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## TAB 8

# The Six-Minute Criminal Court Judge 2020

Victim Impact Statements: The Impact of Amendments  
to the *Criminal Code* after the Enactment of the Canadian  
Victims Bill of Rights

**The Honourable Rita Maxwell**  
*Ontario Court of Justice*

January 25, 2020



# Victim Impact Statements:

The Impact of Amendments to the *Criminal Code*  
after the Enactment of the *Canadian Victims Bill of Rights*

JUSTICE RITA J. MAXWELL

ONTARIO COURT OF JUSTICE

SIX-MINUTE CRIMINAL COURT JUDGE – 2020

# Right of Participation Under the *Canadian Victims Bill of Rights*

- ▶ Section 14 of the *Canadian Victims Bill of Rights*:
  - ▶ “Every victim has the right to convey their views about decisions to be made by appropriate authorities in the criminal justice system that affects the victim’s rights under this Act and have those views considered.”
- ▶ Amendments to Section 722 of the *Criminal Code* facilitate victim participation through a flexible approach to the admissibility of victim impact statements, giving the court more discretion over the form and substance of victim input to be admitted.

# Procedural Protections for Victims under s. 722 of the *Criminal Code*

- ▶ the obligation on the court to inquire of the Crown whether reasonable steps have been taken to give the victim the opportunity to provide input: s. 722(2);
- ▶ discretion to adjourn a sentencing hearing to allow a victim to prepare a victim impact statement: s. 722(3);
- ▶ the use of supportive aids, support persons, screens, CCTV, photographs, and drawings in the presentation of victim impact statements: s. 722(5);
- ▶ the general discretion of the court to allow the statement to be presented “in any manner that the court considers appropriate”: s. 722(5).

# Who is a “Victim”? – An Expansive View Under ss. 722 and 722.2 of the Criminal Code

- ▶ S. 722(1) requires the court to consider any statement from a victim, describing the “physical or emotional harm, property damage or economic loss” **suffered by the victim as a result of the commission of the offence and the impact of the offence on the victim;**
- ▶ “Victims” include direct victims or those closely affected by the offence (for example, family members): *R. v. Duffus* (2000), 2000 CanLII 22831 (Ont. S.C.);
- ▶ S. 722.2 – Community Impact Statements – describing the loss suffered by the community (ie. a school, where the victim is a student; a religious group, where the offence is a religion-related hate crime).

# Enhancing Victim Participation – s. 722(9)

## Substance over Form

- ▶ S. 722(9):
  - ▶ **“Whether or not a statement has been prepared and filed in accordance with this section,** 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 s. 730”;
- ▶ Given the mandate of s. 722, it makes little sense to prefer form over substance in determining whether a statement is admissible: *R. v. Solorzano Sanclemente* 2019 ONCS 695 (Ont. S.C.);
  - ▶ In contrast, see *R. v. Jackson* [2002] O.J. No. 1097 (Ont. C.A.) where, under previous provisions, failure to adhere to prescribed form could render a victim impact statement inadmissible.

# Enhancing Victim Participation – s. 722(8) – Balancing Participation Rights with Offender's Rights on Sentencing

## ► S. 722(8):

- “In considering the [victim impact] statement, the court **shall take into account** the parts of the statement that it considers relevant to the determination referred to in subsection (1) and **disregard any other portion**”;
- Balances the rights of the offender by ensuring only relevant and admissible information is considered on sentencing with the rights of victims to express their views in their own words;
  - *R. v. Browne*, 2017 ONSC 5064 (Ont. S.C.) - in the interest of efficiency, victims should be allowed to read their statements in full; the court can determine, taking into consideration the submissions of counsel, what parts of the statements to disregard.

# Enhancing Victim Participation – s. 722(8) – Balancing Participation Rights with Offender's Rights on Sentencing

- ▶ Other examples of s. 722(8) similarly applied:
  - ▶ *Solorzano Sandermente*, supra, at para. 18;
  - ▶ *R. v. Adamko*, 2019 SKPC 27 (Sask. P.C.), at paras. 34-37;
  - ▶ *R. v. C.C.*, 2018 ONCJ 542 (Ont. C.J.), at para. 24;
  - ▶ *R. v. Lewis*, 2019 BCPC 114 (B.C.P.C.), at para. 21.



# Enhancing Victim Participation – s. 722(8) – Balancing Participation Rights with Offender's Rights on Sentencing

## ► Examples of irrelevant or improper content in a victim impact statement:

- Opinions or criticisms about the offender; “revenge motivation”: *R. v. Gabriel*, (1999) 1999 CanLII 15050 (Ont. S.C.), at para. 29-30; *R. v. McDonough* 2006 CanLII 18369 (Ont. S.C.), at para. 30;
- Reference to unproven allegations, or assertions of fact: *Gabriel*, supra at para. 29; *McDonough*, supra at para. 30;
- Comments addressed to the offender directly: *McDonough*, supra at para. 30;
- Recommendations about sentence: *R. v. Ward*, 2009 ONCA 777; *R. v. Bremner* (2000), 146 C.C.C. (3) 59 (B.C.C.A.);
- A “tribute” to the victim which “appeals to the court to place a value on the life of the victim, or to compensate grief through the imposition of a harsh sentence”: *R. v. Berner*, 2013 BCCA 188 (B.C.C.A.), at para. 17; *McDonough*, supra at para. 19.

# Is Crown Vetting of Victim Impact Statements Eliminated by s. 722(8) of the Criminal Code?

- ▶ NO
- ▶ Efficiency and fairness are better achieved where the Crown exercises its gate-keeping function to vet plainly improper or irrelevant comments from a victim impact statement;
- ▶ Principles set out in earlier jurisprudence (*McDonough*; *Gabriel*) that victim impact statements should not contain improper content, and the role of the Crown in assisting in the preparation and presentation of victim impact statements still apply: *Browne*, supra, at paras 9-10; *C.C.*, supra, at paras 21-22.
- ▶ May see less vetting by Crowns, who may leave it to the sentencing judge to decide on the admissibility of potentially objectionable content.

# Is Crown Vetting of Victim Impact Statements Eliminated by s. 722(8) of the *Criminal Code*?

- ▶ Other practical reasons why the Crown should review and vet statements:
  - ▶ Where the victim impact statement contains unproven statements of fact, victim can be cross-examined on his/her victim impact statement;
  - ▶ Inconsistencies can emerge between trial testimony and the content of the victim impact statement which can lead to an application to re-open a trial, or a mistrial: *R. v. Sheeler* [2014] O.J. No. 5782.

# CLOSING COMMENTS

- ▶ Under s. 722 of the *Criminal Code*, the court plays the overriding gate-keeper role to ensure the appropriate balance is struck between a victim's right to participate and protection of the offender's rights on a sentencing hearing.