

# Imagining the Future of Victims' Rights in Canada: A Comparative Perspective

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*The role of victims of crime in common law jurisdictions has significantly changed over the last few decades from that of simple bystanders and witnesses for the Crown—if needed—to more present and active participants in the criminal justice process. Despite this general trend towards increased participation, victim-related policies have evolved very differently in the different common law jurisdictions.*

*The following piece examines the evolution of victims' rights in Canada and compares their development to those within other jurisdictions, particularly in England, Wales, and the United States. It argues that the evolution of several victims' rights<sup>1</sup> has been incremental, generally slower and more limited in Canada as compared to other common law jurisdictions, namely England and Wales and the United States. Hence, it highlights the limitations of Canadian initiatives with regards to victims' rights and brings forward some of the different initiatives and their implementation in these other jurisdictions as possible measures to consider in shaping the future of victims' rights in Canada.*

## I. INTRODUCTION

In recent years, policies in common law jurisdictions have increasingly brought victims into the foreground through the development of policies that recognize a wide range of rights for victims of crime within the criminal justice process.<sup>2</sup>

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<sup>1</sup> The term “rights” is used throughout this paper for convenience. However, it is important to note that victims in Canada do not have real rights with remedies; therefore, it may not be considered accurate terminology.

<sup>2</sup> Many have criticized the terminology of ‘rights’ employed, suggesting that the term should be reserved for enforceable rights with legal remedies. For pragmatic purposes, the term ‘rights’ throughout this thesis is used in Fenwick’s broader sense and includes entitlements, obligations, and expectations within policies that are not necessarily legally enforceable. See Helen Fenwick, *Procedural ‘Rights’ of Victims of Crime: Public or Private Ordering of the Criminal Justice Process?*, 60 MOD. L. REV. 317, 318 (1997).

These rights have been divided into two categories, namely service and procedural rights.<sup>3</sup> Service rights are defined as initiatives that aim to provide victims with better treatment and better experiences in the criminal justice system. They include, for example, rights to information/notification about important court dates and the progress of their case, assistance for vulnerable victims, and compensation.<sup>4</sup> Procedural rights, on the other hand, are more controversial within the adversarial context since they provide victims with a more participatory role in the decision-making process. They include opportunities for the victims to provide information, and sometimes their views and opinions, to criminal justice agencies and courts on key criminal justice decisions relating to prosecution, bail/custody, sentence, parole release, and licence decisions, largely by submitting ‘victim impact/personal’ statements or through consultation with prosecutors.

In Canada, the increased interest in victims’ rights can be attributed to a number of different factors and situations. Contrary to some of the victims’ movements in other jurisdictions, the development of victims’ rights in Canada was mainly the result of government responses to different international influences rather than a response to an organized movement or organization in its domestic socio-political environment,<sup>5</sup> which has been the case in the United States and, to some extent, in England and Wales.<sup>6</sup> Similarly, to other countries, Canada was a signatory of the *United Nations’ Declaration of Basic Principles of Justice for Victims of Crime*<sup>7</sup> and its policies were influenced by the increasing criticisms of the adversarial model’s shortcomings for victims of crime. Indeed, one of the main rationales behind victim involvement relied notably on the idea that victims were ignored and excluded from the criminal justice process for too long and, as a result, suffered secondary victimization<sup>8</sup> and failed to collaborate with the system.

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<sup>3</sup> ANDREW ASHWORTH & MIKE REDMAYNE, *THE CRIMINAL PROCESS* 52 (4th ed. 2010). This classification will be used for the purposes of this thesis.

<sup>4</sup> Andrew Sanders, *Victim Participation in an Exclusionary Criminal Justice System*, in *NEW VISIONS OF CRIME VICTIMS* 197, 213–15 (Carolyn Hoyle & Richard Young eds., 2002).

<sup>5</sup> It is important to note that for certain policies related to victims of sexual assault, feminist perspectives were influential at a domestic level in Canada. *See, e.g.*, *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, 335–36 (Can.) (the concurring judgment of Justice L’Heureux-Dubé in particular uses feminist views to denounce myths and stereotypes about sexual assault victims); *R. v. Seaboyer*; *R. v. Gayme*, [1991] 2 S.C.R. 577 (Can.) (the Supreme Court of Canada (SCC) upheld the constitutionality of section 277 of the *Criminal Code*, which prevents a complainant’s sexual reputation from being submitted as trial evidence based on now widely accepted feminist reasoning).

<sup>6</sup> A comparative analysis of the ‘movements’ within these two jurisdictions has been examined in further detail elsewhere. *See* Marie Manikis, *Rhetoric or Reality?: Victims’ Enforcement Mechanisms in England and Wales and the United States* (Jan 1, 2014) (unpublished D.Phil. thesis, University of Oxford) (on file with the University of Oxford Faculty of Law).

<sup>7</sup> Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, Annex, U.N. GAOR, 96th Sess., Supp. No. 53, at 214, U.N. Doc. A/40/53 (Nov. 29, 1985) [hereinafter *United Nations Declaration*].

<sup>8</sup> The concept of secondary victimization is based on the notion that in addition to the harm felt from the crime itself, victims also suffer from a second form of harm as a result of their exclusion

In order to fulfill its undertakings under the United Nations Declaration, to minimize secondary victimization, and to increase victim collaboration with the criminal justice system, the Canadian federal government and the various provinces have enacted instruments framed as basic principles and guidelines for developing victim-related policies meant to address these issues. It is worth noting that in Canada, due to the constitutionally recognized separation of powers, victim-related policies fall within dual jurisdictions. More specifically, questions relating to the administration of the criminal justice process are a provincial matter, while criminal law is a federal matter.

As a way to incorporate their international commitments into domestic policy, the federal, provincial, and territorial ministers of justice endorsed the *1988 Canadian Statement of Basic Principles*, which was later replaced by the *Canadian Statement of Basic Principles of Justice for Victims of Crime 2003*. These basic principles were essentially broad and vague, and were meant to “guide the development of policies, programs and legislation related to victims of crime.”<sup>9</sup> Further, all provinces and territories, except for Yukon and Nunavut, have also enacted their own legislation that lists a number of victims’ “rights,” ranging from victims’ services to greater participation in criminal proceedings.<sup>10</sup> In addition, like most common law jurisdictions, Canada has recognized victim participation in sentencing through a legislative victim impact statements scheme in the *Criminal Code*, which will be explored in greater depth below. Recently, the Canadian government introduced legislative reform in the *Canadian Victims’ Bill of Rights* (Bill C-32),<sup>11</sup> (hereinafter VBR) but, as will be highlighted below, this reform is

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from the criminal process. Research on secondary victimization was influential in most jurisdictions. See, e.g., Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 WAYNE L. REV. 7, 7-8 (1987).

<sup>9</sup> DEP’T OF JUSTICE CAN., CANADIAN STATEMENT OF BASIC PRINCIPLES OF JUSTICE FOR VICTIMS OF CRIME, 2003 (2003).

<sup>10</sup> The first province to enact a victims’ act was Manitoba in 1986 and it was aimed at rebalancing the rights of victims with the accused’s *Charter of Rights and Freedoms* (Part I of Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11 (U.K.)) rights. See *The Justice for Victims of Crime Act*, S.M. 1986, c 28 (Can.). A decade later, in 1995, Ontario’s Conservative government, inspired by the same rationales as Manitoba, introduced Ontario’s *Victims’ Bill of Rights*, S.O. 1995, c 6, art 2(1) (Can.). The bill was premised on victims as consumers of the criminal justice system with special needs that had to be fulfilled. For more details, see KENT ROACH, *DUE PROCESS AND VICTIMS’ RIGHTS: THE NEW LAW AND POLITICS OF CRIMINAL JUSTICE* 278 (1999) [hereinafter ROACH, *DUE PROCESS AND VICTIMS’ RIGHTS*]; Kent Roach, *Crime Victims and Substantive Criminal Law*, in *TOWARDS A CLEAR AND JUST CRIMINAL LAW: A CRIMINAL REPORTS FORUM* 219 (Don Stuart et al. eds., 1999).

<sup>11</sup> At the time of drafting this piece, there was a proposed *Victims’ Bill of Rights* in the Canadian Parliament, introduced by the federal government, which would legislate victims’ rights for the first time in federal legislation: Bill C-32, *An Act to Enact the Canadian Victims Bill of Rights and to Amend Certain Acts*, 2nd Sess. 41st Parl., 2014, cl 62-63 (first reading April 3, 2014) [hereinafter *Victim Bill*] (This proposed Bill was introduced in Parliament in April 2014 and is still at

limited in a number of areas related to victims' rights and ultimately seems to create more confusion and raise questions, rather than provide answers and evidence-based solutions.

This article analyzes the Canadian context—including its recent developments and limitations—and explores the possible trajectories Canada can take in light of experiences and findings in other common law jurisdictions.<sup>12</sup> Due to space and time constraints, this analysis addresses specific areas that merit further development in the victims' literature, including the implementation of information rights, the possible involvement of victims in prosecutorial decisions, victim participation in sentencing, and remedies for rights violations.

## II. VICTIMS AND SERVICE RIGHTS

In Canada, a number of different victims' service rights are recognized within the provinces, including government compensation, information, and witness/victim testimonial accommodations within courthouses to facilitate the victim's experience in the criminal justice system. The federal government also has some jurisdiction related to the provision of victims' services, etc., within its remit of federally based offenses.<sup>13</sup> The following section addresses more specifically the current situation of information rights in Canada since it is arguably one of the most important rights identified by victims.

### A. *The Right to Information*

Research suggests that being kept informed about the process is one of the most important needs identified by victims of crime.<sup>14</sup> In Canada, the indispensability of this right for victims cannot be overstated.<sup>15</sup> Support for this claim can be found in various Canadian pilot projects that have been conducted by the Department of Justice Canada. These results have been summarized as follows: "Completing a statement does not, by itself, make the victims feel better about how the system is handling their case. *They want to be informed about the*

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its first reading at the time this piece was drafted). It became law at the moment of final edits without changes to its initial proposal. See Canadian Victims Bill of Rights S.C. 2015, c 13, s 2 (Can.).

<sup>12</sup> Due to time and space constraints, the present article focuses on the experience in England, Wales, and the American jurisdictions that have the most comprehensive and developed models of victims' rights.

<sup>13</sup> Although criminal law and the creation of criminal offenses is a federal power in Canada, provinces are responsible for the administration of justice, including criminal courts. However, for certain specific federal crimes, including terrorism, tax-related, and drug offenses, the administration is also handled by the federal jurisdiction. These crimes, however, are quite limited.

<sup>14</sup> Jo-Anne Wemmers, *Victims in the Dutch Criminal Justice System: The Effects of Treatment on Victims' Attitudes and Compliance*, 3 INT'L REV. VICTIMOLOGY 323, 338 (1995).

<sup>15</sup> ALLAN MANSON ET AL., *Victim Participation in the Sentencing Process*, in SENTENCING AND PENAL POLICY IN CANADA: CASES, MATERIALS, AND COMMENTARY 251 (2d ed. 2008).

*progress of their case and they want information on how the criminal justice system operates” (emphasis added).*<sup>16</sup>

In addition, evidence has shown that when victims are left in the dark and remain uninformed about the developments in their case, secondary victimization often occurs. Indeed, victims who are the most affected by the offense may experience a level of stress similar to that caused by the offense itself when they are not informed about the process.<sup>17</sup> Victims who are not fully informed as to what and why developments are occurring at all stages of the criminal process, both before and after the trial, may experience this form of stress, which arguably diminishes their psychological well-being and increases the period needed for psychological recovery.<sup>18</sup> A Canadian study focusing on sexual assault victims concluded that “[b]eing empowered with knowledge about the proceedings—even when this is by necessity limited—would go a long way to hasten the healing process for women who have been sexually assaulted.”<sup>19</sup>

*Currently in Canada, the various Victims of Crime Acts are very disparate*<sup>20</sup> and do not clearly classify and define the extent of information that must be provided to victims. Further, the Acts remain vague and do not provide a clear division of duties between the agencies that are meant to implement them. Additionally, and most importantly, when agencies fail to provide information to victims, most statutes do not provide a mechanism for accountability and redress. The following paragraphs analyze the various provincial statutes and argue that certain measures can be taken to facilitate compliance and understanding for the agencies and the victims involved in the criminal process.

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<sup>16</sup> Carolina Giliberti, *Evaluation of Victim Impact Statement Projects in Canada: A Summary of the Findings*, in VICTIMS AND CRIMINAL JUSTICE: LEGAL PROTECTION, RESTITUTION AND SUPPORT 703, 717 (Gunther Kaiser et al. eds., 1991).

<sup>17</sup> See Fenwick, *supra* note 2, at 321.

<sup>18</sup> See CANADIAN FEDERAL-PROVINCIAL TASK FORCE ON JUSTICE FOR VICTIMS OF CRIME REPORT, 57 (1983); TIM NEWBURN & SUSAN MERRY, KEEPING IN TOUCH: POLICE-VICTIM COMMUNICATION IN TWO AREAS (1990); JOANNA SHAPLAND, JON WILMORE & PETER DUFF, VICTIMS IN THE CRIMINAL JUSTICE SYSTEM 190–91 (A. E. Bottoms ed., 1985).

<sup>19</sup> Jeffrey Griffiths, Toronto Police Service, *Review of the Investigation of Sexual Assaults* 59 (1999).

<sup>20</sup> See, e.g., ROACH, DUE PROCESS AND VICTIMS' RIGHTS, *supra* note 10, at 285–87 (Roach suggests that significant differences existed between Manitoba's bill and Ontario's. While Manitoba contemplated alternatives to criminal prosecutions by stating that victims should receive information about crime prevention, mediation, and information reconciliation procedures, the Ontario model focused primarily on providing information about criminal investigations and prosecutions. Further, important disparities exist between the various provincial bills regarding victim impact statements and the forms victims can complete.). See also Julian V. Roberts & Marie Manikis, *Victim Impact Statements at Sentencing: The Relevance of Ancillary Harm*, 15 CAN. CRIM. L. REV. 1 (2010).

## 1. 1. Defining and Redefining the Duty to Inform

### *i. Classifying and Defining the Extent of the Duty to Inform*

To clarify the broad notion of informing victims about the progress of their case, Fenwick proposes classifying information rights into two separate categories: the right to *factual* information and the right to be informed of *informal* aspects.<sup>21</sup> The former category includes information related to cautioning, charging, remand, bail and its conditions, court hearings, sentence appeals, and release. The informal aspects, on the other hand, include information on elements such as the system of charge or plea-bargaining, as well as explanations and the reasoning behind the key decisions that are made in cases. For instance, this consists of explaining to victims the decisions made to prosecute or not, the choice behind certain charges, and the outcome of final hearings and sentences.

The various provincial victims' legislation mainly suggest that victims should receive factual information and, in general, do not require agencies to provide victims with further explanations about the decisions that are made throughout the process.<sup>22</sup> For example, in British Columbia, the *Victims of Crime Act*<sup>23</sup> classifies information into three categories. The first category of information includes general information about the criminal justice system. The second category of information refers to information victims are entitled to receive about their specific case, including the status of the investigation, the outcomes of the case, and notifications of court appearances. The third category of information includes information regarding the accused in custody and suggests that the Minister must provide this information to the victim if the victim's interests outweigh the privacy interest of the accused/offender. In other provinces, however, the information provisions are much more general and describe a minimum amount of general information that victims, in principle, should be entitled to receive.<sup>24</sup>

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<sup>21</sup> Helen Fenwick, *Rights of Victims in the Criminal Justice System: Rhetoric or Reality?*, CRIM. L. REV. 843, 846–47 (1995).

<sup>22</sup> Exceptionally, section 2(1)2v of Ontario's Victims' Bill of Rights, S.O. 1995, c 6, art 2(1) (Can. Ont.), requires that victims be provided with some explanations by stating that information should be provided on "the charges laid with respect to the crime and, if no charges are laid, the reasons why no charges are laid."

<sup>23</sup> Victims of Crime Act, R.S.B.C. 1996, c 478, ss 5, 6, 7 (Can. B.C.).

<sup>24</sup> Prince Edward Island's Victims of Crime Act, R.S.P.E.I. 1988 c V-3.1, s 2 (Can.), simply states that "victims should be informed about the progress of the investigation and prosecution of the offence, court procedures, the role of the victim in court proceedings and the ultimate disposition of proceedings." There is no information required about receiving information on the various stages of the process or important prosecutorial decisions. In Nova Scotia, the Victims' Rights and Services Act's information provisions are quite general and, among other requirements, suggest that victims have the right to be informed of the name of the accused. See Victims' Rights and Services Act, S.N.S. 1989, c 14, s 3(2)(a)(i) (Can.).

Manitoba remains the exception with its comprehensive *Victims' Bill of Rights*,<sup>25</sup> it provides information to victims and describes in detail their entitlements at the various stages of the criminal justice process, including the investigation of the offense, the prosecution, the court process, and correctional services. This Bill also lists a number of rights that victims should expect from the system, namely how to obtain dates, times, and places of proceedings, their right to apply for witness protection measures, and their right to file and obtain assistance in completing a victim impact statement.

Further, since victims often misunderstand the outcomes and implications of certain professional and court decisions, particularly regarding sentencing, jury acquittals, and implications of early release decisions, *explanatory* information is also an important need victims have. In other words, victims seek explanations about important decisions that are made in 'their' cases. Currently, most legislation and Policy Manuals that guide criminal justice professionals do not clearly specify the extent of information that must be provided to victims. Instead, they seem to mainly emphasize the provision of general information about the system and certain case-specific decisions, without expressly requiring that explanations be provided to victims. The various acts should therefore require, at least to victims of more serious offenses, the disclosure of a "higher level"<sup>26</sup> of information; namely, the right to be offered *explanations* for decisions and the outcome of the process. Where this is required, it is essential that the legislation also identify who is responsible for meeting this disclosure requirement, as otherwise there will inevitably be problems in getting any one service provider to accept responsibility for this task.

Another important element that is not clearly specified in the statutes is the process victims must follow to exercise their right to information. To facilitate compliance, it is crucial that provisions specify whether the responsible agency should automatically provide information to victims or whether the information should be provided upon the victim's request. In some provinces, including British Columbia and Manitoba, the statutes distinguish between the information that should be requested by the victim and the information that must be provided by agencies without prior request.<sup>27</sup> Most statutes, however, do not specify whether victims must request the information, which can undoubtedly be confusing for victims and the responsible agencies. Other formulations also suffer from

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<sup>25</sup> Victims' Bill of Rights, C.C.S.M. 1998, c V55 (Can.).

<sup>26</sup> See Fenwick, *supra* note 2, at 322.

<sup>27</sup> Victims' Bill of Rights, C.C.S.M. 1998, c V55, ss 7, 11, 12 (Can. Man.). In British Columbia, the Victims of Crime Act, R.S.B.C. 1996, c 478, ss 5, 6, 7 (Can.), divides the information entitlements into three categories: information that must be offered, information that must be given *on request*, and information that will be given in appropriate circumstances. In New Brunswick, the Victims Services Act, S.N.B. 1987, c V-2.1 (Can.), states a wide range of principles, including information, without specifying whether victims should request it. However, with regard to procedures of the Mental Disorder Review Board, it is clearly stated that victims should make a request in writing if they wish to receive any information. *Id.*

ambiguity and need to be made clearer. For instance, the terms “should have access,”<sup>28</sup> “should be given information,”<sup>29</sup> and “should be made available”<sup>30</sup> often create much confusion about whether victims must actually request the information or whether they can expect to receive it from the various agencies automatically. Finally, in some jurisdictions, the term “rights” is specifically used to describe victims’ entitlements, but these statutes fail to specify whether they are negative or positive rights.<sup>31</sup>

*ii. Dividing and Specifying Agencies’ Duty to Inform*

Apart from Manitoba’s *Victims’ Bill of Rights*,<sup>32</sup> which specifies the agency responsible for informing victims at all stages of the proceedings, none of the provincial statutes, nor the *Canadian Statement of Basic Principles of Justice for Victims of Crime, 2003* or the *Canadian Victims’ Bill of Rights*, clearly designate the specific criminal justice agency in charge of fulfilling these specific informational duties. An example of this ambiguity can be found in the *Victims of Crime Act* in Alberta which states that the victim “is to be provided with information by the person or agency that has the information with respect to the case.”<sup>33</sup> Hence, to facilitate compliance, ambiguous terms like “justice system personnel”<sup>34</sup> or statutes that do not provide any specifications<sup>35</sup> must be avoided. Statutes relating to victims’ rights should be more precise and should clearly designate at each stage of the process the agency responsible for performing this duty. As highlighted by Shapland, who has undertaken research on compliance related to victims in England and Wales: “It is only by clearly assigning responsibility to *each* agency for those aspects of criminal justice through which it

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<sup>28</sup> Victims’ Bill of Rights, S.O. 1995, c 6, s 2(1)(2) (Can.).

<sup>29</sup> Victims Services Act, S.N.B. 1987, c V-2.1, s 7 (Can.); DEP’T OF JUSTICE CAN., *supra* note 9.

<sup>30</sup> Victims of Crime Service Act, R.S.N.L. 1990, c V-5, s 7 (Can. Nfld.).

<sup>31</sup> Victims’ Rights and Services Act, S.N.S. 1989, c 14, s 3(2)(a) (Can. N.S.); An Act Respecting Assistance for Victims of Crime, R.S.Q. 1988, c A-13.2, s 4 (Can. Que.).

<sup>32</sup> The Victims’ Bill of Rights, C.C.S.M. 1998, c V55 (Can. Man.).

<sup>33</sup> Victims of Crime Act, R.S.A. 2000, c V-3, s 4(1) (Can. Alta.).

<sup>34</sup> Victims of Crime Act, R.S.B.C. 1996, c 478, ss 5, 6 (Can. B.C.).

<sup>35</sup> For example, in Quebec, the Act Respecting Assistance for Victims of Crime, R.S.Q. 1988, c. A-13.2 (Can. Que.), does not mention at all any agencies or personnel in charge of providing information rights to victims. The Newfoundland Victims of Crime Services Act, R.S.N.L. 1990, c. V-5 (Can. Nfld.), also provides victims with some vague general rights to information without mentioning who or which agency should be in charge of carrying out these obligations. Further, in the Northwest Territories, instead of designating agencies, the Victims of Crime Act, R.S.N.W.T. 1988, c.9, s.5(c) (Can. N.W.T.), suggests that the Victims Assistance Committee should “*promote . . . the availability of information to a victim*” (emphasis added).



has any dealings with victims that it will be possible to identify its tasks and its necessary budget lines.”<sup>36</sup>

It is worth noting that most statutes are complemented by conduct manuals, like the Crown Counsel Policy Manuals, that specify prosecutors' various duties, but also include a number of shortcomings. For instance, the British Columbia *Victims of Crime Act* is complemented by the British Columbia Crown Counsel Policy Manual, which suggests that the Crown should be responsible for providing case-specific information (the second category of information under the *Victims of Crime Act*).<sup>37</sup> Further, police “are designated as having the primary responsibility under [section] 5 of the *Victims of Crime Act*,”<sup>38</sup> which consists of general information (the first category of information under the *Victims of Crime Act*), but suggests that “[i]f aware that a victim has not been offered the required information, Crown Counsel or support staff will provide the standard written information prepared by the Ministry of Attorney General for that purpose.”<sup>39</sup> Despite the Crown Policy, these specifications can be quite confusing for service providers that end up having subsidiary duties in cases where the designated agency does not comply with its duties. Further, in Ontario, the Crown Policy Manual is also vague as to the Crown's informational duties towards victims and basically suggests that the Crown should promote victims' general understanding of the criminal justice structure and the victim's role within it. Even in the most severe crime cases, the Crown is instructed to inform victims in a timely fashion on matters that potentially affect their security and are significant to the case. These instructions can be difficult to interpret due to their vagueness and lack of specificity.

Further, in Alberta, following a public debate and discussions among the various agencies, the Government adopted the *Victims of Crime Protocol: What Victims Can Expect from the Criminal System*, which clarifies victims' expectations throughout the various stages of the process. Despite its clarity on certain issues, the duties among agencies are not clearly delineated and the *Protocol* suggests that the Crown can ask the police, victim service, or correctional services to help it give information to victims without specifying more clearly the division of duties between each agency. An initial separation of the various informational duties would help determine when and at what stage each agency would be most effectively situated to inform victims. A uniform document that describes each agency's role in informing victims at every stage of proceedings would be a laudable measure to achieve greater compliance, reduce confusion

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<sup>36</sup> Joanna Shapland, *Victims and Criminal Justice: Creating Responsible Criminal Justice Agencies*, in *INTEGRATING A VICTIM PERSPECTIVE IN CRIMINAL JUSTICE*, 154 (Adam Crawford & Jo Goodey eds., 2000).

<sup>37</sup> BRITISH COLUMBIA, CRIMINAL JUSTICE BRANCH, MINISTRY OF ATTORNEY GENERAL, CROWN COUNSEL POLICY MANUAL VIC 1, VICTIMS OF CRIME (2003).

<sup>38</sup> *Id.* at 2.

<sup>39</sup> *Id.*

among the various agencies, and help to meet victims' expectations. It would also increase accountability and expose cases of non-compliance, as victims would be able to identify the various agencies in breach of their obligations.

Other common law jurisdictions illustrate that it is possible to establish a clear division of duties that can indeed facilitate the understanding and implementation of these duties. For instance, research suggests that since the enactment of the first *Code of Practice for Victims of Crime in England and Wales* in 2006 (and later reformed in 2013), a clear division of duties has been made which reduces the confusion among the various agencies that existed under the previous Victims' Charters.<sup>40</sup> Prior to the inception of the *Code of Practice*, these duties were not divided in such detail and were considered unclear. For instance, studies on the 'One Stop Shop'<sup>41</sup> illustrate that under the 1996 Charter, it was unclear whether it was the role of the police or the prosecution to inform victims.<sup>42</sup> To facilitate compliance, the *Code of Practice* replaced the previous charters and listed the various duties of each agency. Similarly, American jurisdictions like the state of Arizona have enacted comprehensive Bills of Rights, which specify whether the courts, the prosecutor, or the law enforcement agency are responsible for informing victims at certain stages of the process.<sup>43</sup> Manitoba's statute has also followed this path and has specifically divided the informational duties between the agencies at each stage of proceedings,<sup>44</sup> but this remains the exception in Canada.

Clarification and specificity would not only facilitate compliance and promote the understanding of the responsible agency's role, but would also benefit victims, particularly in jurisdictions that require them to request information and services from these agencies.<sup>45</sup> Thus, victims should be able to know whether they will automatically be informed about various elements of the process, or whether they need to request the information from particular agencies.

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<sup>40</sup> See, e.g., Manikis, *supra* note 6; Marie Manikis, *A Comparative Overview of Victims' Rights, Enforcement Mechanisms, and Redress in England and Wales and the American Federal Jurisdiction*, 6 VICTIMS CRIME RES. DIG. 36 (2013).

<sup>41</sup> 'One-stop shops' were information centers, where the police would collate and communicate information to victims about the progress of 'their case'—information about the charges, trial, outcome of proceedings, and sentences, and help them to complete their personal statements—under the 1996 Charter.

<sup>42</sup> CAROLYN HOYLE ET AL., HOME OFFICE RESEARCH DEVELOPMENT AND STATISTICS DIRECTORATE, EVALUATION OF THE 'ONE STOP SHOP' AND VICTIM PILOT STATEMENT PROJECTS (1998).

<sup>43</sup> ARIZ. REV. STAT. ANN. §§ 13-4401–13-4440 (2000).

<sup>44</sup> Victims' Bill of Rights, C.C.S.M. 1998, c V55 (Can. Man.). The duty to inform is divided between the law enforcement agency, the prosecutor, the department of justice in charge of courts, and correctional services.

<sup>45</sup> See, e.g., Victims of Crime Act, R.S.B.C. 1996, c 478 (Can. B.C.); Quebec's Act Respecting Assistance for Victims of Crime, R.S.Q. 1988, c A-13.2, s 4(2), 5 (Can.) (requiring victims to request information on the progress and final disposition of the case as well as the police investigation); Victims' Bill of Rights, S.O. 1995, c 6, s 3 (Can. Ont.).

In brief, the recognition of victims' informational needs entails, among other measures, the creation of clear and detailed legislative and regulatory instruments that facilitate and encourage understanding, recognition, and compliance by the agencies responsible for informing victims. These agencies mainly include the police, prosecutors, victim services, and correctional facilities, and should be clearly identified at every stage of the process. Further, to facilitate compliance, the various duties among these agencies must be clearly defined and assigned to a particular agency according to each stage of the process.

The recent VBR had the potential of constructing a federal model of victims' service rights, including information rights that would provide the needed clarity on these various fronts. In light of the analysis above, a possible way forward in Canada—supported by evidence of good practice in other jurisdictions—would be either to create more detailed and clear legislation or to have an accompanying guideline to this legislation with more detailed and comprehensive obligations regarding the different service rights, particularly the right to information. Indeed, changes that have proven to be useful in the 2006 and 2013 *Code of Practice for Victims of Crime in England and Wales* would be beneficial not only for federal services, but also for the rest of the provinces. To date, however, contrary to Manitoba's more comprehensive approach, the proposed federal bill remains quite vague and does not specifically define the extent and limitations of this right to information or divide the duties between the responsible service agencies. Further clarifications in this respect is warranted.

### III. PROCEDURAL RIGHTS: A MORE ACTIVE ROLE FOR VICTIMS OF CRIME?

#### A. *Victim Participation in Sentencing*

In most common law jurisdictions, victim participation in sentencing has been recognized through the use of victim impact statements (VIS's) or victim personal statements. This has also been the case in Canada, where this prominent feature of sentencing was added to the *Criminal Code of Canada*.<sup>46</sup> Indeed, criminal justice participants in Canada accepted its incorporation within legislation in 1988 much quicker than in other jurisdictions.<sup>47</sup> Arguably, part of the explanation for this lies in the positive empirical data that revealed early on that VIS's are generally considered useful in assessing harm and enabling judges to reach more

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<sup>46</sup> See Criminal Code of Canada, R.S.C. 1985, c C-46, s 722 (Can.) [hereinafter Criminal Code].

<sup>47</sup> For instance, in England and Wales, the victim personal statement scheme was rolled out nationally in 2001, but the Court of Appeals has only recently provided guidelines and recognition to this regime. See, e.g., *R. v. Perkins*, [2013] EWCA (Crim) 323 (U.K.). This has recently been included in the amended Practice Direction issued in October 2013 (amended December 2013) by the Lord Chief Justice. The Practice Direction, which also reflects the provisions of the Victims' Code of Practice, is set out in the Criminal Procedure Directions.

proportionate sentences.<sup>48</sup> Further, studies have also shown that these statements can also be beneficial and therapeutic for a number of victims that choose to complete them. These findings reveal that victims who chose to complete these statements were more satisfied with the criminal justice process.<sup>49</sup>

Despite this recognition, some problems remain. For instance, sentencing judges have highlighted the lack of clarity that these legislative provisions provide. As they are currently worded, the weight to give these statements and the way in which a statement is meant to be considered remain opaque.<sup>50</sup> Hence, it is an area of sentencing for which clear legislation or appellate court guidance would be needed, but for which appellate decisions have been quite inconsistent throughout the country.<sup>51</sup> For instance, as noted in greater depth in another study, in recent years some appellate courts have considered these statements as relevant evidence at sentencing in order to understand the harm suffered by victims and can, thus, be considered as aggravating and mitigating factors at sentencing.<sup>52</sup> However, other appellate courts have considered the statement's function as purely expressive rather than instrumental to the determination of sentence and have stressed that the statements cannot be used to influence the sentence. Indeed, as emphasized by the British Columbia Court of Appeal in *R. v. W.M.*, the statements were “not tendered for their factual truth; they are expressions of the emotional impact and the other effects these offenses had on the complainants, and as such, the appellant's disagreement with some of their contents does not raise any reviewable issue on appeal.”<sup>53</sup> Further, in stark contrast to the decision in *Cook*<sup>54</sup> by the Appellate Court of Quebec, which unequivocally recognized that the content of a VIS—and more specifically the harm suffered by the family—can be considered an aggravating factor at sentencing, the Alberta Court of Appeal in *Karim*<sup>55</sup>

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<sup>48</sup> See JULIAN V. ROBERTS & ALLEN EDGAR, DEP'T OF JUSTICE CAN., VICTIM IMPACT STATEMENTS AT SENTENCING: JUDICIAL EXPERIENCES AND PERCEPTIONS: A SURVEY OF THREE JURISDICTIONS (2006). Research suggests that judges have found the information contained in VIS's particularly useful in assessing the harm suffered by the victim. This has enabled, in turn, a clearer assessment of the gravity of the offense, which has contributed to a more adequate respect for the principle of proportionality.

<sup>49</sup> *Id.* at 3.

<sup>50</sup> The vague language used in these provisions in Canada is typical of statutory regimes elsewhere, perhaps reflecting an underlying ambivalence towards the role of the victim within the adversarial model of justice. See Julian V. Roberts & Edna Erez, *Communication at Sentencing: The Expressive Function of Victim Impact Statements*, in HEARING THE VICTIM: ADVERSARIAL JUSTICE, CRIME VICTIMS AND THE STATE 232, 232 (Anthony Bottoms & Julian V. Roberts eds., 2010).

<sup>51</sup> Marie Manikis, *Victim Impact Statements at Sentencing: Towards a Clearer Understanding of their Aims*, 65 U. TORONTO L.J. 85 (2015).

<sup>52</sup> A similar purpose of VIS has been recognized in most American jurisdictions. For further analysis, see Paul G. Cassell & Edna Erez, *Victim Impact Statements and Ancillary Harm: The American Perspective*, 15 CAN. CRIM. L. REV. 149 (2011).

<sup>53</sup> *R. v. W.M.*, 2010 BCCA 370, para 16 (Can.).

<sup>54</sup> *R. c. Cook*, 2009 QCCA 2423 (Can.).

<sup>55</sup> *R. v. Karim*, 2014 ABCA 88 (Can.).

highlighted that it is a legal error to treat the family's loss as an aggravating factor. The possibility of cross-examining victims based on their statement also remains unclear. While the Appellate Court of Ontario has recognized that the right to cross-examine victims is not automatic and open-ended,<sup>56</sup> the Appellate Court of British Columbia in *R. v. W.M.* did not think that cross-examination was relevant since VIS are only used as instruments to facilitate expression rather than influence the quantum of a sentence.<sup>57</sup>

To respond to these tensions and inconsistencies within appellate jurisprudence, clearer aims and parameters need to be articulated. Legislation and guidelines can be one way forward. In a recent piece, a model based on empirical findings has been developed which proposes parameters that can serve both instrumental and expressive purposes.<sup>58</sup> This model suggests that because the instrumental purpose can have a direct effect on the sentence, more detailed parameters would need to be developed to ensure fairness for all parties.<sup>59</sup> For instance, the piece outlines that in a model where instrumental aims are present, a mechanism would need to be developed to ensure the reliability of these statements.<sup>60</sup> In addition, if some expressive aims are to be retained along with instrumental ones, the definition of relevance might need to include information that was traditionally not considered relevant, but which may be considered relevant for victim healing.

The VBR would have been a good opportunity for the legislature to clarify the aims behind this regime and to develop or reflect upon adequate parameters that would be useful in advancing those aims. It would appear, however, that such an initiative will not be taking place any time soon, since instead of clarifying the VIS's use and aims, the VBR raises more questions than answers.<sup>61</sup> For instance, the VBR leaves unchanged section 722(1) of the *Criminal Code* that states that a VIS needs to be considered by the court during the determination of the sentence.<sup>62</sup> This can indeed suggest that, like some appellate courts have recognized, the statements may occupy an instrumental function in determining the sentence—but this remains unclear. Further, if instrumental aims are to be retained, the ways, if any, that the reliability of the statement can be assessed and contested need to be specified, but these too are currently lacking. Indeed, few victims who submit a victim impact statement are warned by prosecutors that cross-examination is a possibility<sup>63</sup> and this possibility is not mentioned anywhere in the new VBR.

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<sup>56</sup> *R. v. V.W.*, 2008 ONCA 55 (Can.).

<sup>57</sup> *R. v. W.M.*, 2010 BCCA 370, para. 16 (Can.).

<sup>58</sup> Manikis, *supra* note 51..

<sup>59</sup> Manikis, *supra* note 51.

<sup>60</sup> Manikis, *supra* note 51.

<sup>61</sup> For further discussion on this issue see Manikis, *supra* note 51, at 116.

<sup>62</sup> Criminal Code of Canada, R.S.C. 1985, c C-46, s 722 (Can.).

<sup>63</sup> See Manikis, *supra* note 51.

### B. Refining the Relationship Between Victims and Prosecutors

Another interesting development that is virtually unexplored in Canada is the relationship between victims and prosecutors. The extent of this relationship varies between jurisdictions. For instance, in Canada, prosecutors are meant to inform victims about the opportunity to provide a VIS, but their relationship does not extend beyond this.<sup>64</sup> In England and Wales, prosecutors have extensive informational duties towards victims that extend to the different stages of the process and have gone beyond mere notification by recognizing prosecutorial duties to confer with victims and explain to them why they have made certain prosecutorial decisions.<sup>65</sup> Similarly, in the United States, prosecutorial duties to consult victims upon making determinant decisions have been recognized. For instance, courts have specified that the victims' right to confer with the prosecutor is not to second-guess or veto prosecutorial decisions but rather to allow victims to "obtain information from the government, and to form and express their views to the government and court."<sup>66</sup> More specifically, in a case involving a plea negotiation, the court found that the victim's right to confer with the prosecutor extends to conferring with prosecutors prior to reaching a plea agreement.<sup>67</sup>

When compared to these jurisdictions, Canada's prosecutorial function remains quite insulated and requires less communication with victims. Should prosecutors have more duties to interact with victims? In common law jurisdictions, prosecutors are considered ministers of justice and are meant to represent the public interest as well as the community, rather than individual parties or victims. They are meant to make their decisions independently without any external pressures. However, since victims are part of the community, it would seem legitimate and aligned with the prosecutorial function to include

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<sup>64</sup> For instance, section 722.2(1) of the *Criminal Code* highlights that before imposing a sentence, "the court shall inquire of the prosecutor or a victim . . . whether the victim . . . [has] been advised of the opportunity to prepare a [VIS]." R.S.C. 1985, c C-46, s 722 (Can.). This places a duty upon prosecutors to notify victims about this possibility.

<sup>65</sup> See CROWN PROSECUTION SERVICE, *THE CODE FOR CROWN PROSECUTORS* (2013), [http://www.cps.gov.uk/publications/docs/code\\_2013\\_accessible\\_english.pdf](http://www.cps.gov.uk/publications/docs/code_2013_accessible_english.pdf). Further, prosecutors need to notify victims and explain their choices in a number of cases. See CROWN PROSECUTION SERVICE, *THE CODE OF PRACTICE FOR VICTIMS OF CRIME: CPS LEGAL GUIDANCE* (2013), [http://www.cps.gov.uk/legal/v\\_to\\_z/code\\_of\\_practice\\_for\\_the\\_victims\\_crime\\_%28victim\\_s\\_code%29\\_-\\_legal\\_guidance/](http://www.cps.gov.uk/legal/v_to_z/code_of_practice_for_the_victims_crime_%28victim_s_code%29_-_legal_guidance/).

<sup>66</sup> See *United States v. BP Products N. Am. Inc.*, 610 F.Supp. 2d 655, 727 (S.D. Tex. 2009). Similarly, in *United States v. Heaton*, 458 F.Supp. 2d 1271 (D. Utah 2006), the court stated that victims should be consulted by the prosecutor prior to a request dismissing the charges. See also *United States v. Ingrassia*, No. CR-04-0455ADSJO, 2005 WL 2875220 (E.D.N.Y. Sept. 7, 2005).

<sup>67</sup> *In re Dean*, 527 F.3d 391, 396 (5th Cir. 2008). For an analysis of victims' rights during plea negotiations and possibilities for reform in the Canadian context, see Marie Manikis, *Recognizing Victims' Role and Rights During Plea Bargaining: A Fair Deal for Victims of Crime*, 58 CRIM. L.Q. 411 (2012).

victims' interests, along with other interests, as relevant elements to consider in the exercise of an independent prosecutorial function. Hence, it would seem that the development of prosecutorial interactions with victims would not be antithetical to their function and would not affect their objectivity. Conferring with victims in the context of these decisions and processes does not amount to providing victims a veto over prosecutorial decision-making or transforming the role of prosecutors into victim representatives. Instead, just like VIS's have been helpful for judges in the execution of their independent sentencing duties, victim input in prosecutorial decision-making could arguably be helpful for prosecutorial understanding of the harm suffered by victims. Further, a more discursive relationship between prosecutors and victims can go a long way in helping victims understand the rationales behind crucial decisions, as well as their limited role within the criminal justice process.<sup>68</sup> Having to explain some of their decisions to victims would indeed add a layer of self-reflection and transparency to the decision-making process as well as increase confidence in an agency that traditionally has shared little information with victims and the public.

The system in England and Wales has taken one step further and has recently recognized that victims can also play a crucial role in ensuring that prosecutorial decisions are not only explained but are also revised in cases of error. Indeed, in 2011, the Court of Appeal in *Killick*<sup>69</sup> recognized the right of a victim to seek a review of a Crown Prosecution Service (CPS) decision not to prosecute. In light of this judgment, the CPS launched guidelines for the *Victims' Rights to Review Scheme*, which makes it easier for victims to seek a review of a CPS decision not to bring charges or to terminate all proceedings. In this respect, victims not only have a right to judicially review these decisions, but can also review them independently in a more accessible administrative process explained in greater depth elsewhere.<sup>70</sup> One may wonder whether this possibility to review should be recognized or even expanded to all prosecutorial decisions, but due to space and time constraints, this question will be left for another day.

As highlighted above, the relationship between victims and prosecutors in the Canadian context is very limited and can be explained by the fact that prosecutorial discretion remains one of the least transparent and unfettered powers in Canadian criminal law. This power enables prosecutors to make a number of decisions about the course of proceedings without offering any explanations or being second-guessed or reviewed by any other body, unless abuse of process can be demonstrated.<sup>71</sup> The standard of review required in such cases is very high and has

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<sup>68</sup> See, e.g., JONATHAN DOAK, *VICTIMS' RIGHTS, HUMAN RIGHTS AND CRIMINAL JUSTICE: RECONCEIVING THE ROLE OF THIRD PARTIES* (2008).

<sup>69</sup> *R. v Killick*, [2011] EWCA (Crim) 1608 (U.K.).

<sup>70</sup> THE CROWN PROSECUTION SERVICE, *VICTIMS' RIGHT TO REVIEW SCHEME* (2014), [http://www.cps.gov.uk/victims\\_witnesses/victims\\_right\\_to\\_review/](http://www.cps.gov.uk/victims_witnesses/victims_right_to_review/).

<sup>71</sup> See *Boucher v. The Queen*, [1955] S.C.R. 16, 23 (Can.). More recently, in *R. v. Anderson*, 2014 SCC 41 para. 41 (Can.), the Supreme Court of Canada recognized two forms of prosecutorial

only been met in a minority of cases.<sup>72</sup> Recent decisions have reaffirmed this quasi-absolute power and have also found that prosecutors, contrary to judges, do not have a constitutional obligation to apply the principle of proportionality when making decisions that affect sentencing.<sup>73</sup> The Supreme Court of Canada found that the role of prosecutors is substantially different than the role of judges, highlighting that the prosecutorial function does not include sentencing. One may wonder whether this is a realistic depiction of the role of prosecutors, particularly in light of the numerous ways that prosecutors can influence the sentence. This includes the process of plea bargaining and the ability to craft joint submissions that are very rarely reviewed by courts. This method of case resolution, for which the judiciary holds great deference, transfers important sentencing powers to prosecutors, particularly in the context of the ever-increasing popularity of mandatory minimum sentences in Canada.<sup>74</sup>

The VBR does not include any changes to the current relationship between victims and prosecutors. In this respect, additional research that encourages critical reflections about the role of prosecutors, accountability, and community involvement in criminal justice would be welcome first steps to possible changes that may contribute to greater victim inclusion in the context of prosecutorial decision-making.

### *C. Implementation and Consequences for Non-Compliance*

Another developing theme in the area of victims' rights is the notion of accountability for victims' rights violations. In other words, should there be

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powers, namely exercises of prosecutorial discretion and tactics/conduct before the court. Prosecutorial discretion, formerly known as the prosecutor's core discretion, includes a number of influential decisions, including the decisions to prosecute a charge laid by the police, enter a stay of proceedings in private and public prosecutions, accept a guilty plea to a lesser charge, withdraw from criminal proceedings altogether, and take control of a private prosecution. This also includes the decisions to enter into and repudiate plea agreements as seen in *R. v. Nixon*, 2011 SCC 34 (Can.), and can only be reviewed in exceptional circumstances where there is abuse of process. The abuse of process doctrine is available where there is evidence that the prosecutor's conduct is egregious and seriously compromises trial fairness or the integrity of the justice system. The burden of proof lies on the accused to establish, on a balance of probabilities, a proper evidentiary foundation to proceed with an abuse of process claim, before requiring the Crown to provide reasons justifying its decision. Hence, where a claimant establishes a proper evidentiary foundation for an abuse of process claim, the evidentiary burden may shift to the Crown, who will be obliged to provide explanations for its decision.

<sup>72</sup> See, e.g., *Krieger v. Law Society of Alberta*, 2002 SCC 65 (Can.); *R. v. Nixon*, 2011 SCC 34 (Can.); *R. v. Power*, [1994] S.C.R. 601 (Can.). These cases include situations where there has been a "flagrant impropriety"—the prosecutor acted "dishonestly", in "bad faith", for an "improper purpose," or with a lack of "objectivity"—or the misconduct amounted to an "abuse of process."

<sup>73</sup> *R. v. Anderson*, 2014 SCC 41 (Can.).

<sup>74</sup> This transfer of power has been clearly explained in Palma Paciocco, *Proportionality, Discretion, and the Roles of Judges and Prosecutors at Sentencing*, 18 CAN. CRIM. L. REV. 241 (2014).



mechanisms to monitor the implementation of duties attributed to agencies? If so, should there be consequences for non-compliance?

### 1. The Legal Unenforceability of Victims' 'Rights' in Canada

All provincial victims' rights statutes are legally unenforceable, expressly stipulating that no cause of action or remedy can be received for the failure to comply with the specific victims' act.<sup>75</sup> Victims are left without redress and cannot claim damages or even seek declaratory relief if the statutory provisions are not respected by the agencies that are meant to implement them. Further, provisions found in these statutes state that no right of appeal can arise from the failure to comply with the statutes; some even go so far as to provide that proceedings cannot be delayed because of non-compliance. In comparison to actual constitutional rights, "[v]ictims' bills of rights were enacted, but paled in comparison to enforceable Charter rights."<sup>76</sup>

The legal unenforceability of victims' rights was confirmed in the case of *Vanscoy*.<sup>77</sup> In this case, victims in Ontario who were not notified of pending court dates or consulted with respect to plea bargaining agreements tried to argue in court that their statutory rights under the Ontario *Victims' Bill of Rights* had been breached.<sup>78</sup> They also argued that section 2(5), which prohibited a new cause of action, appeal, or remedies, violated section 7 of the Canadian *Charter of Rights and Freedoms*.<sup>79</sup> The victims argued that principles of fundamental justice require that there be no right without a remedy and thus the *Bills of Rights* contravened this fundamental principle.<sup>80</sup> Finally, they suggested that the right to be kept informed had crystallized into a principle of fundamental justice.<sup>81</sup> The Superior Court, however, decided to dismiss the application and stated that the Ontario *Victims' Bill of Rights* was not intended to, and did not, provide rights to victims of crime.<sup>82</sup> The Court concluded that "... the Act is a statement of principle and social policy, beguilingly clothed in the language of legislation...even if there were

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<sup>75</sup> See, e.g., Victims of Crime Act, R.S.B.C. 1996, c 478, s 10 (Can.) ("no cause of action, right of appeal, claim for damages or other remedy in law exists because of this Act or anything done or omitted to be done under this Act"). A quasi-identical provision is provided in: Victims of Crime Act, R.S.A. 2000, c V-3, s 18 (Can.); Victims of Crime Act, S.S. 1995, c V-6.011, s 18 (Can.); Victims of Crime Services Act, R.S.N. 1990, c V-5, s 13 (Can.); Victims of Crime Act, S.P.E.I. 1988 c 67, s 34 (Can.); Victims' Rights and Services Act, S.N.S. 1989, c 14, s 13 (Can.); Victims of Crime Act, R.S.N.W.T. 1988, c 9 (Supp.), s 18 (Can.).

<sup>76</sup> ROACH, DUE PROCESS AND VICTIMS' RIGHTS, *supra* note 10, at 309.

<sup>77</sup> *Vanscoy v. Ontario* [1999] O.J. No. 1661, 42 WCB (2d) 358 (Can. Ont. S.C.) (QL).

<sup>78</sup> *Id.* at para. 4–10, 14.

<sup>79</sup> *Id.* at para. 15.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at para. 17–37.

indefensible breach of these principles, the legislation expressly precludes any remedy for the alleged wrong.”<sup>83</sup> There have not been any similar challenges in other provinces but courts would presumably reach similar findings if they were presented with such cases. Today, these provincial statutory recognitions are not considered rights but merely principles of good practice that agencies *should* respect. They therefore cannot be considered mandatory even if mandatory terminology is used.

Similarly, victims appealed a decision in which the sentencing judge failed to consider a VIS despite the statutory obligation under section 722 of the *Criminal Code* to do so. In *Tellier*,<sup>84</sup> the judge highlighted that a lack of enforcement of section 722 should normally be considered evidence that the judge disregarded an important element in sentencing. Indeed, section 722 requires judges to consider any statement prepared for the purposes of determining the sentence to be imposed in order to meet certain sentencing objectives, including providing reparations for and acknowledgment of harm done to victims.<sup>85</sup> Despite this acknowledgement, the judge stated that

[h]owever, given the unexceptional nature of these offences, we are satisfied that this experienced judge would have known full well the frightening impact such offences can have. We note as well, that in her submissions at the time of sentencing, counsel for the Crown referred to the “terrifying situation” the clerks would have faced. In the absence of submissions, we do not find it necessary to comment further on this ground of appeal.<sup>86</sup>

In this respect, a statutory duty was breached yet no remedy was offered based on the assumption that the trial judge was experienced and would not need any victim impact statements to fully understand the impact of the offense in question. This decision undermines the rule of law and the legislative function by justifying this kind of violation in cases where the nature of the harm seems unexceptional.

## 2. The Importance of Recognizing Consequences to Non-Compliance

### *i. For Victims*

Despite this unenforceability, certain statutes use the terminology of ‘rights’ to designate these principles, inevitably creating false hopes and expectations for

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<sup>83</sup> *Id.* at para. 22, 41.

<sup>84</sup> *R. v. Tellier*, 2000 ABCA 219, para. 15–16 (Can. Alta.).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at para. 16.

victims of crime.<sup>87</sup> For instance, the discourse of rights has been present in several statutes and includes the right to receive information, the right to make a statement about the effects of the crime, the right to be treated with respect and sensitivity in court, and the right to emotional and practical support. One may argue that these schemes are misleading because they convey the impression of a commitment to victims' rights without clearly specifying what they really are and indeed without providing any legal standing or redress when these 'rights' have been breached or ignored.

Additionally, the creation of false hopes and expectations coupled with the absence of a redress mechanism to respond to breaches likely create a form of secondary victimization. Arguably, a form of victimization may result from the process's failure to respond adequately to victims' complaints when agencies have already failed to fulfill their initial duty. Additional research in this area would be useful to assess the real impact of such false expectations and the extent of secondary victimization.

*ii. For Criminal Justice Agencies*

Recognizing consequences to non-compliance can promote accountability and facilitate implementation. Some commentators argue that obligations placed on criminal justice agencies are unlikely to be taken seriously unless consequences are attached to non-compliance.<sup>88</sup> Accordingly, Shapland states that if one wants change, consequences must be recognized in cases where agencies do not comply.<sup>89</sup> Doak also argues that "[w]ithout a form of justiciable redress, methods used to ensure that victims are able to rely on 'rights' created in Government publications are ultimately meaningless."<sup>90</sup> Similarly, Ashworth and Redmayne have stated that institutionalized systems of accountability can provide a way to ensure that the various authorities fulfill their functions, duties, and powers as they should.<sup>91</sup>

Despite the importance of developing an accessible mechanism of accountability and redress for victims of crime, there are currently no legal

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<sup>87</sup> Victims' Rights and Services Act, S.N.S. 1989, c 14, s 3(2)(a) (Can.); An Act Respecting Assistance for Victims of Crime, C.Q.L.R. c A-13.2, s 4 (Can.); The Victims' Bill of Rights, C.C.S.M., c V55 (Can.); JOAN BARRETT, *BALANCING CHARTER INTERESTS, VICTIMS' RIGHTS AND THIRD PARTY REMEDIES* (2000).

<sup>88</sup> John D. Jackson, *Justice for All: Putting Victims at the Heart of the Criminal Justice?*, 30 J.L. SOC'Y 309, 319 (2003); Marie Manikis, *Recognizing Victims' Role and Rights During Plea Bargaining: A Fair Deal for Victims of Crime*, 58 CRIM. L.Q. 411 (2012).

<sup>89</sup> Joanna Shapland, *Bringing Victims in from the Cold: Victims' Role in Criminal Justice*, in CRIMINAL JUSTICE REFORM: LOOKING TO THE FUTURE, CONFERENCE REPORT, 13 (J. Jackson & K. Quinn, eds., 2003).

<sup>90</sup> DOAK, *supra* note 68, at 246.

<sup>91</sup> ASHWORTH & REDMAYNE, *supra* note 3.

consequences for not providing information to victims and most provinces do not even provide non-legal consequences to breaches.

Some limited victims' initiatives in Canada recognize that victims should be informed of their available options when duties have been breached, and have enacted an administrative mechanism of accountability.<sup>92</sup> For instance, in British Columbia, the provincial statute states that the *Ombudsperson Act* is applicable and provides a complaint mechanism to victims in cases of breaches.<sup>93</sup> According to this Act, the Ombudsperson has important investigative powers that include the inspection of premises, the summons of individuals on oath, and the request of any documents.<sup>94</sup> Further, it has broad recommendation powers towards the authority under investigation and can eventually submit a report to the Lieutenant Governor in Council and the Legislative Assembly if its recommendations are ignored.<sup>95</sup> Prosecutorial discretion remains unaffected since the statute clearly states that the Ombudsman does not have jurisdiction to investigate the appropriateness of these decisions.<sup>96</sup>

Similarly, in Manitoba, the *Victims' Bill of Rights* provides for a formal complaint process to the Director of Victim Support Services, who must make a report after investigating the matter.<sup>97</sup> In case of dissatisfaction with respect to the Director's investigation or report, the victim can make a complaint to the Ombudsman according to the *Ombudsman Act*.<sup>98</sup> This Act provides the Ombudsman with important investigatory powers<sup>99</sup> and the ability to recommend a wide range of measures to the appropriate minister, and to the department or agency of the government concerned, in order to rectify the breach or decision made.<sup>100</sup> Due to space constraints, however, the efficacy of these provincial ombudsmen cannot be analyzed in this article, but further research in this area is needed to determine whether they can effectively respond to victims' rights violations and agency non-compliance.

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<sup>92</sup> DEP'T OF JUSTICE CAN., *supra* note 9; Victims of Crime Act, R.S.S. 1995, c V-6.011, s 2.1(j) (Can.). Further, Alberta's *Victims of Crime Act*, R.S.A. 2000, c V-3, s 3(2)(b) (Can.), suggests that victims can bring their concerns to the Director who is an employee under the government, but it does not specify its specific powers and role—suggesting that the Director can only direct victims on where to go to resolve their concerns; For further information on the right to submit victim impact statements in Canada, see Julian V. Roberts & Marie Manikis, *Victim Impact Statements at Sentencing: The Relevance of Ancillary Harm*, 15 CAN. CRIM. L. REV. 1 (2011).

<sup>93</sup> Ombudsperson Act, R.S.B.C. 1996, c 340 (Can.).

<sup>94</sup> *Id.* at s 15(1)(2).

<sup>95</sup> *Id.* at s 25(1).

<sup>96</sup> *Id.* at s 11(1).

<sup>97</sup> See *Victims' Bill of Rights*, C.C.S.M. 1998, c V55, s 28 (Can.).

<sup>98</sup> Ombudsman Act, C.C.S.M. 2012, c O45, s 2(1) (Can.).

<sup>99</sup> *Id.* at s 30(1), 30(2) (for instance, the Ombudsman can require anyone to give information and can summon them before him and examine him under oath).

<sup>100</sup> *Id.* at s 36(1), 36(2).

Additionally, different models of accountability and redress exist in other common law jurisdictions. Considering the limited developments in Canada, these different models are worth studying and reflecting upon with regard to issues of implementation and adequate enforceability in Canada. For instance, the *Code of Practice for Victims of Crime in England and Wales* provides victims with a complaints procedure to the Parliamentary Ombudsman. In this process, victims have to address their complaints related to non-compliance internally to the agency in breach and eventually to a Parliamentary Ombudsman through a Member of Parliament.<sup>101</sup> An evaluation of this process has been completed and has found that some of its structures, namely the requirement to address these complaints to an MP, render the process inaccessible for victims. This research has also shown that for certain types of recognized victims' rights, ombudsmen are well placed to provide useful and adequate redress for victims' rights violations.<sup>102</sup> For instance, for breaches related to the provision of information by criminal justice agencies, victims were provided a combination of remedies, ranging from apologies to redress payments going up to £5,000 (approximately US \$8,000).

Further, in the United States—as with most criminal justice matters—there is a great deal of variation across states, but some states, and the U.S. Congress, have recognized enforceable court-based mechanisms for victims to address breaches and obtain remedies. The current paper does not aim to evaluate the range of sophisticated remedial schemes, as this will be left for another day and has partly been examined in other research;<sup>103</sup> however it is worth briefly discussing some developments related to these initiatives in America with a main focus on compliance by agencies and the remedial consequences on defendants' rights.

Some American statutes provide victims with legal standing<sup>104</sup> or representation by a prosecutor<sup>105</sup> or another official<sup>106</sup> to file motions before the

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<sup>101</sup> CROWN PROSECUTION SERVICE, UNITED KINGDOM GOVERNMENT, CODE OF PRACTICE FOR VICTIMS OF CRIME (2013), <https://www.cps.gov.uk/publications/docs/victims-code-2013.pdf>.

<sup>102</sup> See Marie Manikis, Victims' Information 'Rights' and Responses to their Breaches: Exploring the Efficacy of the Code of Practice for Victims of Crime (Oct. 1, 2010) (unpublished MSt Thesis, University of Oxford) (on file with the University of Oxford Faculty of Law); Marie Manikis, *Navigating Through an Obstacle Course: The Complaints Mechanism for Victims of Crime in England and Wales*, 12(2) CRIMINOLOGY & CRIM. JUST. 149 (2011); Marie Manikis, *A Comparative Overview of Victims' Rights, Enforcement Mechanisms, and Redress in England and Wales and the American Federal Jurisdiction*, 6 VICTIMS CRIME RES. DIG. 36, 38 (2013).

<sup>103</sup> Manikis, *supra* note 6.

<sup>104</sup> See ARIZ. REV. STAT. §§ 8.416, 13-4437 (2015); CAL. CONST. art. I, § 28(c); FLA. STAT. ANN. § 960.001(7) (2015); IND. CODE § 35-40-1-1 (2015); TEX. CONST. art. I, § 30.

<sup>105</sup> ALA. CODE § 15-23-83 (2015) (Attorney General or district attorney); ARIZ. REV. STAT. §§ 8-416, 13-4437 (2015) (prosecutor, at the request of the victim); TEX. CONST. art. I, §30 (prosecuting attorney).

<sup>106</sup> ALASKA STAT. § 24.65.110 (2015) (victims' advocate has a general ability to advocate for the victim in an ongoing criminal case); CONN. GEN. STAT. §§ 46a-13g (2015) (the Victim Advocate can file a limited special appearance in court to advocate victims' rights); MD. CODE ANN. § 1-326 (West 2015).

criminal trial court to assert the victims' rights. In other states, courts outside the criminal process can provide enforcement options to victims. For instance, in some states, an administrative court can provide a *writ of mandamus* directing an agency to comply with the law.<sup>107</sup> At the federal level, the *Crime Victims' Rights Act* (CVRA)<sup>108</sup> enables victims to enforce their rights by filing a motion in the trial court as well as mandamus action before the appellate court to enforce compliance.

An empirical comparative study of some of these mechanisms found that generally, victims were more likely to be provided their rights in the states with strong statutory and state constitutional protection of victims' rights than the ones where no such protection is provided.<sup>109</sup> Further, it is important to note that the legal enforcement of victims' rights has enabled courts to provide victims with creative remedies when their rights have been breached.<sup>110</sup> Despite these important developments for victims of crime, some courts have ordered remedies that have been criticized for having a considerable impact on the finality of the process as well as the accused's rights. For instance, to remedy the failure of state officials to notify the victim of the hearing scheduled for an offender's release on parole, the Arizona Court of Appeals set aside the offender's release order on parole and directed a new hearing.<sup>111</sup>

It is worth reflecting on types of remedies that may be the best compromise between providing some redress for violations and not impacting the defendant's rights in the process. There may be room to imagine remedies that would directly target the agency in breach rather than the process itself in order to avoid disrupting the process and its finality, and tampering with defendants' rights. For instance, in *Myers v. Daley*,<sup>112</sup> the Court of Appeals sanctioned a prosecutor who was not providing the victim with information about his case by upholding an award of costs for the victim, requiring him to take legal action. A similar remedy may have been an alternative option in the Arizona parole case mentioned above.

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<sup>107</sup> See, e.g., Crime Victims' Rights Act, 18 U.S.C. § 3771(d)(3) (2012); UTAH CODE ANN. § 77-38-11 (2015).

<sup>108</sup> Crime Victims' Rights Act, 18 U.S.C. § 3771(d)(3) (2012).

<sup>109</sup> In this study, a set of significant criteria was identified that would serve as a basis for comparison of the laws, namely: the comprehensiveness of a legal right; the strength of the provision (enforcement); and the specificity with which the law was drawn. For further details, see NATIONAL VICTIM CENTER, COMPARISON OF WHITE AND NON-WHITE CRIME VICTIM RESPONSES REGARDING VICTIMS' RIGHTS (June 5, 1997), reprinted in DOUGLAS E. BELOOF ET AL., VICTIMS IN CRIMINAL PROCEDURE 695 (2d ed. 2006).

<sup>110</sup> For instance, following a motion under the federal *Crime Victims' Rights Act* in *United States v. Turner*, 367 F.Supp. 2d 319, 320 (E.D.N.Y. 2005), the U.S. District Court for the Eastern District of New York ordered the government to provide victims with a summary of the earlier proceedings and notice of future proceedings. See generally DOUGLAS E. BELOOF, VICTIMS IN CRIMINAL PROCEDURE ch. 11 (3d ed. 2010) (discussing remedies in crime victims' rights cases).

<sup>111</sup> *Hance v. Ariz. Bd. of Pardons & Paroles*, 875 P.2d 824 (Ariz. Ct. App. 1993).

<sup>112</sup> *Myers v. Daley*, 521 N.E.2d 98 (Ill. App. Ct., 1987).

However, it may also be that some types of victims' rights breaches really affect the legitimacy, fairness, and outcome of proceedings and therefore require more robust sanctions that can affect the outcome of proceedings. A comparative analysis with other enforcement mechanisms has shown that for certain types of rights, legal enforcement mechanisms, such as the one found in the CVRA, have enabled some adequate remedy.<sup>113</sup> For instance, if we agree that victim impact statements are useful to achieve proportionate sentences by providing more accurate information related to the level of harm suffered, one may think that a process that has not allowed a victim to provide such statement may be flawed, and possibly increase the risk of disproportionate sentences. For these reasons, it may be worth re-opening the sentencing hearing and enabling victims to provide a statement.<sup>114</sup> Similarly, in a case where a victim is not notified of the original sentencing hearing date by a prosecutor and consequently was not able to claim restitution, it may be adequate to re-hear such proceeding in order to attain a just result.<sup>115</sup>

Despite some progress in Canada regarding accountability, most provincial statutes do not provide any mechanisms to ensure accountability and across Canada, as all victims' bills of rights are legally unenforceable. Without effective legislative reform, agencies in breach of their duties towards victims will remain untouchable and victims' rights will continue to be considered discretionary. As a progressive state that values the rule of law and the importance of robust fundamental rights, Canada has yet to show its effective support towards victims of crime by providing adequate tools to ensure that their rights are not trampled on without adequate consequences.

#### IV. CONCLUSION

John Gardner has argued that one of the fundamental roles of the State is to facilitate peaceful living among citizens and to safeguard the basic means by which

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<sup>113</sup> See Marie Manikis, *Victims' Information 'Rights' and Responses to their Breaches: Exploring the Efficacy of the Code of Practice for Victims of Crime* (Oct., 1, 2010) (unpublished MSt Thesis, University of Oxford) (on file with the University of Oxford Faculty of Law).

<sup>114</sup> For instance, in *Kenna v. U.S. Dist. Court for Cent. Dist. Cal.*, 435 F.3d 1011, 1016 (9th Cir. 2006), victims' rights to be heard under the CVRA had been breached by a district court that did not allow victims to be orally heard at sentencing. Victims therefore filed a mandamus action with the federal district court, which recognized that the only way to give effect to the victims' statutory right to be heard was to vacate the sentence and hold a new sentencing hearing.

<sup>115</sup> This was indeed the solution retained by a court in California in which it decided to reconsider its decision regarding restitution. See *Melissa J. v. Superior Court*, 237 Cal.Rptr. 5 (Cal. Ct. App. 1987). More recently, in *United States v. Monzel*, 641 F.3d 528 (D.C. Cir. 2011), following a district court's decision that did not award the full amount of restitution, the victim, through her attorney, challenged the award on a petition for mandamus. The court found that the victim had a right to full and timely restitution and therefore remanded the case to the trial court and ordered that a new amount be calculated that would reflect the losses attributable to the defendant's offense. A similar outcome was also reached in *In re Amy Unknown*, 636 F.3d 190 (5th Cir. 2011).

individual citizens can lead good lives.<sup>116</sup> When the State breaches its social contract by failing to prevent crime, it should respond in ways that minimize any chances of additional harm being caused to some of the injured community members, including victims of crime. In this respect, when responding to crime, the State has an obligation to ensure that adequate measures are in place to minimize any additional harm caused to victims of crime. This includes providing adequate information and explanation about why certain decisions have been reached in relation to their case. To monitor the implementation of these obligations, mechanisms should also be put in place to address situations where these duties are ignored or only partially implemented.

Some developments of victims' rights in the United States, England, and Wales are first steps towards State recognition of obligations towards victims of crime. As highlighted above, Canada is still a long way from meeting similar developments and providing adequate mechanisms of implementation. Based on the comparative perspectives articulated above, Canada has a number of models and empirical findings to rely on for exploring and assessing potential ways forward for the development of victim rights and remedies in the criminal justice process. The enactment of Bill C-32 would have been the right moment and forum to bring in most of these proposals and address topics that may not have featured in this bill, including the relationship between prosecutors and victims as well as improving information sharing. Further, victims as well as criminal justice agencies have long waited for some clarity with regard to the victim impact statement regime. The ongoing controversy and inconsistent judgments at the appellate level with regard to the role of VIS can finally be addressed and unified, but perhaps we may need to wait for further modifications to Bill C-32.

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<sup>116</sup> John Gardner, *Punishment – in Proportion and in Perspective*, in FUNDAMENTALS OF SENTENCING THEORY: ESSAYS IN HONOUR OF ANDREW VON HIRSCH 31 (Andrew Ashworth & Martin Wasik eds., 1998).