative studies implicitly support the claim that professional resistance still remains a problem. For example:

- **Testimonial Aids:** Hickey and McDonald (2019) found that one of the biggest obstacles reported with respect to the use of testimonial aids was professional resistance to their use (which was reported by 45% of respondents).

- **Victim Impact Statements:** Prairie Research Associates (2004) found that while judges believe that victim impact statements are helpful, less than one-third of them inquired as to whether victims had been advised of their right to make a statement despite being statutorily required to do so. Campbell (2015) similarly found that “some” judges in Quebec did not inquire if victims had been given an opportunity to provide a victim impact statement, usually because of busy court dockets or because a joint sentencing recommendation had been made.
- **Victim Surcharge:** McDonald, Northcott and Raguparan (2014) found that judges never questioned nor refused defence requests to waive the surcharge and Crowns never objected when defence counsel requested a waiver.
- **Restorative Justice:** The 2018 Criminal Justice Professionals Survey found that 90% of police and 91% of victim service workers were aware of RJ processes, but 51% of police and 62% of victim service workers rarely make referrals to such programs (Bourgon 2019).
- **Compensation:** In 2007, the Ombudsman in Ontario found that Ontario’s Criminal Injury Compensation Board (“CICB”) was in “deplorable shape” and that “instead of holding out support for victims of crime, [CICB] often greet[ed] them with bureaucratic indifference and suspicion... and embrace[d] delay” (2007:1).

## 5. Legal Culture

Since the inception of the victims’ rights movement, there has been a robust debate as to whether the entitlements and rights of victims should be elevated and enshrined into a set of constitutional rights. One advocate and supporter of the drive to constitutionalize these rights changed his perspective on this issue, and, in 2005, concluded that any constitutional amendment would be a hollow victory without a change in the legal culture of resistance and neutralization. He wrote:

In my view it is necessary to develop a new legal culture prior to turning to the amendment process, instead of hoping that the amendment will spawn an amendment-friendly culture. In our current legal culture crime victims are largely ignored. There are few lawyers and advocates available to assist victims, even though legal assistance would be indispensable for a victim wishing to seek greater participation in a highly-professionalized This is not surprising considering that legal education rarely includes any courses or programs on victims’ rights....Legal representation of crime victims in Canada is a rare event...This is disturbing considering that the right to counsel for the accused is considered indispensable for his/her participation in the process. Accordingly, the proper training and education of legal professionals is a necessary first step in developing a legal culture in which a VRA could flourish (Young 2005:469).

In 2002, a similar sentiment from the American perspective was expressed by one of the authors of the first victims’ rights law school casebook in North America:

As we look to the future of crime victims' rights in America, there is no doubt that crime victim attorneys are in a unique position. These attorneys hold the keys to opening the doors of justice for many crime victims. Based upon the prevalence of victims' rights violations, it is apparent that attorneys have many opportunities to ensure the compliance and enforcement of victims' rights. Attorneys can set precedent simply by taking these laws off the shelves and breathing life into them through legal advocacy. By engaging in this work, attorneys will join in the noble tradition of devoting their skills and time in the defence of civil liberties (Gillis & Beloof 2002:703).

Since the completion of the 2001 report, there has been some increase in entitlements to counsel, as will be discussed; however, the question remains whether the legal culture has changed sufficiently for legal professionals to embrace victims' rights. One crude indicator of a shift in culture since 2001 would be the presence of post-secondary educational programs for lawyers and other service providers. In 2004, Steve Sullivan (former Federal Ombudsman for Victims of Crime) and Professor Alan Young were retained by the Department of Justice to complete a casebook on victims' rights for Canadian law schools. In 2010, this casebook, with some modifications, became the course materials for a victims' rights course at Algonquin College in Ottawa, and since then, the course and casebook has become part of the curriculum at Lambton College, St. Lawrence College and Sault College. The course is described as follows:

Being a victim of crime thrusts a person into a number of legal systems. Students critically examine legal systems from a victims' perspective. Particular focus is placed on the criminal and family law systems and how they intersect. Relevant legislation, as well as recommendations from inquests and inquiries are examined. Restorative justice and victims' rights are explored through discussions and case studies (Algonquin College 2020).

Despite the interest in community colleges, there has been little interest shown in law schools for introducing law students to the tools and skills needed for victim advocacy. Since 2001, there has finally been two textbooks published in Canada relating to victims' rights and the law (Barrett 2001; Perrin 2017), but there is no published casebook on this topic, nor are there any regularly offered victims' rights courses as part of the curriculum at any Canadian law schools. In contrast, dozens of American law schools offer these courses and many American universities offer a Victim Advocacy Certificate program to train students in the delivery of victim services. In addition, American law schools continue to host educational symposiums and dedicate volumes of their law journals to these conferences (McGeorge School of Law 2019; Lewis & Clark Law School 2020; Cassell 2015 [Ohio State Journal of Criminal Law]).

A shift in culture may not be indicated by the current practices of law schools and the legal profession, but since 2000, state actors have devoted a great deal of time to the mission of educating the public about the scope and availability of victim entitlements. The Government of Canada's Victims of Crime Initiative set up the Policy Centre for Victim Issues in 2000, whose mandate now includes the implementation of the Federal Victim Strategy. The Research and Statistics Division of the Department of Justice published an issue of its annual journal,

JustResearch, in 2007 which focused solely on victims of crime research issues, and created the Victims of Crime Research Digest in 2008. Since its inception, the Digest has published 12 issues all dedicated to research and policy issues pertaining to victims' rights.

Although the federal government has taken the lead with respect to education and informational outreach, there are similar efforts being taken by provincial authorities. For example, Alberta released the Alberta Victims of Crime Protocol, which provides a user-friendly outline of what victims can expect from the criminal justice process as well as the rights of both victims and witnesses (Alberta Ministry of Justice and Solicitor General 2013). However, in conducting the research for the 2001 report and for this report, it became apparent that the information available to the public in most provinces with respect to victims' rights and services is often obscured and not readily accessible in any clear fashion.

In the past two decades it cannot be said with any certainty that there has been a significant shift in legal culture such that professional neutralization is no longer an obstacle to success. However, in the past two decades, there has continued to be gradual and incremental law reform in Canada (as well as in other jurisdictions) to enhance or protect the rights and entitlements of victims. The remainder of this report will look at what advancements have been made over the past two decades with respect to participatory rights, welfare rights and restorative justice.

## 6. The Measure of Success

The recital or listing of all the legislative and policy changes in the past two decades does suggest that progress is being made in the vindication of the interests of victims of crime. However, the volume and scope of law reform from the 1980s to 2000 was both greater and more dramatic, yet one of the themes that emerged from the 2001 report is that the extensive effort to integrate the victim had not been entirely successful. The general conclusion reached in the 2001 report was as follows:

The evidence on victim satisfaction with increased participation in the criminal process is not convincing. In addition, there is no evidence to demonstrate that victim participation can lead to a decrease in victim distress (except for the fact that participation through the VIS may lead to increased orders for restitution and restitution is a factor in reducing victim distress). The absence of evidence may suggest one of three possibilities:

- 1) victim participation will not lead to victim satisfaction;
- 2) victim participation has not led to increased satisfaction because the current participatory rights are underutilized, and often merely symbolic in nature; or
- 3) current studies are inconclusive and deficient and therefore better studies need to be undertaken.

Regardless of which possibility is the most plausible explanation, there is one proposition established on the state of the current evidence: victims do not feel greater satisfaction when they participate within the current criminal process but

they do experience some relief of distress and increased satisfaction when their cases are resolved outside of criminal courts in some cases. At a minimum, for true victim rights advocates, this proposition should lead to greater consideration and study of alternatives to adversarial criminal courts (Young 2001b:62).

For many of the scholars, researchers and state agents who have written in this area, the measure of success for law and policy reform is whether there has been an increase in victim satisfaction and confidence in the system. As satisfaction is an elusive and subjective yardstick by which to measure the effectiveness of reform, most scholars and researchers usually address five questions as a measure of success:

1. To what extent are rights or services known to the victim?
2. If known, is the right or service underutilized?
3. Has a legislative initiative (including its implementation), or service, led to greater victim satisfaction or a decrease in secondary victimization?
4. If an initiative or service has not led to greater satisfaction, can this shortcoming be attributed to “professional neutralization”?
5. Is there any evidence to confirm earlier studies which indicated and argued that crime victim satisfaction is more related to process than outcome?

In reviewing the developments regarding participatory and welfare rights in the past two decades, this report will identify any empirical research which addresses these five questions for each particular right or entitlement. Unlike the previous reports, this brief report will not make any prescriptive statements as to what may be needed for future law reform. Rather, the remainder of this report serves the more modest objective of chronicling the continuing growth of victim-related law and policy reform with some preliminary conclusions as to whether such reforms appear to truly address the legitimate needs and concerns of crime victims.

## Part II: Participatory Rights

Throughout the 1980s, victim participation in the Canadian criminal process was significantly enhanced through three different mechanisms. First, there was, and continues to be, a gradual and systematic effort to make the trial process more responsive to victims of violence by removing archaic procedural and evidentiary rules which contributed to the secondary victimization experienced by victims who appear as witnesses at trial. Second, in 1988, the victim impact statement was given statutory recognition, thus providing the victim with a voice at the sentencing hearing.

The enactment of Victims' Bills of Rights in virtually every American and Canadian jurisdiction has been the third mechanism employed to enhance victim participation. It has proven to be the most controversial and the most ineffective mechanism largely due to its ambitious breadth, its indeterminacy and its failure to support the regime of rights it provides with meaningful remedial provisions.

By the end of the millennium, law-makers around the world had embraced victims' rights in principle and, as such, the question moving into this century shifted to one of exploring implementation of the principle. In 1999, Professor Tobolowsky wrote:

the relevant inquiry is no longer whether victims should have participatory rights in the criminal justice process. The incredibly rapid adoption of constitutional and legislative victim rights provisions over the last fifteen years ensures that victims will have a participatory role in the criminal justice process." (Tobolowsky 1999:103)

### 1. Nature and Scope of Participatory Rights

Participation is intrinsically valuable. The perception of some degree of control empowers and strengthens the individual. It is clear that providing crime victims with some degree of control and autonomy is an important first step in the healing process. Victim participation is the first step in regaining self-esteem lost as a result of criminal victimization.

Participatory rights can take on an active or passive role:

Victim initiatives can be divided into passive as well as active forms of participation. Passive forms include the right to receive information and mechanisms that enable victim inclusion as a passive receptor of services. More active forms of participation include victim consultation, providing information, and more recently victims taking on the role of agents of accountability (Manikis 2019a:202).

Whether active or passive, the nature of participatory rights for victims share much in common with the due process rights afforded to the accused. It is arguable that some of the participatory rights, such as notification and consultation, have a constitutional underpinning. Section 7 of the *Charter* guarantees fundamental justice for "everyone" if the law impairs the person's life, liberty and security. In light of our understanding of the phenomena of secondary victimization,

the failure to notify a victim of the date of trial, or the failure to notify and consult with them regarding resolution of the case, is arguably an impairment of the security rights of the victim.

However, in 1999, the Ontario Superior Court rejected the notion that participatory rights can, and should, be elevated to the status of constitutional rights, stating that:

Could it be said that a victim's right to be informed is vital or fundamental to our societal notion of justice? I do not see the law going that far. It is a laudable idea, but it is not vital or fundamental in the manner of a principle such as the presumption of innocence or the right to counsel. (*Vanscoy v. Ontario* 1999:37)

Although no further attempts have been made in court to elevate participatory rights to the level of *Charter* rights since this decision, a fulsome debate has emerged in Canada and the United States about enacting a constitutional amendment to protect victims' right (Roach 2005; Young 2005; Manikis 2010a; Paciocco 2005; Beloof et al. 2018; Cassell 2012; Twist & Seiden 2012; Browne 2004). In Canada, the debate never led to any serious proposals to embark on a path of amending the Constitution, and in the United States, there were numerous proposals for an amendment, which had the support of various Presidents, but all failed with the last attempt being made in 2015 (Cassell 2011; 2012; Twist & Seiden 2012). However, 35 states have enshrined victims' participatory rights in their Constitution (up from 29 states since the writing of the 2001 report).

In terms of constitutional amendments at the state level, 11 states have adopted "Marsy's Law," which refers to a 2008 amendment to the Constitution of California to expand the scope of victims participatory rights with a corresponding right to seek enforcement of these rights in court (Belooof et al. 2018; Cassell & Garvin 2020). Similar to the Marsy's Law constitutional amendments, the *Crime Victims' Rights Act* ("CVRA") was enacted into federal law in 2004 and this statute provides victims with standing to seek enforcement of participatory rights in federal court. It has been suggested that the United States is currently undergoing a "new wave" in terms of the nature and scope of victims' rights:

...a new wave of victims' rights amendments has been enacted over roughly the last decade, expanding the rights promised to victims and ensuring that those rights can be enforced, even by the victims. These new amendments draw on lessons learned over the last several decades regarding the scope, structure, and articulation of rights necessary to make crime victims' rights meaningful. Oregon modified its constitution in 2008 to remove express hurdles to rights enforcement. That same year, California adopted the first Marsy's Law. Since then, similar Marsy's Law amendments were added to the state constitutions of Illinois in 2014, North Dakota and South Dakota in 2016, Ohio in 2017, and Florida, Georgia, Nevada, North Carolina, and Oklahoma in November 2018. (Cassell & Garvin 2020:101) (note: since the writing of this article, Marsy's Law was also adopted in Wisconsin (2020)).

The issue of enforceability of rights will be discussed at the end of this Part; however, it must be noted that the most significant difference between the nature of participatory rights in Canada and the United States lies in enforceability. Both jurisdictions contain a similar, if not, identical

set and scope of rights, but the mechanisms for enforcing these rights in Canada are largely toothless or non-existent.

Putting aside statutory protections for victims in the *Criminal Code*, participatory rights for victims in Canada can also be found in the provincial Bills of Rights, but none of these statutory regimes authorize seeking enforcement in court. In fact, most of the statutes specifically direct that the violation of a right does not give rise to a cause of action. In 1999, two victims launched a constitutional challenge to the Ontario statutory bar on seeking judicial relief on the basis that a legislature cannot constitutionally create a right with a remedy. Surprisingly, the court dismissed the challenge by calling into question whether the provincial laws actually create a right for the victim:

“the legislature did not intend for s.2(1) of the *Victims’ Bill of Rights* to provide rights to the victims of crime...The *Act* articulates a number of principles, whose strength is limited not only by precatory language, but also by a myriad of other factors falling within the broad rubrics of availability of resources, reasonableness in the circumstances, consistency with the law and public interest, and the need to ensure a speedy resolution of the proceedings. Finally, even if there was an indefensible breach of these principles, the legislation expressly precludes any remedy for the alleged wrong. While the Applicants may be disappointed by the legislature’s efforts, they have no claim before the courts because of it.” (*Vanscoy v. Ontario* 1999:21, 41)

This conclusion has been echoed in two recent cases out of Saskatchewan (*R. v. F.(R.D.)* 2016; *R. v. Hitchings* 2016). So after two decades there still remains ambiguity about the nature of participatory rights – it remains unclear whether victims’ rights should be seen as equivalent to constitutional rights, and it remains unclear whether the statutory rights found in all of the provincial Bills of Rights can even be called and considered rights at all.

## 2. The Uniform and Universal Legal Framework

For the most part, victims’ rights reforms around the world are remarkably uniform. Of course, there are variations on the theme, but putting aside the unique “adhesion” procedures in most European countries (a process whereby the victim becomes a secondary prosecutor in the criminal process), many jurisdictions have adopted some form of victims’ rights model which includes compensation schemes, victim assistance programs, and/or participatory rights through victim impact statements and victims’ Bills of Rights.

The reason why victim law reform has taken similar forms around the world is due to the fact that most of the reform was predicated upon the 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (a document co-sponsored by Canada). Further uniformity was achieved in Europe with the passage of the 1983 European Convention on the Compensation of Victims of Violent Crime and the 1985 Recommendation R(85) (The Position of the Victim in the Framework of Criminal Law and Procedure) of the Committee of Ministers of the Council of Europe (Muller-Rappard 1990).

There have been no changes to the European Convention since 2001, and there are now a total of 26 ratifications. However, in 2001 the Council of the European Union adopted the *Framework*

*Decision on the Standing of Victims in Criminal Proceedings* (2001/220/JHA). This Framework was lauded as a “milestone” for victims in the EU because it was the first “hard-law instrument” at the supranational level (Groenjuisen & Pemberton 2009; Kucuktasdemir 2016). It set out minimum standards for the treatment of victims of crime (including the right to be heard, informational components, the opportunity to participate, compensation, protection and victim support), though member states had considerable discretion as to how those rights should be implemented.

In reports prepared in 2004 and 2009 respectively, the European Commission found that the objectives of the Framework Decision were not being achieved due to wide disparity in national laws as well as the frequent use of non-binding instruments to implement such rights (e.g. guidelines and recommendations) (Buczma 2013). The Commission also noted that the Framework did not go far enough to protect victims’ rights (Gavrielides 2017).

As a result of the European Commission’s findings, and after consultation with member states, the *EU Directive on Victims’ Rights* was adopted in 2012, replacing the 2001 Framework Decision. This Directive addressed all of the rights in the Framework Decision but in a more comprehensive and detailed manner (Kucuktasdemir 2016; Buczma 2013), as well as created a new right of review for when a prosecutor chooses not to prosecute (Buczma 2013). It has been noted that there is no European instrument quite like this one, as it imposes “such a vast and comprehensive obligation [on member states] to establish common minimum rights related to victims of crime” (*ibid*:236).

In Canada, in recognition of the United Nations Declaration of Basic Principles of Justice for Victims of Crime, federal, provincial and territorial Ministers Responsible for Criminal Justice and Public Safety put forth a policy statement in 1988 enumerating principles to guide Canadian society in promoting access to justice, fair treatment and provision of assistance for victims of crime. These principles were incorporated, with some variations, into the provincial and territorial Bills of Rights. The policy statement was revised in 2003, and most of the underlying themes from the 1988 statement – such as victim privacy, compassion and respect for victims, information about the process and programs for victims of crime, and the safety of victims – have been incorporated into the 2003 Basic Principles (See **Appendix “A”** for the 1988 and 2003 Statements of Principles). However, some of the bolder language choices in the 1988 statement can no longer be found in the 2003 version. For example, there is no mention of prompt and fair redress for victims in the new statement. Similarly, whereas there was specific reference made to enhanced training to sensitize criminal justice personnel in 1988, the new statement simply states that victims’ needs and concerns should be considered when programs and training practices are created.

As law and policy reform around the world has been modelled on the terms and conditions of the 1985 U.N. Declaration, there is a great deal of uniformity in the approach taken across jurisdictions to date. In recent years, some American jurisdictions have expanded the scope of the U.N. Declaration with their adoption of “Marsy’s Law” constitutional amendments to make participatory rights enforceable by the victim. Canada has not gone this far but the last two decades has seen a number of significant developments at the federal level.

### 3. 2015 Canadian Victims Bill of Rights

Provincial Bills of Rights have been in place for three decades, but the *Canadian Victims Bill of Rights* (“CVBR”) did not come into force until July 23, 2015 (S.C. 2015, c. 13). This Act focuses on four basic principles: a) the right to information; b) the right to protection; c) the right to participation; and d) the right to seek restitution. Many of the principles noted in the 2003 Canadian Statement of Basic Principles have been incorporated into the CVBR. However, some of the principles which are notably omitted include: a) reasonable measures should be taken to minimize inconvenience to victims; and b) the needs, concerns and diversity of victims should be considered in the development and delivery of programs and services (including education and training).

The CVBR affords victims a “right” to convey their views about criminal justice decisions that may impact their rights and it mandates that these views be considered by authorities. However, the Act both explicitly and implicitly creates limitations on complaints/reviews of violations. As in the provincial Bills of Rights, the CVBR explicitly states that a violation of any right does not give rise to a new cause of action, a right to damages or a right of appeal. It further notes that nothing in the Act should be construed as “granting to, or removing from any victim” standing.

The Office of the Ombudsman for Victims of Crime was established to serve as a complaints review process for infringements by federal agencies (though most federal agencies have their own internal review process in place), but, no obligation was imposed on provincial agencies, who are responsible for the administration of criminal justice, to create a complaint process. For victims who feel that their rights have been infringed or denied by a provincial body, their only option is to “file a complaint in accordance with the laws” of that province (which, as will be discussed, do not have effective complaint processes).

In five short years, the CVBR has been cited in over 80 cases. Admittedly, many of the citations are of little substantive value other than making a passing note that the interests of the victim must be considered; however, in 30 cases, the legislation impacted a decision in favour of the victim in various different ways including: preventing the release of sensitive exhibits to media (*R. v. Arfmann* 2020); protection of private text messages and photographs (*R. v. C.C.* 2019; *R. v. GSK* 2019); ensuring that victim apprised of court dates (*R. v. Norwack* 2019); protecting victim from unwanted intrusion by investigator for accused (*R. v. Downey* 2019); allowing family members to provide a victim impact statement on the victim’s behalf (*R. v. Kaliugavarathan* 2017; *R. v. Thompson* 2017; *R. v. Darby* 2016); and allowing a support dog as a testimonial aid (*R. v. W.(C.)* 2016). In 2020, the Supreme Court of Canada also cited the CVBR in criticizing a sentencing judge for not permitting the mother of a victim to provide a victim impact statement (*R. v. Friesen* 2020).

Despite the limited scope of the federal law, the enactment of this statute has been seen as a significant step forward:

Further, Bill C-32 marks a sea change in the law. It is the first time in Canadian history that victims’ rights have been comprehensively set out in federal legislation. It represents a significant shift in the conversation; no longer are victims’ rights purely symbolic social policy that can be easily ignored or outright

dismissed in criminal proceedings....Rather, it is about enhancing the rights of victims throughout the many stages of the criminal process. The codification of administrative rights for victims and the creation of national standards designed to ensure that victims are treated with courtesy, compassion and respect throughout the process is a positive and significant step forward. At a minimum, it will serve as the cornerstone for ensuring that the *Charter* rights of all persons are respected in criminal proceedings. (Barrett 2001 [updated in 2019]:1-17)

The *Canadian Victims Bill of Rights* is a significant development for victims of crime in Canada. The rights that it recognizes are extensive and the fact that it takes primacy over general legislation makes its impact potentially very powerful. It affords victims the opportunity to have a more meaningful voice in the criminal justice system, greater information, enhanced consideration of their security and greater consideration to receive restitution. (Perrin 2017:47).

#### 4. Provincial Bills of Rights

(see **Appendix “B”** for a list of relevant Provincial statutes)

These provincial enactments have been in existence for close to thirty years, but it remains unclear whether they have any significant practical impact in light of the obvious shortcoming of failing to create a process for enforcement of the enumerated rights. Despite this shortcoming, the legislation has continued to be developed and expanded upon since the 2001 report. The similarities among the various provincial regimes far outweigh the differences, and the core similarities all relate to the principle of treating the victim with respect and dignity, and the obligation to keep the victim informed with respect to the nature and timing of court proceedings. There are some unique provisions showing that there is considerable provincial variation and inconsistency, and in seeing the following list of variations, it becomes clear that there are many different aspects of the criminal process which need to be addressed to give effect to participatory rights.

1. Only Manitoba (s. 5) and Ontario (s. 2(1)(5)) require that interviews with sexual assault victims be conducted by officials of the same gender as the victim;
2. Only British Columbia (s. 6(1)(c)), Manitoba (s. 7(d)) and Ontario (s. 2(1)(2)(v)) require that the Crown provide the victim with reasons as to why certain decisions are made or no charges have been laid;
3. Only Manitoba (s. 14) requires that the victim be permitted to give their view on exercises of prosecutorial discretion with respect to plea agreements, the laying or staying of a charge, the Crown’s position on sentencing and whether or not to appeal;
4. Only Manitoba (s. 18), British Columbia (s. 8(f)) and Nova Scotia (s. 3(2)(c)) require that the victim be provided a separate waiting area when attending court proceedings.
5. Only Manitoba (s. 4) requires that the victim be consulted about pre-charge or pre-trial alternative measures as well as restorative justice programs;
6. Only Manitoba (s. 24/25) and British Columbia (s. 3) provide free legal representation for victims involved in O’Connor applications, seeking the production of confidential records;
7. Only Quebec (s. 3(1)) provides compensation to victims for expenses incurred to testify;

8. Only Manitoba (s. 26) and British Columbia (s. 14) establish some degree of employee protection for time-off required for testifying, providing a victim impact statement and observing the sentencing hearing;
9. Only Prince Edward Island (s. 2(c)) and Quebec (s. 6(1)) establish a right of access to medical and social services;
10. Only Ontario (s. 4) allows for waiving the requirement of paying security for costs for crime victim/plaintiffs;
11. Only Manitoba (s. 21(1)) allows victims to request a meeting with an in-custody offender;
12. Only Newfoundland (s. 8(1)) encourages participation in victim/offender mediation;
13. Only Newfoundland (s.10), British Columbia (s.8(d)), the Northwest Territories (s. 5) and Nunavut (s. 5) speak to the need for specialized training of public officials in dealing with victim needs; and
14. Only Manitoba (ss. 27-31), Yukon (s. 11(2)(a)) and British Columbia (s. 12) provide any remedial relief for non-compliance with the prescribed rights, with the former two creating an administrative complaints procedure and the latter directing that the Ombudsman assume jurisdiction over victim complaints.

Some of these unique differences are rather significant (e.g., the failure of 11 provinces/territories to address the need for legal representation and the failure of 10 provinces/territories to address any form of remedial relief) but many of the differences appear to be mere variations on a theme or simple drafting distinctions. For example, the large majority of provincial statutes stipulate that protection of the victim from intimidation is a basic principle, but only Manitoba (s. 18), British Columbia (s. 8(f)) and Nova Scotia (s. 3(2)(c)) give specificity to the principle by stipulating that victims should be accommodated within the court by the provision of special waiting rooms separate and apart from areas accessible to the accused and witnesses.

The integration of the victim in the criminal process through the mechanism of Bills of Rights falls short of providing the victim with any degree of procedural control. Six provincial regimes (AB s. 2(1)(i); NB. s. 9; NL s. 8(3); PEI s. 2(e); QC s. 3(4); SK s. 2.1(h)) limit victims' input to a statutory direction that their views "should" be considered, and Ontario, British Columbia and Nova Scotia remain silent with respect to this simple direction. Moreover, two of the territories (NT s. 5(e); NU s. 5(e)) simply state that the Victim Assistance Committee must promote assistance to victims so that they can provide such input.

Only Manitoba (s. 14) appears to establish a legal obligation on the Director of Prosecutions to ensure that the victim is given an opportunity "provide his or her views" on critical prosecutorial decisions, though the Yukon (s. 5) has also noted that "victims have the right to have their views, concerns and representations considered at any stage of the criminal justice process where the law provides for this possibility." The current thrust of participatory rights has been limited to keeping the victim apprised of the progress of the case, to explaining the process to the victim, to informing the victim of available welfare services and to permitting attendance at trial for the victim. The controversial question remains whether or not these rights should also entail participation in prosecutorial decision-making. For the most part, all jurisdictions stop short of providing the victim with a "veto" or final say respecting prosecutorial decisions (House Standing Committee on Justice and Human Rights 1998).

The provincial Victims Bills of Rights have not been cited frequently in the caselaw to date, nor have they been the subject-matter of extensive academic commentary. Moreover, the operation of these statutes has been limited. The large majority of the references in caselaw are small points dealing with the victim posting security of costs (in Ontario) (see, for example, *Nash v. Sisokin* 2015; *Alary v. Brown* 2015; *Lee v. Choi* 2018), the application of the provincial victim fine surcharge (see for example, *R. v. Broda Construction Inc.* 2019; *R. v. Orchotta* 2004; *R. v. Crawford Homes (1991) Ltd.* 2019) and compensation claims (see, for example, *Johnson v. Alberta (Criminal Injuries Review Board)* 2017; *Gonzalez v. Ontario (Criminal Injuries Compensation Board)* 2016; *Radusin v. British Columbia* 2005).

As one might expect, the enactment of Bills of Rights is also mentioned in the context of confirming that these statutes have not overtaken the traditional perspective that crime victims do not dictate prosecutorial choices. For example, in dismissing the relevance of a victim's recommendation of an appropriate sentencing range, the Alberta Court of Appeal noted:

We are mindful of the recent legislation directing that victims of crime be kept informed of developments in cases which directly involve them (*Victims of Crime Act*, S.A. 1996, c. V-3.3). However, we do not understand that those initiatives intended to give victims of crime either the authority or the responsibility to decide whether a prosecution should proceed, and if so, on what terms. That responsibility can only be discharged by qualified prosecutors who have the training, judgment and courage to make the necessary decisions inherent in every prosecution. For example, whether to proceed, and if so on what charge, whether to oppose bail, whether to seek a particular sentence and whether to appeal. Many times these decisions will be difficult and even unpopular, but the responsibility for making them must always rest with the Crown and not with victims of crime, or other interested parties. (*R. v. Tkachuk* 2001:27)

## 5. The Importance of Information

A cornerstone of all the Bills of Rights, whether federal, provincial or territorial, is the provision of various types of information to the victim at different stages of the criminal process. Simply put, there cannot be a meaningful right of participation if the victim is left in the dark. Studies have shown that general information and emotional support are some of the most common services provided by victim service providers (Sauvé 2010; Allen 2014; Bradford 2005; Gomes et al. 2002). These findings are not surprising given that two of the main reasons that victims contact victim services are the need for information and support (Prairie Research Associates 2004; Wemmers & Canuto 2002).

From the victim's perspective, it is clear that they consider the provision of information at various stages of the process as of critical importance (McDonald 2016; 2020; Wemmers & Raymond 2011; Wedlock & Tapley 2016; Manikis 2014). As Susan McDonald wrote in 2016:

- ...[I]nformation is extremely important to victims of all crimes and their families; in research studies, these people consistently identify that they need:
- Information about their specific case, such as notification of hearings and release;

- General information about the criminal justice system; and
- Practical information about services such as housing and financial support. (McDonald 2016:19).

In addition to the general information noted above, victims have also emphasized the need and importance of information for other things, such as restorative justice (Van Camp & Wemmers 2016; Wemmers 2017) and restitution (McDonald 2010; Wemmers, Manikis & Sitoianu 2017).

The provision of timely and meaningful information appears to be directly related to levels of victim satisfaction with the process: “Quality, quantity and timeliness of information can play a direct role in meeting victims’ expectations for the criminal justice process and their level of satisfaction with that process” (McDonald 2016:19; referring to Wemmers & Canuto 2002). Victims who receive information about developments in their case have a greater sense of procedural justice (i.e. feel they were treated fairly), with the greatest decline in satisfaction/feelings of procedural justice occurring when victims receive information at the outset but subsequently stop receiving such information (Wemmers & Raymond 2011).

Considering that the provision of information is of critical importance to victim satisfaction, it is surprising that the Bills of Rights, federal, provincial and territorial, uniformly fail to direct or stipulate that any particular public official take responsibility for the provision of this information. Manitoba is the exception. For example, it is prescribed in the Manitoba legislation that the “head of the law enforcement agency” must provide victims with information about the status of the investigation, the name of any person charged and whether they have been detained, as well as that the Director of Victim Services must provide victims with information regarding available victim programs and services, the structure and operation of the criminal justice system as well as the Act. This legislation also has other designations of officials responsible for providing other types of information, whereas all the other jurisdictions say nothing.

In light of this omission, it is not surprising that the provision of information to victims still remains a practical problem after many decades of living with these requirements. Research has shown that such information is not always provided to victims or victims are not always satisfied with the information they receive. For example:

- **Wemmers & Raymond (2011):** 56% of victims said that neither the police nor the Crown informed them of developments in their case;
- **Wemmers & Cyr (2006a):** 57% of victims said they had not been notified about developments in case, which led to 70% of victims indicating they were very dissatisfied with the information they provided. The researchers also found that 60% of victims were dissatisfied about the general information they received about the criminal justice system and that the percentage of victims who were dissatisfied increased as time passed (68.5% at the time of the second interview; 68.9% at the time of the third interview).
- **Wemmers & Cyr (2011):** Six out of the 15 victims interviewed had no idea what happened with their case more than a year and a half after the offence took place.
- **Federal Ombudsman for Victims of Crime (2017c:6):** “While victims have a right under the CVBR to be provided information, on request, they are frequently not getting

that information. There are ongoing problems with respect to victims not being informed of bail decisions, convictions, and sentencing. Where they are being informed, it is often happening last minute.”

## 6. The Impact of Victims’ Rights on the Criminal Process

The principles or rights which are found in the various Bills of Rights are not self-executing, and for these rights to operate effectively, it is incumbent upon legal professionals to fit these rights within the existing structure of the process. At times this is an awkward fit, and for some aspects of the process, i.e. investigation and charging, the rights directly conflict with structural components of the existing process. For other aspects, such as the trial process and sentencing, there has been a smoother and more effective integration of these rights.

### a. Investigation, Charging and Plea Bargaining Processes

In furtherance of the objective of keeping the victim informed and involved at the pre-trial stage, the *Criminal Code* was amended in 2015 to require justices to put a statement on the record indicating they took into consideration the safety and security of every victim before making a release order (s. 515(13)), and to allow victims to obtain a copy of the bail order upon request (s. 515(14)). However, beyond this reform of the law of bail (and an amendment to the guilty plea process discussed below), the last twenty years has not seen significant *Criminal Code* reform to address victim participation at the pre-trial stage.

The provision of information to victims at the pre-trial stage is a fundamental aspect of every victim Bill of Rights across the world. In addition, most regimes also speak of a right to consult with the prosecutor about critical decisions affecting the outcome of the case. However, these general principles or rights often come into conflict with the underlying structure of the Canadian process, in which a public prosecutor is provided with virtually unreviewable discretion with respect to all aspects of the charging process.

In 2002, the Supreme Court of Canada listed the core elements of prosecutorial discretion in order to identify the aspects of the process which are virtually unreviewable:

Without being exhaustive, we believe the core elements of prosecutorial discretion encompass the following: (a) the discretion whether to bring the prosecution of a charge laid by police; (b) the discretion to enter a stay of proceedings in either a private or public prosecution, as codified in the *Criminal Code*, RSC 1985, c. C-46, ss. 579 and 579.1; (c) the discretion to accept a guilty plea to a lesser charge; (d) the discretion to withdraw from criminal proceedings altogether: *R. v. Osborne* (1975), CCC (2d) 405 (NBCA); and (e) the discretion to take control of a private prosecution: *Osiowy v. Linn* (1989), 50 CCC (3d) 189 (Sask. CA). While there are other discretionary decisions, these are the core of the delegated sovereign authority peculiar to the office of the Attorney General. (*Krieger v. Law Society (Alberta)* 2002:46)

Subsequent to that decision, the Supreme Court confirmed that the plea negotiation process is part of this core and, as such, plea bargains are virtually unreviewable subject to the impossible and elusive proof of bad faith on the part of the prosecutor (*R. v. Nixon* 2011; *R. v. Anderson* 2014). In light of this well-established principle of prosecution, the general rights to information and consultation may appear to the victim to be hollow and abstract when the prosecutor can disregard or ignore the victim's input with impunity.

Despite the fact that the structure of our process is founded on the British common law, in recent years the British system has evolved to move away from unreviewable Crown discretion. Specifically, in 2013, England and Wales' Crown Prosecution Service introduced an internal administrative review process (the Victims' Right to Review Scheme ["VRR"]) for victims to seek recourse when a decision is made not to prosecute. This Scheme, which was last revised in July of 2016, includes a right to review decisions not to charge, to discontinue or otherwise terminate proceedings. From April 2018 to March 2019, there were a total of 1,930 requests for review received with 205 of those requests being upheld (Crown Prosecution Service 2019b). The *Janner* (2015) case is a prime example of how the review scheme allows victims to meaningfully participate in the process and influence the decisions made regarding whether to prosecute. In that case, the CPS chose not to prosecute the accused due to concerns about the accused's fitness to stand trial and the victim requested an independent review under the VRR in light of having a different view on the capacity issue. Upon review, a recommendation was made that CPS review their decision, which they ultimately did, and Janner stood trial (Manikis 2019a; Rogers 2017).

A recent study, however, has demonstrated mixed results about the effectiveness of this process (Illiadis & Flynn 2018). On the one hand, meaningful input into the process allowed for greater accountability while also giving victims a sense of control. Victim support workers noted that the process had benefits for victims – namely, it gave them a voice, validation, and some control – regardless of the outcome of the case. It also gave victims information about the reasons behind why the matter did not proceed, and these explanations provided victims with a sense of closure, which benefited them regardless of what the final decision was. However, several problems were also identified, which “reduce[d] victim perceptions of legitimacy in the process, thereby hindering the potentially beneficial role of the reform” (*ibid*:552), including a) its limited use; b) issues of accountability/independence (since CPS reviews their own decisions); c) limited data available on the process; and d) that limited information was provided to victims about the process.

In addition to this new review process, judicial review is also available to victims when a decision is made not to prosecute, but such a request will only be entertained if the decision has already been reviewed under the VRR scheme (Crown Prosecution Service 2019a). Judicial review is broader than the VRR scheme in that it also allows decisions to prosecute also to be challenged. However, the High Court will intervene “only in very rare cases” involving prosecutorial decisions generally (*S. v. Crown Prosecution Service* 2016:15) and when a review has been conducted under the VSS scheme, it is highly unlikely that judicial review will succeed.

In the United States, the jurisprudence to date favours the idea that crime victims have rights even before the formal filing of criminal charges, at least at a federal level (Beloof et al. 2018; Cassell, Mitchell & Edwards 2014). In *Re Dean* (2008), for example, the Fifth Circuit concurred

with the following sentiment made by the District Court: “There are clearly rights under the CVRA that apply before any prosecution is underway” (*U.S. v. BP Products North America Inc.* 2008:23). Moreover, as will be discussed later, many American states now grant the victim standing in the process, which provides the victim with direct recourse to the courts without the need for a prosecutor to appeal.

A number of states have statutes granting victims an enforceable right to confer with the prosecution regarding charging decisions, while others have a general right of conferral (as does the CVRA). In Arizona, for instance, before a decision not to prosecute is finalized, prosecutors must notify the victim of the decision and provide them with reasons for declining to prosecute. Part of this obligation also entails informing the victim of their right to request a conferral before the decision has been finalized. However, “in the federal system and many state jurisdictions judicial review of charging decisions results in the almost inevitable ruling that the prosecutor was properly acting within their discretion in charging or refusing to charge” (Beloof et al. 2018:170; see also Brown 2017; Ma 2002). Nonetheless, the following outline of the current state of pre-trial reviewability in the United States shows that there has been much greater integration of the victim into the pre-trial process than in Canada:

In a few states, however, legislatures have granted judges review over prosecutors' decisions to press charges. Colorado, Michigan, Nebraska, and Pennsylvania all have similar statutes that authorize judges to review public prosecutors' decisions not to charge based on private criminal complaints. Each state requires prosecutors to provide reasons for declining to prosecute in certain kinds of cases. State law empowers trial judges to assess prosecutors' discretionary declination decisions, and those explanations provide a basis for judicial review of prosecutorial decision-making. If judges find the decision unmerited, they can order that the prosecution proceed, either by compelling the public prosecutor to litigate it or by appointing a special prosecutor. (Brown 2017:74)

Further, the Federal CVRA gives victims a specific right to be heard on plea bargains as well as a general right to confer with prosecutors. It also allows victims to move to re-open a plea if their right to be heard is violated by way of mandamus. Most states similarly have a statute or constitutional provision that affords victims either a general right of conferral/consultation with the prosecutor (which arguably includes plea bargains) or a specific right to be heard prior to the court's acceptance of a plea (Manikis 2012; Tobolowsky et al. 2016). Courts have been open to rejecting plea agreements or informally re-opening plea hearings to ensure that all victims' rights have been complied with (*United States v. Stevens* 2017; *State v. Casey* 2002).

Creating a meaningful right to review pre-trial decisions in Canada was proposed by victims' rights organizations prior to the enactment of the CVBR (see, for example, Office of the Federal Ombudsman for Victims of Crime [“OFOVC”] 2014). However, it had been cautioned against by other organizations (see, for example, Canadian Bar Association 2013) and was ultimately not included in the Bill. In light of developments in England and the United States, it is somewhat surprising that a change in the conception and operation of prosecutorial discretion has not been similarly enacted in Canada. The failure to move in the direction of the U.K. and the U.S. in this regard leaves untouched the plea bargaining process, which has been one aspect of the criminal

justice process that has generated the loudest outcry from victims (Verdun-Jones & Tijerino 2002).

In the 2001 report, one of the recurring themes found in the literature was that victims often felt betrayed and manipulated by the unreviewable plea bargaining process. Simply put:

Victims want a say (a real say) in the justice process. Parents, siblings and extended families of murder victims as well as victims of violent crimes and of sexual assault are frustrated by the extent to which they feel left out of the decision-making process related to the offender who harmed them. Most offensive to them is the plea bargaining process where their “voicelessness” leaves them feeling alienated by the justice system. For example, the parents of a teenager stabbed eleven times and the brother of someone shot in the back had no say whatsoever when the Crown accepted pleas in each of these separate cases. These pleas both resulted in a seven year sentence and great frustration when the victims learned the offenders could be eligible for release in less than three years. (Public Safety Canada 2001:5)

As noted in Beloof et al.’s casebook, “the victim’s interests in participating in the plea bargaining process are many. The fact that they are consulted and listened to provides them with respect and an acknowledgement that they are the harmed individual. This in turn may contribute to the psychological healing of the victim” (2018:422). In the same vein, it was noted in 2017 that “due to the vast potential of plea agreements to affect the victims’ wellbeing, victim participation is doubly justified” (Pugach & Tamir 2017:53) A series of studies conducted in Australia over the past ten years provide empirical support for the common sense belief of the importance of victim consultation in the plea resolution process:

The victims we interviewed made observations that are consistent with the procedural justice literature. They said that they wanted opportunities to express their views, and wanted these views to be genuinely taken into account by the OPP. Further, their experience of how the OPP lawyers treated them featured prominently in their interviews. The victims also clearly expressed a desire for the lawyers to take the time to understand them as people and their individual priorities. They wanted to feel that they ‘mattered’ to the prosecution lawyers. Our findings support the theory of procedural justice because they indicate that the *process* of being consulted is very important to victims. Victims did not simply focus on the particular prosecution decision in their case, although that remained significant for some. Rather, they expressed strong views about *how* the consultation process was carried out. (Centre for Innovative Justice 2019:9)

In Canada, there has been some modest legislative changes in the past two decades, short of allowing for the reviewability of prosecutorial discretion, designed to make the low-visibility process of plea bargaining more transparent and accountable. In 2015, s. 606 of the *Criminal Code* was amended to require the judge to make an inquiry in cases involving a serious personal injury offence as to whether the victim had been informed of the agreement. In cases involving an indictable offence with a maximum penalty of more than five years, an inquiry must be made as to whether the victim has asked to be informed of any agreement and, if so, what steps have been taken to inform them. If the victim has not been informed, the Crown has a duty to do so as

soon as feasible. The validity of the plea is not, however, affected by a failure to comply with this provision.

Manitoba's *Victims' Bill of Rights* is the only jurisdiction which states that, on request, victims must be given an opportunity to provide their views on any agreement relating to the disposition of a charge (though this pre-dates the 2001 report); however, this obligation is limited to when "it is reasonably possible to do so without unreasonably delaying or prejudicing an investigation or prosecution." In addition, as discussed earlier, the absence of judicial enforcement with respect to rights enumerated in the Bills of Rights undercuts the provision of the right to consult.

In 2014, the Federal Ombudsman for Victims of Crime proposed that former Bill C-32, the *Victims Bill of Rights*, include provisions requiring that the victim's views be considered with respect to plea bargaining:

While informing victims of a plea bargain is helpful in some respects, victims have very clearly indicated a desire to be informed before a plea is entered/accepted and to have a chance to make their views and concerns known to the prosecutor at that time. While the OFOVC does not recommend that victims be given any veto powers in this regard, it does recommend that the Bill ensure that out of respect for the victims and their concerns that the requirement to inform a victim occur prior to the plea and that the victims have a chance to express themselves and to have their views considered. (OFOVC 2014:13)

The CVBR did not ultimately include a provision requiring the victims' views to be considered, and even if it did, the fundamental problem posed by plea bargaining cannot be effectively addressed without a reconsideration and revision of our jurisprudence on prosecutorial discretion, or the enactment of a statutory right of judicial review.

#### b. Protection at Trial

During the 1970s, 80s and 90s, there was a gradual and systematic effort to make the judicial process more responsive to victims of violence. With respect to violence against children and women, there were significant changes made to the substantive definitions of sexual offences and the archaic procedural and evidentiary obstacles to conviction. In addition, the court process was significantly modified to reduce the secondary victimization experienced by victims who appear as witnesses at trial. The achievements have been significant, and the law reform effected in Canada with respect to victims of violence is consistent with developments in most Western liberal democracies.

It is arguable that the most dramatic and successful achievement related to the victims' rights movement has been the gradual creation in the 1970's, 80s and 90s of a set of evidentiary and procedural rules designed to facilitate the effective prosecution of violent crimes against vulnerable victims. All of these changes were outlined in the 2001 report, but a number of changes have occurred since. Most of these changes are not ground breaking, but they show that the path of reform continues as most of the protective evidentiary and procedural rules have been both strengthened and expanded. Most of these changes relate to provisions in the *Criminal Code* and many of the changes were brought about by the enactment of the CVBR in 2015 (in the following section, all section numbers are references to the *Criminal Code*).

*i. Publication Bans (ss. 486.4-486.6)*

For *any* offence (i.e. not just sexual offences) where the victim is a minor, the court must inform the victim of their right to make an application (similar to victims of sexual offences) and *must* make the order when requested (2015). For sexual offences, the following changes have been made: a) new offences have been added to the list of enumerated offences (e.g. child pornography and voyeurism in 2006); and b) publication bans for child pornography offences are mandatory with no application needed (2006). Finally, a related innovation was introduced in 2015 – the ability to testify under a pseudonym to protect the security of a victim/witness (s. 486.31).

In addition, publication bans can now be made for justice system participants involved in certain cases (2001), and the list of offences where this provision applies has expanded over time (2006). Initially the test was whether an order was “necessary” for the proper administration of justice, but that has since been changed to a less rigorous test of whether it is in the “interest” of the proper administration of justice (2015).

As for the effectiveness of these bans in protecting privacy, Canadian media seems to do a better job of protecting the victim’s identity as compared to the United States, but the percentage of media reports that do disclose identifying information about such victims in Canada is not insignificant. A 2010 American study showed that 51% of media articles involving non-fatal child victimizations included identifying information about the victim. The most common identifiers were the family member offender’s name (29%) and the name of the child’s school, daycare or church (18%), but the victim’s name was also included in 9% of the articles. It is also worth noting that the publication of identifying information was significantly more common for non-sexual offences (78% vs 37%) (Jones, Finkelhor & Beckwith 2010). In contrast, a 2015 Canadian study of articles involving violence against children showed that just under a quarter (23%) of articles contained identifying information. The most common identifiers were the name of the child’s school, church or daycare (33%) and the child’s street or address (29%), but the child’s name was also included in 4.44% of the articles (Ha & Ndegwa 2015).

*ii. Third-Party Records (ss. 278.1-278.97)*

Since the 1990s, the privacy of the victim has been protected by a rigorous application process and test which must be satisfied before the private records of a victim can be produced in court for evidentiary purposes. As with publication bans, this protection was strengthened and expanded in 2015. On a trivial level, the notice period for seeking records has been extended from 14 days to 60 days and the list of relevant factors to consider now includes consideration of the security interest of the victim. In addition, the list of offences to which this regime applies has waxed and waned over time.

More significantly, both complainants, and persons in control of the record, have a right to counsel and the judge has a duty to inform them of this right (2015). As was mentioned earlier, the Bills of Rights in Manitoba and British Columbia have already been providing access to counsel for these applications, but with this amendment, the practice has been extended Canada-wide, and now the victim will be provided notice of this entitlement.

In 2018, there was another significant addition to this protection with the creation of a new regime to restrict the use of private records that are already in the accused's possession. In 2002, the Supreme Court of Canada ruled that the third-party records regime did not cover the use/admissibility of records already in the accused's possession (*R. v. Shearing* 2002). Now, the accused must demonstrate that the record is relevant and has significant probative value for it to be admissible, and the victim has the right to counsel and to make submissions. If, however, the accused's reason for introducing the private record relates to the prior sexual conduct of the victim, then its admissibility is governed by s. 276 (historically known as the rape-shield law or *Seaboyer* applications, and discussed in next section).

This protection has also been strengthened by judicial interpretation. In caselaw, the protection has been extended to civil litigation files (*R. v. McClure* 2001) and criminal injury compensation board files which contain information about the victim (*R. v. S.(L.)* 2000; *R. v. Fayant* 2004). Moreover, in 2014, the Supreme Court of Canada expanded this protection to include information about the victim contained in unrelated police occurrence reports, noting that:

There are tangible harms associated with disclosure of personal information in the context of prosecutions for sexual offences... Victims of sexual offences will be less likely to come forward if they know that doing so will entail disclosure of their past interactions with police to the very person who they claim has wronged them. (*R. v. Quesnelle* 2014:36)

A recent empirical study has shown that 56% of victims in Canada retain counsel for applications to release their private records (Jacuk & Hassan 2018), and a 2012 review of the legislation by the Senate concluded that “the records production scheme in the Code, for the most part, is working well. We believe that the scheme in the Code strikes an appropriate balance between the competing interests of complainants and defendants in the unique context of sexual offence trials” (Senate Standing Committee on Legal and Constitutional Affairs 2012:13). However, a small study of survivors of sexual assault found that complainants lacked an “understanding of the criminal justice system overall and third party records applications in particular (McDonald & Northcott 2011:8). Particularly problematic is the fact that several of the participants didn't even know if their records had been produced (*ibid*).

### *iii. “Sexual Activity” (s. 276)*

Since the 1990s, for certain specified offences, there has been a protective regime in place to restrict the accused's use of personal information relating to the victim's sexual activities. In 2018, the regime and application process for this private information was consolidated to be consistent with the process requirements for third-party record applications. The definition of “sexual activity” was also expanded at that time to include as “any communication made for a sexual purpose or whose content is of sexual activity” to capture digital communication and the modern practice of sexting. Most significantly, the victim's right to be advised of, and to retain, counsel now applies to these applications (2018).

While none of the provincial Bills of Rights provide counsel to victims for 276 applications (as British Columbia and Manitoba offer free counsel for third-party record applications), there has been an increase in the number of provincial programs that provide counsel for victims in such

circumstances to ensure that their interests are properly represented. Some examples of how provincial jurisdictions have responded to the legal needs of survivors of sexual violence, though by no means is this list exhaustive, include:

- **Nova Scotia:** Free counsel to sexual assault victims for 276 applications (2019) (Government of Nova Scotia 2019);
- **Ontario (MAG):** Pilot program for victims of human trafficking to obtain legal advice, and hotline lawyers are now available to represent victims during any application hearings that affect the victims' privacy interests (2018) (Gruske 2018);
- **Prince Edward Island:** Introduction of the RISE Program in 2020, which provides up to four hours of free legal advice from a to victims of sexual harassment or violence (Olijnyk 2020); and
- **Saskatchewan:** Spent almost \$190,000 in 2019 on the Listen Project, which provides legal advice to sexual assault victims (Saskatchewan Ministry of Corrections and Policy and Ministry of Justice and Attorney General 2019).

There is a great deal of jurisprudence relating to this application process as aspects of the application process become refined or clarified through litigation; however, there has not been any significant empirical study of these provisions in recent years. Nevertheless, the 2018 introduction of right to counsel for victims is a significant development and its impact warrants further study to confirm the belief of Garvin and Beloof that independent lawyers for sexual assault victims “can open the space for authentic agency by ensuring victims cannot only decide whether and when to engage with the system but also be the architects of how they engage with the system” (2015:77). According to the authors, the importance of counsel cannot be understated, as the rights provided to protect the privacy and dignity of victims at trial “will only be realized when sexual assault victims are provided legal counsel, because only then can authentic victim agency be possible” (*ibid*:68; see also Tanovich 2015).

#### *iv. Testimonial Aids*

To reduce the stress and trauma of testifying, a number of modifications to the process were made in the 1990s to accommodate young victims of violence by allowing them to testify behind a screen, by closed-circuit television or by previous videotaped statements. Many of these accommodations were constitutionally challenged by accused persons arguing that the principles of fundamental justice required that there be a face-to-face confrontation between victim and accused; however, all of the provisions withstood challenge and have since been expanded and strengthened since 2001 (see, for example, *R. v. Levogiannis* 1993; *R. v. L.(D.O.)* 1993; *R. v. Potvin* 1989; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)* 1996).

##### 1) Exclusion of Public (s. 486)

A court's authority to exclude the public has existed for many years, but in the early 2000s it was expanded to place emphasis on safeguarding minors in *all* proceedings, not just sexual offences, as well as justice system participants (2001; 2005). In 2015, the law was further amended so that victims and witnesses could bring an application requesting exclusion of the public on their own behalf, and the list of factors for judges to consider when deciding such applications was

expanded significantly to include society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process. That same year, an alternative to exclusion of the public was also enacted, allowing judges to order that the witness be permitted to testify behind a screen so that the public cannot see them. Since 1988, screens have been employed to prevent a direct visual confrontation between victims and accused. This 2015 reform expands the use of screens to prevent a public viewing of the witness.

## 2) Support Persons (s. 486.1)

In 2006, these orders became mandatory upon application for minors (raised from the age of 14 to 18) and those with disabilities unless such an order would interfere with the administration of justice. In 2006, discretionary orders also became available for any other witness and for any offence. Moreover, support persons can now be requested during any proceeding, not just trials or preliminary inquiries (2006), and applications can be brought before any judge in the jurisdiction if no judge is assigned to the case (2015).

In recent years, support dogs have become an option for victims and witnesses. Until 2014, there had not yet been a case where an application had been made for a support dog or where a support dog had accompanied a witness while testifying (McDonald & Rooney 2014), but following the enactment of the CVBR, applications for support dogs became more commonplace. The jurisprudence to date has been divided on the proper basis for permitting a support dog to accompany the victim or witness (*R. v. Benjamin* 2018; *R. v. Roper* 2015), however, it is clear that there are growing number of cases following the words of the B.C. Provincial Court that allowing a support dog is “in accordance with what the spirit and intent of the testimonial accommodation legislation was meant to address which, at bottom, was just to ensure that witnesses who, in general, could be perceived as more vulnerable, were provided with support so that they could give full and candid accounts of what they were being asked to testify about in court” (*R. v. K.(J.L.)* 2015:6).

## 3) CCTV/Screens (s. 486.2)

Since 2001, there has been a continuing expansion of, and reliance upon, testifying by closed-circuit television from another room or behind a screen. In this regard, the expansion of s. 486.2 is similar to the changes that have been made to the other testimonial aid provisions. Minors and those with disabilities can now request such aids in *any* case (i.e. not just sexual offences) and in *any* proceeding (i.e. not just trials and preliminary inquiries) (2006), and judges must make an order for such victims unless they would interfere with the administration of justice (2006). Discretionary orders are also now available for any witness and for any offence (2006) and, as with the other testimonial aids, witnesses/victims can make an application on their own behalf (2006).

As with applications for private records, and applications to introduce prior sexual activity, there is a wealth of caselaw litigating countless small points of the s. 486.2 process. However, the jurisprudence has not significantly altered the basic contours of using this testimonial aid, and in 2010, the Supreme Court of Canada upheld the constitutional validity of mandatory orders (*R. v. S.(J.)* 2010), including the presumptive framework that children and those with disabilities need not prove that a protective order is necessary,

The *Criminal Code* is silent on who chooses which testimonial aid is appropriate for mandatory orders, which has led to a divide in the jurisprudence. However, the caselaw as a whole leans towards it being the applicant's choice (see, for example, *R. v. Bell* 2017; *R. v. Q.(T.M.)* 2013).

#### 4) Prohibiting Cross-Examination by Self-Represented Accused (s. 486.3)

This relatively new protection has undergone similar expansion in the past two decades. Appointment of counsel, in lieu of cross-examination by a self-represented accused, is now mandatory for all minors regardless of the charged offence (2006), as well as adult victims of criminal harassment (2006) and sexual assault (2015), unless it can be shown that the interest of the administration of justice requires the accused to personally cross-examine the witness. A discretionary application can also now be made for other adult witnesses for any offence (2006). In such instances, counsel will be appointed when the order is needed to obtain a full and candid account (2006) or when it would otherwise be in the interest of the proper administration of justice (2015). Moreover, victims and witnesses can personally request that counsel be appointed (2006).

Section 486.3 has not yet been constitutionally challenged. While the Alberta Court of Appeal in *R. v. M.(C.G.)* (2015) suggested in *obiter* that the provision would likely be upheld, others have expressed concerns about the validity of court-appointed lawyers to replace self-represented accused, with one court noting that “because of its potential effect on fundamental rights, not to mention the ethical issues it raises for the lawyer who accepts such a mandate” (*Québec (Procureur general) c. Québec (Juge de la Cour du Québec)* 2007:53) and another stating that “Section 486.3(2) of the *Criminal Code* raises difficult practical and conceptual issues in relation to the right to make full answer and defence” (*R. v. Wapass* 2014:25).

#### 5) Video-Taped Evidence (ss. 715.1 & 715.2)

Unlike the other testimonial aid provisions, the introduction of previously video-taped evidence at trial has not become available to all witnesses; rather, its use is still restricted to children and those with disabilities. However, in 2006, the provisions were expanded to permit such evidence for all offences, rather than just for those that were previously enumerated. That same year, there were also significant changes made to the *Canada Evidence Act*, with respect to child witnesses, including the abolishment of pre-inquiries into a child's capacity to testify, thereby creating a presumption of capacity to testify for children.

There is an enormous body of caselaw on this testimonial aid and the topics of capacity and presumption are beyond the scope of this report; however, suffice it to say, in 2008, the B.C. Court of Appeal captured the essence of all these modern changes by stating that these provisions reflect “the procedural and evidentiary evolution of our criminal justice system, in order to facilitate the testimony of children as a necessary step in its truth-seeking goal” (*R. v. S.(J.)* 2008:54).

#### 6) Empirical Research on Testimonial Aids

As noted by the Ontario Superior Court of Justice, law reform efforts to the testimonial aid provisions in the past two decades “mark an evolution in the law rendering the trial process more ‘user-friendly’ to vulnerable witnesses” (*R. v. Tehrankari* 2008:6). It is not surprising then that there has been a considerable amount of empirical research studying the effectiveness and operation of the various testimonial aids provisions. In this regard, some of the relevant findings have been as follows:

- Testimonial aids are almost always granted for children (Bala et al. 2011; Hickey 2016; Department of Justice Canada 2015). As noted by Bala et al., following the 2006 amendments to the *Criminal Code*, “there [were] very few reported cases in which use of an accommodation was requested and the accused satisfied the court that use of the accommodation would ‘interfere with the administration of justice’” (2011:64).
- Testimonial aids for adults with disabilities are becoming more common (Barrett 2001; Chong & Connolly 2015), but they are still relatively rare despite the fact that they are usually granted (though they are less likely to be granted than for children) (Ainslie 2013; Hurley 2013; Bala et al. 2011);. Following the 2006 amendments to the *Criminal Code*, the number of published applications for adult witnesses increased substantially, from 10% of all applications to 22.8% after 2006 (Chong & Connolly 2015).
- Although the most frequently used testimonial aid often varies by region, support persons are extremely common and are often cited as the most commonly used testimonial aid (Prairie Research Associates 2004; Hickey 2016; Ainslie 2013; McDonald 2018; Northcott 2009).
- CCTV is often less likely to be requested than a screen and, in fact, many studies have shown that CCTV is the least likely to be requested of all the testimonial aids (McDonald 2018; Ainslie 2013; Bala et al. 2011; Northcott 2009; Prairie Research Associates 2004); however, one study found that CCTV was the most common testimonial aid requested – where the equipment was available – for child witnesses (Hickey 2016).
- Technological/logistical problems are frequently cited with CCTV (Hickey & McDonald 2019; Hurley 2015; Hickey 2016; Bala et al. 2011; Department of Justice Canada 2015).
- While criminal justice professionals seem to have a greater understanding and appreciation for such aids (McDonald 2018; Ainslie 2013), there is still resistance or reluctance to use them (Hickey & McDonald 2019; McDonald 2018; Hickey 2016; Bala et al. 2011; Department of Justice Canada 2011). For example, Hickey and McDonald (2018) found that the most common barrier to the use of testimonial aids was the resistance of criminal justice professionals (reported by 45% of respondents).
- Testimonial aids are usually considered helpful and result in a high degree of satisfaction for the victim/witness (Bala et al. 2011; Northcott 2009). This is especially true for children who are able to testify via CCTV (Hickey 2016; Hurley 2015; Bala & McNamara 2001)
- Simply providing victims the *option/choice* is important, as it can help to alleviate stress and give victims a sense of empowerment (Hurley 2015; Department of Justice Canada 2011; 2015).

## 7. Sentencing and Corrections

Upon conviction, the presumption of innocence no longer applies so one would expect that there would be fewer institutional and conceptual barriers to victim participation. In most jurisdictions, participation has been secured by the introduction of victim impact statements (“VIS”), and since

their introduction in Canada in 1988, their use has become a common feature of the legal landscape with a rich jurisprudence struggling to ascertain the scope and relevancy of the input given by the victim.

Since the 2001 report, there has been numerous statutory revisions to expand the scope of the VIS regime and to clarify ambiguities arising from conflicting caselaw. The most significant changes are as follows:

- The definition of victim now includes those who have suffered property damage or economic loss (2015).
- The court's duty to inquire has become more demanding in that the court must now determine if the Crown took reasonable steps to provide the victim with an opportunity to submit a VIS, whereas before the court simply had to determine whether the victim was aware of their opportunity to submit a VIS (2015).
- Loved ones of victims who are deceased or incapable of acting on their own behalf can now participate in sentencing hearings in the same way a victim would typically be able to, which includes the ability to submit a VIS (2015).
- Community impact statements were initially introduced as a discretionary option for fraud cases only (2011). However, in 2015, they became available for all offences.
- Standardized forms were introduced for VIS (2015).
  - Prior to 2015, the caselaw was divided on what information or methods of expression were permitted. The standardized form has largely resolved this debate by explicitly allowing for various forms of expression (such as drawings, poems and letters) as well as by noting what information is prohibited (such as unproven allegations or comments about offences for which the accused was not convicted).
  - The form also permits victims to provide a suggestion as to sentencing provided they receive prior approval from the court.
- Victims can request the assistance of testimonial aids when reading their VIS (2015).
- The court can adjourn the proceedings if reasonable steps have not been taken to allow the victim to prepare a VIS if doing so would not interfere with the proper administration of justice (2015).
- “Evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation” is now an aggravating factor that must be considered in determining an appropriate sentence (2012).

While it appears that VISs have been gradually accepted by criminal justice professionals, there remains some debate about issues such as the weight that should be given to them and their appropriate content (McDonald 2020; Manikis 2015a; 2019b). As such, the jurisprudence over the past two decades is voluminous and covers a wide range of issues relating to who is a victim,

what is a relevant community, the appropriate form and content of the VIS, the weight to be given to a VIS and the process for resolving disputed facts.

With respect to disputed facts, this raises the issue of the propriety of having the victim cross-examined on his/her statement. The Ontario Court of Appeal addressed this dilemma in 2008 noting that:

Conferring an automatic or unconstrained right to cross-examine would risk undermining the very purpose of victim impact statements, namely, to give victims a voice in the criminal justice process, to provide a way for victims to confront offenders with the harm they have caused, and to ensure that courts are informed of the full consequences of the crime. Conferring an open-ended right to cross-examine might discourage victims from offering such statements and re-victimize those who do. On the other hand, an absolute bar on cross-examination would unduly interfere with offenders' procedural rights. (*R. v. W.(V.)* 2008:28)

It may be that this dilemma is somewhat academic, as Cole (2003) found that 84% of judges stated that cross-examination on a VIS never or almost never takes place. This result was similarly replicated by Roberts and Edgar in 2006, who reported that 97% of judges said that cross-examination never or almost never took place.

Although the flurry of interest and research has tapered off in recent years, it has been noted that over the past two decades Canada has done the most research and has produced the most jurisprudence on this issue amongst all other common law jurisdictions (Manikis & Roberts 2012). In this regard, some of the relevant and important findings of the numerous studies (primarily Canadian) done on the operation and impact of VIS over the past two decades are as follows:

#### *Victim Utilization and Satisfaction*

- Only a small proportion of victims actually submit a VIS (Roberts 2008a; Lindsay 2015; Cole 2011; Roberts & Edgar 2006).
- “Research has shown that the VIS regime in Canada has led to (i) increased victim participation, both at sentencing and parole; (ii) increased victim satisfaction with the criminal justice system; and (iii) increased acceptance amongst criminal justice professionals of victim input” (Roberts 2008b:38).
- Most (but not all) victims find the process of providing a VIS to be beneficial in some way (Roberts 2008b; Prairie Research Associates 2004; Miller 2005; Roberts & Manikis 2011). For instance, Prairie Research Associates (2004) found that 80% of victims who provided a VIS were glad they did. Similarly, Roberts and Manikis (2011) reported that victims who submitted a statement were more satisfied than victims who did not.
- Victims are not particularly vengeful, nor does the introduction of victim impact evidence affect the severity or punitiveness of the sentence imposed (Manikis 2019; Roberts 2008a; 2009; Erez & Roberts 2007).

- For many victims, the “therapeutic” purposes of the VIS are more predominant than the “instrumental” purposes (Roberts & Erez 2004) – i.e. the process itself seems to be more important than the ultimate outcome, as noted in numerous studies from various jurisdictions:
  - **Marshall (2014:574):** “Interestingly, most victims do not seek harsher punishments, rather they seek participation in the justice system, and it is that participation that helps them in the healing process.”
  - **Rossi (2008:199):** “[S]tudies show that victims are ‘not interested in changing sentencing outcomes,’ and they ‘do not want decision making powers.’ Rather, victims report that they only benefited from delivering victim impact statements because it provided an opportunity to be heard, to be treated with respect, to be informed and involved, to be taken seriously, to receive compensation, and to hear the offender’s admission of guilt.”
  - **Du Mont, Miller & White (2007):** Victims were not motivated to submit VISs to influence the outcome of the sentence; rather, they wanted to relay a message to the offender of the impact of the offence, to have their suffering acknowledged and to begin the recovery process.
  - **Meredith & Paquette (2001):** In three of four regions studied, victims assessed the VIS process positively despite frequent doubts that their VIS would have any impact on the sentence ultimately imposed. Many victims ascribed a therapeutic value to the experience of completing statement itself.
  - **Roberts & Erez (2004); Meredith & Paquette (2001):** Victims feel validated when their VIS is referred to by the sentencing judge, as it communicates to them that the community has recognized the harm they have suffered.
- Some Canadian scholars, however, have questioned whether the VIS process is truly effective or beneficial for victims. Of particular concern is the fact that some victims believe that their VIS will influence the ultimate sentence and, when it does not, they become dissatisfied with the overall process.
  - **Meredith & Paquette (2001):** In one of the four regions studied (Toronto), the majority of the victims stated that they would not participate in VIS process again. For them, the only test of effectiveness was how their VIS impacted the accused’s overall sentence.
  - **Roberts (2003):** Many victims who prepare a VIS have at least some expectation that it will affect the sentence and are disappointed when they perceive it did not.
  - **Roberts & Manikis (2011):** While the main reason noted by victims for submitting a statement was to send a message to the court or offender, some wanted to influence the severity of the sentence imposed.

## *Criminal Justice Professionals*

- There is a growing acceptance amongst criminal justice professionals in Canada regarding the use of VISs.
  - **Prairie Research Associates (2005):** Over four-fifths of the judges surveyed stated that they used VISs in determining an appropriate sentence.
  - **Roberts & Edgars (2006):** Judges in all four of the jurisdictions studied reported an increase in the number of VISs submitted overall and most perceived VISs to contain information that is generally useful as well as relevant to sentencing.
  - **Cole (2003):** Two-thirds of Crowns said that VISs were useful to the court in most cases and approximately one-third said that in most cases or almost every case, the victim's VIS contained new or different information that was relevant to sentence.
- However, research has also shown that criminal justice professionals are not necessarily doing everything they can to ensure that this "right" is afforded to victims.
  - **Campbell (2015):** "Some" judges in Quebec failed to make inquiries about whether the victim was given an opportunity to provide a VIS.
  - **Roberts & Edgars (2006):** Overall, almost half (42%) of judges said it was difficult to ascertain whether the victim was provided an opportunity to provide a VIS and almost two-thirds (66%) said they often proceeded to sentencing without knowing the status of the VIS.
  - **Prairie Research Associates (2004:8):** "In interviews, Crown Attorneys, defence counsel, and victim services all questioned whether criminal justice professionals are completely fulfilling their roles concerning victim impact statements. Issues raised were... whether Crown Attorneys diligently pursue obtaining them or submit the statements they do receive."

Despite the fact that the VIS was introduced over 30 years ago, and that the research shows a growing acceptance among legal professionals, it is clear that there are still occasions where the court and the Crown will simply disregard their statutory obligations. It is not encouraging to see that the Supreme Court of Canada felt compelled to write the following admonition just a few months before this report was written:

We do not endorse the apparent refusal of the trial Crown and Judge Stewart to permit the mother to present a victim impact statement in relation to the extortion offense. We would note that neither the trial Crown nor Judge Stewart referred to the provisions of the *Criminal Code* or the *Canadian Victims Bill of Rights*, SC 2015, c. 13, s. 2, that govern the victim's right to present a victim impact statement to the court when they refused to permit the mother to present a victim impact statement. (*R. v. Friesen* 2020:Footnote 5)

Finally, it is beyond the scope of this report to discuss the changes which have been made with respect to victim participation at the post-conviction and correctional stages. Nonetheless, it should be mentioned that since 2001, there have been significant amendments to the NCR (Not Criminally Responsible) process and the parole process to provide extensive notification and informational rights to victims as well as to facilitate participation (by way of an impact statement) and attendance at hearings.

Most significantly, at this correctional stage, we find a rare example of where participatory rights are enhanced by creating a corresponding welfare entitlement. In 2005, the Department of Justice created a program that provides financial assistance (travel, accommodation and meal expenses) to victims who wish to attend parole board hearings (Department of Justice Canada 2011). This program is similar to the provincial Bill of Rights in Quebec (s. 3(1)), which provides compensation to victims for expenses incurred to testify. A 2011 survey of victims who used this financial assistance program between 2006 and 2009 found that more than one-fifth of victims (22%) would not have attended the parole board hearing without the assistance they received, while another one-fifth (20%) said they did not know if they would have attended the hearing if they didn't receive financial assistance (*ibid*). Given the success of this welfare-based program in enhancing the right of victims to be heard, future consideration should be given to the creation of similar programs for other participatory rights.

## 8. The Thorny Issue of Enforcement

Despite the uniformity of the nature and scope of participatory rights in both common law and civil law jurisdictions, there is a divergence in approach with respect to the issue of how to provide remedies for violations of these participatory rights. Unlike some European and American jurisdictions, Canada's robust formulation of participatory rights for victims has not been accompanied by the enactment of remedial provisions. This problematic missing piece has been discussed by many scholars in the field, including Professor Manikis who commented in 2014 about former Bill C-32, the *Victims Bill of Rights*, that: "[I]t is worth noting the unfortunate terminology of 'rights' that is used throughout the bill. A Bill of Rights that does not provide any form of independent recourse or redress will only raise unrealistic expectations, since it does not recognize real rights" (2014:9).

In Canada, victims generally still do not have standing to appeal or contest a decision made by the Crown, and the conventional judicial wisdom that remains is that there is no "situation where a third party is permitted to play a role in the conduct of the prosecution, to address the question of guilt or innocence or to speak to sentence. One would expect that certiorari brought by a third party directed at setting aside a conviction, acquittal or sentence would be equally unavailable..." (*R. v. United States* 2004:21).

Provincial Bills of Rights as well as the CVBR bar the pursuit of civil actions for violations of victims' participatory rights, and without legislative intervention, the only existing legal remedy for the victim or witness to review certain types of adverse rulings at trial is the cumbersome, expensive and extraordinary remedy of appealing directly to the Supreme Court of Canada. For instance, in *A.(L.L.) v. B.(A.)* (1995), a victim was able during the trial to immediately seek relief from the Supreme Court of Canada with respect to an adverse ruling about the production of her

private records. However, interlocutory appeals to the Supreme Court of Canada are few and far between.

While some victims' groups advocated for victims to have funded legal representation and standing at various stages of the criminal justice process prior to the enactment of the VBR, the Canadian Bar Association (2003) expressed opposition to this change for six reasons: a) added costs; b) more delays leading to judicial stays; c) problems of evidentiary disclosure; d) it would overstep the Crown's independence and fetter the Crown's discretion while contributing to a potentially adversarial relationship with the victim; e) it would encroach provincial jurisdiction over the administration of justice; and f) it would infringe the accused's *Charter* rights of fundamental justice, presumption of innocence and a fair trial within a reasonable time.

In the absence of a viable and accessible legal remedy, victims do have recourse to administrative remedies provided for under the CVBR and under the Manitoba, Yukon and British Columbia Bills of Rights. As mentioned earlier, in 2007, the Federal Ombudsman for Victims of Crime was created as an independent body to ensure federal agencies are meeting their responsibilities to victims (OFOVC 2011). The Annual Reports do show that the Ombudsman does receive hundreds of complaints every year; however, the 2017-2018 Ombudsman Annual Report notes that overwhelmingly the most frequent general topic of inquiry or complaint is related to other levels of government (provincial or municipal), with which the Ombudsman cannot assist (OFOVC 2018). The Federal Ombudsman cannot assist the victim with respect to proceedings under the *Criminal Code*, and most of the Ombudsman's work pertains to the Parole Board of Canada.

More significantly, the Ombudsman "has no power or authority to compel departments to produce information or documentation to facilitate a review, nor does it have the authority to enter into binding agreements with departments in order to address the complaint and/or systemic issues" (2014:16). His/her mandate is limited to issuing reports, providing recommendations and bringing public awareness to issues within government institutions. This failure to provide legal remedies "has fostered a perception that the CVBR is legislation that 'lacks teeth' – both in the sense that there is little in the way of meaningful recourse for victims and that there are no checks and balances in place to ensure accountability amongst those working in the criminal justice system" (OVOVC 2017c:11).

The United Kingdom has chosen to provide victims with a similar type of administrative remedy, but even this remedy has more "teeth" than its Canadian counterpart (and, as mentioned earlier, the U.K. in addition has specific remedies for reviewing Crown charging decisions). In 2006, England and Wales introduced a Code of Practice for Victims of Crime that included a complaint process. The Parliamentary Ombudsman can make recommendations as to the type of redress or remedies which should be provided upon a finding of a violation, including: a) an apology, explanation or acknowledgement of responsibility; b) remedial action such as reviewing/changing a decision on the service given, revising published materials or training staff; or c) financial compensation. Breaches of informational rights, for example, can result in a combination of remedies ranging from apologies to redress payments of up to £5,000 (Manikis 2015a).

Although the Parliamentary Ombudsman does not have the power to legally enforce its recommendations, it appears that most agencies comply with its recommendations (Manikis

2013), and it has been noted that the Ombudsman is well placed in certain situations to effectively address breaches and provide adequate redress for violations (Manikis 2010b). Nevertheless, being an unenforceable administrative remedy, it is not entirely surprising that the Victim's Commissioner (2015) found that almost three-quarters of victims that filed a complaint were not happy with the response they received.

Leaving enforcement of participatory rights to an Ombudsman, or to the Director of Victim Services (MB, YK), may seem to be the only viable options in the Canadian legal system which is still guided by the concepts of unreviewable prosecutorial discretion and the maxim that third parties do not have standing at criminal trials and appeals. However, the American legal system shares the same common law roots, and is structured in the same fashion with similar constitutional imperatives, yet in the past two decades many American jurisdictions have bestowed standing upon victims and have enacted enforceable remedies. At a general level, divorced of detail and nuance, the thrust of this important development in the United States can be summarized as follows:

Some American statutes provide victims with legal standing or representation by a prosecutor or another official to file motions before the criminal trial court to assert the victims' rights. In other states, courts outside the criminal process can provide enforcement options to victims. For instance, in some states, an administrative court can provide a writ of mandamus directing an agency to comply with the law. At the federal level, the *Crime Victims' Rights Act* (CVRA) enables victims to enforce their rights by filing a motion in the trial court as well as mandamus action before the appellate court to enforce compliance. (Manikis 2015a:183-184)

There are countless examples of the practical impacts of these remedial innovations, but three examples will suffice to show that the American regime is far more protective of victims' rights than the Canadian. In 2006, a victim was not allowed to read their VIS out loud at the sentencing hearing, and upon filing a mandamus action, the sentence was vacated to require a re-hearing on sentence (*Kenna v. U.S. Dist. Court for Cent. Dist. Cal.* 2006). In 2011, a victim challenged a restitution award by way of mandamus on the basis that the trial judge did not award them the proper amount, and the matter was remitted back to the trial judge to re-calculate what amount would accurately reflect the victim's losses that were attributable to the defendant's offence (*United States v. Monzel* 2011). More recently, in 2020, a failure to allow the victim to submit a VIS before accepting a guilty plea resulted in the sentence being vacated and the matter being remanded back to the trial court for reconsideration of whether the plea agreement should still be accepted (*Antoine v. State* 2020).

Most of the remedial innovation in American jurisdictions has occurred in the past 10-15 years, and just prior to this flurry of legislative and constitutional reform, Professor Beloof made the following observation – one which applies with great force to the current situation in Canada:

Following the very successful first two waves of victims' rights work – first, enacting victims' rights statutes and then enacting victims' rights amendments – a third wave is necessary to give real meaning to these rights. To become real, rights must be accompanied by victim standing, meaningful remedy, and review as a matter of right. Changing the legal culture is difficult and movements do not

overcome obstacles all at once. The victims' rights movement is no exception. As victim participation has become more familiar and accepted, greater achievements are now possible. Victim standing, remedy, and review are now within reach. To achieve victim standing, the problems of discretionary rights, lack of remedy, and discretionary review must be solved. (Beloof 2005:337-338)

## Part III: Welfare Rights

The victims' rights movement had its initial successes in compelling governments to address the financial, material and health needs of victims through compensation, counseling and other services. The first significant victim-related law reform measures taken in the Western World related to state compensation for injuries suffered by crime victims. In 1964, New Zealand enacted the first victim compensation program in the common law world and all Canadian provinces followed this lead, starting with Saskatchewan in 1967 and ending with Prince Edward Island in 1988.

Welfare rights clearly emerged as the initial focus of the victims' rights movement, and compensation was just one component of provincial initiatives relating to victim assistance, as provinces expanded programs and other services to address the needs of the victim outside of the court. It must be recognized that, despite the recent problems confronting compensation programs, and the perpetual problem of underfunding of other programs, the wide array of specialized assistance programs offered by the provinces is one of the crowning achievements of the victims' rights movement.

In the past and current literature, one finds far more attention being paid to the participatory rights of victims compared to their welfare rights. This report is no different. The focus on legal and participatory rights should not lead to an inference that victims prioritize these rights over rights relating to their financial, physical and mental welfare. Rather, less attention is paid to welfare rights because they are less controversial in terms of theory and practice, and effectively addressing welfare rights is largely an exercise in fiscal management and political will. Welfare rights ebb and flow depending on the funds a government is willing to invest in these programs – this is a political issue clearly beyond the scope of this report and outside of the interest and focus of many researchers and academics.

In addition, although welfare rights are clearly an indispensable component of victims' rights, these types of rights have not been the subject matter of proposed constitutional amendments in the United States. Further, welfare rights would not fit within the constitutional law jurisprudence in Canada, as our constitutional regime has never recognized economic rights and has rarely enshrined "positive" rights that impose fiscal obligations on state agents (*Gosselin v. Quebec (Attorney General)* 2002; see also *Weidenfeld v. Alberta* 2020; *R. v. A.(S.)* 2014; *Vail v. Prince Edward Island (Workers' Compensation Board)* 2012). As such, when scholars look at the Constitution as a potential forum for enhancing the role of the victim, the focus is logically placed on participatory rights, which would allow the victim to play a more active role in the criminal process. The discussion of welfare rights is largely left to political actors and bureaucrats, and the nature and scope of these rights often change from decade to decade depending upon the political landscape of the decade.

### 1. Restitution

For many decades, restitution being paid directly by the offender has been available as an option upon sentencing. In the 2001 report, it was noted that restitution as a sentencing option has been

largely ineffective as the regime is “complex and underused and available only in cases of ascertainable damages” (Roach 1999:298). This negative assessment is unfortunate because, as noted in the 2001 report, “the absence of restitution remains a contributor to victim dissatisfaction” (Young 2001:23).

Since 2001, there have been numerous amendments to strengthen and expand the scope of the restitution provisions in the *Criminal Code*. In this regard, the following 2018 statement from the New Brunswick Court of Appeal provides a good outline of the significant changes:

In any event, recent legislative changes make inapplicable any restraint and caution courts may have believed they needed to exercise when considering a restitution order. Since 2015, there has been a clear legislative message requiring courts to consider restitution orders during sentencing process. That year, Parliament adopted the *Victims Bill of Rights Act*, S.C. 2015, c. 13, which added a number of provisions to the *Criminal Code*. Among these is s. 737.1, which: (1) requires a sentencing judge to "consider making a restitution order" in addition to any other measure imposed on the offender; (2) obliges the judge to make enquiries to determine if steps have been taken to provide victims with an opportunity to seek restitution; and (3) requires the judge to give reasons if restitution is sought but not ordered. The 2015 amendments also added s. 739.1, which states that an "offender's financial means or ability to pay does not prevent the court from making an order" of restitution, and s. 739.2, which provides that, in making a restitution order, "the court shall require the offender to pay the full amount specified in the order by the day specified in the order, unless the court is of the opinion that the amount should be paid in instalments, in which case the court shall set out a periodic payment scheme in the order. (*Moulton v. R.* 2018:31)

In recent years, there have been a number of provincial programs developed to assist victims in collecting restitution ordered by a court. In 2009, the Restitution Civil Enforcement Program was introduced in Saskatchewan and it was the first program of its kind in Canada (McDonald 2020). Since then, similar programs have been introduced in Alberta (2020); British Columbia (2015); Nova Scotia (2008); and Prince Edward Island (2016).

An early study (2010) of the Saskatchewan program had mixed results. Few victims applied for a variety of reasons including: a) lack of public awareness of the program; b) victims with older orders could not be contacted due to outdated information; and c) some did not see the benefit of applying (R.A. Malatest & Associates Ltd. 2010). Further, enforcement and securing payments from offenders was challenging, as evidenced by the fact that only three of the 56 orders were paid in full. The study also noted that 26 of the 56 orders were not paid either because of the offender's inability to pay, the offender was in custody or could not be located, or the offender lived on First Nations territory (*ibid*). A more recent study, however, found that the majority of orders under the program (74%) were respected, which allowed the program to distribute \$1.2 million to victims (Hala 2015).

As with victim fine surcharges and victim service programs, there is little Canadian academic literature or empirical research on the topic of restitution (McDonald 2009; 2020). However, the available research echoes similar themes to other areas with respect to the victim's lack of knowledge and utilization of this entitlement. For example, in 2011 it was found that 45% of study participants (not all of whom were victims) had no knowledge about the availability of restitution or compensation for victims (McDonald & Scrim 2011). In 2013, the Criminal Justice Professionals Survey also showed that familiarity with restitution varied between professions (47% of police, 76% of Crowns, 55% of victim service workers) (McDonald 2015).

As expected, restitution is most commonly ordered for property offences (around 80% of the time) (Maxwell 2017; McDonald 2010), but its usage is infrequent (Wemmers 2017; McDonald 2015; Ombudsman 2017c). In particular, there has been a gradual decline of restitution orders between 1997 (7.06% of cases), 2012 (4.09% of cases) and 2017 (2.3% of cases) (McDonald 2015; Maxwell 2017). It comes as no surprise then that Prairie Research Associates (2004) found that few (15%) victims had restitution ordered in their respective cases.

Unlike participatory rights, it appears that victim satisfaction with restitution may be more related to the outcome than to the fairness of the process. In a 2010 study, it was stated that “one striking finding from the interviews and questionnaires was that with few exceptions, victims focused on the final result, that is, whether or not they received the full payment in the end. This focus was evident regardless of any help they received along the way, or whether they were positive about the process itself” (McDonald, Northcott & Loubier 2010:56). In the United States, it has also been found that a successful result being reached in terms of restitution is positively correlated with victims' desire to report victimization in the future (Ruback, Cares & Hoskins 2008).

Despite victim satisfaction upon success, it has been noted that there remains problems with enforcing these orders due to the time and cost required, as well as the complexity of the process (Prairie Research Associates 2004; R.A. Malatest & Associates Ltd. 2010; Martell Consulting Services 2002; Wemmers 2017). A 2004 study, for example, showed that one-half of prosecutors, two-thirds of probation officers and one-third of defence counsel said enforcement was difficult (Prairie Research Associates 2004). Of course, another significant obstacle remains the accused's inability to pay (Prairie Research Associates 2004, R.A. Malatest & Associates Ltd. 2010). This obstacle was noted in a 2010 study, which found that many victims received no payment at all (31%) or only a partial payment (16%) (McDonald, Northcott & Loubier 2010). It has always been known that the low socio-economic level of most offenders renders restitution within the criminal process a pipe dream, and out of this realization spawned the need for programs to compensate victims from the funds of the state.

## 2. Compensation

In 1992, the Federal Government terminated its cost-sharing agreement with the provinces and federal participation in provincial compensation schemes came to an end. The federal-provincial cost-sharing agreements also contained a number of non-financial conditions designed to ensure a certain degree of uniformity in provincial compensation programs. Since that time, many provinces have changed the infrastructure for the administration of their compensation schemes

while others have simply repealed their programs. It still remains unclear the extent to which the scope and coverage of the remaining provincial programs have been reduced as a result of the termination of federal involvement.

The general theme of the changes across Canada since 1992 has been the movement away from formalized applications to compensation boards towards an informal application process lodged within newly-established victim service agencies. There was also a movement away from quasi-judicial hearings. Originally, hearings were mandatory in every province except P.E.I. where hearings were only available upon request. With this change in the process came a change in legislative form with a movement of provisions out of the governing statute into regulations and orders.

In 2001, a report entitled “Criminal Injuries Compensation in Canada: A Status Report (2001)” was prepared for the Department of Justice (Young 2001a). The report concluded that:

...the evolution of current compensation programs demonstrates a trend towards narrowing the scope of recovery and moving the application process into an informal administrative regime...fee schedules, and denials for recovery for intangible non-pecuniary loss, appear to be the wave of the future and only time will tell whether these changes will serve to reduce the effectiveness of compensatory awards...With the significant changes in Canadian programs in the past decade, it has become necessary to suspend one’s judgment regarding the success of the programs in the absence of a large-scale research project... Raw numbers indicate a sense of growth (but not in all provinces in recent years) but an assessment of compensation programs has to take into account the victims’ interest in process values and their non-material needs. Compensation programs may be in a fine state of health but no one really seems to know. (Young 2001a: 3, 61 & 66)

Since that time, there has been a paucity of research and scholarship with respect to compensation programs in Canada, and many of the trends identified in 2001 continue today. A snapshot of the changes since 2001 demonstrates narrowing and informalization across most programs:

- Eight provinces/territories (AB, BC, MB, NB, NS, PEI, QC, SK) have statutory compensation schemes.
- Five provinces/territories (ON, NL, YK, NT, NU) do not have a statutory regime for victim compensation.
- Three provinces/territories (ON, NT, YK) have informal programs that pay for services or emergency expenses incurred by victims (rather than offering traditional forms of compensation).
- Two (NL, NU) do not have a victim compensation program.
- Only two of the schemes (PEI, NB) explicitly allow for pain and suffering.
- None of the provinces hold hearings for the purpose of assessing applications.

Some provinces have expanded the scope of their compensation schemes in the past few decades. For example, in Manitoba, witnesses to a criminal offence are now entitled to compensation for reasonably incurred expenses as well as counselling services. In Quebec, a “close relation” of the victim can also now receive funds for counselling if it would be beneficial to the victim’s rehabilitation. In addition, the program in Quebec now covers the cost of crime scene clean-up as well as termination of a residential lease/rental costs in some circumstances. Given the broad array of expenses that Quebec’s statute covers, it has been noted as the most generous of its kind in North America (Langevin 2010).

In contrast, Ontario has had arguably the most significant change of all the provinces with the dissolution of the Criminal Injuries Compensation Board in October of 2019. A pre-existing Victim Quick Response Program (funded by MAG) has taken over responsibility for compensation, and the process is now governed by an internal policy. Currently, this policy only covers expenses relating to the immediate aftermath of the crime, such as expenses associated with home repairs, basic necessities, short-term counselling, funeral expenses and crime scene clean-up. In addition, the funds are never paid to the victim – instead, a local victim service agency facilitates whatever the victim needs and pays the service provider directly.

In the 2001 compensation report, it was noted that “compensation programs may be in a fine state of health but no one really seems to know” (Young 2001a:66). This comment applies with equal force today. However, there have been two assessments in the past two decades which suggest a poor state of health. In 2007, the Ombudsman of Ontario concluded with respect to Ontario’s Criminal Injuries Compensation Board that “successive governments have stood frozen at the crossroads, afraid to move – unwilling to give the Board the funding it needs to help rather than hurt, yet unprepared to absorb the political fallout that would surely result from abolishing or maiming a criminal compensation scheme that looks so fine on paper...” (Marin 2007:5).

The second negative assessment comes from victims of crime, but it does not emerge from a research study. Rather, in the past decade, the provinces of Alberta and Saskatchewan have been the subject of attack by class action lawsuits relating to the failure to notify child abuse victims of their rights to compensation and the failure of provincial agencies to pursue compensation claims on behalf of these children (*L.(T.) v. Alberta (Director of Child Welfare)* 2015; *Pederson v. Saskatchewan* 2016). At least one of these lawsuits was ultimately settled, but the fact that they were initiated in the first place underscores the conclusion of the Ombudsman of Ontario that victims seeking compensation are often greeted with “bureaucratic indifference and suspicion” (Marin 2007:1).

### 3. Victim Services and the Victim Fine Surcharge

From a modest start as victim/witness assistance programs in the 1980s, the scope and type of services available to victims has expanded greatly but with significant regional variation. Services evolve over time as provinces explore innovative options. For example, the Victim Rights Support Service in Manitoba now helps victims register for their rights under the provincial Bill of Rights as well as provides them with information about the overall process and when/how they may exercise their rights. Meanwhile, British Columbia’s Victim Travel Fund

provides up to \$3,000 for families or victims to attend justice-related proceedings in the province.

From 2000 until 2012, an annual Victim Services Survey was published. In these reports, we can find a wide array of empirical data from which some general trends can be discerned, and the most recent data shows that:

- Most victims who receive assistance are victims of violent crime (Sauvé 2009; Allen 2014).
- Majority of the victims assisted are women (*ibid*).
- Majority of victim service providers offered the following services in 2011/2012 (Allen 2014):
  - Protection services (92%);
  - Crisis services (90%);
  - Support during participation in justice system (90%); and
  - Information to assist victims with the courts and justice system (89%).
- A significant number of providers in 2011/2012 also offered other kinds of assistance including (*ibid*):
  - Medical-related assistance – primarily hospital accompaniment (64%);
  - Shelter-related services (59%); and
  - Assistance with compensation (56%).
- The most common victim service providers in 2011/2012 were as follows (*ibid*):
  - 36% police-based services.
  - 24% community-based, not-for profit organizations.
    - This category includes community-based programs that are affiliated with court-based service providers.
  - 14% sexual assault or rape crisis centres.
  - 10% court-based providers.
    - This category refers to traditional “Victim-Witness Assistance Programs” that are specifically mandated to provide support services for victims.

There are many programs and many organizations involved in implementing victim service programs. In 2011/12 there were 923 victim service providers providing services to 460,000 victims (Allen 2014). In 2009, the Policy Centre for Victim Issues published a Victim Services Directory to connect victims with services in their local jurisdictions, and it lists more than 350 organizations across the country that provide victim services. Currently, the Department of Justice and the Canadian Centre for Justice and Community Safety Statistics (CCJCSS) are in the process of developing a set of universal indicators or standards that victim services across the country should adhere to, which would then be reported on annually. However, due to differences in counting caseloads and varying definitions of “victim,” there remains some challenges for the completion of this project (McDonald 2020).

As with participatory rights, it appears that there still remains a lack of knowledge of existing victim services. In 2006, it was concluded that “victims often do not know their rights and are unfamiliar with the complicated maze of services available to them. Information is vital because it will often determine the victim’s choices: if you are unaware of a service you cannot use it” (Wemmers & Cyr 2006a:69). This study also found that 64% of victims were not asked by the

police whether they wanted information about victim support. Similarly, McDonald and Scrim (2011) reported that 42% of respondents (not all of whom were victims) had no knowledge of victim services at all, while Prairie Research Associates (2004) found that both victims and victim service providers generally noted that there is a lack of awareness of victim services. American studies have shown the same lack of knowledge and information about victim service programs (Sims, Yost & Abbott 2005; Newmark 2006); however, victims in the U.K. have been found to have considerable knowledge about their victim services (Freeman 2013; Bryce et al. 2016).

With a lack of knowledge, one would also expect to see low utilization of victim services. In Canada, studies have shown that between 20% to 25% of victims use available services (Gomes et al. 2002; Prairie Research Associates 2004; McDonald & Scrim 2011), and in the United States the utilization rate is even lower, ranging from 3% to 10% in various studies (Sims, Yost & Abbott 2005; Zaykowski 2014). Even in the U.K., where victims have reported a higher rate of knowledge, the utilization rate is low (20%) (Lowe et al. 2015).

Though the reasons why victims do not utilize such services vary, there are three common reasons noted in the research to date. First, some victims feel they don't need assistance (Sims, Yost & Abbott 2005; Bryce et al. 2016; McDonald & Scrim 2011). Second, some victims feel that "natural" or "informal" supports are more useful or satisfactory (Sims, Yost & Abbott 2005; McDonald & Scrim 2011). Third, as noted above, some victims simply do not have enough information about victim services (Sims, Yost & Abbott 2005). Regardless of why victims choose not to take advantage of the services available to them, the low utilization rates are regrettable in light of the empirical data in Canada (Hollett and Sons Inc. 2003; Alberta Ministry of Justice and Solicitor General 2019; Bradford 2005; Roberts & Roach 2004), the United States (Newmark 2006) and the United Kingdom (Bryce et al. 2016; Freeman 2013) showing high levels of satisfaction from using these services.

As mentioned at the outset, the strength and success of welfare rights is dependent upon the willingness of political actors to fund these services, and as one might expect, there remains an ongoing problem of insufficient funding in Canada (Hollett and Sons Inc. 2003; British Columbia Ministry of Justice 2014), and in the United States (Sims, Yost & Abbott 2005; Kulkarni, Bell & Rhode 2012). In 1989, the federal victim surcharge was introduced as a sentencing option. This was followed by the enactment of similar provincial surcharges across Canada. These programs were designed to collect revenue for provincial victim service programs. In 2001, it was noted that the surcharge was not an effective mechanism to address the underfunding of provincial programs because the surcharge was rarely being applied (Young 2001b).

In 2013, the *Criminal Code* was amended to eliminate the ability of judges to waive the surcharge. At that time, the victim surcharge was also increased to 30% of any fine imposed (up from 15%); \$100.00 for summary convictions (up from \$50.00); and \$200.00 for indictable offences (up from \$100.00). The policy of addressing the under-utilization of the surcharge by making its imposition mandatory was short-lived, as in 2018 the Supreme Court of Canada ruled that the mandatory imposition of this surcharge violated the *Charter of Rights* because it forced judges "to impose a one-size-fits-all punishment which [did] not take into account the individual's ability to pay" (*R. v. Boudreault* 2018:110).

In 2019, the discretionary surcharge was re-introduced, in which imposition could be waived if the court was satisfied that the surcharge would cause the offender undue hardship or would otherwise be disproportionate to the gravity of the offence or the degree of responsibility of the offender. With the re-introduction of discretion, it is instructive to note that there were a number of studies conducted prior to making the discharge mandatory in 2013, which showed that courts often waive imposition of the surcharge with little input or opposition from defence and prosecutor and that the waiver is done routinely without consideration of the relevant factors in support of the waiver (McDonald, Northcott & Raguparan 2014; Ha 2012; Law & Sullivan 2006; Prairie Research Associates 2004). Only time will tell, but it seems unlikely that the fine surcharge will be the solution to the underfunding of provincial service programs designed to protect the welfare rights of crime victims.

## Part IV: Restorative Justice

### 1. Introduction

Adversarial justice can be stressful and traumatizing for everyone in the process, and there may be limits – constitutionally, conceptually and practically – with respect to any law reform effort to mitigate the harsh and alienating component of our criminal process. Knowing that there are limits to the changes which can be made to make adversarial justice a gentler process, there has been a growing movement over the past thirty years to move minor criminal cases out of the institutionalized system and into an alternative process in which the restorative aspects of justice outweigh the retributive aspects. In fact, the 1996 sentencing reform in Canada recognized for the first time that “alternative measures” were part of the criminal justice landscape.

In the 2001 report, it was noted that restorative justice programs around the world seem to increase victim satisfaction, and the report concluded by stating that:

[I]t is critical to review this restorative justice movement as it may be that in some cases victim satisfaction can only be enhanced outside of a criminal court setting. Studies of mediation programs consistently reveal a high level of victim satisfaction for some cases; however, the empirical evidence relating to increased victim participation in the criminal process does not lead to the same finding. The studies do demonstrate that victim participation has not led to chaos in the courts, nor has it led to a significant impact on sentence outcome. However, when the studies turn to victim satisfaction the results are inconclusive and discouraging. (Young 2001b:61)

As this report has shown, studies over the past two decades have demonstrated some increases in victim satisfaction with various aspects of the process, but for the most part, the causes of dissatisfaction still persist and the goal of integrating victims, and increasing their level of satisfaction, is a work in progress. As such, restorative justice continues to be touted as a popular and effective alternative to the traditional process from the victim’s perspective:

Many touched on a theme that the restorative justice program supported them in ways that the formal criminal justice system did not. That is, some felt they did not get the kind of victim services they desired, nor did they feel listened to by court officials/other representatives of the criminal justice system or school system. In contrast, a consistent theme was that participants felt the restorative justice program provided them with attention, answers and services that they otherwise did not have access to. (Bargen, Lyons & Harman 2019:18)

Unlike the criminal justice system, restorative justice is meant to be “both backward-looking – condemning the offense and uncovering its causes – and forward-looking – making amends with the victim and the general community while actively facilitating moral development and pro-social behaviour of the offender” (Luna & Poulson 2006:790). In other words, it focuses on “healing and redress rather than violence and duress; it favours the victim’s gain over the infliction of pain” (Fattah 2011:720). As was noted by the Law Commission of Canada in 2003:

One of the ways we deal with conflict is through the justice system. But, over the past several decades, some Canadians have become dissatisfied with how the formal justice system responds to conflict. Conflicts are framed in legal language, rather than in terms of how individuals experience them; remedies often do not provide adequate redress for those who have been harmed; and the process is frequently time-consuming, costly and confusing (Law Commission of Canada 2003:xiii).

There is no universal definition for restorative justice (Jones & Nestor 2011; Belknap & McDonald 2010; Berlin 2015; Van Camp & Wemmers 2013), but most programs are comprised of some form of mediation or dialogue between offender and victim. However, there are also several restorative justice programs and initiatives that focus on the offender, rather than the victim, such as Circles of Support and Accountability, which started in Canada and aimed to help sex offenders reintegrate into the community upon their release. These programs are beyond the scope of this report.

There continues to be an extensive amount of research and literature pertaining to restorative justice both in Canada and abroad (at least 2 books, over 100 articles and 18 government reports since 2000), and the importance of this concept is underscored by the fact that, in 2002, the UN recognized and addressed it with the adoption of the Basic Principles on the Use of Restorative Justice Programs. In 2015, Manitoba even enacted the *Restorative Justice Act* (C.C.S.M. c. R119.6), which is the first of its kind in Canada. The Act created an advisory council to oversee implementation of a strategy designed to increase the use of restorative justice and to promote public safety by providing for a resolution that affords healing, reparation and re-integration (OFOVC 2017d).

## 2. The Benefits of Restorative Justice

Restorative justice programs have grown in popularity within the victims’ rights movement because there are many different reasons why victims find non-adversarial processes more rewarding. Some victims wish to confront their offenders. Some victims are seeking reparations or an apology. The reasons for participation are varied:

The available research is relatively consistent regarding victims' expectations. Victims participate in restorative justice programs to seek reparation, help the offender, confront the offender with the consequences of the crime, and to ask questions such as why the offence was committed. Interestingly, regardless of the seriousness of the offence, the reasons given by victims for their participation in restorative justice programs remain quite consistent. (Wemmers & Canuto 2002:35)

Generally speaking, restorative justice has been found to be extremely beneficial for victims (see, for example, OFOVC 2017d; Evans, McDonald & Gill 2018; Gavielides 2015):

Research on restorative justice has found many positive benefits, such as high levels of participant satisfaction, decreased fear for victims, and reduced recidivism for offenders. Research has also suggested that restorative justice processes may have positive impacts on a participant's overall well-being (Rugge & Scott 2009:1).

In a similar vein, it was noted in 2014 that:

Generally, a meta-analysis of the documented studies seems to suggest that those who participated in such a program were more likely to: believe the criminal justice system and the handling of their case was fair, believe they had an opportunity to tell their story, feel their opinion was adequately considered, think the judge or mediator was fair, feel the offender was held accountable, receive an apology or forgiveness, believe the outcome was fair, be satisfied with the outcome, believe the other party's behaviour improved, and were less likely to remain upset about the crime, and be less afraid of revictimization (Marshall 2014:586).

While some of the benefits that have been recognized relate to the ultimate outcome of the process, it is important to note that the research has also shown that sometimes the outcome is less important than the process itself. For instance, a recent Canadian study found that "the need for support was often experienced as an independent benefit of the restorative justice process, sometimes surpassing any outcomes (positive or negative) of the encounter with the offender" (Bargen, Lyons & Hartman 2019:17). Van Camp and Wemmers (2013) similarly noted that restorative justice was valued by victims regardless of the outcome and that having an opportunity to participate in the process and to present their complaints ("voice") was a strong indicator of respondents' satisfaction.

Despite the widespread potential benefits of restorative justice programs, some criminal justice professionals remain hesitant to refer victims to such programs. A Quebec study of victim service providers found that many were sceptical of restorative justice programs and reluctant to refer victims to them (Coté & Laroche 2002). Ironically, the reluctance to refer was often related to concerns that these programs could trigger secondary victimization. The 2018 Criminal Justice Professionals Survey also found that, despite 90% of police and 91% of victim service workers being aware of restorative justice programs, only 51% of police and 62% of victim service

workers made referrals to such programs (Bourgon 2019). This stated reluctance may relate to the fact that there is considerable disagreement amongst criminal justice professionals as to whether restorative justice is appropriate for violent or sexual offences (Prairie Research Associates 2004; Bourgon 2019; OFOVC 2017d).

### 3. Victim-Offender Mediation

Victim-offender mediation is the most researched, empirically supported and widespread form of restorative justice practice around the world and it has attracted a large body of research studies (Umbreit & Armour 2011). As such, it is not surprising that victim-offender mediation has been integrated into criminal justice systems around the world (*ibid*). Even the United States, with its aggressive system of adversarial justice, has over 300 victim-offender mediation programs alone (*ibid*) and at least 29 states make reference to victim-offender mediation in their victims' rights statutes (Umbreit, Coates & Vos 2004; Lightfoot & Umbreit 2004).

While victim-offender mediation has historically only dealt with property crimes and minor assaults (and, to a large degree, still focuses on these kinds of offences), there is a growing practice of using victim-offender mediation for serious violent offences (Umbreit, Coates, Vos 2004; Public Safety Canada 2005). In this regard, the CSC Restorative Opportunities Program is the most well-known program in Canada which deals mainly with violent offences. Since the program was established in 1992, a total of 257 offenders have participated in victim-offender mediation, the large majority of whom were convicted of either murder, manslaughter or attempted murder (51%) or sexual offences (27%) (Correctional Services Canada 2018). As with other victim-offender mediation initiatives, which will be discussed below, victims have expressed great satisfaction with the program's mediation process (*ibid*) and it has been found to have a positive impact on the participants' physical and psychological health (Rugge 2006).

The tangible benefits of victim-offender mediation have been demonstrated extensively and have been found "across sites, cultures and seriousness of offenses" (Umbreit et al. 2005:273). Moreover, as was noted in the 2001 report, victims tend to be more satisfied with mediation than traditional criminal justice processes:

Restorative justice has been found to be an effective mechanism for addressing crime and wrongdoing. Typically, crime victims report being satisfied with victim-offender mediation more than 80% of the time and nine out of ten state that they would recommend mediation to a friend (Umbreit, 1999; Umbreit & Armour, 2011; Umbreit, Coates, & Vos, 2001). This compares favorably to satisfaction with traditional court processes, where victims report satisfaction rates of 42–79% (Sherman & Strang, 2007; Strang, Sherman, Mayo-Wilson, Woods, & Ariel, 2013; Umbreit, 1999). Furthermore, commonly over 80% of the time victims report being satisfied with mediation outcomes (Umbreit, 1999; Umbreit, Coates, & Vos, 2004). In several studies, victims indicated over 80% of the time that they found the mediation process and any resulting agreements fair, compared to 37–56% of those who attended court processes (Hansen & Umbreit 2018a:188).

Some of the tangible benefits of victim-offender mediation that have been identified since 2000 include:

1. It helps victims put the offence and victimization behind them (New Zealand Ministry of Justice 2016; Strang 2002; Choi, Green & Kapp 2010);
2. Reduced levels of fear/enhanced feelings of safety (Walgrave 2011; De Mesmaeker 2011; Strang 2002; Strang et al. 2013);
3. Enhanced restitution – either in terms of reaching an agreement (Spriggs 2009) or higher compliance rates (Latimer, Dowden & Muise 2001; Umbreit & Armour, 2011);
4. Empowerment (Koss 2014; Wager 2013; New Zealand Ministry of Justice 2016; Choi, Green & Kapp 2010; Armstrong 2012); and
5. Psychological benefits such as reduction of stress and PTSD symptoms (Koss 2014; Angel et al. 2014; Strang et al. 2013).

Of course, the praise for this form of restorative justice is not universal amongst all victims, and there are still, however, some victims who are not satisfied with the mediation process. Some of the reasons for such dissatisfaction include:

1. Victims felt that their emotions were stifled (Choi, Green & Kapp 2010; Jacobsson Wahlin & Anderson 2012);
2. Inadequate preparation (Choi, Gilbert & Green 2013; Choi, Green & Kapp 2010);
3. Revictimization through the process (Choi, Bazemore & Gilbert 2012; Strang 2002); and
4. Victims felt pressured either to accept the agreement/apology or to finish the mediation (Choi, Gilbert & Green 2013; Choi, Green & Kapp 2010).

There is an enormous body of evaluative literature from many different jurisdictions, and Professor Mark Umbreit has been one of the most prolific scholars who has followed the evolution of restorative justice programs for many decades. In 2018, he and Professor Hansen provided this outline of the various findings from four decades of research:

This research consistently demonstrates that victim-offender mediation is at least as effective as traditional juvenile and criminal justice responses to crime and is commonly shown to be far more effective... To summarize, several key findings about victim-offender mediation have emerged: (a) victims and offenders both generally report higher levels of satisfaction with the process, outcomes, and the fairness of the process than those who participate in court proceedings; (b) victims and offenders tend to derive psychosocial benefits from participating in the victim-offender mediation process; (c) most victim-offender mediations result in restitution agreements that are more likely to be fulfilled than those coming out of traditional juvenile and criminal justice processes; (d) victims who participate in victim-offender mediation are likely to receive a direct apology from offenders, which they often value; (e) victim-offender mediation tends to reduce the likelihood of offender recidivism; (f) victim-offender mediation is typically less expensive than the traditional criminal justice system, producing immediate cost-savings associated with the process itself (when compared to court proceedings), as well as long-term financial benefits from decreases in recidivism and incarceration; and (g) more offenders tend to be diverted away from the traditional criminal justice system when victim-offender mediation is made available. However, these benefits are not necessarily uniformly experienced across diverse programs, countries, ethnic groups, genders, races, ages, types of

crimes, or other intervening variables, all of which need to be more thoroughly researched. However, researchers are increasingly discovering in more detail how victim-offender mediation works, with whom, and under what circumstances (Hansen & Umbreit 2018b:106-107).

From the Canadian perspective, a 2006 study similarly found that “victims desire more than the ability to make demands. Most victims in the sample said that they had been able to make demands, but what mattered most was that they felt they were heard and were not hindered in making demands” (Wemmers & Cyr 2006b:122) The researchers further noted that “victims find mediation fair because it offers them recognition and respect through consultation, not because it allows them to make demands” (*ibid*:123). Much of the research into victim-offender mediation confirms the important conclusion identified in the 2001 report that victims are generally more interested in process than outcome (see, for example, Umbreit et al. 2005; New Zealand Ministry of Justice 2016; Miller 2011; Armstrong 2012; Wemmers & Cyr 2005). Being treated fairly may be more important than the actual result of the case.

## Part V: Conclusion

Whether restorative justice involves the exchange of videos between offender and victim, the provision of a letter of apology by the offender, face-to-face or shuttle mediation or community and/or family conferences, it is clear that victims derive “a great deal of solace from having the chance to ask their questions and have them answered at the dialogue, as well as having the opportunity to describe fully the short-and long-term consequences of the crime” (Miller 2011:172).

These encouraging and positive assessments of restorative justice programs underscore how deeply-entrenched the problems may be in the conventional criminal justice system. When there is an expressed preference for an alternative approach, it casts a shadow on the mainstream approach. At a minimum, policy makers should begin to consider moving as many cases as possible out of the conventional system into the alternative system for two reasons: a) to increase victim satisfaction; and b) to decrease the ever-increasing caseloads within a cumbersome and slow-moving criminal justice system.

Perhaps after four decades of law reform to support and assist victims, one would think that we have reached the end of the journey and that we have uncovered all we need to know about victims and their rights. There is still much that needs to be explored and some of this exploration relates to rudimentary questions like what are the precise needs of crime victims and how these needs may differ for different crimes. After being silenced for most of the 20<sup>th</sup> century, it may take many decades of speaking before we truly understand how the victim can be most effectively and fairly integrated into our system of criminal justice.

Beyond the necessity of exploring the needs, demands and entitlements of crime victims in a theoretically and empirically sound fashion, the problem of professional neutralization must be addressed if we want to ensure that the fall of victims’ rights is not as spectacular and rapid as its rise. Although the problem of professional resistance has not been studied as extensively in the past two decades, it is clear that the practical implementation of victims’ rights has never matched the political rhetoric. It would be easy to account for some of the practical shortcomings as being a product of fiscal constraints, but this explanation only holds weight with respect to welfare rights. With respect to the right to participate in the process, a lack of funding has no impact on this right, and moving forward the important question which needs to be asked, researched and studied is whether legal professionals genuinely welcome and embrace such participation or whether legal culture still views the victim as an intruder who should just leave the professionals alone to do their arduous job of trying to achieve justice.

## Appendix A: Canadian Statement of Basic Principles (1988 and 2003)

<b>1988 Principles</b>	<b>2003 Principles</b>
<ol style="list-style-type: none"> <li>1. Victims should be treated with courtesy, compassion and with respect for their dignity and privacy and should suffer the minimum of necessary inconvenience from their involvement with the criminal justice system.</li> <li>2. Victims should receive, through formal and informal procedures, prompt and fair redress for the harm which they have suffered.</li> <li>3. Information regarding remedies and mechanisms to obtain them should be made available to victims.</li> <li>4. Information should be made available to victims about their participation in criminal proceedings and the scheduling, progress and ultimate disposition of the proceedings.</li> <li>5. Where appropriate, the view and concerns of victims should be ascertained and assistance provided throughout the criminal process.</li> <li>6. Where the personal interests of the victim are affected, the views or concerns of the victim should be brought to the attention of the court, where appropriate and consistent with criminal law and procedure.</li> <li>7. Measures should be taken when necessary to ensure the safety of victims and their families and to protect them from intimidation and retaliation.</li> <li>8. Enhanced training should be made available to sensitize criminal justice</li> </ol>	<ol style="list-style-type: none"> <li>1. Victims of crime should be treated with courtesy, compassion, and respect.</li> <li>2. The privacy of victims should be considered and respected to the greatest extent possible.</li> <li>3. All reasonable measures should be taken to minimize inconvenience to victims.</li> <li>4. The safety and security of victims should be considered at all stages of the criminal justice process and appropriate measures should be taken when necessary to protect victims from intimidation and retaliation.</li> <li>5. Information should be provided to victims about the criminal justice system and the victim's role and opportunities to participate in criminal justice processes.</li> <li>6. Victims should be given information, in accordance with prevailing law, policies, and procedures, about the status of the investigation; the scheduling, progress and final outcome of the proceedings; and the status of the offender in the correctional system.</li> <li>7. Information should be provided to victims about available victim assistance services, other programs and assistance available to them, and means of obtaining financial reparation.</li> <li>8. The views, concerns and representations of victims are an important consideration in criminal justice processes and should be considered in accordance with prevailing law, policies and procedures.</li> </ol>

<p>personnel to the needs and concerns of victims and guidelines developed, where appropriate for this purpose.</p> <p>9. Victims should be informed of the availability of health and social services and other relevant assistance so that they might continue to receive the necessary medical, psychological and social assistance through existing programs and services.</p> <p>10. Victims should report the crime and cooperate with the law enforcement authorities.</p>	<p>9. The needs, concerns and diversity of victims should be considered in the development and delivery of programs and services, and in related education and training.</p> <p>10. Information should be provided to victims about available options to raise their concerns when they believe that these principles have not been followed.</p>
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## Appendix B: Provincial/Territorial Victims' Bills of Rights & Compensation Statutes

<b>Province</b>	<b>Relevant Legislation</b>
Alberta	<i>Victims of Crime Act</i> , R.S.A. 2000, c. V-3 <i>Victims Restitution and Compensation Payment Act</i> , S.A. 2001, c. V-3.5
British Columbia	<i>Victims of Crime Act</i> , R.S.B.C. 1996, c. 478 <i>Crime Victim Assistance Act</i> , S.B.C. 2001, c. 38
Manitoba	<i>Victims' Bill of Rights</i> , C.C.S.M., c. V55
New Brunswick	<i>Victim Services Act</i> , R.S.N.B. 2016, c. 113
Newfoundland & Labrador	<i>Victims of Crime Services Act</i> , R.S.N.L. 1990, c. V-5
Northwest Territories	<i>Victims of Crime Act</i> , R.S.N.W.T. 1988, c. 9 (Supp.)
Nova Scotia	<i>Victims' Rights and Services Act</i> , S.N.S. 1989, c. 14
Nunavut	<i>Victims of Crime Act</i> , R.S.N.W.T. (Nu) 1988, c. 9 (Supp.)
Ontario	<i>Victims' Bill of Rights</i> , S.O. 1995, c. 6
Prince Edward Island	<i>Victims of Crime Act</i> , R.S.P.E.I. 1988, c. V-3.1
Quebec	<i>Act Respecting Assistance for Victims of Crime</i> , C.Q.L.R., c. A-13.2 <i>Crime Victims Compensation Act</i> , C.Q.L.R., c. 1-6
Saskatchewan	<i>The Victims of Crime Act</i> , 1995, S.S. 1995, c. V-6.011
Yukon	<i>Victims of Crime Act</i> , S.Y. 2010, c. 7 <i>Crime Prevention and Victim Services Trust Act</i> , R.S.Y. 2002, c. 39

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