AN ANALYSIS OF MANITOBA COURT OF APPEAL DECISIONS IN CASES HEARD IN THE WINNIPEG FAMILY VIOLENCE COURT, 1990-1992.

BY

MAUREEN S. JENSEN

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Faculty of Social Work
University of Manitoba
Winnipeg, Manitoba

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Maureen S. Jensen

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ABSTRACT

The definition of behavior determines the response to that behavior. Although family violence has been a concern for centuries, concepts of patriarchal and parental rights and related ideas about family autonomy and privacy shielded abuse from social scrutiny and criminal prosecution. Feminists exposed the issue of child sexual abuse and identified sexual assaults against women and children as issues for the criminal justice system. This resulted in reform of the laws regarding sexual assault. Women's groups lobbied governments for many years to recognize wife abuse as criminal behavior and to treat it as a serious criminal offence. Eventually directives were issued to police departments to lay charges where there were reasonable and probable grounds to show that an assault had taken place. But it is not enough to secure legal reform, it is also important to monitor what the outcome of that change is. In the following thesis the author analyzed legal decisions from a superior court, in the form of 46 Manitoba Court of Appeal decisions in cases heard in the Winnipeg Family Violence Court, 1990-1992, to determine whether the reforms contributed to justice for victims of family violence. Using the methodology of theoretically oriented content analysis 18 sentencing goals and factors commonly used in sentencing decisions in criminal cases were quantitatively and qualitatively assessed. The seriousness of the crime as defined by its impact on the victim was mentioned only 6 times in 34 sentencing decisions. By failing, in the vast majority of cases, to acknowledge the seriousness of the crime, the Court of Appeal reinforced and legitimized the minimization of family violence offences. The examination of conviction issues revealed that bias against finding the testimony of women and children to be credible, particularly in sexual assault cases, has persisted despite amendments enacted to remedy this bias. Recommendations are included.

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An Analysis of Manitoba Court of Appeal Decisions in Cases Heard in the Winnipeg Family Violence Court, 1990-1992.

1. INTRODUCTION

The definition of behavior determines the response to that behavior. Although assaults, both physical and sexual, against children by parents or caregivers have been a concern for centuries, concepts of paternal and parental rights and related ideas about family autonomy and privacy shielded abuse from social scrutiny and criminal prosecution (McGillivray, 1988). The second wave of feminism served to bring the issue of child sexual abuse to the forefront and identify sexual assaults against both children and women as issues for the criminal justice system. Physical assaults against children have not fared as well due to systemic neglect, a legal defence provided for parents, teachers and those standing in the place of a parent by section 43 of the *Criminal Code*, and the fact that physical abuse of children is seen as being primarily within the jurisdiction of child welfare authorities rather than the criminal justice system. Public opinion continues to be divided on issues of discipline, criminal sanctions and parental rights. At this time there is no evidence of mass public support for criminalization. What the courts say and do in convicting and sentencing individuals who commit assaults against children and domestic partners impacts on public opinion about the criminal or noncriminal character of abuse and informs future case management decisions by justice and child welfare professionals. Sentencing in family violence cases impacts on public opinion regarding the seriousness of family violence offences.

Sexual offences against children and youth in Canada were recognized as a serious problem by the late 1970s. In December 1980, Parliament established a special committee to inquire fully into the matter and make recommendations. The Report of the Committee on Sexual Offences Against Children and Youth (Badgley, 1984) confirmed

that child sexual abuse is a problem of major proportions with significant impact on children. The Committee's recommendations included a strong emphasis on the need to invoke criminal sanctions for offenders, both for deterrence and for rehabilitation purposes. The Committee described child sexual abuse as a criminal behavior as opposed to a non-victimizing mental health problem. Although several of the Committee's proposals did not comply with *The Charter of Rights and Freedoms*, many of the proposals influenced Bill C-15 amendments to the *Criminal Code* and the Canada Evidence Act, which came into effect on January 1, 1988. These wide-reaching amendments affected the 16 sexual offences in the *Criminal Code* that could apply to child sexual abuse. The definitions of the crimes in the new law reinforce the fact that children need to be protected. Individuals who sexually abuse children are not able to avoid criminal responsibility by claiming a child "consented" to the abuse. The rules of evidence were also changed to make it easier for children's evidence of sexual abuse to be heard in court. For example, in prosecutions of child sexual abuse, corroboration or a child victim's or witness's testimony is no longer required to convict an accused. Also, as in the 1983 changes to the *Criminal Code* concerning adult sexual assault cases, the former rule on "recent complaint" has been removed from all child sexual abuse cases. This rule required the court to hold in doubt the testimony of a sexual abuse victim who did not complain to someone immediately after the offence occured. Children may testify even if the court finds that they are not able to understand the nature of an oath or solemn affirmation. To testify, however, they must be able to "communicate the evidence" and promise to tell the truth (Wells, 1990). Other changes, such as the use of screens or closed-circuit television for hearings, and videotaped evidence, are more controversial, and the use of these provisions is not yet widespread. Nonetheless, law reform changed what had previously been largely a private and socially invisible act into

a crime that had a place in the criminal justice system. The reforms were the subject of several research projects which attempted to assess the impact of the reforms (Gilberti, 1994; Gunn and Linden, 1994; Standing Committee on Justice and the Solicitor General, 1993; Roberts, 1990). The criminal justice system now saw itself as having some stake in the successful prosecution of these cases.

Bill C-127, an amendment to the sexual assault laws, was proclaimed in force on January 4, 1983 following a decade of criticism and lobbying by women's groups. The new law made sweeping changes to centuries-old rape rules, amending *Criminal Code* provisions for the substantive, procedural, and evidentiary aspects of Canada's rape and indecent assault laws. The major changes included replacing the offences of rape, attempted rape, and indecent assault by three new crimes: sexual assault (s.271); sexual assault with a weapon/threats to a third party/causing bodily harm (s. 272); and aggravated sexual assault (s. 273). These offences parallel the three-tiered structure of physical assault, in order to stress the aspect of violence. The maximum penalties prescribed by the Code for these three offences are, respectively, 10 years imprisonment, 14 years imprisonment and life imprisonment. Level 1 sexual assault (s. 271) is in fact a hybrid offence, and this has consequences for the maximum penalty. If the Crown proceeds by way of summary conviction, the maximum penalty is six months imprisonment or a $2000 fine or both. If the Crown elects to proceed by way of indictment, the maximum penalty is imprisonment for 10 years (Mohr and Roberts, 1994). Marital rape was now recognized as a crime. The new sexual assault legislation was intended to have an impact on various behaviors including victim experiences with the criminal justice process. A research program was set up by the Department of Justice Canada to assess the impact of the legislative changes. There were also numerous independent studies on the reforms.

Despite some academic cynicism about the merits of law reform, women's groups have been lobbying government over the past 15 years to recognize wife abuse as criminal behavior and to treat it as a serious criminal offence (Ursel, 1997). They demanded an end to the prevailing double standard. The stated goals of activists and reformers were that the police must charge in incidents of assault or abuse regardless of the relationship between the victim and the perpetrator, Crown attorneys must take these cases seriously and pursue prosecution, and sentencing must reflect the seriousness of the crime. Women's groups were able to generate public support and media attention on the issue of family violence and involved the media in monitoring criminal justice system response to the problem. Pressured by women's groups, Manitoba's attorney general issued a directive in 1983 to all police departments to lay charges where there were reasonable and probable grounds to show that an assault had taken place. Although full compliance with this directive did not take place immediately, the data over an eight-year period indicate that police began to treat wife abuse as a serious crime (Ursel, 1994).

In the early 1980s, Parliament undertook a review of the *Criminal Code* provisions related to assault and in 1983 in addition to sexual assault offences, three offences of assault came into effect. The sexual assault offences mirror closely in structure the assault offences (Mohr and Roberts, 1994). There are three levels of assault: assault (s.266), assault with a weapon or causing bodily harm (s. 267), and aggravated assault. The maximum penalties for assault offences are, respectively, 5, 10 and 14 years imprisonment. As with the first level of sexual assault, the first level of assault is a hybrid offence, with the same implications in terms of the maximum penalty that can be imposed.

As reforms at the police level led to mounting arrest rates, the volume of family violence cases entering the courts provoked a crisis in case management and court delays. The combination of higher numbers, close media scrutiny and public skepticism about the wisdom of judicial decisions created a momentum for court reform in most jurisdictions in Canada. In Manitoba, the result was the development of the Family Violence Court (FVC), which was designed to end the historic double standard while remaining responsive to the particular needs of vulnerable victims. This model is premised on the understanding that victims of family violence are particularly vulnerable and a just intervention must take this into consideration. On September 17, 1990 the FVC began operation. It handles first appearances, remands, guilty pleas, and trials for spouse abuse, child abuse and elder abuse cases which originate in the Winnipeg area. All cases in which the victim is in a relationship of trust, dependency and/or kinship with the accused are designated family violence cases by this court. Cases classified as "spousal abuse" include those in which the victim is between the ages of 18 and 59 and who experienced abuse as an adult by a legal or common-law spouse, ex-spouse or current or former boyfriend/girlfriend. This category is not restricted to heterosexual relations, although the overwhelming majority of cases involve heterosexual couples.

Since the court specializes in vulnerable victims, the FVC has two victim support programs: The Women's Advocacy Program and the Child Abuse Victim Witness Program, which provide support and advocacy for women and children who have been victims of violence by their partners, parents or caregivers. Cases classified as "child abuse" include those in which the victim is under the age of 18 at the time of the offence. This includes adult witnesses who come forward with a complaint of 'historical' abuse, as well as cases of multiple victimization in which at least one victim is a child. As children are considered to be in a position of trust and dependency with all

adults, cases involving children abused by individuals who are not family are also heard in the Family Violence Court (Ursel (1993). Even so, the overwhelming majority of cases in the specialized court are spousal abuse cases.

A comparative data analysis of the FVC and the Court of Appeal was done as part of the Final Report: Year Two on the Family Violence Court (1993). From the list of 4,080 cases heard in the first two years of the courts operation, the report identified 85 cases or 2% of all cases in which an appeal was filed. Of the 85 cases in which an appeal was filed, five cases had decisions still pending at the time of the report and three cases were abandoned, leaving a total of 77 cases in which the Court of Appeal made either a preliminary or a final ruling. The first level of decision making was the merit of the appeal on legal grounds. Appeals must involve a question of law, and the appeal court must decide the threshold question of whether the lower court erred in applying the law. The legal grounds for appeal are somewhat complex and will be discussed further in chapter two of this thesis. Leave to appeal was denied in 19 cases, or 25% of the cases taken to the Court of Appeal, as a result of this preliminary decision-making process, leaving 58 cases. Ten cases involved appeals other than conviction or sentence. These related to issues such as a bail application made in chambers, a motion to extend the time for the filing of a conviction appeal and an application to withdraw a guilty plea. As these cases did not relate to sentence or conviction appeals and could not be analyzed with respect to sentencing factors or recent reforms, they were dropped from the study. Two other cases were dropped from the study as the relationship between the parties did not involve trust, kinship or dependency. These cases involved a tenant and a landlord, and two employees of the same company. The reasons for Family Violence Court hearings rather than standard Provincial Court hearings are not known. There were no appeals filed in elder abuse

cases or in cases of 'psychological abuse'. Psychological abuse is defined in a myriad of ways by various researchers, but usually includes verbal attacks, ridicule, damage to or destruction of property, torture or killing of pets, and threats to cause harm (Johnson, 1996). In spousal assault cases jealousy and unwarranted accusations about infidelity, combined with isolation from family and friends present an attack on the woman's sense of self-worth and render her emotionally dependent and under her husband's control. This type of abuse is referred to by various writers as emotional abuse, obsessiveness, and control.

The remaining 46 cases addressed child or adult physical or sexual assaults. There were 34 sentencing appeals and 12 appeals on conviction only. In some cases both conviction and sentence were appealed. To overcome limitations created by very brief written reasons by the Court of Appeal, it was necessary to refer to lower court information and lawyer's facta (written submissions by the Crown and defense attorneys) in several cases. These cases are identified with an asterisk (following the type of case) in the appendix. Several unsuccessful attempts were made to follow up on the cases in which a new trial was ordered, by contacting the Crown Attorneys who had prosecuted the cases. However, the cases were no longer on the court's data base due to the length of time that had passed since the trial. As cases are filed by date, and the date of the retrial was not available, it was not possible to ascertain the final outcome of cases in which a new trial was ordered. The study therefore consisted of an analysis of 46 Court of Appeal Cases dealing with sentence or conviction issues, which arose in Family Violence Court and involved charges related to domestic violence.

This writer assisted in the analysis of Court of Appeal data for the Final Report: Year Two of the Family Violence Court (Ursel, 1993). Some trends were noted regarding sexual assault cases, particularly with regard to sentences in child sexual

assault cases which did not appear to reflect the severity of the crime. As this issue was beyond the scope of that report, I chose to investigate those cases more thoroughly, using them as the data set for my thesis. My learning goals were to find out more about the cases which were appealed, as they had the potential to be used as precedents which would affect future cases. I chose to use content analysis, a methodology which has a quantitative quality to it, but to use it in a qualitative manner about the fairness of appeal court decisions. The sentencing goals and factors commonly used in sentencing decisions in criminal cases were quantitatively assessed, in order to determine whether they were being referred to in domestic violence cases, whether they were being used as aggravating or mitigating factors, and whether overall the application of these principles contributed to or diminished the possibility of justice for victims of domestic violence. As a social worker I was also interested in finding out whether the recent reforms of the sexual assault legislation, and the rules of evidence regarding children, were having the positive effect they were intended to; and if not, if any hypotheses could be developed as to why this was so, and then generate recommendations to ameliorate the situation. I felt this study was relevant to the field of social work because social workers should be agents of social change, and the field of social work was quite active in lobbying for the amendments. But it is not enough to secure legislative change, it is also important to monitor what the outcome of that change is. Further, as a feminist concerned about child and woman victims, and interested in the concept of family violence courts, I wanted to learn more about how the Manitoba Court of Appeal dealt with Family Violence Court cases.

I began by reading several texts regarding sentence factors and principles, as well as studies which attempted the same sort of analysis I had chosen to do. As noted by Mohr (1994), the only two existing sources of guidance for trial courts and appeal

courts, with few exceptions, are first, reported sentencing decisions and second, legal texts on sentencing in Canada. Mohr (1994), like the Canadian Sentencing Commission (1988) noted that the two texts that are most often quoted in judgments are Ruby (1987) and Nadin-Davis (1982), although both texts are primarily descriptive of current practices and do not deal specifically with the issue of family violence.

As noted by Krippendorf (1980) evidence about the empirical connection between data and what is to be inferred from them is obviously important in any content analysis. To justify any inferences from data, some hard knowledge, some empirical evidence about the connections between data and what is to be inferred from them, is essential. It is this knowledge that enables the researcher to place the data in a suitable context, to render them indicative of phenomena outside of themselves, and thus provide a logical bridge for making inferences (Krippendorf, 1980).

Typical sources of contextual knowledge are: theories and models about the system under investigation, experiences with the context of data that the analyst may want to use, past successes with content analyses of similar data in similar situations, and representative interpreters such as experts. As content analysis was the form of analysis used in several studies of appellate decisions (Vining and Dean, 1980; Benzvy-Miller, 1988; Mohr, 1994) it was the methodology chosen for the present study. Sentencing factors and goals, as outlined by two authorities, Nadin-Davis and Ruby, were used as sources of contextual knowledge. Carney (1979) describes this type of content analysis as theoretically oriented, rather than classical. He notes that the aim of classical content analysis is a description of manifest content and is often accomplished by a frequency count of words whereas the aim of theoretically oriented content analysis is to make inferences from latent content, using the theme as the recording unit. It is the theoretical framework of reference which suggests the standards or norms, and, in

general, the logic of inference, by which to assess such data. As a result, a lengthy literature review section was required.

The next chapter will provide an overview of the court system in Manitoba, and the process and rules for appeals of judicial decisions. This will be followed by the third chapter which deals with four types of family violence: child abuse, both physical and sexual, and physical and sexual assaults against adult victims who are in relationships of trust or dependency with their offenders. The legal and historical context of each type of family violence will be examined and the criminal justice and social policy responses to the problem will also be described. This literature review chapter is very important because in theoretically oriented content analysis it is the theoretical framework of reference which allows inferences to be made from data. The fourth chapter on sentencing will explain sentencing rationale and sentencing disparity - the problem and models of analysis. This will provide examples of similar studies which have examined appellate decisions. The literature review chapter on content analysis, chapter five, will provide a general overview of the methodology by defining content analysis and describing its requirements. A general explanation of content analysis design is also included in this chapter. The sixth chapter, methodology, consists of a detailed description of the process of content analysis as it was carried out for this study and a description of its strengths. The issues of reliability and validity of content analysis as they relate to this analysis in particular are examined and the limitations of the study are clearly defined in this chapter. Chapter seven consists of findings and observations, and an aggregate analysis section which describes trends in sentencing among the different types of family violence offences. Conclusions are an important part of this chapter. The eighth chapter consists of recommendations for reform arising from this study. The ninth and final chapter is an overview of learning goals, a summary of the

importance of this study to the field of social work, and a review of the limitations of the study.

2. THE COURT SYSTEM
Introduction

In order to understand appellate decisions it is necessary to have some knowledge of the Manitoba court system and the Canadian system of appeals as it relates to both summary and indictable offences. The next section provides an overview of the court system in Manitoba, including a description of the Family Violence Court, the Court of Queen's Bench and the Manitoba Court of Appeal. The following section will explain the system of appeals in relation to summary and indictable offences. A flow-chart which summarizes the court system and the system of appeals is found on page one of the Appendix to this thesis.

The Provincial Court of Manitoba

The court, which has judges appointed by the provincial government, is divided into two separate divisions - some judges make up the Family division; the others sit in the criminal division. The Family division is further divided into the Youth Court, and the Family Court. The Youth court operates in all parts of the province, and hears cases of persons under 18 who are charged with committing a crime. Procedure is governed by the Young Offender's Act. The Family court operates in all parts of the province, except in the Winnipeg area. The court hears cases of a family nature. The criminal division of the court hears cases on most minor crimes, and offences under the Highway Traffic Act and other provincial laws. It also hears preliminary inquiries in cases where a person is charged with a major crime. Some of the decisions of the Provincial Court may be appealed to the Court of Queen's Bench for review, but the majority of the decisions must be appealed directly to the Manitoba Court of Appeal (Community Legal Education Association, 1991).

On September 17, 1990 the Family Violence Court began operation. It handles first appearances, remands, guilty pleas, and trials for spouse abuse, child abuse and elder abuse cases which originate in the Winnipeg area. It was the first court in Canada to specialize in family violence cases. Cases eligible to be heard in the FVC involve crimes against persons in which the victim is or was in a relationship of trust, dependency and/or kinship with the accused. This broad definition encompasses a range of intimate relations, including homosexual and heterosexual, married and common law, boyfriend and girlfriend. Child abuse cases are heard in the FVC on the assumption that all children are in a position of trust and dependency in relation to adults (Ursel, 1991). However, as noted earlier, the *Criminal Code* provides all accused charged with an indictable offence with the right to elect to have their trial in Court of Queen's Bench.

The Manitoba Court of Queen's Bench

This court has offices and hears cases in the major cities and towns of the province. Judges, all appointed by the federal government, hear cases dealing with a wide variety of subjects, including all civil suits, major criminal trials, all wills and estates cases, some appeals from the provincial court and from a wide variety of administrative tribunals, for example the Labor Relations Board or the Human Rights Commission (Community Legal Education Association, 1991). In the Winnipeg area, a separate division of the court (the Family Division) conducts all cases of domestic concern, including divorce and adoption. Decisions of any judge of the Court of Queen's Bench can be appealed to the Manitoba Court of Appeal for review, although the grounds for appeal are limited by the type of appeal. This will be discussed further in the next section.

In the first two years of the operation of the Family Violence court, a small percentage of family violence cases elected to be heard in Court of Queens Bench. To be eligible for a hearing in Court of Queen's Bench, a case must involve an indictable offence and the case must proceed first through a preliminary hearing in Provincial Court. At the preliminary hearing the provincial court judge will conduct a hearing similar to a trial, including witnesses for the prosecution and the defence, to determine if there is sufficient evidence for the case to proceed to the Court of Queen's Bench. Only 215, or five percent of the cases heard by the Family Violence Court in 1990-92, proceeded to Queen's Bench. There was, however, a significant difference in the type of family violence cases that proceeded to that court. While child abuse cases constituted the minority (17 percent) of the cases in FVC, accused persons were more likely to elect for a trial in Queen's Bench. Of the 3,316 adult abuse cases, 116, or 3 percent, had their trial in Queen's Bench, while 99 of the 702 child abuse cases - 14 percent - proceeded to that court. Child abuse cases constituted 99 (46) percent of the 215 family violence cases heard in Court of Queen's Bench (Ursel, 1995). One consequence of this selection pattern is that child abuse cases take much longer to process than adult abuse cases. Although the child abuse cases heard in FVC were, on average, disposed in five months, the cases that proceeded to Queen's Bench took two to three times as long.

The Manitoba Court of Appeal

This court has seven judges all appointed by the federal government. The senior judge of the Court is the Chief Justice of Manitoba (Community Legal Education Association, 1991). The court does not hear any trials. It sits only to review decisions of other courts which have been brought before it on appeal. Cases in the Court of Appeal are heard usually by a panel of three judges, although in very exceptional cases five judges may sit together to consider a case. In many cases, decisions of the Court of

Appeal are final. In those cases where a further appeal is allowed, the case goes to the Supreme Court of Canada for review. As in the Court of Appeal, the Supreme Court of Canada decides only questions of law and will not hear sentence appeals.

The System of Appeals

Once a trial has been concluded, it is always possible that either the accused or the Crown may wish to appeal against the verdict or the sentence meted out. Until 1923, there was only a very limited system of appeals in existence in Canada (Salhany, 1989). However, at the present time, a fairly elaborate system of appeals operates in relation to criminal cases. There is a marked difference between the system of appeals available in relation to summary conviction offences (minor offences with a maximum sentence of 6 months or a $2,000 fine) and the system that operates in relation to indictable offences (more serious offences, equivalent to 'felonies', each with its own sentencing structure). Some offences are 'hybrid', meaning that the Crown can choose to prosecute a more serious offence 'summarily' if circumstances warrant this. The following explanation of the system of appeals is meant to provide a context for analysis of the Court of Appeal decisions in this study. As noted earlier, a chart outlining the court system and system of appeals in Manitoba is found on page one of the Appendix of this thesis.

The *Criminal Code* specifies whether an offence is a summary conviction offence or an indictable offence. With respect to certain offences, the *Code* says that the offence can be prosecuted either by summary conviction or by indictment. These offences are called dual or hybrid offences (Wells, 1990). In these cases, the crown prosecutor, in consultation with the police, has the option of deciding to proceed by way of summary conviction or by indictment. Sexual interference, sexual assault, and assault are examples of hybrid offences. Summary conviction offences are generally less

serious offences that are tried in a provincial or territorial court, before a judge only. Unless the *Criminal Code* sets out a specific penalty for the summary conviction offence, the maximum penalty is a $2,000 fine or six months in jail, or both. Summary conviction charges must be laid within six months of the offence (Wells, 1990).

While the trial process in relation to summary conviction offences is relatively straightforward, the appeal process is quite complex (Atrens, 1988). Defendants may appeal either from a conviction or order made against them or against the sentence imposed on them. The prosecutor may appeal either from an order that stays proceedings or, alternatively, against the sentence passed on the accused. Clearly, the Crown has very broad powers of appeal under these provisions of the *Code*; indeed the prosecutor can launch an appeal not only on questions of law, but also on questions of mixed law and fact (Griffiths and Verdun-Jones, 1994). The appeal court may allow the appeal, set aside the verdict, and either direct a judgment or verdict of acquittal be entered or order a new trial. On the other hand, of course, the appeal court could find that the appeal does not have sufficient merit and dismiss it. In the case of an appeal against sentence, the appeal court has the power to vary the sentence "within the limits prescribed by law" or it may just dismiss the appeal altogether.

Indictable offences are more serious crimes and carry the possibility of more serious sentences (up to life imprisonment). In the cases of many indictable offences the accused has the right to "elect" the mode of trial. In these situations, the accused person may choose between three different methods of trial: trial by a Provincial Court judge, trial by a Queen's Bench judge and jury, or trial by a Queen's Bench judge. If the accused fails to make an election, he or she will be deemed to have chosen to be tried by a court composed of a judge and jury.

All accused persons make their first appearance in Queen's Bench or the Provincial Court, of which the Family Violence Court is a part. While some cases involving indictable offences will end at the Provincial Court, others will be moved on to the Court of Queen's Bench - usually those involving more serious offences in which significant terms of incarceration are the anticipated outcome. Before cases are tried in the Court of Queen's Bench, the Provincial Court judge must first conduct a preliminary inquiry to determine whether there is sufficient evidence to warrant committing the accused for trial.

The *Criminal Code* has established only one method of appeal insofar as indictable offences are concerned. All appeals from the decisions of trial courts are to be taken to the Provincial Court of Appeal. Both the accused and the Crown may appeal, but the Crown's rights of appeal are more limited than those of the accused. The major difference between the rights of appeal enjoyed by the accused and the Crown lies in the fact that, in general, the prosecution may only appeal against an acquittal if it involves a question of law, although the accused can appeal against conviction not only on a question of law, but also on a question of fact, or mixed law and fact (Salhany, 1989). In order for the Crown to succeed on an appeal regarding a question of law, it must establish that the trial judge was under a misapprehension as to the correct legal principle or misapplied it.

Where the accused is appealing against conviction, the Court of Appeal may decide to allow his or her appeal where, in its opinion, the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence; or there was a wrong decision on a question of law; or on any ground there was a miscarriage of justice. Where the Court of Appeal decides to allow the accused's appeal, it may direct that a judgment or verdict of acquittal be entered, or order a new trial (*Criminal Code*

s.686). Even when the Crown establishes that there was an error at the trial level, the Court of Appeal will not order a new trial unless the Crown can demonstrate "with a reasonable degree of certainty" that the outcome might have been affected by the error (Griffiths and Verdun-Jones, 1994). Thus, only legal errors that might have had an impact on the decision to acquit the accused can serve as a justification for subjecting the accused to the hardships associated with a new trial. Where an appeal has been made against the sentence imposed at trial, then the Court of Appeal may vary the sentence within the limits permitted by law (maximum sentences), or dismiss the appeal. The court may increase a sentence even when it is the accused who has appealed against his or her sentence.

3. FAMILY VIOLENCE

Introduction

Carney (1979) states that when using theoretically-oriented content analysis it is the theoretical framework of reference which suggests the standards or norms and the logic of inference by which to assess the data. In order to assess Court of Appeal decisions relating to family violence it is necessary to know about the legal and historical background or context of the issue in order to make inferences from the data. It is also important to know about the criminal justice response, particularly the amended assault and sexual assault laws, in order to assess whether the amendments are leading to greater justice for victims of family violence. The social policy response to family violence explains those factors which lead to the criminal justice response and which will continue to shape it. Difficulties with the criminal justice and social policy responses are also explained in the literature review to avoid simplistic inferences.

Child Physical Assaults

Legal and Historical Context

Although child abuse did not become widely recognized by social work and other professions until the late 1960s and early 1970s, the abuse of children has been a feature of most societies for many centuries (Oates, 1991). It has not always been accepted that the state has a duty to protect children. The legal system of ancient Rome recognized the concept of 'patria potestas' (the power of the father) which gave a father complete authority over his children, including the lawful authority to sell them into slavery or even put them to death (Bala, 1991). During the history of mankind, children have been nurtured and encouraged as well as maltreated, abandoned, sacrificed, disfigured and beaten (Garbarino, 1987). The view of children as property, set the stage for child abuse a long time ago and children have been abused physically and mentally by adults since the beginning of civilization. They have been battered, tortured,

exploited, sold into slavery or killed for irritating their parents too much, for being deformed or for being female (deMause, 1974). Maltreatment of children has been justified by the belief that harsh treatment was necessary to discipline, to educate, or to expel evil spirits (Csapo, 1990).

Both the Roman legal concept of 'patria postestas' and the English common law gave guardians virtually limitless power over their children, who, with chattel-like status, had no legal rights to protection. Infanticide has been an accepted procedure in almost every nation for disposing not only of deformed or sickly infants, but all those who might strain the family resources (Langer, 1974). A Roman father had the privilege of selling, abandoning, offering in sacrifice, devouring, killing, or otherwise disposing of his offspring (Radbill, 1968). Seneca, Plato and Aristotle condoned the killing of 'defective' children. The Roman Law of Twelve Tables forbade the rearing of deformed children.

Legislation to afford some degree of protection to children was enacted early in history. The Code of Hammurabi for example, stated that if a nurse allowed an infant to die in her hands and substituted another, her breast should be cut off (Garrison, 1965). An Egyptian record of a child murderer states that she was ordered to carry the dead infant in her arms for three days and three nights (Radbill,1968). Infanticide was a capital offence in Thebes. The Hebrews, Christians and Mohammedans all prohibited infanticide and Constantine issued an edict against selling children into slavery (Csapo, 1990). Female infanticide was permitted in China as late as 1837 and occurred until quite recently.

Abandoning children has been dramatized by fabulous characters in history such as Moses, Romulus and Remus, and Horus. Most abandoned infants however, died of exposure and hunger. To discourage infanticide and in view of the number of

foundlings left along the trail of the crusades, Pope Innocent III around 1200 encouraged the establishment of foundling institutions. St. Vincent de Paul and Catherine II of Russia promoted the cause of the foundling institutions (Csapo, 1990). Almshouses in Colonial America served the same purpose.

Disciplinary measures have varied from culture to culture and from time to time. The biblical sanction for corporal punishment is given in Proverbs, 23:13-14:

> Withhold not correction from a child: for if thou strike him with the rod,he shall not die. Thou shalt beat him with the rod, and deliver his soul from hell.

This passage has resulted in misery for many children raised in devoutly religious homes. Teachers and parents had long had the prerogative of whipping their children, or children in their care. Five thousand years ago in the schools of Sumir, the Iman in charge of the whip punished boys for the slightest infraction and in Roman times boys were flogged by their parents in front of the altar of Diana (Radbill, 1968). The Roman school master used the ferule, a tough stalk of giant fennel, to punish the children; in England and North America it was the birch rod and in ancient Greece the scutica, a whip made of leather thongs; all these were considered important teaching devices (Csapo, 1990). This practice was taken over by Christians who whipped children on Innocents Day or beat them to drive out the devil. This form of child rearing and education had its critics. Plato, for example, in 400 B.C. advised teachers to educate children as if they were playing and Plutarch denounced the scutica in 100 A.D. (Radbill, 1968). In 1611 Roger L'Estrange wrote a book entitled "The Children's Petition", begging for leniency from parents towards their children. At the end of the XVIII century, John Peter Frank became a pioneer in the fight against corporal punishment in the schools (Aries, 1962).

The Calvanistic views that children were imps of darkness led to extremes of chastisement in the old as well as the new world (Radbill, 1968). For example in 1546 the Massachusetts courts adopted the Mosaic law by imposing the death penalty on unruly children and a few years later Connecticut followed suit (Bremner, 1978). The so-called 'stubborn child statute' in Massachusetts, enacted in the 1670s provided that a stubborn or rebellious son over 15 years of age could be put to death on complaint of his parents (Csapo, 1990). Children as young as four years of age were bound to servitude. A master in Salem, Massachusetts, was tried for murdering his apprentice in 1630 and acquitted because the boy was 'ill disposed' (Radbill, 1968). Children from four to ten years old were employed in cotton mills sixteen hours at a time sometimes with irons riveted around their ankles to keep them from running away. The London of Charles Dickens epitomized child maltreatment during the Industrial Revolution when children were sold into slavery or indentured as cheap labor (Csapo, 1990). Finally, in 1833 a law was passed which provided that children from 9 to 13 years of age were not to work in excess of 48 hours per week.

Child protection movements in the last century were aimed at protecting society and promoting religious and family values. This was viewed as consonant with children's interests, which were in any case secondary. Children had little recourse to the law, and child protection was paternalistic, charitable and judgmental (McGillivray,1988). The state exercised its powers in the interests of maintaining social order through the control of children rather than in the interests of the child.

One of the first legal challenges to the absolute rights of parents over their children was recorded in New York City in 1870. A little girl, Mary Ellen, who was starved and beaten repeatedly, was unchained and given refuge from her parents. The

Society for the Prevention of Cruelty to Animals acted on Mary Ellen's behalf as there were no similar societies on behalf of children. This led to the founding of the Society for the Prevention of Cruelty to Children a year later (Csapo, 1990). The first law for the protection of abandoned, or maltreated, neglected children was enacted in 1889 in France. In England the Infant Life Protection Act was enacted in the latter half of the 19th century but was not enforced until after 1908 (Radbill, 1968). In 1909 the first White House Conference was convened and the American Association for the Study and Prevention of Infant Mortality was founded. In Canada legislation against cruelty to animals was enacted as early as 1824 but legislation against cruelty to children was not enacted until 1893 when the Province of Ontario passed the Act for the Prevention of Cruelty to and Better Protection of Children (Csapo, 1990). The only other province to pass such legislation during the 19th century was Manitoba in 1898. Until the 20th century children were considered the property of their parents and physical punishment was considered a necessary technique for the teaching of discipline. Even today the use of physical punishment as a disciplinary tactic continues to be culturally approved in many societies.

As early as 1679, Theophilus Bonet reported on various autopsies of children who died from injuries. There are no records of further concern until Ambroise Tardieu, a forensic pathologist in Paris identified child abuse as a prevailing cause of death in 1860. Tardieu, a Professor of Legal Medicine, published a medicolegal study of 32 children who had been battered to death (Lynch, 1985). Little further was published about the condition until 1946 when an American radiologist, John Caffrey, reported a new syndrome. Caffrey reported in 1946 about six children with subdural hematomas who also had multiple fractures of the long bones. He noted other injuries, including bruising and retinal hemorrhages, and reported that some of these children were poorly

nourished and delayed in their development. Caffey concluded that, in the absence of underlying skeletal disease, the fractures were likely to be caused by trauma. He felt that negligence may have been a factor, but he was unable to obtain any history of trauma from the parents. Others recognized this condition, which became known as "Caffrey's syndrome", but the true cause of these injuries was not clear to most practitioners, such was the level of denial that parents could actually inflict serious injury on their own children (Oates, 1991). An important contribution to understanding these injuries was made in 1955 when two researchers, Wooley and Evans, took a fresh look at children with Caffrey's syndrome. They emphasized the traumatic nature of these injuries and pointed out that the environments of these infants were often hazardous and undesirable.

The period of awareness of child abuse was ushered in by Kempe, Silverman, Steele, Groegemueller and Silver in 1962. They counted the term 'the battered child syndrome' as a way of directing attention to the seriousness of the problem and pointed out that physical abuse was a significant cause of death and injury to children, based on their research into children's autopsies. Since this time tne extent of child abuse has been widely recognized and an extensive literature has developed (Oates, 1991). There now exists an International Society for the Prevention of Child Abuse and Neglect, formed in 1976, which publishes a quarterly journal entitled Child Abuse and Neglect.

Child abuse emerged in the early 70s as a visible and important social problem and has been the subject of social control involving legislation. With increasing protection of children's rights, reporting laws have been mandated, methods of prevention and treatment formulated, and child abuse has become a crime (Csapo, 1990). Society has at least established specific instruments of social control: law enforcement, legal institutions, and sanctions which are designed to eliminate or change

inappropriate behavior of individuals and families. It is only recently that the child's right to preservation of health and life outweighs the right of the family from interference.

Child Physical Assaults
Social Policy Response

Child welfare powers and programs expanded massively in late nineteenth century Canada (Callahan, 1985). The province of Manitoba based its child welfare legislation on that of Ontario. The Ontario *Humane Societies Act* had been amended to give animal protection groups the power to remove children from the lawful custody of parents and guardians for neglect or mistreatment but the need for separate societies and legislation became apparent (McGillivray, 1996). Ontario legislation was amended and Manitoba followed suit, instituting a system of quasi-charitable Children's Aid Societies in 1891, and enacting its *Child Protection Act* in 1898.

The reforms continued in Manitoba, as elsewhere, into the next century. In place of a single statute based on the Tudor Poor Laws (the Manitoba *Apprentices and Minors Act,* 1877), there were by 1913 many statutory provisions in Manitoba empowering agencies to apprehend children for parental transgressions such as neglect and abuse or immoral conduct. Transgressions on the part of the child such as vagrancy, truancy, expulsion from school or petty crime could also result in apprehension. The apprehended child would be placed in a normalizing environment, at first the industrial school; later in a foster family. McGillivray (1996a) points out:

> By the 1920s, child welfare philosophy was moving away from child apprehension and institutional regimes, instead favoring family therapy and family-based settings. Professional social workers and university-based experts were replacing the charitable amateur, to become the new agents of child welfare. To honor the new therapeutic, family-centered commitment, 'child protection' was renamed 'child and family services' (at p. 147).

However despite the renaming the new childsaving was similar to the old. The new expertise legitimized the middle-class bias of child welfare established by nineteenth-century moral crusaders and poor and non-anglophone families continued to be singled out (McGillivray, 1996a; Chun, 1992; Bullen, 1990).

Definitions of child abuse have not changed greatly over the course of the last few decades in the sense that it has been defined as an on-going condition of child maltreatment within a family or substitute family context. There has been a process of differentiation into new types as the significance of various phenomena became better understood. Thus, to the original concern with physical abuse or 'baby-battering', were added first neglect, then emotional abuse and sexual abuse, and, more recently, witnessing family violence and ritual abuse. Spiritual abuse of Aboriginal children placed in some non-Aboriginal families is also a current concern (McGillivray, 1996a).

The current era in child abuse response dates from the publication of the article "The Battered Child Syndrome" (Kempe et al 1962) that alerted physicians to physical abuse when injuries were presented as accident or illness. Within a remarkably short period, physical abuse rose on the public agenda, causing a moral panic which resulted in massive legislative reform and increased funding to researchers. Legislation on reporting and child protection intervention was also developed. Neglect, typically a concern of child welfare agencies was drawn into a schema which saw child abuse and neglect as two complementary types of child maltreatment. Physical abuse covered harms defined as a threat to the health, development, or life of the child arising out of the direct actions of a parent or parents (acts of commission). Neglect covered harms arising out a failure of a parent or parents to provide minimally adequate care in terms of

health, nutrition, shelter, education, supervision, affection, attention or protection (acts of omission). Both were defined primarily as occurring within the family (Wachtel, 1994). Existing criminal laws on assault, negligence, etc. covered parallel injuries to children but the new familialized context which made parents culpable was particularly challenging to accepted norms of the parent-child relationship, the most private of intimate relations.

Increased understanding of the problem of child abuse led to changes in legislation to require professionals and members of the public to report suspected cases of child abuse. Child abuse registers were established in many North American jurisdictions in the mid -1960s to help keep track of abusers and abused children, and to facilitate research (McGillivray, 1996a; Bala, 1991). Changes in reporting laws and growing professional awareness led to significant increases in the number of reports of physical abuse. Multi-disciplinary child abuse protocols were developed to ensure that all individuals who were in a position to know about child abuse were also informed of the reporting laws and that charges would be brought in appropriate circumstances.

Every Canadian jurisdiction has legislation in place to regulate child protection, and the primary social policy response to physical assaults of children has been to involve child welfare authorities. Every provincial protection statute defines a "child in need of protection", though the specific criteria vary. Some provincial statutes, such as Manitoba, expressly outline the philosophical bases or principles within which the statutes are to be interpreted. However, such principles are often contradictory and offer little assistance in interpreting the legislation. Definitions in all jurisdictions generally include physical, sexual or emotional abuse; abandonment; orphanhood; parental failure to meet health needs of the child; inadequate parental care, supervision

or control; and, absence of the parent in circumstances that endanger the child's safety or well-being (Genereux, 1991). It is important to remember that, in addition to child protection legislation, other statutes and legal rules have an effect on the conduct of a hearing. Provincial evidence law, rules of court procedure and relevant case law must also be considered in presenting child abuse cases to court. A crucial aspect of the hearing is the judge's determination of whether or not the child is need of protection. Without such a finding, the court cannot require that the parent or guardian have any involvement with the protection agency. Once such a finding has been made, subsequent orders can be for supervision, temporary wardship or permanent wardship. The purpose of the hearing and the responsibility for proving the case are generally the same in all provinces: the agency must prove its case on the civil standard of proof, the balance of probabilities. This means the judge must be convinced that it is more probable than not that the facts alleged by the agency are true. The concept of "best interests of the child" has a specific meaning in the context of protection proceedings. It does not simply mean what is best for the child in an absolute sense, but rather, that the onus is on the agency to prove that it is best for the child that the state intervene in the family and overcome the normal presumption of family autonomy. The court must be satisfied that the agency has proven the child is within one or more of the legal definitions of a child in need of protection. It sometimes said that the agency is only justified in interfering if parental conduct falls below a minimum social standard (Genereux, 1991). Further problems arise when the norms of one cultural group are imposed on another through child welfare policies and practices.

There are critical differences between the child-rearing practices of Aboriginal peoples and those who are of European background (Andres, cited in Sinclair, Phillips

and Bala, 1991). For example, an Aboriginal child may be cared for by several households of an extended family with the natural parents' understanding that the child would receive the same love and care which they would provide. This contrasts with the non-Aboriginal emphasis on the nuclear family as the basic unit of child care provision. In examining the situation of Aboriginal children within Manitoba's justice system, Judge Kimelman (1985) noted that children need protection to ensure that they are not removed from their families without substantial cause. He pointed out that social workers tend to make idealistic judgments about family functioning and may view situations as neglect where no actual harm is likely to occur.

Child welfare practices have been a major factor in the deterioration of Aboriginal cultures in Canada, on par with the residential school policies and the laws promulgated by the federal Department of Indian and Northern Affairs. Aboriginal people have shown, and continue to show, justified concern about the deterioration of their families, communities, values and customs as a result of the child welfare policies of Canadian governments (Aboriginal Justice Inquiry, 1991). One of the most obvious indicators of the deterioration in Aboriginal cultures is that Aboriginal children have been taken into the child welfare system in disproportionately large numbers. In some provinces, the majority of child apprehensions involve Aboriginal children (1986 Canada Census, cited in Sinclair, Phillips and Bala, 1991). The underlying causes for the severe problems affecting large numbers of Aboriginal children involve such factors as cultural conflict and jurisdictional disputes between governments, as well as poverty and other socioeconomic problems. Available evidence indicates that many aboriginal children who have become involved with the child welfare system at an early age have gone on to spend time in multiple foster placements, and later in young offender institutions and

the adult correctional system (Sinclair, Phillips and Bala, 1991). Aboriginal groups have expressed deep concerns that the pattern of apprehensions inhibits the development of these children as future contributing members of Aboriginal communities, and that it has negative implications for society in general.

Although Aboriginal agencies have made great strides in recent years, there is little guarantee of protection within the system. Perhaps one quarter to one half of Manitoba child abuse cases arise in foster homes (Margo Buck and Heather Leonoff, cited in McGillivray, 1996a). Early practices of intertribal agencies increased the risk. Foster placements on home reserves exposed children to their abusers because foster placements were chosen to provide cultural connection rather than the child's protection (McGillivray, 1996a). Agencies were successfully sued for placements which led to the child's injury or death. Jurisdictional disputes between urban and intertribal agencies are still common, as reserve connections for many urban families remain strong. Although the intertribal agencies have been assailed in the courts many times in the last decade, McGillivray (1996a) states "it cannot be shown that Manitoba Aboriginal children are worse off, physically or culturally, than under former systems" (at p. 175). Intertribal agencies are using Aboriginal healing approaches to both prevent abuse and heal its effects.

However, in most instances child welfare services continue to manifest the basic apprehension or rescue philosophy underlying the original child protection legislation introduced at the end of the nineteenth century (Hepworth, 1985). There are still many children removed from their homes who spend greater or lesser periods of time in some form of substitute care. There are basic resource constraints, namely workers and placement facilities, which determine how many children can come into

care. Nevertheless, the apprehension provisions remain an integral part of child protection legislation, an ultimate sanction, which affects thousands of children and families every year. The actual reasons for apprehension are socially defined and depend on the interpretations of social workers, judges and other persons who themselves reflect the prevailing values of society. Views about child-rearing and child-handling have tended to change. A new way of looking at the rights and needs of children has raised serious questions about the justification for, and efficacy of, radical child welfare interventions (Hepworth, 1985). At the same time, public concern about child abuse, fueled by well-publicized cases of children dying after being badly hurt, has brought more pressures on child welfare agencies to take children into care and to retain them there. The coercive powers of the child welfare system may also bring results not desired nor intended. While foster care placement is and will remain a necessary strategy for the care, protection and treatment of children whose parents are unable to adequately care for them, there is now a new and serious concern that a significant number of children are abused and neglected while in foster care. The findings of a report (Dawson, 1985) of abuse in foster care in Ontario is disturbing. The method employed to obtain study data was that of a survey in the form of a mailed questionnaire to all 51 Ontario Children's Aid Societies who have primary responsibility for the provision of foster care services in Ontario. The questionnaire sought data on all verified or suspected reports of abuse in an agency approved foster home during the years 1979, 1980 and 1981. In the study, one in four children experienced abrasions or bruises. One in four children experienced some form of sexual touching without physical injury. Serious injury occurred in less than 10% of all cases. These involved subdural hematoma, burns and internal injury. One case of malnutrition was reported. Although actual incidence of maltreatment in foster care was not established, study data suggests

the incidence is considerable and comparable to the incidence rate in the general population (Dawson, 1985). For children admitted to foster care because of parental failure or inadequacy, these incidents are a form of 'double jeopardy' and a further assault on their developmental integrity. Abuse in institutions is another issue which is beginning to be studied.

Child protection agencies and the legal system have operated vaguely and ineffectively in the area of child protection. The issues in child abuse cases are complicated by normative conflict and the restoration of victim equality through a process which may further damage family relations. 'Repressive' and 'permissive' child rearing norms involve fundamentally different notions of parent-child and child-state relations (Stone, 1977; McGillivray, 1988). The first, which has characterized much of Western history, is distinguished by patriarchal control, subordination of children to parents and the use of corporal punishment. The second is a product of the eighteenth-century Enlightenment and dominates child rearing philosophies in the present century. Permissive styles stem from a social philosophy termed 'affective individualism' which emphasizes romanticized relations and emotions or affect and the importance of the individual, self-fulfillment and individual rights meriting state protection (Stone, 1977). The greatest gains in child protection have been made in the historical periods characterized by affective individualism. The conflict between the two ideologies is continual. Each has distinct and opposing implications for the standard of treatment of children by families and therefore for state intervention (McGillivray, 1988). Each suggests a different outcome when fundamental interests of parent and child conflict. This poses serious dilemmas both for the administration and reform of civil and criminal law and for the resolution of specific cases.

Child Physical Assaults

Criminal Justice Response

Child abuse is processed either through civil law procedures such as the application of a provincial Child Welfare Act to "protect" the child from further abuse or neglect; or through criminal law procedures, by prosecuting someone who is alleged to have assaulted the child. The Child Welfare Act procedures are much more likely to be used in abuse cases, even though the assaults may have been sufficiently serious to justify criminal procedure (Badgley, 1984). Parental abuse and neglect constitute the basis for prosecution under the Criminal Code. It is a criminal offence to fail to provide a child with the "necessities of life", to use force against a child which is not "reasonable" or "for the purposes of correction", or to sexually abuse a child. Child abuse can be dealt with in the civil court system, involving a child protection hearing, or in the criminal court system, involving a criminal trial, or both may proceed simultaneously. The decisions regarding the manner in which the matter will be dealt with are decided by police and/or child welfare agency protocols and procedures. Initial reporting of the abuse affects the response to the problem as calls to police will often result in criminal investigations while calls to child welfare authorities may only lead to social work interventions.

In a criminal case, the onus is on the prosecution to prove its case beyond a reasonable doubt. This constitutes the criminal standard of proof. Criminal proceedings employ strict rules of evidence and provide the accused with a full set of procedural protections under the *Canadian Charter of Rights and Freedoms*. For example, in a criminal case it is usually necessary for the child victim of alleged abuse to testify in court and be available for cross-examination. Police are responsible for criminal

investigations, while the Crown attorney is responsible for presenting a criminal case in court. There are sometimes disagreements between the child protection agency on one hand, and the police and Crown attorney on the other, about how a child abuse incident should be handled. Sometimes the protection agency has a concern about the potential detrimental effect of a prosecution upon the parents or their relationship with the child, resulting in the agency's reluctance to support a criminal prosecution. Alternatively, the police may be unwilling to press criminal charges in a case where the protection agency thinks such a prosecution would be appropriate (Hallett, 1991). Recently there has been an effort to improve the relationship between child protection agencies and those responsible for criminal prosecutions by developing protocols to govern joint investigations and responsibilities.

Any person may go before a justice of the peace to commence a criminal prosecution against another individual by swearing out an information. The informant must swear before the justice of the peace that he or she has reasonable and probable grounds to believe that the accused person has committed a specific offence (Hallett, 1991). Informations charging criminal offences are most frequently laid by police officers. They must believe that an offence has taken place. The police officer usually establishes reasonable and probable grounds to believe that an offence has been committed following an investigation, unless the officer has actually found the offender committing an offence. The investigation may last several days or even months, or for only a few minutes. Usually, the victim of the alleged offence will be one of the first persons to whom the officer will speak during the investigation. Items that may have been used in the course of the offence (eg. weapons) or that otherwise support the story of the victim and other witnesses (eg. blood-stained clothing or an item left at the scene

by the offender), will be collected during the officer's investigation and kept as exhibits for later use at trial (Griffiths and Verdun-Jones, 1994). The younger the child in such circumstances, the more the investigating police officer may face a dilemma in proceeding with a charge. The investigation often includes speaking with the person suspected of the offence. Sometimes, after interviewing a suspect, the police will decide not to lay a charge. Under the *Charter,* when police interview an individual charged with an offence, they are obliged to ensure that the person is aware of the right to consult a lawyer prior to making a statement (Hallett, 1991). An individual is under no obligation to make a statement to the police and has the right to remain silent.

Section 43 of the *Criminal Code* further limits the utility of the criminal law in dealing with physical assaults of children. The section provides that:

> Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.

Although corporal punishment was once common for criminal infractions, only children remain legally subject to it. This violates Charter protections against cruel and unusual treatment and age-based discrimination. The right to security of the person is compromised by the vagueness and overbreadth of s. 43. As McGillivray (1993) notes:

> There is no limit on what a child can be punished for doing; limits on what can be done to a child are unclear despite centuries of jurisprudence (most rendered nugatory by changing mores). "Reasonableness" varies with judge and jurisdiction, to a degree unacceptable in criminal law (at p. 130).

There is some pressure for the repeal of s. 43. However, attitudes regarding the authority of parents over their children will need to evolve further before there is enough collective will to effect repeal of this section.

The next three sections will review the legal and historical context of child sexual assaults and will examine the evolution of the criminal justice and social policy response to this social issue.

Child Sexual Assaults
Legal and Historical Context

Criminal laws controlling the sexual use of children have been in place since the 11th century (McGillivray, 1990). Unlike modern interpretations and reformulations, however, the misdeed addressed was not harm to child but interference with proprietary rights of the father in the virginity of the daughter. The exception to this is the offence of incest, which lay in the immorality of sexual intercourse within a proscribed range of blood relationships, irrespective of the ages of the offenders Incest became part of Canadian federal criminal law in 1890. The offences of sexual intercourse with a stepdaughter, foster daughter or female ward, and sexual intercourse by an employer with a female employee under 21 years became part of Canadian criminal law in 1892 and 1890 respectively. Neither applied to male children.

The 1869 Offence Against the Person Act included several provisions relating to carnal knowledge of girls under the age of consent (S.C. 1869, c.20, ss. 51, 520) which was twelve years at this time; a different sentence was mandated if the girl was over ten and under twelve. The death penalty was retained where the girl was under 10, while a 2-7 year prison term was deemed appropriate where the girl was between 10 and 12. The death penalty was repealed in 1877 and a minimum term of 5 years was substituted (S.C. 1877, c.28, s. 2; cited in Boyle, 1984). By 1886, the maxima were life

imprisonment if the girl were under 10, and 7 years imprisonment if over (R.S.C.1886, c. 162, ss. 39, 40 cited in Boyle, 1984). By the time these offences were incorporated in the Criminal Code of 1892, the upper age had risen to fourteen (S.C. 1892, C. 29, s. 269; cited in Boyle, 1984). The next significant change came in 1920, when girls between fourteen and sixteen were given a certain measure of protection (S.C. 1920, c. 43, s. 8; cited in Boyle, 1984). These ages have remained unchanged to the present time.

It might appear that the legislation shows a consistent pattern of increasing protection for young women, but the changes in the age of consent were balanced by other factors. This can be demonstrated particularly clearly with respect to the last change, that to the age of sixteen. The 1920 amendments contained a number of provisions designed to protect the interests of the accused (Boyle, 1984). Section 8 divided for the first time those to be protected into the chaste and the unchaste, only chaste girls between fourteen and sixteen being thought deserving of protection. The *overt* distinction between chaste and unchaste females is particularly important, since it reveals that the legislators were not motivated by a desire to protect all females, including those who had already been victimized, but only those who satisfied the criterion of respectability. It also introduced a corroboration requirement (cited in Boyle, 1984), stating that:

> No person accused of any offence under this subsection shall be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused (at p. 155).

The sexual abuse of children did not appear to be a major cause of concern until the late nineteenth century. At that time, public attention was focused less on the plight of sexually abused children than on widespread anxiety over an outbreak of

venereal disease related to increased prostitution by female children who had been sexually abused (Wells, 1990). About the same time, Freud, who was initially convinced that many of his hysterical patients were suffering from the trauma of childhood seduction, abandoned this belief out of personal conflict and under pressure from colleagues. His seduction theory turned into the 'seduction fantasy' leading to generations of therapists who held suspect the statements of women and children who described childhood sexual abuse (Wells, 1990). But it was not only therapists who were suspicious of the statements of women and children who described childhood sexual abuse. Biases in the way in which children's testimony was viewed were enshrined in legislation. The law relating to offences against children is very revealing of the perspective of the law-makers, since their values are expressed in the statutes themselves as well as in judicial and enforcement decisions. The significant features of this area of law relate to the age of consent, *mens rae* and the burden of proof (Boyle, 1984). Until quite recently, there was a strong tendency in Canadian society to deny child sexual abuse. Few cases were reported to the authorities and even fewer prosecuted in the courts (Bala, 1991). The attitude of denial was reflected in laws which were premised on the belief that allegations of abuse were inherently unreliable, which in turn made it difficult or impossible to secure convictions and reinforced the perception that child sexual abuse was not widespread.

The courts had shown several problems in the presentation of evidence by children required to testify in court. Perhaps the most obviously discriminatory rules were those which required corroboration of the evidence of a victim of child sexual abuse. Like many discriminatory laws, the old rules about child witnesses in abuse cases were based on the purported 'scientific' findings of a bygone age (Bala, 1991). These finding were in reality more reflective of social prejudices than of objective

scientific inquiry. The rules were premised on the mistaken belief that allegations of sexual abuse were inherently likely to be fabricated. Perpetrators of these acts, invariably men, were considered less likely to lie than those who made the allegations, usually women and children (Bala, 1991).

In 1940, John Wigmore, the highly influential American authority on evidence, expressed views which are typical of those which shaped the law in this area:

> Modern psychiatrists have amply studied the behavior of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offences by men (at p. 736).

Of course, Wigmore's assertions are erroneous. In a careful analysis of his work in this area, Leigh Bienen (1983) concluded that the "scientific" sources cited by Wigmore were most dubious, even in 1940. More recent empirical research clearly establishes that Wigmore was wrong (Wells, 1990). While the type of view expressed by Wigmore about the unreliability of victims of alleged incidents of child sexual assaults is wrong, it has nevertheless been highly influential.

Until quite recently, Canadian legislation set strict legal requirements for corroboration of the testimony of victims of sexual offences. The Crown was required to show independent evidence confirming that the crime was committed and that it was the accused who had committed it. In the absence of evidence satisfying the strict legal requirement for "corroboration", an acquittal was required, even if the trier of fact was satisfied beyond a reasonable doubt of the accused's guilt (Bala, 1991). A similar rule required that the evidence of a child who gave unsworn testimony, because of an inability to understand the "nature of an oath", also needed to be corroborated.

.Under the old law, corroboration of child's unsworn testimony by other material evidence was required, and as this evidence often was not available, it was pointless to proceed to trial. Also, before the amendments the *Canada Evidence Act* specified that if a child was to give sworn evidence, he or she had to understand the nature of an oath. If the trial judge was not satisfied that the child understood the nature of an oath, a further inquiry had to be made to determine whether the child had sufficient intelligence to understand the duty of speaking the truth. If the child gave unsworn evidence, that evidence had to be corroborated for there to be a conviction, even though the judge or jury was satisfied beyond a reasonable doubt that the accused had committed the offence (Gilberti, 1994). If there was no corroboration, it was essential to have the child 'sworn', otherwise, as a matter of law, there could be no conviction.

Even in cases where a child under 14 years of age testified under oath, the judge first had to warn the jury about the possible unreliability of the child's evidence. In fact, very few cases where the victim was under the age of 12 ever got to court (Gilberti, 1994). For those cases in which the child testified, the trier of fact assumed the testimony suffered from certain frailties that would render the trier of fact reluctant to make a legal determination in the absence of corroborating evidence.

In many instances before 1988, the fact that the child did not complain to someone immediately after the event was used by the defence as evidence that the offence may not have occurred at all. In addition, the law required that certain sexual offences had to be prosecuted within one year. Because of the time delays between the event, the disclosure and the trial, children often found it hard to remember the details of the incident. Many professionals argued that children might refuse to testify, or would testify without giving full disclosure, because of acute discomfort in the presence of the accused.

Before 1988, young victims of unwanted sexual acts encountered a number of difficulties with the criminal justice system. One problem was the fact that girls and boys were given different protection under the law (Gilberti, 1994). For example, in many offences, the victim had to be female and the offender male, and much of the legal wording - such as buggery, or seduction of a female - did not reflect current usage. The old law prohibited only vaginal sexual intercourse and did not encompass the range of sexual activities that normally constitute child sexual abuse, such as fondling, masturbation, and oral intercourse. In addition, unless the accused had touched the child, he or she could not be charged with sexual assault. For example, if the child touched the offender by performing fellatio, the accused was not considered to have assaulted the child. Similarly, if the offender asked the child to perform a sexual act, this did not constitute an offence. Sexual exploitation by someone in a position of trust or authority, such as a teacher or a caregiver, was also not an offence before 1988.

During a period of over a century following Confederation in 1867, there was no major revision of the legal framework of the criminal law dealing with sexual offences. Since the beginning of the 1980s, however, significant legislative amendments and proposals were brought forward in response to a growing public concern about the need to provide better protection against sexual offences. These will be discussed in the following section.

Child Sexual Assaults
Social Policy Response

Impetus for the reforms enshrined in Bill C-15 can be traced back to the 1970s (Gilberti, 1994). In the early part of that decade, two standing committees of Parliament (the House of Commons Committee on Health, Welfare and Social Affairs

and the Senate Committee on Health, Welfare and Science) reported on the lack of appropriate measures for prevention, identification, and treatment of child abuse and neglect. Both committees made numerous recommendations which included proposals for developing prevention strategies, establishing a database to provide for ongoing collection of statistics on the incidence of child abuse (including child sexual abuse), collecting up-to-date information on available programs, amending the *Criminal Code* and the *Canada Evidence Act,* and promoting public and professional education on these issues.

In addition to the legislative changes embodied in Bill C-15, the government established the position of special advisor on child sexual abuse to the Minister of Health and Welfare Canada (now Health Canada). It also provided for the development of public and professional awareness and education programs and the allocation of $25 million over a five-year period to be spent on social, legal and educational activities that would assist victims of child sexual abuse (Gilberti, 1994). The Advisory Council on the Status of Women called for amendments to sections in the *Criminal Code* on sexual offences against women. In 1983, major changes governing sexual assault were made both to the *Criminal Code* and the *Canada Evidence Act.* Also in the 1980s, the Canadian Commission for the International Year of the Child was established to identify and support activities designed to advance the rights and well-being of children. The Law Reform Commission of Canada called for reform of the sections of the *Criminal Code* on sexual offences. Following the tabling of the Commission's report, the federal government established the Child Abuse Information Program at Health and Welfare Canada (now Health Canada), which was later incorporated into the mandate of the National Clearinghouse on Family Violence.

In the early 1970s, research had tended to focus on the broader areas of child abuse and neglect. Toward the end of the decade, however, the legislative committees and lobby groups shifted their attention to child sexual abuse and the need for radical changes to the *Criminal Code*. In 1981, the federal government established a committee under the chairmanship of Dr. Robin Badgley to review the problem. Dr. Badgley was asked to inquire into the extent of child sexual abuse, juvenile prostitution, and child pornography. Specifically, the committee's mandate was to determine the adequacy of the laws and other means used by the community to protect children against sexual offences and to make recommendations for improving such protection. The committee reported in August 1984. Its 52 recommendations ranged in scope from the promotion of health and social awareness and public education to the need for changes in the *Criminal Code* on sexual offences and principles of evidence (Badgley, 1984).

Resistance to the idea of child sexual abuse permeated public attitudes until the mid-twentieth century, until child protection agencies began to find themselves dealing with an ever-increasing number of child sexual abuse cases as the agencies became increasingly more involved in the welfare of children (Hallett, 1991). As with physical assaults against children, child protection proceedings are often initiated to deal with the problem. The social policy response has been to use child welfare provisions to apprehend the child from the home and place him or her in a safe, supportive environment where appropriate therapeutic services are available. There are currently attempts being made to have the offender removed from the home and to provide more support to the mother and the child following disclosure.

However, by definition, sexual abuse is an offence (Bala, 1991). Contravention of the sexual offence provisions in the Criminal Code are seen as being against the public interest, and as contravening the minimum standards of morality. The

stringent laws regarding the reporting of child sexual assaults have removed some of the discretion from child protection workers in dealing with these cases and have reinforced the notion that child sexual abuse is clearly a crime.

The next section will examine the criminal justice response to child sexual assaults.

Child Sexual Assaults
Criminal Justice Response

The traditional response of the Canadian criminal justice system to child sexual abuse has contributed to the "double victimization" of children. Because of their social, psychological, economic and intellectual position, children are the most frequent victims of unwanted sexual acts. Our legal and social systems failed our children, initially by allowing them to become victims (Bala, 1992). And when cases of sexual abuse have been dealt with by the legal system, children have too often been the victims of "secondary trauma", produced by their mistreatment in that system (London Family Court Clinic, 1991). Children have been victims of a discriminatory justice system which developed rules premised on the notion that children are inherently unreliable witnesses whose testimony must be specially scrutinized. The legal system also discriminated against children by failing to recognize their unique characteristics and their need for distinctive treatment.

In the past few years there has been a dramatic change in attitudes and awareness concerning child sexual abuse. Encouraged by growing professional sensitivity and by the feminist movement, adult survivors of childhood sexual abuse have come forward to document the social patterns of denial. Growing public awareness of the problem produced demands for legal reform, most notably resulting in the enactment of Bill C-15, which came into force in Canada on 1 January 1988 and

significantly altered the law governing criminal prosecutions for child sexual abuse. These legislative changes were intended to facilitate the giving of evidence by children and to reduce the trauma of testifying. There have also recently been a number of Supreme Court of Canada decisions which have demonstrated considerable sensitivity to the problem of child sexual abuse, and which are indicative of new judicial attitudes (Bala, 1991). The changes in the law have resulted in more successful prosecutions, which have in turn weakened the social attitude of denial.

The children's rights focus began its slow evolution into law with the 1959 *United Nations Declaration of the Rights of the Child* and gained momentum with the 1979 International Year of the Child. At this time as well, the second wave of feminism and "consciousness raising" sessions within the women's movement led to pressure for further empirical research. Increased media attention to the sensationalistic aspect of child sexual abuse also served to keep it in the public's consciousness. Women's groups began to look to the court system for justice in cases of child sexual assault, as they were doing with physical and sexual assaults against adult women. Since the beginning of the 1980s several significant legislative amendments and proposals were brought forward in response to a growing public concern about the need to provide better protection against sexual offences.

It was in the context of these important legal reforms that the Committee on Sexual Offences Against Children and Youth (the Badgely Committee) was appointed. Their mandate was to deal directly with how a comprehensive and rational legal and social framework could be provided in order to afford needed assistance and protection for the young victims of child sexual abuse. The Committee published its findings in 1984, the year following the proclamation of Bill C-127, which made fundamental amendments to Canada's rape and indecent assault laws. The report confirmed what

child protection personnel were becoming aware of, that child sexual abuse is problem of major proportions, having significant implications for Canada's children. The Committee's recommendations included a strong emphasis on the need to invoke criminal sanctions for offenders, both for deterrence and for rehabilitation purposes (Badgely, 1984). The Committee defined child sexual abuse as a criminal behavior, not a simple, non-victimizing mental health problem. The study highlighted the extent of the problem in the general population and debunked many of the current misconceptions about child sexual assault.

The Badgely Report documented the limited ability of pre-1988 federal law to protect children from sexual abuse (Badgely, 1984). *Criminal Code* definitions of sexual offences against children were inadequate to deal with the sexual abuse of children. In addition, laws on the rules of evidence and the rules of procedure required that a child's testimony be corroborated by other testimony or evidence. These rules usually prevented younger children from testifying. As a result, the criminal justice system was ineffective in dealing with child sexual abuse and children were clearly not being provided with the same protection that adults had acquired at law.

The federal response to the criminalization movement was expressed in child-centered reforms to the *Criminal Code* and the Canada Evidence Act. The federal government was also an instigator of the movement. Although there were concerns expressed that the Badgely Committee's recommendations "went too far", the Committee had nonetheless managed to encourage interest in criminal controls and increased grass-roots concerns for child victims of sexual assaults (McGillivray, 1990). This concern was manifested in increased prosecution rates in the mid-1980s. The two in turn propelled legislative reform. Bill C-15, an effect of criminalization rather than the

cause, came into force on January 1, 1988. Gilberti (1994) defined the goal of the legislation as the following:

> The purpose of the legislation was to increase the protection of children from sexual abuse while still ensuring that the fundamental rights of the accused were upheld. The goals were to provide better protection to child sexual abuse victims and witnesses, to increase the successful prosecution of child sexual abuse cases, to improve the experience of child victims and witnesses, and to bring sentencing in line with the severity of the offence (at p.3).

Bill C-15 replaced some of the existing child sexual offences with gender-neutral offences. These offences were not dependent upon proof of penile penetration: sexual interference, invitation to sexual touching, and sexual exploitation (McGillivray, 1990). Provisions for control of juvenile prostitution were revised and statutory limitation periods abolished. Some offences, such as incest (which also applies to adults) were retained. There are now 16 sexual offences in the *Criminal Code* that could apply to child sexual abuse.

Sexual activity without consent is always a crime regardless of the age or relationship of the individuals. The definitions of the crimes in the new law reinforce the fact that children need to be protected. Individuals who sexually abuse children are not able to avoid criminal responsibility by claiming that a child "consented" to the abuse. It is not a defence to these crimes for the accused to say that he or she believed the young person was older. The person accused of the crime has to prove that all "reasonable steps" to ascertain the child's age were taken. Young persons aged 14 or more but under 18 are protected from sexual exploitation, and their consent is not valid if the person touching them for a sexual purpose is in a position of trust or authority over them or if they are in a relationship of dependency to that person.

The rules of evidence have also been changed to make it easier for children's evidence of sexual abuse to be heard in court. In prosecutions of child sexual abuse, corroboration of a child victim's testimony is no longer required to convict an accused. As in the 1983 changes to the *Criminal Code* concerning adult sexual assault cases, the former rule on "recent complaint" has been removed from all child sexual abuse cases. This rule required the court to be skeptical of a sexual abuse victim who did not complain to someone immediately after the offence occurred. The Bill allowed for children to give evidence without having to meet the stringent restrictions of oath-taking. Children may now testify even if the court finds that they are not able to understand the nature of an oath or solemn affirmation. To testify, however, they must be able to "communicate the evidence" and promise to tell the truth. Child victims may testify from behind a screen or other device within the courtroom or in an out-of-courtroom setting via closed-circuit television. This is permitted when the judge is of the opinion that these measures are necessary and where there is evidence that testifying in front of the accused would prevent the child victim from giving a full and candid account of the sexual offence.

Attrition in cases of sexual assault, particularly child sexual assault, remains a serious problem. Linden and Gunn (1994) studied 384 cases of child sexual abuse reported to the police in Winnipeg, Manitoba in 1984 and 1985. They found that, of the 384 reports to police, a total of 170 were terminated prior to any formal charges being laid, 87 reports were declared unfounded by the police; of the 71 founded cases, charges were not laid in 50 cases, while in 21 cases the suspect was not arrested. The remaining 12 were terminated at the request of the victim or the victim's parent/guardian. Charges were laid in 214 cases; 44 of these involved juveniles and 170 proceeded to the adult system. The Crown stayed 43 of the 170 cases, retaining 127

which proceeded to court. Of the 127, 66 pleaded guilty before trial and 19 pleaded guilty at trial. Fifteen accused were acquitted, four cases were stayed, and 23 were convicted. The filtering out of reports at the police/Crown/court levels accounted for the termination of 71 percent of the cases (Gunn and Linden, 1994).

When they were interviewed, the police reported that the investigating officer decided to charge in consultation with the Crown. According to the police, the most important considerations in charging decisions are physical evidence and the credibility of the complainant. When asked about specific factors, the police indicated that among the most important evidentiary factors were the presence of witnesses and other corroborating evidence, the age of the complainant (young children are seen as making less credible victims), and the ability of the child to testify under oath (Gunn and Linden, 1994). Factors seen as important by some of the respondents included the time delay between offence and reporting, type of abuse, and presence of injuries.

The Crown attorneys who were interviewed all felt that prosecuting cases of child sexual abuse is very difficult. In making the decision whether or not to proceed with a prosecution of a case of child sexual abuse, the two Crown attorneys specializing in these types of cases believed that they exercised their discretion not to proceed more frequently in child sexual abuse compared with other crimes against the person. None of the Crown attorneys felt the criteria used to determine whether to proceed with a case had changed over time, but they noted that because more cases now come to light due to increased public awareness, there had been an increase in the number of prosecutions (Gunn and Linden, 1994). The Crown attorneys all regarded recency of complaint as extremely important. Corroboration is a legal requirement when the child gives unsworn testimony, but they felt it was important in other cases as well. They also

saw physical force and evidence of injury as extremely important. A final factor they felt was important in the decision to prosecute was the previous record of the accused.

In cases of child sexual assault, there are often only two people who actually witnessed the act: the perpetrator and the child victim. Although other witnesses may testify during the criminal trial, it is often the child witness that stands between the accused and his freedom. This means the child is vulnerable to the defence counsel's attempts to discredit the child, either through cross-examination or by calling other witnesses (Harvey, 1991). While the Crown attorney and judge have a role in protecting the child from improper questioning, it must be appreciated that a central focus of a criminal trial in our society is the protection of the legal rights of the accused, and the defence has considerable scope in how it conducts the case.

Children are presumed incompetent as witnesses, and their evidence is considered fraught with frailties (Harvey, 1991). When children take the stand, unlike an adult, they must undergo an inquiry to satisfy the judge that they are competent. In the event that they are permitted to testify under oath, despite Parliament's attempts to legislate away corroboration requirements, some judges still sometimes warn the jury on the frailties of children's evidence (Bala, 1991). The system is designed to guarantee the accused's rights, and not to provide children safety and comfort in the courtroom. Only recently have large-scale attempts been made to enhance the accessibility of children to the criminal courts (Gilberti, 1994). Also, historically, the criminal law has pronounced a bias against children as credible witnesses. Therefore, not only must the prosecution prove the case beyond a reasonable doubt, but within a context where children are presumed to be carriers of falsehood (Harvey, 1991). On the witness stand, once the child has narrated the allegation, the cross-examination by defence, although in theory designed to elicit truth from adults, often serves as a technique to confuse and

intimidate the young child. She may be shown gifts and cards which she gave to the accused in the past, asked about her personal diary or sexual contact she has had with other children or be accused of lying, often using long convoluted questions, at times specifically designed to confuse. As Dr. J. Yuille (1989) describes:

> 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. The adversarial system creates as many problems as it solves in the area of child sexual abuse (at p. 190).

The accused and his interests are represented in court, but the child witness has no true representation (Harvey, 1991). Practically speaking, in most instances it appears the Crown attorney is representing the child and her interests, because the prosecution is better served if the child is well prepared and protected. However, there may be circumstances where the duty of the Crown attorney as an officer of the court overrides any practical benefit to the child. The Crown attorney is, for example, obliged to disclose to the lawyer for the accused prior to the trial the evidence which the prosecution will be putting before the court; the Crown must also disclose the evidence the police have discovered that supports acquittal. The accused has no comparable duty of disclosure (Griffiths and Verdun-Jones, 1994). Thus, even if the Crown attorney is sensitive and experienced in handling child sexual abuse cases, there will be times when it seems that the child is not directly represented in the court, whereas the accused may have an aggressive lawyer, consistently advocating to protect his interests.

Attempts to help the sexually abused child and reduce the incidence of child sexual abuse sometimes results in significant and unintended negative consequences (London Family Court Clinic, 1991). Sometimes laying charges and going to court results in the child being thrown into a system which is extremely slow-moving, requires

frequent recall of the abuse, leads to stigmatization through public exposure, and exacerbates feelings of self-blame, guilt and fear during cross-examination.

On the positive side, however, it can also empower children, reversing their feelings of helplessness, and providing public affirmation that the child was not responsible for what happened, and that the abuse was wrong and unacceptable to society. The London Family Court study (1991) noted that for some child witnesses it was even a cathartic experience which signaled the beginning of their emotional recovery. The problem, as the researchers (London Family Court Clinic, 1991) see it, is that upon entering the courtroom it was hard to predict with any certainty how the events will play themselves out because there are too many factors that cannot be controlled.

The Child Witness Project of the London Family Court Clinic accepted 144 consenting child witness referrals into the evaluation study. In all of these cases charges had been laid by police under Bill C-15 on behalf of children who were either victims of or witnesses to sexual abuse. The study sample consisted of 114 girls and 30 boys. The ages of the children referred ranged from 5 to 17, with the majority of the children falling between the ages of 10 and 15. The study found that for children ages 2 to 8 who made allegations of abuse which were investigated by the London Police Department, on average less than 20% of their complaints resulted in charges being laid. However, for children ages 9-17 the average number of occurrences resulting in charges being laid was over 40% and for children age 12 it peaked at 65%. A comparison of pre-Bill C-15 and post Bill C-15 did not show any significant difference in charge laying responses related to victim's age (London Family Court Clinic, 1991). The same relationship is maintained. The child's and parents' wishes, child's age, and fears of testifying were areas which appeared most often to influence the police officer's decision not to lay a charge.

The delays and length of time in the system were very difficult for the vulnerable children, especially the younger ones who tired out and often gave up the fight. A research study by Runyan et al (1988) has concluded that awaiting criminal court proceedings can cause child victims to continue to feel depressed, and Tedesco and Schnell (1987) found that children who testified were still upset two and a half years later. Although court involvement does not necessarily cause more emotional disturbance in all child victims, it does appear to prevent children from healing (London Family Court Clinic, 1991). Workers with the London Family Court Clinic summarized their findings:

> Going to court resulted in the child being thrown into a system which was extremely slow moving, required frequent recall of abuse, led to stigmatization through public exposure and exacerbated feelings of self-blame, guilt and fear during cross-examination (at p.115).

The reforms adopted by Bill C-15 provided the potential for improving the criminal justice response to child sexual assault but it is clear that further changes are required. The difficulties encountered by child witnesses establish a need for changes to the system of dealing with child abuse. Child abuse is underreported, and of those cases which are reported to the police, even fewer ever reach the courts. Once a case does come to trial, the child witness is often put through a grueling process of examination and cross-examination which often results in damage to the child's self-esteem as described above. The difficulties involved in bringing a case to trial, and the serious problems child witnesses face both in the process of testifying and as a result of testifying emphasize the need for a just outcome for every child abuse case which reaches the courts. To ensure that the efforts of child witnesses are not in vain, it is important to study the outcome of cases in the superior courts, such as the Court of Appeal. The next section will examine the legal and historical context of physical assaults of domestic partners.

Adult Physical Assaults
Legal and Historical Context

The abuse of women has been with us for a long time. In ancient Egypt, men were expected to bash their wives' teeth out with a brick if they spoke out against them, and the medieval church sanctioned flogging of disobedient wives (Metzger, 1978). Historical accounts of battering (Martin, 1976; Lesse, 1979) inform us not only that wife abuse has long been endorsed as well as tolerated, but also that this legacy is very much with us today despite the dismantling of formal sanctions by 1850. As one historian (Metzger, 1978) concludes:

> (m)en today batter their wives for the same reasons that men have battered women throughout history: because they have believed it their right, their privilege, and their duty to do so (at p.3).

In approaching reform in the area of spousal assault it is important to be aware of the history of the law surrounding wife-battering. In particular is important to recognize that the law in Canada at one time viewed assault by a husband on his wife to be acceptable or at least none of the law's business (Alberta Law Reform Institute, 1995). The historical willingness of the law to tolerate a husband's violent behavior toward his wife stemmed from the view that the husband, as the head of the household, had the right to control his wife. It also, in part, stemmed from the idea that a man's home was his private domain and the state had no business interfering between a man and his wife behind closed doors. The attitude of tolerance is now repudiated by the law. However, this historical context remains of significance in examining reform in the area of domestic abuse.

Canadian judicial precedent in the 18th century denied women basic protection against ruthless mistreatment (Davidson, 1978). Case after case revealed women brutalized by vicious husbands. They were strangled, beaten with the handles of

brooms, scalded with boiling water, threatened with loaded revolvers, kicked, bloodied, bruised, blackened and blistered. Judge after judge would profess themselves mortified at having to hear testimony about the violence husbands were perpetrating upon their wives. It was not the cruelty itself that bothered them so much, but that 'transactions of this sort' should be 'screened from public gaze' (Backhouse, 1991). Where they were forced to confront such cases, the judges searched scrupulously for particulars that would justify a husband's violent response. Many probed for evidence about the battered wife's behavior or character, speculating that her shortcomings might 'excuse considerable severity' on the part of her husband. Ruling that it was all a question of degree, they meticulously weighed the amount and nature of the violence.

The judges justified their ruling with tributes to the importance of marriage. But the marriage they were upholding was a very rigid, overbearing, patriarchal one (Backhouse, 1991). The roots of this patriarchal concept lay buried under the elaborate legal rules that had developed around marriage. The English common law, transported to all Canadian jurisdictions except Quebec, had developed a 'doctrine of marital unity'. This meant that the very existence of the wife was legally absorbed by her husband. "By marriage, the husband and wife are one person in law" wrote eighteenth century English jurist Sir William Blackstone, and he left no doubt that the "one person" was the husband. The most significant consequence of this was its impact upon property. But property rules were only one part of the package of common law. Due to the doctrine of marital unity, husbands and wives were barred from suing each other. Violent husbands who injured their wives deliberately or through negligence were completely immune from any lawsuits seeking compensation. The theory was that since the couple was really one person, the law could not permit the husband to sue himself. Furthermore, any damages the wife might have won would immediately have reverted to the husband as

property he was entitled to through the marriage. Also, since a husband and wife were legally one person, the crime of rape between them was taken to be theoretically impossible, no matter how often it may have occurred in real life. When doubts were expressed whether this was the proper legal perspective, the Canadian Parliament rushed through an unequivocal immunity in 1892 (Backhouse, 1991). In return for virtually uncontested dominance inside marriage, husbands were legally liable for their wives' debts, torts, and contracts. The legal rules that transferred women's property to their husbands upon marriage had spawned reasoning that began to treat women themselves as property. Wife battering was the logical, inevitable consequence.

Because a husband's right to beat his wife was deeply entrenched in European law, legal reform of wife battering was a slow process, even in North America. Early American settlers held traditional European attitudes toward women and maintained that a husband had a right to whip his wife (Martin, 1976). In 1824, Mississippi law restricted moderate chastisement to cases of emergency. In the latter half of that century, the issue of wife beating was embraced by the early American and English suffragettes. As a result of public outcry, England eventually passed a matrimonial law that afforded protection to wives maltreated by their husbands; and in 1874, the Supreme Court of North Carolina over-ruled previous laws concerning wife beating by saying that the husband no longer had the right to chastise his wife under any circumstances. Legal reforms in other parts of the world came more slowly: France, in 1924, made wife beating illegal, as did Ireland and Scotland in 1970, and Brazil and Italy in 1975 (Csapo, 1990). In many countries however there still existed numerous legal, political, economic, ideological and religious supports for a husband's authority over his wife which included the approval of his use of physical force against her.

Although a man's traditional right to beat his wife has ceased to be legal, the practice of wife-battering has not disappeared. Before the resurgence of the women's movement in the 1960's, society was largely oblivious to domestic violence against women. The Journal of Marriage and Family for example, did not include one single article on family violence between 1939 and 1960 (Csapo, 1990). And up until the last decade, battered women, more often than not, could not depend on police officers to lay assault charges when called to the scene of a "domestic dispute." (Jaffe, Hastings, Reitzel, Austin; 1993). Despite the fact that in most jurisdictions assault against a spouse is not legally differentiated from other types of assault, police have in the past been reluctant to press charges in cases of conjugal violence

M. Field and H. Field's studies (cited in R.E. Dobash and R. Dobash, 1979) revealed that in Washington, D.C. in 1967, assaults involving strangers resulted in charges 75% of the time, whereas assaults against family members resulted in charges in only 16% of cases. Studies in Boston and Chicago revealed similar patterns (R. E. Dobash and R. Dobash, 1979). In Canada, women fared no better. Charges for wife assault in the 1970s were rarely laid except in the most extreme instances involving weapons or life-threatening injuries. In London, Ontario in 1979 police laid charges in only 3% of wife assault calls despite the fact that wives needed medical assistance in 20% of cases (Jaffe & Burris, 1981). At the time, police officers held many erroneous beliefs regarding victims and the criminal justice system that negatively influenced their decisions regarding charges. Concerns were expressed by police officers that it was difficult to ascertain reasonable and probable grounds that an assault had taken place. In addition, officers tended to believe that victims would not cooperate with the court, leading to most charges being withdrawn or dismissed. Finally, police doubted that laying charges would affect violent behavior in the home (Jaffe & Burris, 1981).

Traditionally, police considered that their primary role in domestic disputes was to restore order, that is, once the officers were able to separate and calm the partners, they believed that their job was done.

Police inaction has also been promoted by departmental practices in some areas (Jaffe et al, 1993). Telephone screening has been widely used by urban police departments to establish priorities for police dispatch. Starting in the mid-1960s, Detroit police dispatchers were instructed to screen out family disturbance calls unless there were indicators of "excessive" violence. Many female callers were put on hold, discouraged, or refused help. Calls given low priority were responded to more slowly, or even completely ignored (R. E. Dobash & R. Dobash, 1979). In the mid-1970s, police training guides often portrayed battered women as nagging or domineering, and instructed police that removal of an intoxicated and abusive husband therefore would be unreasonable (Jaffe et al, 1993). This created impediments for even the most sympathetic officers to respond appropriately to victims.

In the United States, in 1976, two lawsuits (Scott v. Hart and Bruno v. Codd) charged entire police departments in Oakland, California and New York City with failing to protect battered women. Both cases resulted in police departments agreeing to treat battering as a crime, to arrest in felony cases, to provide assistance to battered women when requested, and not to consider marital status in arrest decisions (Schecter, 1982). This provided impetus for 'zero-tolerance' policies, which will be discussed in the section on criminal justice response. The social policy response to domestic violence will be reviewed in the following section.

Adult Physical Assaults
Social Policy Response

Women's groups were the first to place wife battering on the agenda for social justice. During the 1970s, community-based women's groups across Canada established volunteer support services for women (Schecter, 1982). As it soon became apparent that these types of facilities were inadequate to deal with an unanticipated flood of requests for refuge from violent male partners, a number of shelters came into operation.

The first national study of wife battering in Canada was conducted by Linda McLeod on behalf of the Advisory Council on the Status of Women (CACSW) in 1980. One accomplishment of this study was to document the extent of wife abuse and challenge official processes which contributed to its public invisibility. At this time, women who approached various professionals received very little assistance. The unstated practice of police was nonarrest. Women had to lay a formal complaint at the police station at least a day after the incident. While this inaction reflected legal and general social attitudes about the privacy of the family, individual officers often exhibited sexist attitudes towards women in these situations.

The 1980 report advocated a number of plans of immediate action for the protection of battered wives and their children. While critical of a strictly punitive approach, MacLeod acknowledged that if violence in the home was to become unacceptable to Canadians, reform of the law and criminal proceedings was needed. The reforms recommended emphasized the symbolic dimension of law as a deterrent and the rights of wives to legal protection and input into determination of the most appropriate course of action. The Canadian Advisory Council on the Status of Women report, Wife Battering in Canada: The Vicious Circle (1980) was perhaps the most

publicly accessible feminist statement on wife battery. During the same period, the federal Parliament established an all-party committee that invited briefs and testimonies addressing the question of domestic violence and shelter. Many of the recommendations of the CACSW were endorsed by or were similar to those of other advocacy groups. Within the climate reflected by the CACSW report, feminist campaigns against domestic violence increasingly advocated the creation of new criminal offences, the facilitation of arrests, charges, and convictions for crimes against women, and more severe punishment of convicted offenders.

Medical practice and social work developed procedures aimed at improved detection of cases of spousal abuse and their referral to appropriate support services, including treatment programs for abusive men. Increased funding was made available to combat the problem of wife assault. Shelters and transition houses increased in number. Professionals became more involved in wife-abuse services, and recognition of the effects on children who witnessed domestic violence increased, resulting in special programs and interventions for this group as well.

Adult Physical Assaults
Criminal Justice Response

In the early 1980s, Parliament undertook a review of the Criminal Code provisions related to assault, and in 1983 three offences of assault and three parallel offences of sexual assault came into effect.

Assaults are categorized according to the degree of injury or harm done. Simple assault, commonly known as 'Level I assault', is punishable by a maximum prison term of five years. A threatened assault, or an actual assault that did not result in serious physical injury, would both be categorized as a Level I assault. Level II assault involves the presence of a weapon or bodily harm to the victim such as broken bones,

cuts, or bruises, and is punishable by up to ten years in prison. Level III, or aggravated assault, results in wounding, maiming, or endangering the victim's life, and can result in a maximum prison term of 14 years.

A continent-wide move toward laying criminal charges against men accused of assaulting their spouses began during the early 1980s (Johnson, 1996). This movement was spurred on in the United States by the U.S. Attorney General's Task Force on Family Violence, which recommended that family violence be treated as a crime; by several lawsuits brought against police departments for failing to protect battered women who called for help; and in part by the Minneapolis Domestic Violence Experiment published in 1984 (Sherman and Berk). This was the first randomized controlled experiment of the effectiveness of arrest in domestic violence cases. Results showed that dispensing advice or removing the suspect doubled the woman's risk of further violence over a six-month follow-up, compared with arresting the suspect. On the basis of these findings, mandatory arrest was quickly adopted by police departments across the United States.

In Canada, mandatory charging policies were implemented by police departments across the country in the early 1980s (Johnson, 1996). At the same time, sexual assault laws were changed to permit men to be charged with sexually assaulting their wives, and the Canada Evidence Act was revised to allow women to testify against their husbands (Jaffe, Hastings, Reitzel and Austin, 1993). Mandatory charging policies reinforce police authority to lay charges against a suspect where there is reasonable and probable grounds to believe that an assault has occurred regardless of whether there are witnesses to the crime. Prior to mandatory charging policies, women could be required to bring charges against their husbands independently, which could antagonize an abuser into further violence (Johnson, 1996). Women were often too intimidated to

state their preference for arrest while the abusive spouse was present, and so charges often were not laid unless injuries seemed serious to the police or someone else witnessed the assault. The presence of the police and the laying of criminal charges provide immediate (though often very short-term) protection from violence. The deterrent function of mandatory charging is both general and specific. The threat of arrest and public exposure is meant to send a message to all citizens that wife abuse is morally and legally wrong, and the arrest of individual violent men is expected to deter them from further assault on their wives (Button et al, 1992). The following paragraphs will focus on domestic violence initiatives in Manitoba.

There are five dates associated with five major initiatives that capture the history of reform in Manitoba (Ursel, 1997). The reforms began with a change in police policy in 1983 and ended with the new police protocol in 1993. In 1983 the Attorney-General of Manitoba issued a directive to police to charge in all cases in which there were reasonable and probable grounds that an offence had occured, regardless of the relationship between the victim and the accused. As a result the arrest rate increased and what were previously "private" crimes became publicly observable, increasing the visibility of this crime in Manitoba. Unfortunately the policy was unevenly applied and serious gaps remain in policing, prosecution, protection orders and their enforcement, granting bail and timely and appropriate intervention (McGillivray, 1996b). The 1991 Manitoba Pedlar Report identified many of these concerns. A common issue in province-wide consultations was that protection orders be more readily and quickly obtainable and consistently enforced (Pedlar, 1991). Despite efforts to create a more complete police computer databank (the Prohibition Information Database), problems remain. Some police forces (including band constables) do not have access to the

database. Without information backup, the order is "just a piece of paper" (McGillivray, 1996b at p. 81). And studies reveal it is not being enforced in practice.

In 1985 the Manitoba government created a new office to develop and fund wife abuse services. From 1985 to 1990 provincial expenditure on wife abuse services grew from .30 cents per capita to $4.00 per capita, rising to $7.00 per capita by 1996 (Ursel, 1997). The expenditures increased the number of provincially funded wife abuse services from 3 in 1985 to 23 in 1995. In 1990 The Family Violence Court, a specialized criminal court for handling all matters of family violence, was opened. Components of the specialized court include: a special unit of seven crown attorneys who exclusively prosecute family violence matters; two victim support programs, the Women's Advocacy Program and the Child Abuse Victim Witness Program and over 110 hours of court time per week to hear family violence cases. Between 1990 and 1994 there was a steady increase in the number of cases coming to court, from 1,800 the first year, to 2,660 in the second, 3,646 in the third and 4, 140 cases in the fourth year. A primary goal of the court was ending, in a timely way, the backlog of cases which resulted from the increased prosecution of family violence. Cases were at first disposed of within three months, on average but by 1994 it sometimes took up to 18 months.

A dramatic change in sentencing patterns occurred in the FVC. Prior to specialization the most frequent disposition in wife abuse cases was a conditional discharge (Ursel, 1993). In FVC the most frequent disposition is two years supervised probation with court mandated treatment, the second most frequent disposition is incarceration (Ursel, 1997). In 1992 a specialized family violence unit was created in provincial corrections to deliver batterers treatment groups, in response to the growing number of convicted offenders court mandated to treatment. As of 1995 Winnipeg corrections staff were providing treatment for 900 convicted offenders and supervising a

further 600 cases annually. In 1993 the Winnipeg Police Department introduced the "zero tolerance" protocol for charging in domestic violence cases. The policy states that:

> It is a police duty and responsibility to lay a charge when there are reasonable and probable grounds to believe that any offence involving domestic violence has occurred, whether or not the victim wants charges laid (emphasis in original). It is then the crown attorney's responsibility to proceed in a manner consistent with their legal and ethical obligations, and which ensures that the criminal justice system supports victims who are trying to end the violence in their lives. The potential deterrent effect of a successful prosecution must be balanced with the victim's right to be treated with sensitivity and respect. (Winnipeg Police Service, Zero Tolerance Partner Abuse Charging Directive; January 1994 at p. 7).

The "zero tolerance" protocol for charging in domestic violence cases removed discretion from the police level and transferred it to the special family violence Crown attorney's unit.

However some problems with zero tolerance policy remain. The NDP (New Democratic Party) Caucas Task Force Report on Violence Against Women found that enforcement of the provincial zero-tolerance policy was almost non-existent on reserves. In most cases, the victim rather than the abuser must leave the community, with or without her children. Victims from reserve communities in particular face community disapproval or even banishment.

When responding to domestic violence complaints, police officers sometimes find situations where both parties allege they have been assaulted. On the basis that zero tolerance policy requires police to lay a charge whenever there are reasonable grounds to believe that domestic violence has occurred, they have tended to charge both parties with an offence. This has created several problems (Schulman, 1997). Fear that they may be charged with an offence has made women reluctant to call the police when they have been victims of domestic violence. There is a stay rate of

approximately ninety percent in "counter charge" cases, which means that some abusers are not being punished for their violence. This problem has persisted in spite of the fact that in May, 1994, the Manitoba Attorney-General introduced a *Counter-Accusation Charging Directive* to reduce the incidence of unfounded charges against women (McGillivray, 199b). Police computer access to the variety of protection and no-contact orders made by civil and criminal courts at different levels and in a variety of legal proceedings was improved. These measures have not resolved the many problems with system response.

As reforms at the police level led to mounting arrest rates, the volume of family violence cases entering the courts provoked a crisis. The combination of higher numbers, close press scrutiny, and public skepticism about the wisdom of judicial decisions created a momentum for court reform. This confluence of events was not unique to Manitoba. However, Manitoba's response, the Family Violence Court, remains unique in Canada (Ursel, 1995). The development of the court was an attempt to ensure that family violence cases were prosecuted as rigorously as other cases of interpersonal violence, but it also signaled a recognition that violent incidents involving family members were unlike other violent incidents. The victim is often highly bonded to and dependent on the assailant, resulting in a particularly vulnerable and often ambivalent witness. The specialized court was premised on the understanding that a just intervention must take these factors into consideration.

However, the dual and somewhat contradictory mandate of rigorous prosecution has created some difficulties. The specialized Crown attorney's unit has introduced some strategies to deal with them, including the idea of testimony bargaining. Testimony bargaining focuses on Crown negotiation with the witness. Testimony bargaining, involves an agreement not to 'volunteer' information detrimental to the

accused or to mention a circumstance of the offence that may be interpreted by the judge as an aggravating factor (Ursel, 1995). For example, in a common assault case in which the accused was alleged to have slapped the victim and pushed her against the wall, the Crown could agree to read in the slap and omit the shove. Typically, if she agrees the Crown notifies defence that the witness is willing to testify and most often the case is resolved through a guilty plea. This strategy is often used with women who want the violence to stop but do not want to see their partner incarcerated. Testimony bargaining gives the victim/witness a voice in the outcome of criminal proceedings and indicates that the crown not only represents the interest of the state but also the interest of the victim. Testimony bargaining occurs frequently in FVC and is absent from the other courts (Ursel, 1994). The very existence of testimony bargaining contributes to the higher proportion of summary convictions, and creates a bias in favor of probation and court-mandated treatment and against incarceration. Some critics of the criminal justice system or the specialized court would see these differences as evidence that a double standard of justice is being applied to family violence cases and that the separate court does result in a lesser degree of justice (Ursel, 1994). McGillivray (1998) points out that fact-bargaining is unethical as suppressing information about the facts of a case prevents the court from making an informed decision, presents justice from being done and being seen to be done, and defeats the purpose of the system. McGillivray (1998) states:

> If facts are compromised, true judicial independence is compromised and so is the reputation of the administration of justice (at p.370).

Aggravating factors may be 'lost' through fact-bargaining, resulting in sentences which are not commiserate with the seriousness of the offence. In addition to testimony

bargaining, plea bargaining also occurs frequently in Family Violence Court, creating many similar problems.

Any change in legal sanctions is likely to be affected by the ability of prosecutors and defence attorneys to "negotiate" charges and possible sentences in return for guilty pleas (Cousineau, 1988). As McGillivray (1998) states::

> The importance of plea bargaining to the administration of justice is such that it cannot fundamentally be challenged. Where it results in the suppression or eradication of relevant and potentially determinative information, then the deeply inadequate sentencing which may result brings the administration of justice into disrepute (at p. 367).

There is no formal policy on plea negotiation in Family Violence Court or in any other court, even though it is practiced extensively. Canadian studies suggest that plea negotiation occurs in 60 per cent to 70 percent of the cases which go through criminal court (Griffiths and Verdun-Jones, 1994)). The practice of plea negotiation is perhaps more prevalent in Family Violence Court (Prairie Research Associates, 1994). The Manitoba Spouse Abuse Tracking Project tracked every case that was reported to the Winnipeg, Brandon and Thompson police departments for six months - from June 1st to November 30th, 1991. These cases were followed through charges laid, prosecution, court disposition, and probation. The study found that plea negotiation took place in just less than half of the cases for which information was available. In 63 percent of the cases, the type of offence was the most important factor in negotiating a plea (that is, the reduction in the number and/or the severity of the charges. In fewer cases (nine percent) the length or type of sentence the accused would receive in exchange for a guilty plea was a factor in plea negotiations. The Crown negotiated both type of offence and sentence to obtain a plea of guilty in 28 percent of the cases. In many of these cases all charges were stayed, either in exchange for a guilty plea on charges from

another incident, or in exchange for entering into a peace bond with the victim. Further discussion and resolution of the issues surrounding the use of testimony and plea bargaining in Family Violence Court is required. As McGillivray (1998) notes:

> A plea bargain may digest, obscure, or misrepresent the facts. The ethics of plea bargaining are of central concern to achieving fair dispositions upon all relevant information, including acts suggestive of community endangerment. This is acute when the issue is community endangerment or future safety of victims (at p.370).

The 'dangerousness' of an offender is established by his or her criminal record. Reducing the severity of the charge and/or the length of the sentence by testimony or plea bargaining has a negative impact on public safety.

The single major influence on plea bargaining, however, is prosecutorial discretion (Griffiths and Verdun-Jones, 1994). The influence of the prosecutor is also evident in their ability to make sentence recommendations. While the judiciary has emphasized that the final decision regarding sentence lies with the individual judge and that judges are not bound in any way by agreements made between Crown and defence, sentence recommendations by the Crown concerning both type and length of sentence have generally been welcomed. In light of the major role played by prosecutors in the bargaining and sentencing process, one can easily imagine that differences in the nature and extent of plea bargaining either within or between jurisdictions could be dependent on the different approaches or beliefs of individual Crown attorneys. Guidelines need to be put in place regarding the plea and testimony bargaining process in Family Violence Court.

Criminal justice systems can adapt to reform effectively nullifying its intent (Cousineau, 1988). This concern has been expressed with respect to the zero tolerance

policy in force in Manitoba. Mr. Justice Schulman (1997), conducting an inquiry into the deaths of Roy and Rhonda Lavoie, stated that:

> If charges against offenders are routinely stayed or bargained away, the impact of zero tolerance is diminished or lost. Even when an offender is facing multiple charges with respect to the same incident, Crown Attorneys should only stay charges or plea bargain when there is very little likelihood that charges can be successfully prosecuted (at p. 50)

The report suggests that a memorandum, outlining the specific reasons for a stay of charges or a plea bargain, be submitted in order to increase the accountability of Crown Attorneys and investigating police officers. However, it is unclear whether this would be sufficient to address the serious concerns raised by the practises of testimony and plea bargaining in Family Violence Court.

McGillivray and Comaskey (1996b) conducted a study of 26 women who had experienced family violence and were receiving service from a social service agency. McGillivray and Comaskey noted that respondents supported zero tolerance policies and wanted these strengthened and improved, as these policies shift the responsibility for pressing charges to police and prosecutors and women could not be blamed, by themselves or by abusers, for pressing charges. Uniform application of zero-tolerance principles, routine use of restraining orders (and response to breaches), greater police presence and involvement in taking women (and their children) to a place of safety, and longer sentences were recommended by the women. For the majority of respondents, jail is the desired disposition because it offered safety and punishment. McGillivray and Comaskey (1996b) noted that this conflicted with the results of other studies. The authors found that:

> Women in this study stressed the need for punishment. Jail is seen as public punishment, as justice and retribution, a message to the abuser about the public evaluation of his

> conduct and a private lesson. Jail also provided these respondents with a needed period of absolute safety (at p. 85).

Yet jail without treatment to prevent future violence is not helpful, according to the majority of respondents, who want both stiffer sentences and abuser treatment. The authors postulated that the difference between their study and other studies may lie in the recency of the experience of these women. Almost all had recently left abusive relationships and were not interested in going back.

As part of the Manitoba Spouse Abuse Tracking Project (Prairie Research Associates, 1994), 201 women who had been victims of spouse abuse were interviewed. This study emphasized the problems with attrition in physical assaults against adult domestic partners. Attrition occurred at the police level and particularly at the court level. Lack of input by victims led to dissatisfaction with the court process and outcome. In total, 191 (95 percent) of the respondents had contact with the police. Eighty-two percent said they had been assaulted by the same offender prior to the incident being discussed. Sixty percent of the women reported being physically injured during the incident. Of these, less than half sustained what they described as "minor" bruising. Other women suffered injuries which included black eyes, hair loss, cuts that required stitches, burns, broken bones and noses, sexual assaults and concussions. Almost one-half received medical treatment for their injuries. Charges were laid in 175 (92 percent) of the 191 incidents which involved police. The largest proportion of charges was for assaults (59%). Aggravated Assault and Assault with a Weapon accounted for three percent each, Attempted Murder and Abduction accounted for one percent each and Sexual Assault and Unlawful Confinement accounted for two percent each.

Over one-quarter of the women (forty-three women) reported that they were told they could/should drop the charges. All but three of these women eventually asked for the charges to be dropped. Pressure to drop the charges was reported to come from the accused, or other members of his family in 36 cases. Three women felt coerced by defence lawyers. Three women believed that the police told them they could drop the charges and one attributed it to the Crown attorney. Twenty-one percent of the abusers went to jail.

About one-half of the women who provided final court disposition information did not think the court decision was fair. Thirteen respondents felt the offender should have, but did not receive a jail sentence. Where jail sentences were imposed, eight women thought the sentence was too short, and one woman believed the offence did not warrant imprisonment. Nine women thought mandatory counseling should have been, but was not included in the sentence. Five women did not agree with the plea bargaining that occurred. The remaining respondents who commented on the unfairness (eighteen women) disagreed with the court disposition for a variety of reasons. Generally, these respondents felt that the disposition would have had more impact on the offender if they had been consulted.

The research question in the 1990s, as postulated by Jaffe et al (1993) will not be whether zero tolerance policy works, but rather how it can work effectively as part of an integrated community response that includes training for judges and prosecutors, support services for victims from the point of police intervention until court dispositions, and resources for wife assaulters and child witnesses to violence. Further research also needs to focus attention on many victim groups (e.g. Aboriginal women, immigrant women) who live with violence without considering the police as a source of real support

in ending the violence. The next section will describe the legal and historical context of sexual assaults against adults.

Sexual Assaults

Legal and Historical Context

A complete understanding of the present law of sexual assault cannot be achieved without at least a beginning knowledge of its historical context. It is to state the obvious that the people who have created sexual assault laws (until this latest reform) have almost exclusively been male, and it is important to explore the significance of this fact. It would seem reasonable to suppose that, in carrying out any rule-making function, a rule-maker would try to imagine himself as one of those affected by a possible rule in order to reach some opinion of the fairness and efficacy of the rule. But since the ability to put ourselves in someone else's shoes is limited by our imagination, education, sex, class, age and many other factors, all of our law is deeply influenced by this limitation (Boyle, 1984). There is no doubt that law-makers, both legislators and judges, were haunted by the specter of the innocent accused, the victim of a false charge. It was feared that innocent, perfectly respectable men (that is, like them), could suddenly be caught up in the criminal justice system. This was not a fear that was prevalent with respect to other crimes, and special rules had to be developed to protect the falsely-accused person in this context alone. Until very recently, Canadian law displayed an uncritical acceptance of the idea that a rape complainant was inherently suspect.

In 1841, the first session of the first provincial Parliament of Canada consolidated the existing provincial statutes relating to offences against the person. Although rape was not defined, it was enacted that "every person convicted of the crime of rape, shall suffer death as a felon" (cited in Boyle, 1984). The next significant date was 1869, which saw consolidation in the form of the Offences Against the Person Act,

modeled upon, but certainly not slavishly following, the equivalent English Act of 1861. The Act left the rape provisions virtually unchanged, and, unlike England, retained the death penalty for rape (as well as for statutory rape of a girl under the age of ten). The political significance of the retention of the death penalty is not at all clear. At first glance it would appear that it was a harsh measure designed to protect the interests of husband victims but it can just as easily be viewed as a deterrent to convictions. The death penalty for rape was not to disappear until 1954.

In 1890, legislation was passed extending whatever protection the law offered to women who submitted because of fraud, in the form of personation of the victim's husband (An Act to Further Amend the Criminal Law, S.C. 1890, c. 37, s. 14, cited in Boyle, 1984). This provision seems to emphasize the interests of the husband victim, since otherwise personation of any lover would surely have been included.

In 1892 Canada's first Criminal Code provided a much more well-defined crime of rape (Boyle, 1984). It was not significantly different from the familiar version that was later repealed to make way for the three-tiered crime of sexual assault. In 1921 the punishment for rape was altered by including the sanction of whipping along with the other options of death or imprisonment for life. Whipping was an option until as recently as 1972 (Boyle, 1984) when it was dropped from the Code. Otherwise there were only minor changes, which resulted in the modern but now repealed form of rape which states that a male person commits rape when he has sexual intercourse with a person who is not his wife without her consent, or with consent if the consent is extorted or fraudulently obtained. The history of the offence of rape was therefore one of a very gradually broadening substantive offence, accompanied by the *possibility* of extremely severe penalties. It might appear on a superficial level, that the law displayed a determination to punish offenders. Judge-made law and enforcement practices,

however, ensured a concentration on the need to protect men from false accusations and narrowed the scope of protection to certain women who had not infringed judicial and societal norms about what was appropriate behavior and life-style.

Three judicial doctrines, which put sexual offences in a class by themselves with respect to the law of evidence, should be mentioned. One was the recent complaint rule. The general rule was that a victim's complaint that the crime had occurred was inadmissible, but in a prosecution for rape (as well as other sexual offences) evidence of a complaint was admissible to support the credibility of the victim (Polk, 1985). This sounds innocuous, but the reason for the general rule was that there was no reason to doubt the evidence of the witness, so such evidence would therefore be superfluous. To judges charged with developing the law of evidence with respect to rape complaints, there was every reason to doubt the word of the witness, and thus evidence of immediate complaint was required to rebut the strong presumption of fabrication. Its obvious effect was to make more difficult convictions for the relevant offences. The rule has now been abrogated, although the practical implications of this are unclear.

A similar doctrine was that which permitted questioning of a complainant about her past sexual history. Until 1976, the judges who developed and applied the common law assumed that an unchaste woman was more likely to lie (Boyle, 1984). Thus a complainant could be cross-examined as to her sexual conduct in the past in order to attack her credibility. The judge had some discretion to protect her from degrading questioning, but it became notorious that the effect of this doctrine was to subject the rape complainant to severe embarrassment, thus discouraging reporting.

The third principle that was developed in common law as well as incorporated in statutes, was the insistence that a jury be warned of the dangers of convicting on the uncorroborated evidence of the complainant. This blossomed into a rule of practice in

the early twentieth century, although a requirement of corroboration (as opposed to a warning) had already been introduced in statute form with respect certain offences such as seduction. The rule of practice was codified in 1955 but was repealed twenty years later. It was the view of some judges that this merely resurrected the common-law rule of practice. The balance of authority is against this view, although the judge retains a discretion to warn in appropriate cases (Boyle, 1984). Parliament has now forbidden reference to corroboration in sexual assault cases. It is clear that all three of these rules were expressly designed to provide the accused with special protection from false accusation.

The sudden pressure from the Department of Justice to reform the law on rape after years of inaction may be explained by factors other than a belated but genuine recognition of the demands of the women's lobby (Los, 1994). The enactment, in 1982, of the Canadian Charter of Rights and Freedoms (as part of the Constitution Act) was bound to lead to constitutional challenges to those parts of the law that were likely to fail the equal rights test. In particular, section 15 of the Charter granted right to equality without discrimination on the basis of sex, and section 28 determined that "notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons". The Criminal Code had to be carefully screened and all signs of sex discrimination corrected before the three-year moratorium on section 15 expired. The Criminal Code's sections on sexual aggression were an obvious area of concern, with their clearly discriminatory vocabulary and unusual procedures. Furthermore, the existence of an organized women's movement made challenges under the new Charter virtually inevitable. The new sophistication and strength of the movement were demonstrated convincingly in the lobbying effort to ensure the passage of section 28 of the Charter (Hosek, 1983; Keet, 1985). It may be

argued that the amendments finally enacted consisted of the necessary minimum required to make the law on sexual aggression compatible with the Charter rather than being a sincere attempt to address the concerns of women (Los, 1994). The underlying motive for the proposed reform was explained in the Standing Senate Committee by the legal counsel to the Department of Justice (Senate of Canada 1982, vol. 2):

> The bill attempts to reconcile the law on sexual offences with the rest of the criminal law and to bring it back into keeping or into the same stream with the rest of the criminal law (at p. 19).

The elimination of sex discrimination was one of the two basic principles of Bill C-53 in so far as it dealt with sexual aggression against adults, the other being the protection of the integrity of the person (House of Commons Debates 1981, 11). Accordingly, as explained by then Justice Minister Chretien:

> An effort has been made throughout the bill to degenderize the Criminal Code provisions relating to sexual offences in keeping with the equality rights guaranteed by the Charter of Rights (House of Commons Debates 1982, 20039, at p.300).

Therefore, by including female offenders and male homosexual rape, the definition of sexual violation had to be changed and could no longer be limited to the traditional understanding of sexual intercourse. Since a whole range of sexual activities had to be covered, the term 'rape' was no longer appropriate, and 'sexual assault' - suggested by both women's groups and the Law Reform Commission - appeared to be a good substitute. It allowed for a mult-tiered offence to account for different degrees of severity (Los, 1994). Furthermore, with rape classified as a type of assault, inquires into the complainant's sexual conduct with people other than the accused became harder to justify. They were, therefore, further restricted in response to the pressure from the women's lobby and persistent efforts by the NDP Justice Critic, Svend Robinson (Los, 1994). As well, under the Charter, it was clearly no longer feasible to discriminate

against married women. The peculiar usage of the term 'consent' had to be corrected simply because at common law you do not have consent if it is not predicated upon a voluntary act. Similarly, the rules of evidence had to be made consistent with those for comparable offences. The 'recent complaint' requirement and the special rules of corroboration could no longer be sustained. The legal inconsistency of the latter rules were highlighted in the Senate of Canada. The Senate recognized that in the past the idea had developed that in certain circumstances a rule should be applied that there had to be evidence tending to support the evidence of the witness. Unfortunately, classified or lumped together under that heading were children, people of limited capacity, and complainants in sexual cases, which usually meant women. Likewise, the 'recent complaint' doctrine was described as an anomaly, because such a doctrine is not required for any other type of criminal offence. Los (1994) notes that no one recorded in the hundreds of pages of the minutes of the parliamentary debates on the amendments made an attempt to address the question of why it was that women happened to be 'lumped together' with children and the developmentally disabled, and why all these blatantly discriminatory rules were applied to them in a country proud of its egalitarian traditions. Los also recognized that no one asked what kind of damage was done to women as a group as a result of the bias in the law, quite explicit in its design to enforce the gender hierarchy. The next section will address the social policy response to sexual assaults of adults.

Sexual Assaults
Social Policy Response

Legal reform tends not to precede public opinion but to be an expression of it. That is, legal reform generally comes about as a result of wide-spread dissatisfaction with existing legal codes, intensive lobbying on the part of interest groups, and lengthy

public debate (Johnson, 1996). Clark and Hepworth (1994) cite a number of historical factors that coincided with or preceded the change in the law on sexual assault and that must be taken into account when evaluating the impact of legal reform. These factors include the changing social, economic and political status of women, increased media scrutiny on the treatment of women in the courts, and heightened awareness of and focus on victims of crime, particularly female victims, accompanied by new government initiatives and services. As well, specialized investigation units were developed in police departments across the country and resulted in an increase in expertise regarding the investigation of complaints, the gathering of evidence, and the treatment of victims. This was supported by the expansion of sexual assault centers and the growth of specialized treatment teams in hospitals to deal sensitively with victims of sexual assault. Most of these developments were brought about by intensive lobbying on the part of women's groups which long preceded passage of the rape reform legislation.

In view of these important social changes, it would be a mistake to attribute the dramatic and steady increase in the reporting of assaults and sexual assaults entirely to the success of law reform (Johnson, 1996). Significant social changes, of which legal reform was but one, have brought about growing efforts to eradicate the biases that have confronted complaints of sexual assault and domestic assault in the justice system and to provide better treatment and services for victims.

Adult Sexual Assaults
Criminal Justice Response

The legislative changes of 1983 which created three levels of physical assault also abolished the offences of rape, attempted rape, sexual intercourse with the feeble-minded, and indecent assault on males and females. They were replaced with three levels of a new offence of sexual assault that parallel the assault provisions. However,

the new law did nothing to restrict the degree of discretion open to police officers (Johnson, 1996). Sexual assault is undefined by the *Criminal Code*, except that the general definition of assault also applies to all forms of sexual assault. This left a great deal of uncertainty among police and discretion as to what differentiated an assault from a sexual assault and how these events would be classified in official statistics.

Section 271 of the *Criminal Code* simply sets out the penalty for Level I sexual assaults as follows:

> (1) Every one who commits a sexual assault is guilty of
> (a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or
> (b) an offence punishable on summary conviction by 18 months imprisonment and/or a fine of $2,000.

Section 272 describes Level II sexual assaults as follows:

> Every one who, in committing a sexual assault,
> (a) carries, uses or threatens to use a weapon or an imitation thereof,
> (b) threatens to cause bodily harm to a person other than the complainant,
> (c) causes bodily harm to the complainant, or
> (d) is a party to the offence with any other person,
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding 14 years.

In defining Level III sexual assaults, Section 273 of the *Criminal Code* states:

> (1) Everyone commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant.
>
> (2) Everyone who commits an aggravated sexual assault is guilty of an indictable offence and liable to imprisonment for life.

It was not until 1987 that the Supreme Court provided guidelines as to what constitutes a sexual assault. The Court ruled that the test for the sexual nature of an assault does not depend solely on contact with specific areas of the body, but on circumstances of a sexual nature such that the sexual integrity of the victim is violated (Johnson, 1996). The Court established certain factors that are relevant in considering

whether the conduct is sexual, including the part of the body touched, the nature of the contact, the situation in which the conduct occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats.

All too often it is assumed that crimes reported to and recorded by the police represent the totality of victimization. This is obviously not the case, particularly with respect to family violence and sexual assault. Although it is difficult to ascertain the unreported rates of sexual aggression, the best estimates of reporting rates come from victimization surveys (Roberts and Grossman, 1994). In Canada, a victimization survey was conducted by the federal Ministry of the Solicitor General in 1982 (known as the Canadian Urban Victimization Survey, hereafter CUVS; Solicitor General 1985). Members of the public in several Canadian cities were asked about a series of offences, including rape and indecent assault. The reporting rate for rape and indecent assault that emerged (38 percent) was higher than estimates in the United States, but it still meant that the majority of incidents were not reported to the criminal justice system. The CUVS data described rape and indecent assault, and are accordingly out of date now. The most recent data on the reporting of sexual assaults comes from the Violence Against Women Survey. The findings of that survey suggest that the reporting rate of sexual assault is lower than the reporting rate of rape and indecent assault. Only 6 percent of sexual assaults recorded in that survey had been reported to the police (Statistics Canada 1993). This is considerably lower than the CUVS estimates, and significantly lower than the reporting rate of non-sexual assaults (28 percent). The data clearly indicate that sexual assault incidents reported to police represent a very small fraction of all incidents committed.

Even before the reform, women victims of 'real rapes' were treated by the justice system with some restraint, and the question of consent or desire to be raped were usually deemed inappropriate in cases of brutal attacks by strangers against 'respectable' women. It was in 'other' rapes that women complainants were submitted to much harsher treatment and persistently branded as liars (Los, 1994). By promoting reporting and thus encouraging a greater number of such cases to enter the criminal justice system, the reform has perhaps increased rather than decreased the overall victim exposure to humiliating police and court tactics, the new rules on evidence and procedure notwithstanding. While the police statistics show a dramatic increase in sexual assault reports in the years following the overhaul of the rape law, they also show that the percentage of reports treated as unfounded has remained constant and considerably higher than for other crimes against the person, 15 per cent compared with seven per cent (Roberts, 1990). Translated into real numbers, this means that many more complainants now face suspicion, rejection and the stigma of being branded false accusers. While the increased reporting rates indicate sexual assault victims' greater faith in the fairness of the criminal justice system, this does not necessarily benefit individual victims.

Roberts and Gebotys (1993) conducted an evaluation of Bill C-127 and the treatment of sexual assault cases by the criminal justice system. The data-base drawn upon was the Uniform Crime Reporting System (UCR). The UCR is based upon occurrence reports submitted by federal, provincial and municipal police forces across the country. The analyses included all reports of crimes of sexual aggression made between January 1, 1979 and December 31, 1988.

They noted that the next step in the criminal justice process after the classification of reports is the founding decision. Once an incident is reported to the

police, a preliminary investigation is conducted, and as a result a percentage of all reports are classified as "unfounded". According to the Uniform Crime Reporting Manual (Canadian Center for Justice Statistics, 1988), unfounded means that *according to the investigating officer(s),* a crime did not take place or was not attempted. Considerable criticism (Gunn and Minch, 1988), has been directed at this process: in the past, the unfounded rate for crimes of sexual aggression such as rape was higher than for other personal injury offences. In 1982, the last year under the old legislation, the unfounded rate was 30% for rape. This is considerably higher than the rate for the general category of crimes of violence, which was only 6% (Canadian Center for Justice Statistics, 1983). Accordingly, one of the explicit aims of the reform legislation was to decrease the percentage of reports declared by the police to be "unfounded". The data showed that there has been no change in the unfounded rate for crimes of sexual aggression over the period encompassing the 1983 reform legislation. Combining the offences of rape, attempt rape and indecent assault generates an average unfounded rate of 15% over the three years immediately preceding passage of the reform legislation. The average unfounded rate for the three offences of sexual assault for the post-reform period was also 15%. Thus there is no evidence that the reform legislation decreased the percentage of reports declared to be unfounded. In 1982, the last year in which rape and indecent assault existed, the overall cleared by charge rate for these offences was 38% (Canadian Center for Justice Statistics, 1983). Within five years of the passage of the legislation, the cleared by charge rate had risen to 48%. However, this increase cannot be attributed to the reform legislation as there has been an corresponding increase in the clearance rates for the non-sexual assault offences, as well as for the more general category of crimes of violence (Roberts and Gebotys, 1993).

In attempting to determine whether the legal reforms of sexual assault increased reporting rates, Roberts and Grossman (1994) examined police statistics on the reporting of crimes of sexual aggression in Canada, for a 12 year period, beginning in 1977 and ending in 1988. The study noted that there was an overall increase in reports of sexual aggression: in 1983 there was a total of 13,851 reports made; this figure rose to 29,111 in 1988, an increase of 110%. This is more than double the increase of reports of non-sexual assault (Roberts, 1990). Second, the increase in the number of reports (any level) made since 1983 is confined to the first level of seriousness (sexual assault I) which showed an increase of 126%. By comparison, over the same period, reports classified at the second level rose a modest 13%, while reports classified as aggravated sexual assault actually *declined* by 39%. Third, the percentage of all reports accounted by for the first (and least serious) level rose from 88% in 1983 to 96% in 1989 (Roberts and Gebotys, 1993). The researchers note that the decline in reports of aggravated sexual assault also suggests that there has been a significant transformation in the classification procedures used by police forces across the country. Some reports that would have been classified as aggravated sexual assault in the first years after the reforms were introduced are now being classified as level II or perhaps even level I. And since the initial classification is likely to be highly predictive of the eventual charge laid, as well as any subsequent conviction, this shift in police practices has consequences for the entire criminal justice process (Roberts and Gebotys, 1993). This disturbing trend appears to be continuing. In 1990, fully 96 percent of reports of sexual assault were classified by the police as being at the first level of seriousness. Three percent were classified at the second level (sexual assault with a weapon or causing bodily harm); only one percent were classified as aggravated sexual assault. By comparison, the breakdown of cases within the three categories of assault is rather

different. In 1988, 80 percent of all non-sexual assaults were at the first level of seriousness (Roberts and Grossman, 1994). The distribution of all cases taken from the trial stage would be even more unbalanced, for a proportion of the charges at levels II and III will result, through plea bargaining, in convictions at the first level of sexual assault. For example, data from a study on sexual assault in Toronto (Nutall, 1989) found that two-thirds of aggravated sexual assault charges resulted in convictions for the less serious crime of sexual assault with a weapon. Cascading continued at the second level too: an additional 22 percent of charges at the second level of sexual assault resulted in convictions for sexual assault I.

In discussing the relationship between statistics for sexual and non-sexual assault, it is important to realize that, while they are discrete *Criminal Code* sections, in practice there may be a degree of impermeability. Incidents classified as reports of sexual assault may eventually result in convictions for simple assault. Once again the Toronto study cited earlier is informative. Of all charges of sexual assault I or II, fully one-quarter resulted in convictions for non-sexual assault (Nuttall, 1989). The most frequent cause is a decision by the Crown to accept a guilty plea to an assault charge in return for dropping a charge of sexual assault. Such agreements carry benefits for almost all parties except the victim and the public. The state benefits by saving the cost of a trial and obtaining the assurance of a conviction. The defendant gains by obtaining a conviction that carries less stigma and the likelihood of a more lenient sentence (the maximum penalty for assault is five years rather than ten for sexual assault).

Roberts and Gebotys(1993) note that that the rape reform legislation introduced in Canada was successful in achieving one of the goals that inspired it. Ironically, its success has been in attracting more victims into the system, rather than in changing the way the system responds to complaints of criminal sexual aggression.

The reforms have had no significant effect upon the decision as to whether a particular case is founded, and as to whether a charge is laid in the case. The researchers note that the failure of the 1983 legislation to achieve significant changes in the processing of cases by the police indicates that further research into police classification practices is imperative. Since the police are gate-keepers to the criminal justice system, their behavior has consequences for all subsequent stages of the process. Roberts and Gebotys (1993) conclude that Canada's reform legislation, while it has attracted a large number of victims to report victimizations, has failed to change the processing of those reports by the police.

The next chapter will address issues related to sentencing.

4. SENTENCING

Introduction

In order to assess sentencing decisions it is necessary to consider why offenders are sentenced. It quickly becomes evident that there are many conflicting theories regarding the rationale for sentencing, which leads to disparity in sentencing. There are many models of analysis for sentencing disparity and several of these will also be examined in this literature review chapter. This chapter will provide a framework for understanding sentencing disparity and the issues involved in analyzing this disparity.

Sentencing Rationale

Attempts are being made to establish sentencing guidelines which will align sentencing from courtroom to courtroom and bring order into the general disposition of cases. The Canadian Sentencing Commission (1987) stressed the need for principled determination of sentence and sought to articulate a sentencing rational combining retributivism or 'just desserts', 'social utility' and victim compensation through compensatory sanctions, reconciliation programs and the victim impact statement. Protection of the public through a decrease in harmful behavior is the overall but 'limited' goal of the criminal justice system. The purpose of sentencing, according to the Canadian Sentencing Commission (1987, at p.7) is "to preserve the authority of and promote respect for the law through the imposition of just sanctions." The most important consideration is the proportionality of the sentence to the gravity of the offence and the offender's responsibility. But respect for the law is not preserved if sentencing strays too far from the public's perception of gravity and responsibility. In Canadian criminal practice, the perception of the gravity of the offence by the public and non-judicial professionals properly influences disposition (McGillvray, 1988). The often

conflicting goals of sentencing contribute to sentencing disparity. This problem will be reviewed in the following two sections.

Sentencing Disparity - The Problem

The problem of sentencing disparity has been identified as a one of the major issues that should be addressed in any proposal for reform of the Canadian criminal justice system. This concern has been given new impetus by the *Charter,* which might be interpreted in such a manner as to render excessive sentencing disparity unconstitutional (Jobson and Ferguson, 1987). Canada is a geographically immense country, with significant differences between the various provinces, territories and regions. Since the *Criminal Code* generally leaves an enormous degree of discretion in the hands of the courts, it is, therefore, scarcely surprising that there is a considerable degree of sentencing disparity across the country. The maximum penalties in the *Criminal Code* provide little real guidance to the courts since they are set at a level that is generally far too high except for the most serious cases (Canadian Sentencing Commission, 1987). Furthermore, the lack of guidance available to judges has been exacerbated by the complete absence of comprehensive court statistics gathered on a national and continuing basis (Canadian Sentencing Commission, 1987). As the Commission (1987) pointed out:

> In the present system, where there are no formal "standards" against which to judge a sentence, the lack of systematic sentencing information accessible to judges in their determination of sentences almost ensures that there will be unwarranted variation in sentences (p.61).

Both the Crown and the offender have the right to appeal against the sentence handed down by a trial judge but the system of appeal courts is not really suited to establishing uniformity of sentencing on a *national* basis. Although the Supreme Court of Canada has the power to hear appeals on all sentencing matters, its

policy is to deal only with sentencing matters raising questions of law (Canadian Sentencing Commission, 1987). Therefore, the ten provincial courts of appeal effectively serve as the final tribunal on sentencing matters: instead of one court attempting to achieve sentencing uniformity on a national basis, there are ten different courts attempting to achieve such uniformity on a purely provincial basis (Griffiths and Verdun-Jones, 1994). Furthermore, only a few of the appeal courts have given trial courts specific guidance as to the appropriate range of sentences that should be imposed in relation to different categories of offence. In other words, the appeal courts in most provinces have not shown a preference for the formulation of a sentencing "tariff" that gives concrete guidance as to what the "going rate" is for specific offences.

Given this background, it is almost inevitable that there should be evidence of sentencing disparity across Canada. There are significant variations in the manner in which different offence categories are assigned sentences in the various provinces (Hann *et al,* 1983; Hann and Kopelman, 1986). Furthermore, evidence shows that there are significant sentencing variations within the various provinces themselves. For example, Murray and Erickson (1983) found widespread disparity in the sentencing of offenders charged with the possession of cannabis in five locations in Ontario. Similarly, in his classic study of magistrates' courts in Ontario, Hogarth (1971) concluded that these courts varied "immensely" in terms of their sentencing practices and noted that:

> These differences appear to be too large to be explained solely in terms of differences in the types of cases appearing before courts in different areas"(at p. 12).

A wide disparity in the sentencing of similar cases offends the basic notions of fairness held by most Canadians (Nadin-Davis, 1982). This disparity has particularly serious consequences for crimes such as sexual assault. As noted by Mohr (1994), the consequences of a discretionary process that has virtually no legislative restrictions and

ten distinct judicially constructed approaches to the sentencing of sexual assault cases are particularly significant since criminal law in Canada is a matter of federal jurisdiction. Criminal law initiatives, like rape law reform, are meant to have uniform federal application. One clear finding from her study of reported sentencing appeals was that there is no uniform interpretation of this legislation. Mohr (1994) concluded that:

> Different judges in different courts across the country continue to use different yardsticks to measure the 'seriousness' of sexual assaults for the purpose of sentencing. Given the absence of clear direction, the different approaches of these different courts can all be 'justified' according to their different aims or purposes of sentencing (at p.181).

The 1983 legislative change did nothing to address the reality of a sentencing process that gives all the legally trained participants enormous scope in defining a sexual assault and no meaningful guidance as to the purpose of or approach to punishment. Law reform efforts fail to address the individual attitudes and perceptions that drive such decision-making. As her analysis of the cases illustrated, the impact of gender, race and class on judicial decision-making can no longer be ignored. Mohr (1994) notes that:

> The effectiveness or success of legislative reforms cannot be evaluated until there is an articulated and shared understanding of what 'success is...Currently, virtually any sentence that does not exceed the legislative maximum penalty can be justified according to the individual decision-maker's yardstick (at p. 182).

She stated that in order to develop a shared notion of success, the purpose of punishment must be determined, then a new basis of measurement must be constructed that seriously addresses questions of gender, race and class as they influence the understanding of sexual assault and the response to it. The next section will review various models of analysis for examining sentencing disparity and described similarities with the analysis undertaken for this thesis.

Sentencing Disparity - Models of Analysis

Researchers have used two major approaches to the issue of sentence disparity in Canada. The first approach focuses on the characteristics of the judges themselves and suggests that the roots of disparity may be found in the social and psychological factors that impact upon the judicial decision-makers. The second approach deals with the characteristics of the cases and the offenders, and supports the idea that these factors shape the outcome of the sentencing process.

The first approach is consistent with John Hogarth's classic work (1972) on sentencing in Canada. Hogarth's basic premise was that sentencing must be regarded as a "human process" and is "subject to all the frailties of the human mind". Hogarth studied the sentencing patterns of 71 Ontario magistrates. He examined their background characteristics, their philosophies regarding punishment, judicial attitudes and sociolegal constraints on sentencing. Hogarth found that judicial attitudes and judicial perceptions of the facts of the cases before them accounted for a considerable proportion of the disparity in sentencing. Indeed, Hogarth (1971) suggested that, while only about 9% of the variation in sentencing practice could be accounted for by "objectively defined facts", more than 50% of this variation could be explained by "knowing certain pieces of information about the judge himself". In characterizing sentencing as a very human process, Hogarth (1971) concluded that it is a:

> [d]ynamic process in which the facts of the case, the constraints arising out of the law and the social system, and other features of the external world are interpreted, assimilated, and made sense of in ways compatible with the attitudes of magistrates concerned (at p.10).

Palys and Divorski (1984) also concluded that judicial attitudes and perceptions are linked to disparity in sentencing. Unlike Hogarth, who examined actual cases, these researchers applied the "simulated cases" approach, which involves presenting a group

of judges with hypothetical cases and asking them to indicate what sentence they would impose (Palys and Divorski, 1984). It was found that there was a considerable degree of disparity among the sentences handed down by the judges. The researchers postulated that a major source of sentencing disparity could be found in the judges' differential subscription to sentencing goals and the emphasis that they placed on different case facts.

The second approach to sentencing disparity focuses upon the background characteristics of cases and offenders. Brantingham (1984) conducted a sophisticated statistical analysis of a large number of criminal cases decided in two Canadian courts during 1979 and 1980. Brantingham found that the overall pattern of sentencing was one of "more consistency than inconsistency" in judicial decision making. The most important factors affecting decisions, both as to the type of sentence to be imposed and the length of prison terms imposed, were sentencing factors (aggravating and mitigating), particularly the prior record of the defendant. While the study indicates that there was some disparity in sentencing, the general conclusion appears that, overall, judges applied legalistic criteria fairly consistently in arriving at their decisions. Nevertheless, the study did find that, even with the numerous variables that were taken into account in the study, some 35% of sentencing outcomes were unpredictable and that "some proportion of these cases" probably reflected inconsistent sentencing patterns from case to case even for the same judge. Sentencing disparity is the norm across all jurisdictions, and this is important to keep in mind when analyzing sentencing decisions.

The empirical approach which examines sentencing decisions (real or simulated) and uncovers "disparity" or judge-derived variance has been faulted by some critics. The route which Vining and Dean (1980) favor involves the examination of

appellate decisions to uncover the factors affecting sentencing. The researchers chose for their analysis appeals on sentence in British Columbia between January, 1974 and June, 1978. The cases analyzed included appeals both by the offender and by the Crown. The information for the cases was obtained from the actual Court of Appeal registry file used in court by the Court of Appeal justices; thus as much information about each case as possible was obtained. The objective was not to select a statistically accurate sample, but rather to construct, in a qualitative manner, a picture of the factors that appellate judges utilize in sentencing. This is also the goal of this analysis of Manitoba Court of Appeal decisions. Vining and Dean (1980) argue that extensive analysis of appellate sentencing decisions, in all provinces, will encourage the development of sentencing principles that are empirically grounded (that is, judges are actually utilizing such factors) and are normatively sound. Vining and Dean (1980, also state that:

> This is not to say that all will agree with the various appellate courts reasoning or weighting of factors. Rather we would argue that only by a full discussion can the appropriateness or unappropriateness (sic) of factors be decided (at p. 147).

It is hoped that this study of Manitoba Court of Appeal decisions will be followed by other similar studies which also focus on the appropriateness or inappropriateness of factors in appellate decisions.

Another researcher, Sharon Benzvy-Miller completed An Empirical Study of the Use of Mitigating and Aggravating Factors in Sentence Appeals in Alberta and Quebec from 1980 to 1985 (1988) for the Canadian Sentencing Commission. The author used a sample of cases extracted from a number of appellate court judgments from the two provinces. Once the samples were drawn she charted the frequency of mention of each factor for every case. The factors considered were grouped as offender

or offence-related under the headings mitigating and aggravating. The study developed two lists, one consisting of thirty-four factors mentioned by the Court of Appeal of Alberta, and one consisting of thirty factors mentioned by the Court of Appeal of Quebec. The purpose of the paper was to identify the variables that had become relevant in the sentencing process through an examination of the case law. Benzvy-Miller (1987) stated that:

> It is hoped that these variables might inform us of the unwritten guidelines courts follow in a common law system, thereby helping us to structure written ones. In order to understand the operation of mitigating and aggravating factors in sentencing decisions it is necessary to examine these as they appear in appellate court decisions (at p. i).

Certainly, frequency of mention is one indicator of which variables are being relied upon most often. The judiciary necessarily establishes guidelines, intentionally or inadvertently, by providing reasons for decisions which, in a common law system, will be added to the body of law of previous judgment. The precedential value of any particular decision varies, but if there are patterns in the way judges justify sentencing decisions, whether the factors mentioned are actually the most important influences in the process, or simply those most used for presentation to the public at large, it is important to determine if the reasoning or perceived reasoning coincides with public policy (Roberts, 1988). This is also the goal of this analysis of Manitoba Court of Appeal decisions.

Peter McCormick, in his study Caseload and Output of the Manitoba Court of Appeal: An Analysis of Twelve Months of Reported Cases (1990), developed a general statistical description of the Manitoba Court of Appeal in the late 1980s. He noted that the court handed down about 400 decisions a year, and that like other provincial courts of appeal, the Manitoba court does not have the Supreme Court's luxury of deciding what to decide, but must give all appellants their right to appeal, however casually

exercised. Application for leave to appeal to a provincial court of appeal is normally required only for appeals in a limited category of cases, such as the decision of some provincial tribunals, or appeals from conviction for a provincial offence, or Crown appeals from sentence. None are a large component of appeal court workload. As a result, many appeal decisions are routine, but even routine decisions consume court time and demand judicial attention. The study found that 406 decisions were handed down by the Manitoba Court of Appeal between January 1, 1987 and December 31, 1987; of these, 104 panel decisions (and nine chambers hearings on applications) were subsequently reported in one or more of the standard law reports. McCormick noted that reported cases are selected by the reporting services, because they are, by virtue of the legal issues raised or the arguments developed, more important and more useful to the profession than cases that are not reported. Also, the mere fact of reporting gives these cases special importance. Reported cases are more widely and conveniently available as raw material for lawyers, as a guide to trial judges, and as a contribution to legal interpretation for the benefit of appeal judges in other provinces. McCormick also found that the average reported decision of the Manitoba Court of Appeal is just over three pages long, and the median is just under three pages. One-fifth of all decisions are one page or less in length, and a further fifth are two pages or less. Only one Manitoba Court of Appeal decision in thirty is over 10 pages long, and none in his study exceeded 20 pages. The brevity of Manitoba Court of Appeal decision creates difficulties for researchers analyzing decisions of the appellate court.

Renate Mohr completed a study of 196 "pure" sentencing appeals involving adult offenders and child and adult victims for the study cited in the chapter entitled "Sexual Assault Sentencing: Leaving Justice to Individual Conscience" found in the book, Confronting Sexual Assault: A Decade of Legal and Social Change (Roberts and

Mohr, 1994). In attempting to discover what could be learned about the 1983 sexual assault legislation through an examination of Canadian sentencing judgments she concludes that sentencing decisions revealed a great deal about the different 'realities' of the law on sexual assault. As feminist scholars have long maintained, 'realities' are not gender-neutral, nor are they neutral regarding class, race, sexual identity, or physical or mental disability. The sentencing process itself is gendered, the act of exercising discretion is gendered, and clearly sexual assault is a gender-specific crime. No law reform effort is likely to achieve anything of any importance so long as there is so little shared understanding of the offence, of its impact, of the purpose of sentencing, and of the role of the law in achieving the ultimate goal of a society without sexual assault (Mohr, 1994). Mohr noted that there was great disparity in the length and detail of the information set out in sentencing judgments from one province to another. She noted that while Ontario and Nova Scotia court of appeal judgments provide adequate information on both the facts of the case and the factors that the court considered in mitigation or aggravation, judgments from Saskatchewan, Alberta and Manitoba Courts of Appeal were generally either very brief or extremely weak on the facts. Mohr (1994) found that:

> Manitoba Court of Appeal judgments, with some exceptions, are extremely terse, and in many cases the only information presented to shed light on the nature of the of the sexual assault is the charging section of the *Code* and the age of the victim (at p. 161).

The author pointed out that there is an obvious need for all courts of appeal to set out the facts of each case and the factors they considered in their evaluation of the sentence. Although sometimes the facts with which the trial level court is presented are incomplete, especially where the sentencing hearing follows a guilty plea, courts of

appeal must at a minimum set out all the facts that are available to them. Mohr (1994) notes,

> [j]udgments that attempt to spare the readers the "unpleasant and revolting details" offer little guidance to lower courts and make it difficult for anyone to assess the "fitness" of the Appeal Court decision (at p.162).

Mohr also found that in the vast majority of reported decisions in all of the courts of appeal there was a 'conspicuous silence' regarding the stated rationale for interference. Although the ten courts of appeal play the role of the Supreme Court of Canada in determining "fitness" of sentence, there is little legislative or common law guidance as to what this means. In most cases no reference was made to the concept of how "fitness" is determined, and in those few cases where the court does comment on its rationale for interference, it seems to be in circumstances where they are in fact justifying their non-interference. Mohr notes that these pronouncements are at best broad and fail to provide any context for an evaluation of how courts determine what a "fit" sentence for sexual assault is. In a few provinces there is an established "range of sentence" that is used as a yardstick, but this is by no means true for all provinces.

Mohr observed that for almost every Criminal Code offence, whether it be a robbery or a common assault, the sentencing judge considers at least three major factors in determining seriousness: the presence of a criminal record, the blameworthiness of the accused (whether there had been planning, premediation, etc.) and the harm caused by the offence. Her study revealed that sexual assault is an exception. Mohr (1994) noted that:

> In well over one-half of the entire sample of appeal court judgments, aside from a brief description of the facts of the offence, no mention was made of harm to the victim (at p. 171).

There was variation within the 10 appeal courts as some courts, specifically Ontario and Saskatchewan, mentioned victim-based factors more than other courts. Alberta, Manitoba and Newfoundland judgments rarely included any reference to the victim. Mohr (1994) noted that the value of guidance offered by court of appeal judgments is greatly diminished by the fact that only in a minority of cases are aggravating and/or mitigating circumstances clearly stated. In most reported cases the judges list a number of factors, and leave it to the reader to ascertain whether, for example, alcoholism or an employment record served as aggravating or mitigating factors or whether they were just defendant-based factors that the court cited as a matter of course. Many of these issues also arose in the present analysis of Manitoba Court of Appeal decisions. The next chapter will provide an overview of the methodology of content analysis which will be used in this study.

5. CONTENT ANALYSIS

Introduction

This literature review chapter will define content analysis. It will also give some explanation and examples regarding the requirements and designing of content analysis as a method of data analysis. This will provide the theoretical framework, while the following chapter, Methodology, will focus on the process of content analysis as it was carried out for this study.

Definition and Requirements

Content analysis refers to a method of transforming the symbolic content of a document, such as words or other images, from a qualitative, unsystematic form into a quantitative, systematic form (Holsti, 1969; Krippendorf, 1980). It is a form of coding performed on documents that are produced for purposes other than research and then made available for research purposes. Categories and coding schemes are developed in order to quantify content. Content analysis is a phase of information-processing in which communication content is transformed, through objective and systematic application of category rules, into data that can be summarized and compared (Paisley, 1964).

Content analysis is not just a frequency count. It always aims to compare the data it extracts against some norm, standard or theory, so as to draw its conclusions. As Carney (1972) writes,

> [c]ontent analysis is any technique for making inferences by objectively and systematically identifying specified characteristics of messages (at p. 3).

This definition acknowledges that the making of inferences is the major purpose of content analysis. Second, it does not limit data extraction to quantitative measurement. Third, it is prepared to attempt the assessment of what is "written between the lines"

(Krippendorf, 1980). Content analysis is a general-purpose analytical infrastructure, elaborated for a wide range of uses. It is intended for anyone who wishes to put questions to communications to get data that will enable him or her to reach certain conclusions. Some content analyses are more objective than others. All are more objective than an impressionistic assessment of the same question and materials. None are perfectly objective, though some approach this goal quite closely (Holsti, 1969). Content analysis is a research technique for making replicable and valid inferences from data to their context. As a research technique, content analysis involves specialized procedures for processing scientific data. Like all research techniques, its purpose is to provide knowledge, new insights, a representation of "facts" and a practical guide to action.

Despite their diversity, definitions of content analysis reveal broad agreement on the requirements of objectivity, system and generality. The two other requirements are that it must be quantitative and limited to the analysis of content. Objectivity stipulates that each step in the research process must be carried out on the basis of explicitly formulated rules and procedures. It implies that these and other decisions are guided by an explicit set of rules that minimize - although probably never quite eliminate - the possibility that the findings reflect the analyst's subjective predispositions rather than the content of the documents under analysis (Carney, 1979). The investigator who cannot communicate to others his procedures and criteria for selecting data, for determining what in the data is relevant and what is not, and for interpreting the findings will have failed to fulfill the requirement of objectivity. Systematic concerns mean that the inclusion and exclusion of content or categories is done according to consistently applied rules. Generality requires that the findings must have theoretical relevance. Purely descriptive information about content, unrelated to other attributes of documents

or to the characteristics of the sender or recipient of the message, is of little value. Data about communication content is meaningless until it is related to at least one other data. The link between these is represented by some form of theory. Thus all content analysis is concerned with comparison, the type of comparison being dictated by the investigator's theory.

The requirements of objectivity, system and generality are not unique to content analysis, being necessary conditions for all scientific inquiry. Thus, in general terms, content analysis is the application of scientific methods to documentary evidence. The quantitative requirement has often been cited as essential to content analysis, both by those who praise the technique as more scientific than other methods of documentary analysis and by those who are most critical of content analysis (Holsti, 1969). In any content analysis, it must be clear which data are analyzed, how they are defined, and from which population they are drawn (Krippendorf, 1980). The contexts relative to which data are analyzed must also be made explicit. While data are made available, their context is constructed by the content analysis to include all surrounding conditions, antecedent, coexisting, or consequent. The need for delineating the context of a content analysis is particularly important because there are no logical limits as to the kind of context an analyst might want to consider (Holsti, 1969). Any research effort must define the boundaries beyond which its analysis does not extend. In content analysis, disciplinary conventions and practical problems often dictate the choice of these boundaries.

In any content analysis, the kind of evidence needed to validate its results must be specified in advance or sufficiently clear so as to make validation conceivable. Although the underlying premise of content analysis is that direct evidence about the phenomena of interest is missing and must be inferred, at least the criteria for a

validation of results must be clear so as to allow others to gather suitable evidence and see whether the inferences were indeed accurate (Holsti, 1969). As is true for most research, content analyses are rarely 'finished'. Although a good content analysis will answer some questions, it is also expected to pose new ones, leading to revisions of the procedures for future applications, stimulating new research into the bases for drawing inferences, not to mention suggesting new hypotheses about the phenomena of interest.

Designing Content Analysis

Designing means realizing an idea and operationalizing a way of observing reality vicariously. Whereas all scientific research is motivated by the desire to know or to better understand a portion of the real world, a content analysis must show interest in two kinds of reality, the reality of the data and the reality of what the researcher wants to know about (Krippendorf, 1980). In content analysis these two realities do not overlap so the researcher will have to find ways of analyzing the data as symbolic manifestations or as indicative of the phenomena of interest.

Data for content analysis must be known to have something to do with what the researcher wants to infer. The connection between data and the target of the analyst's inferences may be very tenuous and in fact is rarely strong and obvious to begin with. Anything connected with the phenomena of interest qualifies as data for content analysis. Evidence about the empirical connection between data and what is to be inferred from them is obviously important in any content analysis. To justify any inferences from data, some hard knowledge, some empirical evidence about the connections between data and what is to be inferred from them, is essential. It is this knowledge that enables the researcher to place the data in a suitable context, to render them indicative of phenomena outside of themselves, and thus provides a logical bridge for making inferences.

Typical sources of contextual knowledge are: theories and models about the system under investigation, experiences with the context of data that the analyst may want to operationalize, past successes with content analyses of similar data in similar situations, and representative interpreters such as experts or informants of the symbolic qualities of the data (Krippendorf, 1980). In conducting content analysis, it is beneficial to search for an existing coding scheme that might be applicable to the research problem at hand. Not only does the use of an existing coding scheme result in considerable savings for the researcher in terms of time, energy and money but it also serves to make the research project comparable with other studies that have also used the same coding system.

Generally, there are four units of analysis: a word, a theme, a major character, or a sentence or paragraph. A paragraph or even a single sentence, however, often contains more than one idea, and this may make these larger units more difficult to classify while maintaining mutually exclusive categories. Yet the larger units are often more theoretically relevant in the human services (Krippendorf, 1980). Meaning in social interaction normally arises from a whole block of words or sentences. Therefore the primary consideration in selecting a unit of analysis is theoretical: which unit seems to be preferable given theoretical and conceptual considerations. Like other methods of collecting data, content analysis involves a decision about the level of measurement to be used. The level of measurement achieved depends on the variable being measured and on the process used to measure it. The key factor is how the unit of analysis is quantified in the coding process. Coding systems in content analysis generally fall into one of four categories: (1) presences or absences of an element, (2) frequency of occurrence of an element, (3) amount of space devoted to an element, and (4) intensity of expression (Carney, 1979). The content analysis procedure involves the

interaction of two processes: specification of the content characteristics to be measured, and application of the rules for identifying and recording the characteristics when they appear in the texts to be analyzed. The categories into which content is coded vary with the nature of data and the research purpose.

Many researchers seem to value their own categories of analyses, formulate and pretest new instructions to coders until they are sufficiently reliable, and then apply them to data that have never been analyzed before. Thus, large numbers of content analyses are undertaken whose results are neither comparable to each other nor cumulatively contributory to theory. The researcher who relies on existing conceptualization has more of a chance to contribute to knowledge. One obvious starting point is an examination of available literature about how data are related to their context. There are usually well-formulated theories, or at least hypotheses, that can supply concepts and categories in terms of which new data can be described. This allows the researcher to rely on well-developed constructs.

Published content analyses with similar aims are a second source of ideas for coding instructions (Krippendorf, 1980). Some studies rely on a few variables while others define very many. But there is no need to invent a new scheme if existing ones have not been shown to be defective. Even if the validity of these instruments is not firmly established, the use of existing recording instructions or only slight adaptations of them offers two distinct advantages over new ones: first, it provides the possibility of comparing results across different situations out of which standards or expectations may emerge and also it shortcuts the efforts of making such instruction reliable.

Eventually, recording units are classified and coded into categories. The problem of category construction is the most crucial aspect of content analysis, as Berelson (1952) notes:

> Content analysis stands or falls by its categories. Particular studies have been productive to the extent that the categories were clearly formulated and well adapted to the problem and to the content (at p.147).

Categories must relate to the research purpose, and they must be exhaustive and mutually exclusive. Exhaustiveness ensures that every recording unit relevant to the study can be classified. Mutual exclusivity means that no recording unit can be included more than once within any given category (Holsti, 1969). The researcher also has to specify explicitly the indicators that determine which recording units fall into each category. This enables replication, which is an essential requirement of objective and systematic content analysis.

This chapter has provided a general literature review of content analysis. The next chapter will focus on the process of content analysis as it was carried out for this study. Reliability, validity and the limitations of the study are also addressed in the next chapter.

6. METHODOLOGY
Introduction

This chapter will describe the process of content analysis, its design and execution, as it was carried out for the content analysis of Manitoba Court of Appeal decisions in cases heard in the Winnipeg Family Violence Court, 1990-1992. The first section, Process and Strengths will describe how the content analysis was carried out and note the strengths of this methodology for this type of analysis. The section on Reliability and Validity and the Limitations of the Study looks at methods for evaluating the 'success' of the study and also examines the limitations of the study.

Methodology - Process and Strengths

As noted by Krippendorf (1980), content analysis involves three logically separate activities: design, execution and report. These steps were followed in the study of Court of Appeal decisions heard in the Family Violence Court, 1990-92. This section will focus on the design and execution of content analysis. The first step was searching for suitable data. Data for content analysis must be known to have something to do with what the researcher wants to infer. The search for suitable data may follow any known or anticipated connection between what is to be inferred and what could conceivably be observed, sampled, and analyzed. Written decisions from the Court of Appeal were viewed as the best possible data to provide information on the sentencing factors and goals with respect to domestic violence cases in the Family Violence Court. Forty-six cases addressing child or adult physical or sexual assaults will be analyzed.

Evidence about the empirical connection between data and what is to be inferred from them is obviously important in any content analysis. To justify any inferences from data, some hard knowledge, some empirical evidence about the

connections between data and what is to be inferred from them, is essential. It is this knowledge that enables the researcher to place his data in a suitable context, to render them indicative of phenomena outside of themselves, and thus provide him or her with a logical bridge for making inferences. Krippendorf (1980) notes that there are four typical sources of contextual knowledge, two of which were used in the present study. Experiences with the context of data that the analyst may want to operationalize was not used as a source of contextual knowledge, as the writer had little experience with the context of the data until the present study was undertaken. A representative interpreter was not consistently utilized as a source of contextual knowledge in the present study, although Professor Anne McGillvray of the Faculty of Law assisted in category construction and some unitizing of data. The remaining two typical sources of contextual data which were used in the present study are: theories and models about the system under investigation and past successes with content analyses of similar data in similar situations. Krippendorf (1980) notes that these are the strongest and most defensible sources of certainties for analytical constructs.

Established theories relating data to their context are the most unequivocal sources of certainty for content analysis (Krippendorf, 1980). Established theories regarding sentencing principles and goals, as articulating by two Canadian authorities on the subject, Clayton Ruby (1980) and Paul Nadin-Davis (1987) where used to create categories for content analysis in this study. These two authors are usually referred to for a complete account of the mitigating and aggravating factors taken into account by judges in Canada (see Roberts, 1988; Canadian Sentencing Commission, 1987; Stuart and Delisle, 1995).

Past successes enhance the investigator's confidence in applying his or her analytical construct. The studies of sentencing factors affecting appellate decisions by Vining and Dean (1980) and Benzvy-Miller (1988) were very helpful as they also used appellate court decisions as the data base and employed a similar methodology and table of factors. Krippendorf (1980) states that the certainty past successes confer on an analytical construct is the most definite of the four as it provides a history of using the same construct with similar data and in similar contexts.

The next step was to develop plans for unitizing and sampling. As Carney (1979, at p. 133) notes "(T)he study can be only as good as the sample on which it is based". Krippendorf (1980) states that a sample is valid to the extent its composition, whether in proportion, scale, or distribution, corresponds to the composition of the universe for which it is intended to stand. In this case, no sample was used as the study included all 46 Manitoba Court of Appeal decisions regarding family violence cases heard by the Winnipeg Family Violence Court, 1990-1992. Therefore none of the difficulties associated with sampling validity are a concern in the present study.

When developing coding instructions, the researcher who relies on existing conceptualizations has more of a chance to contribute to knowledge. One obvious starting point is an examination of available literature of how data are related to their context. There usually are well-formulated theories or at least hypotheses that can supply concepts and categories in terms of which new data can be described. This allows the researcher to thereafter rely on well-developed constructs (Krippendorf, 1980). In this case, the sentencing principles and goals as outlined by Nadin-Davis (1987) and Ruby (1982) were relied on, as noted above, when creating categories. Anne McGillivray (1988) also developed categories to analyze sentencing decisions.

Carney (1979) refers to content analysis involving inference as theoretically oriented content analysis and contrasts it with classical content analysis, which is primarily a descriptive method involving frequency counts. Carney (1979) notes that it is the theoretical framework of reference which suggests the standards or norms, and, in general, the logic of inference, by which to assess data. Moreover this framework also provides impartial ideas about the categories which are so crucial in the analytical infrastructure.

Krippendorf (1980) notes that published content analyses with similar aims are a second source of ideas for coding instructions, and the studies of appellate decisions by Benzvy-Miller (1988) and Vining and Dean (1980) were invaluable in providing examples of categories. Both studies involved an examination of appellate decisions to uncover the factors affecting sentencing, and both used a list of factors based on the sentencing goals and principles. It was felt that following this methodology for the present study would lead to a rich analysis of Manitoba Court of Appeal decisions because, as Carney (1979) states, the development of theoretically informed content analysis is of much importance. Theory suggests what the categories should be. Then categories can be set up using unbiased outside expert opinion. Carney (1979) states that if inferences are to be made by using content analysis, some guidelines are needed indicating why the things being unearthed in the text relate to other things, behaviors, or attitudes beyond or behind that text. The literature review regarding the legal and historical context of domestic violence, social policy responses to domestic violence, theories regarding sentencing disparity and legal rules regarding the appeal process also provide the information necessary for theoretically informed content analysis.

The unit of analysis chosen was the theme. A theme is "a conceptual entity: an incident, thought-process, or viewpoint which can be seen as a coherent whole" (Carney, 1979, p.176). It is easier to define a theme by giving illustrations than by defining it in generalized, abstract terms. Carney (1979) points out that using themes as counting units often enables constructing ingenious analyses, producing very dramatic findings. Moreover, themes can sometimes reach into aspects of a communication which cannot be dealt with by frequency counts or even contingency analysis: where two or more passages contain almost identical words but mean wholly different things, for example. Carney (1979) notes that when dealing with themes some kind of operational definition of what constitutes the theme is wanted. The operational definition is defined by the contextual knowledge. For this study, a list of categories using themes regarding sentencing goals and factors was developed and used as a data sheet. The sentencing goals and factors used to create the categories are those cited by two Canadian authorities on the subject, Clayton Ruby (1980) and Paul Nadin-Davis (1982). These two authors are usually referred to for a complete account of the mitigating and aggravating factors taken into account by judges in Canada (see Roberts, 1988; Canadian Sentencing Commission, 1987; and Stuart and Delisle, 1995). These categories are very similar to those used by Vining and Dean (1980) and Benzvy-Miller (1988). The list of categories was complied into a table which can be found at the end of the introduction to chapter seven. The literature review regarding each of the categories was used to provide coding instructions by carefully and completely defining each term, frequently using examples. The nomenclature used is that of Ruby (1980) and Nadin-Davis (1982).

Like other methods of collecting data, content analysis involves a decision about the level of measurement used. The key factor is how the unit of analysis is quantified in the coding process. Coding systems in content analysis generally fall into one of four categories: (1) presence or absence of an element, (2) frequency of occurrence of an element, (3) amount of space devoted to an element, and (4) intensity of expression (Carney, 1979). In the present study, the presence of the elements were used, i.e., each theme was noted only once per case if mentioned. In some cases, the appellate decisions were extremely brief. As the appellate court judges take into consideration the points raised in the transcripts of the lower court decisions and lawyer's factums presented to them, these were referred to when the decisions themselves were too brief to be analyzed. These cases are identified with an asterisk (*) following the type of charge (summary or indictable) in the Appendix section.

The first step of the coding process was to mark the sentencing goals and factors found in each of the sentencing decisions. For clarification, information regarding each case was summarized and is included in the Appendix. The Appendix is provided as general information for readers. All coding of the goals and factors was done on the written decisions in order to decrease the possibility of errors. Professor Anne McGillivray of the Faculty of Law assisted by reviewing and discussing category construction. The categories were summarized into a table for content analysis to be found at the of the introduction to chapter seven. The table was used as a data sheet for each case. The literature review for each of the sentencing goals and factors was used as coding instructions. The theme was the category itself and its presence was noted on the appropriate area of each data sheet. This information was complied according to the victim (child or adult), the offence (physical or sexual) and the type of appeal (Crown or

defense, conviction or sentence). Tables summarizing this information for analysis are found at the end of each applicable section in the Findings section of the Study chapter. Factors were further categorized as aggravating and mitigating and the results are included in the aggregate analysis section. A comments section was not used throughout the analysis as the data set was small and only the presence or absence of the goals and factors were noted. The use of this method, rather than a frequency count, reduced many potential difficulties. The following sub-section outlines the sentencing goals, then the sentencing factors, followed by a table which outlines the categories for the content analysis, followed by the study itself. The description of the sentencing goals and factors provides the coding instructions for the content analysis.

Sentencing Goals

The goals of sentencing have traditionally been described as general deterrence, specific deterrence, isolation (incapacitation) and rehabilitation. In recent years some cases and literature on the subject have suggested a fifth, which has come to be known as "denunciation" (Ruby, 1980; Nadin-Davis, 1982).

A. Deterrence

In theory, deterrence should be an important goal of sentencing since, according to its proponents, legal sanctions prevent the commission of crimes by making potential offenders fearful of the threat of punishment. As mentioned, deterrence may be specific or general in nature. Specific deterrence occurs when a convicted offender is deterred from committing further offences as a consequence of his or her personal experience of punishment. General deterrence is achieved when the threat of legal sanctions prevents the commission of potential crimes by people other than punished offenders (Conklin, 1992). An important point made by the research literature

is that it is the certainty rather than the severity of punishment that is most likely to exert a deterrent impact (Gibbons, 1992). Some studies suggest that the perceived risk of arrest has a significant deterrent effect on certain types of offenders such as residential burglars (Decker, Wright and Logie, 1993; Nagin and Paternoster, 1991), although the perception of the degree of risk will vary to the extent that a person has actual experience of being caught and convicted (Horney and Marshall, 1992).

The impact of individual or 'specific' deterrence will also vary with the nature of the individual and the nature of the particular crime involved (Conklin, 1992). Many crimes are committed by individuals who are affected by alcohol or other drugs or who are acting in a state of extreme emotion. In such circumstances people are not likely to weigh the potential drawbacks associated with the commission of a crime. Nonetheless, short of extreme incapacity, which nullifies the intent requirement of a few offences, or extreme provocation which reduces murder to manslaughter, the offender is held criminally responsible.

B. Incapacitation

The theory underlying the sentencing strategy of incapacitation rests on the premise that offenders who are incarcerated are unable to commit crimes in the community, and that, therefore, adoption of this strategy should result in the reduction of crime. Collective incapacitation refers to a sentencing strategy that imposes a prison sentence on all those offenders convicted of a particular category of serious offence. Selective incapacitation, on the other hand, refers to a strategy that relies on individualized sentences based on predictions that particular offenders would commit serious offences at a high rate if they were not incarcerated (Griffiths and Verdun-Jones, 1994). One major problem with such strategies is that any incapacitative effect is significantly reduced by the extent to which the crimes that would have been committed

by incarcerated offenders are replaced by those of other offenders (Blumstein, 1982). Crimes committed by a violent sex offender, for example, are not likely to be replaced by those of other offenders so that, for this category of crime, there is a strong incapacitative effect when such an offender is incarcerated.

The theory of selective incapacitation is that a relatively small number of offenders commit a disproportionately large number of crimes (Blumstein, 1983; Cohen, 1983). If this strategy was adopted, locking up this group of offenders would result in a significant decrease in the crime rate while avoiding overcrowding in the prisons. The strategy hinges on the ability to identify such offenders early in their criminal careers and to imprison them for substantial periods of time. The 'three strikes and you're out' approach used in some U.S. states is an example of this. One major problem with this approach is that some people consider it unjust to impose a more severe sanction on one individual than another who has committed exactly the same offence, solely on the basis of a prediction as to what he or she may do in the future (Conklin, 1992; Von Hirsh, 1976). Furthermore, as Cohen (1983) notes, past efforts at predicting future criminality have not been very successful. Without an adequate technique for making such predictions, Cohen contends that there is no sound basis for implementing selective incapacitation techniques.

C. Rehabilitation

The utilitarian notion that punishment can be justified by its rehabilitative effects has been overwhelmed by an increasing public clamor for punishment rather than treatment (Gibbons, 1992) and by the belief that empirical research has failed to demonstrate that correctional programs are effective in reducing recidivism on the part of convicted offenders (Doob and Brodeur, 1989; Lipton, Martinson and Wilks, 1975). Indeed, in the mid-1970s Martinson (1974) coined the phrase "nothing works," which

has had a major impact on criminal justice policy both in the United States and Canada. The problem is that most of the criticism of the goal of rehabilitation originally stemmed from the strong belief that imprisonment cannot be considered a strategy for reducing the rate of recidivism on the part of convicted offenders (Morris, 1974; Waller, 1974). Therefore, it has been accepted by Canadian courts that offenders should never be given a longer period of imprisonment than they would otherwise deserve, solely on the basis that such a term of imprisonment is allegedly necessary for the treatment or rehabilitation of the offender (Ruby, 1987).

However, while few would argue that imprisonment *per se* has rehabilitative effects, it by no means follows that correctional programs will not have any rehabilitative effects on at least some of those offenders who participate. However there are problems associated with determining the effectiveness of correctional programs. The majority of evaluations use recidivism rates to assess the impact of treatment programs on the offender (Griffiths and Verdun-Jones, 1994). This involves determining the 'rate of return' of released offenders back to institutions, either due to a technical violation of their parole or mandatory supervision conditions or the commission of a new offence. To ascertain the effectiveness of a particular treatment program, the recidivism rate of offenders who have participated in a treatment program is compared with that of offenders who have not been involved in the program. There is disagreement among correctional researchers concerning the usefulness of recidivism rates as accurate indicators of treatment effectiveness. Critics argue that recidivism rates are poor indicators of the effectiveness of correctional treatment because many factors, other than having participated in a program while imprisoned, contribute to an individual's success upon release back into the community, including a supportive family, stable employment, and the process of maturation. Conversely, the fact that offenders who

participated in a particular treatment program are returned to prison is not conclusive evidence that the program itself is ineffective (Griffiths and Verdun-Jones, 1994). Also, recidivism statistics do not record all those who return to criminal activity, only those who are caught doing so within the usually short time-frame of follow-up studies.

Nonetheless, the courts have noted that rehabilitation remains the only certain way of permanently protecting society from a specific offender (Stuart and Delisle, 1995). In some cases, even those involving serious criminal offences, where the chances of rehabilitation are significant, or its benefits to society substantial, the importance of imposing a rehabilitative non-custodial form of sentence may outweigh the perceived general deterrent advantages of a custodial sentence. If so, a court should impose the former, for in such circumstances the requirements of accountability and proportionality can be met with carefully crafted terms and conditions which both restrict the individual's freedom and enhance supervision of the rehabilitative process *R.v.Sweeney,* 1992; cited in Stuart and Delisle, 1995). A conditional sentence is nonetheless a sentence of imprisonment with strict conditions, however the fact that it allows for residency in the community means that the public regards it to be a less severe punishment.

D. Denunciation

Denunciation has been identified as a goal of sentencing with increasing frequency. However, there are at least two quite different forms that this goal has assumed (Griffiths and Verdun-Jones, 1994). One form is based on the view that the sentencing process should serve an educative function. According to the Law Reform Commission of Canada (1974), the solemn imposition of a penalty in a public courtroom provides an opportunity for society to emphasize its basic values by strongly denouncing

behavior that is unacceptable. According to this view the sentencing process influences people's behavior by indicating that unacceptable conduct will be punished.

The courts first gave formal recognition to denunciation, as a goal of sentencing, in 1977 (Stuart and Deslisle, 1995). It was noted that sentences imposed by courts for criminal conduct must have the support of concerned and thinking citizens. There are cases where the punishment inflicted for grave crimes should reflect the revulsion felt by the majority of citizens for them. The ultimate justification of such a punishment is the emphatic denunciation by the community of a crime. The notion of denunciation as a goal of sentencing is associated with the retributive theory of sentencing. Denunciation as a goal of sentencing must be strictly limited to ensuring that sentences imposed for criminal convictions are proportionate to the moral culpability of the offender's unlawful act.

The Canadian Sentencing Commission (1987) pointed out that the denunciatory aspect of sentencing can be only effective if the sentences are actually publicized. According to the Commission (1987), evidence appears to suggest that Canadians receive inadequate information about the nature of the sentencing process and, therefore, suffer from fundamental misconceptions as to the nature of the process. The Commission (1987) also contended that there is no empirical evidence to suggest that the degree of disapproval of any particular crime on the part of the public is either raised or lowered by information about sentencing. Indeed, it is suggested that public views about the seriousness of particular offences are molded by such factors as the public's perception of the harm done or the offender's behavior rather than by knowledge of the severity of the sentence imposed in court or the maximum penalty set out by the *Criminal Code*.

The Canadian Sentencing Commission (1987) raised the question as to why such goals as deterrence, rehabilitation and incapacitation figure so prominently in most discussions about the justification for punishment when it is increasingly clear that the sentencing process can have at best only a very limited capacity to prevent crime. The Canadian Sentencing Commission suggested that punishment meets some deep-seated needs in our psychological makeup:

> Even if punishment cannot ultimately be justified, it apparently satisfies a strong desire, seated both in moral thinking and human emotions, and it cannot be renounced. There is consequently a natural tendency to compensate for the limits of retributivism by attributing to penal sanctions an efficiency in preventing crime which they do not really possess (p.145).

Although there are major problems associated with the adoption of any of the traditional goals of sentencing and justifications for punishment, they have continued to figure prominently both in the sentencing literature and in the opinions of the courts (Ruby, 1987). The next sub-section will define the sentencing factors which were used as categories for analysis.

Sentencing Factors

The factors have been divided into five categories for analysis, those factors relating to (1) the crime, (2) the victim, (3) the offender (4) systemic accommodations and (5) general. It should be noted that these factors refer to sentencing in general, rather than only to crimes against the person. These are common factors in the literature regarding sentencing (Canadian Sentencing Commission, 1987; Nadin-Davis 1982; Ruby, 1987). As well, these categories, with some variations, have been used in similar studies of appellate decisions (Vining and Dean, 1980; Benzvy-Miller, 1988; Mohr, 1994).

Factors Related to the Crime

1. Method

The first factor to be considered with respect to the crime is method, and both planning and deliberation and continuation over a period of time are often addressed. Sophisticated, planned activity is contrasted with impulsive and isolated crimes (Ruby, 1987). Nadin-Davis (1982) notes that:

> A question of extreme importance in deciding where the particular offence before the Court falls within the appropriate range is that of premeditation and planning. Numerous cases may be cited as authority for the proposition that premeditation or the systematic perpetration of an offence over a period renders the crime more serious, and may call for an exemplary sentence (at p.137).

Those who are capable of great sophistication and careful planning are capable of doing more harm as criminals by reason of their greater abilities (Ruby, 1987). They constitute a greater danger to society. Their planning gave them time to reflect before they acted.

The converse proposition, that an offence committed without premeditation or planning is regarded less severely, is also valid (Nadin-Davis, 1982). The absence of premeditation and planning will often act as a mitigating factor. A spur-of-the-moment offence or a panic attempt, where the offender is merely taking advantage of an opportunity offered to him, is the usual occurrence. Even in offences which require, of necessity, premeditation and planning the court will take into consideration that the premeditation was short-lived and that the motive arose out of a sudden impulse (Ruby, 1987). The fact that criminal activity can be shown to have continued over a lengthy period will, in many cases, indicate that there has been a conscious and deliberate choice to engage in criminality. The courts will be less inclined to show leniency in such cases. Then too, the harm done by continuing crime will be greater, and this must be kept in mind in making the sentence appropriate to the offence.

2. Magnitude and Impact of the Crime

A natural and obvious consideration in assessing the seriousness of an offence, is the seriousness of the crime on the victim and community. Such circumstances will justify severe sentences (Nadin-Davis, 1982). This is frequently found in relation to fraud and drug trafficking offences. It is significant mitigation if the crime causes little or no harm. In such circumstances, the penalty may be reduced from what it might otherwise have been. It is not clear why the accused should have the benefit of this (Ruby, 1987). If no harm or little harm occurs, but there is an intent to cause harm, then the issue is whether the intent should be punished, or the effect. Conversely, situations arise in which the effect goes beyond the intent of the crime.

3. Motive

Motive is always important (Ruby, 1987). Canadian courts are prepared to deal with 'ordinary' motives for crime, but there is a special disdain for crimes committed with certain particular motivations. Racial and religious motivations are seen as serious aggravating factors (Ruby, 1987; Nadin-Davis, 1982). The 1997 statement of the principles of sentencing in the *Criminal Code* now identify these factors as constituting 'hate crimes'. It is not yet known whether targeting women or children as victims can be seen as a hate crime. Where the object of the crime is to attempt to defeat the administration of justice, such as threatening a witness, perjuring testimony (lying to the court), or obstructing justice, this is seen as a serious aggravating factor (Ruby, 1987). Unfortunately neither of these influential texts on sentencing make any mention of motive in relation to family violence cases.

4. Violence and the Use of Weapons

The courts differentiate between violence that is planned and that which is "spontaneous", but penalize both. The use of a weapon is an aggravating factor in every

case, and examples can be seen in charges of wounding and assault causing bodily harm as well as in the structure of the offence itself (Ruby, 1987). The use of a weapon indicates a disregard for the safety of the public which should be reflected in a harsher sentence on the grounds that the public needs more protection from such an offender, and that society must repudiate such conduct. The lack of a weapon has been mentioned as a mitigating factor in rape cases, according to Nadin-Davis (1982). For this study, violence was interpreted broadly to mean a description of the offences, or the *Criminal Code* charges for assault offences, both physical and sexual, because the amendments emphasize the violent, rather than sexual, nature of both assaults. Descriptions of physical injuries are included in this section because they indicate the degree of violence inflicted.

FACTORS RELATED TO THE VICTIM

5. Relationship

The relationship of the victim to the offender is considered in sentencing. As all the cases in the present study had their preliminary hearings or appearances in the Family Violence Court, they all involve relationships of trust, dependency and/or kinship with the victim. Cases classified as "spousal abuse" include those in which the victim is between the ages of 18 and 59 and who experience abuse by a legal or common-law spouse, ex-spouse or current or former boyfriend/girlfriend. This category is not restricted to heterosexual relationships. Cases classified as "child abuse" are those in which the victim is under the age of 18 at the time of the abuse. This includes adult witnesses who come forward with a complaint of historical abuse, as well as cases of multiple victimization in which at least one victim is a child. The impact of relationship on sentencing in family violence cases will be discussed further in the following sections. In

this study, 'relationship' is any description of the victim or offender which describes the relationship between them, such as husband/wife, father/teenage daughter.

6. Vulnerability

The fact that the victim of the offence falls within the definition of "vulnerable class" may lead the Court to impose a deterrent or 'exemplary' sentence. Sentences imposed on offenders who abuse children should be harsh in view of the vulnerability of children. This issue will be discussed further in the next section. However in this study vulnerability was analyzed as a distinct category from fiduciary duty/breach of trust, as some appeal judgments mentioned only that children are vulnerable due to their age, failing to recognize that they are additionally vulnerable due to their dependence on adult caregivers. The category of vulnerability focuses on the age of the victim. Fiduciary duty/breach of trust focuses on the relationship between a child and an adult caregiver as this has developed in law.

7. Fiduciary Duty/Breach of Trust

Children are considered to be in a position of trust and dependency with adults. Therefore, children abused by individuals who are not family are also processed through the Family Violence Court (Ursel, 1994). The Supreme Court of Canada in *M.(K.) v. M.(H.)* (1992) held that the relationship between a parent and a child is a fiduciary one and there is a positive duty imposed on a parent, in that case the father, to refrain from incestuously assaulting his daughter. In the words of LaForest J.:

> It is intuitively apparent that the relationship between parent and child is fiduciary in nature, and that the sexual assault of one's child is a grievous breach of the obligations arising from that relationship...For obvious reasons society has imposed on parents the obligation to care for, protect and rear their children. The act of incest is a heinous violation of that obligation (at p.6).

In *J. (L.A.) v. J.(H.) (1993)*, Justice Rutherford dealt with the same issue in the context of an abused child and a non-abusive parent, in that case the mother. He summarized the obligations owed by the mother to her child as follows:

> In my opinion it is clear that the defendant mother breached the fiduciary obligations imposed upon her in equity to protect her daughter from sexual abuse that she was aware of. She had the ability, awareness and means to take action which would have ended the sexual abuse but failed completely to safeguard her daughter's best interests (at p.306).

These cases deal with parents but can be extended to caregivers. The characterization of these relationships as fiduciary results from the exploration by the Supreme Court of Canada over the last 10 years of the scope of fiduciary obligations (Neeb and Harper, 1994), commencing in 1984 with Dickson C.J.'s statement, "...the categories of fiduciary, like those of negligence, should not be considered closed". Characterizing the duty of the relationship does add something to its understanding as a legal issue and provides a basis for compensation in damages (Neeb and Harper, 1994). Where a person has voluntarily assumed a position of trust, the courts view as aggravating the fact that he or she commits a crime upon those who extended that trust. The nature of the trust and its circumstances may vary widely (Ruby, 1980). Both parents and others in positions of control over young persons are severely punished if they abuse this trust.

FACTORS RELATED TO THE OFFENDER

8. Attitude

A change in attitude will be treated as being of the first importance (Ruby, 1987). In addition to the common-law presumption that remorse is expressed in a plea of guilty, the accused's repentance has often been considered in isolation. However, while the presence of genuine remorse indicates rehabilitation, and may mitigate the

sentence, the converse is not necessarily true. A more severe sentence should not be imposed for lack of remorse (Nadin-Davis, 1982). The accused is, after all, being sentenced for his offence only. But the attitude of the offender may be an aggravating factor as well and it may be revealed to a judge in the course of a trial. Usually, though it is the protection of the public as a whole which the court has in mind when drawing inferences from the demeanor of the prisoner at trial. If an offender is truly sorry and has taken steps to correct the behavioral tendencies through, for example, voluntarily entering a treatment program, this suggests that he is less dangerous to the public (Ruby, 1987).

9. Behavior After the Offence

Post-sentence acts include participation in assessment and/or treatment, self-reporting of the crime to the authorities, and attempts to obstruct or assist justice. As Ruby (1987) notes, the behavior of the offender is usually a better indication of his character and attitude than what he or his counsel say about him. Offences that normally would call for severe punishment will have that punishment mitigated by reason of the behavior of the accused after the offence was committed. Examples include getting off drugs, seeking employment, going back to school, marrying, attending church, and abstention from alcohol where that is a problem. Co-operation with the police or prosecution may justify mitigation of the sentence. However, though such co-operation may be a factor in mitigation of sentence, failure to co-operate cannot be an aggravating factor due to the rule against self-crimination which is now protected by the *Charter* (Ruby, 1987).

10. Age

Youth is generally conceded to be a mitigating factor, probably because it carries the greatest possibilities for reform and because we do not expect so much from youthful judgment (Nadin-Davis, 1982). The general rule for most offences is that a sentence should not be imposed on a youthful offender for the purpose of general deterrence, but should rather be directed at his rehabilitation. For the most serious offences, and in particular crimes of violence, the mitigating effects of age are limited. But even in these most serious cases, courts have been increasingly sensitive to the impossibility of meeting the reformative needs of the young in a penitentiary setting. However, due to media coverage of cases of violent incidents perpetrated by adolescents and young children, some victim's groups are lobbying politicians for increased penalties for young offenders, including the automatic transfer of some cases to Provincial Court, which would result in the offender being tried as an adult. A full discussion of the recent changes and proposals regarding young offenders is beyond the scope of this thesis. Only rarely are the courts called upon to consider old age as a mitigating factor in isolation. More frequently, it is discussed in connection with illnesses or age-related degeneration of the brain.

11. Other Penalties

From the perspective of deterring others, the sentencing court must include recognition of the consequences of conviction and imprisonment. In the case of relatively minor crimes, potential loss of employment may weigh in the balance in the decision as to whether a discharge should be granted. Similarly, in other cases where an individualized sentence is imposed with a view to securing the rehabilitation of the

accused, his continuing employment is a major concern and the sentence may be tailored to address this (Nadin-Davis, 1982). Also, in cases where a non-exemplary tariff sentence is appropriate, the term of incarceration may be reduced to take account of the additional suffering which the accused will inevitably suffer as a result of loss of his job or career. A further instance in which sentence may be mitigated due to loss of employment involves situations where a loss of professional license is also likely to occur. Not only is the sentence made more severe by the loss of employment, but the element of protection necessarily considered in sentencing such an offender may become irrelevant where the accused has been removed from his "position of temptation" (Nadin-Davis, 1982).

12. Previous Good or Bad Character

Ordinarily, the fact that an offender is a person of good character will mitigate the offence. For such a person, the mere fact of conviction is considered to be a punishment. Generally, there is a previous history to show that the offence is out of character, and therefore one that is less likely to be repeated (Ruby, 1987). It may also mean that the offender has suffered the shame and disgrace a person of good character would inevitably feel in such circumstances, and this should be treated as a partial punishment in itself. Of course, previous bad character is considered to be an aggravating factor, although it is usually reflected in the offender's criminal history.

13. Impact of the Sentence

As mercy is a consideration of justice, courts attempt to sentence in a way that will avoid unnecessary hardship to the accused or those dependent upon him or close to him. It is always necessary to consider and give effect to a recommendation for

mercy by a jury (Ruby, 1987). In many circumstances sentences are reduced on compassionate grounds by reason of the ill health of the offender. The fact that the offender is illiterate due to a learning disability operates the same way. Psychiatric problems justify a reduction of sentence on the grounds that confinement would be, to that offender, a more serious punishment than it would be for most individuals. Again, unfortunately, the writers (Nadin-Davis, 1982; and Ruby, 1987) make no mention of the connection of impact of the sentence to child sexual abuse or wife assault.

14. Intoxication

The cases in which intoxication is a mitigating factor do not suggest that intoxication is an excuse for crime, but that it is a circumstance to be taken into account - sometimes in aggravation, sometimes in mitigation - in assessing responsibility (Ruby, 1987). A person under the influence of liquor, who is otherwise of blameless reputation, may do something which is quite out of character and the intoxication may be both an explanation and a factor in mitigation. In such cases lenient treatment may be justified in anticipation of rehabilitation. However, involvement in crimes of violence seems usually to render alcohol an aggravating factor, or neutral at best.

SYSTEMIC ACCOMMODATIONS

15. Guilty Plea

The fact that the accused pleaded guilty is viewed in a variety of ways in the sentencing process. It may indicate remorse on the part of the accused, a desire to save witnesses the pain of going through testimony, a willingness to save the expense of a full trial, or the realization by the accused that he is inescapably caught (Nadin-

Davis, 1982). According to the court's interpretation of the plea, its treatment may vary. A plea of guilty is taken as an expression of remorse and is an indication of possibilities for rehabilitation and entitled to mitigating credit as such. Where, however, the court finds that the only sorrow the accused feels is because he was caught, policy questions become paramount. A guilty plea even without an indication of remorse is still a mitigating factor on grounds that it saves the expense of public trials, the agony of witnesses, and encourages other guilty pleas.

16. Time Served in Custody

The *Criminal Code* states that in determining the sentence to be imposed on a person convicted of an offence, a justice, magistrate or judge may take into account any time spent in custody by the person as a result of the offence (Nadin-Davis, 1982). While the section is permissive and not mandatory, credit toward sentence is given for more time than that actually served pending trial. The rationale for this view is that time served pending trial does not count towards early release and is therefore equivalent to a longer term of post-sentence custody. Poorer conditions, including overcrowding and lack of access to vocational and rehabilitation programs that are characteristic of the remand facilities, are taken into account in this calculation. This is calculated as being equivalent to two times post-sentence incarceration. Six months in remand custody is thus equivalent to one year at a provincial institution.

17. Previous Involvement with the Judicial System

It is the practice of courts to punish persistent offenders more severely than those who have not previously committed crimes. A lengthy record is usually indicative of a man who is a danger to the public and results in a heavy sentence (Ruby, 1987).

However, the record must be relevant (related to the crime for the which the offender is being sentenced) and fresh (fairly recent convictions). The exception is with respect to crimes of violence. A prior criminal record for violence is invariably serious, whether the present offence is for a violent or non-violent crime. Conversely, a record which does not include crimes of violence will not be treated quite so seriously. The principal use of a criminal record is to show the character of the accused with a view to indicating whether, and to what extent, society requires protection from him. Thus, if the offence itself leads to an inference different from that of the criminal record, the offence and its circumstances must prevail as the guiding factors in imposing sentence.

18. Inapplicable Defenses or Defenses Based on 'Frailty'

Such "extenuating circumstances as may appear from the evidence" have always been accepted as mitigating factors even though they did not or could not address the question of guilt or innocence. Any matter which partakes of a defence will be considered if it affected the circumstances of the case (Ruby, 1987). In cases of violence, provocation is the clearest example of the operation of this principle. Diminished capacity which is not self-induced is also considered, as is the unfortunate circumstances of the offender's childhood - abuse, poverty, abandonment, etc.

Descriptors

From the goals and factors mentioned above, a table for content analysis was developed. This table was used as a data sheet to record results of the analysis for all of the cases. In order to determine patterns among types of family violence offences, such as the number of Crown appeals which were being initiated, and the number of those which were successful as compared to defence appeals, the cases were

categorized and tabled according to the appellant. These tables are found at the end of each sub-section in Findings and Observations. The sentencing factors were also categorized according to whether they were mitigating or aggravating. This information is included in the aggregate analysis section of chapter seven. The table for content analysis is included for reference, at the end of the introduction in chapter seven. The next section deals with reliability and validity issues in content analysis as they relate to this analysis.

Reliability, Validity and Limitations of the Analysis

Observations and findings made apply only to Manitoba Court of Appeal decisions in cases heard by the Winnipeg Family Violence Court in 1990-1992, the first two years of the new court's operation. Studies of a similar nature should be carried out to determine the extent to which the trends noted in the present study continue or are altered.

In order to determine the strengths and weaknesses of content analysis as a methodology the concepts of reliability and validity must be examined. Reliability assesses the extent to which any research design, any part thereof, and any data resulting from them represent variations in real phenomena rather than the extraneous circumstances of measurement, the hidden idiosyncrasies of individual analysts, and surreptitious biases of a procedure. Validity is that quality of research results which leads one to accept them as indisputable facts. Closest relatives of the term are "empirical truth", "predictive accuracy", and "consistency with established knowledge" (Krippendorf, 1980). The issue of reliability will be examined first.

If research results are to be valid, the data on which they are based, the individuals involved in their analysis, and the processes that yield the results must all be reliable. Reliability is a necessary though not a sufficient condition for validity. To test

reliability, some duplication of efforts is essential. A reliable procedure should yield the same results from the same set of phenomena regardless of the circumstances of application. However, reliability does not guarantee the validity of research results. An analytical procedure may be deterministic, like a computer program, but has nothing in common with the context from which the data stem and repeats its mistakes over and over again. Thus, high reliability cannot provide any assurance that the results are indeed valid.

Krippendorf (1980) points out that there are at least three distinct types of reliability: stability, reproducibility and accuracy. Stability is the degree to which a process is invariant or unchanging over time. Stability becomes manifest under test-retest conditions, such as when the same coder is asked to code a set of data twice, at different points in time. Stability is also known simply as "consistency". This form of reliability test was used for this study. The data was analyzed in April 1996 and retested in August 1998. The analysis was redone after a period of time to allow some distancing from the data. No inconsistencies affecting the research results were found. This resulted in a strengthening of confidence in the research results. Although this is not the strongest form of reliability, it is the best one available, given the researcher's limited resources.

The second type of reliability referred to by Krippendorf (1980) is reproducibility. He defines it as the degree to which a process can be recreated under varying circumstances, at different locations, using different coders. This form of reliability was not utilized due to resource constraints. However there are other problems related to the use of assistants to code data. As noted by Holsti (1969) unless there is reasonable confidence that each analyst used the same rules for identifying and classifying relevant passages, it is impossible to determine whether the findings

reflected inaccuracies or merely differences in subjective predispositions between coders. The 'rules' or coding instructions are much more straightforward for classic content analysis than they ever could be for a theoretically oriented analysis such as this one, thus making it more likely that intercoder differences would indicate differences in subjective predispositions. Perhaps because of this difficulty, content or 'face' validity appears to be the standard for analyses of appellate decisions. Intercoder reliability was not mentioned by the authors of any other appellate decisions analyses (Vining & Dean, 1980; Benzvy-Miller, 1988; McCormick, 1992; Mohr, 1994). Although this analysis has not been reproduced, it would certainly be possible to do so and perhaps another researcher will undertake to do so in the future.

The third form of reliability is accuracy, defined by Krippendorf (1980) as the degree to which a process functionally conforms to a known standard, or yields what it is designed to yield. To establish accuracy, data are obtained under test-test conditions which are met, for example, when the performance of one coder or measuring instrument is compared with what is known to be the correct performance or measure. Although similar measures have been used in previous analyses of appellate decisions, there is no "known" correct measure and therefore accuracy could not be established for this study. Reliability is a necessary though not a sufficient condition for validity, which will be reviewed next.

As noted earlier, validity designates that the quality of research results which leads one to accept them as indisputable facts. A measuring instrument is valid if it measures what it is designed to measure, and a content analysis is valid to the extent its inferences are upheld in the face of independently obtained evidence. The importance of validation lies in the assurance it provides that research findings have to be taken seriously in constructing scientific theories or in making decisions on practical issues. As

Krippendorf (1980) states, such assurances are particularly desirable when content analysis results or theories arising from them are intended to have policy implications, when they are meant to aid government or industry, when they are proposed as evidence in court, or when they affect individual human beings. In such situations wrong conclusions may have costly consequences.

There are many types of validity: content validity, predictive validity, concurrent validity, and construct validity. Holsti (1969) states that *content validity,* also sometimes referred to as *face validity*, has most frequently been relied upon by content analysts. If the purpose of the research is a purely descriptive one, such as this study, content validity is normally sufficient. Content validity is usually established through the informed judgment of the investigator and is determined by evaluating whether the results are plausible and are consistent with other information about the phenomena being studied (Holsti, 1969). The requirements of content validity in this study have been met by comparing the results with other similar studies (Benvzy-Miller, Mohr, 1994; Vining and Dean, 1980) and noting that the research results are consistent with the literature on the effect of the reforms of the sexual assault and child sexual abuse provisions of the *Criminal Code* (Gilberti, C., 1994; Roberts, J. & Grossman, M., 1994; Gunn, R. & Linden, R., 1994; Mohr, R. & Roberts, J., 1994; Roberts, J., 1990; Roberts, J. & Gebotys, R., 1993; Standing Committee on Justice and the Solicitor-General, 1993). The consistencies were established by a thorough literature review of the issues related to sentencing in family violence cases.

Although the research satisfied the requirements of reliability and content validity, some limitations were present. Carney (1979) notes that content analysis is a technique designed for processing abundant data. It requires a certain minimum amount of documentation before it will work properly. As a result, the lower court decisions and

the factums were referred to in some cases. These cases are identified with an asterisk in the Appendix. Appellate judges are aware of the issues and factors of each case as presented to them, and they often do not mention even the most important issues and factors in their judgments, as these are available in writing in the lower court decisions and factums from the Crown attorneys and defence lawyers. However, several researchers have noted the difficulties that this presents for those attempting to analyze appellate decisions (Mohr,1994; McCormick, 1992). Although it would have been preferable to use only the appellate court decisions to allow for greater certainty in establishing which of the factors the judge considered to be the most important, it was not possible to do so in all cases. Some decisions were very brief, thus requiring reference to the information on which the judge based his decision. As a result, more inference was required when analyzing the data in these cases but the required amount of data was available.

As noted by Carney (1979), themes used as recording units can sometimes reach into aspects of a communication which cannot be measured by frequency counts or even contingency analysis, such as where two or more passages contain almost identical words but mean wholly different things. The theme was used as the recording unit to increase the validity of the study, but this has implications for its reliability. The theme was very important in determining whether some factors, such as alcohol use or age of the offender were used as aggravating or mitigating factors. However themes are not clear-cut, self-evident wholes as words are and thus coding becomes more difficult. In this study the difficulty was dealt with by using the presence or absence of mention of the factor, rather than a frequency count. Nonetheless, some difficulty with reliability may remain. As Carney (1979) notes, in content analysis, the moment of truth usually comes with the decisions as to how much reliability to aim for. Validity is generally

obtained at the cost of some loss of reliability, because qualitative analysis of latent meaning will inevitably be involved. Carney (1979) states:

> Language is, of its nature, multidimensional. It is both instrumental (fraught with inner meanings) and representational (simply meaning what it states). Frequency-counts of straightforward, surface meaning rarely go deep enough to answer in-depth questions (at p.48).

As noted by Krippendorf: "Reliability often gets in the way of validity" (1980, at p.130).

Another difficulty with the study, and with all content analysis, is that it is to some extent subjective. As Carney (1979) notes, subjectivity is inevitable because there is no such thing as the 'content' of a document - 'content' that is independent of the person examining the document. Carney (1979, at p. 198) acknowledges that:

> Theoretically oriented content analysis is so important because it relentlessly forces the investigator to examine his (sic) own background assumptions.

This was a very important aspect of the present study. An extensive literature review was used to provide theories to guide the content analysis process and assist in defining categories and recording the data. Literature regarding past and present policies and laws on domestic violence, in addition to sentencing goals and principles being used at the time the cases were heard were used in an attempt to place this study further on the objectivity end of the subjectivity-objectivity continuum of content analysis.

Gerbner (1961, cited in Carney, 1979) states that the counting of forms (of expression or content) of conventional meanings (of words, items, or themes) has high reliability, but it is a semi-clerical operation. Inferences of any depth and critical meaning can be drawn only by consciously shifting the level of attention towards subconscious trends. These have to be chosen so that they are represented by items which can be quantitatively assessed. The focus of questioning can thus be shifted so that it bears on implicit underlying trends which, once detailed, make assumptions stand out. This was

the purpose of the study. The sentencing goals and factors commonly used in sentencing decisions in criminal cases were quantitatively assessed, in order to determine whether they were being referred to in domestic violence cases, whether they were being used as aggravating or mitigating factors, and whether overall the application of these principles contributed to or diminished the possibility of justice for victims of domestic violence. The next chapter will report on the analysis of Manitoba Court of Appeal decisions in cases heard in the Winnipeg Family Violence Court, 1990-1992.

7. ANALYSIS OF MANITOBA COURT OF APPEAL DECISIONS
Introduction

A comparative data analysis of the FVC and the Court of Appeal was done as part of the Final Report: Year Two on the Family Violence Court (Ursel, 1993). From the list of 4,080 cases heard in the first two years of the court's operation, it was possible to identify 85 cases or 2% of all cases in which an appeal was filed. Of the 85 cases, five cases had decisions still pending at the time of the study and three cases were abandoned, leaving a total of 77 cases in which the Court of Appeal made a ruling. The first level of decision making was whether the appeal court judged the merits of the appeal sufficient to proceed to a hearing. Leave was denied in 19 cases or 25% of the cases decided by the Court of Appeal as a result of this preliminary decision-making process, leaving 58 cases. Ten cases involved appeals other than conviction or sentence. These related to issues such as a bail application made in chambers, a motion to extend the time for the filing of a conviction appeal and an application to withdraw a guilty plea. As these cases did not relate to sentence or conviction appeals and could not be analyzed with respect to sentencing factors or recent reforms, they were dropped from the study. Two other cases were dropped from the study as the relationship between the parties did not involve trust, kinship or dependency. These cases involved a tenant and a landlord, and two employees of the same company, and the reasons for Family Violence Court hearings rather than standard Provincial Court hearings are not known. There were no appeals filed in elder abuse cases or cases of psychological abuse. The remaining 46 cases addressed child or adult physical or sexual assaults, and two cases addressed other charges related to domestic incidents. These 46 cases will be analyzed in this study. Description and discussion of conviction

issues could not be quantitatively analyzed and therefore the methodology of content analysis was not used for 12 cases which involved only conviction issues.

To overcome some of the limitations created by very brief written reasons by the Court of Appeal, it was necessary to refer to lower court information and facta (written submissions from the Crown and defense attorneys) in several cases. These cases are identified with an asterisk, following type of charge (summary or indictable), in the appendix. Several unsuccessful attempts were made to follow up on the cases in which a new trial was ordered by contacting the Crown Attorneys who had prosecuted the cases. However, the cases were no longer on the court's database due to the length of time that had passed since the trial. As cases are filed by date, and the trial dates were not available, it was not possible to ascertain the final outcome of cases in which a new trial was ordered. In order to determine several additional characteristics about the cases, such as the number of Crown appeals which were being initiated, and the number of those which were successful as compared to defence appeals, the cases were categorized and tabled according to the appellant. These tables are found at the end of each applicable section in findings and observations. The table for content analysis is reproduced here for reference.

THE TABLE FOR CONTENT ANALYSIS

GOALS

A. deterrence

1. general

2. specific

B. incapacitation

C. rehabilitation

D. denunciation

SENTENCING FACTORS

OFFENCE

1. method (ie. planned, deliberate, purposeful vs. loss of control)

2. magnitude and impact of the crime - harm caused

3. motive

4. violence, use of weapons, threats

VICTIM CHARACTERISTICS

5. relationship

6. vulnerability

7. relationship of dependency, fiduciary relationship

OFFENDER CHARACTERISTICS

8. attitude of the offender (eg. "genuine remorse", no remorse)

9. behavior after the offence (eg. treatment, self-reporting, obstruct/assist justice)

10. age (mitigating if young or old)

11. other penalties (eg.loss of professional license, reputation, money, family)

12. previous character

13. impact of the sentence on physically or mentally challenged offender

14. intoxication

SYSTEMIC ACCOMMODATIONS

15. guilty plea

16. time spent in custody (time served X2)

17. previous involvement with the judicial system (relevant and fresh record)

GENERAL FACTORS

18. inapplicable defences - excuses which may mitigate sentence (eg. frailty, duress,

provocation, diminished capacity which is not self-induced, unfortunate childhood, poverty)

The section on Findings and Observations reveals the results of the content analysis, using tables to summarize the data. A description of the credibility issues in conviction cases is also included as it relates to the sentencing issues being studied. The Aggregate Analysis section describes trends in family violence sentencing as it relates to both sentencing goals and factors. The Conclusions section summarizes the findings of the analysis and the Recommendations section provides some suggestions to ameliorate some of the problems highlighted by this analysis.

Findings and Observations

CHILD SEXUAL ASSAULTS

CROWN APPEALS

The Crown filed an appeal in nine cases of child sexual assault. Of the nine, eight were successful. All were sentence appeals. Thirteen out of 21 possible sentencing factors were mentioned, with relationship and previous involvement with the judicial system being addressed most frequently, in four out of the nine cases. The relationship between the victim and offender was mentioned but not stressed in the cases. Consideration of the fiduciary duty between parents and children, and those "in loco parentis" is a factor in sentencing but was explicitly mentioned in only two of the cases. The lack of a criminal record was mentioned in four of the cases as a mitigating factor. However, it is not unusual for child sexual offenders, particularly those who are not extra-familial offenders, to have no prior criminal record. This is due to the low reporting rates for this type of crime, the extensive duration of the criminal offending,

and the often lengthy delay between the commission of the offences and the reporting of the conduct to the authorities.

It is evident from a review of the cases in the present study that the Manitoba Court of Appeal has attempted to establish a "tariff" or range of sentence for child sexual assaults occurring in a family context. The judgment in the Alberta case of *R.v.Sandercock* (1985) is one of the cases most often referred to by the courts. It sets a three year starting point for the sentencing of Level One sexual assault cases. This was a case of sexual assault which was not in a family context but the Alberta Court of Appeal confirmed its commitment to the "starting-point" approach as a means of achieving a uniform approach to sentencing, with the sentence to be refined (upwards or downwards) to the specific circumstances of the actual case. Mohr (1994) noted that this case which she identified (at p. 161) as "perhaps the most widely cited sexual assault sentencing decision" is unusual in both its length (approximately eight and a half pages) and in the detailed facts and factors. The Manitoba Court of Appeal carefully considered this decision in *R.v.D.(C.)* which was included in this analysis. Justices Philip and Twaddle concurred that the starting point to sentencing for a major sexual assault committed in a family relationship where the victim is a young child and serious sexual acts are repeated over a period of time should be four to five years imprisonment. A variable figure was used to emphasize that even the starting point will depend on the circumstances. The Court noted that:

> This starting point may be somewhat higher than that previously used in this province, but it is justified by the frequency with which this offence occurs and by our increasing knowledge of the devastating effect it has on the victim (at p.10).

In this case, a two year sentence was increased on appeal to four years. Lyon J. A. concurred with the result, and with the determination to create a new category of major

sexual assault arising within a family relationship in accordance with the principles enunciated in *Sandercock* but dissented on the question of raising the starting-point sentence from three years to four or five years under these circumstances.

The case of *R.v.D.(C.)* was cited in the case of *R.v.S.(B.)*. In this case, the offender pleaded guilty to three counts of indecent assault and one count of sexual assault. The complainants were a niece and one of the daughters of the offender. In this case, however, several mitigating factors were identified. These factors are common to subsequent cases in which the sentence failed to reach the starting-point outlined in *R.v.D.(C)*. The offender ceased the criminal activity on his own, he reported his conduct to the police, and he was remorseful and stated a willingness to be treated. In the majority of cases in which the sentence was increased, but was still well below the range identified, mitigating factors such as a good work record, good previous character and lack of a criminal record were identified. In four of the nine cases, a great deal of emphasis appeared to be placed on the offender's motivation and suitability for treatment. In one case, *R.v.D.(M.)*, the Court observed that a four or five year term in a penitentiary would have been appropriate for the offence but tailored the sentence "to fit the circumstances of the accused" who had suffered physical abuse and emotional deprivations as a child and was assessed to be a very good candidate for treatment, having demonstrated his motivation by cooperating fully with his assessment. In this case, Justice Twaddle and Chief Justice Scott denied the Crown's sentence appeal and upheld the two year sentence. The Court noted that the sentence did allow a probation order to be made.

Probation is a disposition of the court that places the offender under supervision in the community. The court can suspend the passing of a sentence, and

put the accused on probation; fine the offender or place the offender on probation; or put the offender in jail, if the sentence is under two years, and order that the jail term be followed by a period of probation. However, there have been many concerns raised regarding the enforcement of probation orders. Jackson et al (1982) reported that the decision to revoke probation in one Canadian jurisdiction was influenced by the personal style and orientation of the probation officer, as well as by the probationer's lifestyle. In nearly 50% of the cases in that study, probation was said by the Court to be successfully completed despite non-adherence to the conditions of the probation order. Officers were generally reluctant to intervene in those cases where the probationer had a stable domestic life and employment. In an exhaustive study of the enforcement of probation conditions in British Columbia, Aasen (1985) found that under the provisions of the *Criminal Code*, it was virtually impossible to 'breach' probationers for violating the conditions of probation. He also noted that it often took a long period of time to charge and convict an offender for breaching a probation order in the rare instances in which it was possible to deal with the breach through the Courts. The study also concluded that many offenders simply do not take probation orders seriously and breach is common.

In seven of the nine Crown appeal cases, general deterrence was the sentencing goal which was articulated by the Court, with denunciation being mentioned in combination with general deterrence in two instances. In increasing a sentence for sexual assault from a suspended sentence to a sentence of nine months in *R.v.L.(C.)* the Court noted that:

> The nature of this offence in this case requires a sentence that appropriately reflects society's view of the gravity of the circumstances and emphasizes general and public deterrence (at p.2).

While these are stern words and the recognition is there that sentences involving a period of incarceration bear a deterrent message, the sentence of nine months does not accord with either the gravity of the offence or the Court's own 'tariff'.

Table
Child Sexual Assaults
Crown Appeals
Sentence Appeals

8 out of 9 appeals were granted

SENTENCING GOALS
general deterrence: 7
rehabilitation: 1
denunciation: 2

SENTENCING FACTORS
OFFENCE:
method: 3
violence, use of weapons, threats: 9

VICTIM CHARACTERISTICS:
relationship: 4
vulnerability: 2
relationship of dependency; fiduciary relationship: 1

OFFENDER CHARACTERISTICS
attitude of the offender: 3
behavior after the offence: 4
previous character: 1

SYSTEMIC ACCOMMODATIONS
previous involvement with the justice system: 4

GENERAL FACTORS
inapplicable defenses or excuses based on frailty: 1

CHILD SEXUAL ASSAULTS
DEFENCE SENTENCE APPEALS

There were 23 defence appeals of child sexual assault cases, of which nine were sentence appeals and 14 were appeals as to conviction. The majority, six of nine sentence appeals, were granted. The factors most frequently cited were age (the youth

or old age of the offender) and the magnitude and impact of the crime. Although the magnitude and impact of the crime was mentioned in four of the nine sentence appeals, it was usually referred to only in the context of the details of the crime rather than the harm actually or potentially caused to the victim. Again, a willingness to undertake treatment appeared to be very persuasive in sentence appeals. In the case of *R.v.B.(F.)*, the offender sexually assaulted his niece over a period of three years, on three separate occasions. He was sentenced to 14 months incarceration, to be followed by three years supervised probation. In this case the advanced age of the offender, his 20 year employment history with the same firm, lack of a criminal record, and the fact that he terminated the assaults on his own were considered. The offender was in therapy at the time of the appeal hearing and it was noted that his emotional state was said to be fragile. Justice Helper remarked that "It is Dr. Opochinsky's opinion that incarceration over an extended period of time could result in harm to the accused" (at p. 2). As in the majority of cases, there was no mention of the emotional state of the child victim or of the harm that she had suffered. The Court of Appeal noted that, although the sentencing judge correctly directed his mind to the principle of general deterrence in pronouncing the sentence he did, he did not attach sufficient weight to the special circumstances of this particular offender. The appeal was granted and a term of nine months incarceration was substituted for the 14 month term imposed earlier. The three-year probation order was confirmed. Although the appeal did not result in a drastic reduction in sentence, it confirmed that the appearance of 'respectability' or community status was a consideration.

Behavior following the offence (treatment, self-reporting) was mentioned in three of the nine sentence judgments. The continuation of the conduct over a period of several years was mentioned in four of the nine sentence judgments. Offender age was

also mentioned in mitigation in four of the sentence judgments. Other penalties were mentioned most frequently, in five out of nine sentence judgments. Penalties other than those imposed by the courts included the loss of a professional license, in the case of a doctor who was sentenced to five years for sexually assaulting five patients over several years. In *R.v.S.(B.)*, the Court noted that the loss of his professional license made individual deterrence a lesser factor. Two factors which were both mentioned twice were attitude of the offender, in particular "genuine remorse", and his guilty plea. Of course, it is difficult to determine how "genuine" remorse is. Remorse for the offence is not to be confused with remorse because one has been punished. A guilty plea is a long-accepted sign of remorse. In cases involving child victims, it spares the child the trauma of testifying, a further factor in favor of the defendant. But guilty pleas are frequently the result of plea bargaining which results in a less serious charge being entered. The use of a guilty plea as a mitigating factor in sentencing allows the offender to benefit twice from a decision that was in his or her own best interest in the first instance.

In the case of *R.v.S.(M.)*, the offender committed one act of fellatio on a seven year old girl. The subject was sentenced to nine months of incarceration to be followed by three years of supervised probation. There was a significant degree of victim-blaming present in this judgment:

> The evidence indicates that the victim in this case was the initiator of the sexual act. There was no evidence that the accused encouraged or invited her participation (at p.1).

The pre-sentence report was negative. There was no remorse for the victim expressed by the accused. He minimized the act and blamed the victim. He denied a need for counseling related to sexual offenders. His counseling experience was related to depression. Nonetheless, the term of incarceration was reduced by Justices Scott and Helper to three months to be served intermittently, with a three year probation order as

imposed by the lower court. Justice O'Sullivan dissented, and would have substituted a two year suspended sentence, saying:

> The act was reprehensible and must be denounced as intolerable. The question though is whether denunciation always requires jail. In my opinion, it does not. The accused has no related record and there is no evidence that he is a pederast or inclined to molest children. The circumstances are unique and not likely to repeat themselves (at p.2).

Denial and minimization by family violence offenders, including sexual offenders, must be overcome if they are to be successful in treatment. It is disappointing to see such attitudes reinforced and legitimized by the Court of Appeal.

The case of *R.v.B (S.)* was an appeal from a total sentence of ten years of imprisonment for the sexual assault of a young girl and boy. The assaults involved sexual touching, cunnilingus, fellatio and simulated intercourse with the girl and sexual touching and fellatio with the boy. The Court of Appeal upheld the ten year sentence. This offender had an extensive criminal history involving sexual assaults against children and had breached a probation order prohibiting him from being alone with persons under the age of 14 years. Although the Court of Appeal reasons for decision were very brief, the reasons for sentence given by the lower court indicated that the children were not related to the accused. However, the accused, through one of the targeted victims, met the children's mother and her boyfriend and was accepted as friend of the family. Trust was extended to the point where the mother allowed the accused to baby-sit the children. It is clear that the breach of trust, in addition to the predatory nature of this offender's assaults, were primary considerations for the appellate court. This was the only case in the study in which incapacitation was articulated as a goal of sentencing: protection of the public, in this case, would best be

served by ensuring that the offender is denied access to the public for a long period of time.

In seven out of nine sentence appeals, no particular goal was mentioned. The Court concerned itself primarily with the quantum of sentence rather than the goal of the sentence. However, "fitness of sentence" was cited in five cases, both in reducing and upholding the sentences.

CHILD SEXUAL ASSAULT

DEFENCE APPEALS AS TO CONVICTION

There were 14 conviction appeals related to child sexual assault cases, of which four were granted. The Court continues to grapple with issues related to the credibility of child witnesses. In *R.v.S.(H.J.)* the Manitoba Court of Appeal cites the Supreme Court of Canada in *D.W.v.R.* (unreported decision released March 28, 1991). That case provides guidance for the trial judge or jury faced with the task of applying the appropriate test where the credibility of an accused is an important factor. The accused must be acquitted if the evidence of the accused is believed; or if the testimony of the accused is not believed but still raises a reasonable doubt. If the evidence of the accused does not raise reasonable doubt, then it is still necessary to establish whether, on the basis of the evidence which *is* accepted, there is a reasonable doubt of the guilt of the accused. In the Manitoba case, the offender's conviction for sexual assault upon his stepdaughter was upheld as the Court of Appeal found that the lower court judge did apply the law correctly and did not merely move on to convict the accused as an automatic response to his rejection of the accused's credibility.

As reviewed earlier in this thesis, no automatic assumptions of lack of reliability arise because of age or nature of the complaint. There must be an evidentiary basis upon which to infer that a witness' evidence is, or may be, unreliable. However,

the bias against finding the testimony of children and women to be credible continues, despite the amendments enacted to remedy this bias. This is most evident in *R.v.R.(E.K.)*. The Court found that a seven-year-old child had been sexually assaulted on March 1, 1988. There was ample medical evidence in support. However Justice Philp stated:

> The fact that the child did not make her complaint against the accused until many months later, and then to a social worker, also casts doubt on her story" (at p.2).

The 1983 amendments to the *Criminal Code* concerning adult sexual assault cases, and the 1988 amendments to child sexual offences abolished the rule regarding 'recent complaint'. In the past, a delay in laying a complaint or in telling another person was allowed to be used to cast doubt on the testimony of a sexual abuse complainant. Although the rule was abolished, negative inference regarding the victim's credibility was made in this case because of the delay in complaint and the fact that she complained to a social worker rather than to police. Justices Philp and Lyon found that they were not satisfied that, on the whole of the evidence, a properly instructed jury, acting judicially, could reasonably have convicted the accused. The accused was acquitted on the issue of the child's identification of the perpetrator, although there was no indication that the child ever wavered in her assertion that the accused was the perpetrator. In this case, the conviction was overturned and an acquittal entered. This is unusuai in that, in most cases in which the conviction was overturned, a new trial was ordered.

Justice Helper dissented. She noted that the young victim did not waiver in her assertion that the accused was the perpetrator of the sexual assault, and the medical evidence clearly corroborated the assault. Justice Helper also 'took judicial notice' of expert evidence that had been presented to the Court regarding the fact that

young children often do not reveal that they have been assaulted until they are in a safe place, and able to disclose to trusted individuals. In this case the victim had been removed from her home and was living with her aunt when she disclosed to a social worker. Justice Helper argued that the inconsistencies in the Crown's evidence did not raise a reasonable doubt on the issues of the identity of the perpetrator. As the identity of the perpetrator was the only issue at trial and as the child's testimony was not weakened on that point, she would dismiss the appeal. Her dissent takes into account a more complete understanding of child sexual assault and makes a factual connection to the identification issue.

This case highlights the fact that, even with what would appear to be very solid evidence, conviction is far from sure. As the high numbers of appeals from conviction indicate, accused persons have little to lose in having their cases reviewed at the appellate level. This case represents an injustice with respect to this child victim and reinforces the accused's notion that he is not a sexual offender and does not require treatment.

Child Sexual Assaults
Defence Appeals
9 Sentence Appeals, 6 were granted
14 conviction appeals, 4 were granted

SENTENCING GOALS
incapacitation: 1
rehabilitation: 1

SENTENCING FACTORS
OFFENCE
method: 3
magnitude and impact: 4
violence, use of weapons, threats: 6

VICTIM CHARACTERISTICS
relationship: 1
relationship of dependency, fiduciary relationship: 2

OFFENDER CHARACTERISTICS
attitude of the offender: 2
behavior after the offence: 1
age: 4
other penalties: 2
previous character: 1
impact of the sentence: 1

SYSTEMIC ACCOMMODATIONS
guilty plea: 3
previous involvement with the justice system: 5
time served in custody: 3

CHILD PHYSICAL ASSAULT
CROWN SENTENCE APPEAL

Far fewer cases were appealed in this category of child assaults. The effect of s. 43 of the *Criminal Code* which allows for corporal punishment, the preference for social work interventions and child welfare proceedings in civil court over criminal law, and the negative effect of precedents from the Court of Appeal have all impacted on decisions to proceed with criminal charges in child physical assault cases. In one case the sentence was appealed by the Crown, and in three cases the defendant appealed. In the case of *R.v.Fabros*, a female daycare provider aged 40 years, was charged with aggravated assault. She denied the offence, and did not take the stand. There were no witnesses, and as a result little is known about the facts of the case.

The *Criminal Code* (s. 268) states that an aggravated assault is committed when someone wounds, maims, disfigures or endangers the life of the complainant. This is a very serious indictable offence, for which the maximum penalty is 14 years imprisonment. The victim was a two year old child in her care. The offender was sentenced to probation only. At the time of the assault she was a nursing mother looking after her own three children and two others, and her family was experiencing financial difficulties as her husband had recently lost his job. While the victim was in her care,

the child sustained extremely serious damage to her liver, her kidney and duodenum. Doctors testified that the injuries were in fact life-threatening. The offender did not seek immediate medical care for the child, who eventually recovered fully from her injuries. The offender also appealed the conviction, but that appeal was dismissed. The Crown appealed against sentence. The Court of Appeal dismissed the Crown appeal, finding that "The case was exceptional and the learned trial judge quite properly regarded it as such" (at p.2). The Court defined the sentencing goal as an "individualized disposition". The gravity of the offence appeared to be measured by the child's complete recovery, which does not appear to be just, as the injuries inflicted were extremely serious and the recovery process was no doubt a very painful one.

Child Physical Assault
Crown Appeal
Sentence Appeal dismissed

SENTENCING GOALS
rehabilitation: 1

SENTENCING FACTORS
OFFENCE
magnitude and impact of the crime: 1
violence, use of weapons, threats: 1

VICTIM CHARACTERISTICS
relationship: 1
vulnerability: 1

OFFENDER CHARACTERISTICS
behavior after the offence: 1

GENERAL FACTORS
inapplicable defences: 1

CHILD PHYSICAL ASSAULTS
DEFENCE APPEALS

In all three appeals by the defendants, all were sentence appeals, with the exception of R.v.Fabros, above. Two out of three of the appeals were granted. There were no cases of child neglect, likely due to a preference for child protection involvement to the exclusion of the criminal justice system. Violence was mentioned in all the cases, as was the relationship between the victim and the offender. However, fiduciary duty/breach of trust was not mentioned in any of the cases. Alcohol and drugs, guilty plea, and previous involvement with the judicial system were also mentioned. The sentencing goal of rehabilitation was identified in two cases, while no mention of any sentencing goal was made in the third case. There were approximately eight times as many prosecutions for sexual assaults against children as compared to physical assaults against children. This is likely related to the screening effects of the corporal punishment excuse in the exercise of police discretion, and case management decisions made by child welfare workers to avoid the criminal justice system in favor of 'family intervention' approaches.

In *R.v.Sansregret* a mother was convicted of common assault of her 11 year old daughter. In this case, as in many others, the facts support a charge of assault causing bodily harm and the lesser charge may be the result of a plea bargain. The maximum sentence for assault is five years, the maximum for assault causing bodily harm is ten years. In this case the victim's head was slammed against a wall several times. She was slapped and punched, then taken outside, slapped several more times, and her head was banged on the ice in the ground. The assaults continued inside and outside the home with the child being dragged up and down the stairs during the assaults. Medical reports verified that the child was suffering from severe facial bruises. The offender was sentenced to 60 days in jail, with a two year supervised probation order attached. The sentence appeal was dismissed. However, the sentence appears to

be lenient in relation to the facts of the offence. The facts also support a charge of assault causing bodily harm, rather than common assault. Rehabilitation was the goal stressed in this case, although the court had been made aware that this offender had a serious alcohol problem which she refused to address.

In the case of another female offender, *R.v.B.(J.),* a grandmother was convicted of assault causing bodily harm following an incident in which she took her five year old grandchild's left hand and placed it on a hot stove element. She was sentenced to eight months incarceration with a one year probation order. The Court noted her "lack of sophistication" (at p.2) and her own experiences of abuse and reduced the sentence to four months incarceration with a one year probation order, with conditions added.

In the third case, R.v.K(M.), corporal punishment was entered as a defence. A father was convicted of common assault and sentenced to a conditional discharge and anger management counseling. He repeatedly slapped, punched and kicked his eight year old son, with sufficient force to severely bruise his back, as noted by a Child Protection Center physician. The defence argued s. 43 of the *Criminal Code*, which justifies reasonable corrective force by a schoolteacher, parent or person standing in the place of a parent. The provincial court judge found the assault was corrective, but that kicking was unreasonable. The sentence imposed appeared to be unusually lenient in view of the offender's previous assault record. Justice O'Sullivan took the opportunity to lash out against the 'zero-tolerance policy' of the Manitoba Attorney General, although this policy was not devised to address assaults against children, and due to s. 43 and civil child protection legislation, it would be of limited utility anyway. As noted by McGillivray (1993) , the judicial stay of proceedings (which means that the judge says that the case should not proceed) contravenes the standards set by the Supreme Court of Canada. Decisions to charge, short of 'flagrant impropriety' are immune from

interference at the appellate level. By staying proceedings in a case which was clearly not the 'clearest of cases', the court exceeded its jurisdiction and set no limits on the 'reasonable' correction of a child. This case underlines the fact that the protections accorded to adults are not accorded to children. As the interests of children must be advanced by proxy through adults, child protection standards vary, according to the philosophies and theories in vogue at the time (McGillivray, 1992). The interest and concern focused on the issue of child sexual assault must be maintained and broadened to encompass the serious problems of child physical assaults and neglect.

Child Physical Assaults
Defence Appeals
3 sentence, 2 granted
1 conviction denied

SENTENCING GOALS
rehabilitation: 2

SENTENCING FACTORS
OFFENCE
violence, use of weapons, threats: 3

VICTIM CHARACTERISTICS
relationship: 3

OFFENDER CHARACTERISTICS
intoxication: 1

SYSTEMIC ACCOMMODATIONS:
guilty plea: 1
inapplicable defenses: 3

ADULT SEXUAL ASSAULT
DEFENCE APPEALS

There were five defence appeals of adult sexual assault cases, of which one was a sentence appeal, *R.v.Q.(S.N.)*, a case of aggravated sexual assault in which an adult male committed a very serious sexual assault against an acquaintance, and in so doing endangered her life by choking her. Medical reports confirmed that the victim

almost died as a result of the assault. The offender was charged with the aggravated sexual assault, anal intercourse and also choking in furtherance of an offence. The *Criminal Code* defines Aggravated Assault as one in which the victim is wounded, maimed, disfigured, or life is endangered. This is an indictable offence and the maximum penalty is life imprisonment. The accused appealed the conviction for the choking offence, but the appeal was dismissed. He also appealed the sentence. The sentence of eight years for aggravated sexual assault and three years concurrent for the anal intercourse was upheld.

The remaining four cases were conviction appeals, three of which were granted. The burden of 'proof beyond a reasonable doubt' becomes very difficult to meet in cases in which there are no witnesses or corroborating evidence, despite *Criminal Code* amendments aimed at ensuring a more just system. In the case of *R.v.N(V.H.)*, the Court of Appeal decision consisted of one sentence: "The appeal is allowed and an acquittal entered" (at p.1). Information from the lower court indicates that the issue was whether the credibility test outlined in *R.v.W.(D.)* (1991) was applied. The test with respect to credibility of evidence as set forth by the Supreme Court of Canada in the aforementioned case states that if the evidence of the accused is believed, an acquittal must be entered. If the evidence of the accused is not believed, but does introduce a reasonable doubt an acquittal must be entered. If the evidence of the accused does not raise a reasonable doubt on its own, the reminder of the evidence must be considered to determine if any reasonable doubt arises from that portion. The Crown had argued that, as the Supreme Court decision was so recently released, a new trial should be ordered. However, the Court of Appeal directed a verdict of acquittal instead. The Court of Queen's Bench had noted that the complainant was a girl of physically 22 years

of age and mentally approximately 14 years of age. The Queen's Bench judge noted that there were some inconsistencies in her evidence. However, the judge found that:

> As in all these cases, it might not exactly have been the way the complainant's evidence came out, but within the terms of the law as it now sits, there was a sexual assault and I therefore find the accused guilty as charged (at p.130).

The defence argued that, in addition to not applying the appropriate test, or in fact any test, with respect to the issue of credibility, the Court erred in not giving due consideration to the principle of reasonable doubt with respect to all the evidence before him. Although a greater range of behavior is now encompassed by the term 'sexual assault', a failure to communicate clearly the specifics of the incident will nonetheless impact on credibility and give rise to a 'reasonable doubt'. Unfortunately, the Court of Appeal decision in this case consisted of one sentence. Chief Justice Scott stated: "The appeal is allowed and an acquittal entered" (at p.1). This does not provide much assistance to the lower courts regarding credibility issues. Similarly, in *R.v.B.(L.)*, the conviction was overturned and an acquittal entered. In this case, again, it was argued that the credibility test outlined in *R.v.D.(W).* was not followed. *R.v.R.(E.D.)* was a case in which the defence argued the 'honest but mistaken' defence of consent. The case involved an adult male and an adult female with cognitive impairments and resulted in a sentence of nine months of incarceration. The accused alleged that the victim complied willingly with the conduct. The Court of Appeal ordered a new trial, stating that there was no consideration given to the potential defence that the offender held an honest but mistaken belief that the victim was consenting to his conduct. Justice Helper dissented, stating that there was "no evidence whatever which would give rise to the 'air of reality' necessary to the defence of honest but mistaken belief by the accused" (at p.4). These cases highlight the fact that convictions in sexual assault cases continue to be very

difficult to sustain, despite legislative amendments which attempted to ensure that sexual assault victims would be treated more equitably by the legal system.

Adult Sexual Assaults
Defence Appeals
1 sentence appeal dismissed
4 conviction appeals, 3 granted

SENTENCING GOALS
none mentioned

SENTENCING FACTORS
OFFENCE
violence, use of weapons, threats: 1

VICTIM CHARACTERISTICS
relationship: 1

ADULT PHYSICAL ASSAULT
CROWN SENTENCE APPEALS

There were three Crown appeals on adult physical assault cases, all three were sentence appeals and all were successful. In the three cases, general and specific deterrence was identified as the primary sentencing goal. The 'lack of planning' of the assaults was noted in two cases. However, the harm caused by the incidents was a factor in all the cases, as was the relationship between the victim and the offender. Alcohol was mentioned in mitigation in two cases. A guilty plea was noted in one case. Previous involvement with the judicial system was mentioned in mitigation in one instance, *R.v.Masse* in which it was noted that the accused "has only one related conviction over a decade ago" (at p.2). Previous involvment was cited as an aggravating factor when the offender was on probation for one assault when he committed another (*R.v.Desmarais).*

The only cases appealed by the Crown were serious assaults. In *R.v.Mitchell* the aggravated assault was severe. Life-threatening injuries resulted, requiring emergency surgery and hospital confinement for 10 days, and the victim continued to

suffer from the brutal beating. Considerable media attention resulted when the sentence for this offence was initially handed down, and this pressure lead to intervention by the Attorney-General. As a result, the Crown was directed to appeal this sentence and the sentence of 18 months was increased to 30 months. This crime carries a maximum penalty of 14 years imprisonment.

The other two assaults were assaults causing bodily harm, for which the maximum penalty is ten years of imprisonment. In *R.v.Vo* the offender seriously assaulted his wife, causing a concussion and bruising. Following the assault, he chased her with a knife. He was sentenced to a two year conditional discharge with probation. Justice Philp noted that the offender had assaulted his wife on other occasions, and stated that:

> Because of his cultural background, it would seem that he is unable to recognize or understand that his conduct is both morally wrong and criminal (at p.1).

The Court of Appeal held that the sentence was unfit but increased it only to a 60 day intermittent sentence, to be followed by a two year period of supervised probation. Cultural background is rarely a factor in mitigating sentence and there is doubt as to whether it should be.

In the case of *R.v.Kaufman* a sentence of 18 months of incarceration followed by 18 months of probation was increased to 24 months less a day of incarceration, with the same probation conditions. This offender was charged with two counts of assault causing bodily harm as well as failure to appear. In the first assault, he attacked the victim, pulling her by the hair, punching, kicking, biting and choking her over a period of five hours. She was choked into unconsciousness. The second victim was punched in the face, breaking her nose. She fell into a glass table, severely cutting her face. He was on bail on the first assault when he committed the second, and was in breach of an

abstaining order. Justice Huband, writing for the Court, stated that "we are all of the view that the sentence, in totality, was too lenient and therefore unfit" (at p.2). It is disheartening to note that the sentences in adult physical assaults, even upon successful Crown appeal, fall short of satisfying a sense of justice regarding the gravity of the offences.

Adult Physical Assaults
Crown Appeals

3 sentence appeals, all granted

SENTENCING GOALS
specific and general deterrence: 3

SENTENCING FACTORS
OFFENCE
method: 2
magnitude and impact of the crime: 1
violence, use of weapons, threats: 3

VICTIM CHARACTERISTICS
relationship: 3

OFFENDER CHARACTERISTICS
intoxication: 2

SYSTEMIC ACCOMMODATIONS
previous involvement with the justice system: 3

ADULT PHYSICAL ASSAULTS
DEFENSE APPEALS

The sentencing goal of deterrence was most frequently mentioned, five times, even when the offenders had not been deterred by their previous involvement with the criminal justice system. Denunciation was mentioned once.

R.v.Dumas was a sentence appeal for assault cause bodily harm and forcible entry. The victim was struck twice, once in the thigh and once in the face. There were no resulting injuries. Three months incarceration and two years supervised probation was decreased to time spent in custody and two years supervised probation. It is unclear

why this offender was charged with assault causing bodily harm instead of common assault, although it is possible that testimony bargaining was a factor in this case.

In contrast, *R.v.Desmarais* was a sentence appeal on a common assault conviction. The offender punched the victim on the back of the head approximately ten times to the right of the face. Injuries sustained by the victim included a lump on the back of her head, a cut on the inside of her left cheek, scrapes on the bridge of her nose and a swollen and scraped right cheekbone. This was the second time in less than two years that the offender was convicted of assaulting the complainant. He had breached probation less than three months earlier. A lack of remorse was noted and he had expressed a willingness to do further harm to her. However, the trial judge thought the charge he was dealing with was assault causing bodily harm and Crown counsel agreed that the trial judge proceeded to sentence on the wrong charge. Deterrence, both general and specific was cited as the sentencing goal although the sentence of 15 months was decreased to time in custody. The most important consideration in sentencing is the proportionality of the sentence to the gravity of the offence and the offender's responsibility. Testimony and plea bargaining are impediments to proportionality.

Adult Physical Assaults
Defense Appeals

3 conviction appeals, all dismissed
5 sentence appeals, 2 granted

SENTENCING GOALS
deterrence: 5
denunciation: 1

SENTENCING FACTORS
OFFENCE
violence and the use of weapons: 5

VICTIM CHARACTERISTICS

relationship: 3
vulnerability: 1

OFFENDER CHARACTERISTICS
attitude: 3
behavior after the offence: 1
age: 1
previous character: 1
intoxication: 1

SYSTEMIC ACCOMMODATIONS
guilty plea: 1
previous involvement with the justice system: 5

GENERAL FACTORS
inapplicable defences: 1

Aggregate Analysis

This analysis will deal with the totals of each section of the table for analysis and will give an indication of the overall trends in Manitoba Court of Appeal decisions in cases heard in the Winnipeg Family Violence Court, 1990-1992. In the 34 sentencing cases, one or more sentencing goals was mentioned in 24 cases. General deterrence was most frequently mentioned, 15 times in total. This is positive, but more research is needed to address some issues. As noted in the previous literature review on sentencing goals, it is the *certainty* rather than the *severity* of punishment that is most likely to exert a deterrent impact (Gibbons, 1992). Studies suggest that the perceived risk of arrest has a significant deterrent effect on certain types of offenders, such as residential burglars (Decker, Wright and Logie, 1993; Nagin and Paternoster, 1991), although the perception of the degree of risk will vary to the extent that a person has the actual experience of being caught and convicted (Horney and Marshall, 1992). This creates many difficulties for the use of this sentencing goal for family violence. Conviction and therefore punishment is never certain but rarely less so than for family violence offenders. Sexual assaults of children and adults are greatly underreported

(Gunn, R. & Minch, C., 1988; Gilberti, 1994). Cases are 'filtered out' at the police and court levels at very high rates (Canadian Panel on Violence Against Women, 1993) and some cases are diverted to the social service system instead. It can be very difficult to secure a conviction in family violence cases (London Family Court Clinic, 1991; Bala, 1990). If family violence offenders are to be deterred through sentencing, changes must be made throughout the criminal justice system to ensure that the majority of cases reach the sentencing stage, otherwise offenders will not be deterred.

Deterrence continued to be mentioned as a goal by the Manitoba Court of Appeal even when the offender had not been deterred by his experience with the courts in the past. In *R.v. Walker* the offender had assaulted the victim on two prior occasions, and in each case, was convicted of common assault and received a non-custodial sentence. He was on probation resulting from the second common assault conviction when he committed assault causing bodily harm on the same victim. Deterrence was the sentencing goal mentioned in upholding the sentence of 12 months plus three years probation. In *R.v.Desmarais* the offender was charged with common assault, although the injuries sustained included a lump on the back of her head, a cut on the inside of her left cheek, scrapes on the bridge of her nose and a swollen and scraped right cheekbone. It is possible that the charge was reduced through plea bargaining, although the courts generally do not mention this in their decisions. Justice O'Sullivan did note that this was the second time in less than two years that the offender was convicted of assaulting the complainant and that the offender had breached probation less than three months earlier. Nonetheless, general and specific deterrence were the sentencing goals mentioned in this case. It may be that family violence offenders will not be deterred by sentencing, in which case other goals such as denunciation or incapacitation would be more appropriate.

Rehabilitation was mentioned as a sentencing goal in five cases. In three of these cases, the unfortunate background or circumstances of the offender was emphasized. In *R.v.D.(M.)* it was noted that the offender had suffered physical abuse and emotional deprivation as a child. In *R.v.Bourassa* the offender's own experiences of abuse, along with her frustration at the child's misbehavior and her own lack of sophistication were cited. In *R.v.B.(F.)* a psychiatrist testified that the offender was in a fragile emotional state and that incarceration over an extended period of time could result in harm to the accused. In *R.v.Fabros* the financial and maternal difficulties of a nursing mother with three children were detailed. In *R.v. Sansregret* the offender's history of abuse and alcohol abuse were cited. In only two of these cases does there appear to be a reasonable expectation of rehabilitation. In *R.v.D.(M.)* the offender made a full confession and cooperated with an assessment by Native Clan, a sexual abuse treatment program. In *R.v.B.(F.)* the offender terminated assaults on his own and began therapy. In *Bourassa* there is no indication that the offender is willing to participate in any type of treatment. In *Sansregret* it was noted that the offender was unwilling to enter alcohol treatment. Public safety can only be increased through rehabilitation if the offender is willing to follow through with treatment. If there is no reasonable expectation of this, then other sentencing goals such as denunciation or incapacitation should prevail. In *R.v.Fabros* the aggravated assault of a two year old child, for which the accused was sentenced to probation, was described by Justice Twaddle as an "exceptional" case (*R.v.Fabros, at p.2*). The appellate judge reiterated the comments of the trial judge who found it to be a sad case and the accused's conduct uncharacteristic of her. There was no indication that the offender was willing to enter treatment, or that treatment was seen as being necessary in this case. The offence resulted in life-

threatening injuries to the child and the sentence, sustained on appeal, is completely at odds with the seriousness of the offence.

Incapacitation was mentioned as a goal in only one case, *R.v.Boone*. The sentence of ten years incarceration was upheld. The offender had a related criminal record and had breached his probation, including an order that he not be alone with persons under the age of 14 years. Justice Twaddle noted the predatory nature of the offender who befriended the victim's mother to gain access to the children. It is difficult, and sometimes impossible, to deter sexual predators and therefore incapacitation through incarceration is a viable goal.

Denunciation was mentioned as a sentencing goal in only three cases. These cases involved very serious assaults, one sexual assault of a twelve year old child which had continued for three and a half years and involved sexual intercourse (*R.v.D.(C.)* and another sexual assault, including sexual intercourse with a 14 year old female described as having a developmental age of less than ten years (*R.v.McGovern)*. The other case, *R.v.Belluk,* involved a physical assault on the victim which lasted 25 minutes. The offender also threatened to kill a friend of the victim with a restricted gun which he had transported to that residence without a permit.

SENTENCING FACTORS

FACTORS RE: CRIME

The method of the crime was mentioned eight times, usually as an aggravating factor due to the lengthy duration of the conduct in child sexual assault cases. The method of the crime was never used to mitigate adult physical assaults by defining them as spur-of-the-moment offences. This could be a positive result of the Manitoba Court of Appeal justices' understanding of family violence as a pattern of

behavior. However the premeditation and planning present in many sexual assault offences, particularly child sexual assault offences, was never mentioned.

The seriousness of the offence is very important in sentencing. However the magnitude and impact of the crime, as defined by the harm done to the victim,was mentioned in only six out of 34 cases. In *R.v.D. (C.)* it was noted that the victim had overdosed three times and spent two weeks in hospital. This is one of only two cases in which the psychological effects are mentioned. In the other, *R.v.Hurd,* the accused grabbed the victim, pulled her behind a school, kissed her and briefly fondled her body on the outside of her clothes. Justice Lyon noted that:

> The complainant has suffered some psychological trauma from the incident, brief as it was, and notwithstanding that there was no physical injury to her (at p.2).

In *R.v.Santos* the victim became pregnant and was left with the unwanted responsibilities of motherhood at an early age. In *R.v.Hiller* the eight year old victim contracted gonorrhea. In *R.v.Masse* life-threatening injuries resulted requiring emergency surgery and hospital confinement for ten days and the victim continued to suffer from the brutal beating. In *R.v.Fabros* it was noted that the assault on a two year old child resulted in serious damage to her liver, her kidney and duodenum. However, it was noted in mitigation that the victim did not suffer any residual problems as a result of the injuries.

In the vast majority of sentencing decisions, no impact on the victim was mentioned. In *R.v.P. (D.E.)* a father committed incest on his teenage daughter. Justice Philp noted that this was a major sexual assault, but also that it consisted of a single act of intercourse with little physical violence. In *R.v.Sansregret* the offender seriously assaulted her eleven year old daughter and Children's Hospital personnel verified the victim was suffering from severe facial bruises. In *R.v.Quast* a doctor testified that she

noted injuries consistent with strangulation and forced anal intercourse. In the doctor's expert opinion, the injuries were most definitely life-threatening. In these serious cases, along with many others, the psychological trauma that would result to the victim from being physically and/or sexually assaulted by someone she or he trusts *is not mentioned.* The seriousness of the crime is one of the most important factors in sentencing and therefore it is impossible to determine an appropriate sentence without assessing the full impact of the crime including residual physical and psychological effects. The fact that the Manitoba Court of Appeal fails to mention the full impact of family violence offences in the vast majority of cases represents a great injustice to the victims and should be remedied.

Motive is always important (Ruby, 1987). Canadian courts are prepared to deal with ordinary motives for crime, but there is a special disdain for crimes committed with certain particular motivations. Motive was never mentioned in any of the cases in this analysis.

Violence and the use of weapons was mentioned frequently, in 28 out of 34 sentencing cases. In *R.v.Quast,* a doctor had testified that various injuries to the victim, consistent with strangulation and forced anal intercourse, were observed. In the doctor's opinion, the injuries were most definitely life-threatening. In *R.v.Mitchell,* the offender assaulted the victim and kicked her repeatedly until she lost consciousness. She was transported to hospital and treated with sutures. A doctor's report described multiple serious injuries to the head. The Manitoba Court of Appeal is adept at considering physical injuries which are an integral part of assaults. However it seems unjust that in these two cases, as in many others which will be discussed further in this section, there is no mention made either of the devastating psychological effect of such serious assaults by an individual whom the victims trusted, or even of the on-going physical

trauma of the violence. One exception is *R.v.Mitchell,* in which it was mentioned (at p.2) that "a scar will result".

FACTORS CONCERNING THE VICTIM

Overall, factors concerning the victim were mentioned 23 times. Vulnerability was mentioned in four cases. The relationship of the victim to the offender was noted in 15 cases. Breach of trust or fiduciary duty was mentioned in only three cases yet it is not the relationship itself that is important but the nature of the relationship and the devastating emotional trauma of assault by a person whom the victim trusts and even loves. In *R.v.P.(D.E.)* a father committed incest on his teenage daughter. Justice Philp noted that this was a major sexual assault, but consisted only of a single act of intercourse with little physical violence. He did not mention the serious breach of trust and fiduciary duty and reduced the sentence to 30 months. The concept of fiduciary duty is important because it reinforces the idea that parents have a duty to care for their children and that abuse is a gross violation of that duty which should result in greater punishment (Neeb and Harper, 1994). Fiduciary duty is also an important concept in civil law and has resulted in successful claims for compensation by child and adult victims of sexual assault.

FACTORS CONCERNING THE OFFENDER

Overall, factors related to the offender were mentioned 31 times in sentencing decisions. Attitude was mentioned as a factor eight times, twice as an aggravating factor and six times in mitigation. In *R.v.M.(B.)* and in *R.v.Mitchell* the court noted that there was no remorse shown by the accused. In *R.v.Mogk* "genuine remorse" was noted (at p.1). The need for caution regarding the use of remorse as a mitigating factor is obvious. Remorse may disappear upon sentencing, and is often replaced by anger at the victim who 'caused' the pain of incarceration. Remorse is particularly hard to justify as a factor

in mitigation in cases in which the offence occurs repeatedly over an extended period of time. In *R.v.D.(C.)*, remorse was noted. The offender had sexually assaulted his 12 year old stepdaughter over a period of three and a half years. The assaults escalated from fondling and masturbation to cunnilingus and digital penetration to repeated acts of sexual intercourse. The assaults only came to light when witnessed by a third party. If the offender was indeed remorseful for his behavior, one would assume that he would have ceased the behavior on his own and/or sought therapy. He certainly had time to do so. A guilty plea is always a mitigating factor, even when it is clearly in the offender's best interest to plead guilty. Restraint and common sense are required when assessing attitude as a sentencing factor in family violence cases, because the behavior which constitutes the offence often continues for many years.

Behavior after the offence was mentioned seven times, four times in mitigation and three times as an aggravating factor. In *R.v.S.(B.)* the offender discontinued his criminal conduct without discovery and turned himself over to the police years later. In *R.v.B.(F.)*, the offender terminated the assaults on his own and began therapy. In *R.v.D.(M.)*, the offender participated in a forensic assessment by a sexual abuse treatment program. It is appropriate that such actions, which are behaviors indicative of "genuine remorse" be considered in mitigation. However the continuation of this positive behavior over the necessary period of time is the important issue, although it is not one which sentencing judges or justices can take into account. Positive behaviors which are impossible to verify should also be regarded as more suspect. In *R.v.D.(C.)* abstention from alcohol was mentioned in mitigation, yet most alcoholics find abstention without treatment to be very difficult to maintain over time.

Two of the three cases in which behavior after the offence was mentioned as an aggravating factor were cases in which continued disregard for the victim was

shown. In *R.v.McGovern* (at p.16) "even after the accused was charged with the offence, he took further advantage of the girl and attempted to have her interfere with the prosecution of the case". In *R.v.Fabros* the offender did not seek medical attention for the child following the assault which resulted in life-threatening injuries. In *R.v.Kaufman* the first assault on one victim was followed shortly thereafter by another assault on another victim. In all of the cases in which behavior after the fact was mentioned as an aggravating factor the behavior was easy to verify.

Age was mentioned five times. It is always mentioned in mitigation. The general rule for most offences is that a sentence should not be imposed on a youthful offender for the purpose of general deterrence, but should rather be directed at his rehabilitation. Nadin-Davis (1982) also points out, however, that for the most serious offences, and in particular crimes of violence, the mitigating effects of age are limited. This does not appear to be the case with respect to some family violence cases heard in the Manitoba Court of Appeal in 1990-92. *R.v.Denny* was a case in which the offender had argued with the victim, his former common-law wife, struck her, removed her clothes, raped her, and physically assaulted her again. The offender had assaulted the victim twice previously and was on bail pending on these charges when the incident occurred. The mitigating effect of age was certainly not limited in this case. Justice Twaddle, for the Court, stated:

> Although there are some aggravating circumstances, it is our view that the offender's age - 18 years at the time of the offence - strongly militates against the penalty which would otherwise have been appropriate (at p.3).

There is no mention made of the age of the victim. The effects of the crime were mentioned in one sentence, focusing as usual on physical violence. "After the accused left, police were called, and took the victim to hospital, where she was treated for minor

injuries" (*R.v.Denny,* p.2). Sentencing involves balancing a variety of factors, and it is not appropriate to have one factor override all other factors, particularly when it is not one over which the offender has control. In the sexual assault case of *R.v.Santos,* the offender was described as "a reasonably young man" (at p.2). In this case the victim was 12 years old when the assaults began, the assaults continued for two years and resulted in pregnancy and the "the victim is left with the unwanted responsibilities of motherhood at an early age" (*R.v.Santos*, at p. 2). It is the task of the defence attorney to put forth all possible factors in mitigation, but the Court of Appeal should use its considerable discretion wisely in deciding which factors should truly mitigate sentence. In *R.v.B.(F.)* the age of the accused (55 years) was also mentioned, with several other mitigating factors. The impact of the crime on the victim, his niece, was not mentioned nor were any other factors relating to her. There is no indication of the victim's age or the breach of trust that occurred. It was noted that an individualized sentence for the "special circumstances of this offender" (*R.v.B.(F.)* at p.2) mitigates sentence for general deterrence. Age of the offender was mentioned in two other sexual offence cases, *R.v.Lacroix* (66 years) and *R.v.Kowtalo* in which the "advanced age of the respondent" was noted (at p.1). It seems unjust that the age of the offender should mitigate sentence when the age of the victim does not aggravate it.

Other penalties were mentioned in mitigation in two cases. In *R.v.Hurd* the offender was hospitalized for three weeks due to injuries inflicted by other inmates while in prison. In *R.v.Starzecki* the offender was a medical doctor who had sexually assaulted several of his patients. The loss of professional license was seen as reducing the importance of individual deterrence as a factor.

Previous good or bad character was mentioned three times, always in mitigation. In *R.v.Lemus,* the offender was of "good previous background" (at p. 2). In

R.v. H. ((J.W.), the offender was "otherwise of good character" (at p. 2). In *R.v.Dumas* "the assault was out of character for the accused" (at p. 2). Behavior in the home is, in most cases, shielded from public scrutiny. Family violence offenders come from all social backgrounds and usually are not be involved in any other type of crime. Family violence offences often continue undetected for many years. As a result of these facts, unique to family violence cases, the use of this factor to mitigate sentence is problematic.

The impact of the sentence on the offender was mentioned in one case. In *R.v.B.(F.)* a report by the offender's psychiatrist noted that his emotional state was fragile and concluded that "incarceration over an extended period of time could result in harm to the accused" (at p.2). Although there were six mitigating factors presented with regard to the accused, only the facts were mentioned regarding the victim and the offense. It was noted:

> These facts involve three separate assaults on the complainant over a period of approximately three years. The assaults, although serious, did not involve sexual assault (at p.2).

It is unjust that a report by a psychiatrist describing the fragile emotional health of the accused and the potential harm of incarceration could be considered in mitigation, without reference to any report detailing the present emotional state of the victim and the harm caused by the offence.

Intoxication was mentioned four times, always in mitigation of sentence although Ruby (1987) stated that in crimes of violence, intoxication is an aggravating factor, or neutral at best. In this analysis, alcohol was mentioned in mitigation in three cases even though there were no indications that the offenders were willing to enter treatment. In *R.v.Kaufman,* a character witness stated that the offender was an alcoholic but felt that he would make progress with counseling related to sexual abuse. In

R.v.Walker, a probation officer felt that the offender would benefit from anger control and alcohol counseling. In *R.v.Masse* it was noted (at p.2) that: "the offender has suffered a lifetime of alcohol abuse. Remarkably, he has only one related conviction over a decade ago." In *R.v.Sansregret* a history of abuse and alcohol abuse lead to a sentencing goal of rehabilitation, even though it was noted that the offender was unwilling to enter alcohol treatment. If there is no reasonable expectation of rehabilitation, the use of alcohol as a mitigating factor in sentencing is questionable.

A guilty plea was mentioned in five cases. As noted by Nadin-Davis (1982) a guilty plea, even without an indication of remorse, is a mitigating factor on grounds that it saves the expense of public trials and the agony of witnesses, and encourages other guilty pleas. In *R.v.Boone* a guilty plea was entered *following* the preliminary hearing in which the victim, a young girl gave testimony regarding sexual touching, cunnilingus, fellatio and simulated sexual intercourse and the young boy gave testimony regarding sexual touching and fellatio. In the four other cases, there was independent corroboration of the assaults. In *R.v.Santos* the child victim became pregnant as a result of the sexual assaults. In *R.v.D.(C.)* the sexual assaults only came to light when witnessed by a third party. In *R.v.Sansregret* Children's Hospital personnel reported the victim was suffering from severe facial bruises. In *R.v.Vo* the victim suffered a concussion and bruising. The benefit to the court system of guilty pleas must be weighed against the principle that sentence must also reflect the severity of the crime.

Time served in custody is always mitigating and was mentioned three times. Pre-trial custody is calculated as being equivalent to two times post-sentence incarceration. In *R.v.P.(D.E.)* it was noted (at p.2) that: "In all of the circumstances, including the pre-trial custody of the accused, the sentence of four years was too long". In *R.v.Hiller* six months in pre-trial custody was mentioned in mitigation and in

R.v.Kaufman time in custody was cited generally. Although the *Criminal Code* states that in determining the sentence to be imposed on a person convicted of an offense a justice, magistrate or judge *may* take into account any time spent in custody by the person as a result of the offence (Nadin-Davis, 1982) it seems unjust to do so as accused persons are denied bail only if it is necessary to do so as a means of ensuring their appearance at trial or of protecting the public (Griffiths and Verdun-Jones, 1994). Section 11(e) of the *Charter of Rights and Freedoms* guarantees the right of a person charged with an offense "not to be denied reasonable bail without just cause". If bail is denied on the basis of previous negative behavior by the offender, he or she should not benefit from time spent in custody at sentencing.

Previous involvement with the justice system was mentioned 14 times. It was mentioned in mitigation in five child sexual assault cases. *R.v.Santos* was typical of these cases. A "lack of related record" was mentioned (at p.2). The literature review section of this thesis reviewed the under-reporting of sexual assaults and the filtering out of cases at the police and court levels, particularly in cases of child sexual assault and it is clear that there are many barriers to conviction in child sexual assault cases. These problems must be overcome in order for this sentencing factor to be as relevant for child sexual assault offences as it is for property offenses. The one child sexual offence case in which previous involvement was used as an aggravating factor, *R.v.Sutherland,* was a case of sexual interference against a 14 year old girl who was not related to the offender. The accused's substantial record (including a prior conviction for having sexual intercourse with a person under the age of 14) was mentioned. Previous involvement with the justice system was mentioned in eight cases of adult physical assaults, five times in mitigation (no related convictions) and three times as an aggravating factor. In *R.v.Kaufman* the offender "had no previous related record" although he was tried for two

assaults at the same time and the second offence occurred while he was on bail for the first. Previous convictions were mentioned as an aggravating factor in *R.v.Walker.* The offender had assaulted his common-law wife on two prior occasions. In each case he was convicted of common assault and received a non-custodial sentence. He was on probation resulting from the second common assault conviction when he committed assault causing bodily harm on the same victim. In *R.v.Desmarais* the offender was convicted of assaulting the complainant twice in less than two years, breached his probation less than three months earlier and expressed a willingness to do further harm to the victim. In both of these cases, deterrence was stated as the sentencing goal. More research needs to be done to determine whether or not family violence offenders are likely to be deterred by sentencing. If this is not the case, as it appears, then other sentencing goals such as denunciation and incapacitation should replace deterrence.

Inapplicable defenses or excuses in mitigation were mentioned in six cases, four times in child physical assaults, once in a child sexual assault and once in an adult physical assault case. In *R.v.Sutherland* the offender was convicted of having intercourse with a person under 14 years of age. The defense argued that the victim consented and was 'streetwise'. In *R.v.D.(M.)* the offender's childhood physical abuse and emotional deprivations were noted. In *R.v.Bourassa* the accused's lack of sophistication, frustration and own experiences of abuse were noted. It was submitted in mitigation that the accused, in *R.v.Fabros,* was a nursing mother of three children, whose husband had recently lost his job which resulted in financial difficulties for the family. In *R.v.Sansregret* the accused's history of abuse was mentioned along with the medical condition of epilepsy. In *R.v.K. (M.)* the legitimate correction of a child by force, as set out in section 43 of the *Criminal Code,* was argued as a defence. This was rejected at trial. The Court of Appeal did not discuss the defence but stated that his

conduct was excused and that the case should never have been proceeded with. A stay of proceedings was entered. The only adult physical assault case in which excuses in mitigation were mentioned, the 'sad' and 'tragic' background of the offender was noted, in *R.v.Kaufman.*

With respect to conviction appeals, there were four defense appeals of adult sexual assaults. Three were granted. No automatic assumptions of lack of reliability arise because of the age or the nature of the complaint in these cases. There must now be an evidentiary basis upon which to infer that a witness' evidence is, or may be, unreliable. However the bias against finding the testimony of women and children to be credible, particularly in sexual assault cases, continues despite amendments enacted to remedy this bias. In *R.v.B.(L.)*, an adult sexual assault case the trial judge stated that he believed the victim and not the evidence of the accused and therefore found him guilty. Defence counsel argued that the trial judge did not consider the issue of whether the accused's explanation might reasonably be true. The Manitoba Court of Appeal overturned the conviction. This case was similar to *R.v.N.(V.H.),* an adult sexual assault case in which the conviction was overturned for the same reason. In *R.v.R.(E.D.)*, an adult sexual assault case, the accused alleged that the victim complied willingly with the conduct. The Court of Appeal ordered a new trial, stating that there was no consideration given to the potential defence that the offender held an honest but mistaken belief that the victim was consenting to his conduct. Justice Helper dissented, stating that there was no evidence whatsoever that would give risk to the "air of reality" necessary to the defence of honest but mistaken belief by the accused.

With respect to conviction issues, in 14 defense appeals of conviction in child sexual assault cases, four were granted. In *R.v.F.(J.)* the jury brought in a guilty verdict against the offender on three of four counts of sexual offences pertaining to two

complainants. On appeal, the offender argued that the trial judge had erred in failing to instruct the jury that the cumulative effect of the evidence of the complainants was not to be considered in determining guilt on each count of the indictment. The judge noted that when two or more counts of charges, or a single charge, are heard together, absent a formal finding of similar fact evidence, the trial judge is obliged to warn the jury that the evidence on one count cannot be used to support the evidence on the other count or counts. The appeal was allowed and a new trial ordered. In *R.v.F.(L.)* the accused was convicted at trial. The Crown and defense attorneys were both of the view that the conviction should not stand. There were two grounds of appeal, an overly aggressive and improper cross-examination of the accused, and a crucial error in a finding of fact by the trial judge. A new trial was ordered. In *R.v.B.(J.)* the credibility of the complainant was at issue. The Court of Appeal was unable to ascertain whether, in the circumstances of this case, given the rejection of so much of the complainant's testimony, it was proper to convict on the balance of her testimony. A new trial was ordered. In *R.v.R.(E.)* the credibility of the child victim/witness was the issue. Two justices of the Court of Appeal found the evidence of the ten year old child to be unsatisfactory and granted an acquittal. There was one unsuccessful appeal of a child physical assault conviction and four unsuccessful appeals of adult physical assault convictions. This is not surprising, as the majority of physical assault cases resulted in bodily injuries which were relatively easy to document.

As noted by Holsti (1969), the end of content analysis is but an arbitrary point in time. It is now time to move on to the next section, conclusions.

Conclusions

Manitoba Court of Appeal decisions in cases heard in the Winnipeg Family Violence Court, 1990-1992 have been analyzed from a number of frameworks. The

aggregate analysis identifies important issues in the way in which the Manitoba Court of Appeal decisions deal with family violence cases. In sexual assaults of both children and adults, credibility issues are paramount. The test with respect to credibility of evidence as set forth by the Supreme Court of Canada in *R.v.W.(D.)* (1991) states that if the evidence of the accused is believed, an acquittal must be entered. If the evidence of the accused is not believed, but a reasonable doubt exists by it an acquittal must be entered. If the evidence of the accused does not raise a reasonable doubt on its own, the remainder of the evidence must be considered to determine if any reasonable doubt arises from that portion. The court has considerable discretion in deciding conviction issues. Bias against finding the testimony of women and children to be credible, particularly in sexual assault cases, has persisted despite amendments enacted to remedy this bias.

The sentencing goal of deterrence was most frequently mentioned, 15 cases out of 34. However, some related issues need to be addressed. It is the *certainty* rather than the *severity* of punishment that is most likely to exert a deterrent impact. Studies suggest that the perceived risk of arrest has a significant deterrent effect on certain types of offenders, although the perception of the degree of risk will vary to the extent that a person has the actual experience of being caught and convicted. Family violence offences are greatly under-reported. Cases which are reported are often 'filtered out' at the court level. Significant barriers to conviction continue to exist in cases where there are no witnesses and there is no evidence of physical injuries. If family violence offenders are to be deterred through sentencing, changes must be made throughout the criminal justice system to increase the rate of successful prosecutions in relation to the rate of offending. Otherwise, offenders will not be deterred. Further research is required

to determine whether deterrence is an effective, and therefore appropriate, sentencing goal.

Sentencing factors which exclusively mitigate sentence were mentioned frequently. Time served in custody, guilty plea, age, impact of the sentence and other penalties are always mitigating and were mentioned 16 times in sentencing decisions. Sentencing factors which could aggravate or mitigate sentence, such as previous involvement with the judicial system, attitude and behavior after the offence were mentioned primarily in mitigation of the sentence. Alcohol, which is usually considered to be an aggravating factor, or neutral at best, in crimes of violence, was always considered in mitigation of sentence due to the potential for rehabilitation, even when the offender had not expressed a willingness to enter treatment. The accused and his or her interests are represented in court, but the victim/witness has no true representation. The Crown attorney has a duty to represent the public interest, while the defence attorney is solely an advocate for his or her client.

The method of the crime was always mentioned as an aggravating factor, in eight cases out of 34, in reference to the long duration of the conduct in child sexual assault cases. However the planning and premeditation present in many sexual assault cases, particularly child sexual assault cases, was not mentioned as a sentencing factor although it was alluded to in the facts of the case. Motive was also not mentioned. Although the relationship of the victim to the offender was mentioned in 15 cases, the Court of Appeal noted the breach of trust in only three cases. This shows little recognition of the fact that it is not just the legal relationship itself that is important but rather the *nature* of the relationship and the devastating effect of an assault, or continued assaults, by a person whom the victim trusts or perhaps even loves. Violence and the use of weapons is always an aggravating factor and was mentioned in 28 out of

34 sentencing decisions. However, the magnitude and impact of the crime on the victim, its severity, was noted only six times. The psychological impact of the offence was noted in only two of these cases. Manitoba Court of Appeal decisions in cases heard in the Winnipeg Family Violence Court, 1990-1992, failed to consider, in the vast majority of cases, the most important factor in sentencing which is the severity of the crime as defined by the physical, emotional and financial harm done to the victim. The most important consideration in sentencing is the proportionality of the sentence to the gravity of the offence and the offender's responsibility. Respect for the law is not preserved if sentencing strays too far from the public's perception of gravity and responsibility. However proportionality cannot be determined until the seriousness of the offence is acknowledged by the courts. By failing, in the vast majority of cases, to give legal weight to the seriousness of the crime as defined by its impact on the victim, the Court of Appeal reinforced and legitimized the minimization of family violence offences. Education of judges in new classes of harms, victims and offenders is appropriate (McGillivray, 1988). It is necessary in family violence cases, both physical and sexual, to ensure justice for victims and the community and respect for the law. It is evident that the creation of the specialized Family Violence Court has not resolved the systemic problems related to conviction and sentencing issues in family violence cases. The next chapter outlines recommendations for reform resulting from this study.

8. RECOMMENDATIONS

Introduction

In the last decade, dozens of reports, studies and critiques of domestic violence and its effects on Canadian (and Winnipeg) women have been produced, among them the Aboriginal Justice Inquiry (Manitoba, 1991), the Domestic Violence Review into the Administration of Justice in Manitoba (1991), The War Against Women: Report of the Standing Committee on Health and Welfare, Social Affairs, Seniors and the Status of Women (Subcommittee on the Status of Women, 1991), the Final Report of the Canadian Panel on Violence Against Women (1993) and the Commission of Inquiry into the Deaths of Roy Lavoie and Rhonda Lavoie (Schulman, 1997). Many hundreds of recommendations have been made for decreasing violence and improving system response. Cases examined in this study also highlighted the need for changes in order to assure that justice is achieved for victims of family violence. The following are three recommendations for improving the court system's response to family violence in Manitoba.

1. A victim impact statement program should be instituted in Manitoba on a permanent basis.

An analysis of 34 sentence appeals in the study reveals that the magnitude and impact of the crime was mentioned as a factor in sentencing in only six out of 34 cases. In the majority of the cases no information pertaining to the serious nature of the crime, other than the victim's age and the criminal charge, were mentioned. This has a significant negative impact on the ability of the courts to sentence appropriately as the seriousness of the crime is one of the most important aspects of sentencing. Victim impact statements could alleviate some of the difficulties in this area and give victims an opportunity to inform the courts of the impact of the crime on their life. This would serve

an educative function to the judiciary and would assist the judge or justices in assessing the seriousness of the crime when making sentencing decisions.

In 1986 the federal Department of Justice, in conjunction with provincial justice departments, initiated six demonstration Victim Impact Statement projects in Canada. The VIS initiative was launched to encourage victim participation in the criminal justice process and ultimately enhance victim satisfaction with the proceedings. Winnipeg was one of the demonstration sites and the project operated for three years.The Winnipeg VIS project focused on the victims of five specific types of crime. These were assault causing bodily harm, assault with a weapon, aggravated assault, sexual assault and noncommercial robbery. However, 'wife abuse' cases were excluded because of the sheer volume of cases. It was felt that the their inclusion would create an unrealistic workload for the single victim impact worker assigned to the project in Winnipeg. However it was noted that the board would support extension of services to victims of other types of crimes, following a positive evaluation of the Winnipeg project. Victims of crimes against the person were presented with an opportunity to provide a written account, for use in court, of the impact of the criminal offence upon them. Included in the VIS was information concerning the physical, emotional and financial effects of the offence. An evaluation of the project (Department of Justice, Research Section, 1990) revealed substantial support (81%) for the program among victims who participated in the program. The information contained in a VIS is not routinely available to the courts from other sources. The Department of Justice, Research Section (1990) noted that:

> A comparison of victim impact statments and police reports did indicate that there was some similarity in the reporting of whether the victim received any physical injuries. It was found, however, that the VIS contained substantially more detail

> relating to the treatment of and ongoing effects of the injury. It was also found that the VIS more frequently contained information concerning the crime's financial impact than did police reports. Finally, evaluators found that the victim impact statements were the only current and available source from which the courts could routinely obtain information on the emotional impact of the crime on the victim (at p. xix).

However, difficulties were encountered with having the VIS introduced as evidence in court. This issue has been addressed in changes to the *Criminal* Code but a permanent VIS program must be developed for the province. This is a matter of justice policy and hopefully the new NDP Justice Minister will consider implementing a VIS program for the province.

The legislative authority for victim impact statements is found in the *Criminal Code of Canada,* Section 735(1.1-1.4). A 1985 amendment to the *Criminal Code* permitted the introduction of victim impact statements. In 1995 the *Criminal Code* was again amended with respect to victim impact statements. Section 722(1) states that "the court shall consider any statement that may have been prepared...describing the harm done to, or loss suffered by, the victim arising from the commission of the offence" in deciding on disposition. McGillivray (1998) notes:

> This is as strong a signal as the Code can send to the Crown to invite victims to prepare and submit statements. Yet victim impact statements are rarely used in Manitoba courts (at p. 371).

A Victim Impact Program would assist judges to accurately assess the gravity of the offence, particularly in family violence cases.

The *Criminal Code* was amended in 1997 to include a statement regarding the purpose and principles of sentencing in section 718. The principles summarized those developed by the courts as a matter of common law. The fundamental principle is that a sentence must be proportionate to the gravity of the offence and the degree of

responsibility of the offender. Section 718.2 of the *Criminal Code* states that evidence that the offender abused his or her spouse or child, or abused a position of trust or authority in relation to the victim shall be seen as an aggravating circumstance. Although it is unclear how much weight will be attached to these broad guidelines by sentencing judges there is, for the first time, a statement in the *Criminal Code* that child abuse and/or breach of fiduciary duty 'shall' be considered an aggravating circumstance which will impact on sentencing. However, in order for these amendments to have any effect on the practice of judicial decision-making, more information on the effects of family violence must be provided to the courts. Although the effects of family violence often share some similarities among offence types, victims in individual cases are best qualified to identify the crime's effect on them. The perspective of victims needs to be heard in court, and the Victim Impact Statement program is a very important means of achieving this goal. In order for a Victim Impact Statement program to be implemented in Manitoba, the government must designate the establishment and protocols of the program and ensure on-going funding. Similar recommendations have been made in the Pedlar Report (Pedlar, D., 1991 at p. 12) and Changing the Landscape: Ending Violence, Achieving Equality (The Canadian Panel on Violence Against Women, 1993 at p. 53).

2. Workshops which focus on violence against women and related gender-equality issues, and on child abuse and related children's rights issues, should be made available to all members of the legal community, including justices and judges, lawyers, and law students.

The cases in this study highlight the fact that judges are often unaware of the effects of family violence and therefore have some difficulty assessing the gravity of the offence in sentencing decisions as noted above. Behaviors which are common to child

victims of sexual assault, such as waiting until they are in a safe place to disclose and disclosing only to a trusted individual, were seen as impacting negatively on credibility. Overtly sexualized behavior, particularly in young children, is also common to child victims of sexual assaults. In one case in the study this behavior was seen as a mitigating factor in sentencing as the victim was viewed as having initiated the sexual act. A full knowledge among Court of Appeal justices of the nature and effects of family violence is necessary to understand its impact on victim-witnesses which may influence perceptions of credibility and factors in sentencing. Without this understanding, the bias against finding the testimony of women and children to be credible, particularly in sexual assault cases, may continue to be a factor in decisions due to the importance of appellate decisions as precedents to be referred to by the lower courts. Although it is very likely that some judges and justices have educated themselves about violence against women and gender equality issues as well as child abuse and children's rights issues, it is necessary that *all* members of the legal community increase their awareness of these issues. The course content should be developed in consultation with organizations and front-line agencies that work with abused women, as well as legal professionals. The provincial government should take the initiative to develop and fund these workshops. This is similar to the recommendations made by the Sub-Committee on the Status of Women (1991, at p. 27) and the Canadian Panel on Violence Against Women (1993 at p. 52).

3. Manitoba Court of Appeal decisions should outline the facts of the case, sentencing goals and the mitigating and aggravating factors considered in determination of the sentence. Evidentiary issues related to conviction, such as the credibility of victim/witnesses, should also be identified in all cases.

As noted by McCormick (1992) and Mohr (1994), Manitoba Court of Appeal decisions are very brief and the cases in this study certainly fit that pattern. In one case of sexual assault, a previous finding of guilty was overturned and the accused was acquitted. The decision, consisting of one sentence, did not provide any information about why the lower court decision was overturned. Decisions which do not include information regarding goals, factors, and credibility issues in addition to the facts of the case do not provide adequate direction for the lower courts. Decisions of this nature also do not allow interested parties to examine the issues related to conviction and sentencing nor do they deal fairly with victims. Although victims may not always be satisfied with the outcome of a trial, they deserve to know why a decision was made. Appellate decisions are also the precedents upon which legal decisions in the province are made. Lawyers refer to Manitoba Court of Appeal decisions when deciding whether, and how, to proceed with a case. Provincial Court judges and Queen's Bench justices refer to appellate decisions when adjudicating similar cases. Issues related to conviction and sentencing need to be outlined by the Manitoba Court of Appeal in all decisions of the appellate court.

9. OVERVIEW

Observations and findings made apply only to Manitoba Court of Appeal decisions in cases heard by the Winnipeg Family Violence Court in 1990-1992. The data set of 46 cases is small, but consists of all the cases dealing with conviction and/or sentencing issues and is not a sample. However content analysis could only be carried out on the sentencing decisions. As conviction issues are of fundamental importance, conviction appeals were examined with respect to the amended laws. The brevity of some of the appellate court decisions was also problematic. Carney (1979) notes that content analysis is a technique designed for processing abundant data. It requires a certain minimum amount of documentation before it will work properly. In order to overcome this difficulty the lower court decisions and the factums were referred to in some cases. As a result, more inference was required when analyzing the data in these cases which may have had some impact on reliability.

Other limitations of the study relate to the method of analysis. Theoretically oriented content analysis, as defined by Carney (1979) is more subjective than classical content analysis, but is capable of providing more in-depth analysis of complex issues. However the use of theories to create categories and to code data does require inference and therefore reliability may be decreased. The use of themes rather than words as recording units also makes precise categorization more difficult.

All of my learning goals were met. I learned more about content analysis as a methodology, and specifically how theoretically oriented content analysis can be used in a quantitative manner to provide information on implicit underlying trends in data. I learned that the legislative changes regarding sexual assault and rules of evidence were having a positive effect in a few cases, but that significant problems related to credibility issues remained. I discovered that although the magnitude and impact of the crime is

one of the most important factors considered in sentencing, it is frequently not even mentioned in sentencing of family violence cases. I learned that the specialized Family Violence Court has not resolved the systemic problems related to conviction and sentencing in family violence cases. Overall, I learned a great deal about the limits of legal reform. I feel this study was important to the field of social work because it is not enough to lobby for change, it is also important to monitor whether the changes made have had the positive effect which was intended. If this is not the case, the social work profession needs to continue to make recommendations and lobby for further changes to achieve justice for victims of family violence. With respect to conviction and sentencing issues in family violence cases, a great deal of work remains to be done.

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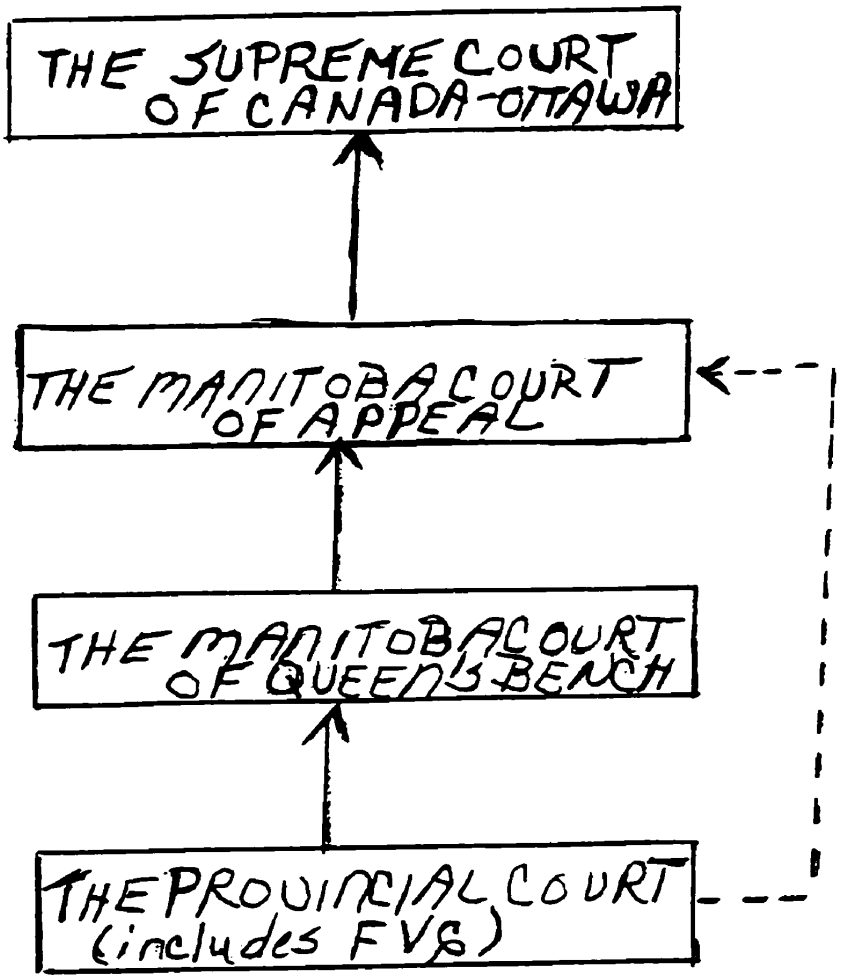
THE COURT SYSTEM IN MANITOBA



LEGEND: ⟶ APPEALS OF SUMMARY CONVICTIONS

⇢ APPEALS OF INDICTABLE OFFENCE CONVICTIONS

Legend to the Appendix
Conviction and Sentencing Decisions

This legend is based on McGillivray (1988).

(Criminal Code Section) (maximum penalty)

N= (case name) (date of Court of Appeal decision) (name of lower court) (type of charge)

Where surnames are cited in full in the law reports for sexual abuse cases, these have been changed to an initial to protect the child victim's privacy, consonant with the Badgely Committee recommendations. This is also the case with adult sexual abuse cases. When information from the lower court is used in the study, an asterik (*) will appear next to the type of charge on the first line.

CC = criminal code charge/s

S= (sentence)

R= (relationship of offender and victim, and age where known)

age of child = at first occurrence, where available
father/mother = birth parent
common-law stepfather includes "boyfriend", live-in or similar relationship with the mother of the child giving regular access and some caretaking and disciplinary authority over the victim, as disclosed by the facts of the case

C= (coram, judges presiding on the case)

F = (facts)

M= (mitigating factors)

P= (major precedents cited)

A = (aggravating factors)

G = (goals of sentencing in the case)

Conviction Decisions

Conviction cases include the following information, in addition to the above information.

I= (the issue/s at trial)

O= (the outcome)

D= (dissent, if any existed)

APPENDIX

CHILD SEXUAL ASSAULTS

s. 155 Incest (Maximum: 14 years)

N = R.v.P. (D.E.) January 6, 1994 Court of Queen's Bench Indictable *
CC= Incest
C = Philp, Helper and Kroft
S = incest; conviction appeal dismissed and sentence appeal 4 yrs. > 30 mths
R = father; teenage daughter
F = major sexual assault; single act of intercourse with little physical violence
P = R.v.D.(C.) (1991), 75 Man.R.(2d) 14.
M = pre-trial custody of the offender (seven and one-half months) along with the other circumstances did not warrant 4 yrs.

N= R.v.K.(A.) October 27, 1993 Court of Queen's Bench Indictable *
C= Twaddle (dissenting) and Helper and Hanssen
CC= Incest (historical)
S = unknown
R= father; daughter
I= The adequacy of the charge to the jury.
O= The trial judge's failure to recite the "ideal" formula suggested by Cory J. in R.v.W.(D.), (1991) 1 S.C.R. 742 did not constitute a misdirection, therefore the appeal was dismissed.
D= Twaddle dissented, noting that instructions on the issue of credibility cannot, in his view, be reduced to any particular formula. Twaddle found that the shortcomings of the charge were such as to constitute legal misdirection. He would have accordingly allowed the appeal and ordered a new trial.

S. 271 Sexual Assault (Maximum: ten years)

N= R.v. D. (C.) October 8, 1991 Provincial Court Indictable
CC= Repeated Sexual Assault
S= 2 years plus 3 years supervised probation increased to 4 years incarceration
C= Philp, Twaddle and Lyon
R= stepfather; stepdaughter 12 yrs.
F= sexual assaults over 3 and one-half years; escalated from fondling and masturbation to cunnilingus and digital penetration to repeated acts of sexual intercourse
M= remorse; guilty plea; acceptance of responsibility; acceptance of psychiatric treatment; abstention from alcohol
A= victim had overdosed three times and spent two weeks in the hospital; length of time of assaults, escalation in severity; assaults only came to light when witnessed by third party
P= Sandercock (1985), 22 C.C.C. (3d) 79 (Alta. C.A.)
G= denunciation and deterrence; establishment of a new category of major sexual assault in a family relationship
D= Lyon concurred with result and reasons, disagreed with need for the starting-point sentence to be raised from three years to four or five years

N= R. v. L. (C.) December 10, 1991 Court of Queen's Bench Indictable
CC= Sexual Assault
S= suspended sentence increased to nine months incarceration
C= Scott, Lyon and Helper
R= unknown; adult aged 22 yrs; girl aged 12 yrs.
F= intercourse occurred four times
M= finally admitted his offense; good work record; good previous background
A= age of girl known to him
G= general and public deterrence; sentence to appropriately reflect society's view of the gravity of the circumstances

N= R. v. S. (B.) October 8, 1992 Provincial Court Indictable
CC= three counts of Indecent Assault, one count of Sexual Assault
S= one year gaol plus two years probation on each offence, to be served concurrently < two years less a day incarceration plus two years' probation on each count concurrent
C= O'Sullivan, Lyon, Helper
R= uncle and father; niece and two daughters
F= the offences involving the niece and one of the daughters consisted of touching and fondling; the offences involving the third complainant continued over four years and culminated in sexual intercourse
M= the offender discontinued his criminal conduct without discovery; turned himself in to the police years later
A= lengthy duration of the conduct
G= general deterrence, denunciatory sentence
P= R. v. C.D. (1991), 75 Man. R. (2d) 14 (C.A.)

N= R. v. B. (C.) December 10, 1991 Provincial Court Hybrid
CC= one count of Sexual Assault and two counts of Sexual Touching
S= 90 days intermittent gaol increased to 2 years gaol plus 2 years supervised probation
C= Scott, Lyon and Helper
R= father; three young daughters
F= fondling, licking and the sucking of breasts over a period of years
M= no prior record; candidate for rehabilitation
A= conduct continued over extended period of time
G= general deterrence

N= R. v. D. (M.) October 8, 1991 Provincial Court Indictable
CC= Repeated Sexual Assault
S= 2 yrs. incarceration plus 3 years probation - appeal dismissed
C= Scott, Twaddle and Lyon
R= stepfather 30 yrs; young stepdaughter
F= repeated sexual assaults over several years; initially fondling then digital penetration, oral sex, masturbation and an attempted act of sexual intercourse; accused occasionally dressed the child in adult lingerie and showed her pornographic pictures and videos

M= full confession; cooperation with forensic assessment by Native Clan; no criminal record; physical abuse and emotional deprivations as a child
P= R. v. Sandercock (1985), 22 C.C.C. (3d) 79 (Alta. C. A.); R. v. C. D. (released contemporaneously)
G= rehabilitation: successful treatment of the accused will better serve the interests of society than a longer, more denunciatory term
D= Lyon agrees with R. v. Sandercock, would increase to three and one-half years

N= R. v. F. (J.) January 13, 1992 Court of Queen's Bench Hybrid
G= conviction and sentence appeal
C= Huband, Philp and Twaddle
CC= Sexual Assault and Gross Indecency
R= adult, girl
F= offender and the girl's mother were good friends, the girl spent overnights at the accused's home, offender fondled her breasts and vagina after removing her pajamas during the first assault; second assault involved digital penetration and fondling of breasts; third assault involved same acts as the second however offender also made her masturbate him to ejaculation; offender agreed on the record that the evidence of the victim given at the preliminary hearing was not in dispute
I= accused appealed the decision not to allow the withdrawal of his guilty plea
O= conviction appeal dismissed, leave to appeal sentence was refused
S= 6 months, plus supervised probation for three years; offender had spent five months in pre-sentence custody

N = R.v. B.(F.) February 18, 1993 Provincial Court Indictable *
CC= one count of Indecent Assault and one count of Sexual Assault
C = Huband, Lyon and Helper
S = 14 mths and 3 yrs supervised probation decreased to 9 months and 3 yrs supervised probation
R = uncle; niece
F = three separate assaults over three years; serious assaults but did not involve sexual assault
M = age of the accused (55); very good work record; terminated assaults on his own; began therapy, therapist stated incarceration over an extended period of time could result in harm to the accused
G = individualized sentence for the "special circumstances of this offender" mitigates sentence for general deterrence

N = R.v.B.(S.J.) September 13, 1993 Provincial Court Indictable *
S = 10 years incarceration, upheld
R = children of a friend, baby-sitting
CC = Sexual Assault (X2), Breach of Probation
C = Twaddle, Helper and Kroft JJ.A.
F = offender befriended the mother, then sexually assaulted the two victims in his own home and their home while baby-sitting them; sexual touching, cunnilingus, fellatio and simulated intercourse with the girl; sexual touching and fellatio with the boy

A = related criminal record, breach of probation, including order that he not alone with persons under the age of 14 years; predatory nature of the offender who befriended the victim's mother to gain access to the children
M = guilty plea after preliminary inquiry
G = long-term protection of the public (incapacitation)
T = sentence appeal and appeal of parole ineligibility

N = R.v.F.(L.) October 10, 1991 Provincial Court Hybrid *
CC = Sexual Assault
C = Scott, Philp and Helper
S = six months incarceration, conviction appeal
R = mother; infant son
F = mother was accused of a single act of fellatio on her three year old son allegedly witnessed by her estranged husband but only reported sometime subsequent to the separation and after the husband had sought legal counsel as to commencing a contested divorce and marital property action against the wife
I = accused was convicted at trial, Crown and defence were of the view that the conviction should not stand; two grounds of appeal, an overly aggressive and improper cross-examination of the accused, and a crucial error in a finding of fact by the trial judge
O = new trial ordered

N = R.v.R.(E.) April 21, 1992 Court of Queen's Bench Indictable *
CC= Sexual Assault
C = Philp and Lyon, Helper dissenting
S = 4 years incarceration
R = stepfather; stepdaughter aged 7 yrs.
O = acquittal
F = child was sexually assaulted on March 1, 1988 and examined that evening at hospital, physical injuries consistent with sexual assault were noted; judge found the evidence of the 10 year old child to be unsatisfactory
D = Helper dissented, noted that the young victim did not waiver in her assertion that the accused was the perpetrator

N = R.v.S.(F.M.) February 18, 1991 Provincial Court Indictable
CC= Sexual Assault
C= Huband, Philp and Lyon
S = 5 yrs decreased to 4 yrs
R = adult; 12 year old child
F = victim was 12 yrs old when the assaults began, continued for 2 yrs; victim became pregnant and gave birth to a child; unwilling participant throughout
P = Sandercock (1986) 1 W.W.R. 291
M = youth of the offender; lack of related record; confessed and entered guilty plea
A = assaults over an extended period of time; offender living in the same household took advantage of a child who had recently immigrated to Canada; the victim is left with the unwanted responsibilities of motherhood at an early age

N = R.v.B.(J.) May 13, 1991 Provincial Court Indictable
CC= Sexual Assault

C = Scott, O'Sullivan and Twaddle
S = conviction appeal - new trial ordered
R = father; 14 yr old daughter
F = a number of distinct assaults
I= credibility of complainant; not able to ascertain whether in the circumstances of this case, given the rejection of so much of the complainant's testimony it was proper to convict on the balance of her testimony

N = R.v.H.(J.W.) March 27, 1992 Provincial Court Indictable
CC= Sexual Assault
C = Philp, Lyon and Helper
S = 9 mths and 2 yrs supervised probation decreased to 90 days intermittent
R = adult; 14 yr old girl
F = accused grabbed her, pulled her behind a school, kissed her and briefly fondled her body on the outside of her clothes
A = complainant suffered some psychological trauma
M = offender had no previous record, otherwise of good character; had already served five weeks incarceration, including three weeks' hospitalization for injuries inflicted on him by other inmates while in prison
G= sentence was too severe and therefore unfit
P= R.v.Stuart, unreported decision date May 7, 1991

N = R.v.L.(H.J.) January 8, 1991 Provincial Court Indictable *
CC= Indecent Assault and Sexual Assault
C = Huband, Philp and Lyon
R = adult; young girl and young boy
F = indecent assault and sexual assault with respect to the girl; gross indecency with respect to the young boy
S = conviction appeal and sentence appeal - both dismissed; sentenced to two years on each charge to be served concurrently
F = defence argued a miscarriage of justice, the way the trial was conducted was unfair to the accused
O = evidence supported finding of guilty beyond a reasonable doubt; sentence imposed was not unfit
M = age of offender (66 yrs), ill health of offender
A = on the facts

N = R.v. S.(H.) November 1, 1993 Court of Queen's Bench Indictable *
CC= five counts of Sexual Assault and one of Indecent Assault
C = Twaddle, Helper and Kroft
S = conviction appeal, alleged miscarriage of justice resulting from procedural decisions or irregularities at trial - appeal dismissed
R = medical doctor; 6 young female patients, some teenagers
F = offender sexually or indecently assaulted the young patients during medical examinations; severance of the charges did not lead to miscarriage of justice; overexuberant Crown prosecutor balanced by trial judge's interventions; expert witness' opinion dealt with by trial judge's careful instructions to the jury
S = 5 yrs for five offences of sexual assault and one of indecent assault - sentence appeal dismissed

A = offence involved five different young women, most in their teens; some of the offences occurred over a period of years; effect of these offences on the victims was devastating;
M = offender's age; loss of professional license makes the need for individual deterrence less of a factor

N = R.v.S.(B.) September 6, 1991 Court of Queen's Bench Indictable
CC= Sexual Assault
S = conviction appeal, one charge of sexual assault - Court of Appeal satisfied that the trial judge applied the law correctly and did not simply move on to convict the offender as an automatic response to his rejection of the accused's credibility
C = Scott, O'Sullivan and Lyon
R = stepfather; stepdaughter
F = several incidents occurred over a period of seven months
P = many, including D.W. v.R. (unreported decision released March 28, 1991); R.v.Laramee (unreported decision released June 18, 1991 (Man. C. A.)

N = R.v.W.(A.) June 23, 1992 Court of Queen's Bench Indictable •
CC= one charge of Rape and two of Sexual Assault
S = conviction and sentence appeal; four and a half years to three and a half years
C = Scott, Huband and Twaddle
R = adoptive father; daughter
I= learned trial judge the issue as being one of whether to believe the only Crown witness or the offender in the conviction appeal, verdict was unreasonable; with regard to the sentence appeal the offender appeared to be penalized for successfully appealing his first conviction (was convicted of a the same offences at a second trial and sentenced to almost double the term of imprisonment previously imposed)
O= conviction appeal dismissed; sentence appeal granted

N= R. v. D.(D.L.) November 10th, 1992 Court of Queen's Bench Indictable •
CC= Sexual Assault (historical)
C= Scott, Twaddle and Helper
R= stepfather; stepdaughter
F= sexual abuse of the stepdaughter which occurred from 1963 to 1971, beginning when she was four years old; assaults involved the touching of the victim's vaginal area, fellatio and sexual intercourse
I= The offender applied under s. 24(1) of the Charger for a stay of proceedings on the ground that delay in bringing sexual assault charges against him violated his right to a fair trial under s. 11(d) of the Charter. The Manitoba Court of Queen's Bench granted the stay. The Crown appealed.
O= The Manitoba Court of Appeal allowed the appeal and remitted the matter for trial, stating that the accused failed to prove his right to a fair trial was denied. Mere delay, without more, did not infringe the accused's rights as there must be evidence of substantial or actual prejudice. The mere possibility that the evidence of the two witnesses may have been favourable to the accused did not constitute evidence sufficient to justify a stay.

N= R.v.S.(H.) March 30, 1993 Court of Queen's Bench Indictable
C= Twaddle, Lyon and Helper
CC= Sexual Assault, Indecent Assault and Gross Indecency (historical)
R= stepfather; stepdaughter

F= sexual assaults covering a period of about ten years beginning in 1976 or 1977, the assaults involved the offender hugging and kissing her in a non-familial way, placing his hand underneath her clothing touching her bottom and her vaginal area and breasts through her underwear, and placed her hand on his genitals, once through his clothing and once underneath even his underpants
I= offender appealed conviction, on the ground that the trial judge misdirected himself on law and on the further ground that the verdict was unreasonable; victim alleged conduct covering a period of about ten years beginning in 1976 or 1977, issue was whether the appropriate test, that suggested in R.v.W.(D.), (1991) 1 S.C.R. 742., was followed.
P= R.v.W.(d.), (1991) 1 S.C.R. 742
O= appeal dismissed; the judges found that the appropriate test was followed.

Intercourse with a Female Under the Age of 14 years

N = R.v.M.(B.J.) June 25, 1993 Court of Queen's Bench Indictable
S = 18 months consecutive incarceration increased to three and one-half years
R = adult; female under 14 yrs (slow learner with developmental age of less than ten years)
CC = sexual intercourse with a female under the age of 14 years; attempting to obstruct justice; failing to comply with a non-communication condition of conditional release
C = Twaddle, Lyon and Kroft
I = trial judge found that the witness was able to communicate her evidence and knew the meaning and importance of a promise to tell the truth, and he allowed her to testify pursuant to s. 16(3) of the Canada Evidence Act on her promising to tell the truth. Defence submitted that "an evidentiary distinction, in terms of weight," should be made between such evidence and that given under oath or affirmation.
O= Appeal Court felt that the weight which should be given to a young witness's evidence is not affected by the form of the witness's commitment to tell the truth. Accused's appeal from his convictions was dismissed. The accused did not press for leave to appeal his sentence. He submitted that the Court should not heed the request of the Crown to increase the sentences.
P = R.v.W.(R.) (1992) 2 S.C.R.122
A = the girl was a slow learner with the mental development of a much younger child; the sexual intercourse occurred frequently over a period of almost two years; no indication of remorse; the offender took advantage of his permitted role as a family friend; even after he was charged with the offence, the offender took further advantage of the girl and attempted to have her interfere with the prosecution of the case, showing continued disregard for the welfare of the victim.
G = denunciatory sentence, the sentence for the primary offence was inordinately low

N= R.v.F.(J.) June 29, 1992 Indictable
C= Philp, Lyon and Helper
CC= two counts alleging sexual intercourse with a female person under the age of fourteen years; one count alleging sexual intercourse with a foster daughter; and one count of indecent assault
S= 90 months incarceration
R= father; twin daughters
I = the jury brought in a guilty verdict against the offender on three of four counts of sexual offences pertaining to two complainants. On appeal, the offender argued that the trial judge had erred in failing to instruct the jury that the cumulative effect of the evidence of the complainants was not to be considered in determining guilt on each count of the indictment. The Judge noted

that when two or more counts are heard together, absent a formal finding of similar fact evidence the trial judge is obliged to warn the jury that the evidence on one count cannot be used to support the evidence on the other count or counts.
O= the appeal was allowed and a new trial was ordered

s. 151 Sexual Interference (Maximum: ten years)

N= R. v. M.(F.A.) January 30, 1992 Provincial Court Hybrid
CC= Sexual Interference
S= suspended sentence with probation increased to 90 days intermittent incarceration, same probation
C= Scott, O'Sullivan, Philp
R= "in loco parentis" adult; girl 8 yrs.
F= offender rubbed his penis between the legs of the victim
M= genuine remorse; good and willing candidate for rehabilitation; incident described by psychiatrist as "a profound aberration in this man's life"
G = sentencing judge failed to give weight to general deterrence; sexual interference is a terrible crime, a serious offence, sentence imposed totally failed to recognize that fact
D= O'Sullivan would dismiss the appeal, jail is not the only way to deter crime

N= R. v. H.(B.C.) March 11, 1991 Provincial Court Indictable
CC= Sexual Interference
S= 2 years supervised probation with conditions increased to one year gaol
C= Scott, Twaddle and Lyon
R= 42 year old "in loco parentis"; 8 year old child
F= accused placed his penis and his hand on the child's vagina
M= accused had served 6 months in pre-sentence custody; no related record
A= victim contracted gonorrhea
G= sentence to match gravity of offence

N= R.v. S.(H.W.) September 3, 1991 Provincial Court Hybrid
CC=Sexual Interference
S= suspended sentence with supervised probation increased to 6 months incarceration
C= Scott, Twaddle and Lyon
R= adult male; female under 14 years
F= touched the victim's vagina with his penis, with a sexual purpose
M= victim consented; victim was "street wise"
A= accused's substantial record (including a prior conviction for having sexual intercourse with a person under the age of 14)
G= sentence to match seriousness of the offence; purpose is protection of children

N = R.v. S.(M.R.) May 7, 1991 Provincial Court Indictable •
CC= Sexual Interference
C = Scott, Helper

D = Lyon dissented; denunciation does not always require jail
S = 9 mths incarceration decreased to 3 mths intermittently on weekends
R = adult male 27 yrs; girl 7 yrs.
F = one act of fellatio
A = no remorse expressed by offender, minimization and victim-blaming; denies need for counseling related to the offence
M = victim was initiator; no evidence that the offender encouraged or invited her participation; duration was seconds or minutes and was terminated by the offender
G = the circumstances in the case warrant incarceration

Obtaining for Consideration the Sexual Services of a Female Person Under the Age of 18

N= R. v. K. (P.) May 25, 1993 Provincial Court Indictable *
CC= two counts of Obtaining for Consideration the Sexual Services of a Female Person Under the Age of 18
S= two year suspended sentence and two year probation order increased to 60 days intermittent incarceration with two year probation order
C= Scott, Lyon and Helper
R= customer; minor prostitute
F= guilty plea to two charges of obtaining for consideration the sexual services of a female person under the age of 18
M= absence of related record; advanced age of respondent
A= vulnerability of children
G= general deterrence; protection of female children from premature sexual intercourse

CHILD PHYSICAL ASSAULTS

s. 268 Aggravated Assault (Maximum: Fourteen years)

N= R. v. Fabros April 16, 1993 Court of Queen's Bench Indictable *
CC= Aggravated Assault
S= probation only, upheld
R= family daycare provider aged 40 yrs.; child aged 2 yrs.
C= Twaddle, Lyon and Kroft
F= unknown
M= nursing mother looking after her own three children and two others; husband had recently lost his job; family was experiencing financial difficulties; sad case; accused's conduct uncharacteristic of her, victim did not suffer any residual problems as a result of the injuries
A= assault resulted in serious damage to her liver, her kidney and duodenum, doctors testified the injuries were extremely serious and in fact life-threatening, the perpetrator did not seek medical attention for the child following the assault
G = rehabilitation: individualized disposition
- offender also appealed conviction, no ground found for interfering with conviction
- Crown appealed sentence, dismissed as "the case was exceptional and the learned trial judge quite properly regarded it as such".

s. 267 Assault Causing Bodily Harm (Maximum: ten years)

N= R. v. Bourassa April 11, 1994 Provincial Court Indictable
CC= Assault Cause Bodily Harm

S= 8 months gaol decreased to 4 months gaol with one year probation with conditions added
C= Philp, Twaddle and Lyon
R= grandmother, 5 year old child
F= the offender took the child's left hand and placed it on a hot stove element
M= accused was at her wits end, not knowing what to do to discipline the child for gross misbehavior (involving setting fire to household items); lack of sophistication; frustration; own experiences of abuse
A= child suffered 2nd degree burns on his left index finger
G= individualized disposition

s. 266 Assault (Maximum: five years)

N= R. v. Krasny June 26, 1992 Provincial Court Summary *
CC= Common Assault
S= conditional discharge decreased to stay of proceedings
R= father; son aged 8
C= O'Sullivan, Huband, Lyon
F= child was kicked
M= wife had lied about financial matters, which had upset the husband; child had opened a packet of sunflower seeds when told not to
M= was the legitimate correction of a child by force, as set out in section 43 of the Criminal Code
A= children and mother went to a shelter following the incident, bruising on right shoulder and shoulder blade noted by Child Protection Center physician
G = prosecutorial discretion (to lay charges in all cases) subject to judicial review; case should never have been proceeded with, therefore stay of proceedings

N = R.v.Sansregret September 8, 1992 Queen's Bench Hybrid *
S = 60 days in gaol, 2 years supervised probation, upheld
R = mother, 11 year old daughter
CC = Assault
C = Scott, Philp and Twaddle J.A.
F = victim's head was slammed against a wall several times, she was slapped and punched, then taken outside, slapped several times again and her head was banged on the ice in the ground; the assaults continued inside and outside the home with the child being dragged up and down the stairs during the assaults
A = Children's Hospital personnel verified the victim was suffering from severe facial bruises; offender was unwilling to enter alcohol treatment
M = guilty plea, history of abuse and alcohol abuse; medical condition - epileptic; first time offender
G = rehabilitation

ADULT SEXUAL ASSAULTS

s. 273 Aggravated Sexual Assault (Maximum: life)

N= R. v. Q.(S.N.) April 20, 1993 Provincial Court Indictable *
C= Huband, Twaddle and Kroft

CC= Aggravated Sexual Assault, Choking in Futherance of an Offence and Anal Intercourse
R= adult male acquaintance, adult female
F = victim went to the offender's apartment; the next thing she remembered was being on the bed, and struggling with the offender, who was trying to strangle her; while strangling her, the offender forced the victim to remove her clothes; he then forced anal intercourse upon her; the victim next remembered waking up the next morning, with a sore and bleeding anus; she was taken to the hospital, a doctor testified that she noted various injuries to the victim, consistent with strangulation and forced anal intercourse; in the doctor's expert opinion, the injuries to the victim were most definitely life-threatening
S= 8 yrs. for aggravated sexual assault and 3 yrs. concurrent for the anal intercourse, sentence appeal dismissed
P= Kienapple (1974) 15 C.C.C. (2d) 524 R.v.Hamilton (1992), 75 Man. R. (2d) 308
I= although there was a choking, which endangered the life of the complainant, it had not been proven that her life had been endangered "in committing" a sexual assault
O= conviction appeal dismissed.

s. 271 Sexual Assault (Maximum: ten years)

N= R. v. D.(E.L.) September 18, 1992 Provincial Court Indictable
CC= Sexual Assault
S= 10 months increased to 2 yrs. less a day with supervised probation for two years on the same terms as attached to the order imposed in Provincial Court
C= Philp, Twaddle and Lyon
R= former common-law husband 18 yrs. old; former common-law wife
F= offender began arguing with the victim; struck her; removed her clothes; raped her; physically assaulted her again
A= offender had assaulted the victim twice previously, was on bail pending on these charges when the incident occurred; minor injuries required treatment at hospital; major sexual assault
M= the offender's age -18 years - "strongly militates against the penalty which otherwise would have been appropriate"
G= protection of the public; rehabilitation; " sentence should be one which permits the making of a probation order"

N= R. v. B.(L.) April 15, 1992 Court of Queen's Bench Hybrid *
C= Scott, O'Sullivan and Philp
CC= Sexual Assault
R= brother-in-law, sister-in-law
P= R.v.D.W., (1991) 1 S.C.R. 742; R.v.Slobodzian (unreported decision of this Court released September 6, 1991)
F= the victim awoke to find her pants and panties pulled down below her knees, and the offender touching her stomach, she confronted him and he left the house; offender stated that victim asked him to touch her stomach, victim denied this; judge stated that he believed the victim and not the evidence of the accused and therefore found him guilty
I= defence argued that the Judge did not consider the issue of whether the accused's explanation might reasonably be true
P= R.v.D.W., (1991) 1 S.C.R. 742 and R. v. Slobodzian (unreported decision of the Court released September 6, 1991)
O= acquittal

N= R. v. R.(E.) May 8, 1991 Provincial Court Indictable *
CC= Sexual Assault
C= Huband, Philp and Helper
R= adult; female acquaintance
F= a number of sexual contacts during one evening, some appeared to be consensual, victim's behavior somewhat incongruent with sexual assault
I= consideration not given to the potential defence that the offender held an honest but mistaken belief that the victim was consenting to his conduct
O= new trial ordered
D= Helper "no evidence whatever...which would give rise to the "air of reality" necessary to the defence of honest but mistaken belief by the accused
N= R. v. N. (V. H.) November 2, 1992 Court of Queen's Bench Unknown (Hybrid)
CC= Sexual Assault
S= four months incarceration
C= Scott, Lyon and Helper
R= adult male, adult female with cognitive impairments
F= victim stated that the offender had sexual intercourse with her, without her consent
I= defence stated that the trial Judge erred in applying the appropriate test to deal with the issue of credibility of conflicting witnesses and did not give appropriate weight to the principle of reasonable doubt
O= acquittal

ADULT PHYSICAL ASSAULTS

s. 268 Aggravated Assault (Maximum: fourteen years)

N= R.v.Mitchell January 26, 1994 Court of Queen's Bench Indictable *
C= Scott, Twaddle and Kroft
CC= Aggravated Assault
S= 15 months upheld
F= offender assaulted the victim and kicked her repeatedly until she lost consciousness; she was transported to hospital and treated with sutures; offender was arrested and made incriminating comments to police; defence did not call evidence at trial
A= doctor's report noted multiple serious injuries to the head, a scar will result; no remorse shown by accused
M= no related or previous assault convictions
O= no merit to conviction appeal and was accordingly dismissed; leave to appeal sentence was granted, but the appeal was dismissed; while the sentence of 15 months may have been a little high in the circumstances, the Court was not persuaded that it was unfit.
G= general deterrence

s. 267 Assault Causing Bodily Harm (Maximum: ten years)

N= R. v. Harper May 11, 1992 Provincial Court Indictable *
C= O'Sullivan, Huband and Lyon
CC= Assault Causing Bodily Harm
R= common-law husband; pregnant wife
S= conviction appeal

F= victim was injured, police were called and noted that the victim had injuries to her face the next day; offender, upon arrival of police at the residence, made comments which suggested he was responsible for beating the victim
I= offender sought to have his inculpatory statement made to police excluded, arguing that his s. 10(b) Charter rights (i.e., his rights to counsel) were violated as the availability of duty counsel was not mentioned
P= R.v. Brydges, 53 C.C.C. (3d) 330
O= conviction appeal dismissed; sufficient compliance with s. 10(b) as interpreted in R.v.Brydges

N= R.v.Walker March 21, 1991 Provincial Court Indictable
CC= Assault Causing Bodily Harm
S= 12 months plus three years probation; appeal dismissed
C= Philp, Lyon and Helper
R= common-law husband; wife
F= the victim received facial bruises and a facial laceration requiring treatment
M= alcohol problem; probation officer felt he would benefit from anger control and alcohol counseling
A= had assaulted her on two prior occasions, and in each case, convicted of common assault and received a noncustodial sentence; was on probation resulting from the second common assault conviction when the ACBH took place
G= deterrence: the sentence was not an unfit one, although it was near the top end of the scale for the circumstances

N= R.v.Belluk March 25, 1991 Provincial Court Indictable
CC= Assault Causing Bodily Harm
C= Scott, Huband and Twaddle
F= the offender beat the victim on and off for about 25 minutes, including stripping her naked and throwing her outside; threatening to kill a friend of the victim with a restricted gun which he had transported to that residence without a permit
S= nine months, appeal dismissed
A= on the facts
M= no prior record; indication of remorse
G= denunciation of domestic violence

N = R.v. Adrian Joseph Dumas September 20, 1991 Provincial Court Unknown
CC= Assault Cause Bodily Harm, Forcible Entry
S = 3 mths gaol and 2 yrs supervised probation decreased to time spent in custody and 2 yrs supervised probation
R = husband; wife
F = struck her twice, once in the thigh, and once in the face; no resulting injuries
M = "assault was out of character for the accused"; exhibited remorse; no evidence of prior similar conduct; minor record
G = "fitness" of sentence

s. 266 Assault (Maximum: five years)

N= R. v. Desmarais January 6, 1992 Provincial Court Indictable •

CC= Common Assault
C= O'Sullivan, Lyon and Helper
S= 15 months decreased to time in custody
F= offender punched victim on the back of the head and approximately ten times to the right of the face, injuries sustained included a lump on the back of her head, a cut on the inside of her left cheek, scrapes on the bridge of her nose and a swollen and scraped right cheekbone
A = this was the second time in less than two years that the offender was convicted of assaulting the complainant; breached probation less than three months earlier; lack of remorse; expression of willingness to do further harm to her
I = the trial judge thought the charge he was dealing with was assault causing bodily harm; Crown counsel agreed that the trial judge proceeded to sentence on the wrong charge
G= general and specific deterrence

N= R.v.Rempel June 18, 1993 Provincial Court Summary *
C= Huband, Lyon and Kroft
CC= Assault
S= suspended for one year
F = the offender and victim were arguing in a car; the offender struck her in the mouth with his fist causing her lips to bleed and loosening a tooth
I= offender appealed conviction; argument was an invitation to the Court to retry the case and arrive at different factual conclusions than the trial judge
D= appeal dismissed

s. 268 Aggravated Assault (Maximum: fourteen years)

N = R.v.Keith Edward Masse September 18, 1992 Court of Queen's Bench Indictable *
S = 18 months incarceration increased to 30 months incarceration
CC = Aggravated Assault
C = Huband, Philp and Twaddle
R = male 53 yrs; female 53 yrs., friend of offender
F = brutal beating
A = assault was unprovoked and severe; life-threatening injuries resulted requiring emergency surgery and hospital confinement for ten days; victim continued to suffer from the brutal beating
M = offender suffered a lifetime of alcohol abuse; has only one related conviction over a decade ago
G = general and specific deterrence

s. 267 Assault Causing Bodily Harm (Maximum: ten years)

N = R.v.Nhan Than Vo January 31, 1992 Provincial Court Indictable
S = 2 yr conditional discharge, supervised, with conditions increased to 60 days intermittent incarceration, to be followed by a two year period of supervised probation
CC = Assault Cause Bodily Harm
C = Philp, Lyon and Helper
R = husband; wife
F = serious assault; wife suffered a concussion and bruising; following the assault the offender chased his wife with a knife

A = offender had assaulted his wife on other occasions; appeared offender was unable to recognize or understand that his conduct is morally wrong and criminal
M = guilty plea
G = general and specific deterrence

N = R.v. Jody Kenneth Kaufman March 25, 1992 Provincial Court Indictable •
S = 18 months and 18 months probation with conditions (12 months gaol on the first assault, 6 months gaol on the second) increased to 24 months gaol and 18 months probation with conditions 12 months on both assaults)
R = adult male; two different female complainants
CC = Assault Cause Bodily Harm (X2), Failure to Appear
C = O'Sullivan, Huband and Lyon
F = Offender attacked first victim, pulling her by the hair, punching, kicking, biting and choking her, over a period of five hours. She was choked into unconsciousness. When she came to, she fled. Victim suffered serious injuries. Police were called, arrested the offender, and took him to a psychiatric ward. He was later released on a recognizance. The second victim was a woman the offender began living with one month prior to assaulting her. He assaulted her on the street, and she fled for home. At their residence, the offender seriously assaulted the victim. He punched her face, breaking her nose. She fell into a glass table, severely cutting her face. The offender was arrested and charged with Aggravated Assault. Outstanding warrants were executed.
M = the offender had a very sad and tragic background, time in custody, no previous related record, victim of the second offence spoke on his behalf, character witness stated that he was an alcoholic but felt that he would make progress with counseling regarding sexual abuse
A = the second offence occurred while he was on bail on the first assault, offender also breached his release conditions by drinking, the first victim left the city "and is probably never to be heard of again", the first assault was severe, vicious, then was followed shortly thereafter by another assault
G = "sentence, in totality, was too lenient and therefore unfit" - Court of Appeal
Provincial Court Chief Justice Scott mentioned specific and general deterrence, noted that the Court of Appeal has stated that there has to be denunciation for this type of crime, it will not be permitted and will be dealt with severely.