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The Sexual Abuse of Children: “Spirit Murdering”

© Diana Parsons

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in partial fulfilment of the requirements
for the Master of Laws (LL.M.)**

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ABSTRACT

This thesis compares and contrasts the current legal protections provided to sexually abused, non-Aboriginal children with that afforded to the Aboriginal children of Canada. In Part I, the main findings and recommendations of the Badgley Committee and the federal government's subsequent enactment of Bill C-15 are examined. In Part II, the inequities which Aboriginal people have suffered as a result of the imposed circuit court system are discussed. As background to a discussion of alternative Aboriginal justice systems, a critique is provided on the case of *R. v. Moses*, [1992] 3 C.N.L.R 116 in which the first sentencing circle was used. A description and critical analysis of various Aboriginal justice projects across Canada are provided. The author has made recommendations to revise the rules of evidence and procedure regarding child sexual abuse victims and to provide protection to women and children living in Aboriginal communities.

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PART I
JUSTICE IN THE SOUTH

1

INTRODUCTION

I. Purpose

The purpose of this thesis is to compare and contrast the current legal protections provided to sexually abused, non-Aboriginal children with that afforded to the Aboriginal children of Canada. The mainstream criminal justice system and alternative Aboriginal systems of justice fail in providing adequate protection to sexually abused children. As the mainstream criminal justice system continues to subject children to the ordeal of testifying and cross-examination, alternative Aboriginal systems of justice are diverting sex offenders back into the community. These systems of justice are ineffective in stopping child sexual abuse.

The incidence and prevalence of child sexual abuse in Canada has been well researched and documented. In 1984, the Badgley Committee reported that one in two females and one in three males are sexually victimized as children or youths. The Badgley Committee did not, however, specifically focus its investigation on the incidence and prevalence of child sexual abuse in First Nations communities. To date, there are no conclusive studies which focus on the sexual abuse of Aboriginal children in Canada. According to a 1987 report by the Child Protection Centre of Winnipeg, child sexual abuse on Manitoba reserves has reached epidemic proportions and as more Aboriginal victims report child sexual abuse, these findings are recognized as reflective of most First Nation communities across Canada.

The sexual abuse of children still occurs at alarming rates in Canada. Children of all ages and cultures and in every socio-economic level are sexually abused. One only needs to be reminded of a few recent cases in which sexual violence was committed against children to realize both the prevalence and seriousness of these offences. For example, a two-month old infant required reconstructive surgery after being sexually abused by her father; numerous children in Prescott, Ontario were sexually abused by their fathers, aunts, uncles and neighbours over a number of years; many Aboriginal children suffered from sexual abuse in residential schools; numerous children were sexually abused in the Mount Cashel orphanage; Dr. Fujibayashi, a well-respected dentist in Nelson, B.C., was awarded the Citizen of the Year Award one year before he was charged and convicted of sexually molesting over 50 of his young patients in the dentist chair; Elly Danica, an incest survivor, gives her personal account of the sexual abuse she

suffered at the hands of her father, and others, including a doctor, a lawyer and a judge, in the 1988 book entitled Don't: A Woman's Word; and most recently, it has come to the public's attention that coaches are committing sexual offences against young, perspective, NHL hockey players.

Yet, in spite of the findings reported by the Badgley Committee, the Canadian public continues to deny the seriousness of the sexual offences committed against children and responds to sexually abused children with disbelief. Children are suspected of lying and fabricating stories of sexual abuse; these conventional assumptions are largely unfounded, but they have persevered over the years. Therefore, in its endeavour to determine the truth, the Canadian criminal justice system subjects sexually abused children to the ordeal of testifying and to the unnerving experience of being cross-examined by defence counsel; it apparently believes that if a child can endure the pain then, and only then, is one considered to be telling the truth. As First Nations communities begin their healing process from the abuses suffered in residential schools and from the high rates of incarceration, in particular, and the impact of colonialism, in general, alternative Aboriginal justice systems endeavour to keep Aboriginal offenders within the community at the expense of child sexual abuse victims, their safety and the right to heal.

Society must respond vigorously to the sexual abuse of children - it needs to be determined why sexual abuse occurs and methods of preventing it and stopping it need to be found. However, until it is completely eradicated, a means must be found of dealing with it that does not re-victimize the victim. This paper is intended to explore the present

legal status of child sexual abuse victims as a preliminary discussion to seeking a legal approach which respects the special needs of child victims and the fundamental rights of the accused.

II. Thesis Content

As background to the consideration of child sexual abuse, Chapter 2 provides the main findings of the Badgley Committee concerning child sexual abuse victims and offenders and the state of the law in regards to the prosecution of child sexual assault offences.

In Chapter 3, I will discuss the recommendations of the Badgley Committee and the response of the federal government, namely the subsequent enactment of Bill C-15, which extends the Criminal Code definitions of sexual offences and revises the rules of evidence and procedure in sexual abuse cases involving child witnesses.

Chapter 4 provides a description of the circuit court system in northern Canada. I will also discuss the inequities which Aboriginal people have suffered as a result of the imposition of this system. In Chapter 5, I will critique the case of *R. v. Moses*¹ which has laid the foundation for justice projects that are currently being piloted in Aboriginal communities. I do not believe that sentencing circles should be processing sexual assault offences. Chapter 6 is a description and critical analysis of the various Aboriginal justice projects which are currently being employed within Aboriginal communities across Canada. In the context of this critique, I will argue that Aboriginal sex offenders must be

¹ *R. v. Moses*, [1992] 3 C.N.L.R. 116.

removed from the community until they receive treatment.

2

The Badgley Report

I. Introduction

As background to the consideration of child sexual abuse, this chapter provides the main findings of the Badgley Committee's investigation of sexual offences committed against children in Canada and its recommendations to improve the laws for the protection of children and youths.

II. The Badgley Committee

The incidence and prevalence of child sexual abuse within the general population of Canada has been well researched and documented. In 1981, the Minister of Justice,

the Attorney General of Canada and the Minister of National Health and Welfare established the Committee on Sexual Offences Against Children and Youths (the Badgley Committee), which was chaired by Robin F. Badgley.¹ During its two-year mandate, the Badgley Committee was instructed to investigate the incidence and prevalence of child sexual abuse in Canada and to make recommendations to improve the laws for the protection of children and youths from sexual abuse and exploitation. Albeit the Badgley Report was submitted fourteen years ago, in 1984, it is still known as one of the most thorough and reliable studies of child sexual abuse in Canada.

A. The Incidence and Prevalence of Child Sexual Abuse

1. The National Population Survey

The Badgley Committee undertook a National Population Survey to determine the occurrence of sexual offences committed against children in Canada. A representative sample size of 2135 adults, defined as eighteen years of age or older, living in all regions of Canada, were randomly selected for the survey.² The size of the sample used in the survey is larger than most that are drawn in national surveys.³ To ensure the anonymity

¹ Committee on Sexual Offences Against Children and Youth, *Report of the Committee on Sexual Offences Against Children and Youths [The Badgley Report]*, Vol. 1 (Ottawa: Minister of Supply and Services Canada, 1984).

² Children, themselves, were not selected for the survey as parental consent would have to be obtained, which may have involved seeking permission from parents or guardians who may have committed sexual offences against the children.

³ The survey's sampling error was between the statistical confidence levels of 0.02 and 0.03 which means that if comparable samples were drawn repeatedly, that

of the respondent and the maximum amount of disclosure, the persons selected in the survey were asked to complete questionnaires which elicited information about unwanted sexual acts having been committed against them and how old they were at the time these incidents took place (see Appendix I). “The response rate to the survey was 94.1 per cent (2008 of 2135).”⁴ The Badgley Committee recognized that the results of a “retrospective analysis,” as undertaken in this survey, may be affected by a person’s decreased ability to recall events; however, for this reason, it was concluded that the results obtained were an underestimate of the occurrence of sexual assault incidents. Also, due to the intensely personal nature of the sexual acts committed, the Committee found that victims recalled these incidents vividly and clearly. The results of the National Population Survey constitute a baseline upon which estimates can be made of the occurrence of sexual offences committed against children. As estimated by the Badgley Committee:

This survey, the first of its kind for Canada with respect to the detailed nature of the questions asked, indicates that sexual offences are endemic, that a significant number of both females and males have been victims of these acts, and that children and youths are disproportionately at risk.⁵

(a) Gender Ratio

The main findings of the National Population Survey revealed that "... at

similar results would likely be obtained from 97 and 98 per cent of the samples. A level of statistical confidence of 0.05 is usually adopted for most national surveys.

⁴ Committee on Sexual Offences Against Children and Youth, *supra*, note 1, at 177.

⁵ *Id.*, at 175.

sometime during their lives, about one in two females and one in three males have been victims of unwanted sexual acts. About four in five of these incidents first happened to these persons when they were children or youths (emphasis in the original)."⁶ The majority of these incidents happened to victims between the ages of twelve and eighteen years. According to the results of the National Population Survey, relatively few victims were under the age of seven.

(b) Reporting of Sexual Offences

The survey also revealed that the majority of victims did not report the sexual offence to family members or friends, nor did they report it to public services that have the mandate to provide assistance and protection. When victims did seek assistance, the police and physicians were contacted more frequently than social services, such as child protection agencies.⁷ The results of the survey indicated that proportionately more female victims sought assistance, than male victims, on the first sexual offence committed against them and that they sought assistance with respect to more serious sexual offences than more minor ones. The reason most often given by victims for not reporting is that "they felt these matters were too personal or sensitive to divulge to others, and because many of them were too ashamed of what had happened."⁸

⁶ *Ibid.*

⁷ *Id.*, at 193.

⁸ *Id.*, at 187.

(c) Types of Sexual Offences

The sexual offences which are committed against children encompass a broad range of sexual acts, "...one broader than may be commonly realized."⁹ The Badgley Committee classified the sexual offences into two broad categories: (1) sexual assault, acts which involve any type of touching; and, (2) exposure, acts involving no touching of the person. In regards to sexual assault, the results of the National Population Survey indicate that:

...a sizeable proportion of Canadians, involving over three times more females than males, has experienced at least once, different acts of sexual molestation entailing the touching, fondling or kissing of breasts, buttocks or genital parts of the body. The unwanted licking or sucking of a person's vagina, penis or anus has occurred at least once to two in 100 females (2.1 per cent) and three in 100 males (3.1 per cent).

In relation to the occurrence of more serious sexual assaults, the findings of the National Population Survey show that about four in 100 (3.8 per cent) females had at least once been raped, i.e., had an unwanted vaginal penetration by a penis. The survey's findings indicate that about two in 100 persons (2.1 per cent) of both sexes have either experienced at least once an unwanted anal penetration with a penis, attempts to commit these acts or anal penetration by means of objects or fingers (emphasis in the original).¹⁰

Subsequently, the Badgley Committee recommended that the *Criminal Code* be amended to expand the list of sexual offences so as to reflect the types of offences which are actually committed against children, a topic that is to be dealt with later in this paper.

Acts of exposure is the offence that is committed most frequently. Based on the

⁹ *Id.*, at 208.

¹⁰ *Id.*, at 206.

findings of the National Population Survey, the Badgley Committee found that “...one in seven persons has been a victim of at least one act of exposure”¹¹ and that while most acts of exposure are committed by strangers, the identity of offenders is known more often than is assumed. Furthermore, the Badgley Committee reported that after acts of exposure, the fondling of a child’s genitalia, breasts or buttocks is the next most prevalent sexual offence committed, followed by acts of vaginal intercourse.¹²

2. National Public Service Surveys

The Badgley Committee undertook three national public service surveys to gather more detailed information on the experience of sexually abused children. The three national public services included the police forces, hospitals and child protection agencies which had the official mandate to handle cases of child sexual abuse. The Badgley Committee focused its research on the information collected by these three public services and attempted to obtain uniformly comparable types of information, but realized it would be limited by the type and completeness of information collected, the different methods used in identifying and classifying sexual offences and the different types of assessment and assistance provided by each of them.

(a) Gender Ratio & Age Distribution

In contrast to the National Population Survey, the three national public service surveys referred only to sexually assaulted children under the age of sixteen and excluded

¹¹ *Id.*, at 240.

¹² *Id.*, at 509-514.

acts of exposure which resulted in different findings on gender ratio.¹³ The findings of the National Population Survey indicate that three in four victims are girls and one in four are boys. In contrast, the findings from all four national surveys combined are only somewhat lower than the most commonly reported estimate of nine in ten victims being girls. In terms of the social policy implications, the Badgley Committee states that although public concern focuses upon the situation of young female victims, the statistics show that a large number of victims are young males and public services to provide assistance and protection to young male victims are also warranted.¹⁴ In regards to the national statistics on the age and sex distribution of child sexual abuse victims, the Badgley Committee states:

...the age and sex of sexually assaulted children tell us little about the anguish and fear they experience as victims. The statistics do, however, clearly indicate that **a large number of victims were very young children and that there are sharp differences proportionately by age between how many children are victims and how many are known to public services** (emphasis in the original).¹⁵

The three public service surveys indicated that two to three times the number of young male and female victims, under the age of seven, were known to public services in comparison to the number of these victims reported in the National Population Survey. The findings indicate that the age and sex of the victim are influential factors in deciding whether to seek the assistance and protection of public services in cases of child sexual

¹³ *Id.*, at 197.

¹⁴ *Id.*, at 198.

¹⁵ *Ibid.*

abuse.

(b) Identity of Offenders

One of the most significant findings from the National Police Survey, one of the three national public service surveys, is that the identity of offenders is known to child victims. The findings indicate that **“the location of sexual assaults committed against children is that well over half (55.4%) were committed in the homes of victims or suspects (emphasis in the original).”**¹⁶ Furthermore, the Badgley Committee reports:

Excluding offences of indecent act (*sic*), almost one in four (24.2 per cent) of the sexual offences was committed by persons either prominent in the child's life or to whom the child was particularly vulnerable. Overall, about three in five offences (59.1 per cent) were committed by persons whom the child knew or was acquainted with.¹⁷

Furthermore, the Badgley Committee states:

...a young person is at risk from persons prominent in his or her life (for example, his or her father, uncle, guardian, or common-law parent) to almost as great an extent as from strangers (emphasis in the original).¹⁸

Therefore, the Badgley Committee concluded that the most important need of sexually abused children is to provide adequate protection from persons whom they already know and trust.

(c) The Use of Threats and Force

Adults often use bribery, seduction, threats or physical force to sexually assault

¹⁶ *Id.*, at 201.

¹⁷ *Id.*, at 538.

¹⁸ *Id.*, at 530.

children. The central focus of the Badgley Committee, however, was on the use of threats and physical force. In undertaking the three national public service surveys, the Badgley Committee used four sub-categories to distinguish sexual assaults where physical coercion had been used in committing the offence. The four sub-categories include: (1) “physical coercion” which involved the use of force, i.e., where a child had been held down; (2) “direct assault” which included any other type of sexual touching, i.e., grabbing a girl’s breast to the forced insertion of a penis in a child’s mouth; (3) the use of weapons whereby the offender “threatened” to use a knife, gun or other object; and, (4) “brandished” a weapon before or during the assault. In analyzing the data collected, the four sub-categories were combined into a single category of “physical force.” The Badgley Committee states: **“The results of the three national surveys indicated that, on average, three in five victims under the age of 16 had either been threatened or physically coerced by assailants”**(emphasis in the original).¹⁹ In other words, three in five children were threatened with a knife, gun or other object or had been physically held down.

More particularly, the National Police Force Survey indicated that “approximately three in five sexually assaulted children known to the police had been intimidated or physically forced by their assailant to engage in sexual acts.”²⁰ The use of intimidation and physical force was not reported by about half of the victims examined at the hospital

¹⁹ *Id.*, at 209.

²⁰ *Ibid.*

or known to child protection agencies. The Badgley Committee concluded that proportionately more victims and their families seek the protection of police forces when threats or physical force were used in committing sexual assaults than other kinds of public services. In cases which were reported to the police, the threat to use a weapon or the actual brandishing of a weapon occurred in approximately two per cent of all assaults; knives were the weapon which was used in over three quarters of these incidents. Other weapons which were used in committing sexual assaults against children include: guns; baseball bats or metal rods; leather belts for bondage or whipping children; wire clothes hangers; and scissors or a screwdriver to stab victims.²¹

The National Hospital Survey, in comparison to the documentation in the other national surveys, indicated that the majority of children examined at the eleven hospitals had been **“victims of serious sexual assaults, and on this basis, proportionately more may have sustained physical injuries and emotional harms”** (emphasis in the original).²² A high proportion of these victims suffered from actual or attempted vaginal and anal penetration. The Badgley Committee states:

From a medical standpoint, the most striking aspect of the physical findings is that most of the actual injuries sustained by the sexually abused children who were medically examined appear to be minimal. A small number of the children had lacerations, more had bruising, redness and inflammation, and only one in 14 was admitted to hospital, many for custodial purposes or for further investigation

²¹ *Id.*, at 210.

²² *Id.*, at 677.

(emphasis in the original).²³

The physical injuries sustained may appear to be minimal, but this does not mean that the sexual assault was not physically and emotionally painful. Of the 413 girls who had been given a gynaecological examination, the Badgley Committee states:

...10 had labial lacerations, 22 had hymenal tears, 18 had vaginal bleeding (presumably non-menstrual), two had vaginal lacerations requiring surgery, one had a breast laceration and one a burn on the breast. Sixteen girls had perineal tears or bleeding, one had a laceration of the buttock, four had anal-rectal tears and 43 were thought possibly to have a sexually transmitted disease.

Among the boys, one had a penile laceration, one an infection of and one a discharge from the penis. One had an anal tear.²⁴

The initial assessment of sexually assaulted children by attending examiners indicate that there was no stereotypic behaviour displayed by victims, rather the results clearly show a broad range of behaviours and emotions. The Badgley Committee provided a number of case studies to demonstrate the types of harm attributable to sexual assault offences committed against children (see Appendix II). The physical pain and emotional trauma which child sexual abuse victims suffer is severe.

(d) Offenders/Frequency of Sexual Offences Committed

Children are typically sexually assaulted by one offender; these assaults are either committed during a single episode, periodically or continuously over a period of time. However, children have also been victims of gang rapes whereby two or more assailants

²³ *Id.*, at 687.

²⁴ *Id.*, at 686-7.

commit the sexual assault. According to three national public service surveys, the Badgley Committee found a total of 343 incidents of child sexual abuse which involved two or more persons. The Badgley Committee reports:

Girls were victims in nine in 10 (89.5 per cent) group attacks; of all types of sexual assaults committed against girls, one in 11 (9.0 per cent) involved two or more assailants. ... Boys were victims of one in 10 (10.5 per cent) sexual assaults by groups; of all sexual assaults committed against boys, about one in 22 (4.5 per cent) had involved two or more assailants.²⁵

Gang rapes are usually planned ahead of time and involve more violence and coercion.²⁶

(e) Sexually Motivated Homicides

At the request of the Badgley Committee, the Justice Statistics Division of Statistics Canada provided a compilation of statistics for all sexually motivated homicides involving children, committed between 1961 and 1981. This national register is unique because of the breadth of information that it collects, its continuity and the information it provides on the homicide victims and suspects who are charged or convicted of these offences. The definition of sexually motivated homicides includes murders which are preceded by sexual or indecent assault and murders in which the victim was not sexually attacked, but was killed because he or she rejected the sexual advances made previously by the murderer. Lovers' quarrels are not included in these definitions; they were listed separately.

During 1961-1980, the total number of sexual assaults and sexually motivated

²⁵ *Id.*, at 218.

²⁶ *Ibid.*

murders involving children and youths under the age of twenty-one was 156. The majority of these murders were female (84 per cent). As the Badgley Committee reports:

Two of the killings were of infants under two years-old. During this period of two decades, sexually motivated killings of children involved: 11 who were between 2-6 years, 29 who were between 7-11 years, 21 who were between 12-13 years, and 25 who were between 14-15 years.²⁷

The risk of being a victim of a sexually motivated homicide differed for males and females. The majority of boys killed were between the ages of 7-11 years old; the risk for girls rose with their age.

The majority of children killed in these sexually motivated homicides were Caucasian (84.6 per cent), but seventeen of the total listed deaths (11.3 per cent) were Indian and Inuit children. It is evident that Indian and Inuit children are a highly vulnerable group. The Badgley Committee reports that they are over four times as likely to be a victim of a sexually motivated homicide in terms of their numbers in the general population of Canada.

Children were most frequently killed by strangling (34.6 per cent); beating (20.5 per cent); and suffocating (9.0 per cent).²⁸ Alcohol and/or drugs had been used by 23.1 percent of the assailants. The use of weapons, namely, stabbing with knives, was twice as high as firearms (19.6 per cent versus 9.6 per cent) in causing these deaths. Furthermore, the identity of assailants was unknown in only about 1/4 of these deaths (23.1 per cent). Of the assailants whose identity was known, several committed suicide, some were

²⁷ *Id.*, at 278.

²⁸ *Ibid.*

insane, and 1/7 of them were acquitted.

(f) Number of Victims vs. Offenders

The number of child molesters, in comparison to the high percentage of sexually abused children, is relatively low. It is common for several siblings to be sexually abused by one perpetrator in cases of incest, and some studies indicate that pedophiles in extrafamilial situations may have several hundred victims.²⁹ The Badgley Committee found that 98.8 per cent of sex offenders were male and 1.2 per cent were female. Also, in the majority of cases, the identities of the offenders were known to victims. The Badgley Committee found that well over half (55.4 per cent) of the sexual assaults committed against children occurred in the homes of victims or suspects. Therefore, the Badgley Committee declared that the most important need of sexually abused children is to provide adequate protection from persons whom they already know and trust.³⁰

(g) Conclusion

The Badgley Committee concluded that the nature and extent of child sexual abuse is serious in Canada and reported that as a result of their work, they had been profoundly moved by the victims' betrayed hopes and suffering. The Badgley Committee reports:

Child sexual abuse is a largely hidden yet pervasive tragedy that has

²⁹ Rix G. Rogers, *The Report of the Special Advisor to the Minister of National Health and Welfare on Child Sexual Abuse in Canada* (Ottawa: Minister of Supply and Services in Canada, 1990), at 18.

³⁰ Committee on Sexual Offences Against Children and Youth, *supra*, note 1, at 218.

damaged the lives of tens of thousands of Canadian children and youths. For most of them, their needs remain unexpressed and unmet. These silent victims - and there are substantial numbers of them - are often those in greatest need of care and help.³¹

The Badgley Committee asserted that the experience of sexually abused children and youth is an intolerable situation - one which should not be allowed to continue.

B. Improving Laws for the Protection of Child Sexual Abuse Victims

At the time of their investigation, the Badgley Committee found that the existing criminal and provincial child welfare statutes were not conducive to providing children protection from sexual abuse and that these laws lacked a central purpose and rationale. Many of the criminal and civil law statutes were drafted in archaic and ambiguous language. Also, these statutes were amended separately, from time to time, without regard for the implications on related legal provisions and they did not allow for the types of sexual offences actually committed against children and youth.

Within the Canadian legal system, the state can intervene in child sexual abuse cases by two distinct means. Under provincial child welfare legislation, the state can intervene in cases of child abuse or neglect and, if necessary, remove the child from the home. Under criminal law, the state can lay charges in cases of child abuse and punish the offender. One crucial weakness of this legal framework, as found by the Badgley Committee, was that no clear-cut guidelines were established as to when either or both methods of state intervention should be used in cases of child sexual abuse. Crucial

³¹ *Id.*, at 29.

decision-making regarding a child's well-being was left to the discretion of social workers and police officers. As a result, the Badgley Committee found that either because of an insufficient assessment of the child's needs or because of an inadequate follow-up to ensure that the child was protected from further risk of sexual abuse, children were frequently left in situations of grave risk.³²

1. Reform of the *Criminal Code* Offences

As found by the Badgley Committee, the Canadian criminal law failed to recognize that child sexual abuse encompasses many forms of unacceptable sexual behaviour. The Canadian criminal law had failed to realize the complexity of child sexual abuse and how it differs from sexual offences committed against adults. The general and vague offences, as set out in the *Criminal Code*, were not capable of dealing with these various types of sexual offences. In addition, the legal terms used to describe the sexual offence obscured the nature of the prohibited sexual conduct. Similarly, there was no rational sentencing policy for sexual offences committed against children. The same criminal behaviour could be charged under three or four different sections of the *Criminal Code*, with each provision having a different maximum penalty and different evidentiary requirements. The Badgley Committee found that this situation resulted in confusion and unnecessary complexity when laying criminal charges and sentencing offenders. "For example, offenders who had committed more serious sexual acts were consistently given proportionately lighter sentences than those who had committed more

³² *Id.*, at 30.

minor offences."³³

While it was easy to agree that the provisions of the Criminal Code were outdated, it was not so easy to know what to do about them. Some commentators argue that certain forms of sexual conduct are harmless and therefore certain sexual offences should be repealed. Others suggest that since few children are seriously harmed by sex offenders that sexual offence provisions serve no useful purpose and, therefore, they should be removed from the *Criminal Code*. From this perspective, it is believed that "sexually abused children are more likely to be harmed by the bitter reactions of their parents or the harsh exposure to legal proceedings than by having been victims of sexual abuse."³⁴ Child molesters are perceived as "harmless, timid and inadequate persons that need compassion and treatment rather than being held accountable for their actions."³⁵ The Badgley Committee states:

While we concur that many provisions in the criminal law of sexual offences are out-dated, our findings clearly indicate that there is no basis for the alleged "harmlessness" of unwanted sexual acts committed against children or for the belief that most of the offenders are "harmless" individuals. We have found that many young victims were encouraged, seduced and intimidated by sexual offenders. Some of these children sustained physical injuries. Many more experienced enduring emotional and social harms.³⁶

Based on its findings, the Badgley Committee proposed a reformulation of the

³³ *Id.*, at 32.

³⁴ *Id.*, at 31.

³⁵ *Ibid.*

³⁶ *Ibid.*

Criminal Code offences in a way that involved a major departure from the traditional classification of sexual offences against children. It believed this reform would provide better protection for children because it would clearly and unmistakably identify the type of sexual offence committed, clarify the specific nature of the sexual conduct for which offenders are liable to punishment and directly assist in enforcing "the law by providing the police and Crown with specific and objective facts upon which to obtain evidence."³⁷

In proposing a reformulation of the sexual offences committed against children, the Badgley Committee was faced with two basic questions: "What conduct should be made criminal?; and What sentences should be available against persons who commit these crimes?"³⁸ The Badgley Committee concluded that characteristics of sexual acts committed against children and youths, which make such acts unacceptable, and therefore, criminal, fall into five broad, and sometimes overlapping, categories. These five categories include:

The nature of the sexual act engaged in, for example, buggery with a 14 year-old;

The age of the child with whom the sexual act is engaged in, for example, sexual touching of an eight-year old's genitals;

The young person's lack of consent to the sexual act, for example, the sexual assault of a 17 year-old girl;

The legal or social relationship between the offender and the young person, for example, acts of oral sex involving a teacher and an 11 year-old pupil; and

³⁷ *Ibid.*

³⁸ *Id.*, at 45.

*The harms which may be incurred by the child as a result of the sexual conduct, for example, physical and emotional injuries, pregnancy and the risk of contacting a sexually transmitted disease.*³⁹

The reformulation was also based on "a rationale that accounts for the specific sexual acts committed and that connects the offences and sentences in a rational manner."⁴⁰

Furthermore, since the existing penalty system was both irrational in its structure and its application, the Badgley Committee strongly emphasized the need to invoke criminal sanctions for the deterrence and rehabilitation of sex offenders.

The Badgley Committee holds that by treating children differently from adults and dealing with some sexual offences committed against children differently from other similar sexual acts has many advantages for child protection. First, it indicates to the public how seriously the criminal law regards the sexual offences committed against children by clearly identifying the sexual behaviour that is completely unacceptable and, if committed, holds the offender liable to severe punishment. "It would thus sharpen the deterrent edge of the criminal law."⁴¹ Second, it assists the police and Crown in their charging practices by giving them objective facts to search for in the collection of evidence, rather than relying on one's personal discretion as to whether the committed sexual offence constitutes, for example, gross indecency. Third, it makes the criminal law more comprehensible and its impact more certain as it is based upon sound policy

³⁹ *Ibid.*

⁴⁰ *Id.*, at 48.

⁴¹ *Id.*, at 49.

and a greater awareness of the different types of sexual offences committed against children. The Badgley Committee clearly defines the sexual abuse and exploitation of children as criminal behaviour and recognizes the severe impact it has on child victims.

2. Rules of Evidence

(a) Competency

At common law, children must be found legally competent prior to testifying at criminal trials of sexual offences. Since the child is typically the only witness to the sexual offence other than the accused, who cannot be compelled to testify, it is believed that the child's testimony at trial is vital in securing a conviction. Historically, no person could testify at trial unless they had sworn an oath to speak the truth. This requirement was based on the premise that witnesses would feel obligated to speak the truth for fear of divine retribution and it applied to adults and children alike. Children who could not properly understand the threat of divine retribution were excluded.

In the late nineteenth century, it was recognized that by not allowing children to testify if they did not understand the nature of an oath precluded them from the protections the law sought to afford them. As the Badgley Committee states:

In 1885, the British Parliament passed a statute (whose long title was *an Act to make further provisions for the Protection of Women and Girls, the suppression of brothels, and other purposes*) which allowed a "child of tender years" to testify in court even though the child's evidence was not taken upon oath.⁴²

Under this statute, a child could provide unsworn testimony at trial on charges of

⁴² *Id.*, at 367.

"unlawfully and carnally knowing" a female under the age of thirteen, or of the attempt to commit such an offence, provided that the testimony was corroborated by other material evidence which implicates the accused.

In 1890, the Canadian Parliament enacted a similar provision to allow children to give unsworn testimony, provided the child's evidence was corroborated. This provision applied to the sexual offences of unlawful carnal knowledge of a female under fourteen years of age, or of the attempt to commit such an offence, and indecent assault of a female.⁴³ A similar provision was incorporated into the 1892 *Criminal Code*.⁴⁴ When the original *Canada Evidence Act*⁴⁵ was passed by Parliament in 1892, it also adopted the policy of accepting the unsworn testimony of children if the evidence was corroborated, but applied this policy to all proceedings under federal law.⁴⁶ This same policy was adopted into the *Juvenile Delinquents Act*⁴⁷ and most provincial evidence acts. Furthermore, the 1955 amendments to the *Criminal Code* made the corroboration requirement applicable to all criminal offences, not just certain sexual offences. It was believed that the testimony of children was inherently unreliable and therefore it was to convict the accused solely on the evidence of a child without corroborating evidence.

⁴³ *Id.*, at 367.

⁴⁴ *Id.*, at 368.

⁴⁵ *Canada Evidence Act*, 1893, S.C. 1893, c. 31, s. 25.

⁴⁶ Committee on Sexual Offences Against Children and Youth, *supra*, note 1, at 368.

⁴⁷ *Juvenile Delinquents Act*, 1908, S.C. 1908, c. 40, s. 15.

At the time of its investigation, the Badgley Committee found that "children of tenders years" had to meet the requirements of section 16 of the *Canada Evidence Act*⁴⁸ prior to testifying at criminal or civil trials. Section 16 states:

16.(1) In any legal proceedings where a child of tender years is offered as a witness, and such child does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

(2) No case shall be decided upon such evidence alone, and it must be corroborated by some other material evidence.

Under this section, the trial judge holds an inquiry to determine whether the child understands the nature of an oath or the moral obligation to tell the truth; if so, then the child is sworn. If, however, the child does not understand the nature of an oath, the trial judge conducts a further inquiry to determine whether the child possesses sufficient intelligence to justify the court's reception of the evidence and whether the child understands the duty to tell the truth; if so, the unsworn evidence of a child is heard.⁴⁹

As noted by the Badgley Committee, the inquiry usually involves the judge asking the child a series of questions regarding age, family, school and the difference between the truth and a lie. The Crown and defence counsel can also ask the child questions before the judge makes a decision as to whether the child will provide sworn or unsworn testimony, or not testify at all.

⁴⁸ *Canada Evidence Act*, R.S.C. 1970, c. E-10.

⁴⁹ *R. v. Bannerman* (1966), 55 W.W.R. 257 (Man. C.A.), affirmed (1966), 57 W.W.R. 736 (S.C.C.); *R. v. Reynolds* (1950), 34 Cr. App. R. 60 (C.C.A.).

If the accused is being tried by a jury, the jury is allowed to remain in the courtroom during this inquiry. If the child is found competent to testify, whether upon oath or unsworn, the jury is allowed to take into consideration the child's conduct at the inquiry in assessing the weight to be given to the child's testimony.

The Badgley Committee determined that children could not benefit from the protections that the law seeks to afford them unless they could speak effectively on their own behalf at trial. From the perspective of the Badgley Committee, there should be no special rules relating to a child's capacity to testify. A child's testimony should be heard and given the same weight as any other witness in the proceedings. Furthermore, as the Badgley Committee states:

Given the generally private nature of child sexual abuse, the overarching legal principle that all relevant evidence should be admissible in court takes on added significance. In the Committee's judgment, those who believe that fetters should be placed on the reception of young children's testimony by way of special competency requirements should bear the onus of demonstrating that the approach advocated by the Committee is contrary to the demands of justice (emphasis in the original).⁵⁰

The Badgley Committee's approach to children's testimony was supported by several grounds. The Committee asserted that to make a distinction on the basis of a child's age, in terms of competency, does not take into consideration the differences in cognitive development and emotional maturity among children of the same age; age is an arbitrary distinction and it is wrong in principle. Also, the Committee found that the legal tests that justify the court's reception of a child's evidence, whether sworn or unsworn, are

⁵⁰ Committee on Sexual Offences Against Children and Youth, *supra*, note 1, at 372.

very similar in practice, although the requirements for corroboration are completely different depending upon whether or not a child testifies under oath. The subtle practical distinction between these two tests was found to be too tenuous a basis upon which to make a legal distinction. The Committee held that there should be no special rules as to a child's competency and that any frailties inherent in a child's testimony should affect the weight given to the evidence and not its admissibility.

The Badgley Committee expressed that it would rather adopt the common sense approach to the credibility and competency of child witnesses espoused by Justice Dickson of the Supreme Court of Canada in *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811, at 823:

Rather than attempting to pigeon-hole a witness into a category and then recite a ritualistic incantation, the trial judge might better direct his (sic) mind to the facts of the case, and thoroughly examine all the factors which might impair the worth of a particular witness. If, in his (sic) judgment, the credit of the witness is such that the jury should be cautioned, then he (sic) may instruct accordingly. If, on the other hand, he (sic) believes the witness to be trustworthy, then ...no warning is necessary.

However, the overwhelming fear that a child experiences when confronting one's abuser inside the courtroom is another significant factor which "might impair the worth" of a child's testimony as the child witness may be unable to speak freely and disclose the details of the sexual acts committed. The presence of the accused may have an significant impact on the child's capacity to tell the truth.

On the basis of these grounds, the Badgley Committee recommended that the *Canada Evidence Act* and every provincial and territorial act be amended to provide that "every child is competent to testify in court and the child's evidence is admissible. The

cogency of the child's testimony would be a matter of weight to be determined by the trier of fact, and not a matter of admissibility."⁵¹ Also, the Committee recommended that children be precluded from testifying if they do not have the verbal capacity to answer simply framed questions. Furthermore, the Committee recommended that "the court shall instruct the trier of fact on the need for caution in any case in which it considers that an instruction is necessary."⁵²

(b) Corroboration

The legal requirements of corroboration are closely tied to the legal tests which determine the competency of children to testify at trial. Corroboration is independent evidence that strengthens or confirms that the testimony of a witness is true; it bolsters the credibility of a witness whose testimony might otherwise be considered unreliable. The Badgley Committee made two general observations which should be borne in mind before considering corroborative evidence in the context of sexual offences:

First, where corroboration of a witness's testimony is required, it is for the judge to determine whether, as a matter of law, there is evidence which may constitute corroboration. It is for the *jury* to determine whether corroborative inferences should in fact be drawn. Second, although corroboration is a general concept, whether particular facts may constitute corroboration is a situation-specific problem for the trial judge.⁵³

Evidence which may constitute corroboration was grouped into three categories which have been previously considered to constitute corroboration in particular cases.

⁵¹ *Id.*, at 373.

⁵² *Id.*, at 374.

⁵³ *Id.*, at 378.

First, evidence may be corroborative if it is based on the victim's physical condition, emotional state or behaviour at the time of, or after, the sexual assault: for example, torn clothing and bruises on the victim; the victim's distressed state shortly after the assault; medical evidence of physical injuries; evidence of the victim's presence at the scene of the crime; the emotional state of the victim on reporting the incident; the victim screaming and fleeing the scene of the sexual assault; and the victim's disclosure of emotional trauma shortly after the incident. A recent complaint by the victim was not considered to be corroborative evidence at the time of the Badgley Committee's investigation as it lacked the necessary independence. Second, corroboration may be based on the accused's condition or behaviour at the time of, or after, the sexual offence is committed: for example, flight of the accused after the sexual offence was committed; evidence of the accused's presence at the scene of the crime; inadequate denial or silence; the accused giving false statements which imply one's guilty conscience; the accused bribing the victim to drop the criminal charges; and the false or contradictory testimony of the accused. Corroborative inferences cannot be drawn from the accused's refusal or failure to testify at trial. Third, various other factors may be considered to constitute corroborative evidence, including: the same type of venereal disease found in the accused and the victim; evidence of the accused's long held passion for the victim and the opportunity to act on it; similar fact evidence relating to previous assaults committed on other persons by the accused in like circumstances; and forensic evidence such as semen found on the victim's clothes. Evidence that the accused had the opportunity to commit the act, by itself, does not constitute corroboration as a sufficient connection cannot be

drawn between the accused and the sexual offence, without other incriminating evidence.⁵⁴

In 1983, amendments were made to the *Criminal Code* relating to corroboration. Section 139(1) of the *Criminal Code*, R.S.C. 1970, c. C-34 provided that an accused could not be convicted of certain sexual offences on the evidence of only one witness, unless the evidence was corroborated by other material evidence. Corroboration was required for the following offences: sexual intercourse with feeble-minded females (s. 148); incest (s. 150); seduction of a female between the ages of sixteen and eighteen (s. 151); seduction under promise of marriage (s. 152); sexual intercourse with a step-daughter, foster daughter, or female ward, or with a female employee under 21 (s. 153); seduction of a female passenger on board a vessel (s. 154); parent or guardian procuring defilement (s. 166).⁵⁵ In January 1983, this section was repealed and replaced by a new section 246.4 which read as follows:

246.4 Where an accused is charged with an offence under section 150 (incest), 157 (gross indecency), 246.1 (sexual assault), 246.2 (sexual assault with a weapon, threats to a third party of causing bodily harm) or 246.3 (aggravated sexual assault), no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration.⁵⁶

The 1983 amendments made it clear that corroboration was no longer required for

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *An Act to amend the Criminal Code in relation to Sexual Offences and other Offences against the Person*, S.C. 1980-81-82-83, c. 125, s. 19.

certain sexual offences. However, the Badgley Committee asserted that it was not clear whether corroboration was required for the offences of buggery⁵⁷ and sexual intercourse with an under-age female.⁵⁸ Corroboration was still required for the offences relating to procuring and the communication of venereal disease.⁵⁹ Moreover, the Badgley Committee asserted that while the amendments no longer required corroboration for an adult's testimony, for certain sexual offences, they did not affect the corroboration required for a child's testimony. Section 586 of the *Criminal Code* was not amended in 1983 and it states:

586. No person shall be convicted of an offence upon the unsworn evidence of a child unless the evidence of the child is corroborated in a material particular by evidence that implicates the accused.⁶⁰

⁵⁷ See *R. v. Gendreau* (1980), 3 Man. R. (2d) 245, a case involving buggery and gross indecency, the Manitoba Court of Appeal considered the following charge to the jury an appropriate one:

"Corroboration, therefore, is not strictly necessary. If the complainant is believed and his evidence is sufficient to sustain the charges, then a conviction should be entered. On the other hand it is settled law that it is dangerous to convict on the uncorroborated evidence of the complainant in sexual offences."

See also *R. v. Cullen* (1975), 26 C.C.C. (2d) 79 (B.C.C.A.).

⁵⁸ See *R. v. Camp* (1977), 36 C.C.C. (2d) 511 (Ont. C.A.);
R. v. Daigle (1977), 37 C.C.C. (2d) 386 (N.B.C.A.);
R. v. Firkins (1977), 37 C.C.C. (2d) 227 (B.C.C.A.);
R. v. Cook (1979), 9 C.R. (3d) 85 (Ont. C.A.); and
R. v. Riley (1978), 42 C.C.C. (2d) 437 (Ont. C.A.).

⁵⁹ Committee on Sexual Offences Against Children and Youth, *supra*, note 1, at 380

⁶⁰ *An Act to amend the Criminal Code in relation to Sexual Offences and other Offences against the Person*, S.C. 1980-81-82-83, c. 125, s. 19.

The requirement of corroboration for a child's unsworn testimony also raises complex legal issues with respect to one child corroborating the evidence of another child and the dangers of convicting an accused solely on the evidence of one child. The issue of the "mutual corroboration" of children's testimony, as provided by the Badgley Committee, was addressed in the cases of *Paige v. The King* (1948), 92 C.C.C. 32 (S.C.C.); *R. v. Taylor* (1970), 75 W.W.R. 45 (Man. C.A.); and, *R. v. Pottle* (1978), 49 C.C.C. (2d) 113 (Nfld. C.A.). In these cases, the court held that the unsworn testimony of one child cannot corroborate another child's sworn or unsworn testimony and only in circumstances where the child provides a sworn testimony can the evidence be used as corroboration of another child's sworn or unsworn testimony.⁶¹ Since the 1983 amendments did not improve the evidentiary position of children, the Badgley Committee asserted that these complex legal issues would continue to be raised in trials involving child sexual abuse.

The dangers of convicting an accused solely on the evidence of a sexually abused child were described by the Supreme Court of Canada in *Kendall v. The Queen*, [1962] S.C.R. 469, at 473. Justice Judson states:

The basis for the rule of practice which requires the judge to warn the jury of the danger of convicting on the evidence of a child, even when sworn as a witness, is the mental immaturity of the child. The difficulty is fourfold: 1. His (sic) capacity of observation. 2. His (sic) capacity of recollection. 3. His (sic) capacity to understand questions put and frame intelligent answers. 4. His (sic) moral responsibility.

⁶¹ The Committee on Sexual Offences Against Children and Youth, *supra*, note 1, footnote 38 at 385.

In this regard, the Badgley Committee asserted that it is evident that Canadian laws continue to assume that a child's testimony is inherently unreliable and untrustworthy.

The Badgley Committee strongly recommended reforms to the *Criminal Code of Canada*, the *Canada Evidence Act*, the *Young Offenders Act* and every provincial and territorial evidence act in order to allow children to testify on their own behalf without the need for corroborating evidence. The nature of these recommendations show respect for the integrity of children, rather than assuming that children lie and fabricate stories of sexual abuse or that they lack the capacity to understand, remember and report what they have experienced.

(c) Recent Complaint

Further to the enactment of Bill C-127 in January 1983, the Badgley Committee recommended that **"...the rules relating to evidence of recent complaint [be] abrogated with respect to *all* sexual offences"** (emphasis in the original).⁶²

Until 1983, the admissibility of a sexual assault victim's complaint was governed by the common law doctrine of "recent complaint." Historically, the common law doctrine held that if the victim of a sexual assault did not complain of the incident at the first reasonable opportunity, then the trier of fact could infer that the complaint was partially or completely untrue. As the Badgley Committee states:

Where the Crown failed to show that the complainant made a complaint at the first reasonable opportunity, not only was the complaint rendered inadmissible, but the trial judge was required to comment on this failure. If the complainant's consent was at issue, the trial judge was required to

⁶² *Id.*, at 390.

instruct himself or the jury that an inference inconsistent with the complainant's evidence of no consent was to be drawn.⁶³

A recent complaint by the victim could only be considered as evidence of the victim's credibility or absence of the victim's consent. It could not be used to corroborate any aspect of the Crown's case.

Prior to admitting the victim's recent complaint as evidence in a trial, Supreme Court Justice Lamer held, in the case of *Timm v. The Queen*,⁶⁴ that the judge must hold a *voir dire* to determine whether there is evidence to constitute a complaint, that such a complaint was not elicited by leading questions or through intimidation and that the complaint was made at the first reasonable opportunity. Furthermore, in other cases it was also held that the recent complaint was only admissible if the complainant testified at trial. In cases where the details of the complaint had to be obtained from another witness, such as the recipient of the complaint, such details could only be introduced after the testimony of the complainant had been heard.

After the 1983 amendments of the *Criminal Code*, the common law doctrine of recent complaint was governed by general evidentiary rules relating to previous statements of a witness. The Crown could raise the fact that a victim made a complaint during the initial examination of a witness, but whether the details of that complaint would be admissible was based upon certain conditions. First, the details of the complaint were inadmissible unless the defence alleged that the victim's testimony was a

⁶³ *Id.*, at 391.

⁶⁴ *Timm v. The Queen* [1981], 2 S.C.R. 315, at 337.

recent fabrication. In this case, the Crown could introduce evidence of the victim's previous consistent statement of complaint to support the victim's credibility. Second, if there was an inconsistency between the victim's testimony at trial and the previous statement of complaint, the defence could introduce the previous inconsistent statement and impeach the victim's credibility. Third, the details of the complaint were admissible under an exception to the hearsay rule, such as a "spontaneous exclamation" or an "excited utterance." The Badgley Committee held that no adverse inferences should be drawn because the victim did not promptly complain to another person after the sexual assault occurred and to that extent the recent complaint doctrine should be abrogated.

It is held by the Badgley Committee that the differences in reporting a sexual assault offence as compared to any other crime are vastly more complex. Children might not even be aware that a criminal act has been committed against them, or they might not be able to articulate their complaint sufficiently according to the law. The offender might have told the child to keep the sexual offence a secret, or threatened the child with harm or punishment. Also, if the offender is a member of the family, the child might realize the consequences of disclosure on his or her family. Finally, the child might fear being accused of provoking the sexual abuse, or having to defend one's prior sexual conduct and reputation at trial. (See Appendix III).

The Badgley Committee agreed with the abrogation of the recent complaint doctrine in January 1983; however, it was noted that section 246.5 of the *Criminal Code* appeared to only abrogate the rules relating to evidence of recent complaint in specific "sexual assault" offences. The common law doctrine of recent complaint applied to all

sexual offences, whether or not the victim's consent was in issue. Therefore, the Badgley Committee recommended that section 246.5 of the *Criminal Code* be amended to refer to all sexual offences. In addition, since a child's remarks on reporting the incident often constitute the most cogent evidence, the Badgley Committee recommended that they be admissible as evidence under a statutory exception to the hearsay rule.

(d) Hearsay

Hearsay evidence is a statement which a witness heard another person say. A hearsay statement is generally inadmissible to prove the truth of the matters asserted in those statements are true because the person who made the original statement cannot be tested upon cross-examination to determine the reliability of one's observations and the meaning which was intended to be conveyed. For example, a social worker would not be permitted to testify on behalf of the child to state what the child had disclosed to them. As Mary Wells states: "The accused has a right to hear the evidence against him or her directly from the person who has firsthand knowledge of the facts. One generally cannot testify about what someone else said about a third person."⁶⁵ Statements made by children who are deemed incompetent to testify are often inadmissible as evidence to prove the truth of the child's assertions, even though these statements should be crucial to the outcome of police investigations and at trial. The Badgley Committee noted that these exclusionary rules are highly significant in cases of child sexual abuse, especially when children are deemed incompetent to testify.

⁶⁵ Mary Wells, *Canada's Law on Child Sexual Abuse: A Handbook* (Ottawa: Minister of Supply and Services Canada, 1990), at 78.

At common law, exceptions were made to this exclusionary rule on the basis of necessity and a presumption of trustworthiness. The current exceptions to the hearsay rule include records made pursuant to a business or professional duty; confessions or admissions by an accused; excited utterances; and statements indicating the declarant's present bodily feeling or state of mind.⁶⁶ The Supreme Court of Canada in *Ares v. Venner*, [1970] S.C.R. 608 created a new exception by admitting as evidence the hospital records and nurses' notes as they were made contemporaneously by doctors and nurses having personal knowledge of the case and they were recorded under a professional duty, without requiring the nurses to testify orally as to the contents of the report. The accused was not prevented from challenging the accuracy of the records and calling the nurses as witnesses. This exception has been extended to include records made pursuant to a business.

An admission is a statement made to a third party which is adverse to the legal position of the person making such statement and, as such, can be presumed to be true.

As the Badgley Committee states:

For example, if, after an alleged sexual assault on a teenager, the accused says to his friend, "I didn't mean to be so rough - things just got out of hand," this statement constitutes an admission which can be admitted in evidence against the accused notwithstanding that the accused does not himself testify.⁶⁷

While an accused's conduct after the offence was committed is more problematic, it can

⁶⁶ Committee on Sexual Offences Against Children and Youth, *supra*, note 1, at 394.

⁶⁷ *Id.*, at 395.

be arguably interpreted as an admission of guilt.

A confession is a clear admission of guilt and is admissible as evidence as an exception to the hearsay rule. If the confession is made to a person in authority, the court must hold a *voir dire* to determine if the confession was made voluntarily. Furthermore, the rule relating to confessions is intertwined with the rights of the accused not to incriminate him or herself and the principle that the Crown must prove its case without the accused's assistance.

"An 'excited utterance' is a statement made by a person while he or she was under the stress of nervous excitement caused by witnessing a startling event."⁶⁸ The circumstances giving rise to an excited utterance must have been startling enough for the declarant to utter the statement without giving thought to the occurrence of events. In this case, both the declarant and the person who heard the statement may testify with respect to the excited utterance. Similarly, statements indicating a person's present bodily feeling or state of mind constitute a further exception to the hearsay rule. Statements made by a declarant to a doctor concerning pain or statements made to a social worker concerning one's emotional state or preference for a dispositional outcome as opposed to another are also admissible.

The Badgley Committee asserts that statements of child sexual abuse victims do not typically fall within any of the established exceptions to the hearsay rule. As previously mentioned, children often are not aware that something aberrant is being done

⁶⁸ *Id.*, at 397.

to them and it is therefore unlikely the child will make an excited utterance. Children who realize that something is wrong with the offender's behaviour may not tell anyone because of fear. And if they eventually do tell someone, their statements will be inadmissible because of the lapse of time between the sexual abuse and the child's disclosure. Yet, the contents of the child's statement is probably the most relevant evidence which the court could hear.

If the child were deemed competent to testify, the admissibility of hearsay evidence of the child's statements could be justified on several grounds. As cited by the Badgley Committee, in *Love v. State*, 64 Wis. 2d 432 (1974), the Wisconsin Court states:

A young child may be unable or unwilling to remember (as here) all the specific details of the assault by the time the case is brought to trial; or be unwilling to testify, or at least inhibited in doing so from a feeling of fear or shame, or as a result of the strangeness of the courtroom surroundings, particularly with a jury and perhaps members of the general public present. The desirability of avoiding the necessity of forcing a young child to testify to such matters at all has been noted, particularly when the defendant is (as here) a parent or occupies some other close relationship to the child.⁶⁸

Furthermore, since the perceived credibility of a child who testifies is a critical factor in the outcome of the case, the Badgley Committee asserts that "allowing the recipient of the child's statements to testify concerning its content would enable the trier of fact to assess the child's credibility on a more realistic basis."⁶⁹

In the Badgley Committee's view the admissibility of a child's previous statements

⁶⁸ *Id.*, at 399.

⁶⁹ *Ibid.*

should be decided on a case-by-case basis. The Committee recommends that the *Canada Evidence Act*, each provincial and territorial evidence act, and the Quebec *Code of Civil Procedure* be amended to provide that previous statements of a child under the age of fourteen be admissible to prove the truth of the matters asserted therein. The previous statements referred to would describe the sexual acts performed with, on, or in the presence of the child by another person. The court would conduct an inquiry, in the absence of the jury, as to whether the statements provide sufficient reliability as to the time, content and circumstances of the statements. These previous statements would include oral or recorded assertions by the child and includes conduct which implies an assertion. The Committee also asserts that its recommendations with respect to hearsay evidence is supported by enacted provisions in at least two American jurisdictions.

(e) Spousal Competence and Compellability

The competence of a witness means that he or she may lawfully be called upon to testify in court; the compellability of witness means that he or she may lawfully be obliged to testify or be charged with contempt of court. Traditionally, the common law was reluctant to oblige one spouse to give evidence against the other in criminal proceedings. The spouse of the accused was not competent to testify for the defence or for the prosecution, unless the offence violated the "person, liberty or health" of the victim spouse. The rules relating to spousal competency apply only to persons who are legally married.

Prior to 1983, an accused's spouse was neither competent or compellable to testify against the accused charged with indecent assault, for example, irrespective of the

potential cogency of that evidence. However, the amendments which took place in 1983 resulted in the spouse of the accused charged with any sexual offence against a young person being a competent and compellable witness for the prosecution under section 4(2) of the *Canada Evidence Act*.⁷⁰ This rule is also applicable to assault offences when the child is under fourteen (section 4(3.1)). Section 4(3) of the *Canada Evidence Act* which provides spouses the privilege of non-disclosure of communications during marriage states:

No husband is compellable to disclose any communication made to him by his wife during their marriage, and no wife is compellable to disclose any communication made to her by her husband during their marriage.

The Badgley Committee asserts that an important legal issue arises with respect to privilege of non-disclosure as to whether it can be claimed by a spouse who is otherwise competent and compellable as a witness for the Crown. If the privilege of non-disclosure can be claimed with respect to a husband's inculpatory statements, especially in cases of incest, then section 4(2) and (3.1) lose their force. The case law shows that Canadian courts differ on this issue.

Accordingly, the Badgley Committee recommended that the *Canada Evidence Act* be amended to provide that where a spouse is deemed competent and compellable to give evidence against the accused under section 4(2) and (3.1), the privilege of non-disclosure cannot be claimed. The Committee also recommended that each provincial and territorial evidence act, and the Quebec *Code of Civil Procedure*, be amended to provide that a

⁷⁰ *Canada Evidence Act*, R.S.C. 1980-81-82-83, c. 125, s.29.

spouse cannot claim the privilege of non-disclosure if otherwise held to be competent and compellable at child welfare proceedings.

(f) Other Recommendations

The Badgley Committee made further recommendations pertaining to the previous sexual conduct of the complainant in sexual offence cases; spousal competency and compellability; similar fact evidence; public access to hearings of child sexual abuse; and the publication of victims' names. However, a discussion of these recommendations are not within the scope of the paper.

(g) Conclusion

The report of the Badgley Committee has provided the Canadian public with a realistic account of the incidence and prevalence of child sexual abuse in Canada and of the victims' experience. From the results of the National Population Survey, the Badgley Committee has determined that one in two females and one in three males will be the victims of unwanted sexual acts at sometime during their lives, before they reach the age of eighteen. Acts of exposure were found to be the most common sexual offence committed, followed by the offences of fondling a child's genitalia and vaginal intercourse. From the response of adults who were sexually abused as children, the Badgley Committee has also determined that most acts of child sexual abuse go unreported.

The results of a National Public Service Survey, involving police forces, hospitals and child protection agencies, revealed that the identity of offenders is usually known to the victims and that well over half of the sexual offences were committed in the homes of

victims or suspects. It was also revealed that three in five victims under the age of sixteen were intimidated, threatened or physically forced into submission by sex offenders. This survey also determined that children may be victimized once, periodically or continuously over a period of time and that children are also the victims of gang rapes and sexually motivated homicides. The Badgley Committee determined that the most important need of child sexual abuse victims is adequate protection from persons whom they already know and trust.

The Badgley Committee found the laws to be inadequate in providing protection to child sexual abuse victims. The sexual offence provisions of the *Criminal Code* were too vague and general to cover the types of offences actually committed against children. Also, there were no clearcut guidelines for the police or social workers as to when to proceed under provincial child welfare legislation or criminal law in cases of child sexual abuse. As a result, the Badgley Committee found that children were left in situations which constitute grave negligence due to an insufficient assessment of the child's needs or an inadequate follow-up to ensure the child was safe.

The Badgley Committee recommended that amendments be made to the *Criminal Code* definitions of sexual offences committed against children. It was also recommended that every child be deemed competent to testify without the need for corroborating evidence. It was believed that these reforms would make the prosecution of child sex offenders easier by permitting children's evidence to be heard in court.

3

Bill C-15

I. Introduction

Chapter 3 is a discussion of the federal government's response to the recommendations provided by the Badgley Committee, namely, the amendments to the Criminal Code definitions of sexual offences and the new rules of evidence and procedure. It also includes the author's recommendations for improving the protection of children from sexual abuse which the criminal law seeks to afford them. Protective measures can be provided for child sexual abuse victims in the courtroom that respects the special needs of child sexual abuse victims and the fundamental rights of the accused.

II. Bill C-15

In response to the findings of the Badgley Committee's investigation of sexual offences committed against children and youth and its subsequent recommendations, the federal government introduced Bill C-15 to amend the *Criminal Code* and the *Canada Evidence Act*. Bill C-15 was passed in Parliament and came into effect on January 1, 1988. It was believed that the major criminal law reforms would accommodate the special needs of child sexual abuse victims and make the prosecution of sex offenders easier. As Mary Wells states:

The law, while paying attention to the concern that accused persons should not be deprived of fundamental rights to a fair trial, creates a series of new offences and defences, and increases the opportunity for children to testify in court. It is anticipated that the law will help to increase the number of successful prosecutions.¹

A. Criminal Code Definitions of Sexual Offences

Sixteen sexual offences or definitions were included in the 1988 reform of the *Criminal Code*.² These criminal offences include: sexual interference; invitation to sexual touching; sexual exploitation of a young person; anal intercourse; bestiality; parent or guardian procuring sexual activity of a child; householder permitting sexual activity; exposing genitals to a child; vagrancy; offences in relation to juvenile prostitution including living off the avails of child prostitution and attempting to obtain the sexual services of a child; incest; corrupting children; indecent act; sexual assault; sexual assault

¹ Mary Wells, *Canada's Law on Child Sexual Abuse: A Handbook* (Ottawa: Minister of Supply and Services Canada, 1990), at 9.

² *Criminal Code*. R.S.C. 1985, c. C-46.

with a weapon, threats to a third party or causing bodily harm; and, aggravated sexual assault.³

Under section 150.1(1) of the *Criminal Code*, the accused can no longer claim that the child consented to sexual intercourse or other sexual acts. Children under twelve years of age are deemed to be incapable of providing consent. Children between the ages of twelve and fourteen are also deemed to be incapable of consenting to sexual acts with the exception of sexual activity involving their peers (section 150.1(2)). The consent of youths fourteen years of age or more, but under eighteen, is invalid if the sexual abuse and exploitation is committed by a person in a position of trust or authority, or if the youth is dependent upon that person. Under section 150.1 (4)-(5), it is not a defence for the accused to claim that the child appeared to be older than expected. The accused must prove that all reasonable steps were taken to determine the age of the young person, such as asking for personal identification to verify one's age.

The reforms to the criminal law recognize that, as part of normal development, adolescents will explore and engage in some form of sexual activity with their peers and, therefore, it is no longer a crime for two adolescents to consent to sexual activity. Therefore, under section 150.1(2)(a)-(c) the defence of consent can be raised if the accused is not more than two years of age older than the victim and is under the age of sixteen. However, if the accused is in a position of trust or authority towards the complainant, or is in a relationship of dependency with the complainant, then the defence

³ Mary Wells, *supra*, note 1, at 14.

of consent cannot be raised.

B. Rules of Evidence

In Bill C-15, Parliament also adopted a more flexible approach towards children testifying, particularly in giving unsworn evidence. Currently, under section 16(1) of the *Canada Evidence Act*,⁴ the court must conduct an inquiry to determine whether a child under the age of fourteen understands the nature of an oath or solemn affirmation and whether a child is able to communicate the evidence, prior to permitting a child to testify. If a child meets both of these conditions, section 16(2) states that the child shall testify. However, if children do not understand the nature of an oath or solemn affirmation, but are able to communicate the evidence, they may testify upon promising to tell the truth under section 16(3). Section 16(4) provides that children who do not understand the nature of an oath or solemn affirmation, or who are incapable of communicating the evidence, are prohibited from testifying.

Bill C-15 also repealed section 16(2) of the 1973 *Canada Evidence Act* which required children's evidence to be corroborated. Furthermore, section 274 of the 1985 *Criminal Code* provides that no corroboration is required for the sexual offences listed within that section and the trial judge is prohibited from instructing the jury that it is unsafe to convict the accused in the absence of corroboration. This section acknowledges the fact that there is usually only one witness to sexual offences committed against children and that there is typically no physical evidence of the assault. Currently, the

⁴ *Canada Evidence Act*, R.S.C. 1970, c. E-10, s. 16; R.S.C. 1985, c. 19 (3rd Supp.). s. 18.

court may convict on the evidence of the child alone if it is satisfied beyond a reasonable doubt that the accused committed the sexual offence.

The rules relating to evidence of recent complaint were abrogated by the 1988 reforms. Section 275 of the 1985 *Criminal Code* states that the rules relating to recent complaint are abrogated with respect to the listed sexual offences. It is now acknowledged that a delay in reporting does not mean that the child is lying; it may actually reveal that the child is being coerced by the offender, which constitutes new evidence, or that the child is too afraid, ashamed or humiliated to report the abuse, or does not understand that the acts committed against them constitute a sexual offence. The abrogation of this section acknowledges the complexities of child victims' reluctance to report the sexual abuse.

Section 276 of the *Criminal Code* provides that no evidence shall be presented by the accused concerning the sexual activity of the complainant other than the accused, unless it is adduced for one of the following reasons. First, it can be presented as rebuttal evidence regarding the complainants' sexual activity or the absence thereof that was previously advanced by the Crown. Second, evidence of specific instances of the complainant's sexual activity to prove the identity of the offender on the occasion set out in the charge can be presented by the accused. Third, it can be presented as evidence of sexual activity that occurred on the same occasion that is set out in the charge and it relates to the consent of the complainant. However, before evidence concerning the complainant's sexual activity is used a hearing must be held, in the absence of the jury and the public, for the court to determine that these requirements are met. A complainant

is not a compellable witness at this hearing. Furthermore, advance written notice must be given to the prosecutor of the accused's intention to adduce this evidence and a copy of such a notice must also be filed with the clerk of the court. This section also provides that the required notice and the evidence obtained at the hearing shall not be published in any newspaper or broadcast in any way.

Section 277 of the *Criminal Code* provides that no evidence of sexual reputation, either general or specific, can be introduced to challenge or support the complainant's credibility. This amendment recognizes that an unchaste young person is not more likely to lie; there is not a direct correlation between chastity and veracity.

Under section 486(3) and (4) of the *Criminal Code*, where an accused is charged with one of the listed offences, the prosecutor or any witness under the age of eighteen may request the judge to make an order restricting the publication or broadcast of information which might reveal the victim's identity. This section also provides that the judge must inform the witness of the right to make an application for an order restricting publication at the first reasonable opportunity. If the sexual offence is committed by a parent or relative, such as incest, the name of the accused may also be prohibited from publication or broadcast as it could identify the victim.

Section 4(3) of the *Canada Evidence Act* was not amended by Bill C-15. If the spouse of an accused is compellable as a witness for the prosecution under section 4(2), the extent of compulsion is still limited by section 4(3) as the spouse is not obligated to disclose any communications with the accused during marriage. This privilege can be detrimental to the safety of incest victims. For example, a child may be caught in a

situation where the mother is too afraid to take legal action against her husband out of fear of being left alone with children to support, or fear of being be battered by her husband, or she may not believe her child's allegations. It is crucial that this amendment be made to the *Canada Evidence Act* so that all potentially relevant evidence of child sexual abuse can be heard by the court. A child's safety far outweighs the confidence of the marital relationship.

In Bill C-15, the federal government also adopted legal procedures to accommodate the special needs of child sexual abuse victims. These procedures were developed in the Unites States. Under section 486(2.1) of the *Criminal Code*,⁵ if an accused is charged with one of the listed sexual offences and the complainant is under the age of eighteen, at the time of the preliminary inquiry or trial, an order may be made at the discretion of the judge or justice to permit the complainant to testify outside the courtroom via closed circuit television or from behind a screen or other device. The purpose of using such devices is to prevent the complainant from seeing the accused. However, the Crown must first satisfy the court that the protection of the victim from the courtroom is necessary to obtain a full and candid account of the acts complained of. Typically, the Crown fulfills this requirement by calling on the child's parents, social workers, or others to give evidence regarding the child's apprehension of testifying in court or in front of the accused.⁶ If such procedures are used the accused, the judge

⁵ *Criminal Code*, R.S.C. 1985, c. 19, (3rd Supp.), s. 486(2.1).

⁶ Nicholas Bala, "Double Victims: Child Sexual Abuse and the Canadian Criminal Justice System" (1990), 15 *Queen's Law Journal* 3, at 9.

and/or jury must be able to watch and hear the child testify. Moreover, the accused must be able to communicate with his or her lawyer at all times.

A child's videotaped evidence is also admissible in court in proceedings relating to one of the sexual offences listed in section 715.1 of the *Criminal Code*.⁷ Under this section, a videotape of a child's statement is admissible if the child is under the age of eighteen, the videotape contains a description of the acts complained of and was recorded within a reasonable time after the offence occurred, and the child adopts the contents of the tape in testimony. The child must still be subjected to cross-examination by defence counsel.

C. Recommendations for the Improvement of Criminal Laws

The federal government's amendment of the *Criminal Code* to include new definitions of sexual offences reinforces the fact that children need to be protected. As a result of the reforms, child sex offenders are no longer able to avoid criminal responsibility by claiming that a child consented to the sexual activity, nor by claiming that they believed the child was older than expected. Not requiring a child's testimony to be corroborated also improves the protection provided to children. Since a child is typically the only witness in cases of child sexual abuse it is very difficult to secure the conviction of the accused when corroborating evidence is required. The rules relating to recent complaints were abrogated and now the court cannot hold in doubt the testimony of a child sexual abuse victim who did not complain immediately after the assault

⁷ *Criminal Code*, R.S.C. 1985, c. 19, (3rd Supp.), s. 715.1.

occurred. Child sex offenders can no longer adduce evidence of the complainant's previous sexual activity or sexual reputation to justify their criminal actions. The court is also required to make an order prohibiting the publication or broadcast of any information which would identify child sexual abuse victims. A child is thereby protected from the stigma which is attached to being a sexual abuse victim. It is also significant that screens, closed circuit television and videotaped evidence are used in the prosecution of child sexual offences to accommodate the special needs of victims. However, the reforms to the criminal law stop short of providing child sexual abuse victims the full protection of the law as it still requires them to testify and be subjected to cross-examination.

Currently, section 16(2) of the *Canada Evidence Act*⁸ provides that a child under fourteen years of age who understands the nature of an oath or solemn affirmation and is capable of communicating the evidence *shall* testify. Moreover, under section 16(3) if a child cannot understand the nature of oath or solemn affirmation, but can communicate the evidence, they can testify upon promising to tell the truth. In fact, the new legislation has increased the child victim's exposure in the courtroom by allowing children as young as three years of age to testify.⁹ Similarly, in *R. v. Khan* (1988), 42 C.C.C. (3d) 197 (Ont. C.A.), the court accepted that a child of four and half years was competent to testify. Videotaped evidence, screens and closed circuit televisions can be used in the prosecution of sexual offences for persons under the age of eighteen, so that the complainant cannot

⁸ *Canada Evidence Act*, R.S.C. 1985, c. C-5.

⁹ *State v. Hussey*, 521 A. 2d 278 (Me 1987)

see the accused, but children are still subjected to the hostile cross-examination of defence counsel. Apparently, it is believed that if a child can endure the trauma of testifying and the scrutiny of the judge and/or jury, the Crown and defence counsel and members of the public, then and only then, is one considered to be telling the truth. The criminal law is still based on the premise that children lie and fabricate stories of sexual abuse.

I recommend that the Canadian criminal justice system abolish the requirement that child sexual abuse victims appear in court. The testimony of complainants should be replaced by expert evidence, videotaped statements and out-of-court interviews. Due to the fear that is instilled in children by sex offenders, the requirement of a child's appearance in court serves only to protect the accused. A child's fear of the offender is great. Psychologists equate the trauma experienced by child sexual abuse victims with that of veterans and prisoners of war. Sexually abused children most often suffer from post-traumatic stress disorder. As psychologists R.C. Carson, J.N. Butcher and J.C. Coleman state:

In post-traumatic stress disorder, the stressor is uncommon (that is, outside the realm of typical human experience) and is psychologically traumatic - for example, a life-threatening situation, destruction of one's home, seeing another person mutilated or die, or being the victim of physical violence.¹⁰

Sexual victimization is also humiliating and degrading. Children tend to feel embarrassed and ashamed, they may feel dirty and even guilty. Child sexual abuse

¹⁰ R. C. Carson, et al., *Abnormal Psychology and Modern Life*, (Los Angeles, Calif.: Scott, Foresman & Co., 1988) at 151.

victims suffer extreme anxiety from having to appear in court, in front of the accused, judge and/or jury, the Crown and defence counsel and members of the public, and describe every intimate detail of the most degrading acts committed against them. In *R. v. P.R.* (23 March 1990) 944-017, District Court Justice Killeen granted the application for a child witness to testify from behind a screen after a psychologist testified at a voir dire that she attempted suicide after receiving a subpoena to testify at the preliminary inquiry. It is not surprising that feelings of shame and fear of reprisal by the offender make it extremely difficult for the child to speak freely and give a full and candid account of the acts complained of.

In addition, through cross-examination the defence counsel intends to raise a reasonable doubt that the accused did not commit the sexual offence. Confronting the child with hostile questions may also raise self-doubt in the child's mind. Similarly, hostile questioning may negatively reinforce the child's belief that they are themselves to blame, that they are partially responsible for the abuse. Children will likely suffer further emotional harm or trauma as a result of cross-examination. As Wendy Harvey and Paulah Edwards Dauns state:

One only needs to witness a single instance of the cross-examination of a child witness to realize that the procedure is ill suited to children. It is easy to confuse a young child with the use of age-inappropriate language, long and circuitous questions, and a confrontational style.¹¹

The power imbalance between the accused, his or her defence counsel and a child victim

¹¹ Wendy Harvey & Paulah Edwards Dauns, *Sexual Offences Against Children and the Criminal Process* (Toronto, Ont.: Butterworths Canada Ltd., 1993), at 186.

is too great for a child to escape the courtroom without experiencing some degree of trauma. In short, I do not consider it "an opportunity" for sexually abused children to testify in court, as Mary Wells asserts.

The North American tendency is to assume that traditional trial procedures are the only civilized way to proceed. On appeal to the Supreme Court of Canada in the case of *Levogiannis v. R.*,¹² the Crown, in the respondent's factum, points out that other legislatures in many free and democratic societies have dispensed altogether with the requirement that a child in sexual abuse cases appear in court to testify. Although a discussion of international law regarding child sexual abuse is not within the scope of this paper, suffice it to say that jurisdictions in the United States, Australia, New Zealand and Europe have developed alternative means of bringing a child's evidence before the court. The Crown states:

These alternative means include the use of depositions, out-of-court interviews, or videotaped statements. Moreover, while some of these various societies may express reservations or disapproval of one or more of the several techniques or devices employed by other free and democratic societies, they are nonetheless unequivocal in their view that child sexual abuse is a serious problem, and that complainants in child sexual abuse cases must be approached with a new sensitivity.¹³

It is my submission that the Canadian justice system is already leaning towards this approach in the prosecution of child sexual offences by relaxing certain rules of evidence, such as corroboration, recent complaints, hearsay and videotaped statements.

¹² (Indexed as: *R. v. Levogiannis* (1993), 85 C.C.C. (3d) 327.)

¹³ *Ibid.*

Since the 1988 criminal law reforms, the evidence of a complainant under the age of eighteen can be brought before the court through videotapes under section 715.1 of the *Criminal Code*, as previously mentioned, and subsequent case law has determined that hearsay evidence of a child's statements is also admissible. In *R. v. Khan*,¹⁴ the Supreme Court of Canada states:

Despite the need for caution, hearsay evidence of a child's statement alleging crimes against the child may be received where the general requirements of *necessity* and *reliability* are met. *Necessity* may be established where the child's evidence is itself inadmissible or expert evidence demonstrates that giving evidence might be traumatic for or harmful to the child. Factors relevant to establish *reliability* may include, but are not limited to, the timing of the statement, the demeanour, personality, intelligence and understanding of the child and the absence of reason for fabrication.

Also, screens can be used to obstruct the child complainant's view of the accused and closed circuit television allows the complainant to testify from outside the courtroom. In spite of the criminal law reforms, these protective devices are used inconsistently and sporadically across Canada. Under section 486(2.1) of the *Criminal Code*, the judge is not bound to grant an application permitting a child to testify from behind a one-way screen or via closed circuit television. The request has often been refused, sometimes inappropriately. In the United States, for example, a child witness was so terrified of the accused that they vomited on the witness stand and the prosecution had to be stopped. Similarly, in *R. v. Dick* (18 August 1988) Prince Rupert Registry 10344 (B.C.S.C.), Justice Rowles refused to grant the application requesting that a six year old victim be

¹⁴ *Ibid.*

allowed to testify from outside the courtroom by closed-circuit television. Shortly after the refusal, the victim met the accused in a hallway of the courthouse and because she was so upset, she was unable to testify. Moreover, Crown prosecutors are reluctant to request the use of screens because the child victim may not appear as credible or the testimony of the child will have less of an impact.¹⁵ The inconsistent and sporadic use of these devices is particularly evident in the northern regions of Canada where criminal justice is administered by circuit courts (as will be discussed in Part II of this thesis).

The Canadian criminal justice system must stop requiring child sexual abuse victims to appear in court to testify. As an interim measure, I recommend that section 486(2.1) of the *Criminal Code* be amended to provide that all complainants under the age of fourteen who are required to appear in court testify from behind a one-way screen or via closed circuit television. Upon application to the court, a judge should be obligated to grant the application to complainants who are fourteen years of age or older. It is evident that the exclusion of child witnesses from the courtroom is necessary for the court to obtain a full and candid account of the acts complained of. If the court deems it necessary a psychological assessment could be provided attesting to the fact that the child is experiencing overwhelming fear and anxiety from the expectation of appearing before the court and testifying before the accused and therefore will likely suffer further emotional harm or trauma. Expecting children to testify before the court and in front of the accused, is a heavy burden to place upon children, let alone subjecting them to cross-

¹⁵ *R. v. Levogiannis* (1993), 85 C.C.C. (3d) 327, at 341.

examination.

In my opinion, amending section 486(2.1) of the *Criminal Code* to make it an obligatory provision is not a violation of the fundamental rights of the accused. In *R. v. Levogiannis* (1993), 85 C.C.C. (3d) 327, the accused was convicted of sexual interference with a twelve year old boy. At trial, the judge permitted the complainant to testify from behind a screen pursuant to s. 486(2.1). The accused appealed to the Ontario Court of Appeal and the appeal was dismissed. On appeal to the Supreme Court of Canada, the appellant argued, *inter alia*, that the use of screens stamps the complainant's testimony with a presumption of truthfulness and creates an appearance of guilt for the accused. In *obiter*, Supreme Court Justice L'Heureux-Dube states:

The use of a screen could very well be held against a child complainant, who might be judged to be an unreliable witness, because she or he is unable to look the accused in the eye, rather than against the accused. If screens were used more regularly as part of the courtroom procedure, as recommended by the Family Court Clinic in London, these perceptions may well be totally eliminated.¹⁶

The Supreme Court of Canada held that section 486(2.1) does not violate the appellant's rights to be presumed innocent or to a fair trial.

¹⁶ *R. v. Levogiannis* (1993), 85 C.C.C. (3d) 327, at 341.

PART II

JUSTICE IN THE NORTH

4

Circuit Courts

I. Introduction

The criminal justice system has failed Aboriginal people. It has arrested and incarcerated Aboriginal people on a disproportionate level and provided little protection to Aboriginal victims of violence. Two specific incidences of this injustice include the rape, stabbing and killing of Helen Betty Osborne in The Pas, Manitoba and the shooting death of J.J. Harper by a Winnipeg police officer. The criminal justice system has been insensitive and inaccessible to Aboriginal people - they have been denied justice. Aboriginal women and children are victims of racism, sexism and suffer unconscionable levels of physical and sexual violence in Aboriginal communities and contemporary

Canadian society.

The purpose of this chapter is to describe the process of circuit courts as a background to the treatment of child sexual abuse victims, in particular Aboriginal children, within the criminal justice system of northern Canada. Historically, criminal justice has been administered by circuit courts in the remote regions of Yukon Territory, Northwest Territories and the northern parts of the provinces. The circuit court system is the clearest example of the unequal and uneven treatment of Aboriginal people within the criminal justice system. As Commissioners A.C. Hamilton and C.M. Sinclair, also Associate Chief Justice and Associate Chief Judge respectively, of the Aboriginal Justice Inquiry of Manitoba state:

The residents of a remote community get their first sight of the circuit court when all its members, who are usually non-Aboriginal, with the exception of the Aboriginal court worker, descend from the plane at the local airport. The court party is then often driven from the airport in an RCMP vehicle to the building or hall where court is to be conducted.¹

II. Circuit Courts

The administration of justice in northern Canada is delivered by travelling circuit courts.² Circuit court hearings are held in most communities only ten to twelve times a

¹ A.C. Hamilton & C.M. Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba Volume 1: The Justice System and Aboriginal People* (Province of Manitoba, 1991), at 227.

² C. Taylor Griffiths (ed.), *Circuit and Rural Court Justice in the North: A Resource Publication* (Simon Fraser University for the Northern Conference, 1990).

year and in some communities they are held as little as four times a year. In Yukon Territory, all communities served by the circuit court are accessible by road, with the exception of Old Crow. Thirteen rural communities are served by two territorial court judges who are involved in 95% of the criminal cases. Week-long circuit courts are held for the communities of Watson Lake, Faro, Ross River and Dawson City. A one to three day circuit court is held in other communities on a rotational basis. The scheduling of circuit courts is determined by caseload and other community events. For example, the circuit courts held in Old Crow are scheduled according to the hunting, fishing and trapping seasons when most people are in the community.

In the Northwest Territories, most communities can only be reached by air, ship or boat, with the exception of those communities centered around Great Slave Lake. Territorial and Supreme Court judges, travelling on six circuits, serve forty to fifty communities. Circuit courts are held monthly in Frobisher Bay, Hay River and Inuvik, while smaller communities are served every three months.

The province of Manitoba is one of the provinces that are served by circuit courts. There are two court parties based out of Thompson, Manitoba that travel to twenty communities in the northern regions of the province. Circuit courts are held in some communities only once a year, but in most communities they are scheduled ten to twelve times a year. Most communities in northern Manitoba can only be reached by air.

A. Delays of Circuit Court Sittings

One of the practical problems with circuit courts is that since most northern communities can only be reached by air, circuit court sittings are frequently cancelled due

to dangerous weather conditions. In the winter, flights can be delayed by snow storms. In the spring and fall, the ice break-up and freeze-up on the lakes and rivers cause flight delays. Also, heavy rains will cause unsafe landing conditions on gravel runways. If a flight is cancelled, the circuit court party may not be able to return for another month as they are tightly scheduled.

The cancellation of circuit court hearings causes severe hardship for Aboriginal people. Some Aboriginal people must come in from the trapline and travel two hours or more by boat or snowmobile to appear in court. For example, the nearest circuit court location to God's Lake Narrows is thirty-two kilometers away. It is accessible to the Aboriginal community of God's River by air, boat or snowmobile. In 1991, a round trip by air costs \$240. One father told the Aboriginal Justice Inquiry that he had taken twenty-four trips to God's Lake Narrows to attend circuit court because of charges against his son. He had spent \$5,700 on airfare. In January 1988, the father took his son to God's Lake Narrows by snowmobile because if the boy did not appear in court a warrant would be issued for his arrest. On the way back from court, his son suffered severe frostbite on his face.³ Since poverty is prevalent in most Aboriginal communities, many people do not own vehicles and cannot afford to pay for transportation. If they cannot return home on the same day then they must assume the additional cost of accommodation. As the Commissioners of the Aboriginal Justice Inquiry state:

Percy and Irene Okimow told of the frustrations they experienced following their daughter's arrest for discharging a firearm, break and enter,

³ A.C. Hamilton & C.M. Sinclair, *supra*, note 1, at 239.

and mischief. Upon her arrest in God's River, their daughter was taken first to God's Lake Narrows for court, where she was denied bail, and then sent to Thompson. Her parents followed her to both communities, attempting to arrange for her release. In the space of a week, the family spent \$1,200 on transportation and accommodation. Another youth who had been arrested at the same time, whose parents had not been able to travel to Thompson, was denied bail.⁴

Another case involved a single mother whose children had various criminal charges against them during their youth. After sitting all day in the courtroom, she was approached by a person who claimed to be the child's defence lawyer and told that the case was remanded until the next day. She had to find accommodations for herself and her child and return to court the next morning only to find that the case was remanded for yet another day. The distance and costs involved to attend at circuit court locations cause severe problems for low-income families.

Lengthy delays have various other detrimental effects on Aboriginal people involved in the circuit court system. Evidence becomes more difficult to present for victims and offenders as memories fade and witnesses become difficult to find over time. Offenders held in custody are clearly affected by the delay in court proceedings. The Manitoba Justice Inquiry found that the circuit court system works too slowly and Aboriginal people are affected disproportionately from the delays.

A delay in legal proceedings has harmful effects for both the victims and offenders. Victims of violence live in fear when the offender is released back in to the community on bail, they experience anxiety and fear of testifying at legal proceedings

⁴ *Id.*, at 237.

and must relive the painful memories of the assault. Also, the healing process cannot begin before the trial is over. The offender's rights to a trial within a reasonable time are guaranteed by section 11(b) of the *Canadian Charter of Rights and Freedoms*.⁵ Moreover, in *R. v. Askov et al.*, [1990] 2 S.C.R. 1199, the Supreme Court of Canada held that the Crown must bear the responsibility for the delay of a trial. The courts must take into consideration the following factors when considering whether the delay of a trial is unreasonable: the length of the delay, the reasons for the delay, waiver and the prejudice to the accused. A lack of institutional resources, such as the lack of facilities, cannot be used to justify the continual postponement of a trial. In *Askov*, the court upheld the stay of proceedings as the delay of the trial had been unreasonable.

The Commissioners of the inquiry held that the delays experienced by the accused who are subject to the northern circuit courts bring the administration of justice into disrepute. One Aboriginal elder told the Inquiry that his grandson pled guilty to a break and enter charge on his first court appearance; however, it was seven months before he was sentenced. In Oxford House, the elder Wesley Weenusk states:

It is also the justice system as we know it ... it's more or less, like, just a game where people are sentenced and people laugh; the judge laughs, the police laugh, everybody laughs about a lot of these cases as if it's just one big joke.⁶

One RCMP special constable, John Constant, in The Pas, Manitoba reported that delays

⁵ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, Schedule B of the *Canada Act 1982* (U.K.), c. 11.

⁶ A.C. Hamilton & C.M. Sinclair, *supra*, note 1, at 240.

in the circuit court system are dragged out by defence counsel to protect the accused's interests. Some lawyers see the delay of proceedings as a defence strategy. In many cases the accused were given very lenient sentences or were acquitted. The court system is viewed by the Aboriginal people as a puppet show, as John Constant states:

...when I had to travel to the communities, such as Moose Lake, many of the accused snickered at the court, because they knew they were going to get off or remanded or somebody would prolong the court case, because in most cases the judge would not ask the defence lawyers as to why their cases were not prepared.⁷

The Manitoba Justice Inquiry reports that whole communities are affected by delays in criminal trials. The Commissioners, A.C. Hamilton and C.M. Sinclair, state:

We found the community of Lac Brochet in a state of shock when we visited. Several young men from that community were awaiting trial on charges of sexual assault. Because of the number of youth involved and the nature of the crime, the case deeply affected everyone in the community. The community was aware that it had a serious problem, and leaders and elders wanted to deal with it, but we were told that they could not begin to look at healing the community until the trials were over.⁸

The chances that an accused will be acquitted on the criminal charges increases due to the cancellation of circuit courts.

B. Circuit Court Facilities

The facilities in which circuit courts are held are not conducive to the administration of justice in a calm and dignified way. Circuit courts are usually held in community halls or school gymnasiums, facilities that are inappropriate and

⁷ *Id.*, at 241-2

⁸ *Id.*, at 242.

unacceptable. The courtroom is often noisy because it is used as a visiting room for families to reunite with the accused who has since been apprehended. The court party often sits at one end of the room and the spectators gather at the other. Also, there are usually not enough seats to accommodate spectators. As a result, the public cannot hear the court proceedings. Because proceedings are in English or French, they often cannot understand the language spoken by the circuit court party, as will be discussed later. Translation is often not available. When provided, it is for the benefit of the court party and accused. It is very rare that words spoken by the court party are translated or explained to spectators. For this reason, Aboriginal people do not believe that a circuit court meets the definition of a public court. The Commissioners of the Inquiry speculated that if such facilities were offered in the City of Winnipeg, most judges and litigants would refuse to proceed with the case. In fact, some judges refused to hold circuit court hearings in some Aboriginal communities because of the poor conditions of the facilities.

It is obvious that these facilities will not be equipped with one-way screens or closed circuit televisions to shield a child victim of sexual abuse from seeing the accused, nor is this equipment carried by Crown prosecutors as they travel from one community to another.⁹

⁹ In speaking to a Crown prosecutor who travels with the circuit court in the Northwest Territories, I have learned that in some cases a child's evidence is videotaped by the investigating police officer or a social worker, if one is available. However, it is not in the majority of child sexual abuse cases that videotaped evidence is used, not by any means.

C. Circuit Court Parties/Language Barriers

The judges, crown prosecutors and defence counsel who travel with the circuit court are predominantly non-Aboriginal persons who often come from the urban south. These circuit court officials are relatively young and transient; they usually live in larger centers, such as Whitehorse, Yukon, Yellowknife, N.W.T. or Goose Bay, Labrador; most of them will only stay and work in the north for one or two years. These justice officials often have little understanding of the Aboriginal individuals they prosecute. Also, the language spoken by justice officials is primarily English or French and, consequently, they fail to grasp the nuances of the verbal and nonverbal communication that are characteristic of the people they serve. In contrast, the recipients of this system of justice are predominantly Aboriginal and have lived their entire lives in remote northern communities.

In the Northwest Territories, the language barrier is particularly acute. The majority of people living in Aboriginal communities often speak English as a second language, or they do not speak English at all. However, interpreters who speak the same Aboriginal language as the accused are not available. This problem affects not only the accused, for whom the process can be boggling, but also the victim and other witnesses.

The Northern Conference states:

The problems of victim assistance are particularly acute in the Northwest Territories for some of the very obvious reasons. We have a **language problem**. ... The result is that the services which are made available to the residents of the Northwest Territories are made available primarily in those two official languages, and unless one can plug in to one of them and derive the benefits, it becomes very difficult to operate in a third language and get the kind of assistance that would be quite readily

available for those with the ability to communicate in one of the official languages (emphasis in the original).¹⁰

In Yukon Territory, this particular problem is less widespread. The majority of residents are non-Aboriginal and most Aboriginal people are fluent in the English language.

D. Time Pressures

There is considerable pressure put on the court party to clear the docket in one day. It is rare that the circuit court party spends a night in the community. Aboriginal people observe the court party conducting trials with one eye on the clock and hear them mentioning that they have to hurry or they will miss their four o'clock plane. The

Commissioners, A.C. Hamilton and C.M. Sinclair state:

The feeling of Aboriginal people is, quite properly, "If you ask us to come to court today, then deal with our case. If you don't have time for our community, then don't come." The community feels insulted by the way it is treated.

Aboriginal people are also aware that they only receive one court hearing a month because decision-makers in Winnipeg have come to the conclusion that, for economic reasons, that is all the administrators of justice are willing to provide. They are left with the unfortunately correct assumption that they are on the short end of a cut-rate justice system.¹¹

It is blatantly obvious to Aboriginal people that there is a complete lack of concern for their rights, needs and priorities.

A Legal Aid lawyer travels with the circuit court and acts as duty counsel to the accused who appears in court without legal counsel. In the 1987-88 fiscal year, duty

¹⁰ C. Taylor Griffiths, *supra*, note 2, at 6-1.

¹¹ A.C. Hamilton & C.M. Sinclair, *supra*, note 1, at 237.

counsel based out of Thompson, Manitoba assisted 2,600 people. Duty counsel must interview clients as quickly as possible before the court convenes. Duty counsel advises the accused, assists the accused in the application for legal aid, assists the accused in being released on bail, and speaks to sentencing if the accused pleads guilty. Sometimes duty counsel is forced to conclude legal matters before a certificate for legal aid is issued because of the pressure to clear the court dockets or the unlikelihood of the defendant reappearing at a later date. Remanding cases adds to future court dockets and increases the risk of some offenders committing crimes in the interim or failing to reappear. By concluding matters before the issuance of a legal aid certificate, the duty counsel is pressured into letting the accused plead guilty.

The limited time spent in the community usually results in the court convening far past the scheduled time as the Crown prosecutor and defence counsel need time to interview witnesses or clients prior to the hearing. Duty counsel have little knowledge of their client's situation before the court convenes. The Aboriginal Justice Inquiry of Manitoba was told by Doug Hastings that in God's Lake Narrows:

The defence lawyers or Legal Aids on an easy docket have 30 to 40 clients to interview before court commences usually by 11:00 or 11:30. It is humanly impossible for any lawyer to adequately prepare a defence for so many clients in such a short time. Plea bargaining is a normal routine.¹²

Likewise, if the defence counsel has this many clients to interview then Crown prosecutors would at least have thirty to forty victims and/or witnesses to interview and prepare. It is highly unlikely that a prosecutor can adequately interview all victims and

¹² *Id.*, at 235.

witnesses or prepare an effective argument on behalf of the Crown. The prosecutor prepares a case on the report and evidence submitted by the police; however, it is more than likely that the Crown prosecutor only meets a child victim for the first time on the day the trial begins.

As a consequence of the time pressures, the defence counsel will be less knowledgeable about the offender's circumstances, the accused's potential defences against the charges, the available alternatives to pre-trial detention and harsh sentences. Also, the defence counsel will not have time to plea bargain for reduced charges or a lighter sentence from the prosecutor. Consequently, the accused will also be unaware of the available options and will be unable to give informed instructions to the lawyer.

E. Plea Bargaining

Plea bargaining is a process that involves an accused pleading guilty to a lesser charge, or pleading guilty to one offence if others are dropped, or pleading guilty if the Crown recommends a lighter sentence. An accused may also plead guilty or agree to provide material evidence or testimony in exchange for a lesser charge, or pleading guilty to one charge, or a lighter sentence. A plea bargain is accomplished through discussions between Crown prosecutors, defence counsel and sometimes police officers. This process can and should benefit the accused and it allows for criminal matters to be dealt with quickly. A plea bargain can be of some benefit to victims as it may relieve them from testifying. It saves the court's time and thereby minimizes the use of public resources. Plea bargaining works best when the defence counsel has the full support and proper consent of the accused. The accused should have a complete knowledge and

appreciation of the evidence against him or her, the Crown prosecutor's position, and how the law affects the accused's position. The accused must understand that the judge has an overriding discretion to accept or reject the plea bargain and impose the appropriate sentence. Plea bargaining works best when there is good communication between the defence counsel and the accused, the contact between them must be appropriate and meaningful. For many Aboriginal people, the process of plea bargaining breaks down at this point.

One of the problems with the process of plea bargaining is that the communication between defence counsel and an Aboriginal accused is impaired. If language and cultural barriers exist between them, it renders almost any communication ineffective. There is little contact between them as defence counsel usually lives in the city and the Aboriginal accused typically resides in a remote community. Typically, the Aboriginal accused rarely sees or hears from his or her defence counsel between court appearances and can only speak to them before court convenes or during recesses. The sense of urgency which is created by the time pressures of circuit court are not conducive to the ends of justice; defence counsel must speak to several clients and make an attempt at plea bargaining with the Crown prosecutor as well. The Commissioners of the Inquiry state:

If, in fact, there are time pressures being brought to bear upon a lawyer because of a scheduled take-off or impending bad weather, defence counsel may feel pressure to make a deal, or to get his or her client to accept deals offered by the Crown. We believe that defence counsel, in fact, do press their clients to accept "deals" in situations that are not fair to them. Poor communication between non-Aboriginal defence counsel and Aboriginal accused and systemic pressures on counsel to "cooperate"

contribute to this practice.¹³

Justifiably, Aboriginal people feel that their rights and interests are ignored by the circuit court party. Some inmates at the Portage Correctional Institute were convinced to plead guilty whether or not they committed the offence, or did so for justifiable reasons. Some Aboriginal women felt pressured into pleading guilty, due to their ignorance regarding the criminal justice system, the lack of alternative legal advice and a history of oppression.

Part of the problem is the degree to which defence counsel takes control over the case from the Aboriginal accused. It often appears that the client is taking instructions from the defence counsel, rather than the other way around. This process is facilitated by the courts by allowing defence counsel to waive the reading of the criminal charges and entering a plea on behalf of the accused. Under these circumstances, all that clients are expected to do is nod their heads in affirmation to plea of guilty.

Another reason that the process of plea bargaining breaks down is that this process is at odds with Aboriginal culture. In Aboriginal communities, a consensus to resolve both community and private matters is derived through open discussions. An Aboriginal accused believes that the "deal" is already made before the circuit court party arrives in the community. Plea bargaining is usually limited to discussions between the prosecutor and defence counsel and the accused; the victim, witnesses and members of the community are never part of that process.

¹³ *Id.*, at 232.

F. Sexual Assault Offences

Aboriginal females, in particular, feel re-victimized by the circuit court system of justice. It is common for circuit court judges be wantonly lenient in respect to sentencing an Aboriginal accused for sexual assault offences committed against Aboriginal females. Lenient sentences trivialize the severity of sexual assault offences, and in turn, this triviality perpetuates sexual violence in Aboriginal communities. As Emma LaRocque, a Professor of Native Studies at the University of Manitoba states:

As a rule, thieves and minor drug dealers receive way stiffer penalties than do child molesters, rapists or even rapist-murderers! This in itself is a chilling message regarding societal devaluation of human dignity. Many Aboriginal communities have expressed concern that courts are especially lenient with Aboriginal offenders who assault other Aboriginal people. The easy parole system, along with lenient sentencing, further sets up Aboriginal victims.¹⁴

Similarly, the delay of circuit court proceedings pose serious problems for victims of sexual violence. Sometimes, offenders are apprehended and released on bail, while others are arrested and immediately released back into the community as the prison is too far away. Offenders usually head straight back to their remote communities perhaps to commit further violence. Their reappearance intimidates the victim and is often intended to do so. Moreover, a restraining order is worthless if police services are not available to enforce them. In addition, with the limited jurisdiction of circuit courts in Manitoba, victims of such intimidation must travel to distant, urban centers to apply at the Court of

¹⁴ Emma D. LaRocque, "Violence in Aboriginal Communities," reprinted from the book *The Path to Healing* by the Royal Commission on Aboriginal Peoples, March 1994, at 77-8.

Queen's Bench for such an order.¹⁵

There are very limited resources to rely on in terms of victim assistance in northern Canada. It is almost impossible to find emergency shelters and adequate housing remains a problem, and police assistance or protection is critically inadequate or virtually non-existent.¹⁶ It was reported to the Canadian Panel on Violence Against Women that women who try to report acts of violence to the police are greeted with a recorded message, in English only, on an answering machine. Some isolated communities do not have police services and when assistance is required it can take from two hours to two weeks for the police to respond.¹⁷ One battered woman reported that the best way to get the police to respond to family violence is to call and tell them: "Help, help, my husband is beating me with a gram of hash."¹⁸ When police assistance is available to Aboriginal sexual abuse victims, it is often cruel and insensitive. As the Commissioners of the Aboriginal Justice Inquiry state:

We heard one example of such treatment from the Aboriginal mother of a 16-year-old rape victim. She told of how the police came to her home after her daughter had reported being raped and had undergone hospital examination and police questioning. The police told the mother that her daughter was lying and should be charged with public mischief. According to the mother, the officer added, "Didn't you want it when you

¹⁵ A.C. Hamilton & C.M. Sinclair, *supra*, note 1, at 236.

¹⁶ Canadian Panel on Violence Against Women, *Final Report of the Canadian Panel on Violence Against Women* (Ottawa: Minister of Supply and Services, 1993), at 168.

¹⁷ *Id.*, at 168.

¹⁸ *Id.*, at 123.

were 16?¹⁹

Judges, Crown prosecutors and defence counsel who travel with the circuit court also need to be sensitized to the reality of violence in Aboriginal communities. Cultural sensitivity programs are short and superficial and they have created a false impression that violence is acceptable in the culture of Aboriginal Peoples.

G. Conclusion

The use of circuit courts in northern Canada raises some very serious issues. The generally accepted principles of judicial independence and being heard by an impartial tribunal are undermined when the court party is seen arriving in Aboriginal communities together, after travelling together on the same plane, and when pressure is put on Crown prosecutors to clear the court docket in one day. The continuous delay of trials and the subsequent acquittals of the accused makes a mockery of the criminal justice system. Also, the administration of justice cannot be conducted in a respectful manner due to the poor conditions of the facilities and the noisy atmosphere of courtroom. Similarly, the sense of urgency that is created by the time pressures of the circuit court party are not conducive to the ends of justice. With the language and cultural barriers that exist between the circuit court party and Aboriginal Peoples, justice cannot be delivered.

The Commissioners of the Aboriginal Justice Inquiry canvassed RCMP officers, Crown prosecutor, Legal Aid lawyers and private defence counsel to determine the reasons for the delay of trials. In short, the Commissioners found that all parties involved

¹⁹ A.C. Hamilton & C.M. Sinclair, *supra*, note 1, at 482.

in the circuit court system claimed that they were not responsible. They felt that they were ready to proceed to trial quite quickly. It is obvious that this is not the case. The Commissioners held that the counsel and the judiciary must take more responsibility for the delays that Aboriginal people experience in the courtroom and that major structural reforms of the circuit court system are required.²⁰ As Territorial Court Justice Stuart states:

The justice system rules and procedures provide a comfortable barrier for justice professionals from fully confronting the futility, destruction, and injustice left behind in the wake of circuit courts.²¹

²⁰ *Id.*, at 246.

²¹ *R. v Moses*, [1992] 3 C.N.L.R. (Y.T. Terr. Ct.) 116, at 118.

5

Critique of *R. v. Moses*

I. Introduction

The purpose of this chapter is to discuss the use of a sentencing circle in *R. v. Moses*¹ that laid the foundation for many Aboriginal community justice initiatives (a topic that will be discussed in the next chapter). Prior to the use of sentencing circles, some circuit court judges consulted with the elders of Aboriginal communities, such as the elders panel in Teslin, Yukon, in sentencing Aboriginal offenders. In this case, the judge requested the accused's family and community to speak to sentencing rather than holding a traditional sentencing hearing. A discussion was held in the form of a circle to

¹ *R. v Moses*, [1992] 3 C.N.L.R. (Y.T. Terr. Ct.) 116.

search for a community-based sentencing alternative, rather than sending the accused to jail. The stated objective of this alternative was to protect the community and break the offender's cycle of substance abuse and crime. Also, through the use of a sentencing circle, Justice Stuart was seeking to improve the prospects of the offender's rehabilitation through the use of community resources. As Justice Stuart states:

Currently the search for improving sentencing process champions a greater role for victims of crime, reconciliation, restraint in the use of incarceration, and a broadening of sentencing alternatives that involves less government expenditure and more community participation.²

However, I believe that the underlying motive of this approach is to merely lessen government expenditure, without a genuine concern for the protection of victims or the community.

II. *R. v. Moses*

A. The Facts

In *R. v. Moses*, the twenty-six year old accused, Philip Moses, was convicted on charges of possession of a weapon, namely a baseball bat, for the purpose of committing an assault on a police constable and on charges of theft and breach of probation. Philip picked up a baseball bat and approached Constable Alderston, who was standing behind an open car door. The police constable warned Philip to stop several times, but Philip kept approaching in a menacing and angry manner. Philip was unaware that Constable Alderston had already drawn his revolver behind the car door. At the last minute, the

² *Id.*, at 118.

Constable jumped inside the police cruiser and sped off. Constable Alderston arrested Philip within an hour without incident. In regards to the charges of theft, Philip was found guilty of stealing some clothes from a family residence in Mayo and plead guilt to breach of probation.

B. The History of the Accused

Philip Moses was a member of the Na-cho Ny'ak Dun First Nation and was born and raised in Mayo, Yukon. Philip was born the third youngest of nine children and suffered from fetal alcohol syndrome. In his childhood years, Philip suffered abuse and neglect at home and, between the ages of ten to sixteen, he was sent to various foster homes, group homes, and juvenile facilities where he suffered sexual and physical abuse. Placements in several juvenile facilities scrapped any hope of Philip obtaining a formal education. Philip functions at a grade 6 level with extremely poor reading and writing skills; he experiences severe difficulty with educational courses. With little education, Philip's attempts to find gainful employment are frustrated. Justice Stuart states:

With virtually no marketable work skills or work experience, without money or a sober home, without a positive personal support system, and with ready access to others addicted to drugs or alcohol, Philip, once out of jail, quickly drifts into the maelstrom of poverty, substance abuse and crime. He commits crime while impaired by alcohol or drugs, to support his addictions.³

Moreover, Philip also has a son, six years old at the time of the trial, whom he never sees or parents.

Philip has a lengthy criminal record of 43 previous convictions for which jail

³ *Id.*, at 120.

sentences were imposed, totaling almost 8 years. Since 1980, assessments of Philip's mental health indicate that he is extremely sensitive, lacks the ability to trust, suffers extensive personal problems and significantly dysfunctional coping skills. Similarly, the assessment indicates that Philip needed to bond with a significant person who could offer counselling and support. Philip's incarceration in juvenile detention centers and adult penitentiaries have destroyed his self-image, caused severe depression and suicidal tendencies. Yet, counselling was never provided. This was primarily due to the unavailability of counselling services. But it was also due, Justice Stuart explains, to Philip's anger and generalized distrust of people, his lack of self-discipline, his ability to take to the streets and his poor self-image. Without psychological intervention, Philip became increasingly dysfunctional, his criminal behaviour increased and he became more violent and self-destructive. He possessed little or no insight into his own behaviour, nor the judgment or perspective to choose a sensible course of action.

For ten years, Philip went from alcohol abuse, to crime, to prison and back again. Each time he emerged from prison, Philip was angrier and more dysfunctional; he was becoming more marginal, entrenched into an existence of poverty, substance abuse and crime. Philip's lengthy criminal record and his history with the justice system conveyed two obvious conclusions. "First, the criminal justice system had miserably failed the community of Mayo."⁴ Second, it has failed Philip.

Justice Stuart states that since Philip was born and raised in Mayo, and his family

⁴ *Id.*, at 121.

lived in Mayo, Philip instinctively returned to this community after his release from seven previous prison terms. Each time he was released, Philip was less able to control his anger or substance abuse and was more dangerous to the community and to himself. The criminal justice system did not protect the community; in fact it endangered the community. As for Philip, it is estimated that one quarter of a million dollars was spent on his care in foster homes, juvenile detention centers, and on his forty-three convictions as an adult.⁵ Yet as Justice Stuart states:

...the justice system continues to spew back into the community a person whose prospects, hopes and abilities were dramatically worse than when the system first encountered Philip as a wild, undisciplined youth with significant emotional and general life skill handicaps. His childhood had destined him for crime, and the criminal justice system had competently nurtured and assured that destiny.⁶

It is evident that incarcerating an offender, particularly without providing psychiatric or psychological treatment, training in general life and work skills, and addiction management, is not a means of rehabilitation.

Justice Stuart states that, once again, the court was being asked to demonstrate its power and punish the offenders who break “our” laws. Justice Stuart states:

Against this abjectly dark picture, given his extensive criminal record, and a sentence of 15 months imposed at his last appearance in 1989, common practice marked out a simple task for counsel and judge. How much jail time would be appropriate? Had Mr. Moses now proven by his criminal conduct that a sentence of two years was warranted; a sentence which would send this relatively young Aboriginal person out of the Territory to

⁵ This estimate does not include social costs, or costs for police services, legal aid, Crown, court, jail, probation and psychiatric assessments.

⁶ *R. v. Moses*, [1992] 3 C.N.L.R., at 121.

a federal penitentiary!⁷

It appears that the criminal justice system had reached a stalemate in trying to rehabilitate Philip. It was obvious that sending Philip back to jail was futile. But, something had to be done. As Justice Stuart states:

It was late in the evening, everyone was tired. The police plane waited to return Mr. Moses to jail. The charter plane waited to return the court circuit (*sic*) to Whitehorse. ... Numerous factors which never appear in sentencing decisions but often affect sentencing decisions, pressed the court to "get on with it." We didn't. Somehow the pernicious cycle plaguing the life of Mr. Moses, had to be broken before he tragically destroys himself or someone else.⁸

Instead, Justice Stuart scheduled a special circuit to Mayo to sentence Philip and to discuss with the community, in an open forum, their effective participation in the sentencing hearing. Justice Stuart noted that Philip's case was not the model case for experimenting with community alternatives, but he felt that they had nothing to lose!

C. Preparing for Sentencing

After the trial, the court was adjourned for three weeks, in which to prepare for a sentencing process that directly involved the community's participation. The probation officer met with the accused and his family, the Chief and members of the community to encourage their participation in the sentencing hearing. They were asked to help break the vicious cycle of criminal behaviour and substance abuse, deteriorating self-esteem and emotional health that Philip was caught in - a cycle that would eventually result in a

⁷ *Id.*, at 120.

⁸ *Id.*, at 120-1.

tragic outcome. The Crown prosecutors were asked to consider what other alternatives, beyond incarceration, would help break Philip's cycle of crime, violence and substance abuse. They also visited the community two days before the hearing and became familiar with their concerns. The local RCMP Corporal was also requested to assist in recruiting community involvement.

D. Safeguards to Protect Individual Rights

Within the sentencing circle, many safeguards were adapted to ensure the protection of individual rights. One of the safeguards maintained during the sentencing circle was keeping the hearing open to the public. However, Justice Stuart states that in some sentencing hearings, an open court is not always conducive to obtaining vital information as some participants are reluctant to disclose the intimate details of their life, particularly in small communities where anonymity is impossible to maintain.⁹

Transcripts of discussions were kept by the court reporter as another safeguard to protect individual rights. Justice Stuart states that some parts of the discussion can be excluded from the transcripts and if the sentencing circle is closed to the public, transcripts are only available if required by the court of appeal.¹⁰

Also, an upper limit was placed on sentencing prior to the sentencing circle discussion. The purpose of the circle is to explore viable sentencing alternatives, drawing upon community resources whenever possible. It is not for the purpose of finding

⁹ *Id.*, at 131.

¹⁰ *Ibid.*

reasons to increase the severity of the sentence. At the outset of the sentencing circle process, the Crown prosecutor and defence counsel were requested to make their customary submissions. In light of these submissions, Justice Stuart set the upper limit for the sentence to be imposed. Imposing an upper limit allows the accused to fully participate without the fear of provoking a harsher sentence and informs the community of what kind of sentence is in store for the offender if an alternative is not found.

Section 668 of the *Criminal Code*¹¹ provides the accused an opportunity to speak before a sentence is imposed. This opportunity to speak is rarely used and it is generally ineffective. The circle affords the accused an opportunity to fully participate and thereby reduces the inequities of the traditional sentencing hearing.

The functions of the Crown prosecutor and defence counsel are not excluded in the sentencing circle. At the outset, the prosecutor states the interests of the Crown in sentencing the accused and through circle discussions the prosecutor is more capable of assessing the Crown's interests and those of the community. Defence counsel is aware of the worst conventional sentence which may be imposed and can use the circle to advance the interests of the accused in developing a constructive sentencing plan.

If a disputed fact arises within the circle discussions, it must be proven in the traditional manner. Court can resume at any time during the proceedings and witnesses can be examined under oath. In a sentencing circle, a disputed fact can either be resolved or rendered irrelevant or unimportant as a sentencing plan is developed upon relevant

¹¹ *Criminal Code*, R.S.C. 1985, c. C-46, s.668.

community principles.

E. The Sentencing Circle

The participants of the sentencing circle included the judge, Crown prosecutor, defence counsel, probation officer, RCMP officers, the Chief of Na-cho Ny'ak Dun First Nation and members of the community. The circle also included the accused and his family, Constable Alderston, and the father of one of Philip's previous victims.

The adversarial nature of the sentencing process, including the dominant seating positions of the judge, Crown prosecutor and defence counsel in the courtroom, was removed. Instead, the chairs were arranged in a circle to seat thirty people and an outer circle of chairs was arranged for people arriving after the sentencing hearing began.

Crown counsel sat to the right of the judge and immediately across from the defence counsel. Philip and his family sat next to the defence counsel and everyone else sat wherever they felt comfortable within the circle setting. Since the participants sit facing each other, it is believed that they all have equal access and exposure to each other. Everyone was encouraged to participate in the discussion as to how the community might best be protected from Philip and how the vicious cycle of alcohol and crime might be broken. The accused was allowed to speak on his own behalf and directly ask questions of other participants. Justice Stuart held that this seating arrangement profoundly changed the dynamics of the decision-making process, and since the roles of participants had changed the focus, tone, content and scope of the discussions also changed.

F. The Sentencing Plan

Philip was given a suspended sentence and two years of probation with

conditions. The sentencing plan entailed a process involving three distinct stages. The first stage of Philip's rehabilitation required his reintegration into the family and their lifestyle. Philip was required to reside with his family on the trapline located sixty miles outside of Mayo. Philip's family was responsible for ensuring that a family member stayed with Philip. The second stage required Philip to attend a two month residential program for alcoholics of Aboriginal ancestry in southern British Columbia. During this time, Philip's family, community and probation officer was to maintain regular contact. The third stage of the sentencing plan returned Philip back to Mayo to live with his family in an alcohol free home environment. The community was responsible for providing a support program to upgrade Philip's life and work skills, providing assistance in securing Philip gainful employment and providing continuous substance abuse counselling. Also, the probation officer was responsible for providing additional support and counselling services. At every stage, the court was to review the sentencing plan within the circle to make revisions where needed and offer any further support required. This sentencing plan incorporates the values and concerns of the criminal justice system, Philip's family and community and, most importantly, Philip; the successful completion of this plan requires the concerted effort of them all.

III. Primary Sentencing Considerations

In the *Moses* case, Justice Stuart offers a full account of how the sentencing plan was developed and the considerations underlying it, including Philip's criminal record, the appropriateness of jail, the unique circumstances of each offender, rehabilitation, the

involvement of First Nation communities, and the new factors and influences for rehabilitation which arose as a result of holding a sentencing circle.

A. Criminal Record

In 1982, Philip was first charged as an adult with two minor offences. Ten years later, Philip had a criminal record of forty-three offences, he had spent eight years in jail and was given several orders of probation. In the three years before this trial, Philip's criminal activity had escalated and twenty-seven more offences were added to his criminal record. In *Moses*, Justice Stuart holds that the length of Philip's criminal record should be taken into consideration in sentencing, but in his view it is often given too much weight by judges.¹²

Justice Stuart states that a quarter of million dollars of public funds was spent on Philip in the past ten years and all that it accomplished was reducing Philip's chances for rehabilitation and lessening public security.¹³ It was evident from Philip's criminal record that the justice system needs to be improved and a constructive alternative needs to be found to automatically imposing ever more lengthy incarceration.

(a) Duration of Criminal Activity

Justice Stuart draws attention to the need to consider the reasons for recidivism. The duration of an offender's criminal activity may indicate a longstanding substance abuse problem, a mental illness, a personality disorder, the offender's conscious choice to

¹² *R. v. Moses*, [1992] 3 C.N.L.R., at 134.

¹³ *Ibid.*

commit crime or many other reasons that are not apparent on the face of the criminal record.¹⁴ In any event, Justice Stuart states that the courts must investigate further.

(b) Types of Offences

Justice Stuart holds that the types of offences committed, and particularly the sentences that are imposed, are more accurate in assessing whether the offender is a danger to the public than the length of an offender's criminal record.¹⁵ For example, process violations, minor thefts, public nuisance and petty offences are incidental to a life of poverty and substance abuse. A criminal record of these types of offences, despite its length, is not a significant aggravating factor. It is the weight of the record that is important, not its size.

(c) Previous Sentencing Remedies

Justice Stuart holds that a lengthy criminal record provides invaluable information as to the history of sentences that were imposed.¹⁶ He states that courts must determine why past sentencing remedies have failed and further investigate the offender's actual circumstances and determine what is needed to improve one's prospects of rehabilitation.

(d) Relapse or Persistent Criminal Behaviour

When the court is faced with an offender with a long criminal record, who has made recent genuine attempts at rehabilitation, Justice Stuart asserts that the courts must

¹⁴ *Ibid.*

¹⁵ *Id.*, at 135.

¹⁶ *Ibid.*

determine whether a new offence was deliberately committed or whether it is a relapse into a mental illness or addiction.¹⁷

B. Appropriateness of Jail

Jail is the most expedient means of getting rid of a problem. Justice Stuart holds that jail simply moves the problem from one incompetent process to another, it is the most expensive means of warehousing offenders.¹⁸ He also asserts that lengthy jail sentences destructively impact upon offenders, increase the chance of recidivism and therefore increase the severity of offences committed against victims. The courts must examine the intended purpose of a jail sentence and analyze it against what actually happens in jail and determine what objectives jail can actually achieve. Violence cannot achieve non-violence. In Justice Stuart's view, Philip's record shows the ineffectiveness of a jail sentence; his record also confirms that those who are punished the most, re-offend the most. Jail must be used as a last resort. The criminal justice system must eagerly and aggressively pursue the involvement of other disciplines.

C. The Unique Circumstances of Each Offender

Justice Stuart holds that the courts must make greater efforts to assess the specific impact of a jail sentence on each offender, particularly when a jail term removes offenders from the support of their family and community or exposes them to a completely different cultural environment. He recommends that jail sentences should be

¹⁷ *Ibid.*

¹⁸ *Ibid.*

avoided if they exacerbate emotional and mental problems. In Philip's case, symptoms such as substance abuse, crime, the chronic inability to cope with the demands and discipline to function independently are a result of his struggle to cope with fetal alcohol syndrome. Jail further compounds this difficulty. This information was indicated in previous psychiatric assessments and pre-sentence reports, but Philip was still repeatedly sent to jail. As Justice Stuart states:

Anyone reading Philip's personal history would simply not believe someone could be subjected to such abuse and survive. Conversely, most justice professionals who read such personal histories, having been conditioned by reading so many similar stories, tend to discount its significance in affecting the offender's ability to function within society.

The standard measure of what offenders can or ought to do is based upon western middle class values, opportunities and lifestyles which bear little relevance to evaluating either Philip's past or what he can do in the future. There is simply *no* basis within the justice system to properly consider the devastating impact a life like Philip's can have on the ability to function, least of all, avoid criminal behaviour (emphasis in the original).¹⁹

Justice Stuart states: "No significant weight should be accorded to specific and general deterrence if the offender suffers from a significant mental disorder."²⁰

D. Rehabilitation

The probation officer explained that Philip persisted in believing that he had never been given a chance at rehabilitation. Any chance that Philip was given was wrapped up in a probation order, that came into effect at the end of a lengthy jail term. Philip's genuinely good intentions, self-esteem and courage to change his life were obliterated by

¹⁹ *Id.*, at 138.

²⁰ *Ibid.*

his negative experience in jail. A probation order without jail was tried, but it failed. The criminal justice system profoundly lacks adequate resources for rehabilitation.

Criminal behaviour stems from an offender's overall life situation, not just substance abuse. Philip must take responsibility for changing his life, but he cannot do it alone. Justice Stuart states that it is hypocritical to recognize the underlying causes of criminal behaviour and then expect an offender to cure him or herself.²¹ The criminal justice system expects offenders to function independently and miraculously gain control over their troubled lives. Rehabilitation must take a new direction, it must address the entire life needs of an offender.

Justice Stuart states that if there were more than token investments in resources for the rehabilitation of offenders, the courts could focus on "finding the right sentence for each offender," rather than "finding a sentence within legally fixed ranges."²² However, he states that even adequate government funding for rehabilitative resources would not suffice. There must be more than government funded, professional treatment programs. Justice Stuart holds that the primary resources for rehabilitation must come from the offender's immediate environment and an effective sentencing plan must engage the offender's family, friends and community.²³

²¹ *Id.*, at 139.

²² *Id.*, at 140.

²³ *Ibid.*

E. Involvement of First Nations

Justice Stuart holds that when the community became involved in Philip's sentencing plan, it moved beyond their frustration with Philip's conduct and their reliance on the criminal justice system for solutions and began taking responsibility for healing and rehabilitating one of its members. The community's involvement was the most significant reason for Philip's sentence to be focused on rehabilitation.²⁴ His sentencing plan was primarily reliant on family and community resources. He states: "For offenders such as Philip, the community must take the initiative to provide rehabilitative programs. This initiative would signify that they care enough to find a positive means of reintegrating Philip into their community."²⁵

Justice Stuart suggests that the impetus for community involvement came from the community, however, I am not certain whether the motivation was that of the community or of the court. I do not believe that the community had much of a choice in the face of Justice Stuart's determination to find an alternative to jail for Philip.

Justice Stuart also asserts that the first challenge for Aboriginal communities in self-determination must be to heal and rehabilitate its members.²⁶ One of the reasons he gives is that the over incarceration of their members impacts upon the community's ability to function. Justice Stuart states: "First Nations have the best knowledge and

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

ability to prevent and resolve the long list of tragedies plaguing their communities.”²⁷ In my opinion, Aboriginal communities have been assisting their members in the healing process for a long time, but rehabilitating them from the destructive impact of residential schools and incarceration in foreign institutions may require more - more expertise and more resources. In reality, there is no real cure for that type of abuse. It must be prevented in the first place. And to achieve prevention, Aboriginal communities have to be given the power and resources and autonomy to become real communities once again.

F. New Factors and Influences for Rehabilitation

Justice Stuart states that several new factors emerged as a result of using a circle in the process of sentencing Philip. First, Philip helped in constructing the sentencing plan that he is expected to carry out; this participation makes him partly responsible for the context of the plan and thus a new reason for making it successful. It therefore improves Philip’s prospects for rehabilitation. Second, Philip knows he has the genuine support of his family as they openly expressed their concerns and contributed to his sentencing plan. Third, since the Chief and other members of the community participated in the circle and contributed their time and resources to help reintegrate Philip into the community, Philip knows he belongs. The messages Philip received from his family and community were strong and, as a result, they released much of his hostility, anger, resentment and feelings of alienation. Fourth, Philip heard directly from two of his victims. As previously mentioned, Justice Stuart believes that only when an offender is

²⁷ *Ibid.*

confronted by the pain of the victim does one understand the impact of their behaviour, and without this perspective, their motivation for rehabilitation lacks an essential ingredient. All of these factors lend support for the reasons that sentencing should focus on rehabilitation.

IV The Benefits of Using Sentencing Circles

Through his experience in the *Moses* case, Justice Stuart clearly came to believe that the solution to the problems faced by persons like Philip lies in sentencing circles. Justice Stuart believes that sentencing circles afford greater participation of the Aboriginal community in the criminal justice system. Justice Stuart maintains that there are several benefits to the use of sentencing circles. This type of sentencing hearing, *inter alia*, lessens government expenditure, challenges the monopoly of professionals, encourages lay participation, enhances information, provides a creative search for new options, promotes a sharing of responsibility, encourages the participation of offenders and victims, creates a constructive environment for sentencing, and provides a greater understanding of the justice systems limitations.

A. Lessens Government Expenditure

Justice Stuart states that for far too long there has been an excessive reliance on justice professionals to resolve conflict within the community.²⁸ He believes that conflicts could be resolved better within the community, for far less money. In regards to

²⁸ *Id.*, at 126.

the use of a sentencing circle and the imposed sentencing plan, he states:

This was a first run at a new process. Failures must not daunt further attempts. It may take time for the feelings of shared responsibility inspired by the circle to be translated into concerted and sustained action. The indolence, apathy and easy but imprudent reliance upon professionals, characteristic of most communities, will not be easily overcome in developing proactive community involvement.²⁹

In this passage, Justice Stuart suggests that most Aboriginal communities are lazy and imprudent because they act like all other Canadian communities and rely on criminal justice professionals to resolve conflict. Justice Stuart implies that the reliance of Aboriginal communities on justice professionals is voluntary. He ignores the fact that the European system of justice has been imposed on Aboriginal Peoples by force, despite its alien assumptions, laws and procedures.

On the contrary, it is the justice professionals who have excessively relied on jail as a means of resolving criminal problems in Aboriginal communities. It appears that now that the criminal justice system has created a morass of problems in its effort to impose a white European system of law on Aboriginal Peoples, punishing them for disobeying through the use of incarceration, a method which has proven to be too expensive, it would like Aboriginal communities to assume responsibility for their problems. However, it will not provide the necessary resources to properly rehabilitate offenders, thereby affording genuine protection to victims and the community.

In Philip's sentencing plan, it has to be assumed that the family and the community were able to properly control and supervise Philip. Also, the court had to rely

²⁹ *Ibid.*

on a treatment program in southern B.C. for alcohol and drug addiction. The community of Mayo does not have the necessary resources to assist Philip with his rehabilitation. They can offer support. In the case of sex offenders, the risk to the community increases substantially and further compounds all of these problems.

B. Challenges Monopoly of Professionals

In discussing how sentencing circles challenge the monopoly of professionals, Justice Stuart compares it to the courtroom, its players and the input of participants. The traditional physical setting of the courtroom controls and limits the participation to judges, Crown prosecutors and defence counsel. It discourages any meaningful participation beyond these players. The lawyers' courteous manner of addressing the judge and standing while addressing the court reinforces the pivotal importance of the judge. This convinces the public to believe that the judge exclusively possesses the knowledge and resources to construct a just and viable solution. Justice Stuart states: "They are so grievously wrong."³⁰

The input of information is controlled by the Crown and defence counsel. Their familiarity with the rules and their use of the legal language, portrays a confidence and skill that the public perceives as a requirement for participation. Also, the public is seated at a distance behind the Crown prosecutor and defence counsel and is sometimes separated by an actual bar. The physical setting of the courtroom and the ritualistic performance of the players discourage the participation of anyone else.

³⁰ *Id.*, at 123.

A sentencing circle breaks down the dominance of the judge and lawyers in a traditional courtroom, their importance and control of input. Everyone seated in the circle can provide input and directly ask questions of one another. As a result, much more information can be obtained about the accused and the community. The use of legalese in the courtroom allows difficult issues to be ignored or superficially considered. The circle does not allow for the evasion of these issues; they quickly surface when the accused's family and community are encouraged to participate.

C. Encourages Lay participation

The circle discussion is informal, but personal; it fosters a sense of equality between members of the community and courtroom professionals. Participants of the circle realize that they shared significant common concerns and objectives. This sense of equality and the sharing of common concerns and objectives helps to create and sustain an effective partnership between the Aboriginal community and the criminal justice system.

D. Enhances Information

In traditional sentencing hearings, the court is forced to rely on bare bones information. Very little is known about the offender, the impact upon the victim, the offender's family and community, the crucial underlying factors that caused the criminal behaviour or whether the sentence resolves or exacerbates the factors promoting crime. The information that the court receives is usually based on second and third hand sources. As Justice Stuart states:

Of course, all judges and counsel know these circumstances exist, but the

courtroom setting, and emphasis on getting through the docket, of processing cases as any good bureaucracy might process licence applications, encourages wilful blindness about many relevant circumstances in sentencing. The sentencing process in searching for an effective sentence to fit the specific needs in each case, is analogous to a “fast forwarded” game of Pin the Tail on the Donkey.³¹

When the community is participating in the sentencing circle, it can readily respond to concerns, fill in missing information, and provide a broader and more detailed scope of information upon which to measure each new sentencing alternative.

E. Creative Search for New Options

Justice Stuart states: “Public censure often focuses on the differences in sentences meted out for the same crime. There should be more, not fewer differences in sentences.”³² Public concern is warranted if the differences are based on the judge’s attitude, inadequate information, an ignorance of the remedial impact of different sentencing alternatives, the lack of commonly accepted objectives, or an ignorance of the impact of an offence on the victim. It is the reasons for the differences that are important for determining whether a sentence is credible. If the predominate objectives of sentencing are to protect the community, rehabilitate the offender, minimize the effects on victims, and encourage greater community participation, then differences in sentencing for the same criminal offence will be greater, they should be expected and welcomed. The enhanced quality and quantity of the information obtained by the community’s participation in the circle allow for a broader and richer range of sentencing

³¹ *Id.*, at 124.

³² *Id.*, at 125.

alternatives. Better information allows for sentencing alternatives to be refined and focused on the needs of each case. In Philip's case, the community was encouraged to reach a consensus as to the appropriate sentence that best served these objectives.

F. Promotes a Sharing of Responsibility

In a traditional sentencing hearing, all input and representations are directed to the judge. After the judge hears all submissions, he is then responsible for providing an intelligent and well-reasoned decision. Justice Stuart found that by engaging the community in a circle discussion, everyone was engaged in the sharing of responsibility for finding a solution and for ensuring the implementation of the sentence. Justice Stuart states: "Time will tell how much each participant, especially the offender, will continue to act upon their obligation to the circle and to the decision collectively developed."³³ Justice Stuart asserts that this was a first run at this new process and that failures should not prevent further attempts.

Inspiring the community's involvement may be difficult, Justice Stuart holds, but not as difficult as breaking down the monopoly that justice professionals hold over conflict resolution. Justice Stuart states:

Forging new and meaningful partnerships between professionals and communities will not be easy, *we are the professional after all, we know what to do, we have the power, we know what is best.* To many, the existing criminal justice system is sacrosanct. Tampering with its rituals is tantamount to heresy.³⁴

³³ *Id.*, at 126.

³⁴ *Ibid.*

In my opinion, I believe that some communities will be not be inspired to share the responsibility and work in partnership with the criminal justice system in the rehabilitation of offenders as the lack the professional expertise and programs, not only to assist in the rehabilitation of offenders, but to heal themselves.

G. Encouraging the Offender's Participation

Most offenders do not participate significantly in sentencing hearings. Justice Stuart finds that they usually sit with their head down, somewhat afraid, but usually more angry, as discussions take place about their lives, their criminal activity and how their community needs to be protected from such hardened criminals.

Circuit court lawyers usually speak on behalf of the accused. Their knowledge is derived from brief interviews, police reports, criminal records and pre-sentence reports. They certainly do not know the accused as well as the accused's family or other members of the community. Defence counsel cannot adequately reflect the accused's pain or desperate search for help. In fact, the defence counsel ensures that the accused's resentment and hostility is not expressed for fear of provoking a harsher sentence. Yet, such feelings may frustrate the accused's rehabilitation.

The accused speaks directly to the participants of the circle, rather than being represented by a lawyer. Philip had never expressed his resentment and hostility to the court before the sentencing circle was held. As Philip spoke of his pain, it riveted everyone's attention. Philip did not convince everyone, nor did he secure the sentence that he sought, but his thoughts and emotions were significantly considered in the construction of his sentence. Philip learned for the first time that the sole interest of the

community and the police was not to remove him from their midst.

Moreover, Justice Stuart believes that the participation of the accused improves the prospects of rehabilitation. Justice Stuart states:

For the first time, the accused will be carrying out a sentence that he played a significant part in constructing. Accordingly, he has a significant new reason for making something he helped build be successful. As part of the circle that created the sentence, Philip carries a responsibility to the circle and especially to (*sic*) First Nation and (*sic*) family to prove that their care and time has not been unwisely invested.³⁵

While the effect described by Justice Stuart could occur, it is not the only possible outcome. It assumes, perhaps unrealistically, that the accused really wants to change and to become a productive member of the community. Some analysts believe that the accused will merely participate in the process of a sentencing circle to avoid a jail term, without being genuinely interested in rehabilitation.

In the case of *R. v. Cheekinew*,³⁶ for example, the accused was convicted of aggravated assault and had a lengthy criminal record, including many previous convictions for violent crimes. Justice Grotsky dismissed an application from the accused to set up a sentencing circle and held that the accused was not a fit and proper candidate; he was not genuinely contrite with respect to the offence committed; nor was he interested in receiving help from the community. The judge held that the lengthy criminal record demonstrated a complete lack of respect for the law and that the accused was merely attempting to avoid the sentence that was justly due to him. Also, to

³⁵ *Id.*, at 141.

³⁶ *R. v. Cheekinew* (1993), 80 C.C.C. (3d) 143 (Sask. Q.B.).

participate in a sentencing circle, an accused must be a fit candidate for a suspended sentence, an intermittent sentence, or a short jail term followed by a probation order. The community must also be willing to participate, make meaningful recommendations for sentencing, and accept the responsibility for the control and supervision of the offender and enforce the terms of the probation order. In this case, the Justice Grotsky was of the view that the accused must receive a punitive term of over two years.

I believe that all offenders would rather participate in a sentencing circle and accept help from the community, than go to jail. Who wouldn't? Whether they are all genuinely interested and motivated in rehabilitation and turning their lives around is uncertain. Whether they can do so is even more uncertain when they suffer with addictions, entrenched dysfunctional habits and a lack of sustained alternatives. Many Chiefs in Aboriginal communities strongly believe that every one of their members is indispensable, no matter what they have done and even if they are liable to commit further crimes of violence. This disregard for the safety of the community is troubling. This problem will be explored in the discussions of the Aboriginal community justice initiatives in Chapter 6.

H. Encouraging the Victim's Participation

Justice Stuart asserts that many offenders believe that the crime they have committed was against the State. They fail to recognize the pain and suffering caused to their victims. Their sentence is understood as the intrusion of an oppressive State bent on the offender's punishment. Expressions of remorse are usually prompted by an offender seeking a lighter sentence from the court or by the offender's perception that they did

something “bad,” like a little boy. Justice Stuart states:

Only when an offender's pain caused by the oppression of the criminal justice system is confronted by the pain that victims experience from crime, can most offenders gain a perspective of their behaviour. Without this perspective, the motivation to successfully pursue rehabilitation lacks an important and often essential ingredient.³⁷

I believe that offenders who commit minor, non-violent offences may gain a perspective into their behaviour by being confronted by the victim's pain. However, this analysis is inappropriate in the context of sex and sexually motivated offences. I do not believe that sex offenders, who believe that women and children exist only for their sexual pleasure would gain this perspective when confronted with the victim's pain. For example, in Ottawa, during 1989 a three month old baby suffocated to death from swallowing semen.³⁸ A person who could do this is incapable of empathy. Such a person is unlikely to be moved by confrontation with his victims' pain. For such persons, others are perceived unidimensionally, as mere sources of sexual gratification. As quoted by Rix G. Rogers, Heather-Jane Robertson, a member of the Canadian Teacher's Federation, states:

The sexual abuse of children is perpetuated by ignoring the prevalence of patriarchy in our society. Specifically, we must address the eroticization of powerlessness, and those forces which encourage many men to believe that they have the right, by virtue of being male, to sexual gratification, with or without consent. This belief drives the rape and harassment of women, sexual violence among adolescents, our refusal to ban

³⁷ *R. v. Moses, supra*, note 1, at 127.

³⁸ Rix G. Rogers, *The Report of the Special Advisor to the Minister of National Health and Welfare on Child Sexual Abuse in Canada* (Ottawa: Minister of Supply and Services in Canada, 1990), at 21.

pornography as hate literature and, I believe, the sexual abuse of children.³⁹

Many sex offenders never realize that sexual aggression is a crime, let alone empathize with the victim's pain. For example, on August 10, 1981, Duane Taylor was released from the Kingston Penitentiary on parole. Shortly after his release, Dr. W.L. Marshall and S. Barrett state:

...Taylor picked up April Morrison, a quiet, happy-go-lucky two-year-old girl, who trailing her older brothers from a nearby park to her modest clapboard home, two doors down from Taylor's rooming house. Before dozens of children with flashlights and bicycles joined adults on foot and in cars to begin searching the working-class neighbourhood, Taylor had what he later described as "fun" with the little girl. When she started crying and bleeding, he panicked, and silenced her by sitting on her face until she suffocated.⁴⁰

Furthermore, an effective method of teaching sex offenders to empathize with their victims' pain is yet to be found. Experimenting with the victims' pain in a sentencing circle is neither an appropriate or effective method for improving an offender's prospects of rehabilitation.

Justice Stuart maintains that sentencing circles encourage the participation of victims, or at least take into account the impact on the victim, in sentencing the accused. In Philip's case, the father of a victim attended the sentencing circle and so did Constable Alderston. Justice Stuart concedes that there is much work to be done in terms of involving the victims in the sentencing process, but he believes the circle is a good

³⁹ *Id.*, at 43.

⁴⁰ Dr. W.L. Marshall & S. Barrett, *Criminal Neglect: Why Sex Offenders Go Free* (Toronto, On.: Doubleday Canada Limited, 1990), at 173.

mechanism for this purpose. He may be right when the victims involved are not afraid of the accused. However, in cases of child sexual abuse there is a great power imbalance and the victim is afraid of the accused.

I do not believe that sentencing circles provide an appropriate forum for the voices of victims to be heard. I strongly believe that sentencing circles and community sentencing alternatives should not be used in cases of sexual assault, particularly in cases of child sexual abuse. As previously stated in Chapter 2, the findings of the Badgley Committee have shown that feelings of shame and fear of reprisal by the offender make it extremely difficult for the child to speak freely and give a full and candid account of the acts complained of in testimony. It would not be any different for child sexual abuse victims speaking within a sentencing circle. Especially, when the accused is allowed to ask direct questions of anyone else in the circle and protective barriers to block the child's view of the accused are not available.

Some Aboriginal community justice initiatives, as will be discussed in Chapter 6 of this thesis, that were established after this decision was rendered, require the victim's consent before an offender can participate in a sentencing circle and carry out their sentencing plan, or healing, within the community. However, if victims do not wish to give their consent, they feel the pressure of speaking out against the aspirations of the Chief, band council and the entire Aboriginal community. If victims do not consent to a community sentencing plan, they may feel or be held responsible for sending the offender to jail. Moreover, if a community sentencing alternative is used and a child sex offender is released back into the community, the safety of the victim and all other children is at

risk.

In the case of *R. v. Naappaluk*,⁴¹ the offender was charged for the fourth time of assaulting his wife and noncompliance with a probation order, which was previously imposed for assaulting his wife. Before sentencing the accused, Justice Dutil held a "consultation circle" at the offenders request.⁴² During the circle, the accused admitted that while he was convicted four times of assaulting his wife, he had actually assaulted her fifty to one hundred times. During the circle proceedings, the accused's wife appeared uncomfortable and fearful, she spoke minimally and only when called upon. As Mary Crnkovich reports:

How could this woman speak out against her husband? How could she speak out against the mayor, the Chair of the Inuit Justice Task Force and others in her community? Did the judge really believe she would speak out, based on the history of this case to date. The victim's actions or lack thereof during the circle, demonstrated the degree of fear and deference paid to her spouse.⁴³

Furthermore, Mary Crnkovich states that since this woman had suffered tremendous

⁴¹ *R. v. Naappaluk*, [1994] 2 C.N.L.R. 143 (Que. Prov. Ct.).

⁴² Mary Crnkovich, Pauktuutit's Justice Coordinator, noted that this was the first time a sentencing circle was used in Nunavik. Very little was known about why Justice Dutil was using the circle, what the circle would accomplish, where this idea originated and how it related to Inuit customs and traditions. The Inuit community was not informed that the sentencing circle was based on an Indian circle tradition. In Mary's conversations with Justice Dutil, it was evident that little, if any, preparatory work had been done to determine how the circle operated in Yukon. This directly impacted on how the participants communicated with each other and on the quality and quantity of information obtained.

⁴³ Mary Crnkovich, *Inuit Women and Justice: Progress Report Number One* (Ottawa: Pauktuutit Inuit Women's Association), at 24.

violent assaults, her husband was able to keep her from reporting the assaults due to the control he had over her. Yet, the violence was seen as a "problem shared by the accused and the victim" and should therefore be resolved together.⁴⁴ The participants of the consultation circle reached a consensus that was accepted by Justice Dutil. The accused would remain in the community and return to his wife. A committee was formed to assist the accused and his family in rehabilitation.

I. Creates a Constructive Environment

The rituals of the courtroom are comparable to that of a degradation ceremony. This environment is counter-productive to the construction of an effective rehabilitation plan or genuinely motivating offenders to seek rehabilitation.

There is a significant difference between a sentence imposed by a community as compared to a circuit court judge. If the community imposes the sentence on an offender, the shame and embarrassment lasts much longer as they face members of the community on a daily basis. On the contrary, a circuit court judge is a stranger and the shame and embarrassment will be over for the offender in a few minutes. Also, the offender is aware that the entire community disapproves of his or her behaviour, not just the judge.

Most importantly, Justice Stuart states that sentencing circles may not be appropriate where the only objective of sentencing is punishment, particularly when a term of imprisonment in excess of two years is expected. Otherwise, Justice Stuart holds, the degradation ceremony held in a courtroom is not capable of achieving anything else.

⁴⁴ *Ibid.*

J. Greater Understanding of Justice System Limitations

Justice Stuart maintains that conflicts are better handled in the community, than by justice professionals in the court. Conflicts, when properly processed, are essential in the building of community spirit and pride and collectively developing solutions to social problems. Communities are more capable of providing support to families in stress, intervening in the criminal activity of young offenders, and maintaining positive support systems for people faced with crippling pressures that typically lead to crime than the courts. In the discussions of the sentencing circle, it was realized that in addition to any formal sentencing remedies for their protection and the accused's rehabilitation, community resources must be utilized.

V. Conclusion

For the most part, I agree with Justice Stuart's opinions on the futility of incarceration, particularly without treatment, and his focus on the rehabilitation of the offender. However, after reviewing the case of *R. v. Moses*, I believe that Aboriginal Peoples are being requested to participate in sentencing circles primarily, if not exclusively, to relieve the provincial and federal governments of the cost of incarcerating Aboriginal offenders. The criminal justice system has finally realized the futility of incarcerating offenders and releasing them without psychological or psychiatric treatment, and the subsequent financial cost to the public. Justice Stuart even states that after offenders are incarcerated, and not provided treatment, they are worse off than when they first started committing crimes. He also states that offenders who have been

punished the most, re-offend the most. Similarly, he states that the more severe that sentence is imposed upon an offender, the more severe impact offenders will have upon victims when they re-offend.. In other words, an offender who is given a more severe sentence, commits more violent offences against victims. As Justice Stuart states:

The leaders of the community where Philip will live out his life are willing to risk their safety in a rehabilitative program, his family and First Nation are willing to invest in Philip. ... What risk could there be.(sic) We knew the risks of jail (further offences)! *“Neither a trial judge nor an appellate court should hesitate to take a calculated risk when satisfied by so doing there is a reasonable possibility that the offender may change his life.”*

The doubts properly raised and fairly expressed by the Crown counsel were simply not enough to offset the support of the community for Philip and for the plan that had evolved. The Crown and judge who do not live in the community and are not familiar with the community must be cautious in opposing, on the basis of a need to “protect the public,” a rehabilitative plan developed by the community (emphasis in the original).⁴⁵

It is clearly evident that the criminal justice system is aware of the dangers to the community, yet still sees it fit to give Aboriginal communities an ultimatum - provide the Aboriginal offender with a community-based disposition or the offender will be sent to jail. Furthermore, this ultimatum is given without offering or providing treatment facilities for sex offenders or offenders with substance abuse addictions. Of course, after numerous Aboriginal children were forcibly removed from their homes and communities and taken to residential schools where they suffered extreme physical and sexual abuse, they can clearly empathize with other victims, and even offenders.

Aboriginal Peoples are also aware of the emotional, physical and sexual violence

⁴⁵ R. v. Moses, *supra*, note 1, at 143.

that is committed against inmates in jail; they have felt that impact within their families and communities as they often live in fear when Aboriginal offenders, more violent than before, are released from jail. The criminal justice system is simply pressuring Aboriginal communities into enforcing white European Laws by dumping the responsibility of rehabilitating their offenders in their own back yards, without concern for their safety.

Furthermore, the necessary treatment facilities are not being made available so that the Aboriginal offenders can remove offenders from the community for treatment and thereby protect victims and the community. Currently, the most Aboriginal communities can offer offenders is support and guidance through healing circles. However, one must take into consideration that many of our elders were forced to attend residential schools and suffered the ills of physical and sexual abuse; without healing, they may still be dysfunctional too.

I agree with Justice Stuart's conviction that sentencing circles are not appropriate for all offenders and crimes or when a sentence is imposed for purely punitive sanction, particularly sentences exceeding to two years. In my opinion, sentencing circles should not be used to process sexual assault offences or any other violent crimes whether or not a sentence over two years is expected. Sexual assault victims cannot fully participate and speak freely within a circle because of the fear of reprisals by the offender. If the victim disagrees with a community-based sentencing plan for the offender, the victim is speaking out against the aspirations of the entire community. If the community sentencing alternative is revoked and the offender is sent to jail, the victim may feel or be

held responsible. Moreover, sexual assault victims would never feel safe if the offender was still released into the community or living in the same house, especially if the offender was the victim's father, and would never heal. Furthermore, when a sex offender is released back into the community, the safety of all women and children is put at risk. Since police service in isolated communities is almost non-existent, there is nobody who can properly control the offender. Also, I do not believe that it is even feasible to expect a member of the family or community to stay with the offender twenty-four hours a day!

One can hardly discredit Justice Stuart, or others involved in this case, for stepping out from behind the comfortable barrier of legal rules and procedures and attempting to confront the futility, destruction, and injustice left behind in the wake of circuit courts. I agree with Justice Stuart that "simply keeping the current machinery of justice in gear"⁴⁶ does not define the parameters of professional responsibility. The criminal justice system has known for years that incarceration, alone, does not work to rehabilitate an offender. Yet, incarceration has been consistently used by the criminal justice system as a quick solution to criminal behaviour. It is like closing your eyes and hoping that the problem will just disappear, but the problem only gets worse. I also believe that "we must move beyond the self-defeating notion that the justice system can 'only do so much.'"⁴⁷ The governments of Canada must eagerly and aggressively pursue

⁴⁶ *Id.*, at 145.

⁴⁷ *Id.*, at 144.

the help of other disciplines and highly invest in treatment programs to assist in rehabilitating offenders.

Tragically, Philip's story is not unique. Justice Stuart recognizes the tragic life that Philip and others have lived. The childhood of most Aboriginal children is struck with poverty, alcoholism, violence and neglect. They are physically and sexually victimized in foster homes, juvenile detention centers and residential schools. Aboriginal people have lived a life of oppression and many are inextricably caught in the pernicious cycle of substance abuse, crime and jail. Statistics have repeatedly shown that Aboriginal offenders are over-represented within the prison population. Philip was born with the additional burden of fetal alcohol syndrome, but even then, more Aboriginal babies are born with fetal alcohol syndrome than non-Aboriginal children. Whether they live at home or on the street, life for Aboriginal people is a maelstrom of poverty, substance abuse, neglect, violence, crime and oppression.

6

Aboriginal Community Justice Initiatives

I. Introduction

In this chapter, I will discuss the Aboriginal community justice initiatives that are currently being piloted across Canada. Such initiatives are in place in Yukon Territory, British Columbia, Saskatchewan, Manitoba, Ontario, Quebec and Nunavik. First, I will provide a general description of four projects which are established in various Aboriginal communities. Second, I will provide an analysis of these justice initiatives whereby I will argue that sex offenders should not be diverted into Aboriginal communities, before they receive long term, intensive psychological or psychiatric treatment. Also, I will provide recommendations for improving the protection of Aboriginal child sexual abuse victims.

II The Aboriginal Justice Directorate

Aboriginal systems of justice focus on the restoration of balance and harmony in the community. The primary objectives of the community-based justice systems are the rehabilitation of the offender, compensation paid to the victim and the community and reconciliation with the community through mediation and negotiation. Criminal behaviour is viewed as disrespectful and shameful to all members of the community. The offender loses authority and respect within the community. Moreover, the feeling of shame when standing before one's peers, family and the community is believed to act as a great deterrent to crime. The offence committed becomes the collective responsibility of the community.

The Aboriginal community believes that an offender commits a crime when one lacks self-esteem and respect for themselves and their community. The mainstream criminal justice system stresses the removal of the problem, rather than resolving the problem within the community context. However, it is believed that persons offend because they feel isolated from their community and that imprisonment compounds this isolation. Furthermore, it allows offenders to avoid their accountability to the community.

The Aboriginal Justice Directorate was established by the federal government to work in partnership with Aboriginal communities to achieve culturally appropriate, community-based systems of justice. The objectives of this initiative are to establish justice systems within communities which are respectful of the Aboriginal culture by providing for meaningful participation of Aboriginal communities in the criminal justice

system, to limit the use of incarceration and thereby to lessen government expenditure. The participation of the Aboriginal community has primarily been used in the sentencing of offenders and creating community-based dispositions.

Currently, several models of justice projects are being piloted in Aboriginal communities. These pilot projects include sentencing circles, diversion projects, healing circles, sentencing panels of elders, community justice panels and projects in which elders participate as advisors in court and as adjudicators in the criminal proceedings. Initially, these community justice projects were established to deal with less serious offences such as shoplifting, property offences and liquor-related offences. However, many of these justice projects are also handling family violence and sexual assault offences.

Some diversion projects operate pursuant to section 4 of the *Young Offenders Act*,¹ while others operate under provincial or federal diversion policies.² The majority of these projects require the accused to admit to the offences or plead guilty to the charges before they are allowed to participate in sentencing circles and community-based dispositions. The sentences include some type of counselling such as individual, family, alcohol and drug abuse counselling or anger management. Also, support is provided by the offender's family, community members, and elders.

¹ *Young Offenders Act*, R.S.C. 1985, c. Y-1, s.4.

² *Criminal Code*, R.S.C 1985, c.C-46, s. 737(1)(b).

A. Unlocking Aboriginal Justice ³

The Gitksan Wet'Suwet'en community is located in the Upper Skeena region of northwestern B.C. The Gitksan Wet'Suwet'en are two socially integrated Peoples: the Gitksan, who has a population of approximately five thousand; and the Wet'Suwet'en, who have a population of about two thousand. The Gitksan Wet'Suwet'en First Nation governs itself according to a traditional hereditary clan system. The clan system consists of groups of members from each "House." The term "House" was historically named for the long houses where many of its members resided. House members are historically related and share a common ancestry and history which is important to the Gitksan Wet'Suwet'en Nation. It provides members a sense of belonging and binds the community together. The broadest grouping of related houses is called a Clan. There are four clans within the Gitksan system and five in the Wet'Suwet'en. The Chief of each House is the highest political authority within the Clan system. The Chief of each House is responsible for the actions of the House and providing assistance and support to its members. Also, elders are respected members of the community and continue to play an important social role; they are considered to be wise and knowledgeable, with proven ability and knowledge.

Since the approval for funding was received from the federal government in 1989, a justice initiative, or pilot project, entitled "Unlocking Aboriginal Justice" has been operating and administered by the Gitksan Wet'Suwet'en First Nation. This justice

³ D. Senini, *Aboriginal Community Justice Initiatives* (an unpublished paper prepared for the RCMP), at 3.

initiative aims to re-introduce the traditional laws, principles and customs of the Gitksan Wet'Suwet'en First Nation. It provides Aboriginal people an opportunity to participate more fully in the administration of justice in their communities. It is believed that this justice initiative provides a more effective justice system, that is consistent with the social and cultural needs and aspirations of the Gitksan Wet'Suwet'en community.

The objectives of this program are to reduce the number of community members who come in conflict with the law from being processed through the European/Canadian criminal justice system. This goal is facilitated by the use of police discretion and referral. The Hazelton detachment of the R.C.M.P. began diverting young Aboriginal offenders to the Gitksan Wet'Suwet'en community justice initiative in March, 1992. This diversion process was also expanded to include adult offenders. Other referrals come from the Crown's office, social workers, probation officers, the victim or offender's family, community workers and House members. The majority of offences being diverted involve shoplifting and damage to property; others include theft, breaking and entering, narcotics offences, and common assaults. Moreover, serious offences, such as spousal and sexual assault, are also being diverted to this community justice initiative. For some reason, they are treated like property offences or nuisance offences rather than being processed through the criminal justice system like other serious offences against the person, such as murder and manslaughter.

Once an offender has been referred to this justice initiative, a program worker contacts the accused to provide information as to how one can benefit from participating in the program. Before the development of an action plan proceeds, the victim and the

offender must agree to participate in the program. Then an initial appointment is made with the offender to determine which House the offender membership. Next, the offender and his/her family meet with the House Chief to develop an action plan for a rehabilitation program. In terms of compensation, a community sentence is determined in conjunction with the victim, the victim's family and the House Chief.

All criminal offences and antisocial acts committed by an individual member are considered as being disrespectful and shameful to all members of a particular House. The members who commit these crimes or antisocial acts lose authority and respect within their community. The fear and threat of standing and being judged before all members of the House is believed to act as a great deterrent to crime. The offender and the offender's House, according to the Gitksan Wet'Suwet'en principles of justice, are held accountable for wrongful acts. The emphasis of a sentence is on the offender's rehabilitation. Since an offence becomes a collective responsibility, the offender and the offender's House pays compensation for the crime committed to the victim and the victim's House. Community members provide support, intervention, prevention and rehabilitation, thereby assisting in the healing process of individuals and the community.

The peace and good order of the community is maintained through social censure within the kinship network, this censure may involve counselling, public apologies, community service, or formal events such as shame feasts. A shame feast is held for the victim and the victim's House for the purpose of restoring pride and respect to the offender, the offender's family and House. Therefore, crimes and antisocial behaviour are considered to be costly in both an emotional and financial sense.

Currently, the House Chief advises on the terms and conditions of community sentences. Traditionally, the Chief is responsible to the members and is there to provide assistance and support in troubled times. The Chief may also provide counselling, supervision and support with weekly visits to the offender.

The community justice initiative is viewed as a means of providing support, intervention, prevention and rehabilitation, thereby assisting the healing process of members. It is reported that many community members are enthusiastic about this justice initiative and claim that it is restoring a sense of pride to the community. It is also reported that, to date, there have not been any difficulties with offenders completing their dispositions.

B. The Sandy Lake Justice Project⁴

The Sandy Lake First Nation is located in northwestern Ontario and has a population of approximately 1,800 members. The Sandy Lake Justice Project began operating in April, 1990 and it applies a traditional form of justice by employing the use of an Elder's Council which co-presides with the judges of the circuit court and justices of the peace. Through this forum, the elders' wisdom, experience and guidance is demonstrated and their respect within the community is restored.

The Elder's Council makes recommendations on the sentencing of community members in cases involving provincial offences, criminal offences, crimes committed by young offenders, and band by-laws. The less serious offences handled by the Elder's

⁴ *Id.*, at 10.

Council include shoplifting, damage to property, and liquor-related offences. However, the Elder's Council also handles serious offences such as child neglect, physical abuse and sexual assault. The Sandy Lake First Nation believes that criminal and family law-related offences are intertwined with the social and economic conditions that exist within their community.

During the court proceedings, the Elders' Council sits at the head of the table with the judge and Crown prosecutor seated at the tables to the side. The elders may actively participate in the proceedings by questioning the accused and witnesses. (The Cree language may be spoken during the hearings as a translator is hired on staff). The Elder's Council recommends methods of dispute resolution when advising on community sentences involving criminal, civil and family law matters. However, if a member of an elder's family comes before the court, the elder is not required to disqualify oneself from the court proceedings.

The recommendations of the Elders' Council are seriously considered by the judge when sentencing the accused. The circuit court travels to Sandy Lake only once every two months; however, the presence of the Elders' Council in the community is felt and respected long after the circuit court has left.

The community believes that the Elder's Council is better at assessing the offender's needs, motivation and capacity for rehabilitation. The elders of the community are familiar with the offender and can provide more meaningful sentences that are consistent with the needs of the community. In this regard, the Sandy Lake community believes this community justice initiative enhances the potential for rehabilitation.

The Sandy Lake First Nation believes that the mainstream justice system lacks an element of community respect which is desperately required before any meaningful changes in the offender's attitude can occur. Therefore, when the Elder's Council co-presides with the judge or justices of the peace, the court is perceived as part of the community and offenders feel as if they are not only appearing before the court, but before the community. Historically, the offender was confronted in the presence of the entire community which caused shame and remorse and the Aboriginal community used shame to teach and rehabilitate. Currently, the Elder's Council usually recommends such dispositions as individual or family counselling, alcohol and drug abuse counselling, or anger management. Also, the offender's family, elders and members of the community provide support.

C. The Teslin Tlingit Tribal Justice System⁵

The Teslin Tlingit Tribal Justice System is a traditional form of Aboriginal justice which was developed and implemented in the southern Yukon in January, 1991. The Teslin Tlingit First Nations consists of a population of approximately 700 members. The tribal justice system consists of five elders, one from each of the five Tlingit clans, who co-preside with the Territorial Court Judge and advise on sentencing dispositions of offenders from the community. The tribal justice system allows Tlingit members to re-identify with their traditional ways and customary practices. The court is seen as part of the community process and offenders feel as if they are not only before the court, but also

⁵ *Id.*, at 38.

before the community.

The main types of offences heard by the circuit court and Clan leaders are directly related to alcohol and/or substance abuse. Other offences that are heard include minor offences, such as damage to property and break and enter, and more serious offences such as spousal abuse and sexual assault.

Clan leaders are notified a few days in advance of the circuit court arriving in the community. The circuit court travels to the community once every two months. The Clan leaders know the offenders well and discuss the types of community-based dispositions with members of their clan before recommending them to the court. After the judge has made the final comments in court, the Clan leaders retire to deliberate their sentencing recommendations; they must reach a consensus with respect to the conditions of the sentence. These recommendations are taken into serious consideration by the judge.

The dispositions recommended by the Clan leaders are intended to reflect the community's concerns and cultural values. The Teslin Tlingit community believes that antisocial acts are like an illness and require healing, that misbehaviour requires counselling. Therefore, the recommendations generally focus on rehabilitation, treatment and healing. Offenders are usually given probation orders with conditions which include: attending alcohol abuse programs, performing community service work, paying fines, receiving counselling from elders, making public apologies, attending counselling or treatment for sexual assault, and attending programs for anger management.

D. Hollow Water

The community of Hollow Water is located northeast of Winnipeg, Manitoba on Lake Winnipeg. Hollow Water and three surrounding Métis communities comprise a population of approximately 1,000. In the book entitled The Four Circles of Hollow Water, Christine Seville-Ferri states:

The community reflects its history of colonization and the resultant trail of demoralization and despair. Even comprehending the enormity of the healing task within Hollow Water is difficult.⁶

The sexual abuse which has occurred in Hollow Water has been described as being endemic for several generations and it intensified in the 1960's. It is estimated that three of four individuals have been victims of childhood sexual abuse, while one in three individuals are estimated to sexually offend others. It is reported that all offenders were known to their victims or related by blood. In comparison to the non-Aboriginal population, there is a relatively high percentage of female offenders.⁷

Over ten years ago, the community of Hollow Water began developing a treatment model which is known as Community Holistic Circle Healing (CHCH) to begin healing its members from sexual abuse. The goal of this treatment model is to protect the community by the re-balancing of the offender and the victim. It is believed that the process holds sex offenders accountable to their community and it promotes the healing

⁶ C. Seville-Ferri, "The Victims' Circle: Sexual Assaults and Traumatization in an Ojibwa Community," *The Four Circles of Hollow Water* (Ottawa: Supply and Services Canada, 1997), at 125.

⁷ *Ibid.*

of all - victims, offenders and the community. Berma Bushie states:

These people need a healing community, a safe place where they can begin to talk about the crimes that they've committed. It's only when people are open and can support these people that offenders interact and begin to change their lives and come back into balance. We see them as being out of balance. So we tell the courts we want these people here. They've committed the crime in this community. It affected the people in this community. It's their responsibility to start paying restitution for the pain they've caused. They're no good to us sitting in jail or wherever they are taken. It's easy for them to do the jail.⁸

Within this treatment model, the community of Hollow Water believes the offender is held accountable through healing or re-balancing within the circle.

In Hollow Water, when a child discloses sexual abuse, it is reported to the RCMP and the investigation is undertaken by the team of CHCH workers. It is reported that prior to the development of CHCH, police investigations rarely found enough evidence to proceed with laying criminal charges because members in the community would not disclose any information to them. The CHCH team knows the family, relatives and the history of those families and they can very quickly verify a child's disclosure. The team is required by law to take the child to the RCMP station where a statement is taken. Small children are taken to child protection for medical assessments.

When there is sufficient evidence to lay a charge, the RCMP contact CHCH to begin the process. The CHCH team informs the offender that the RCMP will be laying a charge and gives the offender a choice of the available options. The offender can let the charges be processed through the criminal justice system, or plead guilty to the charges

⁸ B. Bushie, "A Personal Journey," *The Four Circles of Hollow Water* (Ottawa: Supply and Services Canada, 1997), at 153-4.

and be given a probation order, then diverted to the community treatment program of CHCH. Most importantly, CHCH insists that the offenders plead guilty so children do not have to testify at trial. Within this treatment process, the offender is offered support and guidance in a non-blaming, non-judgmental approach.

Also, the team speaks to sentencing through the sentencing circle process. During the sentencing circle session, there are four circles, or steps. In the first circle, participants state why they are there. The second circle is focused on the victim. Participants in the circle absolve the victim of guilt and shame, praise the victim for their courage in coming forward and disclosing the abuse, and re-assure the victim that the abuse was not their fault. The focus of the third circle is on the offender. Participant of the circle tell the offender how the abuse affected them and what they expect from the offender. It is believed that the abuse not only affects the victim, but the family and community as well. The intention of this process is to provide recommendations to the judge as to the offender's disposition. In the fourth circle, the accused pleads guilty and the team requests the court to provide them four months to complete a community assessment of the offender's commitment to peace and the healing process.

Within this four month period, the four circles will be completed again. The offenders are brought into the first circle with the team of CHCH workers and the process of breaking the silence begins. The offenders are asked to disclose the details of the sexual offences which they have committed and accept responsibility for them. Gradually, the offender feels the non-judgmental support of the circle and fully discloses these details. The CHCH team conveys to the offenders that they are there to help heal

and become a productive balanced person.

The second circle requires offenders to begin working with their immediate family. The offenders must admit to their partners and children the sexual offences that they have committed. This circle is ongoing throughout the treatment process. The CHCH team believes that it is the offenders' responsibility to inform their families of such crimes. In the third circle the offenders are required to disclose to their families of origin. Within the fourth circle, the offenders must disclose to the whole community or to whomever attends the sentencing circle. At this time, the judge will sentence the offender.

III. Analysis of Justice Initiatives

Out of the four community justice initiatives that were described, the justice initiative in the communities of the Gitksan Wet'Suwet'en First Nation is very unique in that offenders diverted to the program bypass the criminal justice system altogether. It is at the discretion of police officers, Crown prosecutors, social workers, community members, or the family members of the victim or the accused, to divert offenders, violent offenders included, to this community justice initiative. There is no trial held for the offender, the accused is not found guilty and convicted of criminal charges. In fact, there is no criminal record at all. Furthermore, there is not a sentencing hearing to assess the offender's criminal record, including the length, kinds of offences committed, previous sentencing remedies or whether the offender has persistently committed these kinds of offences. This could prove to be dangerous in terms of spousal and sexual assaults,

particularly when the recidivism rate is so high for both kinds of offences.

Most importantly, before the Gitksan Wet'Suwet'en First Nation will begin developing a community-based disposition, both the victim and offender must agree to participate. When it is clearly evident that the community is enthusiastic about the program, the community's aspirations are well known and shared, and the community has unequivocally expressed its frustrations with the criminal justice system's interference, victims are not entirely free to refuse to participate in this program. It takes an enormous amount of courage to report a sexual offence to the police, let alone speak out against an entire community that wants to keep the offender out of jail.

By contrast, in the Community Holistic Circle Healing (CHCH) program of Hollow Water the offender has the choice of being processed through the criminal justice system or pleading guilty to the sexual offence charges and being put on a probation order, with the recommendation of CHCH that the offender is diverted back into the community for treatment. In a 1996 interview with Berma Bushie, one of the CHCH workers, she states;

In the beginning CHCH was set up for victims. As the process evolved, though, we needed to deal with offenders, and the victim part moved into the shadows. Now, we try to concentrate on the offenders to make sure the victims are safe in the community. The result is that, when you look at the total picture, you get the impression that victims are in the background.⁹

CHCH maintains a circle for the offender and a separate one for the victim. After much

⁹ B. Bushie, "W'daeb-awae': the truth as we know it," *The Four Circles of Hollow Water* (Ottawa: Supply and Services Canada, 1997), at 190.

emotional work has been done with their separate circles, the offender and the victim are eventually brought together in a “bonding” circle.

In the bonding circle, it is believed that the victim and offender acknowledge the pain and emotional damage they have suffered as a result of the abuse, and the offender accepts responsibility for the sexual assault. The psychologists, who were initially hired to do assessments and testing, strongly disagreed with the victim/offender work that CHCH was doing.¹⁰ However, the workers at CHCH still held these circles. The reasons provided by the CHCH workers included the fact that the victim and offender have to live together in a small community and there is no way of separating them; the purpose of the whole process is to empower victims so that they do not live in fear their entire lives; and that victims begin to realize that the sexual assault was not their fault and that the shame and guilt belongs to the offender. Within this circle, it is believed that the victim and offender will deal with their pain together. These sessions are scheduled once a week and usually last all day. In my opinion, it jeopardizes the victim’s healing, particularly if the offender is going through the procedure to simply avoid jail and is not capable of empathizing with the victim’s pain.

In the Sandy Lake Justice Project, elders are not required to disqualify themselves from court proceedings when a family member comes before the court. The issue of

¹⁰ Although the reasons for the psychologist’s objections to this approach are not provided, with my previous training and experience as a front-line crisis worker for the Sexual Assault Centre of Edmonton, I would assume that the psychologists objected to this approach because of the potential emotional re-traumatization of the victim. As previously stated, sex offenders are not usually capable of empathizing with the victim’s pain.

one's objectivity and bias may arise. However, it is believed that the social obligation and responsibility to the First Nation community, elders act in accordance with their heritage, traditional teachings and discipline.¹¹

All four of the Aboriginal community justice initiatives which I described handle violent offences, such as spousal assault and sexual assault, and divert these offenders back into the community. I strongly disagree with this approach. Sex offenders in particular require long term, intensive professional treatment to understand and control their deviant behaviour. Due to the emotional and physical harm they inflict upon victims, sex offenders not only need to be punished, they need to be removed from the community and to undergo rigorous psychological or psychiatric treatment. Sex offenders require more than community counselling, supervision and support to be rehabilitated. As Dr. W.L. Marshall & Sylvia Barrett state:

Sex offenders, like criminals in general, tend to be adept at manipulating others for their own ends, and they appear not to have internalized society's rules and morals. They are aware of the rules, but they have no respect for them. The very fact that sex offenders usually exercise great caution to avoid getting caught demonstrates that they know what they are doing. They are also prone to be self-centered and insensitive to their victims.¹²

Aboriginal communities do not have the necessary means to fully supervise and control

¹¹ When I worked with the Aboriginal Justice Directorate, however, it is my understanding that the South Vancouver Island Justice Project was shut down because the Chief had abused his power in trying to divert his son, who was charged with a serious sexual assault offence, back into the community.

¹² Dr. W.L. Marshall & S. Barrett, *Criminal Neglect: Why Sex Offenders Go Free* (Toronto, On.: Doubleday Canada Limited, 1990), at 66.

sex offenders; they do not even have adequate police services. In addition, they do not have the necessary expertise to effectively treat the deviant behaviour of sex offenders.

IV. Conclusion and Recommendations

Alternative justice initiatives provide a greater opportunity for Aboriginal communities to participate in the administration of justice. However, when their participation is limited to the sentencing of Aboriginal offenders and taking responsibility for rehabilitating offenders within the community, they are basically administering and enforcing white European laws. Historically, the sentence for committing a sexual offence within some Aboriginal communities was banishment or death. In the traditional lifestyle of Aboriginal Peoples, communities survived together through a collective effort, an individual could not survive alone. In alternative systems of justice, “dual respect” must take a central role. P.A. Monture-Okanee and M.E. Turpel state:

Dual respect means two things: developing a system which aboriginal people respect *in their communities* through creative and culturally appropriate criminal justice institutions and norms, and ensuring that, *outside aboriginal communities*, the criminal justice system operates in a manner which is respectful of the aboriginal offender’s history, language, culture, aboriginal rights and treaty rights (*emphasis in the original*).¹³

However, alternative systems of justice must also operate in a manner which is respectful of the rights of Aboriginal women and children and the trauma which they experience as a result of physical and sexual assault.

¹³ P.A. Monture and M.E. Turpel in “Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice” (1992) *University of British Columbia Law Review* 239, at 252.

A central objective of Aboriginal community justice initiatives must be to ensure the safety of women and children, otherwise it fails. When Aboriginal Peoples allow the diversion of violent offenders back into the community, it has failed to consider and appreciate the serious and dangerous consequences of physical and sexual assaults for women and children. Traditionally, Aboriginal people view the sexual abuse of children as a form of “spirit murdering.” The Director of the Native Women’s Transition Centre in Manitoba, Josie Hill states:

[I]t is no less than the absolute disrespect of a human being.... Our own ... grandmothers ... state that when a child is sexually abused , ‘the spirit leaves; the spirit can hide; the spirit can die,’ as a result of the great shock ... the ultimate effect is that people become unable to function in the home and community.¹⁴

The diversion of violent offenders back into the community conveys the message that physical and sexual violence is not serious and the offender has not done anything wrong. These are two very dangerous messages to send - it gives the offender license to continue committing these violent assaults and puts victims in immediate danger.

As previously mentioned in the discussion on circuit courts, Aboriginal offenders that sexually assault Aboriginal women and children are typically given lenient sentences. Now that the criminal justice system has found a way for Aboriginal communities to “meaningfully” participate in criminal proceedings, it can aggressively pursue its objective to practice restraint in the use of incarceration and thereby further lessen

¹⁴ A.C. Hamilton & C.M. Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba Volume 1: The Justice System and Aboriginal People* (Province of Manitoba, 1991), at 482.

government expenditure by diverting Aboriginal sex offenders back into the community.

Does this mean that most sexual offences will be dealt with by way of summary conviction so that an Aboriginal sex offender can be diverted back into the community on a probation order?

In the case of *R. v. P. (J.A.)*,¹⁵ the forty-five year old accused pled guilty to three child sexual offence charges. In 1980, the accused had indecently assaulted his thirteen year old daughter, C.P.; on four separate occasions he fondled the vaginal area of his daughter and made her touch his penis. In 1982, the accused had sexual intercourse with his foster daughter, A.P.; she was also thirteen years of age at the time.¹⁶ In 1987, the accused sexually assaulted another one of his daughter's, R.P., who was also at the age of thirteen at the time. On another occasion, when the accused's wife was away from home, he removed R.P.'s panties and fondled her and made her touch his penis.

The Crown suggested a term of imprisonment of fifteen months to two years. On the contrary, the defence counsel urged the court to consider imposing a community-based disposition, in light of the circumstances. Territorial Court Justice Lilles noted that there were a number of considerations which make the sentencing of this offender unique. First, the evidence and submissions of Chief David Keenan, representing the five clan leaders of the Teslin Tlingit Tribal Council and the community, recommended a

¹⁵ *R. v. P. (J.A.)*, [1991] N.W.T.R. 301 (Yukon Terr. Ct.).

¹⁶ In this case, there were actually seven separate incidences of child sexual offences, this is a clear example of how the criminal justice system trivializes the sexual offences committed against Aboriginal women and children.

community-based disposition. Second, the pre-sentence report conveyed favourable information concerning the accused, which was confirmed in the testimony of his wife and one of his daughters, C.P., who was sexually victimized and was twenty-four years old at the time of trial. Third, there are no treatment programs for sex offenders in Yukon, except for the counselling being offered by the Teslin community.

Chief David Keenan, speaking on behalf of the community and the Teslin Tlingit Tribal Justice System, recommended that the accused be given a community-based disposition, which was culturally relevant and supportive of family healing, that would denounce sexual abuse within the community and encourage other victims and offenders to come forward for treatment and rehabilitation. Chief David Keenan states:

According to Tlingit culture, it is important to keep the family together whenever possible or realistic to do so. The offender, the victims and the rest of the family must be brought together in the “healing circle” in order to “break the cycle of abuse” which would otherwise tend to repeat itself from one generation to another.¹⁷

As a result, Justice Lilles placed the accused on three years probation, with the conditions that he attend Clan meetings and regularly participate in healing circles; that he make an apology to the community and a promise to never commit these kinds of offences again; that he attend any treatment facility for sex offenders as recommended by his probation officer; that his probation performance be reviewed by the court three times; that he abide by a curfew; and that he complete 760 hours of community service. In my opinion, the accused received a extremely light sentence for sexual assaulting his three daughters.

¹⁷ *R. v. P. (J.A.)*, [1991] N.W.T.R. 301 (Yukon Terr. Ct.), at 305.

Breaking the cycle of sexual abuse so that it is not passed on from one generation to the next is crucial, but I do not believe that keeping the family together is always the best solution, particularly in cases of incest. The safety of victims cannot be assured.

A step towards the healing and rehabilitation of offenders is certainly a step in the right direction. However, until the criminal justice system develops a genuine respect for Aboriginal Peoples, particularly women and children, it will continue to use the Aboriginal community as a dumping ground for criminal behaviour which it cannot, itself, handle.

The government of Canada must make restitution for the heinous crimes that it has committed against Aboriginal Peoples in its attempt at assimilation and oppression. I recommend that the federal government establish treatment facilities specifically for Aboriginal sex offenders and prisons for Aboriginal offenders in general. These facilities must be operated by Aboriginal Peoples and established throughout northern Canada, that are easily accessible to isolated, northern communities. This resolution will also require the authority and autonomy of Aboriginal Peoples to decide for ourselves what system of justice is culturally appropriate - an aspiration will be achieved through self-determination. Until this accomplished, I recommend that the criminal justice system of Canada maintains the responsibility for Aboriginal sex offenders, by removing them from the community and placing them in specialized treatment facilities. Furthermore, I recommend that circuit courts are abolished and replaced with permanent court facilities to provide Aboriginal Peoples the same accessibility and protections offered by the criminal justice system in the south. As P.A. Monture-Okanee and M.E. Turpel state:

Self-determination means aboriginal design, control and management of institutions and programs. It also means control over fiscal arrangements. It obviously encompasses, at least from a community-based perspective, control over civil and criminal justice matters including dispute resolution structures.¹⁸

¹⁸ P.A. Monture-Okanee & M.E. Turpel, *supra*, note 13, at 263.

APPENDICES

Appendix I

Excerpt from Badgley Report:¹

Extent of Occurrence

The 2008 persons in the National Population Survey were asked whether any unwanted sexual acts had ever been committed against them and how old they were when these incidents had occurred. Preceding these questions, definitions were given of “the sex parts” (e.g., vagina, penis, crotch, and anus) of a person’s body. The questions dealing with unwanted sexual acts elicited information about: exposures, threats, touching and attacks. The questions asked were:

- Has anyone ever *exposed* the sex parts of their body to you when you didn’t want this? The reply categories were: never happened to me; and circle as many as apply of penis, woman’s crotch, breasts, buttocks, nude body, and other (specify).
- Has anyone ever *threatened* to have sex with you when you didn’t want this? The reply categories were: never happened to me; and a listing of the number of times these incidents had occurred.
- Has anyone ever *touched* the sex parts of your body when you didn’t want this? The reply categories were: never happened to me; and circle as many as apply of: *touched* your penis, crotch, breasts, buttocks and anus; and *kissed/licked* your penis, crotch, breasts, and anus; and other types of touching (specify).
- Has anyone ever *tried to have sex* with you when you didn’t want this, or *sexually attacked* you? The reply categories were: never happened to me; and circle as many as apply of: *tried* putting a penis in your vagina, tried

¹ Committee on Sexual Offences Against Children and Youth, *Report of the Committee on Sexual Offences Against Children and Youths [The Badgley Report]*, Vol. 1 (Ottawa: Minister of Supply and Services Canada, 1984), at 179-180.

putting something else (a finger or an object) in your vagina, tried putting a penis in your anus, and tried putting something else in your anus; and *forced* a penis in your vagina, forced something else in your vagina, forced something else in your vagina, forced a penis in your anus, and forced something else in your anus; *stimulated* or *masturbated* your crotch or penis; and other acts (specify).

Appendix II

Excerpt from Badgley Report:²

Case Studies. Before presenting the statistical findings obtained in relation to the mental state assessment of sexually abused children, a number of case studies are given which show the types of harm attributable to offences of this kind. The excerpts were taken from the notes in patients' charts made by attending professional health workers.

Case Study 1. Two year-old boy who experienced attempted anal intercourse by a male babysitter. Attending professional's comment: "It is unlikely that this child will have any long-term effect as a result of this incident by itself - but if the mother continues to remain anxious and under distress, the child may eventually react to the mother's extreme over-protectiveness.

Case Study 2. Three year-old boy who experienced anal intercourse by an unknown male. Social worker's comment: "Patient's behaviour has changed for the worse since the time of the assault: temper tantrums, angry testing episodes, difficult to manage, encopresis, wild behavioural misconduct."

Case Study 3. Three year-old girl who was the victim of thigh intercourse, oral-anal contact and an object inserted in her vagina by a family friend. Psychiatrist's comment: "Since sexual abuse, child fondles mother's male friends and is involved in bestiality, bizarre dreams and tantrums."

Case Study 4. Six year-old boy sexually fondled by father. Attending professional's comment: "Will require long-term counselling."

Case Study 5. Six year-old girl sexually fondled by uncle. Attending professional's comment: "Serious emotional aftermath; preoccupation with sex; severe anxiety.

Case Study 6. Seven year-old girl sexually fondled by father. Attending professional's comment: "Fear that court order (two years probation and no visiting rights) and sexual abuse had forced her to give up hope of ever having a relationship with her dad ... fear of abandonment by mother now that she had lost her father."

² Committee on Sexual Offences Against Children and Youth, *Report of the Committee on Sexual Offences Against Children and Youths [The Badgley Report]*, Vol. 1 (Ottawa: Minister of Supply and Services Canada, 1984), at 690-2.

Case Study 7. Nine year-old girl, victim of thigh intercourse, attempted rape and vaginal penetration by a finger by a neighbour. Social worker's comment: "Patient now exhibits difficulty sleeping and preoccupation with incident."

Case Study 8. Nine year-old girl raped by adoptive father, grandfather and her two brothers. Psychiatrist's comment: "Patient does not know how to approach male adults in any other way than in a fashion which would be considered to be very seductive. Patients sexualizes all relationships with males, has disturbing dreams and would like to go home to adoptive parents, but is simultaneously fearful of them. She will require long-term sexual psychiatric treatment."

Case Study 9. Nine year-old girl, victim of a finger penetration in her vagina. Social worker's comment: "A psychological trauma is anticipated, even if the patient has adequate parenting. She is afraid of being alone, of the dark and perhaps in the future, of men."

Case Study 10. 10 year-old girl whose genitals were fondled by a family friend. Social worker's comment: "Patient is now suffering from anxiety, sleeplessness, separation anxiety and nightmares."

Case Study 11. 10 year-old girl, finger penetration of vagina by her step-father. Paediatrician's comment: "Patient panics when left alone or is in a crowd; she believes everyone knows she was involved with incest; has been eating compulsively; provocative to peer group males; phobia of older men."

Case Study 12. 11 year-old girl who was tied up and forced to witness a friend being raped by a stranger. Psychiatrist's comment: "Patient became a compulsive eater (30 plus pounds in three months). At one point, she stated that she was only staying alive for her mom and dad's sake. Mother states that child has feelings of lack of self-worth. Child is scared at night of someone breaking into the house. She feels down most of the time; there is no fluctuation in this. She thinks she would be better off dead because she wouldn't have to deal with troubles. All in all, a very depressed angry little girl."

Case Study 13. 11 year-old girl raped by her stepfather. Attending professional's comment: "Lost interest in school work and activities she used to enjoy; withdrawal; severe depression."

Case Study 14. 11 year-old girl sexually fondled by her father. Attending professional's comment: "Guilt because father is on probation; depression; sexual preoccupation."

Case Study 15. 11 year-old boy, anal intercourse and fellatio by foster father.

Attending professional comments: "Problems at school; personality disorder."

***Case Study 16.* 11 year -old boy, anal intercourse by friend's father. Attending professional's comment: "Fear of adult males; questions his own sexuality."**

***Case Study 17.* 12 year-old girl, raped by foster father. Attending professional's comment: "Danger of sexual abuse, promiscuity and prostitution; preoccupation with sex."**

***Case Study 18.* 12 year-old girl, genitals fondled by mother's common-law partner. Social worker's comment: "Sexual acting-out; very low self-esteem; negative behaviour; harming herself. This, plus her whole family turning against her, has led to a very disruptive life for a 12 year-old girl."**

***Case Study 19.* 13 year-old girl, sexually fondled by her father. Attending professional's comment: "Long-term emotional and social problems because the family don't (sic) believe her."**

***Case Study 20.* 13 year-old girl, fellatio and attempted rape by her step-father. Attending professional's comment: "Attempted suicide; drug use; guilt."**

***Case Study 21.* 13 year-old girl, was raped by her uncle, became pregnant and had an abortion. Attending professional's comment: "Guilt about rape and aborting baby; will need long-term one-to-one therapy."**

***Case Study 22.* 13 year-old girl, sexually molested by her mother, had intercourse with mother's common-law partner. Attending professional's comment: "Attempted suicide; severe depression; withdrawal."**

***Case Study 23.* 14 year-old girl, raped by her father. Attending professional's comment: "Depression; guilt re sexual abuse; will require ongoing intervention in the family situation as well as psychotherapy."**

***Case Study 24.* 14 year-old boy, victim of anal intercourse by mother's common-law partner. Attending professional's comment: "Preoccupation with sex; attempted bestiality."**

***Case Study 25.* 15 year-old girl, raped by her father. Attending professional's comment: "Patient feels guilty: 'If I didn't tell anyone, no one would ever know and my father would be in no trouble'."**

***Case Study 26.* 15 year-old girl, sexually fondled by her mother's common-law partner. Social worker's comment: "Patient experiences concerns about her own**

sexuality and an 'emotional deadening' towards males her own age; tends to overeat. Feels she has few friends, partly through choice, because she does not 'trust' people."

Case Study 27. 15 year-old girl, raped and forced to commit fellatio by five unknown males. Attending professional's comment: "This young girl's total behaviour - home, school, family and peer group disintegrated after incident. If no proper psychotherapy follow-up, prognosis bad."

Case Study 28. 15 year-old girl, sexually molested by uncle. Attending professional's comment: "Suicidal; negative social behaviour."

Case Study 29. 15 year-old girl, raped by her uncle and her mother's common-law partner. Attending professional's comment: "Long-term problems; tried to harm herself with a knife; very anxious."

Case Study 30. 16 year-old girl, raped when she was age 11 by three cousins. Social worker's comment: "Emotional, developmental and social growth affected ... has become involved in negative behaviour i.e., sexual promiscuity, drug abuse. Self-image is poor - sees herself as a sexual object that has been abused. High need for intimacy which patient has not been able to meet in a satisfying way therefore causing lack of trust in people and in herself."

Case Study 31. 17 year-old girl, raped by her father when she was age 13. Psychologist's comment: "Patient needing intense counselling and support during this period to help her work through her feelings. Patient stated she felt like a prostitute at times, has had thoughts of killing herself, and portrays a very low self-esteem."

Appendix III

The Badgley Committee provided the following case study taken from the National Police Force Survey to illustrate the often compelling circumstances which deter young sexual abuse victims from making a prompt complaint.

A complaint was lodged by the suspect's wife in relation to alleged acts of sexual intercourse and other sexual acts committed against the wife's 12 year-old daughter (the suspect's step-daughter). According to the wife's statement, the suspect had a history of violence, had assaulted her on a number of occasions and once threatened to kill her with a rifle. The wife's statement alleged that her daughter first gave an indication that the suspect had been sexually abusing her when the daughter was three years-old. According to the statement:

One night I was putting the girls to bed when D. started to cry. I asked and she said I can't tell you because Dad would give me a licking... [on being questioned further] she said Dad has been playing with my bummy - I asked which one and she indicated it was her vagina. She said he lifted up my nightie, sat me on his knee, lifted me up and down and put his finger in my vagina...

The wife accepted the suspect's denials of wrongdoing, but said she continued to be suspicious. During the daughter's early adolescence, the suspect was alleged to have forced her to have intercourse several times over a period of about a year. About three months after the last of these incidents, the mother became suspicious again because of the "hickies" which the daughter was observed to have. On being questioned, the daughter broke down and related the whole story to her mother.

In her statement, the daughter stated that she delayed in telling her mother of the suspect's activities for fear of being blamed, hated, and possibly even killed for having had sex with her step-father.³

³ Committee on Sexual Offences Against Children and Youth, *Report of the Committee on Sexual Offences Against Children and Youths [The Badgley Report]*, Vol. 1 (Ottawa: Minister of Supply and Services Canada, 1984), at 389.

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