

Consultations on a Bill of Rights for Victims

Justice Canada

BRIEF

Jo-Anne Wemmers, PhD
Professor, School of Criminology
Full-time Researcher, International Centre for Comparative Criminology
University of Montreal
<http://www.cicc.umontreal.ca/recherche/victimologie/victimologie.html>

Sarah Ménard April
Student, Faculty of Law
University of Montreal

June 29, 2013

Table of Contents

Table of Contents	2
<i>Introduction</i>	4
<i>Part I: Victims' rights in Canada</i>	5
1.1 History of the role of the victim in common law countries	5
1.2 The current situation in Canada.....	6
1.2.1 Victims' rights at the federal level	7
1.2.1.1 The Canadian Statement.....	7
1.2.1.2 Criminal Code	8
1.2.1.3 The Corrections and Conditional Release Act (CCRA)	11
1.2.3 Provincial aspects	12
Summary	13
<i>Part II: Sources of inspiration for Canada: Victims' rights in the United States and in international criminal law</i>	14
2.1 The United States	14
2.1.1 State legislation	14
2.1.2 Federal legislation	15
Summary	17
2.2 The International Criminal Court	18
2.2.1 The emergence of victims' rights in international law	18
2.2.2 Procedural rights	19
2.2.3 Limitations on the procedural rights of victims.....	20
2.2.4 Lack of precision in the drafting of provisions concerning victims' rights	20
Summary	22
<i>Part III: Instituting broader recognition of victims' rights in Canada</i>	23
3.1 The choice of a legislative instrument.....	23
3.1.1 A new statement of victims' rights.....	23
3.3 The exercise of rights in judicial proceedings	24
3.3.1 Stages in judicial proceedings	25
3.3.1.1. The pre-trial stage.....	25

3.3.1.2 The trial	25
3.3.1.3 Sentencing	29
3.3.3 Possible remedies for failure to respect participation rights	31
3.4 The role of victims in relation to other participants in the judicial process	32
3.4.1 In relation to the accused	32
3.4.2 In relation to the prosecution	33
3.4.3 In relation to professional associations	34
4. Action plan for the implementation of procedural rights	35
<i>Part IV: Summary of final recommendations</i>	36
Appendix1: Comparison of rights as recognized in various jurisdictions	37
Appendix2: Summary of rights that may be exercised within the judicial process	39

Introduction

While crime is an age-old phenomenon, the concept of the “victim of crime” is a relatively recent development. The word *victime* came into the French language in 1495, but at that time it did not have its current meaning, referring instead to an animal used in a religious sacrifice. It was not until 1782 that the word began to be used in its modern sense: that of a person subjected to hatred, torment or injustice (*une personne qui a subi la haine, les tourments, les injustices de quelqu’un*).¹ In order to understand how the concept has evolved, we have to study the development over time of our system of criminal justice in order to gain a clearer picture of how the role of the victim has changed.

Beginning in the 1980s, our society has decided to grant a more important status to the victims of crime. An effort has been made to improve the situation of victims within the criminal justice system. In 1988, the word “victim” was included for the first time in Canada’s *Criminal Code*.² The provinces have also passed legislation recognizing the rights of crime victims. Nevertheless, effective legal recourse is still lacking when victims’ rights are not respected.

In this brief, we shall look at the rights of victims to be participants in the criminal justice process. In Part I, we shall discuss the current situation in Canada, whereby victims have no enforceable procedural rights. In Part II, we shall look at the situation in the United States and at the International Criminal Court, two systems in which victims have been given the right to participate. These systems are relevant to our case because they share some similarities with the Canadian system and provide remedies when victims’ rights are violated, thus ensuring that those rights are exercised and respected. In Part III, we shall suggest possible ways of introducing procedural rights for victims into Canadian criminal law. To that end, we propose recognizing victims as participants in the judicial process. This would enable them to enjoy certain procedural rights, and to seek a remedy when their rights are not respected. Lastly, in Part IV, we shall present an action plan for the gradual implementation of the legislative changes we propose.

¹ Jo-Anne Wemmers, *Introduction à la victimologie* [introduction to victimology], Montreal, Les Presses de l’Université de Montréal, 2003.

² Criminal Code, R.S.C., 1985, c. C-46, s. 718(e).

Part I: Victims' rights in Canada

1.1 History of the role of the victim in common law countries

Criminal liability, as currently perceived, relates to crime as an attack on the social order, rather than as an attack on one victim in particular. Yet this has not always been the case in the common law countries. In the beginning, criminal law was based on an entirely different concept: that of private justice. [TRANSLATION] “The goal of justice in criminal matters was essentially to compensate the victim. The penalties associated with crimes were not primarily punitive in nature, but sought rather to compensate the victim for the harm suffered; moral guilt was a secondary consideration.”³

The state gradually assumed a larger role in criminal justice, to the point where it completely replaced the victim in the prosecution of the accused. The victim was relegated to the role of a witness to a crime against the state, thus limiting his or her participation in the judicial process.⁴ The fact that a crime also constitutes a violation of the victims' rights was ignored, and the victim thenceforth became the forgotten party in criminal proceedings.

Since the 1980s, however, the pendulum seems to have been swinging the other way in criminal justice. A significant development for Canada, and internationally, was the adoption in 1985 by the United Nations General Assembly of the Declaration of Basic Principles of Justice Relating to Victims of Crime and Abuse of Power.⁵ Canada was active, incidentally, in securing the adoption of the Declaration.

The Declaration reflects a human rights approach to victimology and includes both victims of crimes and victims of abuse of power. Note that the reference is to “basic principles... relating to victims,” rather than to victims' “rights.” While this is a “soft law” instrument rather than a legal document spelling out detailed obligations, it nevertheless constitutes a basis for minimum standards in the treatment of victims⁶ that governments are bound to respect in their domestic legislation. More specifically, it lists a series of principles of justice relating to victims.⁷ They are to have: (1) access to justice and fair treatment (information, participation, consultation); (2) a right to restitution; (3) access to compensation from the state; and (4) access to victim assistance services.

One of the most important advances achieved by the Declaration, however, consisted of the procedural rights described in article 6 of Appendix A, which refers to “allowing the **views and**

³ Pierre Béliveau and Martin Vaclair, *Traité général de preuve et procédure pénale* [general treatise on evidence and criminal procedure], 19th edition, Cowansville, Éditions Yvon Blais, 2012, p. 5.

⁴ Jo-Anne Wemmers, *Introduction à la victimologie*, *supra*, note 1.

⁵ United Nations Resolution A/RES/40/34.

⁶ Jo-Anne Wemmers, *Introduction à la victimologie*, *supra*, note 1, p. 150.

⁷ United Nations Declaration of Basic Principles of Justice Relating to Victims of Crime and Abuse of Power, *supra*, note 5

concerns of victims to be presented and considered at appropriate stages of the proceedings where their **personal interests** are affected, **without prejudice to the accused** and consistent with the relevant national criminal justice system.” (Emphasis added.) It is worth noting that this “Magna Carta”⁸ for victims’ rights was adopted unanimously by the United Nations General Assembly, despite the diversity of the legal systems of member states and the contradictions between them. In particular, there are significant differences between common law countries, where the victim is traditionally relegated to the role of a mere witness, and civil law countries, where victims are given many more procedural rights, up to and including the status of a party at trial. On the other hand, unanimous adoption was not achieved without compromise, and article 6(b) provides a perfect example. The introduction of the right to participate generated lively debate during the drafting of the Declaration, particularly on the part of the United Kingdom and the Netherlands,⁹ which argued for reducing the scope of the victim’s right to participate through the addition of the second part of the provision relating to the right of the accused to a fair trial. Hence, when a jurisdiction allows victims’ views and concerns to be presented, it must also take into consideration the rights of the accused. Victims’ rights, therefore, are not absolute, but are to be given their due proportion. Consequently, article 6(b) represents a compromise,¹⁰ drafted in terms that are broad enough to allow governments wide discretion in implementing the Declaration within their respective criminal justice systems.¹¹

Following the adoption of the Declaration, some states made changes in their systems of criminal justice in order to grant certain rights – procedural, economic or social – to the victims of crime.

1.2 The current situation in Canada

In Canada, criminal jurisdiction is shared between the federal government and the provinces, under the *Constitution Act, 1867*.¹² The federal government has legislative authority with respect to the criminal law, whereas the provinces are responsible for the administration of justice through the courts. This is important with regard to victims’ rights, since the two levels of government have approved different legislative measures and instruments. Furthermore, the professional associations that are also involved in recognizing the importance of victims in the criminal justice system are regulated by the provinces.

⁸ Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings*, Cambridge, Intersentia, 2011, p. 95.

⁹ *Idem*, p. 97.

¹⁰ Gilbert Bitti, *Les droits procéduraux des victimes devant la Cour pénale internationale* [the procedural rights of victims before the International Criminal Court] in Jo-Anne Wemmers, (ed.), *Les droits des victimes dans un contexte international* [victims’ rights in an international context], Vol. 44, No. 2, Montreal, Les Presses de l’Université de Montréal, 2011, p. 96.

¹¹ Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings*, *supra*, note 8, p. 97.

¹² Constitution Act, 1867, 30 & 31 Victoria, c. 3 (U.K.), ss. 91(27) and 92(14).

1.2.1 Victims' rights at the federal level

The rights of victims of crime as recognized by the federal government are derived from three distinct sources: the *Criminal Code*, which allows a victim to be heard at a sentencing hearing; the *Corrections and Conditional Release Act* (hereinafter “the CCRA”); and the 2003 Canadian Statement of Basic Principles of Justice for Victims of Crime¹³ (hereinafter “the Canadian Statement”). Despite the varied nature of these legal texts, one common characteristic is that they provide no remedy if the rights or principles enshrined in them are not respected.

1.2.1.1 The Canadian Statement

In order to implement the UN Declaration,¹⁴ in 1988 the federal and provincial justice departments endorsed the Canadian Statement of Basic Principles of Justice for Victims of Crime¹⁵ (hereinafter “the Statement”). They agreed to adopt this statement of victims' rights in order to provide guidance and establish a standard for any legislative or administrative initiative in the area of criminal justice in Canada. The Statement calls for victims of crime to be treated with courtesy, compassion and respect; to receive prompt, fair reparation for any harm suffered; to be provided with information about available victim assistance services; and to have their views taken into consideration.

However, some aspects are not included in the Statement. For example, it does not contain a definition of “victim,” and since it refers only to principles, it does not give victims enforceable rights. Nor does it indicate in any precise or practical way who is required to abide by these principles. It does however require that victims cooperate with the judicial authorities. In 2003, a revised version of the Statement of Basic Principles of Justice for Victims of Crime was endorsed by the provincial and territorial Ministers of Justice.¹⁶ In essence, the new Canadian Statement matches the content of the previous one, except that it no longer contains the requirement for victims to cooperate with the judicial authorities.

The principles set out in the Canadian Statement “are intended to promote fair treatment of victims and should be reflected in federal/provincial/territorial laws, policies and procedures:

1. Victims of crime should be treated with courtesy, compassion, and respect.
2. The privacy of victims should be considered and respected to the greatest extent possible.
3. All reasonable measures should be taken to minimize inconvenience to victims.
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.
5. Information should be provided to victims about the criminal justice system and the

¹³ Justice Canada, Canadian Statement of Basic Principles of Justice for Victims of Crime: <http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/guide/secn.html>

¹⁴ United Nations Declaration of Basic Principles of Justice Relating to Victims of Crime and Abuse of Power, *supra*, note 5.

¹⁵ Justice Canada, 2003 Canadian Statement of Basic Principles of Justice for Victims of Crime.

- victim's role and opportunities to participate in criminal justice processes.
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.
 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.
 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.
 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.
 10. Information should be provided to victims about available options to raise their concerns when they believe that these principles have not been followed.”¹⁷

1.2.1.2 Criminal Code

The *Criminal Code* is a law of general application that governs all of Canada. Since 1988, it has allowed the presentation in court of a victim impact statement (hereinafter a “VIS”), but only at the sentencing hearing, after an accused has been convicted. It was following the introduction of the VIS that the word “victims” appeared for the first time in the *Criminal Code*. The VIS was introduced in order to give effect to article 6(b) of the UN Declaration, which requires:

Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.

It thus allows limited participation by victims in criminal proceedings after a conviction. While the weight given to it still varies, the introduction of the VIS did put an end to a tendency in the case law to exclude victims' evidence concerning the harm they had suffered in order to avoid arbitrary testimony containing excessive emotional intensity.¹⁸

The victim impact statement in the *Criminal Code*

¹⁶ *Idem*.

¹⁷ Justice Canada, 2003 Canadian Statement of Basic Principles of Justice for Victims of Crime, *supra*, note 15.

¹⁸ Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice*, Toronto, University of Toronto Press, 1999, p. 290.

Section 718(e) of the *Criminal Code* states that one of the fundamental purposes of sentencing is “to provide reparations for harm done to victims or to the community.”¹⁹ Section 722(1) states that in determining the sentence to be imposed, or whether the offender should be discharged, the court “shall consider any statement... prepared in accordance with subsection (2) of a victim of the offence.”²⁰ A copy of the written statement is to be provided to the offender.²¹ The victim may request to read the statement aloud in court.²² Under the *Criminal Code*, “victim” means both direct victims – “those to whom harm was done or who suffered physical or emotional loss as a result of the commission of the offence”²³ – and indirect victims: “the spouse or common-law partner or any relative of that person, anyone who has in law or fact the custody of that person or is responsible for the care or support of that person or any dependant of that person” if the victim “is dead, ill or otherwise incapable of making a statement.”²⁴ With these provisions, Parliament thus gave victims the opportunity, albeit a very limited one, to take part in criminal proceedings. It is not free of consequences, however, because producing a VIS makes the victim subject to subsequent cross-examination by defence counsel.²⁵ There are also limits on what a VIS may contain. For example, it cannot contain opinion, new facts or evidence from expert witnesses.²⁶ Also excluded are criticisms of the accused and recommendations as to the severity of the sentence.²⁷

However, this recognition of a role for victims in criminal proceedings still does not give them the status of a participant, much less that of a party on the same basis as the prosecution and the accused. In his book entitled *Sentencing*,²⁸ Canadian jurist Clayton C. Ruby provides an accurate summary of the current position of victims within our criminal justice system:

Notwithstanding the provisions mandating the court to consider the victim impact statement (section 722(1)) and permitting victims to present their statement to the court (section 722(2.1)), it must be remembered that a criminal trial, including the sentencing hearing, is not a tripartite proceeding. Complainants do not have any special status in law by reason of being the persons named in the indictment. They have no status in criminal proceedings other than as witnesses for the Crown. They do not have standing to make submissions for or against the offender.

The Criminal Code contemplates prosecution of the accused by the Crown. It does not accord the persons affected by an offence status as parties to the proceeding against the accused, apart from the provision relating to restitution of property... Nor does it grant to them the right to make representations against the accused independent of those which the Crown chooses to put forward.

¹⁹ Criminal Code, s. 718 (e).

²⁰ *Idem*, s. 722(2).

²¹ *Idem*, s. 722.1.

²² *Idem*, s. 722(2.1).

²³ *Idem*, s. 722(4) (a)

²⁴ *Idem*, s. 722(4) (b).

²⁵ Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice*, *supra*, note 18, p. 290

²⁶ Clayton C. Ruby, *Sentencing*, 8th edition, Markham, Ontario, LexisNexis Canada, 2012, p. 639.

²⁷ *Gabriel*, [1999] O.J. No. 2579, 137 C.C.C. (3d) 1, paras. 15-16.

²⁸ Clayton C. Ruby, *Sentencing*, *supra*, note 26.

When read in context, s. 722(2.1) does not give a victim standing in general at the sentencing hearing... What victims do have, however, is statutory permission to file a statement with the court describing only the loss suffered by or the harm done to them by the offender as a result of the commission of the offence, and nothing more.²⁹

The criminal process is concerned with wrong done to the community whose laws have been broken. A crime is not a wrong against the actual person harmed. The object of the criminal law is to inflict appropriate punishment for the wrong that the offender has committed.³⁰

Presenting a VIS at a sentencing hearing is therefore not a right, but merely something victims are permitted to do. In the remainder of the proceedings, victims act only in the capacity of witnesses, rather than that of victims as such. In other words, at all stages of the trial except the sentencing, the status of victim is simply not recognized by the *Criminal Code*.

Problems in the implementation of the VIS

The opportunity to present a VIS has now been in place for 25 years. Since the administration of justice is under provincial jurisdiction, the use of a VIS varies from province to province. According to a Quebec study, of the victims who had an opportunity to present a VIS, 67% did so.³¹ However, even when a victim does complete a VIS, they cannot always be certain that it will be used at trial.

According to a British Columbia study, “victim-impact statements were most likely to be used in cases where prosecutors believed them to be important. They were even sometimes filled out by the police, without the victim understanding that he or she was making a victim-impact statement.”³² Thus, VISs are often used to serve the interests of Crown prosecutors, rather than the interests of the victim as such. This causes problems when the interests of the prosecution are contrary to those of the victim, which is not unusual:

Public prosecutors represent the State and not the victim. While the Prosecutor will consider the impact of crime on the victims, this is not the only factor that they must consider when deciding on how to handle the case.³³

This divergence of interests is particularly striking in connection with plea bargaining between the Crown prosecutor and counsel for the defence.

In some cases, therefore, despite the existence of a VIS, the specific interests of the victims may

²⁹ *Sparks*, [2007] N.S.J. No. 50, para. 13.

³⁰ Clayton C. Ruby, *Sentencing*, *supra*, note 26, p. 637.

³¹ Jo-Anne Wemmers and Katie Cyr, *Victims' Needs within the Context of the Criminal Justice System/Les besoins des victimes dans le système de justice criminelle*, Montreal, International Centre for Comparative Criminology, University of Montreal, 2006: http://www.cicc.umontreal.ca/recherche/victimologie/besoins_victimes.pdf.

³² Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice*, *supra*, note 18, p. 291.

³³ Edna Erez, Micheal Kilchling and Jo-Anne Wemmers, *Therapeutic Jurisprudence and Victim Participation in Justice*, Durham, Carolina Academic Press, 2011, p. 82.

not be considered in determining the sentence, particularly when plea bargaining takes place before the VIS is presented in court. According to a study by Justice Canada released in 2001, this situation generates considerable frustration for some victims:

One source of particular frustration was the perception that "plea-bargained" sentences are agreed to without any reference to the impact of the crime on the victims as expressed in their statements. Some participants found it particularly frustrating that the sentences in their cases had been negotiated between the Crown and the Defence even before their statements had been prepared. In these instances, not only were the victims dissatisfied with the sentence given, but they felt that the process had abused their time and fragile emotional state, knowing that their statements would be given no weight in sentencing.³⁴

There is thus a risk that victims will be victimized a second time when they come into contact with the judicial process.³⁵ Some authors go so far as to describe the VIS as merely symbolic in the context of a sentencing hearing, although it does nevertheless represent a step forward in the recognition of the procedural rights of victims.³⁶ They therefore advocate an improved framework for the plea bargaining process in Canada that enables victims to play a greater role as participants in the bargaining.³⁷

1.2.1.3 The Corrections and Conditional Release Act (CCRA)

The *Corrections and Conditional Release Act*³⁸ is a federal law that, as its title implies, regulates parole. This is a stage in the process that takes place outside the criminal trial and may occur some years later. However, the Act does bestow some rights on victims, including the right to be informed – when the victim expressly requests it – of the offender’s name, the offence of which the offender was convicted, the date of commencement and the length of the sentence that the offender is serving, and the eligibility dates and review dates applicable to the offender “in respect of unescorted temporary absences or parole.”³⁹

The CCRA also recognizes the victim’s right to be heard: a VIS may be presented at Parole Board hearings. The statement may describe any safety concerns in connection with the possible release of the offender.⁴⁰

In 2007, the federal government established the Office of the Federal Ombudsman for Victims

³⁴ Justice Canada, *Victims of Crime Research Series* (Summary Report on Victim Impact Statement Focus Groups), Ottawa, Justice Canada, 2001.

³⁵ Marie Manikis, *Recognizing Victims’ Role and Rights During Plea Bargaining: A Fair Deal for Victims of Crime*, (2012), 58: 3-4, *Criminal Law Quarterly*, p. 422.

³⁶ Kent Roach, *Due Process and Victims’ Rights: The New Law and Politics of Criminal Justice*, *supra*, note 18, p. 292.

³⁷ Marie Manikis, *Recognizing Victims’ Role and Rights During Plea Bargaining: A Fair Deal for Victims of Crime*, *supra*, note 35, p. 412.

³⁸ Corrections and Conditional Release Act, S.C. 1992, c. 20

³⁹ CCRA, s. 142(1)(a).

⁴⁰ CCRA, s. 140(10).

of Crime to enable the Government of Canada to meet its responsibilities towards victims. However, the Ombudsman has jurisdiction with respect only to the rights recognized in federal legal documents, such as the Canadian Statement. The Office is an administrative agency, rather than a judicial one, but it does constitute an important tool for victims in cases where the offender has been sentenced to imprisonment and is subject to the CCRA.⁴¹

1.2.3 Provincial aspects

Every Canadian province has adopted a legislative instrument on victims' rights. The rights in question largely match what is found in the UN Declaration⁴² and the Canadian Statement:⁴³ Victims have the right to information, consultation, reparation, compensation, assistance and protection. Each province takes a different approach, however, to the exercise of those rights, which means that recognition of victims' rights is not uniform across Canada.

While specific procedural rights are recognized, they are ineffective in the sense that the victim has no remedy when they are violated. For example, in *Vanscoy*, which pertains to victims' rights in Ontario, the court dismissed the application on the following grounds:

The legislature did not intend for s. 2(1) of the Victims' Bill of Rights to provide rights to the victims of crime... Even if there was an indefensible breach of these principles, the legislation expressly precludes any remedies 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.⁴⁴

The result is that victims' rights are not recognized by the courts as genuine "rights," but rather as principles that give provincial legislation a symbolic rather than a coercive value.⁴⁵

Manitoba is distinct from the other provinces in that its *Victims' Bill of Rights*⁴⁶ is more detailed and comprehensive. For example, it gives victims a number of rights, listed under the following headings:

- Right to information from police agency
- Right to give opinion on alternative measures and release
- Right to interview by same gender in sexual offence
- Right to confidentiality
- Right to information about investigation of offence
- Right to information about prosecution office (name, address and telephone number of the office responsible for prosecuting the offence)

⁴¹ CCRA.

⁴² United Nations Resolution A/RES/40/34, *supra*, note 5.

⁴³ Justice Canada, 2003 Canadian Statement of Basic Principles of Justice for Victims of Crime, *supra*, note 15.

⁴⁴ *Vanscoy v. Ontario*, 1999, O.J. No. 1661.

⁴⁵ Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice*, *supra*, note 18, p. 287.

⁴⁶ The Victims' Bill of Rights, S.M. 1998, c. 44, C.C.S.M. c. V55.

- Right to information about prosecutions, to be provided by the Director of Prosecutions
- Right to information about status of prosecution
- Right to give views on prosecution
- Right of victim to have restitution requested
- Right to information about court administration
- Right to information from correctional services
- Right of victim to discuss release and conditions
- Right to request meeting with offender
- Right to information about legal aid services.

However, possible remedies in the event of failure to respect Manitoba's Bill of Rights are administrative rather than judicial in nature, since they are based on a process whereby a complaint is submitted to an ombudsman. It is nevertheless a document which could be used as a basis for the Canadian government, particularly with respect to the explicit recognition of victims' rights and the positive obligations placed on government representatives.

Summary

Whereas the provinces have mainly produced instruments that have little coercive force, the federal government has recognized the appropriateness of a statement presented by the victim at sentencing, while recognizing that reparation for victims is one of the purposes of sentencing. However, this is not an actual "right," and there is no remedy when a victim is denied an opportunity to present a VIS. At the other stages of the judicial process, victims have no part to play as such, although they may be called upon to testify. Despite these shortcomings, the situation in Canada shows that greater recognition of victims' rights can be achieved by both levels of government through the passage and amendment of legislation.

Part II: Sources of inspiration for Canada: Victims' rights in the United States and in international criminal law

In order to understand how greater recognition of victims' rights to participate can be achieved in practice, it is helpful to analyze what other systems have done in this respect. After the adoption of the 1985 United Nations Declaration, a number of countries other than Canada sought to give more voice to victims by giving them more rights. Since our criminal law system is based on the British tradition, the key question is: how can victims' rights be integrated into a common law system in which two parties confront each other before an impartial judge?

In an attempt to answer that question, Part II will present two systems that have given victims enforceable rights. A comparative summary of these systems is presented in Appendix 1.

2.1 The United States

Like Canada, the United States has a common law-based criminal justice system in which two parties – the state and the accused – confront each other in order to uncover the truth. Under this system, the interests of victims have no specific protection. It is based on the premise that the prosecution represents the interests of society at large. Since victims are members of society, they are represented indirectly by the prosecution. It is therefore not necessary to grant them a specific interest or procedural rights.⁴⁷ The same reasoning is frequently invoked in our Canadian criminal justice system, which is also based on common law. Like the Canadian system, the American judicial system is divided in two with laws made by the states and federal laws.

2.1.1 State legislation

The United States has seen very substantial advances in victims' rights in recent decades, particularly through the influence of civil society and crime victims groups. By 2006, 33 states had incorporated victims' rights into their constitutions.⁴⁸ The US Department of Justice's National Institute of Justice conducted a study of various US states in order to assess the impact of such legislation on victims' rights. The results show the importance of adopting legislation that recognizes the right of victims to participate:

Where legal protection is strong, victims are more likely to be aware of their

⁴⁷ American Bar Association, Victims Committee, Criminal Justice Section, *The Victim in the Criminal Justice System*, June 2006

⁴⁸ *Idem*, p. 2.

rights, to participate in the criminal justice system, to view criminal justice officials favourably, and to express more overall satisfaction with the system. Moreover, the levels of overall satisfaction in strong-protection states are higher. Strong legal protection produces greater victim involvement and better experiences with the justice system. A more favourable perception of the agents of the system – police, prosecutors, victim/witness staff and judges – is another benefit.⁴⁹

Thus, not only do victims have a more positive experience when their rights are recognized, but the overall image of the criminal justice system is also improved.

2.1.2 Federal legislation

The greatest advance in the United States in the area that concerns us, however, was achieved by the federal government, which in 2004 adopted the Crimes Victims' Rights Act⁵⁰ (hereinafter "the CVRA"), granting procedural rights to the victims of federal crimes and enabling them to participate in criminal trials. The result of the adoption of the CVRA was a real revolution in criminal law and procedure:

The crime justice system has long functioned on the assumption that crime victims should behave like good Victorian children – seen but not heard. The CVRA sought to change this by making victims independent participants in the criminal justice system.⁵¹

Victims are thus not recognized as parties at trial, but rather as participants, which is still a major advance in an adversarial system.

The CVRA lists eight rights afforded to victims in federal criminal cases:⁵²

- (1) The right to be reasonably protected from the accused.
- (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
- (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
- (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
- (5) The reasonable right to confer with the attorney for the Government in the case.
- (6) The right to full and timely restitution as provided in law.
- (7) The right to proceedings free from unreasonable delay.
- (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

⁴⁹ Jeremy Travis (Director), U.S. Department of Justice, Office of Justice Programs, *The Rights of Crime Victims – Does Legal Protection Make a Difference?* (Research in Brief), National Institute of Justice, 1998, p. 10.

⁵⁰ Crime Victims' Rights Act, section 102 of the *United States Justice for All Act of 2004*, Pub. L. No. 108-405, 118 Stat. 2261-64 (codified at 18 U.S.C. § 3771 (2006 & Supp. III 2009)).

⁵¹ *Kenna v US District Court* (2006: 435 f, 3d, 1011), para. 14.

⁵² CVRA, *supra*, note 50.

The rights of victims are thus stated exhaustively in the CVRA, which limits their application. For example, only victims of federal crimes can benefit from these rights. Moreover, the definition of “victim” is limited to those who are “directly and proximately harmed”⁵³ by the crime. The right to be “reasonably heard” is limited to certain stages in the proceedings: “those involving release, plea, sentencing, or any parole proceeding.” In addition to the rights listed, however, the CVRA imposes obligations on the court and on the prosecution. The court must ensure that these rights are respected,⁵⁴ and government employees engaged in the detection, investigation or prosecution of crime must make every effort to ensure that crime victims are kept informed in detail of the investigation and prosecution process.⁵⁵ The CVRA also provides the possibility for victims to be represented by counsel and requires the prosecutor to inform the crime victim of the rights described in subsection (a) of the Act.⁵⁶

In addition to setting out the rights of victims, the CVRA also provides for review mechanisms when those rights are not respected in judicial proceedings. It provides a specific remedy in the form of a “motion for relief and writ of mandamus.”⁵⁷ Victims may also apply to a judge of the district court in the district in which the crime occurred in order to assert their rights. If the district court denies the relief sought, “the movant may petition the court of appeals for a writ of mandamus.” In so doing, he or she is acting not as a participant, but rather as a party to the petition. Interestingly, the court hearing the application must decide the application “forthwith within 72 hours after the petition has been filed,” thereby facilitating the administration of justice and preventing recognition of victims’ rights from complicating or delaying proceedings. If the court of appeals does deny the relief sought, the reasons for the denial must be clearly stated in a written decision.

This procedure was the subject of an important ruling in which the trial judge had declined to hear the victim at a sentencing hearing for an accused, since he had heard the victims during the trial of his co-accused – his father. In his reasons, the judge wrote “I have listened at Mr. Leichner’s father’s sentencing to the victims and, quite frankly, I don’t think there’s anything that any victim could say that would have any impact whatsoever.”⁵⁸ Following a petition for a writ of mandamus, the court hearing the petition found that the trial judge had made an error in law by refusing to hear from the victim in court, thereby denying his right to be “reasonably heard” at a hearing. The court noted that the only way to assert the victim’s right was to order a new sentencing hearing at which he would be given an opportunity to be heard.⁵⁹ In its decision, the court clarified the purpose of the CVRA as follows:

The statute was enacted to make crime victims **full participants** in the criminal justice system. Prosecutors and defendants already have the right to speak at sentencing; **our interpretation puts the crime victims on the same footing.** Our interpretation also serves to effectuate other statutory aims: (1) To ensure that the district court doesn’t discount the impact of the crime on the victims; (2) to force the defendant to confront the human cost of his crime; and (3) to allow the

⁵³ CVRA, s. 3771(f).

⁵⁴ CVRA, 3771(b).

⁵⁵ CVRA, 3771(c)(1).

⁵⁶ CVRA, 3771(c)(2).

⁵⁷ CVRA, 3771(d)(3).

⁵⁸ *Kenna v US District Court* (2006: 435 f, 3d, 1011), para. 11.

⁵⁹ *Kenna v US District Court, supra*, note 51, para. 33.

victim to regain a sense of dignity and respect rather than feel powerless and ashamed.⁶⁰ (Emphasis added)

The CVRA is not without its critics, however. It sets out the duties of judges in very general terms, but concentrates on the prosecution's responsibilities with respect to victims' rights. This makes it more difficult to sanction a failure to discharge their obligations. Thus, the courts "have generally been more inclined to provide remedies for participatory rights in criminal proceedings following court violations of rights, but have been much less inclined to provide for prosecutorial (governmental) breaches, or breaches that do not affect the outcome of proceedings."⁶¹ In response to this issue, some authors suggest that greater involvement of professional bodies and other organizations is required to initiate a cultural change among lawyers.⁶² For example, the American Bar Association is actively promoting victims' interests within the criminal justice process by adopting Fair Treatment Guidelines for lawyers in their dealings with crime victims.⁶³

Summary

U.S. experience shows that affording specific rights to victims, and providing an opportunity to contest the decisions of courts of first instance when their rights are not respected, give them full standing in criminal proceedings.⁶⁴ It is in this area, therefore, that the process can make it possible in reality for victims' rights to be not mere principles, but genuinely enforceable, by allowing victims to secure a measure of control over decisions involving criminal proceedings.⁶⁵

⁶⁰ *Kenna v US District Court*, *supra*, note 51, para. 28.

⁶¹ Marie Manikis, A Comparative Overview of Victims' Rights, Enforcement Mechanisms, and Redress in England and Wales and the American Federal Jurisdiction, in Justice Canada, Research Digest, The Victims of Crime: <http://canada.justice.gc.ca/eng/rp-pr/cj-jp/victim/rd6-rr6/rd6-rr6.pdf>, p. 42.

⁶² Mary L. Boland and Russel Butler, *Crime victims' rights: From illusion to reality* (2009) 24 Criminal Justice, American Bar Association: http://www.americanbar.org/content/dam/aba/multimedia/domestic_violence/publications/lgbttoolkit_boland_resource_authcheckdam.pdf, p. 7.

⁶³ American Bar Association (Victims Committee, Criminal Justice Section), *The victim in the criminal justice system*, *supra*, note 47, p. 3

⁶⁴ Tyrone Kirchengast, *Les victimes comme parties prenantes d'un procès pénal de type accusatoire* [victims as full participants in adversarial criminal proceedings], in Jo-Anne Wemmers (ed.), *Les droits des victimes dans un contexte international*, Vol. 44, No. 2, Montreal, Les Presses de l'Université de Montréal, 2011, p. 112.

⁶⁵ *Idem.*, p. 111.

2.2 The International Criminal Court

2.2.1 The emergence of victims' rights in international law

A few years after the adoption of the 1985 United Nations Declaration, the Security Council used its powers under Chapter VII of the United Nations Charter⁶⁶ to establish the International Criminal Tribunal for the former Yugoslavia and, subsequently, the International Criminal Tribunal for Rwanda. Given its role within the United Nations, the Council would have been expected to give the kind of prominence to victims called for by the 1985 Declaration, but this was not the case. These *ad hoc* tribunals were established in accordance with a procedure based largely on common law.⁶⁷ When their terms of reference were drafted, the Council was more concerned with punishing the perpetrators of war crimes and crimes against humanity than with giving thought to the victims.⁶⁸ At the hearings, therefore, the victims were cast in the role of mere witnesses. This decision resulted from the assumption that the interests of the victims would be represented through the interests of the prosecution, and thus defended by the prosecutors.⁶⁹ There was strong criticism, subsequently, of this failure to respect the UN Declaration.⁷⁰

Not until the establishment of the International Criminal Court (ICC) did an international body give genuine effect to victims' right to participate, and this was seen as a major innovation.⁷¹ It should be said that the establishment of the ICC was the outcome not of a Security Council resolution, but of a multilateral treaty between member states. In addition to government bodies, non-governmental organizations played an important role⁷² in its establishment, which explains why victims' rights find a place in the treaty setting up the ICC, known as the Statute of Rome.⁷³ The Member States of the ICC, which includes Canada, also adopted Rules of Procedure and Evidence.⁷⁴ These specify how the procedural rights of victims are to be exercised, in particular through the Registry. However, the scope of the rights in question is reduced by significant statutory limitations.

⁶⁶ United Nations Charter (and Statute of the International Court of Justice), June 26, 1945: <http://www.un.org/en/documents/charter/>

⁶⁷ Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford, Oxford University Press, 2009, pp. 562-563.

⁶⁸ *Idem*.

⁶⁹ *Idem*.

⁷⁰ Vladimir N. Tochilov, *Victims' Procedural Rights at Trial: Approach of Continental Europe and the International Tribunal for the Former Yugoslavia*, in Jan J. M. Van Dijk, Ron G.H. Van Kaam and Jo-Anne Wemmers (eds.), *Caring for Crime Victims: selected proceedings of the Ninth International Symposium on Victimology, Amsterdam, August 25-29, 1997*, 9th edition, New York, Criminal Justice Press, 1999.

⁷¹ Gilbert Bitti, *Les droits procéduraux des victimes devant la Cour pénale internationale*, *supra*, note 10, p. 63.

⁷² Luc Walley, *La Cour pénale internationale, une juridiction pour les victimes ?* [the International Criminal Court: a jurisdiction for victims?], in Jo-Anne Wemmers, (ed.), *Les droits des victimes dans un contexte international*, Vol. 44, No. 2, Montreal, Les Presses de l'Université de Montréal, 2011, p. 44.

⁷³ Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTC; coming into force: July 1, 2002.

⁷⁴ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court*, First Session, 3-10 September 2002, (ICC/ASP/1/3 and Corr.1), Part II, A.

2.2.2 Procedural rights

The Rome Statute and the Rules of Procedure and Evidence afford victims the right to participate, the right to be represented, and the right to reparation. The Rules impose a general obligation on the various chambers and other organs of the Court to take the needs of victims into consideration in performing their functions.⁷⁵ They also contain a definition of “victims”, specifying that the term applies to natural persons or organizations or institutions that have sustained direct harm.⁷⁶

More specifically, article 68(3) of the Rome Statute gives victims the right to participate; it reads:

Where the **personal interests** of the victims are affected, the Court shall permit their **views and concerns** to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or **inconsistent with the rights of the accused and a fair and impartial trial**. (Emphasis added)

This article bears a striking resemblance to article 6(b) of the 1985 UN Declaration, particularly with respect to “views and concerns”, but also to the Court’s obligation to consider the right of the accused to a fair and impartial trial.

Rule 90 gives victims the right to choose a legal representative and, in some cases, to receive financial assistance in paying for representation.⁷⁷ It is the responsibility of victims’ legal representatives to ensure that their clients’ rights are respected during the proceedings. To that end, they may “attend and participate in the proceedings in accordance with the terms of the ruling of the Chamber.”⁷⁸ Among other things, victims may make opening and closing statements,⁷⁹ and their representatives may address the court for leave to question witnesses.⁸⁰

Article 75 of the Rome Statute sets out victims’ right to reparations, which may be paid by the convicted person or from a trust fund for victims, established and administered by member states, but independently of the Court. The Trust Fund thus acts as an intermediary, and enables victims’ rights to reparations to be protected even when the convicted person is insolvent.⁸¹ It is important to note that at the preliminary stage of the trial and the appeal, victims act as participants, but at the hearing on reparations, they act rather as parties.⁸²

⁷⁵ Rule 86.

⁷⁶ Rule 85.

⁷⁷ Rule 90.

⁷⁸ Rule 91.

⁷⁹ Rule 89.

⁸⁰ Rule 91.

⁸¹ Jo-Anne Wemmers, *Introduction à la victimologie*, *supra*, note 1, p. 190

⁸² Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings*, *supra*, note 8, p. 234.

2.2.3 Limitations on the procedural rights of victims

While victims do have procedural rights, and their own legal representative to defend their interests, in contrast to the *ad hoc* tribunals, the fact remains that the exercise of their rights is intrinsically bound up with the interests of the prosecution, and depends on the decisions the prosecutor makes. The prosecutor will determine the charges laid against the accused on the basis of the evidence available to him or her.⁸³ The choices the prosecutor makes will thus have a direct impact on the temporal, territorial and material limitations placed on victims' rights at trial, indirectly determining who will be entitled to reparations. Note that only the victims of an offence may attend Court proceedings, which means that not all the victims in the geographical location where the crimes were committed will be able to exercise their right to participate, but only those who were victims of the crimes described in the indictment prepared by the prosecutor. Since crimes of this kind generally take place over an extended period, the prosecutor must also choose the period to which the charges relate, based on the evidence available. These factors limit access to Court proceedings, because the victims of one act constitute an infinitely smaller group than the victims of the situation as a whole. For example, when Prosecutor O'Campo decided not to prosecute Thomas Lubanga Dylo for sexual assaults committed in the Democratic Republic of Congo, referred to as the RDC, he thereby prevented the victims of those crimes from taking part in the proceedings and receiving reparations.⁸⁴ Since the evidence relating to those crimes could not be presented, his decision also had the effect of limiting the right of victims to uncover the truth.⁸⁵ Furthermore, the rights of the victims also depend on the outcome of the trial. Under article 75 of the Rome Statute, only the victims of a person convicted by the Court may receive compensation from the offender. This means that the effectiveness of the right to reparations is intrinsically bound up with the establishment of the guilt of the accused beyond all reasonable doubt.⁸⁶

2.2.4 Lack of precision in the drafting of provisions concerning victims' rights

While the 1985 United Nations Declaration is an instrument intended to be very general in nature in order to give states flexibility in its implementation, the Rome Statute has a legal authority that is much more coercive, and much more detailed content. It is curious, therefore, that in drafting the Statute, states merely borrowed wording from the Declaration. This has consequences, legally speaking, because article 68(3) gives ICC judges very wide discretion in the practical implementation of the right to participate.⁸⁷ It is thus up to the judge to strike a balance between civil law and common law procedure.⁸⁸ A number of authors have criticized the work of the Court's chambers on the grounds that each has developed different case law respecting the implementation of victims' rights. The failure to harmonize the case law of the various organs of the Court poses serious problems with respect to fairness between victims,⁸⁹

⁸³ Rome Statute, article 66(3).

⁸⁴ Gilbert Bitti, *Les droits procéduraux des victimes devant la Cour pénale internationale*, *supra*, note 10, p.73.

⁸⁵ Luc Walley, *La Cour pénale internationale, une juridiction pour les victimes ?*, *supra*, note 72, p. 45.

⁸⁶ Rome Statute, article 66(3).

⁸⁷ Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings*, *supra*, note 8, p. 240.

⁸⁸ *Idem*, p. 227.

⁸⁹ *Idem*, p. 240.

some of whom are denied the exercise of a right in one case, while it is allowed in another. For example, victims' access to evidence, the ability to introduce new evidence, the extent of the rights of anonymous victims and the definition of "victims' interests" have all been decided differently in one chamber or another.⁹⁰ Victims are thus treated differently, not on the basis of preset legal criteria, but depending on who the judge is in the case that concerns them. Greater predictability with respect to the right to participate is therefore essential, in order to avoid arbitrary decisions in the future.

As a result of the way in which article 68(3) of the Rome Statute is drafted, moreover, judges have had difficulty in striking a balance between the rights of the accused, and the rights of victims. Some authors have gone so far as to describe the outcome of some decisions, in which the extent of victims' rights was reduced in order to protect the rights of the accused, as token participation.⁹¹ Others go even farther, questioning the entire process before the ICC:

The lack of harmonization and the failure to clarify these and other important issues affecting the Court's operation seriously compromise the integrity of the system – both for the victims and for the accused. As a whole, it appears that the Court has little conceptual understanding of an agreement on how to approach victim participation in international criminal proceedings.⁹²

For the time being, therefore, effective reparations remain a distant prospect.⁹³

With regard to possible means of clarifying the rights of victims and thus making them more predictable, some authors suggest that the effort at uniformity should come from the judges and prosecutors themselves,⁹⁴ while others go so far as to advocate codification of victims' rights,⁹⁵ which could be undertaken by the states parties to the Rome Statute. It should be noted, however, that the states in question have already grasped the importance of clarifying victims' rights. A resolution by the Assembly of States Parties issued in 2009 recognizes that the Court has not only a punitive function, but also a reparatory function.⁹⁶ This constitutes a major advance, particularly by comparison with the *ad hoc* tribunals, whose main objective was punitive from the beginning. The resolution also contains a list of seven principles the court should follow in dealing with victims. Among other things, the State Parties recognize the importance of the role of victims, and the need to take their views and concerns into consideration at every stage in the proceedings. They also undertake to provide fair and effective access to proceedings before the Court, and make it a catalyst in the improvement of the rights of victims of international crimes, worldwide.⁹⁷ In a word, the resolution recognizes

⁹⁰ Gilbert Bitti, *Les droits procéduraux des victimes devant la Cour pénale internationale*, *supra*, note 10, pp. 80 and 81.

⁹¹ *Idem*.

⁹² Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings*, *supra*, note 8, p. 333.

⁹³ Luc Walley, *La Cour pénale internationale, une juridiction pour les victimes ?*, *supra*, note 72, p. 60.

⁹⁴ *Idem*, p. 334.

⁹⁵ Gilbert Bitti, *Les droits procéduraux des victimes devant la Cour pénale internationale*, *supra*, note 10, p. 63.

⁹⁶ Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings*, *supra*, note 8, p. 331

⁹⁷ Assembly of States Parties, Resolution ICC-ASP/8/Res.3, para. 35, referring to the Report of the Court on the strategy in relation to victims, ICC-ASP/8/45, 18-26 November 2009.

that participation is a right, not a privilege.

Summary

Recognition of the procedural rights of victims in proceedings before the ICC and in the United States illustrates a number of issues that could arise if those rights were recognized in a system like ours. These experiences show the importance of a sound definition of procedural rights afforded to victims and the difficulties that arise when the rights of victims are placed in opposition to those of the accused, since in most cases the rights of the accused will carry the day.

They also show that the issue of diverging interests between victims and the prosecution should be examined carefully before legislation is adopted that gives victims standing as participants within the Canadian judicial process. Lastly, they show the importance of the legal representative's role in defending victims' interests.

Part III: Instituting broader recognition of victims' rights in Canada

In order to achieve better recognition and respect for victims' rights, the status of participant should be explicitly recognized in legislation by the federal Parliament. Procedural rights, defined in detail, should then be granted to those participants. For example, the wording should specify the stages in legal proceedings at which victims' rights can be exercised. Lastly, remedies should also be provided if victims' rights are violated, in order to ensure that their implementation is effective.

3.1 The choice of a legislative instrument

Both in the United States and in international criminal law, the recognition of victims' rights has been given effect by the adoption of a legislative instrument. This has been the vehicle whereby both systems have introduced procedural rights that enable victims to take an active part in judicial proceedings, and have made their rights effective. In Canada, we have already taken successful steps in that direction. In 1988, Canada's *Criminal Code* was amended to include the victim's statement.⁹⁸ The amendment followed the adoption of the Canadian Statement, which gave victims the right to express their views and concerns in criminal proceedings.

3.1.1 A new statement of victims' rights

As noted in Part I, a statement on victims' rights already exists at the federal level: the Canadian Statement of Basic Principles of Justice for Victims of Crime.⁹⁹ However, it is limited to ten broadly stated principles that allow varied interpretation in their application. A bill of rights for victims, as now being considered by the federal government, would make it possible to clarify the extent of those rights and the stages in judicial proceedings at which they apply. This would reduce the arbitrary element in their implementation by the courts.

While such a measure would be welcome, the issue of the effectiveness and coercive power of the new document must be considered. Questions must be asked concerning the extent to which the statement will establish a standard: will it set out general principles, or specific, detailed rights? In our opinion, the new instrument should not merely set out principles and general rights, since there is a risk that the same problem will arise as with provincial legislation in the same area. The rights recognized by provincial laws have been judged ineffective, since there is no effective remedy if they are violated. This means that a victim cannot compel a court to respect his or her rights when they are ignored. Consequently, the future bill of rights should not reproduce something similar to what has already been adopted provincially. There is a need

⁹⁸ Criminal Code, s. 722.

⁹⁹ Justice Canada, 2003 Canadian Statement of Basic Principles of Justice for Victims of Crime., *supra*, note 15.

therefore to give effectiveness to victims' rights and to provide for recourse when the courts overlook them.

We therefore favour amending the *Criminal Code* to include both substantive and procedural rights. The VIS is now established in the Code, but only at the sentencing stage. It would therefore be consistent to amend the sections of the Code governing other stages in criminal proceedings, and include rights enabling victims to take part in these stages.

3.3 *The exercise of rights in judicial proceedings*

Under the *Criminal Code* as it now stands, a victim is a witness to a crime against the state. We believe, however, that it should be recognized that a crime constitutes a violation of the rights of the victim, as well as a crime against society.¹⁰⁰ Human Rights Watch takes a similar view:

Human rights standards demand that victims be treated with compassion and with respect for their human dignity throughout the criminal justice process, and that no group or category of victims should suffer from discrimination. **Victims of crime should be able to have access to and participate in the criminal justice system through procedures that provide them with information, notice, and an opportunity to be heard without prejudice to the rights of the accused.** Human rights standards recognize that victims should be protected and assisted in all appropriate instances, and they should have access to specialized help in dealing with emotional trauma and other hardships caused by their victimization.¹⁰¹ (Emphasis added)

It is therefore important to recognize victims' legitimate interests in criminal proceedings. In practical terms, this is done by giving victims **standing as participants**. In our view, it is only through recognition of such standing that the rights of victims will truly be respected.

The Barreau du Québec made a recommendation to that effect in the course of a study on the role of victims in criminal proceedings:

[TRANSLATION]

Victims should have status in criminal proceedings equivalent to that of the accused. The victim should also be considered an agent of the judiciary throughout the judicial process, and not merely when the accused is charged, and during testimony. Both federal and provincial bodies have recognized the importance of witnesses within the criminal justice system. Application of these principles will afford victims their rightful place.¹⁰²

¹⁰⁰ Jo-Anne Wemmers, "Victims' Rights are Human Rights: The importance of recognizing victims as persons," *Temida*, 2011.15 (2), 71-84.

¹⁰¹ Human Rights Watch, *US Policy and International Standards on the Rights and Interests of Victims of Crime*, 2008: <http://www.hrw.org/sites/default/files/reports/us0908webwcover.pdf>, p. 2.

¹⁰² Barreau du Québec, *Le rôle de la victime dans le système de justice pénale*, (Mémoire du Barreau du Québec) [the victim's role in the criminal justice system – Brief by the Barreau du Québec], 1998:

In our view, therefore, recognition should be given effect at the various stages in judicial proceedings we are about to consider. A summary of the proposed amendments for each stage is included in Appendix 2.

3.3.1 Stages in judicial proceedings

It is important to determine at which stages in judicial proceedings victims' rights are to be exercised. As things stand, victims have an opportunity to present a VIS to the court only at the sentencing hearing. We suggest, however, that the right to participate be extended to include the entire criminal justice process, rather than just the sentencing. We propose to separate judicial proceedings into four stages: (1) the pre-trial stage, (2) the trial, (3) sentencing and (4) remedies in case of violation. Each stage entails different interests for victims. The participatory rights to be applied are therefore different, as are the means of their exercise. As noted above, the lack of recourse when victims' rights are violated is a major obstacle to their effectiveness. If participatory rights are explicitly granted to victims, there is an absolute necessity to provide remedies.

3.3.1.1. The pre-trial stage

The interests of victims are at stake from the initial contact with police officers and investigators. Next comes the pre-trial stage, which is a part of the criminal proceedings: the laying of charges and the preliminary inquiry. The latter is optional, however, at the request of either party: prosecution or defence.

At these two steps, the victim's role is non-existent, or very limited. With respect to the charges, the victim's role is limited to reporting the crime to the police authorities; this triggers the investigative process that can lead to the laying of charges by the Crown.¹⁰³ Note, however, that an ordinary citizen – including a victim – may also lay an information about an offence.¹⁰⁴ At both the laying of charges and the investigation stage, the victim's interest is to be informed of progress, and not to be left in ignorance. In order for the need to be informed and notified at this stage to become a right, it is important for it to be clearly stated in the *Criminal Code*.

3.3.1.2 The trial

At the trial itself, the victim's role is limited to that of a witness. Since each party controls its evidence, it is up to the prosecutor to determine whether and how a victim's testimony is to be used in court. It is at this stage in the process, therefore, that the participatory rights of victims are most lacking, despite the existence of the current Canadian Statement. The latter recognizes

<http://www.barreau.qc.ca/pdf/medias/positions/1998/199809-victimes.pdf>, p. 15.

¹⁰³ Criminal Code, s. 504.

¹⁰⁴ Criminal Code, s. 507.1(1).

ten principles that can be used as a basis for further development of victims' participatory rights, particularly the right to be informed, the right to be heard, the right to privacy, and rights related to their relations with other participants in the judicial process. The right to representation by counsel should be added to the list. This is not explicitly included in the Canadian Statement, but it is a necessary consequence of recognizing victims as participants in criminal proceedings.

The right to be informed and notified

The Canadian Statement has already established four principles relating to the right to be informed. As currently expressed, however, these principles cannot be described as "rights", and no remedy is provided if they are violated.

Yet the right to be informed is fundamental, since it is a prerequisite if victims are to participate in judicial proceedings.¹⁰⁵ A U.S. National Institute of Justice study of the procedural rights of victims in that country made its importance clear:

Perhaps the most fundamental right of a crime victim is the right to be kept informed by the criminal justice system. Notification plays a key role in a victim's ability to participate in the system because victims cannot participate unless they are informed of their rights and of the time and place of the relevant criminal justice proceedings in which they may exercise those rights. Victims clearly attested to the importance of their rights to attend and be heard at proceedings, but unless they receive notice of proceedings and of their rights, cannot exercise those rights.¹⁰⁶

The importance for victims is not limited merely to being informed of the dates of hearings or other steps in the process, but extends to the right to be informed of their rights and the opportunities available to them.¹⁰⁷ For example, the right to be informed is exercised when the victim is notified of the possibility of preparing a VIS that can be used at the sentencing stage.

In order for being informed and notified to become a right, it is important to state it clearly in the *Criminal Code* and to impose a positive obligation on agents of the government:

- (1) to inform victims of their rights, and about the operation of the judicial process; and
- (2) to notify victims of the dates of hearings and other steps in the judicial process.

Such obligations could be placed upon the representatives of the prosecution, as is the case in the United States with respect to federal crimes.¹⁰⁸

¹⁰⁵ Jeremy Travis (Director), U.S. Department of Justice, Office of Justice Programs, *The Rights of Crime Victims – Does Legal Protection Make a Difference?* (Research in Brief), National Institute of Justice, 1998,, *supra*, note 49, p. 5.

¹⁰⁶ *Idem*, p. 2.

¹⁰⁷ *Idem*, p. 4.

¹⁰⁸ Crime Victims Rights Act, *supra*, note 50, para. 2.

The right to be heard and consulted

The Canadian Statement reads in part:

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.¹⁰⁹

Although it recognizes the importance of victims' being heard during criminal justice processes, it remains very general in relation to the practical exercise of the right to be heard. As noted, a victim can be heard only by presenting a written statement at the sentencing hearing. Both the Canadian Statement and the *Criminal Code* therefore fail to recognize victims' rights to be consulted from the beginning of the criminal justice process, with regard both to the charges and to the evidence produced in court.

New legislation should therefore be enacted to make these principles actual rights. In so doing, Canada might draw inspiration from the United States and the CVRA, which affirms:

The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.¹¹⁰

This right exists at all four stages of the judicial process, and not only at sentencing. With respect to the right to be consulted, the CVRA refers to:

The reasonable right to confer with the attorney for the Government in the case.¹¹¹

The right to privacy

As explained above, the interests of victims are sometimes at odds with those of prosecutors, and even the media. This was true in the Homolka case, among others, in which the victims objected to the dissemination of video evidence that the prosecution and the media wished to show to the court. The matter was resolved in a way that satisfied no one: the soundtrack of the video evidence was made public, but not the visual content.

When the privacy of victims is at stake, it is important to give them an opportunity to seek a non-publication order. The right to be heard and to be represented by counsel acquires its full weight in this context. The Canadian Statement already provides that:

The privacy of victims should be considered and respected to the greatest extent possible.¹¹²

In order to ensure better respect for the privacy of victims and avoid any recurrence of the

¹⁰⁹ Justice Canada, 2003 Canadian Statement of Basic Principles of Justice for Victims of Crime, Principle No. 8.

¹¹⁰ CVRA, s. 3771(a)(4).

¹¹¹ CVRA, s. 3771(a)(5).

¹¹² Justice Canada, 2003 Canadian Statement of Basic Principles of Justice for Victims of Crime, Principle No. 2.

unsatisfactory outcomes experienced in a number of courts, there should be explicit recognition of the right to privacy within the judicial process. Parliament could again draw inspiration from the CVRA, which refers to “The right to be treated with fairness and with respect for the victim’s dignity and privacy.”¹¹³

Respect for, and the exercise of, the right to privacy are intrinsically bound up with the victim’s right to be informed and to be heard. Should an item of evidence violate the privacy of a victim without their consent, they should be informed in advance of the filing of such evidence and should be able to express before the court their refusal to allow the evidence to be made public. In this manner, through counsel, they could apply for a non-publication order. While this is at odds with the principle that trials should take place in public, such orders already exist in Canadian criminal law.

We therefore recommend explicit recognition in the *Criminal Code* of victims’ right to privacy in the context of a criminal trial. The means of exercising that right should also be recognized: the right to be informed, the right to be heard and the right to apply through counsel for a non-publication order.

The right to counsel

In order for victims to be able to take part in proceedings and secure recognition of their legal personality, it is important that they be represented by counsel. This would constitute a major advance in the recognition of procedural rights as the ability to retain and instruct counsel is essential in order for victims’ rights to be meaningful.¹¹⁴ Representation by counsel will also provide an answer to a number of critics who oppose greater participation by victims in the criminal justice process. Since the addition of a participant at trial disturbs the adversarial dynamic of common law trials, some people are opposed to the granting of procedural rights to victims. They also believe it would add an emotional and subjective element to the trial. Yet the availability of counsel to defend the interests of victims makes the process more formal and more objective:

[TRANSLATION]

When victims are given legal recognition through the expertise and independence of counsel accompanying them throughout the judicial proceedings, there is a significant reduction in the fear that they will convey a subjective, exaggerated or even untruthful message.¹¹⁵

There is thus no reason to fear that greater participation by victims will negatively affect the right of the accused to a fair trial.

If the right to counsel is recognized, as it is now before the ICC and in relation to federal crimes in the United States, a question arises as to payment for lawyers responsible for defending the

¹¹³ CVRA, s. 3771(a)(8).

¹¹⁴ Tyrone Kirchengast, *Les victimes comme parties prenantes d’un procès pénal de type accusatoire*, supra, note 64, p. 107.

¹¹⁵ *Idem*, p.118.

interests of victims. Should the state or the victims pay those costs? This is a major issue in terms of access to justice, and constitutes a potential limitation on victim participation. Given the substantial costs generally associated with the services of an attorney, some may have to make a choice between the opportunity to assert their rights, and that of representing themselves, which would not really be advisable given the complexity of criminal proceedings. It would therefore be appropriate to consider the possibility of extending legal aid to victims, on the same basis as to persons accused. On the other hand, such a measure would involve the provincial jurisdiction over the administration of justice,¹¹⁶ since legal aid programs are a provincial responsibility. We therefore recommend that the provinces consider the possible inclusion of representation by counsel for victims in their legal aid programs, together with other measures to improve access to justice.

3.3.1.3 Sentencing

As explained in Part I, victims are given an opportunity to present a statement at the sentencing hearing. The court may thus take the statement into consideration in determining sentence. In principle, the victim may indicate in the VIS whether they wish to seek reparations from the offender. As we have seen, reparations for harm done to victims are among the objectives of sentencing.¹¹⁷ In rendering its decision, therefore, the court may take the consequences of the offence for the victim into consideration, and order reparations.

In a good many cases, however, sentence is determined on the basis of a joint recommendation by the prosecution and the defence, following a process of negotiation commonly known as plea bargaining.

[TRANSLATION]

This is a common practice whereby the prosecution and the defence negotiate the final determination of a criminal case between themselves. In its most common form, the resulting agreement calls for the accused to plead guilty to one or more charges in return for the withdrawal of others; the parties will often have agreed also on the sentence to be imposed.¹¹⁸

While such an agreement is not binding on the judge,¹¹⁹ it nevertheless provides significant guidance, and the recommendation thus presented by the prosecution and the defence have to be taken seriously, unless it is clearly inappropriate to the circumstances, contrary to the public interest or likely to bring the administration of justice into disrepute.¹²⁰ The recommendation may address both the charges and the appropriate sentence.

¹¹⁶ Constitution Act, 1867, s. 92(14).

¹¹⁷ Criminal Code, s. 718(e).

¹¹⁸ Jean-Paul Perron, *La négociation en droit pénal* [negotiation in criminal law], in *Collection de droit 2012-2013*, École du Barreau du Québec [Quebec Bar School], Vol. 12, *Droit pénal – Infractions, moyens de défense et peine* [criminal law: offences, defences and sentencing], Barreau du Québec, 2012, p. 2.

¹¹⁹ *Attorney General of Canada v. Obadia*, 20 C.R. (5th) 162.

¹²⁰ *R. c. St-Pierre*, REJB 2003-37475.

In many cases, the victim is totally excluded from this informal and unregulated negotiation, and this may cause problems, because the prosecutor does not have the same interests as the victim at this stage in the judicial process.

[TRANSLATION]

The prosecutor is effectively the representative of the director of public prosecutions, and does not necessarily represent the interests of the complainant, the victim or the police. The prosecutor's first duty is to secure the higher interests of justice, even at the risk of the acquittal of the accused,¹²¹ and in the performance of his or her duties, despite the adversarial system in which he or she is operating, must take the interests of the accused into account and may, the absolute terms of the legislation notwithstanding, act upon non-legal considerations that are not incompatible with the interests of justice and the protection of society.¹²²

As explained in Part I, there is a risk that victims may be victimized a second time as a result, among other things, of their false expectations with respect to the VIS and its impact on sentencing. According to the 2001 study by Justice Canada, some victims experienced considerable frustration with the court process, when they had the impression that the sentences imposed had been negotiated before they presented their VIS. In such cases, they felt that their experience as victims had not been taken into consideration, and were resentful of the apparent lack of respect within the system for the effort they had put into preparing their statements.¹²³

Affording victims a right to information at this stage of the process would make it possible to lessen the negative effects of their participation felt by victims. This approach has already been adopted by the province of Manitoba. Manitoba's *Victims' Bill of Rights*¹²⁴ reads as follows:

If a victim requests information about the prosecution of a person for the offence, the Director of Prosecutions must ensure that information is given to the victim on ... the process for entering a plea of guilty or not guilty, including the possibility of discussions between the Crown attorney and an accused person, or his or her legal counsel, on a resolution of the charge.¹²⁵

A right to consultation should also be considered for victims that would precede the negotiations, in order to have an impact on them.¹²⁶ Victims should also be kept informed of developments during the bargaining process.¹²⁷

¹²¹ Jean-Paul Perron, *La négociation en droit pénal*, *supra*, note 118, p. 6.

¹²² *Idem*, p. 7.

¹²³ Justice Canada, *Victims of Crime Research Series*, *supra*, note 34.

¹²⁴ *Victims' Bill of Rights*, *supra*, note 46.

¹²⁵ *Victims' Bill of Rights*, *supra*, note 46, s. 12(i).

¹²⁶ Marie Manikis, *Recognizing Victims' Role and Rights During Plea Bargaining: A Fair Deal for Victims of Crime*, *supra*, note 35, p. 418.

¹²⁷ *Idem*, p. 422.

3.3.3 Possible remedies for failure to respect participation rights

In order to ensure that the participation rights of victims are enforceable, there must be mechanisms to sanction failure to respect those rights on the part of the courts or the prosecution. A judicial organ must therefore be in place to provide oversight and sanction incorrect decisions at first instance. It is useful, therefore, to study the possibility of using appeals and judicial review as mechanisms to monitor victims' rights.

In Canadian criminal law, the possibility of appealing a decision must be based on a specific legislative provision.¹²⁸ Currently, only the prosecution and the accused can appeal a decision at first instance. The procedure is tightly regulated, and not all cases qualify to be heard by an appeal court. The process is slow and complicated, and in many cases, it extends over a number of years. As a procedural vehicle, therefore, it is slow and cumbersome, and not entirely indicated as a means of sanctioning failure to respect victims' rights. On the contrary: in order to be effective, the monitoring of victims' rights should follow a simpler and quicker procedure.

As an example, the U.S. makes specific provision in the CVRA for a proceeding that also exists in Canada: the writ of mandamus. When an agent of the state fails to meet his or her obligations, it is used to compel him or her to do so. As explained earlier, it was used in the United States when a judge failed to hear the victims at a sentencing hearing. The victims used the writ of mandamus to require a higher court to review the decision at first instance, and that body ultimately ordered a new hearing. Mandamus thus enables the victim to secure a decision by a higher court to sanction any failure to respect his or her rights. Note that the CVRA specifically states that failure to respect victims' rights cannot lead to a new trial. The remedies available to victims are thus limited, so as to prevent the administration of justice from being overly impeded by motions from victims whose rights have not been respected.

In Canada, the writ of mandamus is one of the “extraordinary remedies”¹²⁹ used in judicial review. Its purpose is to request the superior court to order a person, a court or some other body to perform a public duty enshrined in a law or regulation, or in the common law.¹³⁰ Historically, it has mainly been used when police officers have refused to exercise their powers on behalf of society.¹³¹ It is a procedure that can be used when the administration of justice falls short, as the Court of Appeal of British Columbia has explained:

The high prerogative writ of mandamus was brought into being to supply defects in administering justice. It is not to be regarded as some secondary or unusual remedy which the Courts should avoid granting if they can avoid it, but as a speedy, inexpensive and efficacious remedy wherever by any reasonable

¹²⁸ Michel Beauchemin, *L'appel* [appeals] in *Collection de droit 2012-2013*, École du Barreau du Québec, Vol. 11, *Droit pénal – Procédure et preuve* [criminal law: procedure and evidence], 2012, p. 2.

¹²⁹ Criminal Code, s. 774.

¹³⁰ Pierre Béliveau and Martin Vaclair, *Traité général de preuve et procédure pénale*, supra, note 3, p. 1180.

¹³¹ Amir Attaran, *Mandamus in the Enforcement of the Criminal Law: Ending the Anti-protest Injunction Habit – Issues Arising from Macmillan Bloedel v. Simpson* (1999) 33 *University of British Columbia Law Review*. Vol. 33, p. 185.

construction it may be applicable.¹³²

Thus, it is a quicker remedy than an appeal. It can be applied to both prosecutors and courts when they fail to meet an obligation under the law. The mandamus procedure is best suited to the stages prior to conviction. On the other hand, if the victim realizes at the sentencing stage that a sentence has been imposed without their having an opportunity to be heard, providing for a right of appeal might be appropriate.

We therefore recommend that one or more remedies be provided explicitly in the legislation to enable victims to make a motion when their rights are not respected, and the court or the Crown's representatives fail to meet their obligations towards them. A mechanism like the writ of mandamus should also be provided for, so that a higher court can monitor decisions at first instance in such cases. It should also be specified in the wording that the mandamus procedure is to be resolved quickly – within a week – in order not to prolong the proceedings; in the United States, the time allowed is 72 hours.¹³³ Canada could thus draw inspiration from the procedure followed in the United States, amending the *Criminal Code* to give victims procedural rights and place positive obligations upon courts and prosecutors.

3.4 The role of victims in relation to other participants in the judicial process

Since our system of criminal law is of the adversarial variety, greater recognition of victims' right to participate would necessarily entail a change in the dynamics involving the various participants at trial. It is therefore important to consider these changes, and the relations victims will develop with the accused and the prosecution. It is equally important to consider the role of the professional associations, particularly with respect to guiding the changes in practices that amendment of the *Criminal Code* would generate.

3.4.1 In relation to the accused

Ideally, everyone involved in the judicial process – victim and offender alike – should have protected rights. Those rights should not be regarded as conflicting, however, because greater recognition for the participatory rights of victims would not necessarily diminish the protection of the rights of the accused. Probably the best example is the right to be informed. Very often, victims want to be kept informed of developments in the criminal justice process. Informing the victim of developments in their case has no impact on the rights of the accused. In some cases, obviously, victims' rights will be contrary to the rights of the accused. Should such a situation develop, priority should very likely be given to the rights of the accused, which enjoy constitutional protection,¹³⁴ particularly when the interests of victims jeopardize their rights to a fair trial.

¹³² *R. ex. rel Lee v. W.C.B.*

¹³³ CVRA, s. 3771(d)(3).

¹³⁴ Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act (U.K.), 1982, c. 11

While some authors would like to see victims' rights enshrined in the Canadian Constitution¹³⁵ in order to avoid such situations, we believe the solution lies in the way victims' rights are understood. We therefore recommend, rather, that victims' rights not be viewed as a way of opposing or reducing the scope of the rights of the accused. We prefer to invest in an approach whereby the rights of victims expand the obligations on other participants in the system, such as judges, police officers and prosecutors.

3.4.2 In relation to the prosecution

As we have pointed out, the history of the criminal law shows that the state has gradually replaced the victim in the criminal process. The concept in which the commission of a crime constitutes an attack on the rights of the victim has been replaced by a concept of the judicial process in which the victim is but a witness to a crime against the state. In Canadian law as we know it, the representative of the state thus has no obligation towards victims. The Canadian Statement merely notes that "Victims of crime should be treated with courtesy, compassion and respect,"¹³⁶ and that "All reasonable measures should be taken to minimize inconvenience to victims."¹³⁷

The prosecution has no subsequent obligation to inform or notify victims, or to take their particular interests into account. This can be attributed to the premise whereby the prosecution is defending the interests of society in general. In theory, victims are members of society, which means that their interests are indirectly defended by the prosecution. Such an outcome is not always achieved in practice, however. The interests of the victims may be opposed to those of the prosecution, the ideal example being the right to privacy. Our study of the International Criminal Court also highlights this issue.

Greater attention to the rights and interests of victims may thus be achieved through a broader framework for the powers of the prosecutor, and the development of obligations towards victims. This approach is more promising than a diminishing of the rights of the accused, since the prosecution has no special protection of a constitutional nature. The risk that the Charter¹³⁸ might be invoked to reduce the scope of victims' rights is lower. Historically, the first people to take up a prosecutorial role in criminal trials were victims. It therefore seems natural to us for the powers of the state to be altered by a reverse swing of the pendulum: that is, by extending greater recognition to victims within the judicial process.

This broader framework for the powers of the prosecutor can be achieved by adding positive obligations that will improve the implementation of victims' rights. For example, prosecutors might be required to keep victims informed of their decisions with respect to the trial. They could be required to tell victims what sentence they wish to suggest to the court, or to their defence colleagues. We therefore recommend that specific positive obligations be set out in

¹³⁵ Alan Young, *Crime Victims and Constitutional Rights* (2005), 49: 1 *Criminal Law Quarterly* 432.

¹³⁶ Canadian Statement of Basic Principles of Justice for Victims of Crime, *supra*, note 15, Principle No. 1.

¹³⁷ *Idem.*, Principle No. 3.

¹³⁸ Canadian Charter of Rights and Freedoms, *supra*, note 134.

legislation, so that public prosecutors are explicitly required to respect victims' rights. In particular, the federal government could draw inspiration from the legislative work done in Manitoba in the drafting of such obligations.¹³⁹

3.4.3 In relation to professional associations

Greater participation by victims in the judicial process will be achieved only through legislation, but the effectiveness of its implementation requires action on the part of participants in the current criminal justice system, including judges, prosecutors and defence attorneys. In addition to legislative amendments, there must be a real change in the culture and perceptions of such people. The Barreau du Québec is not alone in sharing this view. In a working document on the role of victims, the Barreau concluded that changes in legislation would not solve all problems: the main requirement is to change attitudes.¹⁴⁰ Genuine recognition of victims' rights cannot be achieved in reality, therefore, without help from the professional associations. For example, it has been shown that a VIS is often used only when it serves the prosecutor's interest. It is currently the prosecutor's decision as to whether or not a VIS will be used at a sentencing hearing. It is essential, therefore, for prosecutors to be made aware of the importance to victims of taking part in the judicial process in a respectful and dignified way.

Lawyers who have known only adversarial trial dynamics throughout their careers could have difficulty in accepting and adapting to greater participation by victims in the criminal justice process. The issue is an especially important one because it is the lawyers who, in reality, can impede recognition of victims' rights, as American research has shown: "the primary barrier to successful implementation of a victim's rights is the socialization of lawyers in a legal culture and structure that do not recognize the victim as a legitimate party in criminal proceedings."¹⁴¹ It is in addressing this issue that professional associations can play a useful role in training lawyers in order to bring about a change of culture in legal practice. As Professor Alan Young, of the Osgoode Hall Faculty of Law at York University puts it, the first step in achieving better recognition of victims' rights is "the proper training and education of legal professionals."¹⁴²

This approach is not perfect, however, because such a change would take years to achieve.¹⁴³ The professional associations, moreover, are creatures of the provincial governments. It is therefore up to the provinces to implement a genuine cultural change in the training of lawyers and in their practices. While improved awareness among criminal law practitioners is a necessity, it is not sufficient in itself. More consideration from lawyers for participatory rights would doubtless improve victims' experiences within the judicial system, but those experiences remain limited to the VIS presented at the sentencing hearing or testimony in the determination of guilt. unless there is a change in the legislation. We therefore recommend that if there is more recognition of the procedural rights of victims as a result of amendments to legislation, the professional associations set up training programs and establish standards of practice in order to

¹³⁹ The Victims' Bill of Rights, *supra.*, note 46.

¹⁴⁰ Barreau du Québec, *Le rôle de la victime dans le système de justice pénale*, *supra*, note 101, p. 14.

¹⁴¹ L. Henderson, *Revisiting Victims' Rights* (1999) Utah Law Review 383.

¹⁴² Alan Young, *Crime Victims and Constitutional Rights*, *supra*, note 135, p. 469.

¹⁴³ *Idem*, p. 470.

achieve a cultural change among practitioners within the criminal justice system.

4. Action plan for the implementation of procedural rights

Amendments to the *Criminal Code* would obviously constitute a major change, and we therefore suggest that the process be gradual, and divided into two phases. This would make it possible to assess the amendments before extending them to the country as a whole.

As was done in the 1980s with the gradual introduction of the VIS, we suggest a gradual process for the incorporation of victims' rights into the *Criminal Code*. The introduction of the VIS took place in two phases. First, it was introduced in a few districts as an experiment, and subsequently evaluated.¹⁴⁴ In the second phase, it was extended to the whole of Canada. It would be advisable to proceed in the same way – that is, in two phases – with respect to participatory rights. The change could be made initially, in two large cities: Ottawa and Montreal, for example. The experience in those cities will have to be assessed before the change takes effect across Canada. It will thus be possible to verify the effectiveness of the change before legislation is introduced nationwide.

We therefore propose an action plan for the implementation of procedural rights in five stages:

1. Passage of legislation setting out procedural rights
2. Implementation of the legislation in two Canadian cities
3. Assessment of the implementation
4. Possible amendments to the legislation
5. Adoption of new legislation as part of the *Criminal Code*.

¹⁴⁴ Nicole Boudreau, *La satisfaction des victimes d'actes criminels à l'égard du projet de Déclaration de la victime au Tribunal de Montréal* [crime victims' level of satisfaction with the victim impact statement project in the Montreal court], Montreal, University of Montreal, 1989.

Part IV: Summary of final recommendations

Amendments to the *Criminal Code*

A. That the federal government

- table amendments to the *Criminal Code* in Parliament that include procedural rights for victims of crime

That the amendments

- recognize the status of victims as participants in the criminal justice process
- clearly state what rights are recognized, and the stages of the process at which they may be exercised
- recognize the right to be informed and notified, and impose obligations to inform victims on other participants in the criminal justice system
- recognize the right to be consulted by the Crown's representative when the interests of victims are at stake, particularly where plea bargaining takes place
- recognize the right to be heard at various stages in the criminal justice process when victims' interests are at stake
- recognize victims' right to privacy, and their right to be heard when that right is threatened
- recognize the right to reparations
- recognize the right to be represented by counsel, and
- provide remedies, such as the writ of mandamus, if victims' rights are violated

B. That gradual introduction as an experiment

- be set up and assessed in two Canadian cities
- serve as a model for the nationwide introduction of new procedural rights for victims

Appendix 1: Comparison of rights as recognized in various jurisdictions

Right	Current Canadian statement	Crime Victims Rights Act, s. 3771 (United States)	International Criminal Court (Rome Statute and Rules of Procedure and Evidence)
(a) Right to be heard	<p>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. (Principle No. 8)</p>	<p>The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding. (para. 3)</p> <p>The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding. (para. 4)</p>	<p>Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. (article 68, Rome Statute)</p> <p>Possibility of making opening and closing statements (article 89; Rule 89)</p>
(b) Right to be informed	<p>Information should be provided to victims about the criminal justice system and the victim's role and opportunities to participate in criminal justice processes. (Principle No. 5)</p> <p>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. (Principle No. 6)</p> <p>Information should be provided to victims about available victim assistance services, other programs and assistance available to them, and means of obtaining financial reparation. (Principle No. 7)</p> <p>Information should be provided to victims about available options to raise their concerns when they believe that these principles have not been followed. (Principle No. 10)</p>	<p>The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused. (para. 2)</p>	<p>The Statute recognizes victims' right to be notified of decisions and proceedings (Rule 92)</p>

(c) Right to security	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. (Principle No. 4)	The right to be reasonably protected from the accused. (para. 1)	The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses (article 68(1))
(d) Right to privacy	The privacy of victims should be considered and respected to the greatest extent possible. (Principle No. 2)	The right to be treated with fairness and with respect for the victim's dignity and privacy. (para. 8)	... the Chambers of the Court may, to protect victims... conduct any part of the proceedings <i>in camera</i> (article 68(2))
(e) Right to counsel	Not recognized.	Recognized.	Recognized, together with the possibility of financial assistance (Rule 90) The Rules contain some specifics concerning the participation of counsel (Rule 91)
(f) Right to confer with the prosecutor	Victims of crime should be treated with courtesy, compassion and respect. (Principle No. 1) All reasonable measures should be taken to minimize inconvenience to victims. (Principle No. 3)	The reasonable right to confer with the attorney for the Government in the case. (para. 5)	The ICC Registry deals with administrative issues surrounding the participation of victims.
(g) Right to reparation	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.	The right to full and timely restitution as provided in law. (para. 6)	Right to reparations (article 75) ICC States Parties have set up a fund to provide funding for reparation orders.
(h) Right of recourse	None	Mandamus	Appeal

Appendix 2: Summary of rights that may be exercised within the judicial process

Stage in the judicial process	Current state of victims' rights and their role	Victims' rights advocated	Means of asserting victims' rights to participate
Stage I: Pre-trial steps	(a) Laying of an information	Right to be informed of developments in the process	Obligation to notify victims that an information has been laid on behalf of the Attorney General
	(b) Preliminary inquiry: The victim may act as a witness. In the case of a sex offence, the victim may apply for an order prohibiting the publication of certain information (s. 486.4, CC)	Right to be informed of developments in the process Right to be heard on certain issues at the preliminary inquiry Right to privacy	Obligation to notify victims when a preliminary enquiry is held Enable victims to express their views at the preliminary inquiry concerning <i>in camera</i> proceedings, and changes of venue
Stage II: Trial	The victim may act as a witness.	Right to be informed Right to be consulted Right to privacy Right to be heard Right to counsel	Recognition of rights, and the possibility of seeking judicial review if they are not respected
Stage III: Sentencing	Possibility for the victim to issue a written statement Possibility for the statement be read in court Possibility of including reparations in the sentence	Right to be informed Right to be consulted Right to be heard Right to counsel Right to reparation	Right to be informed of negotiations between the prosecution and the accused Right to be heard concerning joint sentencing recommendations Right to be heard concerning the impact of the offence
Stage IV: Recourse	Right of appeal only for the prosecution and the defence. No rights for victims.	Right to be heard Right to be informed Right to counsel (when the sentence is	Possibility for the victim to be heard when the sentence is appealed.

