REG Quest
REGULATORY OFFENCES AND COMPLIANCE
NEWSLETTER
VOLUME 4, NO. 9 – September 2011

Should s. 7 *Charter* Rights Impose Positive State Obligations in the Context of Donor Anonymity?

Case Comment on *Pratten v. British Columbia (Attorney General)* and the Interpretation of s. 7 of the *Charter*

SAHAR ZOMORODI, LL.B.,
UNIVERSITY OF KENT, ENGLAND, NCA CANDIDATE

In a recent decision, the B.C. Supreme Court considered the question of whether s. 7 of the *Charter of Rights and Freedoms* (the *Charter)*, the provision that guarantees the right to life, liberty and security of the person, should impose a positive obligation on government to constitutionally recognize the right to know one's biological origins. Although a landmark decision was reached in *Pratten v. British Columbia (Attorney General)*[1] that struck down legislation protecting donor anonymity, the case marks an exceedingly cautious approach to judicial interpretation of constitutional rights.

This paper will analyse the impact of the Supreme Court's decision in *Pratten v. British Columbia (Attorney General)*, where Madam Justice Adair ruled that s. 7 cannot be interpreted to impose on the state a positive duty to act and legislate with respect to the protection of gamete donor information. I will argue that the needs of donor inseminated offspring present a situation where a group's fundamental rights to liberty and security cannot be exercised without government intervention and that the *Pratten* case presented a clear circumstance that warranted a novel application of s. 7 to guarantee adequate living standards for donor offspring.

1 2011 CarswellBC 1231, 2011 BCSC 656 (B.C. S.C.).

continued on page 2

AUTHORS:

Mr. Justice Rick Libman, B.A., LL.B., LL.M., Ph.D.

Bernard Aron, B.A., J.D., LL.M.

John P. Allen, B.A., B.Sc., LL.B., LL.M.

IN THIS ISSUE

CARSWELL®

Continued from page 1

What is Donor Insemination and the Law on Donor Insemination in Canada?

Over the last twenty years, reproductive technologies have advanced to offer a multitude of options to couples that for reasons of infertility, heritable disease, sexual orientation, or single-status, cannot conceive children. Nevertheless, the scientific, medical, ethical, and legal issues have not fallen short of these advances and have posed significant challenges for interested parties.

In 1993, the Royal Commission on New Reproductive Technologies published a final report. The Report stipulated the legislative response to regulating inseminated reproduction and access to information that has been largely non-existent in the context of gamete donation. In Canada, the only regulation of reproductive technologies is the Processing and Distribution of Semen for Assisted Conception Regulation,[2] which came into force in 1996 under the *Food and Drugs Act*.[3] In 2000, the regulations were amended to include the Health Canada Directive – Technical Requirements for Therapeutic Donor Insemination, which set out mandatory screening of donor semen as well collection of non-identifying donor information. The Directive recommends that medical records be kept indefinitely but does not oblige practitioners to do so. The federal regulations are a public health precaution to prevent transmittable diseases in the fertilization process. They do not require biological information to be collected or retained, give donor offspring the right or access to identifying information about their donors, or make provision for delivering records relating to the identity of donors from outside Canada to any fertility clinic or government authority.

The lack of regulation on issues of privacy and access to information demonstrated a need for further measures in the legislative framework. Recognizing this need, the *Assisted Human Reproduction Act*[4] made its way through at the federal level. The Act was intended to include provisions on the establishment of a registry for donors and donor offspring and health reporting information. Sections 17 and 18 of the Act provided that the designated federal agency would maintain a personal health information registry on gamete donors for the purposes of identifying health and safety risks, and shall disclose, on request, health reporting information to donor offspring and their descendants. Disclosure of identifying donor information could be done with the donor's written consent.[5] The Act also addressed the pressing concern relating to the risk of carrying blood-relative offspring by allowing the disclosure of genetic information to any two individuals who have reason to believe that one or both were conceived by donor insemination.[6] However, before donor offspring were able to reap the benefits of the Act, the province of Quebec brought a Reference challenging the constitutional validity of ss. 8-19 (among other sections) of the federal legislation (see *Québec (Procureur général) c. Canada (Procureur général)*).[7] The Supreme Court of Canada concluded that ss. 14-18 (among other sections) were *ultra vires* the federal government and any legislative response concerning privacy and access to information was a matter for the provincial government and not Parliament to decide.

Without the relevant sections of the *Assisted Human Reproduction Act*, there is no policy developed about the disclosure of information to children conceived through donor insemination. This ruling essentially nullified the process whereby donor offspring would have the right or opportunity to learn the identity of the donor. Donor offspring are left to rely on ineffective private sector donor information registries to find information concerning their genetic history.

Pratten v. British Columbia (Attorney General)[8]

In the absence of legislation, Olivia Pratten, a 29-year-old conceived by an anonymous sperm donation, challenged the provincial legislature on its failure to protect the liberty and security of all donor offspring under s. 7 of the *Charter*. When Ms. Pratten reached the age of majority, she sought information about her biological father and genetic history through the doctor that performed the insemination on her mother and was denied due to the absence of legislation that would ensure information on gamete donors are recorded and preserved in the province of BC. Bylaws created by the College of Physicians and Surgeons of BC authorized under the *Health Professions Act*[9] permit the destruction of records six years after the last recorded entry. As a result, Ms. Pratten's doctor had destroyed the records identifying her biological father. Ms. Pratten argued that donor offspring can face delayed medical treatment, and an inability to have conditions that are inherited or genetic diagnosed and treated by a lack of information. She asserted that circumstances of medical necessity may arise where access to identifying and non-identifying records

2 SOR/96-254.
3 R.S.C. 1985, c. F-27.
4 S.C. 2004, c. 2.
5 Section 18(3) *Assisted Human Reproduction Act*, S.C. 2004, c. 2.
6 *Supra*, note 5, s. 18(4).
7 2010 CarswellQue 13213, 2010 CarswellQue 13214, 2010 SCC 61, [2010] S.C.J. No. 61, (sub nom. *Reference re Assisted Human Reproduction Act*) 410 N.R. 199, 327 D.L.R. (4th) 257, 263 C.C.C. (3d) 193 (S.C.C.).
8 *Supra*, note 1.
9 R.S.B.C 1996, c. 183.

is required to safeguard her physical and psychological well being, and that of other donor offspring.[10] As such, Ms. Pratten claimed that the lack of regulation requiring medical practitioners to obtain and preserve donor information was a violation of the right to life, liberty, and security of the person on the basis that there were potential health risks associated with not knowing one's genetic disposition.

Ms. Pratten's second argument was that the omission of donor offspring from the benefits and protections provided to adoptees under B.C.'s *Adoption Act*[11] and Adoption Regulation[12] constituted a violation of s. 15(1) of the *Charter*, the right to equal protection under the law. Ms. Pratten asserted that the distinction between adoptees and donor offspring was profoundly unfair and discriminatory especially when donor offspring experience the same need to learn about their biological parents and experience the same sense of loss and incompleteness by the lack of information as adoptees. Justice Adair concluded that the province's failure to include donor offspring in the *Adoption Act* and Adoption Regulation constituted a "violation of the rights of Ms. Pratten and donor offspring under s. 15(1) of the *Charter*".[13] The violation was not a justifiable limit under s. 1 of the *Charter*. (This portion of the claim will be excluded from our analysis in order to focus the discussion on the s. 7 positive rights claim.)

. . . and the s. 7 "Positive Rights" Claim

In essence, the *Pratten* case required the Court to consider whether s. 7 of the *Charter* could impose a positive obligation on the government to take steps to protect life, liberty and security of the person.

Traditionally, s. 7 of the *Charter* has been interpreted as restricting the state's ability to deprive individuals of their life, liberty and security of the person. This requires a claimant to first show that she was deprived of her right, and then to establish that the state caused such deprivation (through a positive act) in a manner that was not in accordance with the principles of fundamental justice.[14] Cases like *R. v. Morgentaler*,[15] *Rodriguez v. British Columbia (Attorney General)*[16] and *R. v. Parker*[17] clearly reflect the negative rights interpretation in judicial reasoning, which asserts that the purpose of s. 7 is to guard against certain kinds of *deprivations* as a result of the justice system and its administration and does not impose positive obligations on the state to ensure that each person enjoys life, liberty, and security of the person.[18] However, Pratten sought to argue that circumstances of medical necessity warrant the right to access donor identifying information and that there should be a positive obligation on the state to legislate in that regard. Her argument relied on the dissenting judgement of Madame Justice Arbour in *Gosselin c. Québec (Procureur général)* who held that in certain circumstances s. 7 does include a positive dimension. She wrote, at para. 319:

> . . . s. 7 rights include a positive dimension, such that they are not merely rights of non-interference but also what might be described as rights of "performance", then they may be violable by mere inaction or failure by the state to actively provide the conditions necessary for their fulfilment . . .

Chief Justice McLachlin, writing for the majority, was also willing to entertain the idea that

> [o]ne day s. 7 may be interpreted to include positive obligations. I leave open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances" [at paras. 82-83].

In light of the interpretation of s. 7 proposed in *Gosselin c. Québec (Procureur général)* and the arguments put forth by Ms. Pratten on

10 *Supra*, note 1 at para. 271.
11 R.S.B.C. 1996, c. 5.
12 B.C. Reg. 291/96.
13 *Supra*, note 1 at para. 269.

14 *Blencoe v. British Columbia (Human Rights Commission)*, 2000 CarswellBC 1860, 2000 CarswellBC 1861, 2000 SCC 44, REJB 2000-20288, [2000] S.C.J. No. 43, [2000] 2 S.C.R. 307, 3 C.C.E.L. (3d) 165, 38 C.H.R.R. D/153, 81 B.C.L.R. (3d) 1, 190 D.L.R. (4th) 513, [2000] 10 W.W.R. 567, 23 Admin. L.R. (3d) 175, 2000 C.L.L.C. 230-040, 260 N.R. 1, 77 C.R.R. (2d) 189, 141 B.C.A.C. 161, 231 W.A.C. 161 (S.C.C.) at para. 47.
15 1988 CarswellOnt 954, 1988 CarswellOnt 45, EYB 1988-67444, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30, 63 O.R. (2d) 281 (note), 44 D.L.R. (4th) 385, 26 O.A.C. 1, 37 C.C.C. (3d) 449, 62 C.R. (3d) 1, 31 C.R.R. 1, 82 N.R. 1 (S.C.C.).
16 1993 CarswellBC 1267, 1993 CarswellBC 228, EYB 1993-67109, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519, 82 B.C.L.R. (2d) 273, 85 C.C.C. (3d) 15, 107 D.L.R. (4th) 342, 17 C.R.R. (2d) 193, 24 C.R. (4th) 281, 158 N.R. 1, 34 B.C.A.C. 1, 56 W.A.C. 1, [1993] 7 W.W.R. 641 (S.C.C.).
17 2000 CarswellOnt 2627, [2000] O.J. No. 2787, 49 O.R. (3d) 481, 188 D.L.R. (4th) 385, 146 C.C.C. (3d) 193, 75 C.R.R. (2d) 233, 37 C.R. (5th) 97, 135 O.A.C. 1 (Ont. C.A.).
18 Reaffirmed in the majority decision in *Gosselin c. Québec (Procureur général)*, 2002 CarswellQue 2706, 2002 CarswellQue 2707, 2002 SCC 84, REJB 2002-36302, [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429, 221 D.L.R. (4th) 257, 100 C.R.R. (2d) 1, 44 C.H.R.R. D/363, 298 N.R. 1 (S.C.C.) at paras. 77 and 81.

behalf of herself and all donor offspring, Justice Adair refused to accept the positive rights application of s. 7 and held that the right to life, liberty, and security does not create positive rights, such as the right to know one's biological origins, nor does it require legislation to be created to advance such a right. She rejected the argument on the basis that (1) "the potential implications of a free-standing constitutional right to know one's biological origins are uncertain and may be enormous";[19] (2) Ontario courts have ruled against the proposition that there is a constitutionally protected right to know one's past, in the context of adoption legislation (*Infant No. 10968 v. Ontario*,[20] *Cheskes v. Ontario (Attorney General)*);[21] and (3) the conclusion that s. 15 right has been breached is sufficient to address Ms. Pratten's claim, anything further would go far beyond what's necessary to address the complaint.

> In that light, I have concluded that this case will not be the "one day" when s. 7 is interpreted to impose on the state a positive duty to act and legislate where it has not done so. I respectfully decline to adopt Madam Justice Arbour's analysis of s. 7 in *Gosselin*" [at para. 291].

Analysis

Considering Justice Adair's highly sympathetic judgement, the decision on the s. 7 *Charter* claim was a surprising outcome. Why shouldn't the right to know one's biological origins be a constitutionally protected right?

Once evidence has been accepted, as it was in *Pratten*, that donor offspring are a vulnerable group and the preservation of records are in the best interests of the child,[22] and that serious harm can be caused by cutting off a child from his or her biological roots",[23] and in particular that a legislative response is necessary but nonexistent and dependency on the private sector is inefficient,[24] there is enough evidence to support a positive interpretation of s. 7 rights. If the vast amount of evidence presented in this case was not enough to qualify as the "special circumstances" that Justice McLachlin alluded to in her majority judgement in *Gosselin*,[25] I am not sure what would. The fact is that donor inseminated offspring are in a situation where the group's fundamental rights to liberty and security cannot be exercised without government intervention. Given the lack of legislation in this area, the *Pratten* case presented a clear circumstance that warranted a novel application of s. 7 to impose positive state action to guarantee adequate living standards for donor offspring.

In my opinion, this was an exceedingly cautious approach to the advancement of rights in Canadian society. The *Charter* is grounded on the living tree doctrine, which emphasizes evolution and growth in constitutional interpretation of rights. It requires a broad and progressive approach when dealing with the recognition of rights, particularly in an area that has been left largely unregulated for some time. Donor insemination is a new reproductive technology that creates human beings, not artificial objects. These human beings have basic needs essential to their physical and psychological well-being. The government must bear the burden and serious responsibility to consider the best interests of children who do not have the choice to speak for themselves when decisions are being made. Thus far, decisions have been made that protect the interests of secrecy and quantity of supply in the reproductive market at the expense of considerable health risks to donor offspring and their children. Sufficient evidence is now available to illustrate the needs of gamete donor offspring and the importance of access to biological information to meet those needs. As such, the state has a duty to protect the best interests of children and the right to life by virtue of the *Canadian Charter of Rights and Freedoms* and the UN Convention on the Rights of the Child, which protect the dignity and worth of the human being. Any advances in the human reproductive scheme demand social and ethical responsibility through state action.

Although the decision in *Pratten v. British Columbia (Attorney General)* is a landmark decision and a huge step forward in the advancement of donor offspring rights, the recognition of the right to biological information under s. 7 of the *Charter* is equally significant to the development of human rights, particularly in a society where the institution of family has changed so drastically over the last two decades. Furthermore, if the protection of privacy of personal information is a legislative mandate[26] and a recognized constitutional right implicit in s. 7 and s. 8 of the

19 *Supra*, note 1 at para. 290.
20 2006 CarswellOnt 3640, 81 O.R. (3d) 172, (sub nom. *R. v. Marchand*) 142 C.R.R. (2d) 25 (Ont. S.C.J.), affirmed 2007 CarswellOnt 7403, 2007 ONCA 787, [2007] O.J. No. 4440, 88 O.R. (3d) 600, 45 R.F.L. (6th) 260, 163 C.R.R. (2d) 336, 288 D.L.R. (4th) 762 (Ont. C.A.), leave to appeal refused 2008 CarswellOnt 2359, 2008 CarswellOnt 2360, 166 C.R.R. (2d) 375 (note), (sub nom. *Infant No. 10968 v. Children's Aid Society of Toronto*) 386 N.R. 400 (note), 255 O.A.C. 391 (note) (S.C.C.).
21 2007 CarswellOnt 5849, [2007] O.J. No. 3515, 87 O.R. (3d) 581, 159 C.R.R. (2d) 191, 288 D.L.R. (4th) 449, 42 R.F.L. (6th) 53 (Ont. S.C.J.).
22 *Supra*, note 1 at para. 208.
23 *Supra*, note 1 at para. 207.
24 *Supra*, note 1 at paras. 209-211.
25 *Supra*, note 18 at paras. 82-83.
26 See *Privacy Act*, R.S.C. 1985, c. P-21 and the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 (PIPEDA).

Charter then so should the protection of personal autonomy and health of donor offspring. Recognition of the rights of children demands positive action by the state, particularly in the context of donor inseminated offspring, to offer basic protection for life, liberty and security of the person.

Sources

- Government of Canada Report, *Reproductive Technologies: Surrogacy, and Egg and Sperm Donation, 2001*, http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/BP/prb0035-e.htm
- Joseph Marcus, *Pratten v. British Columbia (Attorney General): B.C. Supreme Court Declares Sperm Donor Anonymity Unconstitutional*, http://www.thecourt.ca/2011/06/04/pratten-v-british-columbia-attorney-general-b-c-supreme-court-declares-sperm-donor-anonymity-unconstitutional/
- MEMORANDUM OF ARGUMENT OF THE APPLICANT, OLIVIA PRATTEN, No. S087449 Vancouver Registry, http://www.equalityrightscentral.com/papers_docs/20101116102644/Pratten_Plaintiff%20Memorandum%20of%20Argument.pdf
- Monique Shebbeare, *Advocating a mechanism for sperm donors to relinquish legal parenthood*, http://www.bcheritagelaw.com/blog/estate-planning/advocating-a-mechanism-for-sperm-donors-to-relinquish-legal-parenthood/
- Monique Shebbeare, *BC Court Declares an end to Anonymous Sperm Donation*, http://www.bcheritagelaw.com/blog/adoption/bc-court-declares-an-end-to-anonymous-sperm-donation/
- Nola M. Ries, *Section 7 of the Charter: a constitutional right to health care? Don't hold your breath*, http://findarticles.com/p/articles/mi_hb1366/is_1_12/ai_n29057517/

Provincial Offences and Victim Impact Statements

JUSTICE RICK LIBMAN

Part of the sentencing reform recommendations recently proposed by the Law Commission of Ontario in its Interim Report[1] on Modernizing the *Provincial Offences Act* of Ontario[2] concerns providing for the reception of victim impact statements on sentencing proceedings for provincial offences. This contrasts with the procedure currently in use under the *Criminal Code*[3] where there are detailed provisions that permit the use of victim impact statements in sentencing proceedings for criminal offences.

The rationale for using victim impact statements on sentencing for provincial offences proceedings was described by the Law Commission as follows:

> A victim impact statement can be a valuable tool in POA proceedings. In addition to giving victims a voice in the proceedings, such statements would provide the court with necessary information to permit it to fashion appropriate compensatory or rehabilitative sentences.[4]

In this article, then, I will examine the case for making victim impact statements available for provincial offences. It should be noted at the outset that while victim impact statements are not a sentencing tool or disposition themselves, they do serve to impact the court's sentence. Although the breach of the regulatory standard may cause harm, or potential for harm, to a person or the community, there is no formalized mechanism under the Ontario *Provincial Offences Act*[5] to provide victims of regulatory offences with the opportunity to convey such information to courts, thereby depriving the judge or justice of the peace at the time of sentencing of hearing how the commission of the regulatory offence has impacted the party most directly impacted by the regulated offender's conduct. This contrasts to the *Criminal Code*[6] where there are detailed provisions which allow the victim of a crime[7] to file before the court a victim impact statement, in prescribed written form,[8] "describing the harm done to, or loss suffered by, the victim arising from the commission of the offence."[9] Such a victim may also read his/her statement to the court;[10] the court, in turn, has the obligation to inquire of the prosecutor, prior to sentencing, whether the victim has had the opportunity

1 Law Commission of Ontario, *Modernizing the Provincial Offences Act: A New Framework and Other Reforms* (Interim Report, March 2011) (Toronto: Law Commission of Ontario, 2011).
2 *Provincial Offences Act*, R.S.O. 1990, c. P.33.
3 *Criminal Code*, R.S.C. 1985, c. C-46.
4 Above, note 1 at 132.
5 *Provincial Offences Act*, note 2.
6 *Criminal Code*, note 3.
7 The *Criminal Code*, note 3, definition of "victim" includes "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). Where no such person is capable of making a victim impact statement due to, for example, death or illness, the victim's spouse, common-law partner, relative or anyone responsible for the care or support of that person, or any dependent of that person, may provide a victim impact statement: s. 722(4)(b).
8 *Criminal Code*, note 3, s. 722(2).
9 *Criminal Code*, note 3, s. 722(1)
10 *Criminal Code*, note 3, s. 722(2.1).

to prepare a victim impact statement,[11] and may adjourn the proceedings to allow this to be done.[12]

The victim impact statement provisions of the *Code* reflect the objective that courts should impose sentences that "provide reparations for harm done to victims or to the community."[13] Accordingly, victims play a "significant role" in the sentencing process.[14] In fact, a number of purposes are served by victim impact statements in the sentencing process: courts receive "relevant evidence" concerning the effect or impact of the crime from the person able to provide direct evidence on point; resort to the "best evidence on the subject of victim loss", namely, the victim himself/herself, assures an accurate measure of any necessary compensation and brings home to the offender the consequences of his/her behaviour; victim participation in the trial process "serves to improve the victim's perception of the legitimacy" of the process; and information respecting the "individuality of the victim" promotes an understanding of the consequences of the crime in the context of the personal circumstances of the victim.[15] In short, without this type of information "a Court would be unable on its own to adequately understand the harm done and the loss suffered by a victim."[16] This, in turn, helps the court "to understand the circumstances and consequences of the crime more fully, and to apply the purposes and principles of sentencing in a more textured context."[17]

A number of decisions support the practice of receiving victim impact statements into evidence on sentencing with respect to regulatory offences. However, this is up to the individual judge or justice of the peace. Hence, while victim impact statements have been adduced in evidence in provincial offences proceedings in the Ontario courts,[18] as well as other jurisdictions,[19] there is no automatic right to do so. As a result, the authority of courts to hear such evidence remains unclear. Equally uncertain is the manner that such evidence should take when it is tendered, given that there are no prescribed victim impact statement forms, as is the case under the *Code*, and whether the victim has the right to personally address the court, or someone else, if the victim is unavailable to do so. It may also be unclear whether a person would be considered a "victim," and thus entitled to participate in the sentencing process, where he/she does not suffer harm immediately or directly, but is nevertheless impacted by the regulated party's conduct, as might occur in a pollution case. Indeed, in environmental cases where the community is put at risk, it may be that there is no one who does not consider that he/she qualifies as a "victim". The fact that some classes of victims of regulatory offences may be easier to identify than others, however, is no reason to preclude the court from hearing such evidence on sentencing. These are just a few of the uncertainties that illuminate the victim impact statement process, at present, in relation to provincial offences and other public welfare statutes.

One of the anomalies that results from this omission in provincial offences legislation is that for victims of both criminal and regulatory offences, which are the subject of the same or related transactions, such as stealing a car contrary to the *Criminal Code*,[20] and causing an accident while driving it away in excess of the speed limit contrary to the *Highway Traffic Act,*[21] the victim would be permitted to describe to the sentencing court, as of right, the impact of the offence on him/her only for the former offence, but not the latter. The same result is produced where the defendant is charged with a *Code* offence, such as dangerous driving,[22] but is permitted to plead guilty to a provincial offence, such as careless driving:[23] the victim is entitled to address the court in the former instance only, but not the latter.

11 *Criminal Code*, note 3, s. 722.2(1).
12 *Criminal Code*, note 3, s. 722.2(2).
13 *Criminal Code*, note 3, s. 718(e).
14 Clayton C. Ruby, *Sentencing,* 7th ed. (Markham: LexisNexis Canada Ltd., 2008) at 633. See further Joan Barrett, *Balancing Charter Interests. Victims' Rights and Third Party Remedies* (Toronto: Carswell, 2001) at 4-22 and 4-23.
15 *R. v. Gabriel*, 1999 CarswellOnt 2105, [1999] O.J. No. 2579, 137 C.C.C. (3d) 1, 26 C.R. (5th) 364 (Ont. S.C.J.) at para. 19.
16 *R. v. Neely*, 2003 CarswellOnt 7648, [2003] O.J. No. 1977 (Ont. S.C.J.) at para. 191.
17 *R. v. Taylor*, 2004 CarswellOnt 3380, [2004] O.J. No. 3439, 189 O.A.C. 388, 189 C.C.C. (3d) 495 (Ont. C.A.) at para. 42.
18 See, for example, *R. v. Hutchings*, 2004 CarswellOnt 3907, 2004 ONCJ 200, [2004] O.J. No. 3950 (Ont. C.J.); *R. v. Trigiani* (January 31, 2000), Libman J., [2000] O.J. No. 5872 (Ont. C.J.) at para. 16, affirmed 2001 CarswellOnt 4233, [2001] O.J. No. 6111, 18 M.V.R. (4th) 222 (Ont. S.C.J.); *R. v. Messercola*, 2005 CarswellOnt 148, 2005 ONCJ 6, [2005] O.J. No. 126, 16 M.V.R. (5th) 82 (Ont. C.J.); *R. v. Di Franco*, 2008 CarswellOnt 9677, [2008] O.J. No. 879 (Ont. S.C.J.). For a recent case where there were objections to the admissibility of portions of the victim impact statements, see *R. v. Long Lake Forest Products Inc.*, 2009 CarswellOnt 3054, 2009 ONCJ 241, [2009] O.J. No. 2193 (Ont. C.J.).
19 *R. v. Robinson*, 2008 CarswellBC 1854, 2008 BCSC 1195, [2008] B.C.J. No. 1691 (B.C. S.C.).
20 *Criminal Code*, note 3, s. 335.
21 R.S.O. 1990, c. H.8, s. 128.
22 *Criminal Code*, note 3, s. 249.
23 *Highway Traffic Act,* note 21, s. 130.

The enactment of victim impact statement provisions under the *Provincial Offences Act* would thus allow victims of provincial offences to play a greater role in the sentencing process, while ensuring that courts receive information as to the impact of the offence on those most directly affected. This furthers the court's ability to address the issue of remedial measures as well as rehabilitation of the offender, and the other sentencing principles, deterrence and denunciation. Indeed, a statement of sentencing principles and purposes for regulatory offences that accords priority to remediation undertaken by the regulated party would doubtlessly be enhanced by the nature and quality of information furnished by victim impact statements.

Post-*Ovided* . . . the Transcript Saga Continues

VARTAN HS MANOUKIAN,
LICENSED PARALEGAL WITH THE FIRM OF SOLID LINE TRAFFIC DEFENCE

Appeals play an integral role in the administration of justice, involving not only criminal trials but also quasi-criminal or regulatory offences proceedings.[1] Under the *Provincial Offences Act (POA),* transcripts are required for appeals commenced under both Part I[2] and Part III[3] proceedings. This article will discuss the issue of obtaining transcripts of trial proceedings and the jurisprudence concerning inaccurate transcripts, lengthy delays in obtaining transcripts, missing court documents or gaps in the trial record.

Transcripts required in the adjudication of appeals and/or *Charter* applications are often the "forgotten hero". As Hill J. stated in *R. v. Hannemann*,[4] "there cannot be a meaningful right of appeal without an accurate transcript."

In *R. v. Byers*,[5] the defence sought a rehearing, as a portion of the evidence of the Crown forensic psychologist from a previous proceeding had been accidentally erased (at para. 2).The Crown argued that the hearing ought to proceed with the gap in the transcript, remedied by the production and sharing of the Crown's notes, court reporter's log notes, and the Judge's notes to all parties (at para. 9). The court referenced *R. v. Hayes*[6] for the proposition that a new trial need not be ordered for every gap in a transcript and that as a general rule there must be a serious possibility that there was an error in the missing portion of the transcript, or that the omission deprived the Appellant of a ground of appeal. Di Tomaso J. was (a) not persuaded that a miscarriage of justice would occur if the Dangerous Offender hearing proceeded (at para. 26); and (b) of the view that the court reporter's log and Crown exhibits, together with his notes, formed a proper and adequate summary of Dr. Seto's evidence available for use in the proceedings by the court and all parties, and for further use by any other court reviewing the proceeding (at para. 27).

In *R. v. Grey*,[7] the accused, an unrepresented person, brought a pre-trial motion to (a) prohibit the Crown from using Quicklaw reports of prior rulings in his case; (b) for prohibiting Durno J. from any future matters involving the accused; (c) for an inquest into missing tapes and transcripts from the accused's motions; and (d) for permission to wear a baseball hat in court.

On the issue of the Quicklaw report, C. Hill J. ruled that the relief sought is unavailable as the applicant did not serve notice on the third party respondent Quicklaw, nor did he file any evidence in support of the application.[8] As for the *certiorari* application in aid of prohibition, it was Hill J.'s view that the extraordinary remedy does not lie against a justice of the superior court of criminal jurisdiction and that the accused could ask Durno J. to recuse himself from case managing the criminal indictment matters, should he reasonably believe an appropriate basis exists for doing so (at para. 5). In the absence of correspondence, transcript orders or affidavit material, the Applicant's demand for an "inquest" into an issue involving tapes and transcripts was not allowed (at para. 6). As to the accused's application to wear an inoffensive headdress to not feel "naked" and to give him confidence in acting for himself without legal assistance, Hill J. left it to the trial judge to decide whether some exception exists from the convention of removal of a hat while in court, a show of respect for the institution of the court (at para. 7). However, Hill J. made an Order for release, on

1 *R. v. Ovided*, 2008 CarswellOnt 4181, 2008 ONCJ 317, [2008] O.J. No. 2780, 91 O.R. (3d) 593, 174 C.R.R. (2d) 189 (Ont. C.J.).
2 O. Reg. 722/94, s. 9.
3 O. Reg. 723/94, s. 8.
4 2001 CarswellOnt 671, [2001] O.J. No. 839, [2001] O.T.C. 162 (Ont. S.C.J.).
5 2010 CarswellOnt 9712, [2010] O.J. No. 5487 (Ont. S.C.J.).
6 1989 CarswellNS 18, 1989 CarswellNS 387, EYB 1989-67393, [1989] S.C.J. No. 1, [1989] 1 S.C.R. 44, 89 N.S.R. (2d) 286, 89 N.R. 138, 48 C.C.C. (3d) 161, 68 C.R. (3d) 245, 227 A.P.R. 286 (S.C.C.).
7 2005 CarswellOnt 722, [2005] O.J. No. 715 (Ont. S.C.J.).
8 The accused believed that the Quicklaw judgments in previous rulings were not an accurate account of what the judge said (at para. 4).

conditions, of a copy of a tape-recording of the proceedings of a previous proceeding (at para. 6).

In *R. v. P. (J.)*,[9] the Crown appealed from an order staying charges against J.P. in connection with alleged sexual offences perpetrated against his spouse's daughter. The basis for the stay was that the respondent had been deprived of his right under s. 7 of the *Charter* to make full answer and defence, due to the loss of a portion of the complainant's testimony from the preliminary inquiry (at para. 2). The loss of a portion of the complainant's evidence occurred due to an unexpected and unforeseeable defect in one of the tapes used to record the evidence from the preliminary inquiry. There was no suggestion that the missing tape was deliberately destroyed or tampered with or altered in any fashion, nor that the defect in question was part of a larger systemic problem that the responsible ministry was aware of but chose to ignore (at para. 4). In *R. v. La*,[10] the Supreme Court of Canada stated that where the Crown has met its duty of explaining the circumstances of the loss of any missing evidence, in order to make out a breach of s. 7 on the ground of lost evidence, "the accused must establish actual prejudice to his or her right to make full answer and defence" (at paras. 24 and 25). On appeal, the court held that the trial judge erred both in his analysis and conclusion in that he made no mention of *R. v. La*, but rather applied the principles set forth in *R. v. Carosella*.[11] In *Carosella*, the missing documents had been deliberately destroyed by the Sexual Assault Crisis Centre as a matter of policy to avoid having to produce them to accused persons. In allowing the Crown appeal, the Court of Appeal for Ontario held that the loss of the missing transcript could not reasonably be attributed to "unacceptable negligence" on the part of the Crown, who had provided a satisfactory explanation for its loss[12] (at para. 5).

In *R. v. Sheridan*,[13] the Crown appealed an Order by a judge sitting on a *POA* appeal who allowed the Crown appeal and directed that a new trial be held. It was the unchallenged submission of the Crown at the *POA* appeal that (a) the transcripts of the evidence of the two Crown witnesses and the reasons for judgment of the presiding justice of the peace had been lost and could not be replaced (at para. 8); and (b) at trial there was some evidence upon which the trial judge could have found that the Appellant was the person who had committed the offence (at para. 5). The Court of Appeal for Ontario held that since the important missing information could not be replaced, the Provincial Court judge was entitled to hear the appeal as a *trial de novo* in the appeal court (at para. 8) and that he erred in ordering a new trial, since this can only be ordered after an appeal has been heard and decided on the merits of a complete record before him, which he did not have (at para. 9).

In *Smith v. Canada (Customs & Revenue Agency)*,[14] the plaintiff Smith brought a civil action against the defendants based on wrongful detention and wrongful search upon arrival from Jamaica at the Toronto airport, where he had been arrested for smuggling narcotics. On appeal it emerged that a full transcript could not be prepared (at para. 9), as the tapes from certain trial dates were inadvertently erased during the process of copying them to create a second backup set (at para. 9). One of the grounds of appeal raised by the plaintiff was that the trial judge erred by failing to consider the plaintiff's submissions on *Charter* violations (at para. 7). Counsel for the plaintiff asserted that he did make such an argument before the trial judge, and that there were other lawyers in the courtroom when he made these submissions before the trial judge. Counsel for the defendant asserted that no request was made for the trial judge to deal with *Charter* damages as a separate cause of action. On appeal, Stinson J. ruled that the plaintiff indeed advanced *Charter* arguments at trial and directed that the plaintiff include in the revised appeal book and compendium an affidavit from a solicitor who was present in the court at the relevant time, to confirm that submissions were made to the trial judge concerning a s. 24 damages remedy.

In *R. v. Ovided*,[15] Libman J. dealt with the issue of the delay of the production of trial transcripts for use on appeals and how it engaged s. 7 of the *Charter*.[16] In *Ovided*, Libman J. held that the inordinate delays on the part of Court Support Services for the City of Toronto in the preparation of trial transcripts, and its cavalier attitude evidencing a complete lack of interest in facilitating the Appellants' right to a timely disposition of their appeals,

9 2009 CarswellOnt 7510, 2009 ONCA 850, [2009] O.J. No. 5169, 256 O.A.C. 242 (Ont. C.A.).
10 1997 CarswellAlta 490, 1997 CarswellAlta 491, [1997] S.C.J. No. 30, [1997] 2 S.C.R. 680, 200 A.R. 81, 44 C.R.R. (2d) 262, 8 C.R. (5th) 155, 148 D.L.R. (4th) 608, 146 W.A.C. 81, 213 N.R. 1, 116 C.C.C. (3d) 97, [1997] 8 W.W.R. 1, 51 Alta. L.R. (3d) 181 (S.C.C.).
11 1997 CarswellOnt 85, 1997 CarswellOnt 86, [1997] S.C.J. No. 12, [1997] 1 S.C.R. 80, 31 O.R. (3d) 575 (headnote only), 2 B.H.R.C. 23, 112 C.C.C. (3d) 289, 98 O.A.C. 81, 4 C.R. (5th) 139, 142 D.L.R. (4th) 595, 207 N.R. 321, 41 C.R.R. (2d) 189 (S.C.C.).
12 *Supra*, note 10, paras. 24 and 25.
13 1992 CarswellOnt 3120, [1992] O.J. No. 447 (Ont. C.A.), leave to appeal refused (1992), 143 N.R. 392 (note), 59 O.A.C. 38 (note) (S.C.C.).
14 2005 CarswellOnt 1765, [2005] O.J. No. 1566 (Ont. Div. Ct.).
15 *Supra*, note 1.
16 Section 7 of the *Charter* states: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

such as the repeated refusals to answer any queries by the parties or the appeal court as to the status of the transcripts, constituted a "shocking aberration in our court reporting system" (at para. 75). Libman J. concluded that "this is one of those rare cases where the community's sense of fair play and decency has been violated." The proceedings had become "oppressive or vexatious", and constituted a violation of the Appellants' s. 7 *Charter* rights to fundamental justice. As a result, Libman J. ordered a stay of the proceedings in each of the appeal cases (at para. 85). After noting that costs against the prosecution in a provincial offences prosecution is an "exceptional tool", reserved for cases which involve "a marked and unacceptable departure from reasonable prosecution standards" (at para. 88), Libman J. awarded costs against the Crown so as to express the court's disapproval of these shocking periods of delay, which have an obvious detrimental effect on the administration of justice (at para. 92).

In *R. v. Sameluk*,[17] a commercial fisherman was charged with three counts of over-fishing contrary to s. 36(2) of the Ontario Fishery Regulations, made pursuant to the *Fisheries Act*, R.S.C. 1985, c. F-14, which related to activities on the 3rd and 4th of December, 2004. The trial which was scheduled to take place over five separate dates concluded almost three years after the offence dates.[18] On June 24, 2008, almost three and one-half years after the offence dates, the Appellant was convicted on the two counts of over-fishing and fined a total of $4,000. The third charge was withdrawn at the request of the Crown. The Appellant was also prohibited from engaging in any further commercial fishing activity.

The defendant filed a Notice of appeal one day prior to the expiry of the statutory 30 days time to file an appeal. Seven years after the offence dates and almost two years after the setting of the time and place for the hearing of the appeal, the Appellant brought a motion for a stay of proceedings with costs alleging a violation of his s. 7 *Charter* rights. The Appellant relied on such cases as *R. v. Chaulk* [19] and *R. v. Ovided, supra*, for a claim for a stay of proceedings. In the alternative, the Appellant asked that the matter be remitted to the appeal court for a new trial.[20] The basis for the motion was the alleged mismanagement of the court record by the provincial offences office of the City of Thunder Bay (at para. 3) and missing transcripts. The Crown's position was that there was sufficient record for the appeal court to hear the appeal and that much of the delay for the hearing of the appeal was occasioned by the Appellant. The Crown also took the position that there was no basis for the request for a stay of proceedings or to order a new trial, although if one was ordered it should be heard by the Appeal court (at para. 4).

On appeal, McKay J. summarized the following as contributing to the delay in the hearing of the appeal: motions by the Appellant to adjourn the proceedings; adjournment to investigate missing court documents related to the appeal by the defence; time to listen to the tapes of proceedings, where it was previously stated that the tape recordings were jeopardised; new documents surfacing; failure to order a transcript in a timely manner by the Appellant in one instance; the unavailability of transcripts for two days of trial; an upheaval in the office and subsequent time consuming reviews of the trust accounts counsel of the Appellant; and a consent adjournment due to a death in family of the Appellant's counsel. At one point, transcripts were expedited. When the tapes from November 29 and 30 were inaudible, they were sent to an outside agency to determine whether they could be salvaged.

It is also of interest that on one occasion during the appeal proceedings the Crown brought a motion to prevent Mr. Thatcher, the Appellant's counsel, from acting as counsel on the motion as he had appeared as a witness at trial. Mr. Thatcher took the position that counsel for the Crown, Mr. Dunsmuir, could not appear as counsel on the motion or the appeal, as another lawyer from the same office, Mr. Kappos, had filed affidavit evidence on the motion. McKay J. was of the view that the application for a stay was an interlocutory proceeding and that the legal partner of counsel for the Appellant would not be prohibited from acting as counsel on the application for stay, but that it would not be appropriate for him to act as counsel on the appeal, since he appeared as a witness at the trial.

The court found that the transcripts for two days of trial which could not be reproduced on appeal related to the trial court making a ruling that the trial on the merits would be conducted first, following which the application for stay would be heard. McKay J. stated that the relevant question was whether "the respondent is prejudiced on the appeal because of the missing transcript," and that the test was whether or not any missing portion of a transcript "has any real impact on the court's ability to hear the appeal in a fair and effective manner, which allows the Appellant to argue all available grounds of appeal." McKay J. stated that the

17 2011 CarswellOnt 3383, 2011 ONCJ 259, [2011] O.J. No. 2237 (Ont. C.J.).

18 Under s. 82 of the *Fisheries Act*, proceedings may be instituted at any time within but not later than two years after the time when the Minister becomes aware of the subject-matter of the proceedings.

19 1997 CarswellOnt 6123, [1997] O.J. No. 6281 (Ont. Prov. Div.).

20 Section 127(1) of the *POA* provides for a new trial in certain instances where the court record is incomplete (at para. 21).

Appellant had failed to link the two day proceedings for which no transcript was available (at para. 26) to a ground of appeal.

McKay J. found that the evidence on the motion to stay did not point to evidence of improper conduct by the City of Thunder Bay, with respect to the failure of the tapes to function properly (in respect to the missing transcripts). In dismissing the motion to stay, the primary claim by the Appellant, McKay J. held that significant portions of the delay were attributable to the Appellant and that the overall delay did not affect the fairness of the appeal. McKay J. also concluded that the trial clerk did not fail to carry out the duties imposed by s. 115 of the *Provincial Offences Act*[21] and forwarded all documents filed as part of the court record in a timely fashion and that any missing documents could simply be re-filed with the appeal court, if required (at para. 29).

Conclusion

A stay of proceedings is only available as a remedy in exceptional cases, where it is clear that the conduct of enforcement officers or the Crown is so flagrant and shocking as to constitute the abuse of the court's process, such that compelling an accused to stand trial would violate the fundamental principles of justice underlying the community's sense of fair play and decency or where proceedings would be oppressive and vexatious.[22]

Ovided does not stand for the proposition that every transcript related issue will result in a stay of the proceedings or costs awarded against the Crown. Furthermore, a cost award against a provincial offences prosecution is an exceptional tool, reserved for cases which involve a marked and unacceptable departure from reasonable prosecution standards.

A gap in transcription of evidence could be potentially remedied by an agreed summary of the evidence prepared by counsel, with the assistance of notes taken by the court, the court reporter's log notes, and notes taken by counsel. On appeal, the notes of the trial justice could be provided to the court in place of an unavailable transcript.

Ultimately, in order to establish a breach of right to make full answer and defence under s. 7 of the *Charter* as a result of inaccurate transcripts, missing court documents or gaps in the trial record, the applicant has to more than show that the lost transcript was likely relevant and material or logically probative to issues at trial. The respondent must establish actual prejudice to his or her right to make full answer and defence.

21 115. Transmittal of material — Where a notice of appeal has been filed, the clerk or local register of the appeal court shall notify the clerk of the trial court of the appeal and, upon receipt of the notification, the clerk of the trial court shall transmit the order appealed from and transmit or transfer custody of all other material in his or her possession or control relevant to the proceeding to the clerk or local registrar of the appeal court to be kept with the records of the appeal court.

22 *R. v. Power*, 1994 CarswellNfld 9, 1994 CarswellNfld 278, EYB 1994-80059, [1994] S.C.J. No. 29, [1994] 1 S.C.R. 601, 117 Nfld. & P.E.I.R. 269, 2 M.V.R. (3d) 161, 89 C.C.C. (3d) 1, 365 A.P.R. 269, 165 N.R. 241, 29 C.R. (4th) 1 (S.C.C.).

CARSWELL®

One Corporate Plaza, 2075 Kennedy Road, Scarborough, Ontario M1T 3V4
Tel: (416) 609-3800 from Toronto
1-800-387-5164 from elsewhere in Canada/U.S.
Internet: http://www.carswell.com
E-mail: www.carswell.com/email
Monday through Friday, 8:30 a.m. to 5:30 p.m.

Content Editor: Rajbir Sandhu
Product Development Manager: Ken Murphy