Research and Statistics Division

JustResearch

2004 – Issue No. 11

www.canada.justice.gc.ca/en/ps/rs

Contents

Welcome

Welcome to the newest edition of JustResearch. In keeping with the development of a strong research capacity within the Department of Justice Canada, the Research and Statistics Division is pleased to announce a new format for JustResearch. Beginning with this issue, we will be providing complete original research articles from within the Division, as well as from other researchers in other government departments, academia, and non-governmental organizations. We are excited about moving into the next phase of our development. This move will allow us to disseminate and integrate a broader range of policy relevant research across the Department and throughout our readership. In addition to this change, we will now be publishing JustResearch according to policy relevant themes. In the present issue, our theme is Research and Policy: Bridging the Gap. In order to provide potential contributors with sufficient time to prepare articles, we will also be announcing themes for upcoming issues. Issue 12 will focus on the theme: Justice and the Canadian Family while Issue 13 will explore the theme: Achieving Justice for Vulnerable Canadians. Potential contributors can refer to the Submission Guidelines for direction on how to submit your research. We look forward to working with you and continuing to bridge the gap between policy decision-making and the empirical evidence that guides it. ▲

Submission Guidelines for Prospective Authors

Submissions

To submit an article to JustResearch, please send an electronic copy of the article via email to the following address:

Editor
JustResearch
Research and Statistics Division
Department of Justice Canada
E-mail address: jeff.latimer@justice.gc.ca

Style and Focus

The goal of JustResearch is to disseminate and integrate policy relevant research results across the Department of Justice Canada and within our readership. As such, articles should focus on issues related to the mandate and the broader policy direction of the Department of Justice Canada and be written in a clear and non-technical language appropriate for a broad audience. Please consider the themes for upcoming issues in the preparation of your submissions.

Length

Articles should be between approximately 1200 to 2000 words (3-5 pages, single spaced, Times New Roman, 12-point font).

Content

Articles may be submitted in either French or English. Authorship and institutional affiliation should be included with all submissions. Please note that headings and sub-headings are strongly encouraged. Tables and Figures should be numbered consecutively and placed appropriately throughout the article. References, footnotes and endnotes should be in the style of the most recent edition of the *Publication Manual of the American Psychological Association*.

Publication

Please note that we cannot guarantee all submissions will be published. All accepted articles will be edited for content, style, grammar and spelling. Any changes will be sent to the author(s) for approval prior to publication.

Upcoming Themes

Issue: Number 12, Theme: Justice and the Canadian Family;
Due Date: Submissions should be received by July 31, 2004.

Issue: Number 13, Theme: Achieving Justice for Vulnerable Canadians;
Due Date: Submissions should be received by November 30, 2004. ▲

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FEEDBACK

We invite your comments and suggestions for future issues of JustResearch. We welcome your ideas for articles, themes, topics or issues to examine from the literature and are happy to include information on any relevant and interesting research work undertaken in other departments. We may be contacted at: rsd.drs@justice.gc.ca

Issue 11 Theme: Research and Policy: Bridging the Gap

In the fall of 2003, the Research and Statistics Division celebrated its work through Research Week. The theme was "Research in Justice: Developing Options, Answering Questions, Monitoring Changes." In this issue of *JustResearch*, we are pleased to continue the exploration of the different ways in which social science research supports the legislative and policy-making process.

Research plays an integral part in the various responsibilities of the department's role as Attorney General and that of Minister of Justice, although ultimately it may only be one of many competing factors that support decision-making. Research informs and bridges the gap between the questions and issues faced by the department, the decision-making process, the current and future needs of the Government of Canada and the responsibilities to the Canadian public. Research also responds to the demands for evidence-based decision-making, value for public expenditure, and performance measures.

As social science researchers working *within* the Department of Justice, we are in many cases well positioned to provide research support to our policy partners. When ideas or concepts emanate from the academe, the transfer from research to policy becomes more complicated and potentially less timely.

Nathalie Des Rosiers, President of the Law Commission of Canada, addressed the recipients of the 2002 Canadian Policy Research Rewards on this very theme. She noted that the journey from research to policy is similar to translating for different audiences. We involve translation for our official languages every day. Legalese often requires translation for a non-legally trained audience. For research to be able to play a productive role, it also must undergo some translation.

Indeed, there are many challenges inherent in ensuring that research is recognized in the legislative and policy-making process. The translation from the world of research to that of policy requires skills and talents from all parties, but it is incumbent upon the researchers to understand both languages. Researchers must be able to convey the ideas, the findings, the numbers, and achieve a resonance with their policy colleagues. Strong working relationships, excellent communication skills, and these translation skills become truly essential. It is often through narrative, or story telling, that the ideas take shape and achieve that resonance. A number, or statistic, on its own has never influenced policy without the story behind it.

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continued...

In the Research and Statistics Division, there are many opportunities to work closely with Justice colleagues, to provide research that supports and informs the legislative and policy making process, and to communicate ideas, findings and numbers. Many of us become storytellers as we translate our research into usable information for our colleagues. In this Issue of JustResearch, we have included a few examples of such research. ▲

Upcoming Conferences

Second American Symposium on Victimology: Research and Practice in Victim Services. June 2-4, 2004. Topeka, Kansas, USA. Theme: Symposium will focus on research and practice related to victimology and victim services. http://www.american-society-victimology.us/events/asv_2004/

National District Attorneys Association Summer Conference. July 18-21, 2004. Vancouver, British Columbia, Canada. Theme: Gangs and violent crime; identify thefts and credit card fraud; telemarketing fraud; high profile cases; child pornography and Internet crimes against children; drug prosecution, prevention and treatment; ethical issues; performance measures for the justice system; budgets and grants; and, litigation of employment matters. http://www.ndaa.org/events/conferences/summer_conference_2004.html

Keeping Justice Systems Just and Accountable: A Principled Approach in Challenging Times. August 8-12, 2004. Montreal, Quebec, Canada. Theme: Current challenges to national criminal justice systems; developing international criminal justice system; principles of sentencing and application to attain justice for the state, victims and offenders; application of corrections and conditional release programs and mechanism to address miscarriages of justice; children and youth who are offenders, victims of crime or witnesses in criminal proceedings; restorative justice programs and special programs for aboriginal and indigenous offenders. http://www.isrcl.org/

Second International Conference Towards a Safer Society: Understanding and Tackling Violence. August 31-September 3, 2004. Edinburgh, Scotland. Theme: The origins of violent behaviour; systematic approaches to the assessment of violence risk; the management of violent offenders in the community; family violence and stalking; legal and ethical issues; youth violence; alcohol & crime; spousal violence. http://safersociety.gcal.ac.uk/

RESEARCH IN PROFILE

A Burden on The Court? Self-Representing Accused in Canadian Criminal Courts

By Ab Currie,
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Introduction

It is often argued that self-representing accused place a burden on the courts. The burden on the courts caused by the presence of self-representing accused has two main aspects. One relates to the normal roles of judges and prosecutors in adversarial justice. It is frequently observed that judges and prosecutors have to step outside of their normal roles to assist self-representing accused. Because they do not know how to argue a case, self-representing accused may jeopardize their rights. Thus, judges and, to a certain extent, prosecutors, because they are officers of the court and are bound to uphold fair process, are obliged to intervene in ways that are outside the norms of the adversarial process.

"The burden on the courts caused by the presence of self-representing accused has two main aspects. One relates to the normal roles of judges and prosecutors in adversarial justice."

A second aspect is that self-representing accused are said to slow down the court process. The criminal court process at the pre-trial stages moves at a very fast pace. Appearance times are typically measured in minutes as the court moves through crowded dockets. The "efficiency" of the court is dependent on the presence of trained prosecutors and defence counsel who are familiar with court procedures. With the possible exception of experienced criminals who are repeat users of the court, self-representing accused are unfamiliar with the law and with court procedures. Low levels of literacy, low levels of education, mental disorders and cognitive limitations often related to excessive alcohol and drug abuse occur more frequently among criminal accused than in the general population, and are limitations on the capacities of self-representing accused to function unassisted in the court process. As a consequence, self-representing accused are unsure about the charges against them and the possible consequences, are completely ignorant about the court process, do not know when or how to make arguments, or talk too long and get off the point when they do speak in court. The necessity for judges to intervene in order to explain the process to self-representing accused contributes to the problem of self-representing accused slowing down the courts.

"A second aspect is that self-representing accused are said to slow down the court process."

According to these arguments it should bear out that self-representing accused take longer to move through the courts. The burden on the court hypothesis should be borne out by a number of

A BURDEN ON THE COURT?
continued...

measures. If self-representing accused slow down the courts, pleas may be entered later, appearance times may be longer, the number of appearances per case may be greater, and the length of time to dispose of a case may be longer for self-representing accused compared with accused who are represented by a lawyer.

METHOD

"Data from a recent study of self-representing accused in Canadian criminal courts...allows each of these propositions to be examined."

Data from a recent study of self-representing accused in Canadian criminal courts (Hann, Nuffield, Meredith & Svoboda, 2003) allows each of these propositions to be examined. The self-representing accused study gathered data from nine provincial courts in Canada, which were selected to represent a wide variety of city types and accused populations. Prince Edward Island was the only province not included. Data from one of the nine participating provinces (Manitoba) was not sufficiently detailed to include in the present research. The remaining eight databases allow an examination of the burden on the court hypothesis using indicators for each of the variables proposed above. Two measures are presented for each variable, the median observation and the observation for the 75th percentile. In each case the data compare self-representing accused with accused represented by legal aid duty counsel and with clients represented by other lawyers. Legal aid duty counsel, whether private bar lawyers or staff lawyers, could be identified in all of the courts. However, it was not possible, except for two courts, to distinguish accused represented by legal aid lawyers and those represented by privately retained counsel. The latter category is, therefore, a mix of the legal aid lawyers, both staff and private bar lawyers on certificates, and lawyers privately retained by accused. Where it was possible to make the distinction between legal aid and privately retained lawyers other than duty counsel, the two categories are identified in the tables.

"...from samples of disposed cases drawn from court databases in each of the eight courts."

The data used in this analysis were from samples of disposed cases drawn from court databases in each of the eight courts. The sample sizes and methods of collection varied from one court to the next, depending on factors unique to the particular court database. The sample sizes are as follows: St. John's, a random sample of 501 cases; Halifax, a random sample of 509 cases; Bathurst, 250 cases disposed in late 2001; Sherbrooke, 250 cases disposed in late 2001, a random sample of 495 cases disposed from September through November of 2001; Brandon, all 2761 cases disposed between October and December of 2001; Regina, all 10,000 cases disposed in 2001; Edmonton, 623 cases disposed in late 2000 and early 2001[1]; and Kelowna, all 1020 cases disposed in 2001. The data represent criminal court appearances from first appearance to final appearance at which a sentence was passed.

[1] For more detailed information on the samples see Hann, et al. (2003a) and Hann et al. (2003b).

RESULTS

Timing of Pleas

This is the least certain of the indicators of burden on the court. Lawyers interviewed in the court study were asked to identify mistakes frequently made by self-representing accused. Respondents indicated that, at first appearance, self-representing accused did not know when to plead guilty and some accused tended to "test the tolerance levels of judges by seeking multiple postponements" (Hann et al., 2003a, p.19). These observations are an indication that accused might plead guilty later rather than earlier. On the other hand, the respondents reported that self-representing accused tended to plead guilty to 'get it over with', plead guilty as soon as they are denied bail in order to avoid jail, plead guilty before seeing the disclosure and plead guilty even when they have a viable defence (Hann et al., 2003a). These observations suggest that self-representing accused would tend to plead guilty earlier in the court process. Although there are arguments pointing in both directions, on balance, the tendency should be for self-representing accused to plead guilty earlier, and thus to be less of a burden on the court.

"...at first appearance, self-representing accused did not know when to plead guilty and some accused tended to "test the tolerance levels of judges by seeking multiple postponements..."

Table 1a: Median Appearance at Which Plea Was Entered

	Court Location							
	SJ	H	B	SH	SC	R	E	K
Self-Represented	1	2	1	1	7	2	2	2
Duty Counsel	4	3	1	--	2	6	2	2
Private or Staff Lawyer	3	5/3	3	3	7	6/16	4	4

1. SJ=St. John's, Newfoundland; H=Halifax, Nova Scotia; B=Bathurst, New Brunswick; SH=Sherbrooke, Quebec; SC=Scarborough, Ontario; R=Regina, Saskatchewan, E=Edmonton, Alberta; K=Kelowna, British Columbia.
2. In Halifax and Regina, the first number represents legal aid lawyers and the second number represents privately retained counsel.

An examination of the data in Table 1a and Table 1b show that, in four cities, self-representing accused enter guilty pleas earlier than accused who have legal representation, that is , in St. John's, Halifax, Regina and Sherbrooke. They enter guilty pleas at about the same time in Bathurst, Edmonton and Kelowna. In only one court, Scarborough, did self-representing accused enter guilty pleas later than accused with legal representation.

"... in four cities, self-representing accused enter guilty pleas earlier than accused who have legal representation in four cities..."

A BURDEN ON THE COURT?... continued...

Table 1b: Appearance at Which 75% of Accused Enter a Guilty Plea

	Court Location							
	SJ	H	B	SH	SC	R	E	K
Self-Represented	3	3	2	1	13	5	3	3
Duty Counsel	6	4	1	--	4	9	2	3
Private or Staff Lawyer	6	7/5	4	6	10	9	5	7

1. SJ=St. John's, Newfoundland; H=Halifax, Nova Scotia; B=Bathurst, New Brunswick; SH=Sherbrooke, Quebec; SC=Scarborough, Ontario; R=Regina, Saskatchewan, E=Edmonton, Alberta; K=Kelowna, British Columbia.
2. In Halifax, the first number represents legal aid lawyers an d the second number represents privately retained counsel.

"Self-representing accused do not place a greater burden on the court in terms of the timing of pleas."

Self-representing accused do not place a greater burden on the court in terms of the timing of pleas. It is possible that self-representing accused did consume the time of judges who may have been required to provide assistance to these accused. The court observation component of the research did not gather data about this issue. However, the greater burden might be reflected in the data presented on the number of appearances and appearance times.

"However, the greater burden might be reflected in the data presented on the number of appearances and appearance times."

Table 2a: Median Duration of Appearance in Minutes

	Court Location							
	SJ	H	B	SH	SC	R	E	K
Self-Represented	2/4	2	4	1	2	2	1	1
Duty Counsel	4	6	1	--	2	2	1	3
Private or Staff Lawyer	3	2	3	5	2	2	1	2

1. SJ=St. John's, Newfou ndland; H=Halifax, Nova Scotia; B=Bathurst, New Brunswick; SH=Sherbrooke, Quebec; SC=Scarborough, Ontario; R=Regina, Saskatchewan, E=Edmonton, Alberta; K=Kelowna, British Columbia.
2. In St. John's, the first number represents first appearance court and the s econd number represents non -trial appearances in trial court.

Duration of Individual Appearances

If self-representing accused place a greater burden on the courts, the duration of appearances may be longer. Table 2a and Table 2b show the median duration of appearances in minutes and the appearance times in minutes for 75% of cases.

A BURDEN ON THE COURT?...
continued...

Table 2b: Duration of 75% Of Appearances in Minutes

	Court Location							
	SJ	H	B	SH	SC	R	E	K
Self-Represented	4/8	3	7	2	2	2	1	4
Duty Counsel	12	7	2	--	4	6	3	6
Private or Staff Lawyer	10/7	3	6	10	4	6	2	5

1. SJ=St. John's, Newfoundland; H=Halifax, Nova Scotia; B=Bathurst, New Brunswick; SH=Sherbrooke, Quebec; SC=Scarborough, Ontario; R=Regina, Saskatchewan, E=Edmonton, Alberta; K=Kelowna, British Columbia.
2. Under Self-Represented in St. John's, the first number represents first appearance court and the second number represents non-trial appearances in trial court.
3. Under Private or Staff Lawyer in St. John's, the first number represents legal aid lawyers and the second number represents privately retained counsel.

"...self-representing accused do not consume more court time in terms of the length of appearances."

The only court in which appearance times for self-representing accused are longer than for accused with some form of legal representation is Bathurst. This is the case for both median and percentile measures. Clearly, self-representing accused do not consume more court time in terms of the length of appearances.

Number of Court Appearances

If self-representing accused place a greater burden on the criminal courts, there should be a difference in the number of court appearances per case compared with accused represented by counsel. Table 3a and Table 3b show the median number of appearances per case and the number of appearances for the lowest 75% of all cases.

Table 3a: Median Number of Court Appearances for Disposed Cases

	Court Location							
	SJ	H	B	SH	SC	R	E	K
Self-Represented	2	2	2	1	6	2	2	4
Duty Counsel	5	3	1	--	3	5	2	3
Private or Staff Lawyer	5	5/4	4	4	7	5	4	7

1. SJ=St. John's, Newfoundland; H=Halifax, Nova Scotia; B=Bathurst, New Brunswick; SH=Sherbrooke, Quebec; SC=Scarborough, Ontario; R=Regina, Saskatchewan, E=Edmonton, Alberta; K=Kelowna, British Columbia.
2. In Halifax, the first number represents legal aid lawyers and the second number represents privately retained counsel.

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continued...

Table 3b: Number of Court Appearances for 75% Of Disposed Cases

	Court Location							
	SJ	H	B	SH	SC	R	E	K
Self-Represented	3	4	3	1	11	5	3	9
Duty Counsel	8	5	2	--	5	9	2	6
Private or Staff Lawyer	7	8/7	5	7	10	9	6	16

1. SJ=St. John's, Newfoundland; H=Halifax, Nova Scotia; B=Bathurst, New Brunswick; SH=Sherbrooke, Quebec; SC=Scarborough, Ontario; R=Regina, Saskatchewan, E=Edmonton, Alberta; K=Kelowna, British Columbia.
2. In Halifax, the first number represents legal aid lawyers an d the second number represents privately retained counsel.

There are three courts in which the median and 75th percentile appearance numbers are higher for self-representing accused compared with accused represented by duty counsel. These are Bathurst, Scarborough and Kelowna with respect to median number of appearances and Bathurst, Edmonton and Kelowna in terms of the number of appearances for disposed cases up to the 75th percentile. There are three courts, St. John's, Halifax and Regina, in which the number of appearances for self-representing accused is lower compared with accused represented by duty counsel. Edmonton shows the same number of appearances. Using the percentile measure, the number of appearances for 75% of all cases is lower in St. John's Halifax and Regina. The number of appearances for the lowest 75% of all disposed cases is higher in Bathurst, Scarborough, Edmonton and Kelowna.

"...the number of appearances for self-representing accused is lower than for accused represented by other legal aid and privately retained lawyers."

In all but one of these courts, the number of appearances for self-representing accused is lower than for accused represented by other legal aid and privately retained lawyers. The percentile indicator for the Scarborough court is the one instance in which the number of appearances for self-representing accused is greater than for accused represented by both duty counsel and other lawyers.

"...there is no support for the hypothesis that self-representing accused place a greater burden on the courts."

Based on the comparison of the number of appearances in disposed cases between self-representing accused and accused with legal representation, there is no support for the hypothesis that self-representing accused place a greater burden on the courts.

Elapsed Time to Disposition of Cases

If self-representing accused place a burden on the criminal courts, the total elapsed time to disposition may be greater compared with accused having legal representation. Table 4a and Table 4b present the data on median elapsed time and elapsed time for the 75th percentile of disposed cases.

A BURDEN ON THE COURT?... continued...

Table 4a: Median Elapsed Time For Disposed Cases in Weeks

	Court Location							
	SJ	H	B	SH	SC	R	E	K
Self-Represented	1	14	7	13	24	4	8	1
Duty Counsel	21	5	2	--	5	15	2	--
Private or Staff Lawyer	18	29/25	13	19	24	15/25	13	4

1. SJ=St. John's, Newfoundland; H=Halifax, Nova Scotia; B=Bathurst, New Brunswick; SH=Sherbrooke, Quebec; SC=Scarborough, Ontario; R=Regina, Saskatchewan, E=Edmonton, Alberta; K=Kelowna, British Columbia.
2. In Halifax and Regina, the first number represents l egal aid lawyers and the second number represents privately retained counsel.

"When duty counsel lawyers retain a case to disposition they tend to settle early."

Table 4b: Total Elapsed Time for 75% of Disposed Cases in Weeks

	Court Location							
	SJ	H	B	SH	SC	R	E	K
Self-Represented	8	29	12	23	39	24	18	7
Duty Counsel	43	21	9	--	14	40	12	3
Private or Staff Lawyer	41	54/47	18	37	42	46	21	11

1. SJ=St. John's, Newfoundland; H=Halifax, Nova Scotia; B=Bathurst, New Brunswick; SH=Sherbrooke, Quebec; SC=Scarborough, Ontario; R=Regina, Saskatchewan, E=Edmonton, Alberta; K=Kelowna, British Columbia.
2. In Halifax, the first number represents leg al aid lawyers and the second number represents privately retained counsel.

"Case complexity would probably partly explain the pattern observed in these data."

The evidence based on time to dispose of cases is mixed on the issue of the greater burden in the court because of self-representing accused. The median elapsed time to disposition for self-representing accused is greater than for accused represented by duty counsel in four courts (Halifax, Bathurst, Scarborough and Edmonton). It is less in two courts (St. John's and Regina). Data are not available for two courts. On the other hand, the median elapsed time to disposition is less for self-representing accused compared with accused represented by non-duty counsel lawyers in all courts except one, the Scarborough court in which elapsed times are both 24 weeks.

Comparing self-representing accused with accused represented by legal aid duty counsel lawyers, elapsed time to disposition for 75% of disposed cases is greater for the self-representing group in five courts; Halifax, Bathurst, Scarborough, Edmonton and Kelowna.

A BURDEN ON THE COURT?... continued...

It is less in the St. John's and Regina courts. Comparing self-representing accused with accused represented by all lawyers other than legal aid duty counsel, elapsed time is less in all of the courts. However, the elapsed times are quite close in both Scarborough and Edmonton.

When duty counsel lawyers retain a case to disposition they tend to settle early. They settle earlier compared with accused self-representing but not as early as accused represented by other lawyers. Case complexity would probably partly explain the pattern observed in these data.

"...lawyers...would likely have different motivations for favouring quick dispositions."

It is possible that duty counsel have a strong motivation to get cases off their desk, although staff lawyers and private bar lawyers working on a duty counsel roster would likely have different motivations for favouring quick dispositions. Staff lawyers, who may be assigned to duty counsel work for longer periods of time, might be motivated to seek quick dispositions because they have busy court schedules with first appearance, disposition or screening courts and bail courts meeting daily. Private bar lawyers performing duty counsel work on the basis of a roster might only be doing duty counsel work for a week, and would be motivated to seek quick dispositions within the time period of their assignment.

Conclusion

"Almost all of the data suggest that the burden on the court hypothesis should be rejected."

The data from the study of adult accused in Canadian provincial criminal courts does not support the claim that self-representing accused are a burden on the courts by slowing the pace and efficiency of the court. Almost all of the data suggest that the burden on the court hypothesis should be rejected. The data on elapsed time to disposition shows that elapsed times for self-representing accused tend to be greater than for accused represented by duty counsel. However, this may be a function of lower case complexity of cases handled by duty counsel, since the pattern is the reverse for other accused represented by all other lawyers, lawyers who would likely be dealing with cases that are more complex than duty counsel.

While the data do not point toward a greater burden on the court, the tendency toward earlier guilty pleas, fewer appearances, shorter times per appearance and, compared with duty counsel, longer time to disposition all suggest a burden on the accused. Even at the pre-trial stages the criminal courts are adversarial and they operate according to a complex set of rules in a formal atmosphere. The court dockets are crowded and the courts operate at a very fast pace, with appearances lasting only a few minutes. Although self-representing accused may choose to proceed without a lawyer, qualitative evidence from the lawyer interviews suggests that they do so for the wrong reasons. For instance, they

A BURDEN ON THE COURT?... continued...

self-represent because they feel they cannot wait for a lawyer to argue their case (Hann et al., 2003a). Further, they may not only choose to represent themselves for ill-advised reasons but may do so with unfortunate consequences, such as agreeing to unworkable release conditions (Hann et al., 2003a).

Judges may spend more time counselling self-representing accused, and as indicated above, the court observation data did not address this aspect of the issue. However, on the strength of the quantitative evidence, the lack of legal representation in criminal court cases does not appear to place a burden on the courts. The burden would seem to fall much more heavily on the accused and adds weight to the need for legal representation in criminal courts.

"The burden would seem to fall much more heavily on the accused and adds weight to the need for legal representation in criminal courts."

References

Hann, R., Nuffield, J., Meredith, C., & Svoboda, M. (2003) Court Site Study of Adult Un-represented Accused in Provincial Criminal Courts: Part I - Overview Report. Ottawa, ON: Research and Statistics Division, Department of Justice Canada.

Hann, R., Nuffield, J., Meredith, C., & Svoboda, M. (2003) Court Site Study of Adult Un-represented Accused in Provincial Criminal Courts: Part II Site Reports. Ottawa, ON: Research and Statistics Division, Department of Justice Canada. ▲

We are now welcoming submissions for our next number which will be on the theme of

Justice and the Canadian Family

Please send your submissions to
jeff.latimer@justice.gc.ca

Submission deadline
July 31, 2004

Bill C-46 Caselaw Review

By Susan McDonald,
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and Andrea Wobick,
Legal Researcher,
Policy Centre for Victim Issues

Introduction

In the 1990s, Canada witnessed significant changes in its sexual assault law, through legislative amendments and caselaw. There were a number of Supreme Court of Canada decisions that supported the rights of the accused (e.g. *R. v. Seaboyer* (1991) 2 S.C.R. 577) within the context of access to complainants' confidential records, as well as significant discussion around the impact of these decisions. Bill C-46 was passed in 1997 and amended the *Criminal Code* to include specific provisions regarding the production and disclosure of third party records to the accused in sexual assault proceedings (S.C. 1997, c.30, s.278.1). The provisions were challenged on constitutional grounds in *R. v. Mills* ((1999) 3 S.C.R. 668 (hereinafter *Mills*)) and in November 1999, the Supreme Court upheld the legislation.

"...Bill C-46...amended the Criminal Code to include specific provisions regarding the production and disclosure of third party records to the accused in sexual assault proceedings..."

As part of an ongoing review of the impact of the legislative amendments, the authors undertook a caselaw review of all reported s.278.1 cases in the time period immediately following the *Mills* decision until June 2003[1]. The purpose of the review was to obtain information on case characteristics (such as types of records sought, relationship between defendant and complainant), as well as the reasons for the decisions rendered.

There is significant literature dealing with sexual assault law and in particular, the changes that have been introduced into the Canadian context during the 1990s. Scholars from different disciplines and perspectives have provided commentaries on the several Supreme Court of Canada and appellate court decisions (e.g. Busby, 1997, 1998; Holmes, 1997; Gotell, 2002)[2]. While the critical commentaries were insightful, they do not provide the focus of the caselaw review.

Method

Judges are required to provide reasons for their decisions in s.278.1 applications (s.278.8(1) and (2)). This study is based only on the decisions found in QuickLaw. Decisions reported on

1 A key informant study was also conducted with criminal justice professionals in Toronto and Ottawa (see Mohr, 2002).

2 Gotell (at para.22 of QuickLaw version) suggests that "Charter rights discourse invades" the test for likely relevance where fair trial rights overrides consideration of the needs, harms and interests of the complainant. Gotell (at para. 27) is further critical of the court's discussion of privacy and suggests that underlying the discussion is "a highly individualistic and atomistic understanding of complainants' concerns." The decision individualizes the complainant who is not seen as someone who is part of different relationships that are based on power and control and it restricts one's ability to construct an "authoritative version of events" (at para. 27).

BILL C-46...
continued...

QuickLaw were retrieved from December 1, 1999 until June 30, 2003. The time period covers 43 months after the decision of *Mills* in November 1999.

The search terms used were "s.278", in conjunction with other terms such as "records" or "sexual offences". Cases found were checked against lists compiled by Professor Lise Gotell (2002) and preliminary work by Professor Karen Busby (1998) to ensure that all relevant cases were retrieved. There was some duplication of cases and some inconsistencies. Cases were reviewed to determine whether they fit the criteria of being decisions on s.278 records applications. A total of 48 decisions were reviewed.

The decisions reviewed from QuickLaw do not equal total decisions in Canada on s.278.1 applications within this time period. These decisions, however, are those that are reported and because they are available through the QuickLaw database, they become precedents for future caselaw. Lawyers and judges would look to the decisions reported in QuickLaw for their precedents and would rarely have other information on cases available to them.

Decisions are usually provided orally. Unless a particular request is made, oral reasons are not usually transcribed and published. Judicial practices on the publication of reasons vary across Canada. There are no cases on s.278 records applications found on QuickLaw from Quebec.

A caselaw review is limited in what it can ultimately tell us. It cannot reveal perceptions, beliefs or feelings of the key players; it does not answer the question of whether applications for records have become standard practice. A thorough caselaw review, however, may reveal trends in the jurisprudence and as such, it can perform a useful check on a trend that might not accurately reflect the jurisprudence.

Results

A total of 48 cases were reviewed covering the timeframe of December 1, 1999, through to June 30, 2003. One quarter of those cases (12 out of 48) were at the appellate level. Most cases were from Ontario (17) with Newfoundland having the second most cases (9). There were no cases from Nunavut, Prince Edward Island, or Quebec.

"Overall, the majority of complainants were female, the defendants were male and in a majority of cases, there was a prior relationship between them."

Characteristics about the defendants and the complainants presented below are consistent with trends noted in earlier caselaw reviews (Busby, 1998; Gotell, 2002). Overall, the majority of complainants were female, the defendants were male and in a majority of cases, there was a prior relationship between them. A significant proportion of the complainants were young.

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Information about Defendants

In all of the cases where the information was available (45 out of 48 cases), the defendant was male. At least 79% of the cases (38 out of 48) surveyed involved an adult defendant. Of the remaining 10 cases, 6 involved youths and in 4 cases, the age was not specified in the judgement.

Information about Complainants

In 60% of the cases (28 out of 47), there was only one complainant (in 4 cases the complainant was a male and in the remaining 24, a female). The sex of the complainant was not identified in 5 cases. In 30% of the cases (14), there was more than one complainant, ranging from 2 to 64 complainants.

"In 30% of the cases..., there was more than one complainant, ranging from 2 to 64 complainants."

The majority of cases examined involved young complainants. Of the 38 cases where the age of the complainant(s) was identified in the written judgement, just over three-quarters of the cases involved complainants that were younger than 18 years of age, and 6 cases involved adults. In 3 cases, there were both adult and young complainants.

"just over three-quarters of the cases involved complainants that were younger than 18 years of age..."

Of the 6 cases studied involving adult complainants, 3 had developmental or cognitive delays. Another young child complainant was noted to have mental deficiencies, and in another case involving two teenaged girls, the facts suggest that the complainants had cognitive or developmental disabilities. In 4 cases, the complainant had a drug or alcohol dependency, although in one case the addiction developed subsequent to the alleged offence taking place.

Several of the complainants had some involvement with a child services agency. In 3 cases, complainants lived in group homes and in 5 cases, there was a history of Children's Aid Society (C.A.S.) involvement. Furthermore, social services, child welfare agencies, child and family services and like organizations had involvement with complainants in 11 cases.

Relationship between the Defendant and the Complainant

The majority of cases showed some form of prior relationship between the accused and the complainant(s). There were 28 cases where it was possible to determine the relationship between the parties with certainty. Most involved family members (father, step-father, uncle, etc.) and there were 7 cases where the defendants had some form of professional relationship with the complainant (e.g. doctor or psychologist/patient).

"...there were 7 cases where the defendants had some form of professional relationship with the complainant..."

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Reasons

Given the list of factors that must be considered and the importance of the likely relevance (s.278.3(4) a-j) of the reasons for the production of the records, the reasons in each of these cases were reviewed closely.

"a court...must consider "the rights and interests of all those affected by disclosure"...three principles at stake...are full answer and defence, privacy, and equality..."

In *Mills*, the court stated that a court in deciding whether to order production must consider "the rights and interests of all those affected by disclosure" and that the three principles at stake in s.278 cases are full answer and defence, privacy, and equality (para.61).

In two thirds of the cases (26 out of 39) where the issue was whether or not to order production of the records, the judge made a general reference to s. 278.3(4), the subsection which lists the factors to be considered. This reference most often came in the form of mentioning that she or he must consider the provision, or that she or he had considered the provision in making a decision. The defendant's right to a full answer and defence (mentioned in 28 cases) and the potential prejudice to personal dignity and the right of privacy upon disclosure (29 cases) were the most commonly explored of the seven factors in the cases.

The probative value of the record was also a common theme, arising in almost half of cases (19), as was the reasonable expectation of privacy of the complainant, which was discussed by the judge in almost two thirds of the cases (24).

The least common listed factors to be utilized in the decision were society's interest in encouraging victims to seek treatment, mentioned in 5 cases, and the integrity of the trial process mentioned in 4 cases. Both the influence of discriminatory beliefs or biases (8 cases) and society's interest in reporting offences (9 cases) were mentioned in slightly less than one-quarter of the cases. In only one case did the judge go through an analysis of each factor listed in section 278.3(4), and in 9 of the 39 cases she or he examined five or more of the factors listed.

"...the concept of equality...is rarely mentioned."

As a whole, judges in the cases reviewed have frequently cited the defendant's right to full answer and defence and the complainant's right to privacy as competing concerns in their reasons with respect to record production; the concept of equality, however, is rarely mentioned. In fact, a detailed consideration of equality only occurred in four judgements. This is not to say that more judges did not consider the notion of equality or that it did not factor into the judgement. Whereas other factors listed in s.278.3(4) and in *Mills* were explicitly stated, that was rarely the case for the principle of equality.

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"..."privacy concerns are at their strongest where aspects of one's individual identity are at stake, such as in the context of information 'about one's lifestyle, intimate relations or political or religious opinions'"..."

Privacy, however, is a *Charter* right that came up frequently in the reported judgements. In 4 cases, the judge focused almost exclusively on privacy interests while excluding any detailed analysis of other factors. A person's reasonable expectation of privacy may be found in s. 8 of the *Charter*. In *Mills*, privacy interests were defined as the right to be left alone by the state, which includes the ability to control the sharing of confidential information about oneself (para.79-80). The Court stated that, "privacy concerns are at their strongest where aspects of one's individual identity are at stake, such as in the context of information 'about one's lifestyle, intimate relations or political or religious opinions'" (para.80). It went on to state that a key consideration when deciding whether to order production of therapeutic records in sexual assault cases is the relationship of trust and confidence between the complainant and the record-keeper (para.82).

In the 40 cases where disclosure/production was decided, no production was ordered in 15 cases. In several of these cases, the judge rejected the defence's argument that the record(s) would demonstrate the complainant's lack of credibility or competency, or show a motive to fabricate the complaint. In one such case, which involved a complainant who was legally blind and had a mild cognitive delay, the judge stated that the application for disclosure may have been based on a discriminatory belief that individuals with an intellectual disability are potentially incapable of telling the truth (*R. v. Tatchell*, [2001] N.J. No. 314, at para. 20).

Of the remaining 25 cases, partial or full disclosure was made to the defence in 14 cases, and in the remaining 11 cases, after partial or full disclosure to the judge, the case ended. In several of these cases, uncertainty as to the complainant's credibility or a motive to fabricate was mentioned as a reason for ordering production of the records. The defendant's right to a full answer and defence was also frequently cited often in the context that it should take precedence over the complainant's right to privacy in those circumstances.

In the 11 cases where full or partial production was ordered to the judge and further disclosure to the defence did not form part of the judgement, the reasons were similar to those offered in cases where production to the defence was ordered. Several such cases cited the credibility or potential for fabrication on the part of the complainant as a reason for production.

"...the way that judges have interpreted s. 278.5...has been inconsistent in the post-Mills caselaw."

In conclusion, the way that judges have interpreted s. 278.5 in deciding whether to order production of relevant records has been inconsistent in the post-*Mills* caselaw. Different judges have placed varying emphasis (and sometimes none at all) on the factors listed in section 278.5(2) and in the guidelines offered by both the

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legislation and the Supreme Court's interpretation of the legislation in *Mills*. Privacy has been a key factor in decision-making whereas mention of equality has been quite sparse. However, it is very difficult to determine specific trends with respect to reasoning as the detail in judgements thus far has been so varied.

"Privacy has been a key factor in decision-making..."

Conclusion

This caselaw review revealed findings that are consistent with previous studies (Busby 1998; Gotell, 2002). For example, in a majority of cases, there was a relationship between complainant and defendant (familial, professional); the majority of defendants were male while complainants were female; complainants were young; multiple records were sought; and records were ordered disclosed/produced to the defence in approximately 35% of cases.

"No specific trends in terms of reasons could be discerned from the review with the exception of a greater emphasis on privacy of complainants."

No specific trends in terms of reasons could be discerned from the review with the exception of a greater emphasis on privacy of complainants. This caselaw review provides general and specific information on case characteristics and reasons in decisions in s.278.1 cases. It provides a specific tool with which to monitor trends in jurisprudence. Such monitoring is important to determine whether legislative provisions are working in the manner intended by Parliament. Given the many changes in sexual assault law in Canada over the past twenty years, such research plays an important role to inform policy at the Department of Justice. It will be important to continue research in this area as time passes.

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Privacy and Rights Issues Related to Developments in Health Genetics: Highlights of Recent Legal and Policy Research at the Department of Justice Canada (DOJ)

ByValerie Howe,
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The Biotech Century

Many analysts predict that the 21st Century will be distinguished as the "Biotech Century." They foresee that new developments in biology and genetics facilitate the merging of biological information with advances in informatics, and other areas such as nanotechnology. The results, they suggest, will reach into many sectors of the economy and many facets of life. The merged technological developments have every potential to be "transformative" in the sense that chemical or computer technologies have been - that is, to substantially change the way we produce and live. The first Speech from the Throne under Prime Minister Paul Martin notes: "We want a Canada that is a world leader in developing and applying the path-breaking technologies of the 21st century - biotechnology, environmental technology, information and communications technologies, health technologies, and nanotechnology."

"The merged technological developments have every potential...to substantially change the way we produce and live."

The Genetic Information and Privacy Working Group

This update will identify developments related to the 'genetic' or human health side of biotechnology and recent research in support of the Department of Justice's role as Chair of the Genetic Information and Privacy Working Group (GI&P). The Champion is Senior Assistant Deputy Minister of the Policy Sector, Joy Kane. The GI&P was established under the aegis of the Canadian Biotechnology Strategy to identify the challenges that may be posed as this science increasingly enters the marketplace as technology. Stewardship has consistently been a pillar of Canada's plan for biotechnology and for genetics in particular and the Department of Justice's lead role in this area reflects the importance attributed to human rights and privacy in the stewardship framework. As well, research in this area is increasingly being recognized as fitting within the rubric of "research on human subjects." This brings into play ethical principles such as respect for human dignity and autonomy. In its first year the GI&P undertook background research to outline the state of affairs as the science becomes marketable and available as technology. The Department of Justice Canada compiled and analyzed the domestic and international legal framework for the GI&P, which is now in the process of outlining and assessing several policy options.

"...brings into play ethical principles such as respect for human dignity and autonomy."

PRIVACY AND RIGHTS...
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Issues in Genetic Science

Genes are a small proportion of the DNA in our chromosomes (about 2%) but they are key to life because they "code for protein" which means that they carry the instructions for making all the protein-based structures and activities the body needs to function. Genes direct the formation of proteins and proteins do the work of the cells.

The double chains of DNA in the human genome are made up of over 3,000,000,000 complimentary base pairs surrounded by sugars and phosphates. The bulk of the work, though, is done by the 30,000 genes that produce about 200,000 proteins.

"Now that the human genome has been mapped, two key areas of focus for the science are gene sequencing and gene expression."

Now that the human genome has been mapped, two key areas of focus for the science are gene sequencing and gene expression. Scientists need to understand the differences in the sequence of the four base pairs - pairs of Adenine, Thymine, Cytosine and Guanine - in each chromosome in different people. While the order of the DNA chain is very similar for all humans, the small differences mean that each individual has his or her own unique sequence. The sequence encodes the structure of an enzyme or other protein specified by that gene, which in turn determines its function within cells of the organism. Various changes in the sequence or order of any specific base, including a dropped base or inverted order, can mean a mutation, some of which lead to increased likelihood of disease. Attention is also focused on the role of non-gene DNA in gene "expression" - regulation or activity. People may have a problematic gene sequence or mutation but the gene may be 'turned off' or not 'expressed'. Scientists have much to learn about the cellular and intercellular events that signal the nucleus to express genesm (Howe, in press).

Impacts of the Science on Society

At this time, there are not many genetic therapies available[1] . Two important areas where science and society are interacting are research and genetic testing. In order to better understand how genes actually work in humans in the real world, researchers need genetic samples from a wide range of populations - family lines; members of small isolated communities with strong hereditary tendencies; comparative populations[2]; and, representative national samples. For population health benefits and some other types of research, there is a need to combine genetic information about a specific individual with their life-style, environment and other health factors. Even though the interest is in aggregate statistics, the researchers may not wish to remove all identifying

"For population health benefits ...there is a need to combine genetic information about a specific individual with their life-style, environment and other health factors."

1 Here is one example based on the use of embryonic stem cells: "*Researchers from the University of Alberta have performed the world's first successful islet cell transplants that have freed patients with severe diabetes from their insulin shots for more than a year*" (Stem Cell Network, 2002, p. 3).

2 For example, the Haplotype project involves several countries, see: www.genome.gov/Pages/Research/HapMap.

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continued...

information, according to the Canadian Institute for Health Research (CIHR), because of "the need to consider the effect of important individual characteristics or to link data about individuals so as to construct histories over time" (CIHR, 2002, p.8). The genetic research undertaken by universities, governments, and the private sector depend upon the willingness of Canadians to agree to the use of their genetic information. And that consent requires assurances about the confidentiality and security of that information.

Genetic Research and Data-bases

Research undertaken under the aegis of the GI&P indicated that only a few Canadian firms are gathering genetic information (Howe, in press); that much of the research is linked to Health Canada or a university and guided by Ethical Review Boards and the Tri-Council Policy Statement; and that protections are in place to ensure the security of the information. As well, typically, the information is 'anonymized' so that the personal identifier is not kept with the genetic information but is kept separately and the genetic information is coded. While no immediate problems were identified, the GI&P recommends greater education and development of best practices in regard to the collection and conditions of storage of genetic information and other sensitive personal health information. Efforts in this regard, as well as projects to enhance the awareness of standards for research on human subjects have been proposed.

"...the GI&P recommends greater education and development of best practices in regard to the collection and conditions of storage of genetic information..."

Guidelines and standards are also being developed or enhanced in regard to clinical or diagnostic genetic testing at many levels from associations of doctors to the international level. In general, informed consent is considered essential. For that reason, and because there can be substantial health benefits, genetic screening of newborns is of particular interest for policy research and development. In its report entitled "Promoting Safe and Effective Genetic Testing in United States - Final Report of the Task Force on Genetic Testing", the National Human Genome Research Institute recommends that: "If informed consent is waived for a newborn screening test, the analytical and clinical validity and utility of the test must be established, and parents must be provided with sufficient information to understand the reasons for screening." This is an example of the broad range of policies and guidelines currently under development.

"...genetic screening of newborns is of particular interest for policy research and development."

Genetic Tests

Doctors in medical practice now have an ever-increasing range of genetic tests available that provide some additional information to family history information and need to decide whether to recommend genetic testing. A test may reveal that a person has a particular mutation on a particular gene - and this may raise the

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"Tests at the genetic level add to what can be known about a person's heredity from family history but rarely provide certainty."

probability that they may develop a particular disease, condition or characteristic. Only in rare cases will having that gene or mutation indicate the exact fate of that person in regard to that condition since most conditions result from the interaction of several genes in particular situations - such as health conditions, environmental conditions, etc. Tests at the genetic level add to what can be known about a person's heredity from family history but rarely provide certainty. A report commissioned by Health Canada for the GI&P indicates the following developments in testing are anticipated:

- the ability to test for complex and multi-factorial disorders will increase;
- pharmacogenetic testing, the ability to test for gene-based reactions to specific drugs, will begin to emerge; and,
- there will be a significant (5-10% a year) growth in the numbers of tests for single gene disorders.

With the proliferation of new tests, accompanied by public belief in their efficacy, one may expect policy issues to arise with respect to the need for regulation in such areas as:

- evaluation of tests;
- costs of testing and the extent to which these may limit access; and,
- patents and direct-to-consumer marketing of tests.

The Legal and Policy Research

In its first year the GI&P conducted a range of research including the following:

- Documentation/analysis of major legislative and policy initiatives internationally (DOJ);
- Cataloguing and analysis of provincial and federal legislation relevant to genetic information and privacy including human rights, privacy, and health legislation with commentary (DOJ);
- Analysis of recent Supreme Court decisions on human rights, privacy and disability that provide a context for how the court might view issues that could be raised as genetic testing technology becomes readily available (DOJ);
- Expert discussion of possible futures as the scientific and technological possibilities grow (Genetic Futures Forum hosted by DOJ);
- Expert discussion of patent law and policy as it has been applied in the human genetics and possible implications - a human rights interpretation (DOJ);

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continued...

- Interviews with Genetic Counsellors on the public's responses to the possibility of having tests that tell them about possible future health outcomes and a review of relevant literature (Health Canada);
- Surveys of holders of data-banks in the private and public sectors about their holdings and their privacy and security practices (Statistics Canada, Health Canada, Industry Canada);
- Analysis of how genetic information might impact employment law and practices (Human Resources and Development Canada); and,
- Discussion with businesses about how they might use genetic information (Industry Canada).

Analysis and Recommendations

"...genetic information would likely be protected...a review of jurisprudence suggests that discrimination on the basis of a 'perceived' disability is unlikely to be tolerated by Canadian courts..."

The compilation and analysis of existing legal frameworks at the institutional, national, provincial, and international level reveal a web of protections for privacy, autonomy, human dignity, and against discrimination. While few of these protections specifically refer to genetic information, interpretation of the terms used (personal information, sensitive information, health information, recorded information, etc.) provides support for the view that genetic information would likely be protected under a range of regulatory, privacy, and rights legislation - if and when cases of abuse arise. Chief among these protections are those in the *Charter of Rights and Freedoms* and a review of jurisprudence suggests that discrimination on the basis of a 'perceived' disability is unlikely to be tolerated by Canadian courts (Nola, in press). Bartha Maria Knopper's analysis of the legal framework (DOJ, 2003) has noted that the 'patchwork' of protections creates a lack of clarity and certainty. However, other analysis by Eugene Oscapella (2003) in the context of a discussion of instruments of choice, notes that a patchwork is not necessarily a bad thing and may be entirely adequate.

Next Steps

In law, policy, and practice, the policy research undertaken by the GI&P revealed no significant problems that warrant priority attention. Still, the pace of scientific and technological change is so fast, the potential applications so broad, and the issue sufficiently sensitive that an active monitoring of the developments in the global market and in Canadian clinics and institutions is warranted.

Two specific legal reforms are under consideration[3]. One idea is an amendment to the Privacy Act definition of 'personal information record' to clarify that genetic samples and information are

[3] See Oscapella (2003) for a detailed discussion of these options.

PRIVACY AND RIGHTS ISSUES...
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included. Another is a possible amendment to the *Canadian Human Rights Act* definition of 'disability' to clarify that discrimination is forbidden also on the basis of a perceived disability or a predisposition to a disability. It is anticipated that such reforms might arise when next there are amendments to either of these Acts.

"...discrimination is forbidden also on the basis of a perceived disability or a predisposition to a disability."

As well, more attention should probably be devoted to increasing public awareness and confidence through communication of the various governance frameworks and activities. It would be desirable to have greater mutual awareness of activities at each level (institution, province, nation, and international) by those at the other levels. Ongoing development and enhancement of standards and guidelines should be promoted and made more evident to Canadians in all walks of life. Governments need to understand how Canadians view these issues, the expectations they have for health benefits, their values in regard to issues such as sharing family information or the need for genetic counselling, their desire to know, or not know, genetic information when there is not a valid treatment, and so on. Current research will explore these questions about Canadian values.

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"Ongoing development and enhancement of standards and guidelines should be promoted and made more evident to Canadians in all walks of life."

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Canada's Administration of Justice: International Outlooks

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Introduction

A fair administration of justice is achieved when citizens treat each other fairly and justly. Justice institutions, processes and frameworks adequately protect individual and collective rights. There is also consonance between what the law punishes or facilitates and the values dominant in society. No one is above the law and the law is applied fairly to all.

If Canada is perceived as a fair society there will be more confidence in the international community that its legal framework would adequately handle settlement of international disputes and, thus, enable favourable trade and investment outcomes.

How is Canada seen by the international community in terms of the administration of justice? How does it compare to other countries of mixed legal systems (bijural or multijural) or to common law and civil law countries? Are countries that rank higher in terms of its administration of justice rank accordingly in terms of the presence of legal frameworks supporting world competitiveness?

Method

Tentative answers to these questions are found in data drawn from World Competitiveness Survey (WCS). This interesting information is compiled and published by IMD International[1]. Annually, more than fifty countries are ranked according to major dimensions of world competitiveness. Hundreds of indicators measure countries' performance of the domestic economy, government, business and infrastructure. In addition to hard data, IMD evaluates countries through an Executive Opinion Survey, a panel comprised of international experts in the business and economics fields.

World competitiveness is defined by IMD as a "quality in nations related to the facts and policies that shape the ability of a nation to create and maintain an environment that sustains more value creation for its enterprises and more prosperity for its people" (IMD, 2003, p. 702). This notion covers both tangible and intangible aspects such as the efficiency of government or businesses, the size and growth of the economy, the sustainability of growth and the impact of education, research, etc.

[1] The International Institute for Management Development (IMD) is a business school based in Lausanne, Switzerland. The website www.imd.ch/wcy provides generalinformation on the purpose, methodology and coverage of the World Competitiveness Survey.

CANADA'S ADMINISTRATION...
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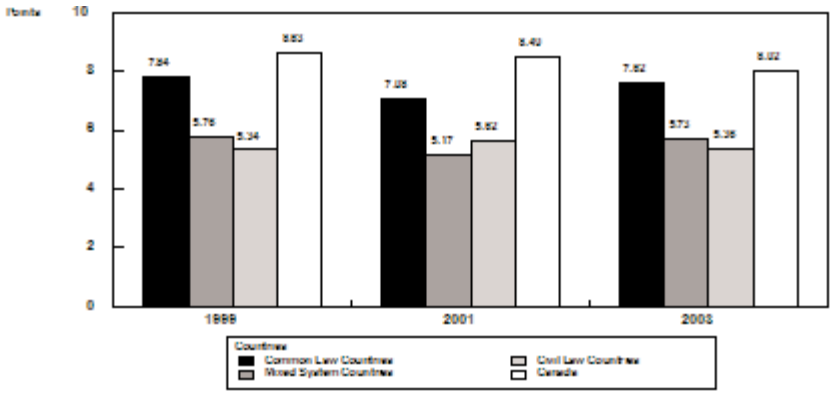
Results

Between 1999, 2001 and 2003, experts of the Executive Opinion Survey of the WCS assessed if countries had a fair administration of justice or not. A generic scale ranging from 1 (unfair administration) to 10 (fair administration) was used for this purpose. Figure 1 presents the average scores given by experts to each country in terms of perceived administration of justice in 1999, 2001 and 2003. Canada and other countries were classified by their dominant legal systems[2] .

"...experts assessed that common law countries were more fair in the administration of justice than mixed system....and civil law countries."

In all three years of observation, experts assessed that common law countries were more fair in the administration of justice than mixed system (including Canada) and civil law countries. Canada's scores were relatively higher than the averages of all systems and kept above the 8-point mark (8.63 in 1999, 8.49 in 2001 and 8.02 in 2003).

Figure 1: Country Scores, Fair administration of Justice, WCS 1999-2003



"...from an individual country perspective, Canada ranked 11th out of 51 countries in 2003."

According to Figure 2, from an individual country perspective, Canada ranked 11th out of 51 countries in 2003. Nordic countries such as Finland, Denmark and Iceland topped the list in terms of a fair administration of justice. Singapore was the only mixed legal system country surpassing Canada's average scores. Canada's score was notably higher than that of many industrialized countries such as Germany, Netherlands, United Kingdom, United States and France.

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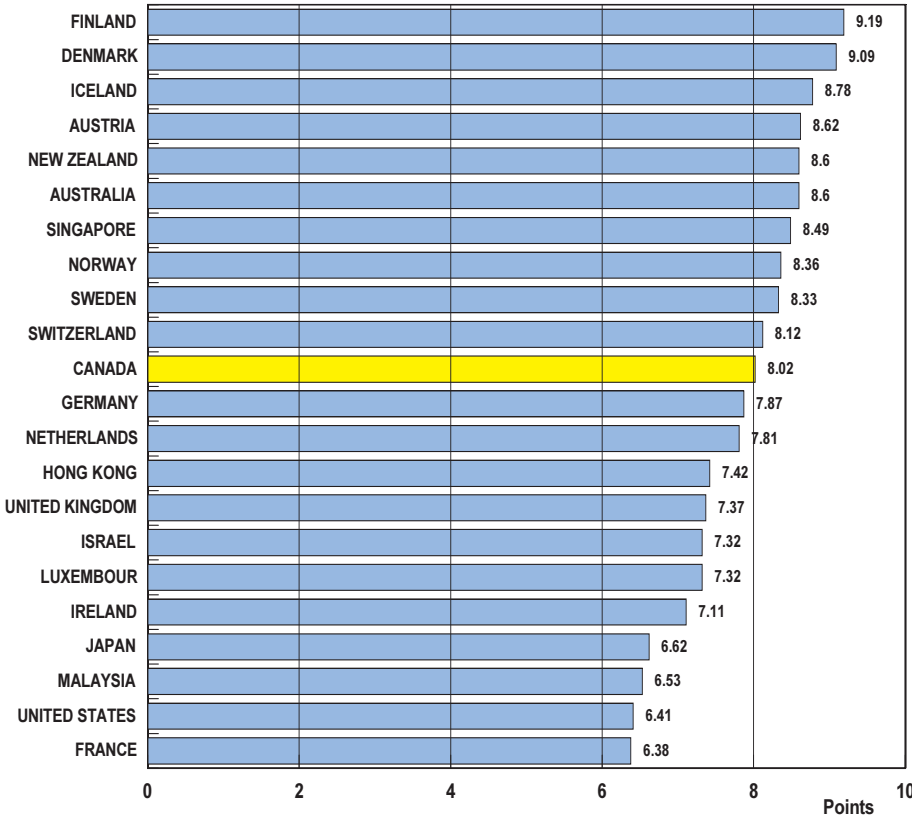
2 University of Ottawa's Faculty of Civil Law taxonomy was used to group countries. In 2003, common law countries comprised Ireland, New Zealand, United States, United Kingdom and Australia. Mixed legal system countries included Hong Kong, Israel, Jordan, Singapore, **Canada**, Mainland China, India, Indonesia, Korea, Malaysia, Philippines, Taiwan, Thailand, and South Africa. Civil law countries consisted of Austria, Belgium, Chile, Czech Republic, Denmark, Estonia, Finland, Greece, Hungary, Iceland, Luxembourg, Netherlands, Norway, Portugal, Slovak Republic, Slovenia, Sweden, Switzerland, Argentina, Brazil, Colombia, France, Germany, Italy, Japan, Mexico, Poland, Romania, Russia, Spain, Turkey and Venezuela. (see: www.droitcivil.uottawa.ca/world-legal-systems/eng-generale.html)

CANADA'S ADMINISTRATION...
continued...

Figure 2: Country Scores, Fair Administration of Justice, WCS 2003



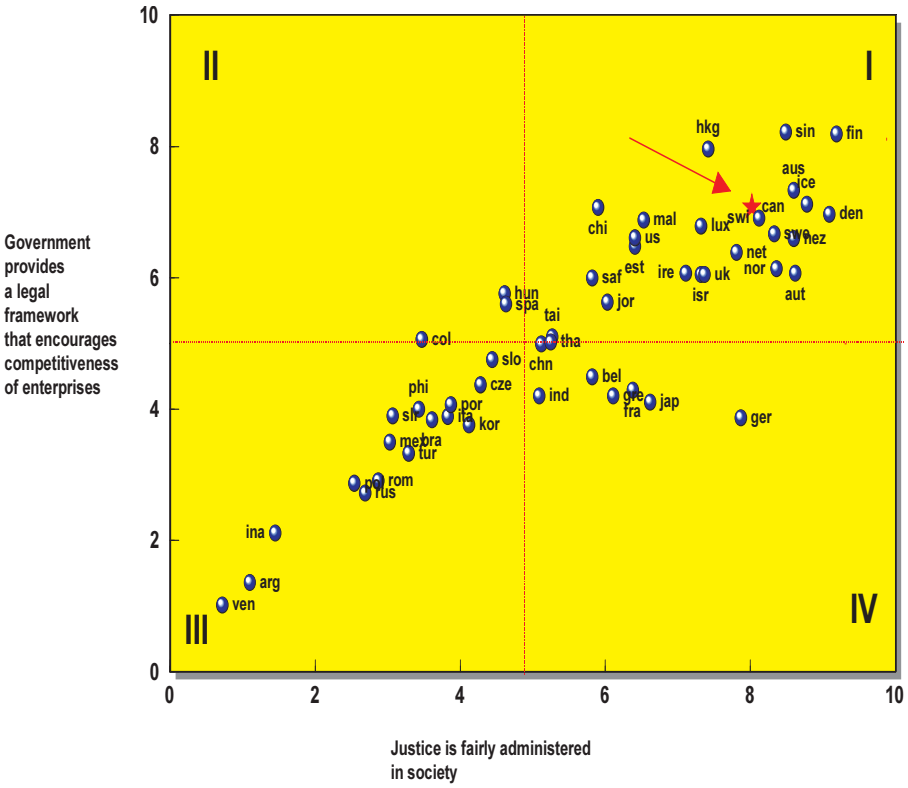
The 2003 WCS revealed also that a fair administration of justice in society is strongly correlated with the presence of governmental legal frameworks that encourage the world competitiveness of enterprises. Figure 3 presents the positions of countries surveyed by the 2003 WCS in a two-dimensional plane spanned by these dimensions.

"Canada... favourable evaluations in both terms of the administration of justice and governmental legal frameworks."

Country positions are presented in quadrants to facilitate identification of characteristics. Canada occupied a middle position in quadrant I (see arrow, top right of plot), which contains favourable evaluations in both terms of the administration of justice and governmental legal frameworks. In contrast, countries located in quadrant III received low scores on the two dimensions. Venezuela, Indonesia and Argentina, for instance, seem to be grappling in terms of problems in administering justice and being unable to create legal frameworks promoting competitiveness. A clear outlier in quadrant IV is Germany. Although the administration of justice is seen by experts as more than satisfactory, the presence of legal frameworks promoting competitiveness were not found to be commensurate with this level of administration.

CANADA'S ADMINISTRATION...
continued...

Figure 3: Assessment of a Fair Administration of Justice and Presence of legal frameworks promoting world competitiveness, WCS 2003



Country Symbols

arg-Argentina	den-Denmark	ina-Indonesia	net-Netherlands	slo-slovenia
aus-Australia	est-Estonia	ire-Ireland	nez-New Zealand	saf-South Africa
aut-Austria	fin-Finland	isr-Israel	nor-Norway	spa-Spain
bel-Belgium	fra-France	ita-Italy	phi-Philippines	swe-Sweden
bra-Brazil	ger-Germany	jap-Japan	pol-Poland	swi-Switzerland
can-Canada	gre-Greece	jor-Jordan	por-Portugal	tai-Taiwan
chi-Chile	kkg-Hong Kong	kor-Korea	rom-Romania	tha-Thailand
chn-China	hun-Hungary	lux-Luxembourg	rus-Russia	tur-Turkey
col-Colombia	ice-Iceland	mal-Malasya	sin-Singapore	uk-United Kingdom
cze-Czech Republic	ind-India	mex-Mexico	slr-Slovak Republic	us-United States
				ven-Venezuela

Conclusion

"...Canada's performance on the world stage appears to be quite satisfactory."

A better understanding of how Canada fares internationally in terms of its administration of justice is reflective on the justice system's progression towards its proposed policy goals of fairness, inclusiveness, adaptability, efficiency and accessibility. Looking at Canada's progress provides important clues about the degree to which its bijural system (compared to other uni-legal or multi-legal systems) may be responsible for favourable economic and legal outcomes. If the opinion of WCS experts is to be used as the main criteria used to estimate progress made by the system towards its desired goals, Canada's performance on the world stage appears to be quite satisfactory.

CANADA'S ADMINISTRATION...
continued...

REFERENCES

IMD. (2003). Executive Summary, IMD World Competitiveness Survey Yearbook 2003. Lausanne, Switzerland: IMD. ▲

Connexions

The Justice Information Center of the National Criminal Justice Reference Service. Provides information on publications, abstracts, conferences on the following topic areas: Corrections; Courts; Crime Prevention; Criminal Justice Statistics; Drugs and Crime; International; Juvenile Justice; Law Enforcement; Research and Evaluation; Victims. http://www.ncjrs.org/

UK National Criminal Intelligence Service. Information on UK Organised Criminals Operations, Drugs Trafficking, Financial Intelligence, Fraud, Money Laundering, Firearms, High-Tech Crime, and Sex Offences Against Children and other related topics are available at this site. http://www.ncis.co.uk/default.asp

The National Archive of Criminal Justice Data (NACJD). The NACJD provides computerized crime and justice data from Federal agencies, state agencies, and investigator initiated research projects to users for secondary statistical analysis. http://www.icpsr.umich.edu/NACJD/

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Current and Upcoming Research from The Research and Statistics Division

A One-Day Snapshot of Aboriginal Youth in Custody Across Canada: Phase II

Contact: Jeff Latimer,
A/Principal Researcher

Although many studies contend that Aboriginals are over-represented at all stages in the criminal justice system, there is little empirical data to support this contention. Furthermore, no research has been completed specifically on the over-representation of Aboriginal *youth* in the Canadian criminal justice system. The central objective of this study was to provide accurate incarceration rates for Aboriginal and non-Aboriginal youth in Canada.

Using a *Snapshot* method, which counts all youth in custody on a specific day, data were collected across Canada, with the exception of Quebec. The data collected included socio-demographic data (e.g., age, gender), offence information, custody types (e.g., open, secure, or remand), and sentence lengths. Additional data were collected on Aboriginal youth in custody including Aboriginal identity, social service involvement (e.g., child protection, social assistance), criminal history, and information on mental health issues (e.g., substance abuse, suicide).

As part of the study, qualitative data collection with Aboriginal youth in custody was completed using a Sharing Circle method. During the *Sharing Circles*, topics were introduced by an Elder and then each youth was passed a 'talking stone' and provided with time to share their experiences on the particular subject. The participants were asked to discuss topics such as alcohol and drug use, home life, experiences in custody, and ideas for effective programming to promote rehabilitation. The Sharing Circle Research Team collected the opinions and experiences of more than 250 Aboriginal youth in 11 custody facilities across Ontario, Manitoba, Saskatchewan, Alberta, British Columbia, and the Northwest Territories. ▲

Research on Compliance with Child Support Orders and Agreements in Prince Edward Island

Contact: Jim Sturrock, Research Manager

The project was conceived as an analysis of compliance in Prince Edward Island, and a test to help assess the methodologies for studying compliance in other provinces. The research in P.E.I. included: information extracted from a sample of cases registered at the province's Maintenance Enforcement Program (MEP); interviews with paying parents and recipients of child support; and interviews with family law lawyers, judges, court workers, mediators, court-appointed social workers and maintenance enforcement officers. Ultimately, the objective was to collect and analyze sufficient information to provide a national perspective on compliance with child support orders and to lay the groundwork so that the research in other provinces, with larger numbers of interviews to work with, will be able to explore how the key determining factors interact with each other over time. ▲

Linking Family Change, Parents' Employment and Income and Children's Economic Well-Being: A Longitudinal Perspective (An Analysis of the National Longitudinal Survey of Children and Youth)

Contact: Catherine Thomson, Senior Research Officer

The study is based on analyses of Cycles 1 (1994 95) and 2 (1996 97) data from the Family History and Custody section of the National Longitudinal Survey of Children and Youth (NLSCY). Having these two cycles of data allows the examination of cases in which families had broken apart between 1994 95 and 1996 97. This enables, for the first time, analyses based on the situation "before" and "after" certain family transitions, such as parents' separation or family re-composition, thereby providing new insight into the relationship between family change, income and labour force participation. It also makes possible the examination of how custody (viewed as physical custody), father-child contact and child support payments change over time for those parents who were already separated at the time of Cycle 1. ▲

Report on Family Law Research in Nunavut

Contact: Cherami Wichmann, A/Senior Research Officer

This paper describes family law research carried out by Nunavut Justice representatives. Four projects were undertaken, including: an overview of existing family and family-law statistics from various sources; an inventory of family law services available across Nunavut; focus group meetings in select Nunavut communities with elders and the general public concerning family law issues; and, a family law survey involving face-to-face interviews with residents of Nunavut on a wide range of family law matters. The report provides both qualitative and quantitative research results across a range of issues including family structure and trends, views and understanding of family law, use of and access to family law and family law services, as well as information and other needs. ▲

The Survey of Child Support Awards: Analysis of Phase 2 Data Collected through January 31, 2002

Contact: Cathy Thomson, Senior Research Officer

This paper provides an updated examination of child support amounts, and some of their characteristics in cases where there were children involved in a divorce in selected courts across Canada. ▲

Managing Contact Difficulties: A Child-Centred Approach

Contact: Cherami Wichmann, A/Senior Research Officer

This paper examines the utility of parental alienation syndrome (PAS) and other formulations that have been proposed to explain alienation. Drawing on a literature review and consultation with key informants in Canada and abroad, the authors put forward several critical questions concerning contact difficulties. The paper discusses how contact benefits children, factors that influence contact, the child's experience of contact, prevalence of difficulties and variables related to undermining and obstructing child-parent relationships. The implications for managing contact difficulties are also presented, along with possible directions for a child-centred response to contact difficulties. ▲

Child Custody Arrangements: Their Characteristics and Outcomes

Contact: Cherami Wichmann, A/Senior Research Officer

This project involved a review of available literature to summarize existing knowledge concerning different types of custody arrangements, focusing mainly on shared custody. As part of the project, the researcher was asked to identify research methodologies and research instruments that could be used in developing the project to interview parents with shared custody arrangements. ▲

Voice and Support: Programs for Children Experiencing Parental Separation and Divorce

Contact: Cherami Wichmann, A/Senior Research Officer

This project augments legal research on the voice of the child previously undertaken by the Department of Justice Canada, which focused on the benefits and drawbacks of giving children a direct voice in the courts as custody and access decisions are being made. The purpose of this project was to investigate similar issues but with a view to providing children with opportunities that allow them to voice their wishes and concerns outside of the courtroom. This paper also covers programs and services that address children's needs in dealing with and adjusting to family breakdown. ▲

Shared Custody Arrangements: Pilot Interviews with Parents

Contact: Cherami Wichmann, A/Senior Research Officer

This paper presents the findings from a pilot test project of interviews with parents who had shared custody arrangements in Alberta, including matched pairs of parents. Respondents were drawn from cases identified in the "Survey of Child Support Awards", a Department of Justice survey of selected courts across Canada that collects information on child support awards in cases of divorce. Cases where shared custody was granted were randomly selected and parents were contacted and asked to participate in a telephone interview on the day-to-day workings of their arrangements. The research examined matters

such as costs associated with shared custody, how shared custody actually works in terms of time spent with the children, schedules for sharing custody, arrangements concerning decision making and other matters. ▲

High Conflict Separation and Divorce: Options for Consideration

Contact: Cherami Wichmann, A/Senior Research Officer

The purpose of this report was to build upon the results of a literature review on high conflict divorce undertaken by the Department of Justice Canada in 2001, reviewing and outlining options for reform to custody and access policy, including legislative and programmatic approaches. The author drew upon the report of the Special Joint Committee on Child Custody and Access, the federal government's response to the Committee's report, as well as legal approaches to high conflict cases internationally. The report offers various options for consideration in dealing with high conflict separation and divorce cases. ▲

Legal Systems and World Competitiveness (Phase II)

Contact: Fernando Mata, Senior Research Officer

This research will examine the linkages between legal systems and world competitiveness among 51 countries surveyed by the World competitiveness Surveys between 1999 and 2003. Countries will be classified according to the University of Ottawa's Civil Law Department taxonomy of legal systems (common law, mixed systems and civil law countries). Annual indicators of worLd competitiveness comprise an average of 300 indicators, which include measures related to the performance of the domestic economy, government and business as well as infrastructure related indicators. In phase I of the project indicators for 2003 were analyzed. Through principal components analysis, more than half of the total variation in the data was reduced to the variation in 14 major domain scales. Country differences in domain scale scores by legal systems groups were examined in detail. Although the data analysis did not reveal any systematic relationship between legal systems and world competitiveness domains (due mostly to substantial intra-group variation), some characteristics such as taxation and energy levels were the most salient in separating countries with different legal systems.

LEGAL SYSTEMS... continued...

Canada's scores in world competitiveness domains revealed a good standing with respect to other mixed (bijural & multijural) legal system countries as well as with respect to common law and civil law countries. ▲

Criminal Justice Outcomes in Intimate and Non-intimate Partner Homicide Cases

Contact: Nathalie Quann, A/Senior Statistician

The goal of this project is to enhance understanding of the criminal justice outcomes in cases of intimate partner homicides. This research will present an historical analysis using both qualitative (where available) and quantitative data sources to further examine the use of plea resolutions in intimate and non-intimate partner closed homicide cases in which an accused was identified (including first degree & second degree murder and manslaughter) in Toronto, Ontario. Data sources will include coroner records and prosecutor files (which include police summary reports, etc). Socio-demographic variables are to be included in the data collection for both victim and offenders, such as gender, age, employment, incident location and relationship of accused to victim. As well, case characteristics such as initial charge, plea, verdict at trial, conviction and length of sentence will be examined. Original data will be gathered from 1997 to 2002 with an estimated number of 240 homicides (intimate and non-intimate) over the 6 year-period. Analysis will also incorporate findings from previous years dating back to 1974 with an approximate sample size of 1,000 closed homicide cases where an accused was identified. ▲

Measuring Recidivism in Domestic Violence Incidents in Ontario

Contact: Nathalie Quann, A/Senior Statistician

The purpose of the research is to explore and compare recidivism rates of domestic violence offenders whose cases have been processed through a Domestic Violence Court (DVC) and domestic violence offenders whose cases have been processed through a standard criminal court in Ontario. A Domestic Violence Court facilitates the prosecution of domestic assault cases and early intervention in abusive domestic situations, provides support to victims and strives to increase offender accountability. In a

MEASURING RECIDIVISM... continued...

DVC court, teams of specialized personnel, including police, Crown Attorneys, Victim/Witness Assistance Program staff, probation services, Partner Assault Response program staff and community agencies, work together to ensure priority is given to the safety and needs of domestic assault victims and their children.

For the purposes of this study, recidivism is defined as a conviction for a new domestic violence offence. The follow-up period for measuring recidivism was been set at two years after the initial conviction in 2001. Criminal history for all offenders will be available for additional analysis. Demographic characteristics (gender and age) and conviction information will be analyzed and compared to the control group.

Both the Domestic Violence Evaluation System (DOVES) and the Canadian Police Information Centre (CPIC) databases will be used to identify a random sample of 500 offenders who have gone before the court and received a conviction for a domestic violence offence in 2001. ▲

"Just Between You and Me" - The Delivery of Public Legal Education and Information via Peers

Contact: Susan McDonald, A/Senior Research Officer

The Public Legal Education and Information (PLEI) needs of women who experience family violence are well documented and immense. Women who experience family violence do so in the private and unsupported environments of their own homes. Thus reaching women with legal information, which they so often need, is very challenging. Research has shown that adults learn from one another, although in the case of legal information, the information passed on may be inaccurate, out-of-date or incomplete.

The objective of this project is to undertake a participatory action research to determine the viability of the provision of Public Legal Education and Information (PLEI) through peers to victims of family violence as a delivery model.

"JUST BETWEEN YOU...
continued...

The project is training twenty women from the Sault Ste. Marie area, nine of whom are Aboriginal, with a detailed, thorough curriculum that includes the dynamics of family violence, seeking assistance, basic information in criminal and family law and where to find further information and support if needed. The women will be equipped to provide information and referrals within their own networks - at parks, at the hairdresser, in church.

An evaluation framework has been developed and evaluation is incorporated into the training process. While this project is short term in nature (only the curriculum development, training of peers, and evaluation of this content and process), the results may benefit many in the community in the long term. ▲

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INTERNET SITE:
HTTP://CANADA.JUSTICE.GC.CA/EN/PS/RS/INDEX.HTML

JustReleased

Here is a list of reports recently released by the Research and Statistics Division of the Department of Justice Canada that may be of interest to you, all of which are available on our Internet site at: **http://canada.justice.gc.ca/en/ps/rs/rep/100-e.html**

A Typology of Profit-Driven Crime

R. Tom Naylor, Professor of Economics at McGill University and a scholar on commercial and financial crime, has developed a typology of profit-based crimes. He identifies three types of crime based on the target and the type of offence: predatory crime, market-based crime, and commercial crime. One benefit of the typology is to clarify the precise nature of the economic forces at work, and therefore contribute to a better understanding of the possible economic (and social) costs. This, in turn, could lead to the development of more novel approaches to deterrence. http://canada.justice.gc.ca/en/ps/rs/rep/rr02-3.pdf

Peace Bonds and Violence Against Women: A Three-Site Study of the Effect of Bill C-42 on Process, Application and Enforcement

In this report, Dr. Rigakos assessed the impact of Bill C-42 amendments on the application and enforcement of Criminal Code sections 810 and 811 recognizances, also known as "peace bonds". Through data analysis from Statistics Canada's Adult Criminal Court Survey (ACCS) and key informant interviews in three jurisdictions (Nova Scotia, Ontario and Manitoba), this report examines changes in processing, availability and enforcement of peace bonds in cases of spousal violence. http://canada.justice.gc.ca/en/ps/rs/rep/rr03-1.pdf

Minority Views on the Canadian Anti-Terrorism Act (formerly Bill C-36)

The report presents the findings of focus group sessions which sampled the views of minority group members regarding the provisions of the Anti-Terrorism Act as well as personal and community impacts. The firm Créatec conducted the focus groups between March 10 and 21, 2003. In total, 16 focus groups were carried out in Halifax, Montreal, Toronto, Calgary, and Vancouver covering 138 male and female participants from approximately 60 ethno-cultural minority backgrounds. Sessions, which had an average duration of two hours, were conducted both in English and French. http://canada.justice.gc.ca/en/ps/rs/rep/rr03-4.pdf

Victim Privacy and the Open Court Principle

This report analyzes the tension between victim privacy and the open court principle, especially in the context of sexual assault proceedings. It explains that the open court principle is one of the most highly prized values in the Anglo-Canadian common law tradition. The report raises, but does not answer, the question of whether victim privacy and the need for anonymity in particular, is justified by the nature of the offence, or should instead be regarded as a remedial measure to address the chronic under reporting of sexual offences and encourage victims to trust the system. http://canada.justice.gc.ca/en/ps/rs/rep/rr03_vic_1.pdf