

# Admissibility of evidence on the prevalence of counterfeiting and its impact on direct victims and society

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# **Admissibility of evidence on the prevalence of counterfeiting and its impact on direct victims and society**

## **1. Introduction**

Evidence about the prevalence of counterfeiting in society and its impact on both the direct victim and society will give courts an understanding of the information they require to impose a just sentence consistent with the principles and objectives of sentencing. This paper discusses three possible legal bases for the admissibility of this evidence. In section two, the author argues that this evidence is admissible as relevant evidence at common law. In section three, the author argues that this evidence is relevant to the fundamental principles of sentencing set forth in ss. 718 and 718.1 and therefore admissible pursuant to s.723(2) of the *Criminal Code*. Section four provides a background of the development of victim impact statement law. This section is helpful to provide a context for section five in which the author argues that evidence on the prevalence and impact of counterfeiting should be admissible in a victim impact statement from the Bank of Canada.<sup>1</sup>

## **2. Admissibility as relevant evidence at common law**

### **a. Prevalence**

Courts have had little difficulty holding that evidence on the prevalence of an offence in the community is admissible at common law because it is relevant to the need for general deterrence. In *R. v. Bui* the British Columbia Court of Appeal held that:

...It is obvious to me that the learned trial judge placed a great deal of emphasis on deterrence. We are all well aware that trafficking in heroin and cocaine has become an extremely serious social problem in and about the city of Nanaimo and under those circumstances it was in my view open to the learned judge to impose this sentence ...<sup>2</sup>

In *R. v. Johnas et al* the Alberta Court of Appeal quoted with approval from another judgment from the British Columbia Court of Appeal, which held that evidence about the prevalence of an offence in the community is relevant:

The court itself, however, cannot be unaware of the vast increase in appeals coming before the court in robbery. We think that we must be, in some measure, guided by the following observations. Mr. Justice Tysoe,

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<sup>1</sup> The author acknowledges his indebtedness to an excellent review entitled *Victim Impact Statements Case Law Review* prepared by the Policy Centre for Victim Issues of the Department of Justice in September of 2002. The author would also like to thank Jocelyn Sigouin, counsel at the Policy Centre, and Teresa Donnelly, counsel for the Attorney General of Ontario, for carefully reviewing a draft of this paper and making many helpful suggestions.

<sup>2</sup> *R. v. Bui* (January 18, 1996, Doc. V102588) (B.C.C.A.)  
<http://www.canlii.org/bc/cas/bcca/1996/1996bcca51.html> at para. 4

of the British Columbia Court of Appeal, in *R. v. Adelman*, [1968] 3 C.C.C. 311, 63 W.W.R. 294, said at p. 314:

Where the incidence of a particular type of crime has become so great that the Court must punish it severely in order to assist in bringing it under control, rehabilitation becomes secondary.<sup>3</sup>

In *R. v. Cook* the Manitoba Court of Appeal indicated that:

Robbery is a very serious crime. More particularly convenience store and gas bar break-ins are prevalent in this community and known to be a matter of public concern. There is good reason for the courts to reflect this concern when imposing punishment.<sup>4</sup>

In *R. v. Sigouin* the Quebec Court of Appeal specifically held in a counterfeiting sentencing that the prevalence of the offence in the community was a relevant factor on sentencing.<sup>5</sup> The Court of Appeal for Ontario has also indicated in *R. v. Sears* and *R. v. Rohr* that the prevalence of an offence in the community is a relevant factor when considering the need for deterrence.<sup>6</sup>

### **b. Impact**

As will be discussed later in the paper, there was reluctance on the part of some courts to allow victims to participate in the sentencing hearing.<sup>7</sup> This position was not taken universally, however. In *R. v. Landry* the Nova Scotia Court of Appeal had no difficulty holding that the trial court erred when it refused to allow the Crown to call the victim, the offender's former spouse, to give evidence relating to the injuries that she had suffered in the assault.<sup>8</sup> This position was subsequently quoted with approval by the Supreme Court of Canada in *R. v. Swietlinski* when it held that:

It is well known that the victim's testimony is admissible at a hearing on a sentencing case: see, e.g., *R. v. Landry*.<sup>9</sup> [citations omitted]

Recently, in *R. v. Merrill* the Saskatchewan Queen's Bench simply confirmed, without feeling the need to cite any authority, that it was appropriate to consider the increasing prevalence of an offence in the community and also to consider the impact of the offence on the victim when imposing sentence.<sup>10</sup>

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<sup>3</sup> *R. v. Johnas et al.*; *R. v. Cardinal* (1982), 2 C.C.C. (3d) 490 (Alta. C.A.) at 493

<sup>4</sup> *R. v. Cook* (1996), 113 Man. R. (2d) 168 (Man. C.A.) at para. 2

<sup>5</sup> *R. v. Sigouin*, [1970] C.A. 569 (Que. C.A.)

<sup>6</sup> *R. v. Sears* (1978), 39 C.C.C. (2d) 199 (Ont.C.A.) at 200; *R. v. Rohr* (1978), 44 C.C.C. (2d) 353 (Ont.C.A.) at 355

<sup>7</sup> *Re Regina and Antler* (1982), 69 C.C.C. (2d) 480 (B.C.S.C.); *R. v. Robinson* (1983), 38 C.R. (3d) 255 (Ont. H.C.)

<sup>8</sup> *R. v. Landry* (1981), 61 C.C.C. (2d) 317 (N.S.C.A.)

<sup>9</sup> *R. v. Swietlinski* (1994), 92 C.C.C. (3d) 449 (S.C.C.) at 465

<sup>10</sup> *R. v. Merrill* (1998), 174 Sask. R. 299 (Sask. Q.B.) at para. 11

### **Part 3. Admissibility as relevant evidence pursuant to *Criminal Code***

#### **a. Prevalence**

Evidence about the prevalence of the offence in the community is relevant to the statutory principles of sentencing. Section 718, which was enacted in 1995, states the fundamental purposes and objectives of sentencing.<sup>11</sup> This section has been used by the courts to determine the scope of relevant evidence on a sentencing hearing. Section 718 provides as follows:

**718.** The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(a) to denounce unlawful conduct;

(b) to deter the offender and other persons from committing offences;

(c) to separate offenders from society, where necessary;

(d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

**718.1** A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Evidence about the prevalence of the offence in the community is relevant to the need to deter the offender and others from committing the same offence pursuant to s.718(b). It also helps the court understand the relative gravity of the offence and determine a proportionate punishment pursuant to s.718.1.

#### **b. Impact**

In addition, evidence about the impact of the offence is clearly relevant to:

- assist in the rehabilitation of the offender pursuant to s.718(d) by ensuring the offender is aware of the impact of the offences on the victim and society;
- promote acknowledgement by the offender of the harm done to the victim and the community pursuant to s.718(f);
- prevent the victim from being reduced to obscurity in the sentencing process;<sup>12</sup>  
and

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<sup>11</sup> S.C. 1995, c.22, s.6

<sup>12</sup> *R. v. Gabriel* (1999), 137 C.C.C. (3d) 1 (Ont. Sup. Ct.) at p.11

- help the court understand the relative gravity of the offence and determine a proportionate punishment pursuant to s.718.1;

Therefore, this evidence should be admissible in view of the broad and compulsory language of s.723(2) which indicates that the "... court shall hear any relevant evidence".

The relevant provisions in s.723 are set out below:

**723. (1)** Before determining the sentence, a court shall give the prosecutor and the offender an opportunity to make submissions with respect to any facts relevant to the sentence to be imposed.

**(2)** The court shall hear any relevant evidence presented by the prosecutor or the offender.

...

**(5)** Hearsay evidence is admissible at sentencing proceedings, but the court may, if the court considers it to be in the best interests of justice, compel a person to testify where the person

- (a) has personal knowledge of the matter;
- (b) is reasonably available; and
- (c) is a compellable witness.

It should be observed that evidence on prevalence and impact could be admissible as hearsay pursuant to s.723(5) without the witness being qualified as an expert. If a prosecutor wished to qualify a witness as an expert, there is little doubt that the employees from the Bank of Canada, or police officers, experienced in this area would readily qualify pursuant to the test set out in *R. v. Mohan*.<sup>13</sup>

Finally, it should be noted that s.724(1) also codifies the principle that a court may accept as proved "... any fact agreed upon by the prosecutor and the offender." The history of victim impact legislation shows that the defence often accepts that is a tactical advantage to admit statements without requiring the victim to testify. The same may prove true with evidence about the prevalence and impact of counterfeiting.

#### **Part 4. Background on victim impact statement law**

This section will explore the development and scope of victim impact law. This background provides a context for the discussion in the section five about whether evidence on the prevalence and impact of counterfeiting is admissible from the Bank of Canada in a victim impact statement.

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<sup>13</sup> *R. v. Mohan*, [1994] 2 S.C.R. 9 <http://www.canlii.org/ca/cas/scc/1994/1994scc34.html>

### **a. Early judicial reluctance to victim participation**

While the criminal justice system was originally victim driven, this changed over time to the point where until recently the victim was seen as having essentially no role to play other than that of witness. The extent of the reluctance to allow victim participation in the process can be seen in the 1982 decision of *Re Regina and Antler*.<sup>14</sup> After Mr. Antler was convicted of having sexual intercourse with a female under 14, the victim's counsel applied to the trial judge to make submissions with respect to the emotional impact of the crime. The trial judge denied the request. The victim then applied to the superior court for an order compelling the trial judge to receive her evidence. The application was opposed by the defence and the Crown. McLachlin J. (as she then was) concluded the victim had no *locus standi* that would allow her to invoke the court's jurisdiction. The superior court held that the *Criminal Code* governed the proceedings and didn't provide for submissions by the victim. The victim's petition was dismissed with costs.

A similar reluctance was shown in 1983 in *R. v. Robinson* where the parents of the dead child applied to the court to make a statement on the offender's sentencing hearing. The court rejected the application and held:

I do not consider that permitting the statement proposed in this case to be made would be helpful. As I have said, it's not for any lack of concern or sympathy for the victim or her family. I do not think it is relevant. I do not think it would help me with the task that most judges, in my experience, agree is the most difficult that they face as judges, and that is to establish a fair and just sentence. "Fair" in the circumstances means fair to all, not merely to the victim or to the victim's family, but also to the accused in this case, the convicted man, and his family.<sup>15</sup>

### **b. Legislative reform**

This lack of receptivity by the courts may have encouraged the Minister of Justice to note in 1988 that that "the victim of crime is often a forgotten person in our criminal justice system."<sup>16</sup> Victim impact legislation was introduced into the *Criminal Code* in 1989 and was initially included with the provisions dealing with pre-sentence report by a probation officer.<sup>17</sup> Parliament was initially rather tentative about the use of victim impact statements. The new s.735(1.1) did not require courts to receive a victim impact statement, but simply provided that courts "may receive a statement". In 1996, the provisions were given their own section number (s.722) and courts were required to consider a statement that had been prepared in compliance with the legislation.<sup>18</sup> In 1999, several substantive amendments were made including:

<sup>14</sup> *Re Regina and Antler* (1982), 69 C.C.C. (2d) 480 (B.C.S.C.)

<sup>15</sup> *R. v. Robinson* (1983), 38 C.R. (3d) 255 (Ont. H.C.) at pp. 259-60

<sup>16</sup> Alan Young, *Two Scales of Justice: A Reply* (1993), 35 C.L.Q. at p. 356, fn. 5 citing: R. Cleroux, *Sweeping Reforms Proposed in Payments to Crime Victims*, November 6, 1987, *The Toronto Globe and Mail*, p.2

<sup>17</sup> R.S.C. 1985, c.23 (4<sup>th</sup> Supp.), s.7

<sup>18</sup> S.C. 1995, c.22, s.6

- (a) the right to present a victim impact statement was added [s.722(2.1)];
- (b) the admissibility of other evidence concerning any victim of the offence was re-defined [s.722(3)];
- (c) the definition of victim was widened from “the” person to whom harm was done to “a” person [s.722(4)(a)];
- (d) the copy of the victim impact statement was no longer to be provided by the clerk of the court after it was filed, but rather “as soon as practicable after a finding of guilt” [s.722.1];
- (e) the court was directed to inquire of the prosecutor or a victim of the offence whether the victim(s) had been advised of their opportunity to prepare a victim impact statement as soon as practicable after a finding of guilt and in any event before imposing sentence [s.722.2(1)]; and
- (f) the court was directed that on its own motion, or application by the prosecutor or a victim, it might adjourn the proceedings to permit the victim to prepare a statement or present evidence if satisfied to do so would not interfere with the proper administration of justice [s.722.2(2)].<sup>19</sup>

Finally, in 2000 the definition of victim was widened to include not only the spouse, but the “common-law partner” [s.722(4)(b)].<sup>20</sup>

### **c. Current victim impact statement legislation overview**

It may be helpful to set out the current legislation before we examine the development of victim impact law more closely.

**722.** (1) For the purpose of determining the sentence to be imposed on an offender or whether the offender should be discharged pursuant to section 730 in respect of any offence, the court shall consider any statement that may have been prepared in accordance with subsection (2) of a victim of the offence describing the harm done to, or loss suffered by, the victim arising from the commission of the offence.

2) A statement referred to in subsection (1) must be

(a) prepared in writing in the form and in accordance with the procedures established by a program designated for that purpose by the lieutenant governor in council of the province in which the court is exercising its jurisdiction; and

(b) filed with the court.

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<sup>19</sup> S.C. 1999, c.25, s.17

<sup>20</sup> S.C. 2000, c.12, s.95(d)

(2.1) The court shall, on the request of a victim, permit the victim to read a statement prepared and filed in accordance with subsection (2), or to present the statement in any other manner that the court considers appropriate.

(3) Whether or not a statement has been prepared and filed in accordance with subsection (2), the court may consider any other evidence concerning any victim of the offence for the purpose of determining the sentence to be imposed on the offender or whether the offender should be discharged under section 730.

(4) For the purposes of this section and section 722.2, "victim", in relation to an offence,

(a) means a person to whom harm was done or who suffered physical or emotional loss as a result of the commission of the offence; and

(b) where the person described in paragraph (a) is dead, ill or otherwise incapable of making a statement referred to in subsection (1), includes 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.

**722.1** The clerk of the court shall provide a copy of a statement referred to in subsection 722(1), as soon as practicable after a finding of guilt, to the offender or counsel for the offender, and to the prosecutor.

**722.2** (1) As soon as practicable after a finding of guilt and in any event before imposing sentence, the court shall inquire of the prosecutor or a victim of the offence, or any person representing a victim of the offence, whether the victim or victims have been advised of the opportunity to prepare a statement referred to in subsection 722(1).

(2) On application of the prosecutor or a victim or on its own motion, the court may adjourn the proceedings to permit the victim to prepare a statement referred to in subsection 722(1) or to present evidence in accordance with subsection 722(3), if the court is satisfied that the adjournment would not interfere with the proper administration of justice.

The court is directed to consider any statement that has been prepared in accordance with the legislation for the purpose of determining the sentence to be imposed or whether the offender should be discharged. [s.722(1)] The statement must be prepared in writing in accordance with the procedures established by a designated program in each province and filed with the court. [s.722(2)] On the request of the victim, the court shall permit the victim to read the statement or present the statement in any other manner the court considers appropriate. [s.722(2.1)] Regardless of whether a victim impact statement has been filed, the court may consider any other evidence concerning any victim of the offence. [s.722(3)] Victims are defined to mean a person to whom harm was done or who suffered physical or emotional loss as a result of the commission of the offence. [s.722(4)(a)]. If that person is dead, ill or otherwise incapable of making a statement, then the definition of victim includes the spouse, common-law partner, any relative, person who has custody or is responsible for the care or support of the person, or any dependant of the person. [s.722(4)(b)] The clerk of the court is required to provide a copy of the victim impact statement as soon as practicable after a finding of guilt to the offender or the offender's counsel and to the prosecutor. [s.722.1] Courts are required as soon as practicable after a finding of guilt, and in any event before sentence is imposed,



to inquire as to whether the victim or victims have been advised of the opportunity to prepare a victim impact statement. The court shall make these inquiries of the prosecutor or a victim of the offence or any person representing a victim of the offence. [s.722.2(1)] On the application of the prosecutor, or a victim, or on its motion the court may adjourn the proceedings to permit the victim to prepare a victim impact statement or to present evidence in accordance with subsection 722(3) if the court is satisfied that the adjournment would not interfere with the proper administration of justice.[s.722.2(2)]

#### **d. Definition of victim**

The original 1989 enactment referred to “*the* person to whom harm was done”.

**722(1.4)** For the purpose of this section. "victim", in relation to an offence,

(a) means **the** person to whom harm is done or who suffers physical or emotional loss as a result of the commission of the offence, and

(b) where the person described in paragraph (a) is dead, ill or otherwise incapable of making a statement referred to in subsection (1.1), includes the spouse or any relative of that person, anyone who has in law or in fact the custody of that person or is responsible for the care or support of that person or any dependant of that person.<sup>21</sup> [emphasis added]

This definition led some courts to take the narrow view that only the “direct” victim of the offence was “*the* person to whom harm is done”. In *R. v. Curtis* the offender seriously assaulted his separated wife’s gentleman friend in front of both the offender’s wife and two year old daughter.<sup>22</sup> The assault took place in the parking lot of a church that all were about to attend. The offender broke the gentleman’s nose, two ribs and fractured his jaw. The gentleman was hospitalized and required surgery. The offender pled guilty to assault causing bodily harm. At trial the judge received not only a victim impact statement from the gentleman, but from the wife on behalf of herself and daughter. In the latter statement the wife set out her recollection of the assault and its impact on her, her daughter, and on her future relationship with the gentleman’s mother. The defence objected to the receipt of this statement at trial. The trial judge admitted it and the defence argued this was an error on the appeal.

The Court of Appeal noted that several cases had allowed statements from persons who were not the direct victims:

There have, however, been a number of exceptions to the general rule of receiving only the statements of "direct" victims. Impact statements have been received from an aunt (*R. v. H.(A.)* (1991), 65 C.C.C. (3d) 116, 13 W.C.B. (2d) 49 (B.C.C.A.)); a mother (*R. v. Melville*, New Westminster Registry, No. X019013, January 13, 1989); a maternal grandmother (*R. v. McMurrer* (1990), 84 Nfld. & P.E.I.R. 248, 10 W.C.B. (2d) 381 (S.C.); reversed on appeal, P.E.I.C.A., No. AD-0230, January 28, 1991 [reported

<sup>21</sup> R.S.C. 1985, c. 23 (4th Supp.), s. 7

<sup>22</sup> *R. v. Curtis* (1992), 69 C.C.C. (3d) 385 (N.B.C.A)

89 Nfld. & P.E.I.R. 36, 12 W.C.B. (2d) 168]; leave to appeal to S.C.C. refused, No. 22378, June 20, 1991); the members of families of the victim (*R. v. Poole*, Ont. Dist. Ct., Thunder Bay District, No. 1216-88 [summarized 7 W.C.B. (2d) 51]; *R. v. Lecaine* (1990), 105 A.R. 261 (Alta. C.A.), and *R. v. Black* (1990), 110 N.B.R. (2d) 208, 11 W.C.B. (2d) 324); "many people", referring to people in the community (*R. v. Sousa*, B.C.C.A., Vancouver Registry, No. CA12625, September 27, 1991 [summarized 14 W.C.B. (2d) 111]), and from a series of physicians and psychiatrists who had worked with the victim: *R. v. S.(C.C.)* (1990), 81 Nfld. & P.E.I.R. 81, 9 W.C.B. (2d) 558 (S.C.). In *R. v. McMurrer*, the case involving the statement from the maternal grandmother, the court mentioned that there was "no indication that the statement complied with s. 735(1.4)(b); however, the accused did not object to it".<sup>23</sup>

Notwithstanding these decisions, the Court of Appeal concluded that only direct victims could submit victim impact statements largely because the definition of victim in s.735(1.4)(a) referred to "*the* person to whom harm is done".<sup>24</sup> (emphasis added) In addition the court noted this interpretation was also supported by the fact that s.735(1.4)(b) only allowed the spouse of a victim to submit a victim impact statement if the victim was dead, ill, or otherwise incapable of doing so.<sup>25</sup>

*Curtis* was not always followed and, for example, was rejected in *R. v. Phillips*.<sup>26</sup> The court in *Phillips* relied first on a point that was not seen as persuasive in *Curtis*: namely s.33(2) of the *Interpretation Act*.<sup>27</sup> Section 33(2) states that words in the singular include the plural. The court in *Phillips* concluded this meant there was no reason to restrict the word "victim" in s.735(1.4)(a) to the singular.<sup>28</sup> Second, the court decided that a broader interpretation would further the remedial intent of Parliament. The court quoted with approval at page 526 from an article by Professor Alan Young entitled *Two Scales of Justice: A Reply*:

The victim impact statement accords the victim an opportunity to ensure that their concerns are incorporated in the sentencing process without being exposed to the trauma of testifying... Sentencing, among its many objectives, aspires to impose a sentence that the victim will regard as just. Ensuring that their concerns are heard creates the basis for victims to accept and believe in the fairness of the process... Finally, without the victim's impact, the seriousness of the crime cannot be fully appreciated. What may be viewed from the bench as trivial, may in fact be serious, and conversely what may be generally regarded as a serious crime may not be if the full story was

<sup>23</sup> *R. v. Curtis* (1992), 69 C.C.C. (3d) 385 (N.B.C.A.) at p. 391

<sup>24</sup> *Ibid*, at p. 391

<sup>25</sup> *Ibid*, at p. 391

<sup>26</sup> *R. v. Phillips* (1995), 26 O.R. (3d) 522 (Gen. Div.)

<sup>27</sup> *Interpretation Act*, R.S.C. 1985, c.I-21

<sup>28</sup> *Ibid*, at p. 525

before the court... Victim impact statements can help offenders appreciate the ramifications of their conduct on others and thereby add an awareness essential to promote and sustain genuine contrition and the will to change their behaviour.<sup>29</sup>

The court also noted that the United States Supreme Court decided to allow victim impact statements in *Payne v. Tennessee*,<sup>30</sup> which overruled its earlier decision in *Booth v. Maryland*.<sup>31</sup> The court quoted with approval at page 527 from Justice Souter's concurring opinion in *Payne* in which he stated at pages 2615-16:

Murder has foreseeable consequences. When it happens, it is always to distinct individuals, and after it happens other victims are left behind. Every defendant knows, if endowed with the mental competence for criminal responsibility, that the life he will take by his homicidal behavior is that of a unique person, like himself, and that the person to be killed probably has close associates, "survivors," who will suffer harms and deprivations from the victim's death. Just as defendants know that they are not faceless human ciphers, they know that their victims are not valueless fungibles, and just as defendants appreciate the web of relationships and dependencies in which they live, they know that their victims are not human islands, but individuals with parents or children, spouses or friends or dependents. Thus, when a defendant chooses to kill, or to raise the risk of a victim's death, this choice necessarily relates to a whole human being and threatens an association of others, who may be distinctly hurt. The fact that the defendant may not know the details of a victim's life and characteristics, or the exact identities and needs of those who may survive, a "unique" individual, and harm to some group of survivors is a consequence of a successful homicidal act so foreseeable as to be virtually inevitable.

In 1999 the *Code* was amended and the definition of victim in s.722(4)(a) changed to "... a person to whom harm is done or who suffers physical or emotional harm as a result of the commission of the offence."<sup>32</sup> This change helped the court in *R. v. Duffus* to reject *Curtis*' restrictive approach.<sup>33</sup> Duffus was convicted of sexually assaulting an employee from when the victim was 16 to when she was 19 years old. The Crown tendered a victim impact statement from the victim's father describing the impact of the sexual assault on himself and his family. The defence objected and relied on *Curtis*. The court rejected *Curtis* and held that Parliament by its amendment had intended to recognize that victims of crime are not limited to direct victims but include the broader community as well.<sup>34</sup>

<sup>29</sup> Alan Young, *Two Scales of Justice: A Reply* (1993), 35 C.L.Q. 355 at pp. 362-63

<sup>30</sup> *Payne v. Tennessee*, 111 S Ct 2597 (1991) <http://supct.law.cornell.edu/supct/html/90-5721.ZS.html>

<sup>31</sup> *Booth v. Maryland*, 107 S Ct. 2529 (1988)

<sup>32</sup> S.C. 1999, c. 25, s. 17

<sup>33</sup> *R. v. Duffus* (2000), 40 C.R. (5<sup>th</sup>) 350 (Ont. Sup. Ct.)

<sup>34</sup> *Duffus, supra*, at p.353

The court in *Duffus* further held that in order to be admissible the statement had to be from a person who claimed to have suffered harm or physical or emotional loss as the result of the commission of the offence.<sup>35</sup> This requirement clearly flows from the language of s.722(4) itself. The court went on to hold that the person submitting the victim impact statement also had to be closely enough connected to the direct victim to be directly affected.<sup>36</sup> The court offered no rationale for this *obiter* statement. While this statement undoubtedly reflects the reality in most cases, it is difficult to see why the language of the section requires it.

In *R. v. Markowski* the court also took a broader approach to who qualified as a victim.<sup>37</sup> The head teller for a branch of a bank stole approximately \$9,000 from the bank. The teller covered her trail by keying in the identities of other tellers when she stole the money. A corporate security officer for the bank submitted a victim impact statement that detailed the stress suffered by the tellers who came under suspicion and who were required to identify and account for various discrepancies during the investigation. In addition, the statement described the tellers' personal monetary loss because the branch did not qualify for an annual bonus as a result of the thefts. The statement also pointed out that customers were also harmed. The court treated all of this information as relevant and admissible.<sup>38</sup>

In *R. v. Coombs* the court accepted a victim impact statement from the security officer who was on duty in the accused's apartment building the night she committed infanticide.<sup>39</sup> The security officer indicated that he had been so affected that he had not been able to maintain employment since the night. The court accepted that he was a victim of the accused's crime.<sup>40</sup>

#### **e. Procedural requirements**

Section 722(1) requires courts to consider victim impact statements that have been filed in accordance with s.722(2). Section 722(2)(a) requires the statement to be in writing and prepared in accordance with procedures established by a program designated for that purpose by the lieutenant governor in council of the province. The statement must be filed with the court pursuant to s.722(2)(a). The clerk of the court is required by s.722.1 to provide counsel for the offender and the prosecutor a copy of the statement as practicable after a finding of guilt.

These requirements are not always strictly observed. If no objection is taken by the defence, courts will most likely accept victim impact statements on the basis of

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<sup>35</sup> *Duffus, supra*, at p. 354

<sup>36</sup> *Duffus, supra*, at p. 354

<sup>37</sup> *R. v. Markowski*, [2002] S.J. No. 584 (Sask. Prov. Ct.), 2002 SKPC 87  
<http://www.canlii.org/sk/cas/skpc/2002/2002skpc87.html>

<sup>38</sup> *Ibid*, at para. 3

<sup>39</sup> *R. v. Coombs*, [2003] A.J. No. 1209 (Alta. Q.B.), 2003 ABQB 818  
<http://www.canlii.org/ab/cas/abqb/2003/2003abqb818.html>

<sup>40</sup> *Ibid*, at para. 9

substantial compliance or waiver,<sup>41</sup> or pursuant to s.722(3). However, the viability of s.722(3) must be examined carefully in light of *R. v. Jackson* which is discussed in more detail later in the paper.<sup>42</sup>

The Department of Justice's Victim Policy Centre has a web site that contains information the reader may find of use.<sup>43</sup> Provincial sites also include very helpful information including details about preparing a victim impact statement in accordance with the provincial forms.<sup>44</sup>

#### **f. The content of victim impact statements**

Section 722(1) indicates that the victim impact statement should describe "the harm done to, or loss suffered by, the victim arising from the commission of the offence." The case law makes it clear that the courts will ordinarily not allow victim impact statements to stray far from these statutory limitations.

In *R. v. Gabriel* the offender pled guilty to criminal negligence causing death.<sup>45</sup> Thirty victim impact statements were filed from the victim's parents, grandparents, other relatives, her fiancé and her employer. In addition, other statements were filed from persons whose relation to the deceased was either remote or difficult to determine.<sup>46</sup> More than half of the statements referred to: (1) the facts of the offence, (2) the character of the offender, and (3) the punishment the offender deserved.<sup>47</sup> The language of s.722(1) makes it clear that victim impact statements were not intended to provide a vehicle for any of these purposes.

The court noted several reasons why these types of statements should not be permitted. The court held that attempts to state the facts of the offence usurped the role of the prosecutor and risked inconsistency with or expansion of prior trial testimony.<sup>48</sup> The court also observed that allowing the victim to comment on the character of the offender could encourage inflammatory remarks and the element of personal revenge by the victim.<sup>49</sup> The court indicated that recommendations with respect to sentencing should usually be avoided because the Attorney General represents the public interest in prosecution. Interestingly, the court held that recommendations as to the severity of punishment may sometimes be made. Without referring to the statutory prescriptions that limit the content of victim impact statements, the court held that statements with respect to sentencing could be made in exceptional circumstances such as when the court

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<sup>41</sup> *R. v. Gabriel, supra*, at p. 18

<sup>42</sup> *R. v. Jackson* (2002), 163 C.C.C. (3d) 451 (Ont. C.A.)

<sup>43</sup> <http://canada.justice.gc.ca/en/ps/voc/index.html>

<sup>44</sup> <http://canada.justice.gc.ca/en/ps/voc/other.html>

<sup>45</sup> *R. v. Gabriel* (1999), 137 C.C.C. (3d) 1 (Ont. Sup. Ct.) at p. 5

<sup>46</sup> *Ibid*

<sup>47</sup> *Ibid*, at p. 6

<sup>48</sup> *Ibid*, at p. 15

<sup>49</sup> *Ibid*, at pp. 12-14

requests them, in cases of aboriginal sentencing circles,<sup>50</sup> or when the victim seeks unexpected leniency such as a request for a non-jail sentence when jail might be a fit disposition.<sup>51</sup> The issue as to whether the victim impact statement may contain recommendations with respect to sentence will be discussed in more detail later in the paper in section 4(g). In the end result, the court only considered the information which described the harm done to, or loss suffered by, the identifiable victims in the case.<sup>52</sup>

A second case that deals with the contents of victim impact statements is *R. v. Jackson*.<sup>53</sup> In *Jackson* a police officer attempted to stop the offender for riding double on a bicycle. The offender jogged away, turned, and fired a shot from a .357 calibre handgun in the direction of the officer. A second shot was fired. The officer took cover. There were also bystanders in the area but no one was injured. The offender was convicted after a trial of discharging a firearm with intent to endanger the life of the police officer, possession of an unregistered firearm, carrying a weapon for a purpose dangerous to the public peace, and discharging a firearm with intent to prevent arrest.<sup>54</sup>

After counsel made their submissions with respect to sentence, the officer requested an opportunity to address the court. The officer testified over the defence's objections. The officer said that he was concerned about the increased risk to police officers from the use of handguns and firearms. He further said that the hands of the police are increasingly tied down with red tape. The officer indicated that in his opinion the offender had deliberately lured him for the purpose of shooting him.<sup>55</sup> The defence objected again and indicated that no victim impact statement had been filed and no notice had been given of this evidence. The judge did not allow the officer to continue to testify.<sup>56</sup>

The Court of Appeal held that the officer's evidence exceeded the limits of what is permitted in a victim impact statement. The Court indicated that s.722 provides simply that the victim impact statement may describe "the harm done to, or loss suffered by, the victim arising from the commission of the offence." The officer's statement clearly exceeded this because it covered the causes and incidence of crime, the use of firearms, and the facts of the offence.<sup>57</sup>

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<sup>50</sup> *Ibid*, at p.15 citing Cory J.'s statement in *R. v. Gladue* (1999), 133 C.C.C. (3d) 385 (S.C.C.) <http://www.canlii.org/ca/cas/scc/1999/1999scc21.html> which, although not dealing with sentencing circles, did refer at para. 94 to the trial judge's failure to consider "the possibly distinct conception of sentencing held by ... the victim's family."

<sup>51</sup> *Ibid*, at p. 15 citing *R. v. Grant*, [1998] O.J. No. 1511 (C.A.) <http://www.canlii.org/on/cas/onca/1998/1998onca10250.html> as authority for the last point.

<sup>52</sup> *Ibid*, at p. 20

<sup>53</sup> *R. v. Jackson* (2002), 163 C.C.C. (3d) 451 (Ont. C.A.), (2002-03-26) ONCA C32921;C28624 <http://www.canlii.org/on/cas/onca/2002/2002onca10147.html>

<sup>54</sup> *Ibid*, at paras. 1-3

<sup>55</sup> *Ibid*, at paras. 40-41

<sup>56</sup> *Ibid*, at para. 42

<sup>57</sup> *Ibid*, at para. 51

**g. Use of victim impact statements by the courts**

Section 718's statement of the fundamental purposes and objectives of sentencing has been used by the courts to interpret and understand the purpose and proper use of victim impact statements. In *R. v. Gabriel* the court held that victim impact statements serve a number of purposes consistent with the statutory purposes and principles of sentencing. The court held that victim impact statements could benefit the sentencing process by:

- a) providing information on the impact of the crime to help the court understand the relative gravity of the offence and determine a proportionate punishment pursuant to s.718.1;
- b) providing information that assists the court to determine appropriate reparations pursuant to s.718(e);
- c) promoting acknowledgement by the offender and a sense of responsibility for the harm done to the victim and the community pursuant to s.718(f);
- d) improving the victim's respect for the administration of justice by giving the victim a chance to participate and the satisfaction of being heard; and
- e) preventing the victim from being reduced to obscurity while the proceedings focus on finding a disposition that is tailored to the offender to best protect the public interest.<sup>58</sup>

In an informative article, Julian Roberts made the interesting observation that most of the reasons for victim impact statements suggested by the court in *Gabriel* emphasize that the statements allow the victim an opportunity to communicate to the judge. Roberts notes that victim impact statements also allow the victim to communicate with the offender and provide the court with an opportunity to communicate with both the victim and the offender.<sup>59</sup> Roberts argues that the communication from the victim to the offender could help make the offender aware of the impact of the offender's conduct on other people.<sup>60</sup>

It appears from *Gabriel* that information from victim impact statements could be properly used as an aggravating factor if it helps prove the harm or loss caused to the victim.

As an aggravating feature of sentencing, loss or harm is to be established by the prosecution: *R. v. McDonnell* (1997), 114 C.C.C. (3d) 436 (S.C.C.) at paras. 22-38, *Criminal Code*, s.724(3). Assessment of harm caused by a crime has long been an important concern of sentencing and evidence of specific harm relates to assessment of an offender's moral culpability and blameworthiness:

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<sup>58</sup> *R. v. Gabriel*, *supra*, at p. 11

<sup>59</sup> Julian Roberts, *Victim Impact Statements and the Sentencing Process: Recent Developments and Research Findings* (2003), 47 C.L.Q. 365 at pp. 376-77

<sup>60</sup> *Ibid*, at p. 377

*Payne v. Tennessee*, 501 U.S. 808 (1991) at 2605-6, 2608 *per* Rehnquist C.J.<sup>61</sup>

Other cases have downplayed the notion of whether victim impact statements could be used to prove aggravating features. In *R. v. Readman* the court held that the victim impact statements should not impact on the sentence imposed to any great degree because the crime committed was one against society.<sup>62</sup> The court in *Readman* was concerned that the sentence imposed could not reflect whether the life that was lost was an ordinary one, an extraordinary one, or that of a very young or old person. The court held at paragraph 14 that the following purposes were served by victim impact statements:

[14] ... First, the words of the victim of a crime might well serve to educate the offender as to the effects of his or her criminal behavior, with some potential rehabilitative effect. Second, victim impact statements may provide some sense of catharsis for victims, particularly those who choose not to pursue any form of redress in the parallel stream of the civil law. Third, the inclusion of victim impact statements in the materials presented during a sentencing hearing may serve to assure the public that sentencing judges, while bound to sentence in accordance with the principles discussed earlier, are always keenly aware of the unique and intensely personal response of each victim harmed by the criminal conduct of another.

Notwithstanding *Readman*, if the victim impact statement contains statements that show the harm or loss suffered was less than one would ordinarily expect it is difficult to see how this would not be a mitigating factor. The converse should be true as well.

While there is general judicial agreement that victim impact statements should not contain suggestions for more severe penalties, there is disagreement over whether the statements may include statements urging lesser penalties. As we've already seen, the *Gabriel* decision, relying on comments made by the Court of Appeal for Ontario in *R. v. Grant*, held that prosecutorial submissions could properly mention that the victim seeks leniency in circumstances where it might otherwise not reasonably be expected.<sup>63</sup>

The opposite conclusion appears to have been reached in *R. v. FrigINETTE* where the British Columbia Court of Appeal dealt with a situation where a victim in a spousal domestic assault urged the courts not to incarcerate the offender.<sup>64</sup> In a concurring judgment by Ryan J.A., which was approved of by the majority judgment, the court held at paragraph 10 that:

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<sup>61</sup> *Ibid*, at p. 9

<sup>62</sup> *R. v. Readhead*, [2002] B.C.J. No. 1810, 2001 BCPC 208  
<http://www.canlii.org/bc/cas/bcpc/2001/2001bcpc208.html> at paras. 10-11

<sup>63</sup> *R. v. Gabriel*, *supra*, at p. 15

<sup>64</sup> *R. v. FrigINETTE* (1994), 53 B.C.A.C. 153 (B.C.C.A.), (1994-11-29) BCCA CA019359  
<http://www.canlii.org/bc/cas/bcca/1994/1994bcca10710.html> at para. 2



[10] ... Although the effect of a crime on a victim is often taken into account when sentence is imposed, the attitude of the victim towards the length of the sentence cannot be taken into account. When the state intervenes and an accused's conduct is deemed criminal, his conduct is a crime against society and it is therefore the public, not the private interest which must be served by the sentencing process.

This position is consistent with statements in both *R. v. Gabriel* and *R. v. Bremner* that victim impact statements are not intended to transform criminal prosecutions into tripartite proceedings.<sup>65</sup> *Bremner* may illustrate the apparent judicial confusion in this area as it both approved of *Friginette's* statement that the offender's views with respect to the length of sentence cannot be taken into account<sup>66</sup> and appeared to approve of *Gabriel's* statements that the offender's request for leniency can be considered in exceptional circumstances.<sup>67</sup> The apparent contradiction may be explained by the fact that *Friginette* concerned a domestic assault where courts have been sensitized to the fact that vulnerable victims in spousal assaults often express requests for lenient sentences as a result of complex inter-personal dynamics.

This reluctance to hear the victim's views on sentence may change as a result of the Supreme Court of Canada's decision in *R. v. Proulx*.<sup>68</sup> The Court in *Proulx* indicated at paragraph 113 that when determining whether restorative objectives can be satisfied that the judge should consider "... the victim's wishes as revealed by the victim impact statement (consideration of which is now mandatory pursuant to s.722 of the *Code*).” The Supreme Court of Canada did not elaborate on how the language of s.722 could be interpreted to require courts to consider the victim's wishes. The Court in *Bremner* was certainly quick to indicate that this statement by the Supreme Court of Canada was not intended to give the victim any part in recommending a sentence.<sup>69</sup>

#### **h. Oral presentation of statements**

In 1999 the *Code* was amended with the inclusion of s.722(2.1).<sup>70</sup> This provision directs that the court shall, on the request of the victim, allow the victim to read a statement prepared and filed in accordance with s.722(2), or to present the statement in any other manner the court considers appropriate.

There is no case law on whether this section means the victim must be allowed to read a prepared and filed statement or whether the court may direct that the statement be

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<sup>65</sup> *R. v. Gabriel, supra*, at p. 12; *R. v. Bremner* (2000), 146 C.C.C. (3d) 59 (B.C.A.C.), [2000] B.C.J. No. 1096, 2000 BCCA 345 <http://www.canlii.org/bc/cas/bcca/2000/2000bccca345.html> at para. 24

<sup>66</sup> *R. v. Bremner, supra*, at para. 25

<sup>67</sup> *Ibid*, at para. 27

<sup>68</sup> *R. v. Proulx*, [2000] 1 S.C.R. 61, 140 C.C.C. (3d) 449, <http://www.canlii.org/ca/cas/scc/2000/2000scc5.html>

<sup>69</sup> *R. v. Bremner, supra*, at para. 39

<sup>70</sup> S.C. 1999, c.25, s.17

presented in another manner. Legal commentators have differed.<sup>71</sup> Allan Manson has suggested that s.722(1.1) gives the judge the option of either permitting the oral submission or permitting the victim impact statement to be presented in another way.<sup>72</sup> Allen Edgar has concluded that the section obliges the court to permit an oral presentation if the victim requests it.<sup>73</sup> Before s.722(1.1) was passed, courts had expressed concern that oral presentations by victims may not be appropriate because of the victim's health or stability, the possibility of personal invectives being directed at the offenders, or the potential for disturbances leading to a loss of control over the courtroom.<sup>74</sup> As the court must remain in control of its own process to ensure a dignified and fair proceeding, a judge facing these circumstances may well decide that s.722(1.1) permits the court to order that the presentation not be made in an oral submissions, but in another appropriate manner.

### **i. The Crown as gatekeeper for victim impact statements**

The relationship between the Crown and the victim who wishes to submit a statement is not entirely clear. The view in *Gabriel* was that the Crown had a responsibility to act as the gatekeeper for victim impact statements to make sure their contents were properly admissible to prevent victims from being disappointed.<sup>75</sup> While no authority was provided by the court for this comment, the statement was clearly consistent with the court's emphasis that victim impact statements should not be allowed to turn prosecutions into tripartite proceedings. Requiring the Crown to act as the gatekeeper certainly helps avoid the perception that victim impact statements expand the role of the victim to that of a party. In *Jackson* the Court also indicated that the Crown had a responsibility to ensure that the content of the officer's statement was admissible.<sup>76</sup> *Jackson* should be viewed with caution because it involved an unusual situation where no victim impact statement had been filed and, after submissions had been made, the Crown indicated that the officer (who was the victim) would like to address the court. As the Court in *Jackson* did not consider either the procedure followed or the substance of the officer's statement to comply with s.722, its comments may not mean that Crowns have a general responsibility to ensure that the contents of victim impact statements are admissible.

There is nothing in s.722 that imposes a gate keeping obligation on the Crown with respect to a victim impact statement. In fact, the language and procedure set out in s.722 suggest, if anything, the opposite. Section 722(2)(a) requires the statement to be in writing and prepared in accordance with a program designated for that purpose. Section 722(b) requires the statement to be filed with the court. Section 722(1) indicates that statements prepared in accordance with s.722(2) shall be considered by the court. None of this suggests any involvement by the Crown. The non-involvement of the Crown is

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<sup>71</sup> Julian Roberts, *Victim Impact Statements and the Sentencing Process: Recent Developments and Research Findings* (2003), 47 C.L.Q. 365 at pp. 367-68

<sup>72</sup> *Ibid*, citing at p. 367, fn. 7: A. Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2002) at p. 197

<sup>73</sup> *Ibid*, citing at p. 368, fn. 10: A. Edgar, *Victim Impact Statements* (London: University Judicial Education Program, 2000) at p. 1

<sup>74</sup> *R. v. Gabriel* (1999), 137 C.C.C. (3d) 1 (Ont. Sup. Ct.) at p. 16

<sup>75</sup> *Ibid*, at p. 16

<sup>76</sup> *R. v. Jackson*, *supra*, at para. 50

even more strongly suggested by s.722.1 which provides that the clerk of the court shall provide a copy of the victim impact statement as soon as practicable after a finding of guilt to counsel for the offender and counsel for the prosecutor. Arguably, if Parliament had intended the Crown to have an active role supervising the contents of a victim impact statement there would be no need for s.722.1 to require the clerk to provide a copy of the statement to the Crown who had supervised its preparation to ensure statutory compliance. This position may also be bolstered by the addition of s.722(2.1) in 1999 which directs that the court shall, on the request of the victim, allow the victim to read a statement prepared and filed in accordance with s.722(2), or to present the statement in any other manner the court considers appropriate. Again, there is nothing in this provision that suggests any role for the Crown. This may strengthen the argument that Parliament's intent was to give the victim an independent voice in sentencing that is not dependent on the Crown's approval or involvement.

**j. Other provisions for adducing victim impact evidence**

Sections 722(3) and 723(2) may also provide an avenue to present victim impact evidence in a manner other than a victim impact statement. As s.722(3) has been amended, it is important to examine the former and new provision before considering *Jackson* and *Bremner* which both commented on the older provisions. The current and former versions of s.722(3) are set out below:

**Former**

**722(3)** A statement of a victim of any offence prepared and filed in accordance with subsection (2), does not prevent the court from considering any other evidence concerning any victim of the offence for the purpose of determining the sentence to be imposed on the offender or whether the offender should be discharged under section 730.

**Current**

**722(3)** Whether or not a statement has been prepared and filed in accordance with subsection (2), the court may consider any other evidence concerning any victim of the offence for the purpose of determining the sentence to be imposed on the offender or whether the offender should be discharged under section 730.

Section 723(2), which has not changed, should also be considered. It provides as follows:

**723(2)** The court shall hear any relevant evidence presented by the prosecutor or the offender.

Both *Jackson* and *Bremner* put very restrictive interpretations on both ss.722(3) and 723(2). These restrictive interpretations are probably no longer good law in light of the amendments to s.722(3) which make it clear that the court may consider any other

evidence from any victim of the offence regardless of whether a victim impact statement has been prepared and filed.

In *Jackson* the Crown argued that the statement of the officer could have been admitted under the former s.722(3) or s.723(2). The Court rejected this argument and held at paragraph 54 that:

[54] In my view, these provisions do not assist the respondent. I do not read s.722(3) as giving the prosecution or the victim the option of either providing a victim impact statement or making a statement to the court immediately before a sentence is passed. The references to filing a victim impact statement in accordance with s.722(2) and to “any *other* evidence” indicate to me that s.722(3) is subsidiary to s.722(2) and that it merely supplements the normal procedure with respect to victim impact statements. Section 722(3) does not allow for an alternate method of placing victim impact evidence before the court. With respect to s.723(2), I do not read this provision as requiring a court to consider evidence tendered in a manner that fails to respect directly applicable *Criminal Code* provisions governing its admissibility...

The reasoning of the court in *Jackson* may well have been coloured by the facts of the case with respect to the timing, lack of notice, and content of the statement that was made by the officer. The court first determined that the officer’s evidence did not qualify either procedurally or substantively as a victim impact statement. Second, it decided that the officer’s evidence could not be admitted pursuant to s.723(2) - which requires the court to hear all relevant evidence - because there was another way for the evidence to have been admitted. This position seems a somewhat strained interpretation designed to force victim impact evidence into the victim impact statement format. There was nothing in the language of s.722 that created victim impact statements which suggested this section was intended to be the exclusive mechanism for this type of evidence to be admitted. In fact, on its face the former version of s.723(3) provided that a court was not prevented from considering any other evidence concerning any victim of the offence even if a victim impact statement has been filed. Finally, the language of s.723(2) was quite clear that the court “shall” hear any relevant evidence presented by the prosecutor or the offender. It does not say that the court shall hear any relevant evidence except for evidence that could have been adduced by way of a victim impact statement.

Regardless of whether *Jackson* was correct at the time, the amended s.722(3) makes it much clearer that “the court may consider any other evidence concerning any victim of the offence” whether or not a victim impact statement has been prepared and filed. As a result, it is unlikely that *Jackson*’s holding - which seems to suggest that victims must complete a victim impact statement - can still be considered good law.

In *R. v. Bremner* the offender was convicted of four counts of indecent assault that had taken place thirty years earlier when the offender was a sea cadet in his mid 20's.<sup>77</sup> The four victims were also sea cadets who ranged in ages at the time from 13 to 16. At the time of the sentencing, s.722.(2.1), which now directs a court to permit the victim to read the victim impact statement or present the statement in any other manner the court considers appropriate, was not in effect.<sup>78</sup> As one victim wanted to present the statement to the court, the Crown applied under the former s.722(3), which indicates that the filing of a victim impact statement does not prevent the court from considering any other evidence concerning any victim of the offence, for the victim to be allowed to read his statement. The defence objected on the basis that the content of the statement that was to be read did not comply with s.722. The trial judge allowed the statement to be read.<sup>79</sup> The victim impact statement that was read included recommendations with respect to sentencing.<sup>80</sup> The other victim impact statements made recommendations with respect to sentencing and used psychiatric diagnostic terms.<sup>81</sup>

The Court of Appeal indicated that s.722(3) was not intended to authorize any further evidence from the victim beyond what was adduced at trial. The Court indicated that the further evidence contemplated in s.722(3) was that of a person with knowledge and expertise who could testify about the harm done to the victim such as a psychiatrist, psychologist, or doctor.<sup>82</sup> The Court confirmed that the sections in the *Code* dealing with victim impact statements do not permit a victim to suggest a sentence or erode the usual rules with respect to expert evidence.<sup>83</sup>

As with *Jackson*, the holding in *Bremner* that s.722(3) was not intended to authorize further evidence from the victim is probably no longer good law. The amended s.722(3) makes it very clear that the court has a discretion to hear “any other evidence concerning any victim of the offence” whether or not a victim impact statement has been prepared or filed.

As a result, the courts may interpret s.722(3) in a manner that will make evidence from other victims of the offence, such as the Bank of Canada, more likely to be admitted whether or not a victim impact statement has been prepared and filed.

### **Part 5. Admissibility as victim impact statement pursuant to *Criminal Code***

Victim impact statements from the direct victim of counterfeiting offences will undoubtedly provide the court with relevant information for sentencing. In addition, a victim impact statement from the Bank of Canada could help provide the court with information to help it understand the prevalence of the offence in the community and the

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<sup>77</sup> *R. v. Bremner, supra*, at paras.2-3

<sup>78</sup> *Ibid*, at para. 19

<sup>79</sup> *Ibid*, at para. 20

<sup>80</sup> *Ibid*, at para. 28

<sup>81</sup> *Ibid*, at para. 23

<sup>82</sup> *Ibid*, at paras. 20-21

<sup>83</sup> *Ibid*, at para. 23

broader impact of the offence. This section will explore two issues that arise with respect to the use of victim impact statements by the Bank of Canada. The first is whether the Bank qualifies as a victim. The second issue is whether evidence about the prevalence and general impact of counterfeiting in Canada is proper content for a victim impact statement.

**a. The Bank of Canada as a victim of counterfeiting offences**

As a result of the 1999 amendment to s.722(4) that changed the definition of victim from being the victim of the offence to a victim of the offence,<sup>84</sup> and the subsequent case law,<sup>85</sup> it is now clear that victims no longer have to be the direct victim of the offence. The question remains, though, whether the Bank of Canada is “a person to whom harm was done ... as a result of the commission of the offence”.

Courts should have little difficulty accepting that the Bank falls within the definition of victim. First, the *Criminal Code* defines person to include “bodies public, bodies corporate, societies, companies”.<sup>86</sup> The Bank should therefore qualify as a person because it is a corporate body as defined by the *Bank of Canada Act*.<sup>87</sup> Second, the Bank is a person “to whom harm was done” by a counterfeiting offence. By law the Bank has the “sole right to issue notes intended for circulation and those notes shall be a first charge on the assets of the Bank.”<sup>88</sup> One of the core responsibilities of the Bank is to issue quality bank notes that are readily accepted and secure against counterfeiting. The Bank is responsible for the design of the notes and copyrights these designs. It funds the research and development for the creation of new notes including their security features. The Bank is also responsible for educating and training the public about bank notes and their security features. All of this costs time and money. In fact, as a result of the increase in counterfeiting, all of this costs more of both. The Bank spent approximately two years and \$7 million in research and development for the new series of bank notes released in 2004.<sup>89</sup> In addition, the new \$100 bank note will cost approximately 50% more to produce (9 cents compared to 6 cents) than the previous one because of its heightened security features.<sup>90</sup> The Bank’s spending for all costs related to currency production – research and development, communications, education and training, and so forth – have more than doubled from 2001 to 2004 from \$40 million to \$85 million.<sup>91</sup> As a result, courts should have little difficulty in concluding that the Bank is “a person to whom harm was done” by counterfeiting offences.

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<sup>84</sup> S.C. 1999, c.25, s.17

<sup>85</sup> *R. v. Duffus, supra; R. v. Markowski, supra; R. v. Coombs, supra*

<sup>86</sup> *Criminal Code*, R.S., c. C-34, s.1

<sup>87</sup> *Bank of Canada Act*, R.S., c.B-2, s.1, s.3(2)

<sup>88</sup> *Ibid*, s.25(1)

<sup>89</sup> Information from Charles Spencer, Director, Strategic Leadership, Bank of Canada, January 20, 2004

<sup>90</sup> *Ibid*

<sup>91</sup> *Ibid*

### **b. The content of victim impact statements and general impact evidence**

The second issue is whether evidence about the prevalence and general impact of counterfeiting is proper content for a victim impact statement. The *Code* provides in s.722(1) that the victim statement must describe “the harm done to, or loss suffered by, the victim *arising from the commission of the offence.*” (emphasis added) Is evidence about the general impact of the offence evidence “arising from the commission of the offence”?

The language of the section can be read broadly enough to include information about the prevalence of an offence and the broader social harm caused by it. Reading the language narrowly to require that all evidence has to be from the specific offence before the court ignores the remedial intent of Parliament when passing this legislation. The *Interpretation Act* directs that:

**12.** Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.<sup>92</sup>

First, a broader reading helps further Parliament’s intent by ensuring that courts understand the wider impact of the “... loss suffered by, the victim arising from the commission of the offence.” The loss suffered by corporate victims can really only be appreciated if the court understands the impact on the corporation by the commission of the type of offence in issue. For example, in *R. v. Dunning* the offender pled guilty to driving without due care and providing false information to the Insurance Corporation of British Columbia (ICBC).<sup>93</sup> The offender had been involved in a motor vehicle accident, left the scene and then later falsely reported that his vehicle had been stolen. The Crown filed a Victim Impact Statement from the insurer that pointed out that the company lost approximately a \$100 million a year to fraud which ended up costing each policy holder an additional premium of \$150.<sup>94</sup> The court appeared to accept that this information was appropriate without analyzing whether information about the general impact of the offence was admissible as part of a victim impact statement. There has been recognition for this in other cases. I understand from a representative of the Workplace Safety and Insurance Board (WSIB) that in an Ontario case, *R. v. Goldman*, the Board submitted a victim impact statement similar to the one in *Dunning* which outlined the general costs and impact of fraud on the Board. It is difficult to see how a court could really understand the loss suffered by a victim such the ICBC or WSIB without having broader information about the prevalence and overall impact of the type of offence on the company.

Second, a broader reading also helps ensure that courts have the information that they need from victims to impose just sentences that are consistent with the fundamental principles and objectives of sentencing. Parliament’s clear intent was to make sure that

<sup>92</sup> *Interpretation Act*, R.S., c-I23, s.1

<sup>93</sup> *R. v. Dunning* [2001] B.C.J. No. 1636 (B.C. Prov. Ct.), 2001 BCPC 175  
<http://www.canlii.org/bc/cas/bcpc/2001/2001bcpc175.html>

<sup>94</sup> *Ibid*, at para. 15

victims of crime were no longer the forgotten persons in the sentencing process. One of the reasons for this change was because the impact of the offence was relevant to several principles of sentencing. As we have seen, evidence about the prevalence of the offence in the community is clearly relevant to the need to deter the offender and others from committing the same offence pursuant to s.718(b) and to promote acknowledgement by the offender of the harm done to the victim and the community by this type of offence pursuant to s.718(f). Similarly, evidence about the impact of counterfeiting crimes on the direct victim and society at large will help promote acknowledgement by the offender of the harm done to the victim and the community pursuant to s.718(f), and help the court understand the relative gravity of the offence and determine a proportionate punishment pursuant to s.718.1. Therefore, interpreting the section in this broader manner will also help further Parliament's intention that courts should have the information from victims that they need to impose just sentences consistent with the fundamental principles and objectives of sentencing.

However, some courts may interpret the provision strictly and limit the victim impact statement to evidence of the harm caused by the specific offence. In major cases, such as *R. v. Weber* which involved the manufacturing of several million dollars worth of counterfeit \$100 bills, the Bank could still present a victim impact that dealt specifically with the harm caused by the particular offence.<sup>95</sup>

In addition, it should not be overlooked that evidence relating to the prevalence and broader impact of the crime should still be admissible at common law or pursuant to s.723.

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<sup>95</sup> *R. v. Wesley Weber* (unreported, October 23, 2001, Ontario Court of Justice)