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Expanding Victims' Rights in the Charter Era and Beyond

Joan Barrett*

I. OVERVIEW

The role and importance of victims of crime to the criminal justice system was aptly described by the Honourable Mr. Justice Martin in his Report to the Attorney General as follows:

The victim of crime is uniquely placed among members of the public to assess how effectively the administration of criminal justice responds to the fact of a crime having been committed. No one, with the possible exception of the offender, is closer to the criminal act, and thus, generally speaking, more interested in the response of the criminal justice system to that act. Therefore, satisfying the interests and needs of victims, is, along with treating the accused fairly, one of the criminal justice system's most important objectives.¹

Ironically, while there can be little doubt that the victim is the person most directly affected by the commission of a criminal offence, traditionally our adversarial system failed to accommodate the interests of anyone other than the state and the accused.² This flowed from the concept that crimes were committed against the state and prosecutions were undertaken

* Counsel, Crown Law Office Criminal. The views expressed herein are those of the author and do not reflect those of the Ministry of the Attorney General. The author is grateful to Riun Shandler, Counsel Crown Law Office-Criminal, for his helpful comments and suggestions on an earlier draft of this paper and to Megan Ward, Counsel, Crown Law Office-Criminal, for her research assistance on the limited issue of victims' rights in foreign jurisdictions.

¹ Report of the Attorney General's Advisory Committee, *Charge Screening, Disclosure, and Resolution Discussions* (Toronto: Queen's Printer for Ontario, 1993), at 307.

² This is in contrast to the historical role of victims during the Anglo-Saxon period when crimes were akin to torts and victims were responsible for pursuing persons who had harmed them in order to receive compensation. For further reading on this topic see: John Hagan, *Victims Before the Law: The Organizational Domination of Criminal Law* (Toronto: Butterworths, 1983); Peter Burns, "Private Prosecutions in Canada: The Law and a Proposal for Change" (1975) 21 McGill L.J. 269.

in the name of Her Majesty the Queen. The result was that the criminal trial was viewed as “a contest between the state and the accused”,³ thereby barring the consideration of the rights or interests of any third party.

Hence, while the criminal justice system expected much from victims of crime in terms of reporting offences and cooperating as required in the investigation and any subsequent prosecution, it provided little in return. Rather, once a crime was reported, victims were largely ignored and relegated to the role of silent bystanders despite the fact that their privacy, security and safety interests could be at risk. Moreover, in some circumstances, the criminal process itself exacerbated the loss of autonomy and trauma experienced by victims.

In the late 20th century, the plight of victims and the need to safeguard their interests hit the political radar. By the time the *Canadian Charter of Rights and Freedoms*⁴ was proclaimed in force on April 17, 1982, the victims’ rights movement had gained momentum throughout North America. Compensation schemes were established for victims of crime, other support services were developed to assist victims through the criminal process, and efforts were made to reduce the risk of secondary victimization arising from some of the discriminatory evidentiary and procedural rules of the criminal process. The Charter assisted this movement by offering the means by which persons other than the accused and the Crown could assert rights in criminal proceedings. The Charter also provided the basis upon which the Supreme Court would ultimately find that the rights of complainants and witnesses are entitled to equal protection.

Not long after the Charter’s enactment, its influence on legislative initiatives was readily apparent. Parliament embraced Charter principles in enacting legislation designed to advance the procedural, substantive and welfare rights of victims. Indeed, since the early 1990s the Charter has been expressly referenced in several amendments to the *Criminal Code*⁵ that are aimed at facilitating the testimony of children and sexual assault complainants as well as the protection of privacy interests in third party records. As a result of this legislative reform, victims have gained greater recognition as well as a greater role in the criminal process. For instance, prior to the proclamation of the Charter in April of 1982, any

³ *R. v. Seaboyer; R. v. Gayme*, [1991] S.C.J. No. 62, 66 C.C.C. (3d) 321, at 403 (S.C.C.).

⁴ Part I of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “the Charter”].

⁵ R.S.C. 1985, c. C-46.

form of victim participation in criminal proceedings was non-existent. Now, victims have statutory rights of participation at various stages of the criminal process. In addition, the evidentiary and procedural rules governing criminal proceedings have undergone significant reform in an attempt to reduce the risk of secondary victimization. Also, as a result of legislative reform by provincial and territorial governments, victims' rights legislation has been enacted in all Canadian jurisdictions. Most jurisdictions also offer some form of compensation for victims of crime. Consequently, victims of crime now enjoy more procedural, substantive and welfare rights. In short, the evolution of the role of victims during the 1980s and 1990s transformed the legal landscape.

This paper focuses on the gains that victims have made over the last 25 years predominately through legislative reform and the related Charter jurisprudence. It then questions whether these gains have resulted in increased victim satisfaction or whether the Charter, and the numerous legislative initiatives designed to address victims' interests, including the enactment of victims' bills of rights, merely created false hopes. Finally, it considers some of the remaining challenges and whether there are other viable measures to address the lingering dissatisfaction of victims with the criminal justice system.

II. LEGISLATIVE REFORM DURING THE CHARTER ERA

The concept of some degree of victim participation in criminal proceedings and the need for greater evidentiary and procedural protections to guard against the risk of secondary victimization took hold in the late 1980s and continued with vigour well into the 1990s. This evolution in the role of the victim and the need to safeguard victims' interests is evident in the introduction of victims' rights legislation, the numerous amendments to the *Criminal Code*⁶ and other legislative initiatives during this period which are discussed herein.

1. Victims' Bills of "Rights": A Misnomer

Starting in 1986 with the enactment of Manitoba's *Victims' Bill of Rights*,⁷ every province and territory throughout Canada has enacted some form of victims' rights legislation. While the bills vary to some extent,

⁶ R.S.C. 1985, c. C-46.

⁷ S.M. 1998, c. 44.

at a minimum they all provide that, upon request, victims are entitled to receive information about the status of the investigation and the progress of the proceedings. This formal recognition that victims are entitled to certain basic information about the proceedings is significant. Indeed, it is a critical first step in allowing for greater victim involvement in and understanding of the criminal process.

Prior to the enactment of victims' rights legislation, criticism was often voiced that victims were being forgotten and ignored by the criminal justice system. Following the laying of a charge, the victim heard nothing more of the case unless and until required as a witness. In cases of a plea or where the victim was not required as a witness, the victim sometimes heard nothing more of the matter and was left guessing as to the ultimate disposition of the case. Even in cases of notoriety, victims would learn of developments in the case such as an offender's release on bail, plea agreements and sentencing dispositions through the media, through members of their community, or through first-hand observations if they subsequently encountered the offender.⁸ Consequently, the enactment of victims' rights legislation was an essential development in the evolution of the victim's role in the criminal process. By recognizing that victims are entitled to basic information about the criminal process, legislatures have provided the necessary foundation for victims to become aware of their role, of the support services that may be available, and of any rights of participation that may exist.

The Charter's influence on the enactment of victim rights legislation is evident. For instance, prior to the enactment of the Ontario *Victims' Bill of Rights, 1995*,⁹ there were calls for a victim-centred and Charter-driven review of the criminal process in Ontario to ensure that victims were afforded "equal protection and benefit" of the law and "security of

⁸ In 1993, Priscilla de Villiers, whose daughter was murdered by Jonathan Yeo, an offender out on bail for serious offences, described her role as a victim to the Standing Committee on Administration of Justice as follows:

As victims, however, once the Halton police had concluded their part of the investigation, we had no contact with any government official, in spite of the extensive media coverage. In fact, the few pronouncements made by the Attorney General's office were published in the Toronto Sun and brought to our attention by a reporter with that newspaper. . . . As victims, we had no persona, we had no face. Nina's death was sensational at the time, and yet we received little consideration as victims. What consideration, then, can the equally tragic, less publicized cases expect?

(Legislative Assembly of Ontario, Committee Hearings, May 31, 1993, at 1540.)

⁹ S.O. 1995, c. 6.

the person” as guaranteed by the Charter.¹⁰ Also, in 1992, the coroner’s jury at the Jonathan Yeo inquest went so far as to recommend a “Charter of Rights for victims” in order to “stop victims from being re-victimized”.¹¹ Following on the heels of the Yeo jury recommendations, CAVEAT,¹² a victims’ rights non-profit organization founded by Priscilla de Villiers, the mother of one of Yeo’s murder victims, lobbied for the enactment of a victims’ bill of rights to help protect the victim and inject more accountability into the justice system.

Further, the Canadian Statement of Basic Principles of Justice for Victims of Crime, which serves as a guide to the federal and all provincial and territorial governments in the development of policies, programs and legislation related to victims of crime, expressly recognizes that “all persons have the full protection of rights guaranteed by the Canadian Charter of Rights and Freedoms . . .” and that the “rights of victims and offenders need to be balanced”.

Accordingly, the Charter has assisted in shaping provincial and territorial legislation designed to assist victims and witnesses in the criminal process. The enactment of victims’ bills of rights has provided a recognized standard of treatment for victims of crime which includes the right to receive information about the process. The provision of information is an essential first step towards ensuring that the system is more accountable and that victims have the opportunity to become more involved if they so choose.

While the enactment of victims’ rights legislation is significant as it recognizes the need to keep victims apprised of developments in the proceedings, it unrealistically heightened the expectations of some victims. This is likely due to the fact that the very title of most bills, “*Victims’ Bill of Rights*”, is misleading in that it suggests something that does not exist: rights. Indeed, any hope that victims’ bills of rights provided enforceable statutory rights vanished soon after their enactment. Within three years of the enactment of Ontario’s *Victims’ Bill of Rights, 1995*,¹³

¹⁰ The Advisory Board on Victims’ Issues, “Victims of Crime in Ontario: A Vision For The 1990’s” (Ontario, Queen’s Printer, 1991), at 21-22.

¹¹ Ministry of the Solicitor General, Inquest into the Death of Jonathan Yeo, Verdict of the Jury, Recommendation 129 (1992).

¹² Canadians Against Violence Everywhere Advocating Its Termination. Ten years after its formation, CAVEAT ceased operations on May 31, 2001. In a May 10, 2001 news release announcing its closure, the gains made by CAVEAT since its opening in 1991 were summed up as follows: “[T]he role of the victim in the criminal justice system is now accepted as an integral part of the system itself and the inclusion of victims in policy making signals that our work has not been in vain.”

¹³ S.O. 1995, c. 6.

the decision of *Vanscoy v. Ontario*¹⁴ found that the *Victims' Bill of Rights* conferred no rights at all and was nothing more than “a statement of governmental policy wrapped in the language of legislation”.¹⁵

In *Vanscoy*,¹⁶ the victims in two separate cases relied upon the *Victims' Bill of Rights, 1995*¹⁷ to request declaratory relief after the Crown proceeded with pleas over their objection. One applicant, Ms. Vanscoy, was the mother of a 14-year-old girl who was shot to death by a young person. Ms. Vanscoy challenged the Crown's decision to accept a plea to manslaughter and proceed with a joint submission for a two-year custodial disposition over her objection. The second applicant, Ms. Even, objected to the Crown accepting a plea to aggravated assault from the original charge of attempt murder. In dismissing the applications, the Court unequivocally rejected the assertion that the pleas violated any of the victims' “rights” under the Ontario *Victims' Bill of Rights* or that the failure to be kept informed violated their section 7 Charter rights. Rather, the Court held that the *Victims' Bill of Rights, 1995* was merely “a statement of principle and social policy, beguilingly clothed in the language of legislation”¹⁸ and therefore did not confer any “rights”.

As a result of the *Vanscoy*¹⁹ decision, victims' rights legislation has been criticized as lacking teeth and giving rise to false expectations.²⁰ In addition to the lack of any enforceable “rights”, the bills suffer from other weaknesses. For instance, the standards of treatment set out in victims' bills of rights are often reliant upon victim initiative, silent as to the particular person or group responsible for providing the “right”, and are couched heavily in language that conveys broad discretion to justice system participants as to how and when information and other services are to be provided. Indeed, while all bills recognize that victims are entitled, upon request, to information about the status of the investigation and the proceedings, they do not state who is responsible for providing this information — whether it is the Crown, the police, the victim/witness assistance program or some other justice system participant. In addition,

¹⁴ [1999] O.J. No. 1661, 99 O.T.C. 70 (Ont. S.C.J.).

¹⁵ *Vanscoy v. Ontario*, [1999] O.J. No. 1661, 99 O.T.C. 70, at para. 41 (Ont. S.C.J.).

¹⁶ *Vanscoy v. Ontario*, [1999] O.J. No. 1661, 99 O.T.C. 70 (Ont. S.C.J.).

¹⁷ S.O. 1995, c. 6.

¹⁸ *Vanscoy v. Ontario*, [1999] O.J. No. 1661, 99 O.T.C. 70, at para. 22 (Ont. S.C.J.).

¹⁹ *Vanscoy v. Ontario*, [1999] O.J. No. 1661, 99 O.T.C. 70 (Ont. S.C.J.).

²⁰ See, for example, Alan Young, *Justice for All: The Past, Present and Future of Victims' Rights in Canada*, August 11, 1997, prepared for CAVEAT, at 7; Kent Roach, “Crime Victims and Substantive Criminal Law” in D. Stuart, R.J. Delisle & A. Manson, *Towards a Clear and Just Criminal Law: A Criminal Reports Forum* (Toronto: Carswell, 1999), at 224.

with the exception of Manitoba and British Columbia, there is no formal complaint process to deal with alleged violations and most bills of rights expressly state that no remedy exists for violations.²¹

As noted by Professor David Paciocco,²² the purely symbolic nature of “victims’ rights” is clearly deliberate on the part of legislatures. Indeed, had the legislatures intended anything more substantive, remedial and enforcement provisions could have been included as is found in the victims’ rights legislation of other jurisdictions. For instance, in the United States, the *Crime Victims’ Rights Act*,²³ enacted in October 2004 as part of the federal Code of Service, expressly provides that victims may apply for a writ of *mandamus* and may also motion the court to re-open a plea or sentence in certain circumstances.²⁴ Further, to ensure compliance, the Act requires the Attorney General to promulgate regulations containing “disciplinary sanctions, including suspension or termination from employment” for Department of Justice employees who “willfully or wantonly” fail to comply with federal law as it relates to the treatment of crime victims. The victims’ rights legislation of the United Kingdom also contains remedial provisions. As of April 2006, the *Code of Practice for Victims of Crime* provides a binding set of policies on all criminal justice agencies in England and Wales in respect of how victims of crime are to be treated. Although a breach does not give rise to criminal or civil liability, violations may be investigated by the parliamentary

²¹ Manitoba’s *Victims’ Bill of Rights*, S.M. 1998, c. 44, creates an administrative complaint process which allows the victim to file a complaint with the Director of Victim Services. The Act also imposes a duty on the Director to investigate all complaints and to report back to the victim as to any steps taken or recommendations made to address the complaint. British Columbia’s *Victims of Crime Act*, R.S.B.C. 1996, c. 478, s. 12, allows for complaints to be made to the Ombudsman except in respect of matters falling within prosecutorial discretion.

²² D. Paciocco, “Why the Constitutionalization of Victim Rights Should Not Occur” [2005] 49 C.L.Q. 393, at fn. 33.

²³ 18 U.S.C. § 3771.

²⁴ In *Kenna v. United States Dist. Court*, 435 F.3d 1011 (9th Cir. 2006), the Court held that the sentencing judge erred in not allowing victims to speak at an offender’s sentencing hearing. In that case, more than 60 victims of the two offenders’ multi-million dollar fraud scheme filed victim impact statements. In addition, several of them spoke at the co-accused’s sentencing hearing held three months earlier before the same judge. In refusing to allow the victims to speak a second time, the sentencing judge stated there was not “anything else that could possibly be said”. Following the passing of sentence, one victim filed a writ of *mandamus* seeking an order vacating the sentence as well as an order allowing the victims to speak at the rehearing. On review, the Court found that the sentencing judge erred. However, as the offender was not a party to the application, it ordered the matter back to the district court to determine whether the sentencing hearing should be re-opened for purposes of allowing the victims to speak. Ultimately the re-opening was denied.

ombudsman and may be taken into account by courts in determining a question in the proceedings.²⁵

While most Canadian victims' bills of rights lack remedial provisions and are largely symbolic in nature, this does not strip them of value. Indeed, the enactment of victims' rights legislation has been significant in that the bills establish standards for the treatment of victims, which includes the provision of information. The very existence of such legislation also serves to increase the general awareness of victims in the criminal process. In fact, victims' rights legislation has had a direct impact on the policies governing Crown prosecutors in their treatment of victims.²⁶ Further, the victims' rights legislation has influenced the development of support services such as the Victim/Witness Assistance Program, which provides support and information for victims of crime through the criminal process.

Accordingly, victims today are better informed of the process and their role in the system than they have been in the past. Information enables victims to assert their rights and thereby exercise more control. However, due to the purely administrative nature of victims' rights legislation, it is limited in scope. Consequently, legislative reform aimed at providing victims and witnesses with increased procedural and participatory rights has also been essential in the evolution of victims' rights. As with the victim rights legislation, the Charter's influence in the reform of the procedural and substantive rules governing criminal proceedings is readily apparent.

2. Procedural Rights: Creating a Fairer Process

A common complaint of victims of crime is the lack of control over the criminal process. Upon the reporting of a crime, victims are thrust involuntarily into an unknown entity: the criminal justice system. Further, in some circumstances, the criminal process poses a risk of secondary victimization, particularly in respect of child witnesses and sexual assault complainants.

The Supreme Court recognized the hardships endured by child witnesses in its early Charter jurisprudence. In the decision of *R. v.*

²⁵ *Domestic Violence, Crime and Victims Act 2004* (U.K.), c. 28; *Victims Code of Practice*, Order 2006 No. 629.

²⁶ See, for example, Ministry of the Attorney General, Crown Policy, Practice Memorandum [2005] No. 11, *Victims of Crime: Access to Information & Services Communication and Assignment of Sensitive Cases* (Ontario, March 31, 2006).

Levogiannis,²⁷ L'Heureux-Dubé J., on behalf of a unanimous Supreme Court, recognized that the criminal justice system was failing children and that it was necessary to consider this context when determining whether the accused's Charter rights were violated by section 486(2.1) (now 486.2) of the *Criminal Code*,²⁸ which allowed for children to testify from outside of the courtroom or from behind a screen:

The examination of whether an accused's rights are infringed encompasses multifaceted considerations, such as the rights of witnesses, in this case children, the rights of accused and courts' duties to ascertain the truth. . . . one cannot ignore the fact that, in many instances, the court process is failing children, especially those who have been victims of abuse, who are then subjected to further trauma as participants in the justice process.²⁹

Applying this contextual analysis, the Court upheld the constitutionality of section 486(2.1) and found that the Charter required the protection of child witnesses from emotional harm during criminal proceedings.

The fact that the criminal justice system was equally failing sexual assault complainants also did not escape notice.³⁰ Consequently, in an effort to protect vulnerable witnesses from the risk of secondary victimization, in 1988 Parliament completely overhauled the procedural and evidentiary rules applicable in respect of sexual offence proceedings and children's testimony through a series of amendments designed to: allow for the use of various testimonial aids including screens, closed-circuit television, videotaped evidence and support persons; abolish the former statutory requirement of corroboration in respect of the unsworn evidence of children; and create a statutory presumption against the admission of a complainant's sexual history.³¹

²⁷ [1993] S.C.J. No. 70, 85 C.C.C. (3d) 327, at 333-36 (S.C.C.).

²⁸ R.S.C. 1985, c. C-46.

²⁹ *R. v. Levogiannis*, [1993] S.C.J. No. 70, 85 C.C.C. (3d) 327, at 333 (S.C.C.).

³⁰ See, for example, the Supreme Court of Canada decisions of *R. v. Osolin*, [1993] S.C.J. No. 135, 86 C.C.C. (3d) 481 (S.C.C.) and *R. v. Seaboyer*; *R. v. Gayme*, [1991] S.C.J. No. 62, 66 C.C.C. (3d) 321 (S.C.C.), wherein the Court recognized that in prosecutions of sexual offences, the law historically accepted irrelevant evidence as being relevant based upon discriminatory myths about women.

³¹ Bill C-15 was enacted on January 1, 1988 (*An Act to amend the Criminal Code and the Canada Evidence Act*, S.C. 1986-87, c. C-15, R.S.C. 1985, c. 19 (3rd Supp.)) and provided for the use of screens, testimony outside of the courtroom, the admission of a complainant's prior videotaped statement in certain circumstances and the abolition of the requirement of corroboration in respect of the unsworn testimony of child witnesses. Rape-shield legislation was first introduced on April 26, 1976 as a result of the *Criminal Law Amendment Act, 1975*, S.C. 1974-75-76, c. 93, s. 8, but underwent a number of amendments. In fact, the 1976 provision was found to provide even less

As with section 486(2.1) of the *Criminal Code*,³² it was only a question of time before these other provisions were challenged on the basis that they violated the right to a fair trial and the right to full answer and defence. Indeed, in *R. v. L. (D.O.)*,³³ the Supreme Court considered the validity of section 715.1 of the Code, which allows for the admission of prior videotaped statements of children in certain circumstances. In upholding the validity of this provision, the Supreme Court again adopted a contextual analysis and considered the rights of the accused alongside the rights of complainants and witnesses. As stated by L'Heureux-Dubé J., in a concurring judgment:

I suggest that the *Charter* requires that we bring these multiple considerations foremost in our mind, as truth cannot be attained in a vacuum. Children require special treatment to facilitate the attainment of truth in a judicial proceeding in which they are involved.

.....

. . . in the determination of what is fair, one must bear in mind the rights and capabilities of children . . .³⁴

As evidenced by these statements, almost immediately following the enactment of the Charter, the Supreme Court of Canada used Charter principles to recognize that the rights of complainants and witnesses must be considered at the initial stage of defining the actual scope of an accused's Charter rights, rather than under section 1 of the Charter.³⁵

Through the 1988 amendments to the Code the risk of secondary victimization at the hands of the adversarial process was highlighted and statutory measures were implemented to minimize it. While these amendments were aimed at reducing the risk of secondary victimization and eradicating discriminatory beliefs and practices that were prevalent

protection to sexual assault complainants than that provided by the common law: *R. v. Seaboyer*; *R. v. Gayme*, [1991] S.C.J. No. 62, 66 C.C.C. (3d) 321, at 349 (S.C.C.).

³² R.S.C. 1985, c. C-46.

³³ [1993] S.C.J. No. 72, 85 C.C.C. (3d) 289 (S.C.C.). See also *R. v. F. (C.C.)*, [1997] S.C.J. No. 89, 120 C.C.C. (3d) 225 (S.C.C.).

³⁴ *R. v. L. (D.O.)*, [1993] S.C.J. No. 72, 85 C.C.C. (3d) 289, at 307, 312 (S.C.C.).

³⁵ See also: *R. v. Mills*, [1999] S.C.J. No. 68, 139 C.C.C. (3d) 321 (S.C.C.), wherein the Court held that the right to full answer and defence had to be determined in light of the privacy and equality rights of complainants and witnesses in respect of third party records. As noted by Professor Jamie Cameron, this approach is significant as it places the onus on the accused to establish a violation of rights rather than the onus being on the government to justify any limits on the accused's rights which arise from the operation of the statutory provision: "Dialogue and Hierarchy in *Charter* Interpretation: A Comment on *R. v. Mills*" (2000) 38(4) *Alta. L.R.* 1051, at 1065-66.

under the pre-Charter regime, Parliament did not expressly cite Charter principles as the underlying objective when enacting the legislation. Rather, the first substantive recognition of victims' rights by Parliament came in August 1992, just over 10 years after the enactment of the Charter, with Bill C-49.³⁶ Bill C-49 was enacted in response to the Supreme Court of Canada's decision of *R. v. Seaboyer*.³⁷ In that case, although the Supreme Court recognized the need to prohibit cross-examination of sexual assault complainants on their prior sexual history, the Court struck down the former section 276 on the basis that a blanket prohibition, irrespective of the circumstances of the case, was unreasonable.³⁸

Significantly, the preamble of Bill C-49³⁹ specifically recognizes the need to consider and accommodate the Charter rights of complainants as well as the accused by providing, in part, as follows:

. . . Whereas the Parliament of Canada intends to promote and help to ensure the full protection of the rights guaranteed under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*;

Whereas the Parliament of Canada wishes to encourage the reporting of incidents of sexual violence or abuse, and to provide for the prosecution of offences within a framework of laws that are consistent with the principles of fundamental justice and that are fair to complainants as well as to accused persons . . .

Since the enactment of Bill C-49⁴⁰ in 1992, Parliament has continued to cite Charter principles, particularly sections 7 and 15, as its underlying objective when enacting other amendments to the *Criminal Code*⁴¹ aimed at enhancing and protecting victims' interests. For instance, in creating the regime governing the production of third party records, as set out in sections 278.1-278.91 of the *Criminal Code*, Parliament expressly stated that its objective behind Bill C-46 was to help "ensure the full protection of the rights guaranteed by the *Canadian Charter of Rights and Freedoms* for all". The preamble to Bill C-46 also provides that since Charter rights "are guaranteed equally to all", in cases of a conflict, Charter rights "are

³⁶ See the preamble to an *Act to amend the Criminal Code (sexual assault)*, S.C. 1992, c. 38, s. 2 proclaimed in force August 15, 1992.

³⁷ [1991] S.C.J. No. 62, 66 C.C.C. (3d) 321 (S.C.C.).

³⁸ The validity of the revised s. 276 of the *Criminal Code*, R.S.C. 1985, c. C-46 was subsequently upheld in the decision of *R. v. Darrach*, [2000] S.C.J. No. 46, 148 C.C.C. (3d) 97 (S.C.C.).

³⁹ *Act to amend the Criminal Code (sexual assault)*, S.C. 1992, c. 38, s. 2.

⁴⁰ *Act to amend the Criminal Code (sexual assault)*, S.C. 1992, c. 38, s. 2.

⁴¹ R.S.C. 1985, c. C-46.

to be accommodated and reconciled to the greatest extent possible”.⁴² Similar language is also found in the preamble to Bill C-79, which, in part, expanded the use and availability of testimonial aids to more vulnerable witnesses and also expanded the term “victim” to allow for the increased use of victim impact statements.⁴³

Most recently, as of January 2, 2006,⁴⁴ the former age restrictions on the availability of testimonial aids and publication bans have been lifted entirely, thereby extending the use of these supports and procedural protections to all witnesses and complainants provided certain criteria are met. In addition, the former discretionary nature of these orders in respect of young witnesses testifying in proceedings of enumerated offences has been replaced with orders that are mandatory in any proceedings whenever the witness is under the age of 18 years or has a disability that impairs the witness’s ability to communicate the evidence. Consequently, the new provisions effectively create a presumption that children or disabled persons can testify with testimonial aids upon request subject only to a limited right of refusal where the court is of the view that this will interfere with the proper administration of justice.

The expanded availability and use of testimonial aids in criminal proceedings is significant as it gives effect to the Charter principles of equality and security of the person by creating a process designed to ensure that the testimony of all persons is given equal treatment regardless of age, disability or other vulnerability that may affect their ability to testify.⁴⁵ Further, as the eradication of discriminatory beliefs and practices

⁴² *An Act to amend the Criminal Code (production of records in sexual offence proceedings)*, S.C. 1997, c. 30. The enactment of s. 278 is significant in the development of victims’ rights as the regime created in ss. 278.1-278.91 reflects the approach adopted by the minority in the decision of *R. v. O’Connor*, [1995] S.C.J. No. 98, 103 C.C.C. (3d) 1 (S.C.C.), rather than that of the majority of the Supreme Court. For this reason, the legislation was subject to numerous challenges but was ultimately upheld by the Supreme Court in the decision of *R. v. Mills*, [1999] S.C.J. No. 68, 28 C.R. (5th) 207 (S.C.C.).

⁴³ *Act to amend the Criminal Code (victims of crime) and another Act in consequence*, S.C. 1999, c. 25.

⁴⁴ *Act to amend Criminal Code, the DNA Identification Act and the National Defence Act*, S.C. 2005, c. 32.

⁴⁵ Similarly, in *R. v. Pearson*, [1994] B.C.J. No. 2828, 95 C.C.C. (3d) 365 (B.C.C.A.), the principled exception to the hearsay rule as set out in *R. v. Khan*, [1990] S.C.J. No. 81, 59 C.C.C. (3d) 92 (S.C.C.), was extended to a disabled adult sexual assault complainant. In that case, the Court recognized that in some circumstances, the right to equal protection of the law, as guaranteed by s. 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11, required modifications to the traditional rules of evidence to ensure that the account of disabled witnesses was received.

enhances the ultimate fairness of trial and the search for the truth, these developments do not violate the Charter rights of accused persons.

3. Participatory Rights: Gaining a Voice in Criminal Proceedings

(a) *Sentencing and Other Disposition Proceedings*

The road to acquiring participatory rights in the criminal justice system for victims has been long and arduous. Prior to 1988, victims were forced to assume the role of silent bystanders who were entirely dependent upon the prosecutor to determine what, if any, evidence of victim impact to adduce in the sentencing proceedings. In fact, some early attempts by victims to adduce direct evidence of the impact that the offence had on them were quickly dismissed by courts.⁴⁶

Given this history, the introduction of victim impact statements arising from the proclamation of Bill C-89 on October 1, 1988,⁴⁷ was an unprecedented breakthrough for victims of crime. For the first time in the history of the *Canadian* criminal justice system, victims were given a voice in the criminal process, albeit a limited one which was subject to the court's discretion.⁴⁸

It took a further eight years before the concept of victim participation in sentencing proceedings became a statutory right of victims, rather than one subject to the court's discretion.⁴⁹ Since then, the Code has undergone further amendments, each one further entrenching the concept of victim participation in the criminal process. For instance, in an effort to give victims greater participatory rights at the time of sentencing, the victim impact provisions of the Code were amended on December 1,

⁴⁶ See, for example, *R. v. Robinson*, [1983] O.J. No. 2416, 38 C.R. (3d) 255 (Ont. H.C.J.), wherein the Court held that a statement from the father of a deceased victim was irrelevant to the issue of sentence and that its admission would be unfair to the accused. Also, in *R. v. Antler*, [1982] B.C.J. No. 1705, 69 C.C.C. (2d) 480 (B.C.S.C.), a request by the lawyer for a young sexual assault victim to make submissions regarding the emotional effect of the offence on the victim was denied. A *mandamus* application by the victim to compel the sentencing judge to receive the submissions was equally unsuccessful.

⁴⁷ *An Act to amend the Criminal Code (victims of crime)*, R.S.C. 1985, c. 23 (4th Supp.).

⁴⁸ Section 735(1.1) to (1.4) of the *Criminal Code*, R.S.C. 1985, c. C-46 provided that the Court "may consider a statement ...". Now, s. 722(1) provides that "the Court shall consider any statement...".

⁴⁹ Bill C-41, *An Act to amend the Criminal Code (sentencing)*, S.C. 1995, c. 22, which was proclaimed in force on September 3, 1996, replaced the word "may" with "shall", thereby mandating the admission and consideration of impact statements that are prepared and filed as required.

1999.⁵⁰ The 1999 amendments expanded the term “victim” to allow for multiple victim impact statements,⁵¹ created a duty of inquiry on sentencing courts, and provided victims with the option of reading their impact statements in court.⁵² The duty of inquiry requires sentencing courts to inquire as to whether or not the victim has been advised of the opportunity to prepare an impact statement and allows the court to adjourn the proceedings to allow for the preparation, filing and presentation of a victim impact statement.⁵³

Despite the mandatory language of the new duty of inquiry found in the Code, in practice sentencing courts do not invariably make the required inquiry. The failure to make the required inquiry has been found not to affect the validity of the proceedings.⁵⁴ Hence, although the creation of a duty of inquiry implicitly recognizes that the existence of the right to submit a victim impact statement is meaningless absent knowledge that this right exists, whether this will ultimately increase the use of victim impact statements remains to be seen as it is highly dependent upon compliance by justice system participants. What is evident is that as a result of the December 1999 amendments, the admission of victim impact statements from multiple persons who are affected by the commission of the offence is now not uncommon.⁵⁵ In addition, victims are availing themselves of the opportunity to read their impact statements at sentencing hearings.

Significantly, the right to adduce evidence of victim impact does not start and end with sentencing proceedings. Rather, this right has been extended to other proceedings including faint-hope hearings,⁵⁶ hearings

⁵⁰ Bill C-79, *An Act to amend the Criminal Code (Victims of Crime) and another Act in consequence*, S.C. 1999, c. 25.

⁵¹ Prior to this amendment courts were inconsistent in their approach as to whether or not multiple statements or the statements of indirect victims could be filed. For instance, in *R. v. Curtis*, [1992] N.B.J. No. 34, 69 C.C.C. (3d) 385 (N.B.C.A.), the Court held that the statement of a woman who witnessed her estranged husband assault her new companion was inadmissible as she was not the “direct” victim.

⁵² *Criminal Code*, R.S.C. 1985, c. C-46, s. 722.2(2).

⁵³ *Criminal Code*, R.S.C. 1985, c. C-46, s. 722.2(1).

⁵⁴ *R. v. Tellier*, [2000] A.J. No. 903, 2000 ABCA 219 (Alta. C.A.). This is in contrast to some American jurisdictions where the failure to notify the victim of a plea, or of a parole hearing or sentencing hearing may provide grounds to have the decision set aside.

⁵⁵ See, for example: *R. v. McDonough*, [2006] O.J. No. 2199, 209 C.C.C. (3d) 547 (Ont. S.C.J.), in which 18 victim impact statements were filed; and *R. v. Daley*, [2002] N.B.J. No. 433, 255 N.B.R. (2d) 105 (N.B.Q.B.), in which 15 victim impact statements were filed.

⁵⁶ *Criminal Code*, R.S.C. 1985, c. C-46, s. 745.63(1). This right has existed since September 3, 1996, when Bill C-41 was proclaimed in force: See *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, S.C. 1995, c. 22.

before the National Parole Board⁵⁷ and hearings before the Review Board in respect of offenders who are found not criminally responsible on account of mental disorder.⁵⁸ Of these extensions, the most controversial is the right to file and present victim impact statements in Review Board disposition hearings since the objectives of such hearings differ significantly from those of sentencing hearings. Specifically, while the acknowledgment of, and reparation for, harm done to victims are express statutory objectives of sentencing,⁵⁹ the same is not true of disposition hearings in which the primary issue is whether the accused poses a significant risk of harm to public safety.⁶⁰ Also interesting is the unprecedented duty of notification imposed on the Review Board. Pursuant to section 672.5(13.2) of the Code, upon receipt of an assessment report which reflects a change in the accused's mental condition which may provide grounds for a discharge, the Review Board must "notify every victim of the offence" that they are entitled to file a victim impact statement.⁶¹ The introduction of a notification duty in respect of disposition hearings is interesting as it goes well beyond the duty of inquiry imposed on sentencing courts but is silent as to what, if any, remedy exists for a failure to comply. Presumably, as with a failure by a sentencing court to comply with its duty of inquiry, a failure by the Review Board to comply

⁵⁷ Victims have been permitted to read impact statements in hearings before the National Parole Board since 2001: see *Corrections and Conditional Release Act*, S.C. 1992, c. 20, ss. 23(1)(e) and 25(1); National Parole Board Policy Manual, Policy 10.3. The admission of victim impact statements in provincial parole hearings varies, as does the ability to present these statements or even attend the hearings. In some American states, including Arizona, the failure to notify the victim or to hear from the victim of the offence may provide grounds to have a parole decision set aside. See, for example, *Hance v. Board of Pardons and Parole*, 875 P. 2d 824 (Ariz. Ct. App. 1993).

⁵⁸ *Criminal Code*, R.S.C. 1985, c. C-46, s. 672.5(14). The admission of victim impact statements in disposition hearings was first introduced on December 1, 1999, following the proclamation of Bill C-79 (S.C. 1999, c. 25). More recently, on January 2, 2006, as a result of the proclamation of Bill C-10 (S.C. 2005, c. 22), the provisions were amended to impose a duty to notify victims in certain circumstances and a duty to inquire as to whether or not the victim is aware of the right to prepare a statement prior to the making of a disposition.

⁵⁹ *Criminal Code*, R.S.C. 1985, c. C-46, s. 718.

⁶⁰ *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] S.C.J. No. 31, 135 C.C.C. (3d) 129 (S.C.C.).

⁶¹ In *Re Harris* Unreported decision, July 12, 2006, reasons released September 19, 2006 (O.R.B.), the Ontario Review Board gave an expansive interpretation to this notification duty and found that the term "assessment report" includes a hospital report. Hence, the notification duty arises whenever a hospital report suggests that there has been a change in the accused's mental health condition which might provide grounds for a discharge.

with the duty of notification will not be fatal to the validity of the proceedings.⁶²

While victim participation is now firmly entrenched in sentencing and other disposition proceedings as a result of legislative reform, courts are vigilant in guarding against a “runaway model for victim participation”. Consequently, courts resist any suggestion that the right to prepare and submit evidence of victim impact is a general right of standing in the proceedings.⁶³ The lack of a general right of standing in sentencing proceedings is evident in the ability of courts to limit the number of statements filed and exclude statements that are not in the prescribed form or that attempt to speak to the actual length of the sentence.⁶⁴ Given these controls, in order to guard against victims developing unrealistic expectations as to their role in sentencing or other disposition proceedings, clear guidelines at the very outset of the process are required as to the use and limits of victim impact statements. Absent such guidelines, any subsequent limitations that are placed on the admission and use of this evidence will surely leave victims feeling cheated by the system.

(b) Participatory Rights in the Trial Process

Although the concept of victim participation originated in the sentencing phase, through the Charter and statutory reform based on Charter principles, it has now extended to parts of the trial stage. While criminal proceedings are far from tripartite in nature, victims now have statutory rights of standing in respect of defence applications for the production of their private records,⁶⁵ requests for publication bans⁶⁶ as

⁶² In *R. v. Tellier*, [2000] A.J. No. 903, 2000 ABCA 219 (Alta. C.A.), the Court found that the failure of a sentencing court to comply with the duty of inquiry was not fatal.

⁶³ In *R. v. Gabriel*, [1999] O.J. No. 2579, 137 C.C.C. (3d) 1, at 12-13 (Ont. S.C.J.), the Court held that although victim impact statements made a significant contribution in providing victims with a voice in the criminal process, it was also important to remember that the “criminal trial, including the sentencing phase, is not a tripartite proceeding” and that “the dangers of a runaway model for victim participation in the sentencing process can, in the long run, serve to defeat the very objectives of victim input”.

⁶⁴ In *R. v. Gabriel*, [1999] O.J. No. 2579, 137 C.C.C. (3d) 1 (Ont. S.C.J.), the Court restricted its consideration of the victim impact statements to those parts which described the harm done to, or loss suffered by, the victim. Also, in *R. v. Sparks*, [2007] N.S.J. No. 50, 251 N.S.R. (2d) 181 (N.S. Prov. Ct.), the trial judge refused to allow the victims to read their original unedited impact statements and stated at para. 13 that the right to present such evidence was not a general right of standing in the sentencing proceedings.

⁶⁵ *Criminal Code*, R.S.C. 1985, c. C-46, s. 278.4(2).

⁶⁶ *Criminal Code*, R.S.C. 1985, c. C-46, ss. 486.4, 486.5. While these provisions enable the complainant or witness to request a publication ban, there are no provisions which provide for

well as requests for the use of testimonial aids such as a support person,⁶⁷ screens and closed-circuit television.⁶⁸

Through this extensive legislative reform, Parliament has expressly recognized the need to encourage and facilitate participation by all victims and witnesses in the criminal justice system. The creation of limited participatory rights at various stages of the criminal process is not only laudable social policy but is essential in circumstances where the Charter rights of victims or other third parties are at stake.⁶⁹ Indeed, the enactment of the Charter expanded the focus of criminal proceedings such that the criminal trial is no longer exclusively concerned with determinations of guilt or innocence, but may also be used by the accused to challenge the conduct of the police, as well as by third parties to assert their Charter rights to the extent their rights are affected.

Although the Charter offered the means by which courts could allow direct participation by victims, victim participation has predominantly been based upon statutory rights expressly set out in the *Criminal Code*.⁷⁰ Also, while courts recognize the need to consider and balance victims' rights with those of the accused for purposes of resolving conflicts, they are reluctant to recognize any general common law rights of participation. For instance, in *R. v. O'Connor*,⁷¹ the Supreme Court created a regime for the production and disclosure of private records in the hands of third parties. While this regime required that notice be given to third parties, the Court was silent as to whether or not the third parties were entitled

an automatic right of standing for families of deceased victims. Consequently, families of deceased victims who seek restrictions have had to apply for standing, as was the case in the proceedings against Paul Bernardo: *French Estate v. Ontario (Attorney General)*, [1998] O.J. No. 752, 122 C.C.C. (3d) 449 (Ont. C.A.), leave to appeal refused [1998] S.C.C.A. No. 139 (S.C.C.). See also *R. v. Bernardo*, [1995] O.J. No. 246, 38 C.R. (4th) 229 (Ont. Gen. Div.).

⁶⁷ *Criminal Code*, R.S.C. 1985, c. C-46, s. 486.1.

⁶⁸ *Criminal Code*, R.S.C. 1985, c. C-46, s. 486.2. In *R. v. Levogiannis*, [1993] S.C.J. No. 70, 85 C.C.C. (3d) 327 (S.C.C.), the Court recognized that the failure to make an order allowing for the use of a screen where one was required, may violate the witness's legal rights. Interestingly, the Code does not confer a right of standing in respect of applications under s. 276 to admit evidence of the complainant's prior sexual activity.

⁶⁹ In *A. (L.L.) v. B. (A.)*, [1995] S.C.J. No. 102, 103 C.C.C. (3d) 92 at 106 (S.C.C.), in finding that complainants had standing in appeals from a ruling on a third party record application, the Supreme Court of Canada held that the "*audi alteram partem* principle, which is a rule of natural justice and one of the tenets of our legal system, requires that courts provide an opportunity to be heard to those who will be affected by the decisions".

⁷⁰ R.S.C. 1985, c. C-46.

⁷¹ [1995] S.C.J. No. 98, 103 C.C.C. (3d) 1 (S.C.C.).

to make legal submissions at the hearing of the application.⁷² It was only through the enactment of sections 278.1-278.91 of the Code in May 1997,⁷³ that third parties, including the record holder, the subject of the records and any other person to whom the records relate, acquired statutory rights of standing for purposes of making legal submissions at the hearing.

In circumstances where there is no statutory right to make submissions, requests for standing fall within the court's discretionary powers and are dealt with on a case-by-case basis.⁷⁴ Such requests have met with mixed success. For instance, the decision of *Vanscoy v. Ontario*⁷⁵ established that victims have no standing to challenge pleas entered into by the Crown. Also, while victims now have statutory rights to provide evidence of victim impact, attempts to expand this into a right to speak to or challenge the actual sentence imposed have failed.⁷⁶

By refusing requests for participatory rights in the resolution of charges and by limiting the nature and scope of victim participation at the sentencing phase to that which is expressly provided for in the *Criminal Code*,⁷⁷ courts recognize that the basic concept underlying our criminal justice system is that crimes are offences against society as a whole. Therefore, the exercise of prosecutorial discretion and issues of sentencing must serve the public interest, not private interests. Consequently, to the

⁷² However, in its companion decision of *A. (L.L.) v. B. (A.)*, [1995] S.C.J. No. 102, 103 C.C.C. (3d) 92 (S.C.C.), the Supreme Court held that third parties, including complainants who are the subject of a third party record application, have standing on appeals from such rulings. As stated by L'Heureux-Dubé J., in a concurring judgment at para. 28:

Here, both the complainant and the Crown possess a direct and necessary interest in making representations. Both would be directly affected by a decision regarding the production of the complainant's private records. The decision is susceptible of affecting the course of the criminal trial. Both, therefore, must be afforded an opportunity to be heard.

⁷³ *An Act to amend the Criminal code (production of records in sexual offence proceedings)*, S.C. 1997, c. 30. The constitutionality of this regime was upheld by the Supreme Court of Canada in *R. v. Mills*, [1999] S.C.J. No. 68, 139 C.C.C. (3d) 321 (S.C.C.).

⁷⁴ *French Estate v. Ontario (Attorney General)*, [1998] O.J. No. 752, 122 C.C.C. (3d) 449, at paras. 73-77 (Ont. C.A.), leave to appeal refused [1998] S.C.C.A. No. 139 (S.C.C.).

⁷⁵ [1999] O.J. No. 1661, 99 O.T.C. 70 (Ont. S.C.J.).

⁷⁶ In *R. v. Tkachuk*, [2001] A.J. No. 1277, 159 C.C.C. (3d) 434 (Alta. C.A.), the Court held that Alberta's *Victims of Crime Act*, S.A. 1996, c. V-3.3 did not provide any rights of participation in prosecutorial discretionary decision-making, nor did it provide a right to speak to the length of the sentence. Also, in *United States of America v. Levy*, [2004] O.J. No. 1789, 184 C.C.C. (3d) 427 (Ont. S.C.J.), the Court found that a victim had no standing to challenge the refusal of a sentencing judge to make a restitution order. Similarly, in *R. v. Coelho*, [1995] B.C.J. No. 1220, 27 W.C.B. (2d) 397 (B.C.S.C.), the Court dismissed a *certiorari* application brought by the father of a deceased victim which sought to challenge the sentence imposed. In dismissing the application, the Court held that neither the *Criminal Code*, R.S.C. 1985, c. C-46 nor the Charter gave victims a right to speak to the severity of the sentence.

⁷⁷ R.S.C. 1985, c. C-46.

extent that victim participation is sought in matters falling within prosecutorial discretion or for purposes of speaking to the severity of the sentence, it will most likely be denied.

However, in circumstances where victims have sought standing in respect of matters that do not impinge on prosecutorial discretion or do not concern the actual sentence imposed, courts have been more receptive. Indeed, in the criminal proceedings against Paul Bernardo and the related proceedings against his accomplice, Karla Teale, the families of two murder victims obtained limited rights of standing at both the trial and appellate stage. At the trial stage,⁷⁸ the families were granted intervenor status for purposes of making submissions on an application for an order excluding the public from the courtroom during the playing of a videotape depicting their deceased daughters. In that case, the families argued that their rights under sections 7 and 12 of the Charter would be violated if the videotapes were played in open court as it would have a serious detrimental effect on their emotional and physical well-being. In granting standing, Le Sage A.C.J.O. found that the families had a unique and different perspective to offer from the Crown, but also noted that intervenor status for victims “will be rare”.⁷⁹ At the appellate stage, in separate proceedings relating to an appeal of a section 810.2 recognizance which was ordered in respect of Karla Teale upon her release from prison, the two families were again granted intervenor status to make submissions on one of four grounds of appeal.⁸⁰ The standing granted to the French and Mahaffy families in the proceedings against Paul Bernardo and Karla Teale serves as an excellent example of how victims may play a direct role in criminal proceedings without compromising the fair trial rights of the accused.

While the very nature of our adversarial system will always impede the expansion of participatory rights for victims in the criminal process — since the state as the singular antagonist against the accused is inconsistent with criminal proceedings becoming tripartite in nature — this does not necessarily preclude any further expansion of victim participation.⁸¹

⁷⁸ *R. v. Bernardo*, [1995] O.J. No. 246, 38 C.R. (4th) 229, at 236-37 (Ont. Gen. Div.).

⁷⁹ Similarly, in *R. v. Glowatski*, [1999] B.C.J. No. 1110, 42 W.C.B. (2d) 355 (B.C.S.C.) the family of a deceased victim was granted intervenor status to make submissions opposing a request by the media for access to autopsy photos filed as exhibits during the trial proceedings.

⁸⁰ *Teale v. Noble*, [2005] Q.J. No. 15382, [2005] R.J.Q. 2940 (Que. S.C.).

⁸¹ Interestingly, in Germany, over the past few decades the criminal justice system has undergone a transformation such that victims almost have full participatory rights in criminal proceedings, including the right to independent legal representation. For a fuller discussion of victims'

Rather, the focus should now be on the ways in which the Charter may be used to allow for increased victim participation while maintaining the fair trial rights of the accused.

In determining whether or not to allow direct victim participation in criminal proceedings, factors that courts ought to consider include the nature of the issue (*e.g.*, whether it is a matter falling within prosecutorial discretion),⁸² the interests at stake, the risk of prejudice to the accused, whether the victims can offer a unique perspective that may be useful to the court in resolving the matter in dispute and whether the granting of intervention will result in any delay in the proceedings. With respect to concerns regarding delays in the proceedings, consideration should also be given to the extent to which increased participation can realistically be accommodated in an already overburdened system that is on the brink of collapse.⁸³ Hence, although some participation by victims in the criminal process can co-exist with the fair trial rights of an accused, given the need to ensure that criminal charges are not in jeopardy of being stayed on account of unreasonable delay, it may be that any increased participatory rights of victims can be better accommodated at the appellate stage. For instance, in the section 810.2 proceedings in respect of Karla Teale, the French and Mahaffy families sought direct involvement in the proceedings before the trial court but were persuaded to maintain only a “watching brief” at that stage. However, on appeal they were granted intervenor status in respect of one issue.⁸⁴

The extent to which courts are willing to grant standing to interest groups at the appellate stage also offers some guidance as to when and how the system can best accommodate increased third party participation. While public interest groups do not represent the victim of the offence,

rights in the German legal system, see S. Walther, *Victims' Rights in the German Court System* (2006) 19 Fed. Sent. R. 113.

⁸² The exercise of prosecutorial discretion is not even subject to the review of courts except in the very limited circumstances where there is some evidence of bad faith. Accordingly, public policy demands that matters falling within prosecutorial discretion are left to the unfettered discretion of the Crown acting in the public interest and in accordance with its duties as a Minister of Justice. Indeed, in *P. (K.) v. Desrochers*, [2000] O.J. No. 5061, 52 O.R. (3d) 742 (Ont. S.C.J.), *var*d [2001] O.J. No. 4560, 151 O.A.C. 341 (Ont. C.A.), the Court held that the Crown did not owe a fiduciary duty to victims when exercising its discretionary decision-making powers.

⁸³ Mr. Justice Moldaver has described the criminal justice system as being in a “state of crisis. It is spinning out of control. . . .” Hon. M. Moldaver, “Long Criminal Trials: Masters of a System They Are Meant to Serve” (2006) 32 C.R. (6th) 316.

⁸⁴ *Teale v. Noble*, [2005] Q.J. No. 15382, [2005] R.J.Q. 2940 (Que. S.C.).

they often share common interests. For instance, in *R. v. Latimer*,⁸⁵ following the accused's conviction for murdering his severely disabled daughter, groups representing disabled persons were granted intervenor status on appeal for purposes of advancing the rights of disabled persons. Also, in *R. v. Ahenakew*,⁸⁶ B'nai Brith was granted intervenor status on the issue of the *mens rea* for the offence of wilful promotion of hatred and the meaning of the word "wilfully" in the realm of hate speech and its effects on minorities. While standing was granted in these cases at the appellate stage, it is unlikely it would have been granted at the trial stage given the increased risk of prejudice to the accused, the risk of delay and the need to avoid adding to the complexity of the trial proceedings. Indeed, in *Canadian Foundation for Children, Youth and the Law v. Canada*,⁸⁷ the Foundation was granted standing on appeal for purposes of advocating on behalf of children and children's rights. However, the Court rejected the claim that children should have the right to independent legal representation at the trial stage or that the failure to provide for this violated children's rights to due process under section 7 of the Charter. These decisions demonstrate the greater flexibility of the appellate stage to allow for the direct participation of third parties.

4. Welfare Rights of Victims: Restitution and Criminal Injuries Compensation Schemes

In addition to the increased procedural and substantive rights of victims, there has also been an increase in the welfare rights of victims over the last 25 years. This increase is most evident in the creation and growth of support services designed to assist victims of crime through the criminal process and in the increased availability of restitution for loss suffered as a result of the commission of the offence. Victims now have the support of the Victim/Witness Assistance Program, toll-free government information lines and an increased number of community-based services.

With regards to the issue of compensation, there is no doubt that in many circumstances crime victims suffer financial loss as a result of the offence. The financial loss may arise from various factors such as the

⁸⁵ [1995] S.J. No. 101, 128 Sask. R. 195 (Sask. C.A.) (In Chambers), application for leave to appeal granted [1999] S.C.C.A. No. 40 (S.C.C.).

⁸⁶ [2007] S.J. No. 219, 2007 SKCA 54 (Sask. C.A.).

⁸⁷ [2004] S.C.J. No. 6, 180 C.C.C. (3d) 353, at paras. 5-6 (S.C.C.).

loss of, or damage to, property, the loss of income or support in circumstances where the commission of the crime affects the victim's earning capacity, or it may be due to expenses incurred for a funeral, counselling or medical treatment. While some form of compensation for victims of crime has always been available, whether under the *Criminal Code*⁸⁸ or some other legislative provision, compensation for victims of crime remains woefully inadequate.

From the inception of the *Criminal Code* in 1892,⁸⁹ provision was made for some degree of compensation. However, the difficulty with these provisions was that it required the victim to bring the application and it was also closely tied to the property values underlying the Code such that it compensated for loss of or damage to property but made no provision for the loss of income or other forms of financial harm. This changed with the proclamation of Bill C-41 on September 3, 1996, which created a new Part XXIII of the *Criminal Code*.⁹⁰ Bill C-41 repealed the former compensation provisions of the Code and replaced them with new provisions allowing for restitution orders that were not dependent upon an application by the aggrieved party and which were available to cover pecuniary damages such as loss of income.⁹¹ Consequently, the availability of restitution was significantly expanded.

The availability of restitution under the *Criminal Code* is important as the civil process is not readily accessible to all victims of crime for a myriad of reasons, including a lack of financial resources as well as the time and emotional stamina required to pursue the matter in civil courts. Accordingly, the making of a restitution order spares the victim the civil process yet achieves the same result since the order may be filed and enforced as a judgment of the civil court.⁹²

Interestingly, one of the more controversial restitution orders made in recent years was the order made in favour of Louise Russo, who was rendered a paraplegic when hit by a stray bullet during a botched contract killing. In that case, a number of accused were charged and pleaded guilty to various offences including attempt murder, conspiracy to commit murder

⁸⁸ R.S.C. 1985, c. C-46.

⁸⁹ S.C. 1892, c. 29.

⁹⁰ *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, S.C. 1995, c. 22.

⁹¹ *Criminal Code*, R.S.C. 1985, c. C-46, s. 738(1).

⁹² *Criminal Code*, R.S.C. 1985, c. C-46, s. 741(1). However, a restitution order should not be made solely to spare the victim the expense and aggravation of going through the civil process. See *R. v. Taylor*, [2003] O.J. No. 5129, 180 C.C.C. (3d) 495 (Ont. C.A.); *R. v. Boughner-Miniaci*, [2007] O.J. No. 2121 (Ont. C.A.).

and weapon offences.⁹³ As part of the plea agreement, Ms. Russo received \$2 million in restitution from the convicted offenders to assist with the costs of her future care. Although all of the offenders also received fairly lengthy and entirely fit jail sentences, the substantial restitution was the subject of much controversy. Many questioned whether the offenders had bought a “get out of jail early” card. The controversy surrounding the making of this restitution order crystallizes how society’s interest in punishing offenders is not the mirror image of the victim’s interest and can be more punitive.

The availability of restitution orders under the *Criminal Code*⁹⁴ is an important tool for victims seeking financial redress, but its availability is limited. Indeed, it is dependent upon many variables including, most of all, a conviction. It is also dependent upon the discretion of the sentencing court,⁹⁵ the offender’s ability to pay,⁹⁶ the amount of the loss being readily ascertainable⁹⁷ and the general principles of sentencing. Given these variables, it is easy to see why many victims who have suffered financial loss do not receive any restitution. Consequently, the availability of other avenues of financial redress and particularly victim compensation schemes is crucial. However, victims have been ill served by the compensation schemes in existence throughout the country.

Commencing in 1973, the federal government started to fund criminal injuries compensation schemes. However, federal funding ceased in 1992 with the introduction of the victim fine surcharge scheme instituted under the *Criminal Code*.⁹⁸ Since then, the funding and operation of criminal injuries compensation schemes has fallen to provincial and territorial governments. The lack of a national scheme gives rise to inequality of treatment. Some jurisdictions offer no compensation for victims of crime, while others that do offer compensation subject victims to a highly cumbersome and bureaucratic process or lack measures designed to ensure that victims are made aware of its availability. Hence,

⁹³ *R. v. Scarcella*, [2006] O.J. No. 1555 (Ont. S.C.J.).

⁹⁴ R.S.C. 1985, c. C-46.

⁹⁵ See, for example: *R. v. Fitzgibbon*, [1990] S.C.J. No. 45, 55 C.C.C. (3d) 449, at 454 (S.C.C.).

⁹⁶ While an offender’s ability to pay should be considered by a sentencing court in determining whether or not to order restitution, it is not dispositive. See, for example: *R. v. Gagnon*, [2000] O.J. No. 3410, 147 C.C.C. (3d) 193 (Ont. C.A.).

⁹⁷ See, for example: *R. v. Zelensky*, [1978] S.C.J. No. 48, 41 C.C.C. (2d) 97, at 113 (S.C.C.).

⁹⁸ R.S.C. 1985, c. C-46.

it is not surprising that over the years many criticisms have been voiced concerning the criminal injuries compensation programs.⁹⁹

By far the most damning criticism of any provincial criminal injuries compensation scheme came in February 2007, with the release of the Ontario Ombudsman's Report *Adding Insult to Injury*.¹⁰⁰ In his Report, the Ombudsman found that rather than supporting and helping victims of crime, the Ontario Criminal Injuries Compensation Board greeted victims with "bureaucratic indifference and suspicion". The Report also found that the Board "trades in technicality and embraces delay" rather than "giving steadfast and urgent assistance". Throughout his scathing Report, the Ombudsman cites several examples of shockingly poor treatment by the Board of victims of violent crime. The Ombudsman also found that in many instances, rather than offering a helping hand, the Board was guilty of inflicting secondary victimization by operating in a manner that invites and encourages victims to fail in their attempt to obtain compensation. Moreover, in addition to making the application process extremely lengthy and unnecessarily complicated, the Board attempts to "fly under the radar" such that only one in every 40 victims of violent crime even tries to apply for compensation.¹⁰¹ As a result of reviewing several files which had been the subject of complaint, the Ombudsman concluded as follows:

The obvious conclusion is that the Criminal Injuries Compensation Board functions, even in the unimpressive way it does, by flying under the radar so that only a miniscule number of entitled claimants ever come forward. It creates hyper-technical hurdles that discourage applicants and stockpiles the claims made by those who are uncommonly persistent. This is a shocking state of affairs. The Criminal Injuries Compensation Board is not an institution to be celebrated. It is an embarrassment.¹⁰²

While the Ombudsman's Report highlighted the many problems with the Ontario Criminal Injuries Compensation Board, the Boards of other provinces are not without criticism. Rather, all criminal injuries

⁹⁹ See, for example: Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999), at 300; Ontario Office for Victims of Crime, *A Voice for Victims: The Office for Victims of Crime Report on Victim Services in Ontario* (Toronto: Queen's Printer, 2000), at 61.

¹⁰⁰ A. Marin, Ombudsman Report, "Adding Insult to Injury", *Investigation into the Treatment of Victims by the Criminal Injuries Compensation Board* (February 2007).

¹⁰¹ A. Marin, Ombudsman Report, "Adding Insult to Injury", *Investigation into the Treatment of Victims by the Criminal Injuries Compensation Board* (February 2007), at paras. 9-13.

¹⁰² A. Marin, Ombudsman Report, "Adding Insult to Injury", *Investigation into the Treatment of Victims by the Criminal Injuries Compensation Board* (February 2007), at para. 13.

compensation schemes may be criticized for their restrictive eligibility criteria and their lack of outreach programs to increase awareness and encourage applications. Further, they are all saddled with over-bureaucratized processes. What is clear is that the money raised through the imposition of victim fine surcharges pursuant to section 737 of the *Criminal Code*¹⁰³ is not reaching the intended beneficiaries: victims. Renewed efforts must be made to ensure that the millions of dollars raised each year through the imposition of victim fine surcharges is actually used to fund programs designed to assist victims of crime at all stages of the criminal process. Further, outreach programs are necessary to ensure that victims are aware of the availability of compensation and offered assistance in the application process.

In response to the Ombudsman's Report condemning the Ontario Criminal Injuries Compensation Board, on March 2, 2007, the Attorney General announced the appointment of former Chief Justice McMurtry, who is "to forge a new framework for victim support and compensation" following broad-based consultations with both victims' organizations and communities.¹⁰⁴ Hopefully this review will address the problems with the current program and develop a new framework for victim support and compensation. Such a new framework should focus on the needs and interests of victims and be driven by Charter principles, including the right to security of the person, privacy and the right to equal protection and benefit of the law.

III. CONCLUSION

There is no doubt that victims of crime have made significant gains over the last 25 years. There is also no doubt that the Charter has contributed greatly to these gains and will continue to influence the development of victims' rights in the coming years. Indeed, the media, another traditional outsider to the criminal process, has used section 2 of the Charter to acquire recognized rights of standing in respect of restrictions that are placed on the right to access or disseminate information filed or heard in court proceedings. Interestingly, the media, through its continuous efforts, appear to have made greater gains under section 2 of the Charter than victims have obtained through sections 7, 8 and 15 of the Charter. In fact, as a result of the Supreme Court's decision of *Dagenais v. Canadian*

¹⁰³ R.S.C. 1985, c. C-46.

¹⁰⁴ Ministry of the Attorney General, News Release March 2, 2007.

Broadcasting Corp.,¹⁰⁵ the media gained a common law right of standing in criminal trial proceedings prior to victims. There are several possible explanations for this apparent disparity. First, unlike victims, who are not mentioned in the Charter, “freedom of the press” is expressly recognized in section 2 of the Charter. Further, the media have significantly greater resources and are capable of advancing more coordinated and focused challenges to restrictions on their ability to access and disseminate information to the public. Media conglomerates have highly skilled in-house counsel who are capable of effectively responding in short order to any such restrictions. In contrast, crime victims do not constitute one collective group with a shared common interest, they do not have counsel on retainer and they often do not know or fully understand their rights within the system. Also, one of the key obstacles faced by victims is a lack of financial resources needed to participate in the process for purposes of advancing their own interests. In this regard, it is noteworthy that of all the victims’ bills of rights, only Manitoba’s and British Columbia’s expressly provide for legal representation for victims in respect of third party record applications. In other provinces, legal aid assistance may be available for such applications.¹⁰⁶ However, there is no available funding in respect of the many other issues that may impact on victims’ rights and interests.

Accordingly, while the role of victims in the criminal process has evolved significantly over the last 25 years, there are lingering concerns.¹⁰⁷ The Charter offers a mechanism for addressing these concerns. Since the Charter is a “living tree”, victims can continue to use the Charter to further entrench their role and rights of participation in the criminal process. The Charter should also be used to ensure an equitable balance between victims’ rights and the rights of the accused in individual cases. Indeed, the Supreme Court’s leading decisions of *R. v. O’Connor*¹⁰⁸ and *R. v. Mills*¹⁰⁹ recognize that victims’ rights are deserving of equal

¹⁰⁵ [1994] S.C.J. No. 104, 94 C.C.C. (3d) 289 (S.C.C.).

¹⁰⁶ Even though legal assistance may be available, research shows that in the majority of cases complainants do not have independent legal representation: see J. Koshan, “Disclosure and Production in Sexual Violence Cases: Situating Stinchcombe” (2002) 40 Alta. L. Rev. 655, at 684-85.

¹⁰⁷ Professor Larry Wilson notes that even today a number of sexual assaults go unreported due to a fear of the criminal justice system. Also, complainants who do come forward continue to express frustration and anger over their experience; see “Independent Legal Representation for Victims of Sexual Assault: A Model for Delivery of Legal Services” (2005) 23 Windsor Y.B. Access Just. 249.

¹⁰⁸ [1995] S.C.J. No. 98, 103 C.C.C. (3d) 1 (S.C.C.).

¹⁰⁹ [1999] S.C.J. No. 68, 139 C.C.C. (3d) 321 (S.C.C.).

protection. No doubt, the concept of equal protection and equal rights will continue to influence all cases in which there is a conflict of rights. In this regard, the words of La Forest J., in *R. v. Lyons* offer some guidance: “. . . s. 7 of the Charter entitles the appellant to a fair hearing; it does not entitle him to the most favourable procedures that could possibly be imagined”.¹¹⁰ Also, as stated by McLachlin J. (as she then was) and Iacobucci J. in *R. v. Mills*: “fundamental justice embraces more than the rights of the accused.”¹¹¹

Finally, it remains to be seen whether the appointment of an Ombudsman for Victims of Crime by the federal government in 2007 will assist in the further development of victims' rights. What is clear, however, is that victims have moved from the sidelines and are no longer silent passive observers in the criminal process. Accordingly, efforts must be made to accommodate their interests in a manner that also preserves the fundamental right of an accused to a fair trial. The Charter has and will continue to serve as a key instrument by which these goals can be accomplished, through both statutory reform and developments in the common law.

¹¹⁰ [1987] S.C.J. No. 62, 37 C.C.C. (3d) 1, at 46 (S.C.C.).

¹¹¹ [1999] S.C.J. No. 68, 139 C.C.C. (3d) 321, at para. 72 (S.C.C.).

